

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

JOHN DOE,

Plaintiff-Appellee

v.

TANGIPAHOA PARISH SCHOOL BOARD, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Louisiana
U.S.D.C. Case No. 03-2870

The Honorable Helen G. Berrigan
United States District Judge

**EN BANC BRIEF AMICI CURIAE OF THE ANTI-DEFAMATION
LEAGUE AND AMERICANS UNITED FOR SEPARATION OF
CHURCH AND STATE IN SUPPORT OF APPELLEE JOHN DOE**

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CERTIFICATE OF INTERESTED PERSONS

Case No. 05-30294

John Doe v. Tangipahoa Parish School Board, et al.

The undersigned counsel of record certifies that the following additional listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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Amicus Curiae

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CERTIFICATE OF INTERESTED PERSONS – Continued

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The Anti-Defamation League (“ADL”) and Americans United for Separation of Church and State (“Americans United”) (collectively “*Amici*”) respectfully file this *amici curiae* brief in support of Appellee, John Doe (“Appellee” or “Doe”), and ask this Court to affirm the holding of the United States District Court for the Eastern District of Louisiana.¹

I.

NATURE OF AMICI’S INTERESTS

ADL was founded in 1913 to advance good will and mutual understanding among Americans of all creeds and races; combat racial, ethnic, and religious discrimination in the United States; and fight hate, bigotry, and anti-Semitism. ADL is, today, one of the world’s leading civil and human rights organizations. Among ADL’s core tenets is strict adherence to the separation of church and state embodied in the Establishment Clause of the Constitution’s First Amendment. ADL believes that this separation preserves religious freedom and protects our democracy. To further this strong belief, ADL has filed *amicus curiae* briefs in a number of important First Amendment cases. *See* <http://www.adl.org/civil_rights/ab/> (visited April 17, 2007).

¹Both Appellants and Appellee have consented to ADL and Americans United appearing as *amici curiae* in support of Appellee.

ADL especially rejects the notion that the separation principle is inimical to religion. To the contrary, ADL strongly maintains that a high wall of separation is essential to the continued flourishing of religious practices and beliefs in America and the protection of minority religions and their adherents. The more government and religion become entangled, the more threatening the environment becomes for each. As Justice Black poignantly noted, “a union of government and religion tends to destroy government and degrade religion.” *Engel v. Vitale*, 370 U.S. 421, 431 (1962).

ADL also advocates the importance of public schools as a vehicle for the transmission of this country’s democratic principles and, thus, works to ensure the integrity and strength of the public schools. ADL provides schools with guidance and programs on how to maintain the constitutional separation of church and state and safeguard the religious freedom of students and staff of both majority and minority faiths. *See generally* <<http://www.adl.org/education/>> (visited April 17, 2007). Thus, ADL has a great interest in ensuring that school boards – an integral part of our Nation’s public schools – do not introduce sectarian prayer into the public school system and, therefore, files this brief in support of Appellee.

Americans United is a national, nonsectarian public interest organization based in Washington, D.C., that is committed to preserving the constitutional principles of religious freedom and separation of church and state. Since its founding in 1947,

Americans United has participated as party, counsel, or *amicus curiae* in many of the leading church-state cases decided by the Supreme Court of the United States and by the United States Courts of Appeals. Americans United has more than 75,000 members nationwide, including many thousands within the jurisdiction of this Court.

II.

SUMMARY OF ARGUMENT

Presented with a resolution to limit its opening prayers to a brief nonsectarian, non-proselytizing invocation, the Tangipahoa Parish School Board (the “Board”) effectively resolved, instead, to begin its meetings with definitively sectarian prayer by *unanimously* rejecting the resolution. The Board thereby reaffirmed its commitment to the endorsement of a particular faith by opening its meetings with sectarian prayer. The Board’s decision plainly reveals its true motive of seeking to advance religion in its schools.

Our Nation’s public schools have the unique function of training American citizens in an environment free of parochial, divisive, or separatist influences. In a series of opinions, the Supreme Court has vigilantly protected this function and environment by prohibiting state-sponsored religious activity in America’s public schools. That protection has not been limited to the classroom but, rather, has extended to prohibit government from endorsing religion in *various school-related*

activities. This Court should likewise extend the same protection to the Board's meetings as the Board's activities are inextricably intertwined with the public school system. The Board's meetings constitute an integral part of the school system; are open to the public, including students, parents, and teachers; are conducted on school property; and set policy for all of the schools in the system.

Contrary to the Board's contention, the Supreme Court's holding in *Marsh* does not suggest that the Board's meetings should be treated differently than other school activities. In particular, *Marsh* represents an exceedingly narrow exception to the Supreme Court's *Lemon* test based on the "unique history" of legislative prayer. Neither the Supreme Court nor the federal courts of appeal have ever extended the *Marsh* exception to school board prayer. This Court should not accept the Board's constitutionally infirm invitation to become the first circuit to do so. Indeed, school boards do not share the unique history that motivated *Marsh* and are not analogous to state legislatures and city councils.

Even extending *Marsh* to school board prayer, however, would not save the Board's sectarian prayers. The Board begins its meetings with explicitly sectarian prayers that invoke "Jesus Christ" and the Christian faith. If nothing else, *Marsh* did not approve such sectarian prayer. In fact, the Supreme Court and lower federal courts have repeatedly declared that *Marsh* does not protect prayers that advance

Christianity over other religions, and the Board's policy of doing so violates the First Amendment under any Establishment Clause test. Ignoring the principle of governmental neutrality toward religion, as the Board asks this Court to do, is unconstitutional and dishonors our Nation's religious pluralism. Accordingly, the District Court correctly held the Board's prayers unconstitutional, and *Amici* respectfully urge this Court to affirm that holding.

III.

ARGUMENT

A. The *Marsh* Exception for Legislative Prayer Should Not Be Extended to School Board Prayer.

The Board has defined a seemingly straightforward issue for this Court: Do the Supreme Court's numerous and wide-ranging opinions regarding the role of the Establishment Clause in the Nation's public schools govern school board prayer, or does the narrow exception to the Supreme Court's Establishment Clause jurisprudence created by *Marsh v. Chambers*, 463 U.S. 783 (1983), for nonsectarian legislative prayer apply? The proper question should, instead, be: Why should this Court single out school boards from the rest of the school system and permit them to begin their meetings with prayers when such conduct is not permitted elsewhere in the schools?

The answer to this more appropriate question is that school boards should not be treated differently.

1. *Marsh* Represents a Narrow Exception to the *Lemon* Rule.

Appellants premise their appeal on extending the Supreme Court’s holding in *Marsh* to school board prayer.² In doing so, Appellants espouse, and ask this Court to adopt, a constitutionally infirm position that no other federal appellate court has chosen to adopt. The Supreme Court and federal appellate courts have recognized *Marsh* to be a narrow exception to the *Lemon* rule and have not extended it to the public-school context. This Court should likewise decline Appellants’ invitation to extend *Marsh* beyond the scope of the Supreme Court’s holding.

In *Marsh*, the Supreme Court held that the Nebraska Legislature’s practice of beginning its sessions with a nonsectarian prayer did not violate the First Amendment because of the “unique history” surrounding legislative prayer. 463 U.S. at 791. The *Marsh* Court reasoned that the Framers of the Constitution could not have intended the Establishment Clause to preclude legislative prayers because the “same week

²Although the Board now attempts to justify its practice of beginning its meetings with sectarian prayer under the rule established by the Supreme Court in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the Board conceded, before the panel, that its practice could not pass constitutional muster under *Lemon*. See *Doe v. Tangipahoa Parish Sch. Bd.*, 473 F.3d 188, 191, 197 (5th Cir. 2006) (Barksdale, J.); see also *id.* at 205-06, 211 (Stewart, J., concurring).

Members of the First Congress voted to appoint and to pay a Chaplain for each House” they also “voted to approve the draft of the First Amendment for submission to the States.” *Id.* at 790. The Supreme Court concluded that opening legislative sessions with prayer was constitutional “[i]n light of [this] unambiguous and unbroken history of more than 200 years.” *Id.* at 792.

Since deciding *Marsh*, the Supreme Court has repeatedly emphasized that the “unique history” of legislative prayer served as the basis for the case’s holding. *See, e.g., County of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 596 n.46 (1989) (*Marsh* “sustained the practice of legislative prayer based on its unique history”); *Edwards v. Aguillard*, 482 U.S. 578, 583 n.4 (1987) (same). The lower federal courts have likewise considered *Marsh* a narrow exception to the *Lemon* test based upon the unique history of legislative prayer. *See, e.g., Mellen v. Bunting*, 327 F.3d 355, 369 (4th Cir. 2003) (“The Supreme Court has since emphasized that *Marsh* is applicable only in narrow circumstances.”); *Jager v. Douglas County Sch. Dist.*, 862 F.2d 824, 829 n.9 (11th Cir. 1989) (“*Marsh* created an exception to the *Lemon* test only for such historical practice.”).

2. The Supreme Court and Federal Appellate Courts Have Refused to Extend *Marsh* Into the Public-School Context.

Recognizing *Marsh* as a limited and narrow exception to *Lemon*, the Supreme Court and lower federal courts have repeatedly rejected requests to extend *Marsh* to other Establishment Clause cases. The Fourth Circuit has declared that, “in the more than twenty years since *Marsh*, the [Supreme] Court has never found its analysis applicable to any other circumstances; rather, the Court has twice specifically refused to extend the *Marsh* approach to other situations.” *Wynne v. Town of Great Falls, S.C.*, 376 F.3d 292, 302 (4th Cir. 2004), *cert. denied*, 545 U.S. 1152 (2005). In one of those cases, *Lee v. Weisman*, 505 U.S. 577 (1992), the Supreme Court chose not to apply *Marsh* to determine the constitutionality of nonsectarian prayer at a high school graduation ceremony. The *Lee* Court opined that the “[i]nherent differences between the public school system and a session of a state legislature distinguish this case from *Marsh*.” 505 U.S. at 596. *See also Glassroth v. Moore*, 335 F.3d 1282, 1298 (11th Cir. 2003) (not extending *Marsh* to a case involving the constitutionality of a display of the Ten Commandments in a judicial building).

Appellants argue, nevertheless, that the Court should extend *Marsh* to the Board’s openly sectarian prayers because *Marsh* supposedly applies to all deliberative bodies. *See Appellants’ En Banc Br.* at 11-12. Appellants rest this argument upon the

statement in *Marsh* that the “opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country.” *Id.* at 9 (quoting *Marsh*, 463 U.S. at 786). From this statement, Appellants reason that: (1) *Marsh* applies not just to legislative bodies but all deliberative public bodies; (2) the Board is a deliberative public body; and, therefore (3) *Marsh* must apply to the Board. The Supreme Court and federal appellate courts have rejected this erroneous syllogism, holding that “*Marsh* does not support the proposition that government-sponsored prayer at all ‘deliberative public bodies’ is presumptively valid.” *Coles*, 171 F.3d at 380.

In fact, even *Marsh* itself does not support the conclusion Appellants ask this Court to adopt. The Supreme Court did not define the phrase “other deliberative public bodies” in *Marsh*. *See Doe*, 473 F.3d at 206, 209 (Stewart, J., concurring). The Supreme Court referred to “public bodies” only one other time in its majority opinion, stating that “[t]o invoke Divine guidance on a public body *entrusted with making the laws* is not, in these circumstances, an ‘establishment’ of religion or a step toward establishment.”³ *Marsh*, 463 U.S. at 792 (emphasis added). Unlike the state legislature at issue in *Marsh*, the Board makes only policies for its schools and not

³Appellants cite this statement from *Marsh* as well but conspicuously omit the highlighted language. *See* Appellants’ En Banc Br. at 9.

laws or similar decrees for the public at large. Thus, if any guidance is to be gained from the Supreme Court's language in *Marsh*, it is that the opinion suggests the Supreme Court did not intend its holding to extend to school boards.

Not only does *Marsh* itself not support the Board's argument, but other federal courts have refused to apply *Marsh* blanketly to *all* deliberative public bodies. The Fourth Circuit has rejected, for example, extending *Marsh* to a judge's practice of opening court sessions with a prayer. *See North Carolina Civil Liberties Union Legal Found. v. Constangy*, 947 F.2d 1145, 1149 (4th Cir. 1991); *see also Newman v. City of East Point*, 181 F. Supp. 2d 1374, 1381 (N.D. Ga. 2002) (not applying *Marsh* to Mayor's Prayer Breakfast). Certainly, courts fit Appellants' definition of "deliberative public bodies" because they are public bodies and judges regularly deliberate in the course of their duties. *See Appellants' En Banc Br.* at 11. Yet, *Marsh* does not apply to courts, and it does not *ex proprio vigore* apply to the Board.

Likewise, a number of other deliberative bodies satisfy the statutory definition of "public body" in Louisiana Revised Statutes § 42.4.2(2), which the Board invokes. *See, e.g., Hoffpauir v. State, Dept. of Pub. Safety & Corr.*, 762 So. 2d 1219, 1221 (La. App. 1 Cir. 2000) (State Board of Prison Pardons); La. Op. Atty. Gen., No. 94-333, Aug. 22, 1994 (LSU Student Government); La. Op. Atty. Gen., No. 92-166, June 4, 1992 (city ethics board); La. Op. Atty. Gen., No. 89-424, Sept. 1, 1989 (university

faculty senate). *Marsh* does not — and should not — apply to all of those bodies. The Board’s assumption that *Marsh* necessarily applies to all “deliberative public bodies” goes too far and improperly interprets that phrase out of the context the Supreme Court addressed in *Marsh*, i.e., law-making public bodies.

3. The Supreme Court’s School Prayer Cases Apply Outside the Classroom to Other School-Related Activities.

The Supreme Court has consistently acknowledged that the “Establishment Clause must be applied with special sensitivity in the public-school context.” *Allegheny*, 492 U.S. at 620 n.69 (citing *Edwards*, 482 U.S. at 583-84). The Board wrongly seeks to limit the effect of this jurisprudence because its practice cannot survive the special scrutiny with which the Supreme Court has protected the public schools from government sponsorship of religion. As the Supreme Court noted in invalidating Louisiana’s Creationism Act, the “Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools. . . . ‘[t]he public school is at once the symbol of our democracy and the most pervasive means of promoting our common destiny. In no activity of the State is it more vital to keep out divisive forces than in its schools.’” *Edwards*, 482 U.S. at 584 (quoting *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203, 231 (1948)).

In his concurring opinion in *School District of Abington Township, Pennsylvania v. Schempp*, Justice Brennan forcefully articulated the importance of the constitutional prohibition against state endorsement of religion in the schools:

[T]he American experiment in free public education available to all children has been guided in large measure by the dramatic evolution of the religious diversity among the population which our public schools serve. The interaction of these two important forces in our national life has placed in bold relief certain positive values in the consistent application to public institutions generally, and public schools particularly, of the constitutional decree against official involvements of religion which might produce the evils the Framers meant the Establishment Clause to forestall. . . . It is implicit in the history and character of American public education that the public schools serve a uniquely public function: the training of American citizens in an atmosphere free of parochial, divisive, or separatist influences of any sort – an atmosphere in which children may assimilate a heritage common to all American groups and religions.

374 U.S. 203, 241-42 (1963) (Brennan, J., concurring).

Motivated by these principles, the Supreme Court and this Court have sought broadly to prevent the state from endorsing or becoming entangled in religion through its schools. *See, e.g., Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 312, 317 (2000) (holding student-led prayer before high school football games — “traditional gatherings of a school community” including teachers, parents, and students — violated First Amendment); *Lee*, 505 U.S. at 599 (striking down school-sponsored prayer at high-school graduations); *Edwards*, 482 U.S. at 583, 596-97 (declaring

Creationism Act unconstitutional “in the special context of the public elementary and secondary school system”); *Freiler v. Tangipahoa Parish Bd. of Educ.*, 185 F.3d 337, 348 (5th Cir. 1999) (holding evolution disclaimer unconstitutional because of danger of “students *and parents* perceiving that the School Board endorses religion” (emphasis added)); *Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402, 406 (5th Cir. 1995) (prohibiting school district employees and agents from participating in or supervising student-initiated prayers at extracurricular events).

The Supreme Court’s school prayer cases do not reflect simply a concern for the coercive pressures that may exist in schools. The “Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not.” *Engel*, 370 U.S. at 430. The High Court’s cases also reveal its concern about government conveying a message of official support for religion and the divisiveness inherent in state-sponsored religious activities in the public schools, such as the sectarian prayers with which the Board begins its meetings. *See Santa Fe*, 530 U.S. at 309-10.

The Board cannot divorce itself from the schools and school system to preserve its practice of sectarian prayer. The Board sits at the “head of the class” and should

not be permitted to do what every other official in the school system cannot. The message sent to the students in the school system, some of whom attend the board meetings, would be, at best, confusing. As the Sixth Circuit noted in considering the very same question, “[m]ixing religious activity with a government institution designed to foster and educate youth in the values of a democratic, pluralistic society is troubling because of the special nature of public schools as ‘the symbol of our democracy and the most pervasive means for promoting our common destiny.’” *Coles ex rel. Coles v. Cleveland Bd. of Educ.*, 171 F.3d 369, 378 (6th Cir. 1999).

4. The Nature of School Boards Makes the *Marsh* Exception Particularly Inappropriate to Apply to School Board Prayer.

a. The Board Is an Integral Part of the School System.

By its own admission, the Board’s “meetings are an integral part of the Tangipahoa Parish School System.” Rec. 000237. The “meetings are open to the public, *including students*.”⁴ Rec. 000175 (emphasis added). Students do, in fact, attend these meetings and, on a number of occasions, have actually led the prayers at issue. *See* Rec. 000176-78. Although attendance at any Board meeting may be voluntary, members of the community — including students and their parents —

⁴The Board holds its meetings on school property, and members of the School Board preside over the meetings. Rec. 000175.

plainly attend and participate in the meetings.⁵ In fact, Louisiana law imposes special public comment requirements on school board meetings, mandating that school boards allow public comment before a vote is taken on each agenda item. *See* LA. REV. STAT. ANN. § 42:5.1 (West 2006).

The Board meetings are not merely open to the public but address important issues affecting the school system. “The Board is responsible for the operation and government of the schools comprising the Tangipahoa Parish School System,” which includes thirty-five schools and 18,023 students. Rec. 000174-75. Louisiana law invests school boards with broad powers over the state’s public schools, including hiring and disciplining school employees, hearing teacher grievances, and assigning students to different schools. *See* LA. REV. STAT. ANN. §§ 17:81, 81.8, 100.4, 104 (West 2001 & Supp. 2005). Most importantly, the Board establishes academic and other policies for the schools. The Board should not therefore be separated for the purposes of Establishment Clause scrutiny from the rest of the school system it

⁵In *Freiler*, this Court declared unconstitutional a resolution adopted by the same Board requiring the recitation of a disclaimer before the teaching of evolution. The Court noted that “School Board members *and parents who were present*” discussed the language of the disclaimer before the Board adopted it. *Freiler*, 185 F.3d at 341 (emphasis added).

oversees. The Board is an integral and inseparable part of the school system because, as the Sixth Circuit has recognized:

[S]chool board members are directly communicating, at least in part, to students. They are setting policies and standards for the education of children within the public school system, a system designed to foster democratic values in the nation's youth, not to exacerbate and amplify differences between them.

Coles, 171 F.3d 382. Consequently, “[a]lthough meetings of the school board might be of a ‘different variety’ than other school-related activities, the fact remains that they are part of the same ‘class’ as those other activities in that they take place on school property and are *inextricably intertwined with the public school system.*” *Id.* at 377 (emphasis added).

Contrary to the Board's argument, the Board differs little from the Cleveland Board of Education addressed by the Sixth Circuit in *Coles*. See Appellants' En Banc Br. at 12-15. The Board resembles that public body much more than it does the Louisiana Legislature and than the Board itself would like to admit:

Characteristic/Practice	Tangipahoa School Board	Cleveland School Board
Manages day-to-day problems concerning the operation of a public school system	YES	YES
Promulgates policies re curriculum	YES	YES
Promulgates dress code policies	YES	YES
Promulgates policies re searches of student lockers	YES	YES
Promulgates disciplinary rules and suspension and expulsion procedures	YES	YES
Holds public meetings	YES	YES
Holds meetings on school property	YES	YES
Permits public comment	YES	YES
Students and parents attend meetings and participate	YES	YES
Students sit on board	POSSIBLE⁶	YES
Students give prayers	YES	NO

Compare Coles, 171 F.3d at 371-73, and Tangipahoa Parish Schools Policy Manual, <<http://www.tangischools.org/policymanual/>> (visited April 16, 2007); *see also infra* at _____. Although like the Louisiana Legislature, the Board’s members are elected, “that is where the similarity ends,” and “[w]hat actually occurs at the school board’s

⁶The trial court record does not reveal whether students sit on the Board or have sat on the Board in the past. Nevertheless, as Judge Barksdale observed, “it is possible under Louisiana law for a student to be a Board member.” *Doe*, 473 F.3d at 192 (citing LA. REV. STAT. ANN. § 17:52(E)(1) (West 2001)) (Barksdale, J.).

meetings is what sets it apart from the deliberative process” of other public bodies. *Coles*, 171 F.3d at 381. Therefore, this Court should not treat the Board differently from the rest of the school system.

b. School Boards and Legislatures Have Very Different Histories, Practices, and Functions.

As the *Coles* Court held, the Board’s “practice of opening its meetings with prayer does not fit within the rubric of *Marsh*.” 171 F.3d at 383. School board prayer does not share the unique history of legislative prayer upon which *Marsh* is based. Indeed, “[s]uch a historical approach is not useful in determining the proper roles of church and state in public schools, since free public education was virtually nonexistent at the time the Constitution was adopted.” *Edwards*, 482 U.S. at 583 n.4; *see also Wallace v. Jaffree*, 472 U.S. 38, 80 (1985) (“Since there then existed few government-run schools, it is unlikely that the persons who drafted the First Amendment, or the state legislators who ratified it, anticipated the problems of interaction of church and state in the public schools.”) (O’Connor, J., concurring). Because public school boards did not exist when the Constitution was adopted, they lack a long-standing history of opening prayers comparable to legislative prayer.⁷

⁷The Board’s discussion of the history of school boards misses the mark. *See Appellants’ En Banc Br.* at 16-17. As that discussion demonstrates, colonial schools
(continued...)

School board prayer also differs from legislative prayer because the opening prayer is not directed solely to the members of the board but to the audience attending the meeting as well. Unlike in state legislatures, members of the community — including teachers, parents, and students — participate in school board meetings. *See supra* at _____. The Board’s prayer conveys a message to this audience that the state endorses religion. “School sponsorship of a religious message is impermissible because it sends the ancillary message to members of the audience who are nonadherents ‘that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.’” *See Santa Fe*, 530 U.S. at 309-10 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 688 (1989) (O’Connor, J., concurring)). In contrast, “legislative prayer is primarily directed at the legislators themselves, who have decided to have prayer.” *Constangy*, 947 F.2d at 1149.

In addition, as the Sixth Circuit concluded in *Coles*, school boards serve a different function than legislative bodies. 171 F.3d at 381-82. School boards consider

⁷(...continued)

were not “public” schools in the sense they are now; indeed, they fostered religious education. Those schools differ from the situation considered in *Marsh* where “[f]rom colonial times through the founding of the Republic and ever since, *the practice of legislative prayer has coexisted with the principles of disestablishment and religious freedom.*” *Marsh*, 463 U.S. at 786 (emphasis added).

only school-related matters and make policy only for their school systems. Thus, students comprise an important component of the boards' constituency. School boards communicate with this constituency both directly at school board meetings and indirectly through the policies and programs they adopt. Schoolchildren have a resulting interest in attending school board meetings and, as the undisputed facts of this case prove, play a greater role in school board meetings even if that role is only to lead the opening prayer. *Id.*; Rec. 000176-78. Therefore, because of the important differences between school boards and other public bodies, this Court should reject the Board's request to extend *Marsh* into the public school arena.

B. The Board's Overtly Sectarian Prayer Violates the First Amendment's Establishment Clause Even Under *Marsh*.

1. The Board Begins Its Meetings With Overtly Sectarian Prayers.

This Court has observed that “[p]rayer is perhaps the quintessential religious practice for many of the world’s faiths, and it plays a significant role in the devotional lives of most religious people.” *Karen B. v. Treen*, 653 F.2d 897, 901 (5th Cir. Unit A 1981), *aff’d mem.*, 455 U.S. 913 (1982). Prayer is, thus, inherently religious. The Board has not, however, merely adopted a policy of beginning its meetings with prayer, a practice that itself would likely offend many non-believers. The Board begins its meetings with blatantly sectarian prayer.

That the Board's prayers are sectarian is obvious beyond peradventure. The Board's February 18, 2003 prayer, given by the assistant superintendent, concluded as follows:

Also, we thank you for the greatest gift of all – your darling son, Jesus Christ. For we all know that He was born, died, and rose again, so that we all may be forgiven for our sins. And Lord, as we leave this meeting tonight, we ask that you guide us safely to our various abodes. These things we ask in your darling son, Jesus Christ's name. Amen.

Rec. 000180. The September 23, 2003 prayer, given by the son of one of the board members, referred to the "Devine [sic] Author of *our blessed religion*" and ended with "Grant our supplications, we beseech Thee, through Jesus Christ our Lord. Amen."

Id. (emphasis added). The May 18, 2004 prayer likewise invoked "Jesus Christ."
Rec. 000181.

These prayers are plainly sectarian because they are given in Christian terms and invoke a deity in which only Christians believe. In *Allegheny*, the Supreme Court made clear that such "praise to God in Christian terms is indisputably religious – indeed sectarian – just as it is when said in the Gospel or in a church service." 492 U.S. at 598. Similarly, in *Wynne*, the Fourth Circuit held that prayers sponsored by a town council that frequently referred to "Jesus Christ" were sectarian because they "invoked a deity in whose divinity *only* those of the Christian faith believe" and were not prayers "'within the embrace of what is known as the Judeo-Christian tradition,'

which is a ‘nonsectarian prayer’ without ‘explicit references . . . to Jesus Christ, or to a patron saint.’” 376 F.3d at 300 (quoting *Lee*, 505 U.S. at 588, 589). Indeed, even as early as 1915, the Supreme Court of Louisiana recognized that reciting the New Testament in this state’s public schools discriminated against Jews because “the reading of the Bible is religious instruction, and . . . when the New Testament is read it is Christian instruction.” *Herold v. Parish Bd. of Sch. Directors*, 68 So. 116, 121 (La. 1915).

2. The Board’s Sectarian Prayers Unconstitutionally Advance Religion in Violation of *Marsh*.

Marsh itself did not address, let alone approve, the kind of sectarian prayers used to open the Board’s meetings. In *Marsh*, the Supreme Court expressly noted that “[a]lthough some of his earlier prayers were often explicitly Christian, [the legislative chaplain] removed all references to Christ after a 1980 complaint from a Jewish legislator.” 463 U.S. at 793 n.14. Accordingly, *Marsh* held that the “content of prayer is not of concern to judges where, as here, there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief.” *Id.* at 794-95. Unlike in *Marsh*, the Board’s prayers themselves and the Board’s practices demonstrate that the Board intended to use the prayers to advance only one faith.

As the District Court correctly found, the “repeated references to ‘Jesus,’ ‘Jesus Christ,’ and ‘Jesus as the Son of God,’ are clearly Christian beliefs meant to venerate the Christian faith.” Rec. 000079. Thus, even if *Marsh* applied to the Board’s prayers, they would still be unconstitutional. “Indeed, in *Marsh* itself, the Court recognized that not even the ‘unique history’ of legislative prayer can justify contemporary legislative prayers that have the effect of affiliating the government with any one specific faith or belief. The legislative prayers involved in *Marsh* did not violate this principle because the particular chaplain had ‘removed all references to Christ.’” *Allegheny*, 492 U.S. at 603 (citations omitted); *see also Wynne*, 376 F.3d at 298 n.3 (“*Allegheny*’s discussion of *Marsh* entirely accords with the limits the *Marsh* Court itself placed on its holding.”).

At least three circuit courts have found sectarian that prayers similar to those said here advanced religion in violation of *Marsh*. In *Wynne*, the Fourth Circuit held that a town council’s sectarian prayers violated the Establishment Clause even under *Marsh*. The Fourth Circuit noted that “‘pars[ing]’ the prayers in this case would seemingly be permitted under *Marsh*, for the record in this case is replete with powerful ‘indication[s]’ that the Town Council did indeed ‘exploit’ the prayer opportunity ‘to proselytize or advance’ one faith.” *Wynne*, 376 F.3d at 298 n.4. After considering that record, the *Wynne* Court concluded that:

Marsh does not permit legislators . . . to engage, as part of public business and for the citizenry as a whole, in prayers that contain explicit references to a deity in whose divinity only those of one faith believe. The invocations at issue here, which specifically call upon Jesus Christ, are simply not constitutionally acceptable legislative prayer like that approved in *Marsh*. Rather, they embody the precise kind of “advance[ment]” of one particular religion that *Marsh* cautioned against.

Id. at 301-02 (footnote omitted).

Likewise, the Seventh Circuit recently held that sectarian legislative prayer violated *Marsh*. In *Hinrichs v. Bosma*, 440 F.3d 393 (7th Cir. 2006), the Seventh Circuit refused to stay a judgment enjoining the Indiana General Assembly’s practice of beginning its sessions with sectarian invocations. Christian clerics gave 41 of the 53 invocations considered by the district court, and “the majority of the Christian prayers [were] identifiable by supplications to Christ.” *Id.* at 395. The Seventh Circuit observed that although it had never “addressed the constitutionality of legislative prayer,” it had “read *Marsh* as hinging on the nonsectarian nature of the invocations at issue” and held that the Christian invocations at issue violated that limitation. *Id.* at 399. *See also Bacus v. Palo Verde Unified Sch. Dist. Bd. of Educ.*, 52 F. App’x. 355, 357 (9th Cir. 2002) (“Solemnizing school board meetings ‘in the Name of Jesus’ displays ‘the government’s allegiance to a particular sect or creed.’”); *accord Rubin v. City of Burbank*, 124 Cal. Rptr. 2d 867, 873 (Cal. App. 2 Dist. 2002).

Moreover, the Board’s actions both before and after this suit was filed confirm that it sought to use its prayer opportunity to advance religion. First, the Board selected the individuals who gave the prayers, plainly choosing people who would give Christian prayers. Rec. 000176; *Doe*, 473 F.3d at 204 (Barksdale, J.). Second, even after *Doe* filed this lawsuit, the Board *unanimously* rejected a resolution to limit its opening prayer to “a brief non-sectarian, non-proselytizing invocation to solemnize the occasion.”⁸ Rec. 000182. The Board’s selection of only Christians to lead the prayers and its unanimous rejection of the resolution provide the very evidence of the Board’s “practices and motivations” on which Judge Clement opined the Court should focus.⁹ *Doe*, 473 F.3d at 212 (Clement, J., dissenting).

Lastly, the broader context of this case and the Board’s prior practices reveal that the Board sought to advance religion through the prayer opportunities at its

⁸As in the present case, the town council in *Wynne* also refused requests to substitute a nonsectarian prayer for its sectarian prayers. 376 F.3d at 295.

⁹Appellants suggest that they unanimously rejected the resolution due to First Amendment concerns even though no evidence of this supposed intent appears in the record. *See* Appellants’ En Banc Br. at 30; *see also Doe*, 473 F.3d at 216 (Clement, J., dissenting). In *Hinrichs*, the Seventh Circuit expressly rejected a similar suggestion that “prohibiting clerics from invoking Christ would violate the Free Exercise or Free Speech Clauses of the First Amendment.” 440 F.3d at 402.

meetings.¹⁰ Doe’s amended complaint alleged that the Board had authorized, permitted, or acquiesced in several unconstitutional practices in addition to the prayers recited at its meetings, and the parties’ Consent Judgment enjoined most of those practices. *See* Rec. 000187-191, 000270-71. Accordingly, as in *Santa Fe*, “[t]his case comes to [the Court] as the latest step in developing litigation brought as a challenge to institutional practices that unquestionably violated the Establishment Clause,” and this Court should “refuse to turn a blind eye to the context in which this policy arose.” 530 U.S. at 315. The Board’s prayers embodied its very obvious intention, which was unconstitutional under *Marsh*.

3. Considering the Prayers’ Overtly Sectarian Language Does Not Impermissibly “Parse” the Content of Those Prayers.

In *Marsh*, the Supreme Court held that because the Nebraska Legislature’s prayers did not proselytize, advance any one religion, or disparage any other religion, “it is not for us to embark on a sensitive evaluation or to parse the content of a particular prayer.” 463 U.S. at 794-95. This caveat does not apply to the Board’s prayers because, as discussed above, the Board did exploit its prayer opportunities to

¹⁰This Court has found prior actions taken by this Board to run afoul of the First Amendment’s protections. *See, e.g., Freiler*, 185 F.3d at 348 (declaring evolution disclaimer unconstitutional under *Lemon*); *Karen B.*, 653 F.2d at 902 (holding Louisiana school-prayer law and school board resolution implementing it unconstitutional under *Lemon*).

advance Christianity. Moreover, considering the overtly sectarian language in the Board's prayers hardly constitutes the "sensitive evaluation" or "pars[ing]" of the prayers against which the Court warned or even the "comparative theology" about which Appellants voice concern. *See* Appellants' En Banc Br. at 25-27.

The Fourth Circuit expressly dismissed a similar complaint in *Wynne*, concluding that "a recognition that the [town council's] prayers often included an invocation to Jesus Christ does not constitute the 'parsing' referred to in *Marsh*." 376 F.3d at 298 n.4. In holding sectarian legislative prayer unconstitutional, the *Hinrichs* Court likewise rejected "the argument that deciding which prayers are sectarian is an inappropriate role for judges." 440 F.3d at 402. The Ninth Circuit reached the same result in *Bacus* when teachers challenged the constitutionality of prayers said "in the name of Jesus" at school board meetings. The Ninth Circuit declined to decide whether to follow *Marsh* or *Coles* because "*Marsh*, assuming without deciding that it is applicable, would not save the practice in the case at bar. . . . In the case at bar the references to Christ were not removed despite objection, and the prayers, almost always 'in the Name of Jesus,' did advance one faith." *Id.* (citations omitted).

Not only does Appellants' argument lack jurisprudential support, it also espouses an unrealistic and unworkable analytical approach. How can a court

determine whether a challenged prayer unconstitutionally proselytizes or advances religion if it cannot consider the language of the prayer? It is neither possible nor sensible, under *Marsh*, for a court to decide whether a prayer is unconstitutional by focusing — as Appellants suggest — only on “how” and “why” a school board begins its meetings with a prayer and not on “what” is said. *See* Appellants’ En Banc Br. at 18-19. Considering the words that are spoken represents an integral part of “how” and “why” the prayer is said in the first place. Therefore, *Marsh* does not prohibit this Court’s consideration of the Board’s prayers themselves.

C. Respecting Governmental Neutrality Towards Religion Strengthens Both Government and Religion.

This Court has previously recognized that the “Supreme Court consistently has expressed the view that the First Amendment demands *absolute governmental neutrality with respect to religion*, neither advancing nor inhibiting any particular religious belief or practice and neither encouraging nor discouraging religious belief or unbelief.” *Karen B.*, 653 F.2d at 901 (emphasis added). The Board’s prayers violate that absolute neutrality by favoring Christian religious beliefs and thereby sending a message to all who do not ascribe to those beliefs that they are outsiders. The Supreme Court has made clear that such a message violates the protections of the First Amendment. *See Allegheny*, 492 U.S. at 593-94 (“Whether the key word is

‘endorsement,’ ‘favoritism,’ or ‘promotion,’ the essential principle remains the same. The Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief or from ‘making adherence to a religion relevant in any way to a person’s standing in the political community.’” (citation omitted)).

The fact that a majority of the residents of Tangipahoa Parish may share the religious beliefs of the Board and even support its prayers does not insulate those prayers from constitutional challenge. “While in some societies the wishes of the majority might prevail, the Establishment Clause of the First Amendment is addressed to this contingency and rejects” it. *Lee*, 505 U.S. at 596. Accordingly, in declaring a public crèche display unconstitutional, the Supreme Court observed that “[t]o be sure, some Christians may wish to see the government proclaim its allegiance to Christianity in a religious celebration of Christmas, but the Constitution does not permit the gratification of that desire, which would contradict the ‘logic of secular liberty’ it is the purpose of the Establishment Clause to protect.” *Allegheny*, 492 U.S. at 612 (citations omitted). The *Allegheny* Court opined further that:

Precisely because of the religious diversity that is our national heritage, the Founders added to the Constitution a Bill of Rights, the very first words of which declare: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof” Perhaps in the early days of the Republic these words were understood

to protect only the diversity within Christianity, but today they are recognized as guaranteeing religious liberty and equality to “the infidel, the atheist, or the adherent of a non-Christian faith such as Islam or Judaism.”

Id. at 589-90.

Respect for governmental neutrality towards religion should not, however, be construed as indifference or hostility towards religion. Rather, neutrality respects our Nation’s religious pluralism as commanded by the Constitution. *Id.* at 610. The Supreme Court has repeatedly instructed that governmental neutrality towards religion strengthens both church and state by keeping them separate. *See, e.g., Engel*, 370 U.S. at 432 (“religion is too personal, too sacred, too holy, to permit its ‘unhallowed perversion’ by a civil magistrate”); *Zorach v. Clauson*, 343 U.S. 306, 324-25 (1952) (“My evangelistic brethren confuse an objection to compulsion with an objection to religion. It is possible to hold a faith with enough confidence to believe that what should be rendered to God does not need to be decided and collected by Caesar.”) (Jackson, J., dissenting). The Supreme Court has recently confirmed that respecting the principle of neutrality “guard[s] against the civic divisiveness that follows when the Government weighs in on one side of religious debate.” *McCreary County, Ky. v. ACLU of Ky.*, 545 U.S. 844, 874 (2005). This Court should likewise respect this principle by affirming the District Court’s holding.

IV.

CONCLUSION

The Board has purposely adopted a policy of beginning its meetings with the recitation of explicitly sectarian prayers in violation of the Establishment Clause of the First Amendment. Contrary to the Board's contention, the Supreme Court's holding in *Marsh* does not save its unconstitutional practice. Indeed, no circuit has ever extended *Marsh* to the unique context of the public school system. Even if *Marsh* applied to school board prayer, however, the Board's overtly sectarian prayer would still violate the First Amendment. Accordingly, *Amici* respectfully urge this Court to declare the Board's endorsement of sectarian prayer unconstitutional and affirm the District Court's holding.

DATED: April 20, 2007.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE WITH TYPE-
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1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) and 32(a)(7)(B) because this brief contains 6,972 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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Dated: April 20, 2007.

CERTIFICATE OF SERVICE

Pursuant to Federal Rule of Appellate Procedure 25(d), I hereby certify that the above and foregoing *EN BANC BRIEF AMICI CURIAE* OF THE ANTI-DEFAMATION LEAGUE AND AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE IN SUPPORT OF APPELLEE JOHN DOE has been served on the following counsel by depositing two (2) paper copies and an electronic copy in the First-Class United States Mail, properly addressed and postage prepaid, this 20th day of April 2007:

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I hereby certify further that the *EN BANC BRIEF AMICI CURIAE* OF THE ANTI-DEFAMATION LEAGUE AND AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE IN SUPPORT OF APPELLEE JOHN DOE has been filed with the Clerk of Court by depositing seven (7) paper copies and an electronic copy in the First-Class United States Mail, properly addressed and postage prepaid, to the Clerk of Court, this 20th day of April 2007.

JOSHUA S. FORCE