UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Case No. 10-1819

JANE DOE, *et al.*,

Plaintiffs-Appellants

vs.

INDIAN RIVER SCHOOL DISTRICT, *et al.*,

Defendants-Appellees

Appeal from the United States District Court
for the District of Delaware

BRIEF OF *AMICUS CURIAE* ANTI-DEFAMATION LEAGUE IN SUPPORT OF PLAINTIFFS-APPELLANTS AND REVERSAL

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CONSENT TO FILING AMICUS BRIEF

All parties, through their counsel, have consented to the filing of an Amicus Curiae brief by the Anti-Defamation League (ADL) in this matter. Thomas J. Allingham II, on behalf of Plaintiffs/Appellants, granted consent to Shelly A. Solomon, Counsel for the ADL, in a telephone conversation with him on June 28, 2010. Jason P. Gosselin, on behalf of Defendants/Appellees, granted consent to Ms. Solomon in a telephone conversation with her on June 25, 2010.

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NATURE OF AMICI'S IDENTITY AND INTERESTS

Organized in 1913 to advance good will and mutual understanding among Americans of all creeds and races and to combat religious, ethnic, and racial prejudice in the United States, the Anti-Defamation League ("ADL") is today one of the world's leading organizations dedicated to fighting hatred, bigotry, and discrimination. ADL's mission is "to stop . . . the defamation of the Jewish people[,] . . . to secure justice and fair treatment to all citizens alike[,] and to put an end forever to unjust and unfair discrimination against . . . any sect or body of citizens." ANTI-DEFAMATION LEAGUE CHARTER (1913). ADL believes that the vigorous defense of our Nation's rights of religious liberty and freedom of conscience are critical in achieving this mission

In recent decades, our Nation's public schools have unfortunately become a principal battleground in the contest over the meaning of religious establishment. In this contest, ADL has long believed, and has long argued, that government-sponsored religious activity in our schools poses a particular threat to the continued vitality of religious liberty.

Moreover, public schools play a vital role in American life, teaching the core values of democracy to our nation's children. To that end, ADL has consistently defended the rights of students to feel welcome in our public schools, whether they are religious or are of no faith. In that regard, ADL fully endorses

the Supreme Court's position in Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 309 (2000), in which the Court rejected "[s]chool sponsorship of a religious message" as such sponsorship "sends the ancillary message to members of the audience who are non-adherents '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.'"

SUMMARY OF ARGUMENT

If this Court affirms the District Court's summary judgment decision in favor of the Indian River School District, it would become the only standing appellate court precedent favoring organized, official prayer during public school-related activities. There being no serious argument that District's school board prayer policy comports with traditional Establishment Clause tests, the District relies primarily, and the District Court entirely, on the narrow exception from those tests afforded to legislative prayer by the Supreme Court's decision in Marsh v. Chambers, 463 U.S. 783 (1983). There is no precedent for extending that narrow exception to the public school setting, including school boards, and for good reason: school board meetings are conducted for the benefit of, and regularly involve, impressionable school children. School board meetings do not have the same history that motivated the Supreme Court to allow prayer for legislatures. In fact, the relevant history in Indian River is of extensive, unconstitutional, and

divisive promotion of religion throughout the public school system, of which the school board prayer is only one part.

The promotion of religion in Indian River has not only been pervasive, but deeply sectarian. In the school board setting, board members select the prayers. Almost all of the prayers offered at school board meetings have been explicitly Christian, with frequent invocations of Jesus Christ. The District Court erred in finding that religiously biased prayer was permitted by Marsh; the Supreme Court has said just the opposite. In light of the consistent jurisprudence disfavoring government promotion of religion in public school education, and against government promotion of sectarian religious views in any context, the presence of both in the Indian River School District is particularly disturbing, and patently unconstitutional.

THE FACTUAL CONTEXT OF INDIAN RIVER'S SCHOOL BOARD PRAYER POLICY.[1]

Acting out of an abundance of credulity, the District Court adopted the School Board's rationalization that its opening prayers were intended to do no more than solemnify the proceedings. Doe v. Indian River Sch. Dist., 685 F.Supp.2d 524, 550 (D.Del. 2010). Whatever persuasiveness that explanation might have in a vacuum, it has no validity for the Indian River School District

[1] Amicus ADL incorporates the Statement of Facts in Appellants' Opening Brief By Reference

(IRSD), where school board prayers are just the last of a number of religious activities left standing as a result of this litigation. Over the years, the school district has allowed prayers at athletic and academic banquets, school potlucks, school Baccalaureate services, school graduations, as well as at school board meetings. See Appellants' Opening Brief at 22. Certain schools in the district gave preference to students who were members of Bible clubs and distributed Bibles to students; certain teachers openly taught and advocated religion in the classroom. See id.; see also Complaint at ¶¶ 31-39, ¶¶ 48-51. While these religious activities are no longer part of this lawsuit as a result of a settlement entered on November 7, 2007, they are part of its history.

The 2004 graduation ceremony of Sussex Central High School was the genesis of the Complaint in this action. Indian River Sch. Dist., 685 F.Supp.2d at 528. At the ceremony, a local minister delivered two prayers, including the invocation that the "Heavenly Father . . . directs [graduates] into the truth, and eventually the truth that comes by knowing Jesus." Id. Graduation prayers had been commonplace in the district, including during the ten year period after the Supreme Court decided Lee v. Weisman, 505 U.S. 577 (1992), forbidding prayer at graduation. See Appellants' Opening Brief at 22; Complaint at ¶¶ 23-30.

Subsequently, former plaintiff Mona Dobrich complained about the content of the prayers and, later, requested that the School District revise its prayer

policies. Indian River Sch. Dist., 685 F.Supp.2d at 528. On August 23 and 24, 2004, meetings were commenced to discuss prayer at school board meetings. Id. at 529. As a result of media attention, the meetings were heavily attended, and many participants loudly communicated their support for prayer. Id. Plaintiffs and others have described the intimidating and divisive atmosphere at those meetings. See Appellants' Opening Brief at 23-24. As a result of the controversy over prayer in school activities, community members who oppose religious activity in IRSD public schools have experienced intimidation and harassment.[2]

Subsequently, the board adopted a Board Prayer Policy, known as Policy BDA.1, investing Board Members with the opportunity, on a rotating basis, to open public school board meetings with prayer, and unfettered discretion to choose the content of that prayer. Although the 2004 Policy has a rotation

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[2] See Sean O'Sullivan, Suit against prayer spurs backlash, THE NEWS JOURNAL (Wilmington, Del.), Apr. 11, 2005, at 1A (reporting that supporters of Mona Dobrich refused to come forward for fear of alienation and damage to their livelihoods); Neela Banerjee, Families Challenging Religious Influence in Delaware Schools, N.Y. TIMES, July 29, 2006, at A1 (district resident explained to the New York Times, "[w]e have a way of doing things here, and it's not going to change to accommodate a very small minority. If they feel singled out, they should find another school or excuse themselves from those functions. It's our way of life."). In 2006 a group called Stop the ACLU attempted to publicize the Dobriches' address and phone number – an act that could only have malicious intent. See Jonathan Starkey, IRSD prayer suit draws plenty of attention, COASTAL POINT (Sussex County, Del.), July 21, 2006, available at http://www.thecoastalpoint.com /content/irsd_prayer_suit_draws_plenty_attention (last visited July 14, 2010).

requirement, the Board President Charles Bireley only called on select Board members to offer prayers, and all but one of these members testified that they always name Jesus in their prayers. See Opening Brief in Support of Plaintiffs' Motion for Summary Judgment at 15. Board members have not been able to recall a single non-Christian prayer ever being given at a public Board meeting. See id. at 14. In the three years after the Policy was adopted, the Board held 36 regular meetings, and of those meetings, 33 opened with prayer (the remaining 3 were opened with a moment of silence). See id. at 5 n.3 These prayers were overwhelmingly sectarian and all of the sectarian prayers were Christian; most referred directly to Jesus Christ. See Opening Brief in Support of Plaintiffs' Motion for Summary Judgment at 5, 14-15.

Students regularly participate in IRSD board meetings: they receive public recognition and awards; student government representatives address the Board at most regular meetings; JROTC students present the colors at the beginning of each meeting; and certain students participate in hearings regarding matters such as expulsion. Indian River Sch. Dist., 685 F.Supp.2d at 531. Finally, students, as any citizens, have a right to attend Board meetings.

ARGUMENT

I. Traditional Establishment Clause Standards Should Apply to Indian River's School Board Prayers

A. The Establishment Clause Standards

The Establishment Clause's guarantee "that government may not coerce anyone to support or participate in religion or its exercise . . . .", Santa Fe Indep. Sch. Dist., 530 U.S. at 302, is traditionally evaluated under the test enunciated in Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971), or the Endorsement Test. Lynch v. Donnelly, 465 U.S. 668, 687-94 (1984) (O'Connor, J., concurring); Modrovich v. Allegheny Cty., 385 F.3d 397, 401 (3d Cir. 2004). Organized, official prayer during public school activities has been consistently found unconstitutional under these tests. See Santa Fe, 530 U.S. at 316-317; see also, Lee, 505 U.S. at 598-599; Borden v. Sch. Dist., 523 F.3d 153, 179 (3d Cir. 2008), cert. den., 129 S.Ct. 1524 (2009); Coles v. Cleveland Bd. of Ed., 171 F.3d 369, 385-386 (6th Cir. 1999).

The District Court did not attempt to analyze IRSD's policy under these traditional tests. Given the district's long history of allowing prayer and other religious activities in myriad public school settings, its purposeful promotion of religion is obvious. See McCreary Cty. v. ACLU, 545 U.S. 844, 866 (2005) (objective observer "presumed to be familiar with the history of the government's actions and competent to learn what history has to show"); Borden, 523 F.3d at

177 (history of past prayer activity leads to reasonable inference that current conduct "is meant to preserve a popular 'state-sponsored religious practice'").

Instead, the district court found the school board prayer to be akin to the legislative prayers permitted by the Supreme Court in Marsh v. Chambers. In that case, the Court carved out a narrow exception to its governing Establishment Clause jurisprudence, holding that opening prayers are constitutionally permissible at sessions of state legislatures and "other deliberative public bodies." Marsh, 463 U.S. at 786. Since Marsh, the Supreme Court has been silent as to the parameters of "legislative prayer" and what characteristics an entity must possess to be labeled a "deliberative public body." See Coles, 171 F.3d at 381 ("As far as Marsh is concerned, there are no subsequent Supreme Court cases."); Freedom from Religion Found., Inc. v. Obama, No. 08-cv-588-bbc, 2010 U.S. Dist. LEXIS 37570, at *60-61 (W.D. Wis. Apr. 15, 2010) ("Although the [Supreme] Court has discussed Marsh in subsequent cases, it has not relied on it to justify similar practices."). It has consistently been cited as a narrow decision.[3] The only Court

[3]See, e.g., Lee, 505 U.S. at 585 ("The influence and force of a formal exercise in a school graduation are far greater than the prayer exercise we condoned in Marsh."); Cty. of Allegheny v. ACLU, 492 U.S. 573, 603 (1989) ("Marsh plainly does not stand for the sweeping proposition . . . that all accepted practices 200 years old and their equivalents are constitutional today."); Mellen v. Bunting, 327 F.3d 355, 369 (4th Cir. 2003), cert. den., 541 U.S. 1019 (2004) ("The Supreme Court has . . . emphasized that Marsh is applicable only in narrow circumstances."); Coles, 171 F.3d at 376 (stating the Marsh stands as a "unique

(continued...)

of Appeals case that has directly addressed whether Marsh should apply to school board prayer, Coles v. Cleveland Board of Education, found that it should not.[4] The Supreme Court has never granted *certiorari* in a school board prayer case.

B. Marsh Should Not Apply to School Board Prayer

The Marsh Court based its decision on the historical context of opening prayers at legislative sessions, pointing out its "unambiguous and unbroken history of more than 200 years." 463 U.S. at 792. A primary component of this history was the fact that the First Congress voted nearly simultaneously to appoint and pay a chaplain for each House and to approve the First Amendment for submission to the states for ratification. Id. at 791.

(continued...)

and narrow exception"); N.C. Civil Liberties Union Legal Found. v. Constangy, 947 F.2d 1145, 1148 (4th Cir. N.C. 1991), cert. den., 505 U.S. 1219 (1992) (explaining that Marsh is "predicated on the particular historical circumstances presented in that case").

[4]Two other Courts of Appeals have addressed school board prayer but struck down the policies based on the sectarian content of the prayers, without deciding whether or not the Marsh exception is applicable. See Doe v. Tangipahoa Parish Sch. Bd., 473 F.3d 188, 197 (5th Cir. 2006), vacated, 494 F.3d 494 (5th Cir. 2007); Bacus v. Palo Verde Unified Sch. Dist. Bd. of Educ., 52 F. App'x 355, 356 (9th Cir. 2002). The Tangipahoa decision was later vacated on appeal for lack of standing by the plaintiffs. On remand, a new policy was the subject of motion practice in the district court before the dispute was mooted by a dismissal stipulated by the parties.

In contrast, there is no similar history for public schools in this country. See, e.g., Edwards v. Aguillard, 482 U.S. 578, 583 n.4 (1987) ("[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."); Weisman v. Lee, 908 F.2d 1090, 1096 (1st Cir. 1990), aff'd, Lee, 505 U.S. 577 (holding that the "history" and "special circumstances" of Marsh are not present at school graduations); Jager v. Douglas Cty. Sch. Dist., 862 F.2d 824, 829 (11th Cir. 1989), cert. den., 490 U.S. 1090 (1989) ("Similarly, the present case does not lend itself to Marsh's historical approach because invocations at school-sponsored football games were nonexistent when the Constitution was adopted.").[5] One commentator has noted that "[w]hether the focus is the general one of public schools [or] the more specific

[5]Courts have not hesitated to find Marsh inapplicable in other Establishment Clause prayer cases when a unique historic tradition is not present. See, e.g., Mellen, 327 F.3d at 370 (finding that a supper prayer at the Virginia Military Institute did not share the "unique history of Marsh because public universities and military colleges did not exist when the Bill of Rights was adopted); N.C. Civil Liberties Union Legal Found. v. Costangy, 947 F.2d 1145, 1151 (4th Cir. 1991) (holding Marsh is inapplicable to prayer at the beginning of state court proceedings); Freedom from Religion Found., 2010 U.S. Dist. LEXIS 37570, at *60-61 (finding no historical tradition of a National Day of Prayer); Herdahl v. Pontotoc County Sch. Dist., 887 F. Supp. 902, 908, n. 7 (N.D. Miss. 1995) ("As there is no evidence presented of any unique history of the District's practice, e.g., over 200 years of past practice, [Marsh, Allegheny, and Lynch] are of little value.").

topic of locally elected public school boards, . . . it is clear that no such animal existed in 1787 nor, for the most part, even in 1866." Bruce P. Merenstein, Comment: Last Bastion of School Sponsored Prayer? Invocations at Public School Board Meetings: The Conflicting Jurisprudence of Marsh v. Chambers and the School Prayer Cases, 145 U PA. L. REV. 1035, 1060 (April 1997). "Even if the Framers did approve of legislative prayer, it requires a great leap of faith or logic to conclude that they approved of prayer at modern public school board meetings." Id. at 1061.

School boards are a modern creature, arising from the need for the democratic administration of public schools. There is simply no historical tradition of the federal government's deference to school board prayer. Instead, the history in Indian River School District is of pervasive, sectarian religious activity throughout the school system, often in violation of clear and binding court precedent.

C. School Board Meetings Are School Activities Requiring Particular Vigilance Against Government Coercion of Religion

Along with the historical distinctions between Indian River's school board and the legislative setting where Marsh has been applied, the axiomatic and deep connection between school boards and public school education counsels against extending Marsh to public school board prayer. The courts have been

particularly vigilant about government promotion of religion in official school settings because of the unique environment for coercion and the vulnerability and impressionability of students. See Santa Fe Indep. Sch. Dist., 530 U.S. at 311-312, Lee, 505 U.S. at 593; cf. Good News Club v. Milfrod Cent. Sch., 533 U.S. 98 (2001) (finding that a school could not deny a religious club access to after-school facilities because doing so would violate its First Amendment rights). While school board meetings are not as exclusively focused on students as some other settings where prayer has been found unconstitutional, they are still intensely intertwined with students and their interests.

As the Coles court put it "the fact that the school board meetings are an integral component of the Cleveland public school system serves to remove it from the logic of Marsh and to place it squarely within the history and precedent concerning the school prayer line of cases." 171 F.3d at 381. The members of the community that attend school board meetings do so precisely because the board is presiding over issues affecting their children's education. As the Sixth Circuit explained in Coles:

> What actually occurs at the school board's meetings is what sets it apart from the deliberative processes of other legislative bodies. Simply stated, the fact that the function of the school board is uniquely directed toward school-related matters gives it a different type of "constituency" than those of other legislative bodies—namely, students.

171 F.3d at 381.

Because of the issues at stake, and "[b]ecause school boards usually cover fairly small geographic areas and their meetings provide constituents an intimate opportunity to comment on a narrow range of issues (for example, local taxes, educational programs, building projects), citizen attendance is more common, more expected and more visible: The board of education meeting, which takes place all across the land - and on a regular basis - is one of democracy's last assembly places where any citizen, by the simple virtue of being a taxpayer, student, parent, or employee, can feel rightfully, even wrathfully, able to assert his full authority to observe or even speak." Merenstein, 145 U. PA. L. REV. at 1058-59 (quoting National Sch. Pub. Relations Ass'n, The School Board Meeting: Facing New Challenges from the Public and the Media 5 (1970)). The regular community participation creates a greater chance for religious promotion than the episodic encounter citizens – adults and children -- have with their state and federal legislatures. See Lee, 505 U.S. at 597.

In addition, it is practice in Indian River, as it is in many school districts throughout the country, for students to attend and participate in school board meetings. The meetings are timed so that students and other members of the

public can attend.[6] In Coles, the Court based its opinion in part on the fact that the meetings of the Cleveland Board of Education were "attended by students who actively and regularly participate[d] in the discussions of school-related matters" and the court noted that "unlike officials of other legislative bodies, school board members are directly communicating, at least in part, to students." 171 F.3d at 381-82. At meetings of the school board, students regularly submitted questions about the effectiveness of the board's programs, received awards from the board, sat with and delivered reports to the board, and "actively engage[d] school board members in substantive discussions." Id. at 382.

Despite the clear factual similarities between the student participation in Coles and the instant case, the District Court only addressed its holding in a footnote, dismissing its import because it was not binding precedent nor persuasive authority in the court's view. Indian River Sch. Dist., 685 F. Supp. 2d at 539, n. 120 (D.Del. 2010). The District Court, however, failed to distinguish Coles in any meaningful way and instead denigrated the decision by raising the specter of its uninhibited application to non-student activities on school grounds such as teacher conferences and training sessions. Id. Such activities were not before the Court,

[6] For example, the upcoming board meeting on June 29, 2010 is timed to start at 7:00 p.m. See http://www.irsd.net/event/2010/6/1/board-education-meeting.htm (last visited June 27, 2010).

and, more importantly, are factually distinct from school board meetings in their non-public nature and complete absence of student participation.

The fact that student participation and attendance at meetings of the Indian River School Board is not mandatory is of little import to this case. There is still an exclusionary effect on students if they choose not to attend board meetings because of, or remove themselves during, the opening prayer. Moreover, the attendance of certain students, such as JROTC members, is required if these students want to feel like full participants in their organization. Along these same lines, it is difficult to imagine how a student could actively seek a seat on his or her school government, knowing full well that he or she will have to either abstain from representing the student body at a board meeting or submit to the opening prayer. Furthermore:

> Unlike ordinary constituencies, students cannot vote. They are thus unable to express their discomfort with state-sponsored religious practices through the democratic process. Lacking a voice in the electoral process, students have a heightened interest in expressing their views about the school system through their participation in school board meetings.

Coles, 171 F.3d at 381.

In short, students who hear these official prayers and do not share the religious beliefs of the speaker are likely to feel excluded and feel as if they are second-class citizens. As the Supreme Court observed:

> School sponsorship of a religious message is impermissible because it sends the ancillary message to members of the audience who are nonadherants "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."

Santa Fe Indep. School Dist., 530 U.S. at 309.

II. Sectarian Prayer Clearly Violates The First Amendment

The school board prayers since its new policy went into effect have been consistently sectarian, with frequent invocations of Jesus Christ. This is not disputed by appellees or the district court. The district court incorrectly holds that sectarian school board prayer is permissible under Marsh and is, therefore, constitutional under the First Amendment. This holding not only misinterprets Marsh, but it runs afoul of the bedrock principle behind the Establishment Clause – that "government may not demonstrate a preference for one particular sect or creed (including a preference for Christianity over other religion)." See Cty. of Allegheny, 492 U.S. at 605.

In Marsh, the Court noted that while "some of his earlier prayers were often explicitly Christian, [the chaplain] removed all references to Christ after a 1980 complaint from a Jewish legislator." 463 U.S. at 793 n.14. In County of Allegheny the Court, discussing Marsh, stated that not even the unique history of legislative prayer "could justify contemporary legislative prayers that have the

effect of affiliating the government with any one specific faith or belief." Cty. of Allegheny, 492 U.S. at 603. Any other reading of Marsh that would permit sectarian prayer would "gut the core of the Establishment Clause." Id. at 604.

Contrary to the District Court's conclusion, Marsh does not preclude examination of the school board prayer's content to determine if it impermissibly advances one faith. See Wynne v. Town of Great Falls, South Carolina, 376 F.3d 292, 299, n. 4 (4th Cir. 2004), cert. den., 545 U.S. 1152 (2005) (finding that looking at prayer content to conclude prayer was sectarian was not "parsing" the content, but simply recognizing the fact that the prayers often included an invocation to Jesus Christ); Tangipahoa Parish Sch. Bd., 473 F.3d at 203, n. 3 (noting that a content-based analysis does not contradict Marsh and is often required to determine if prayer advances religion).

Consistent with the Supreme Court's own understanding of Marsh, other Circuits have interpreted Marsh to prohibit sectarian prayer in legislatures or other such deliberative bodies. See Tangipahoa Parish Sch. Bd., 473 F.3d at 200 (recognizing that other sister circuits have not expansively applied Marsh in legislative and other deliberative bodies and when they do the circuits emphasize that it only permits nonsectarian prayers). For example, the Fourth Circuit held in Wynne v. Town of Great Falls, South Carolina that a city council's practice of opening their meetings with a prayer that "frequently refer[red] to Jesus Christ,

Christ or Savior in the opening or closing portion" violated the Establishment Clause of the First Amendment. Wynne, 376 F.3d at 294. The Court found that the prayer at issue was not the sort of nonsectarian "legislative prayer" approved of in Marsh. Id. at 298; see also, Turner v. City Council of the City of Fredericksburg, 534 F.3d 352, 356 (4th Cir. 2008), cert. den., 129 S.Ct. 909 (2009) (finding that a city council's decision to provide only nonsectarian legislative prayers placed it "squarely within the range of conduct permitted by Marsh); Hinrichs v. Bosma, 440 F. 3d. 393, 399, 401-402 (7th Cir. 2006), rev'd, 506 F.3d 584 (7th Cir. 2007) (the court invalidated the House of Representatives' practice of opening its proceedings with prayer that was usually Christian, rejecting the Speaker of the House's argument that "Marsh does not establish a line between permissible nonsectarian legislative prayer and impermissible sectarian prayer," and found that Marsh precludes sectarian prayer; the case was later reversed and remanded with instructions to dismiss for lack of standing); but see, Pelphrey v. Cobb County, 547 F.3d 1263, 1274 (11th Cir. 2008).[7]

[7]The district court recognized that Allegheny interpreted Marsh to exclude sectarian prayer, but cited Pelphrey in support of allowing sectarian prayer rather than the Supreme Court's own interpretation and the majority of circuit courts. Indian River Sch. Dist., 685 F.Supp.2d at 543, n. 144. In Pelphrey, the prayers being challenged came from multiple religious traditions, 547 F.2d at 1266-67, rather than exclusively Christian prayers as occurred in Indian River.

As with the legislative/deliberative body line of cases, sectarian prayer has been prohibited in the school board context. In Bacus v. Palo Verde Unified School Dist. Bd. of Educ., the Ninth Circuit found that the prayers at issue did not disparage other religious faiths and did not proselytize but "that [was] not enough." Bacus, 52 F. App'x at 357. For the court, it was significant that the prayers advanced one particular faith, Christianity, because the Establishment Clause prohibited preferring one religious denomination over another. Id. Therefore, school board prayer, assuming that the Marsh applied to school boards, could not be sectarian.

More recently, the Fifth Circuit has also decided that Marsh prohibits sectarian school board prayer. In Doe v. Tangipahoa Parish School Bd., the court explained that legislative prayers like the one in Marsh, or mottos or pledges that simply refer to God, are "permissible 'ceremonial deism' and do not give an impression of governmental approval." Tangipahoa, 473 F.3d at 198. The court agreed with the Fourth Circuit, however, that prayer could not "'contain explicit references to a deity in whose divinity only those of one faith believe.'" Id. at 202. Since the prayers at issue referred exclusively to the Christian deity, it was sectarian and therefore unconstitutional. Id. at 202-203.

The prayers recited in the Indian River school board meetings do not reflect the type of constitutional "ceremonial deism" permitted in mottos, pledges,

or even the legislative prayer in Marsh. For one, the school board's Policy explicitly permits prayers to be sectarian and, indeed, they are. Despite the fact that under the Policy prayer must be rotated among Board members, an overwhelming majority of the prayers were Christian and explicitly referred to Christ. This is particularly the type of prayer that has been prohibited in other Circuits that have found prayers must be nonsectarian under Marsh. See Wynne, 376 F.3d at 300 (finding that council prayers that frequently referred to Christ, even if each prayer only did so once, did advance Christianity)

Sectarian prayer is particularly improper in a school board setting, considering the risk of improperly influencing an impressionable student body, a factor that is not present in legislatures, or other deliberative bodies. This factor was of particular concern to the Court in Coles, which chose not to apply Marsh's line of reasoning for legislative bodies to school boards. The court found that this "reality support[ed] [its] conclusion that that logic behind the school prayer line of cases," to prevent young, impressionable students from being coerced into religion, was "more applicable to the school board's meetings than is the logic behind the legislative prayer exception in Marsh." Coles, 171 F.3d at 381. Even if the Court chooses to apply Marsh to the present case, it must, at minimum, recognize the influence sectarian prayer may have on the student body in attendance.

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION

This brief complies with the type-volume limitation of Fed. R. App. P. 29(d) and Fed. R. App. P. 32(a)(7)(B) because this brief contains 4,860 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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CERTIFICATE OF BAR MEMBERSHIP

Pursuant to 3d Cir. L.A.R. 28.3(d), the undersigned hereby certifies that Eric Rothschild is a member in good standing of the Bar of the United States Court of Appeals for the Third Circuit.

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CERTIFICATE OF IDENTICAL COMPLIANCE OF BRIEFS

Pursuant to 3d Cir. L.A.R. 31.1.(c), the undersigned hereby certifies that the text of the electronic brief filed in this action is identical to the text in the paper copies of the brief filed in this action.

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CERTIFICATE OF VIRUS CHECK

Pursuant to 3d Cir. L.A.R. 31.1.(c), the undersigned hereby certifies that the virus detection software program Symantec Endpoint Protection has been run on the file containing the electronic brief and that no virus was detected.

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CERTIFICATE OF SERVICE

I, Eric Rothschild, hereby certify that the foregoing Brief of *Amicus* Curiae Anti-Defamation League in Support of Plaintiffs-Appellants and Reversal were served by CM/ECF this 28th day of June 2010 upon the following:

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