No. 16-55425

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FREEDOM FROM RELIGION FOUNDATION, INC.,
Plaintiff-Appellee,

v.

CHINO VALLEY UNIFIED SCHOOL DISTRICT BOARD OF EDUCATION, *et al.*,
Defendants-Appellants.

On Appeal from a Final Judgment of the
United States District Court for the Central District of California
Case No. 5:14-cv-02336, Hon. Jesus G. Bernal

BRIEF OF AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE; AMERICAN CIVIL LIBERTIES UNION; ACLU OF SOUTHERN CALIFORNIA; ANTI-DEFAMATION LEAGUE; CENTRAL CONFERENCE OF AMERICAN RABBIS; HADASSAH, THE WOMEN'S ZIONIST ORGANIZATION OF AMERICA, INC.; INTERFAITH ALLIANCE; HINDU AMERICAN FOUNDATION; JEWISH SOCIAL POLICY ACTION NETWORK; UNION FOR REFORM JUDAISM; AND WOMEN OF REFORM JUDAISM AS *AMICI CURIAE* SUPPORTING APPELLEES AND AFFIRMANCE

DANIEL MACH
HEATHER L. WEAVER
American Civil Liberties Union Foundation
915 15th Street, NW
Washington, DC 20008

PETER ELIASBERG
ACLU of Southern California
1313 West 8th Street
Los Angeles, CA 90017

BRENDAN HAMME
ACLU of Southern California
1851 East First Street, Suite 450
Santa Ana, CA 92705

RICHARD B. KATSKEE
ERIC ROTHSCHILD*
KELLY M. PERCIVAL†
Americans United for Separation of Church and State
1310 L Street, NW, Suite 200
Washington, DC 20005
(202) 466-3234

STEVEN M. FREEMAN
DAVID L. BARKEY
MICHELLE N. DEUTCHMAN
Anti-Defamation League
605 Third Avenue
New York, NY 10158

Counsel for Amici Curiae

* Admitted in Pennsylvania only. Supervised by Richard B. Katskee, a member of the D.C. bar.
† Admitted in California only. Supervised by Richard B. Katskee, a member of the D.C. bar.

CORPORATE DISCLOSURE STATEMENT

Amici are nonprofit entities. They have no parent corporations, and no publicly held corporation owns any portion of any of them.

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INTERESTS OF THE *AMICI CURIAE*[1]

Amici are religious and civil-rights organizations that represent diverse beliefs and faith traditions but share a commitment to preserving religious freedom for all. *Amici* believe that government-sponsored prayer interferes with the rights of conscience, disenfranchises religious minorities, and is particularly coercive and harmful to schoolchildren. *Amici* therefore oppose school-sponsored prayer, including at school-board meetings.

The *amici* are:

- Americans United for Separation of Church and State.
- American Civil Liberties Union.
- ACLU of Southern California.
- Anti-Defamation League.
- Central Conference of American Rabbis.
- Interfaith Alliance.
- Hadassah, the Women's Zionist Organization of America, Inc.
- Hindu American Foundation.
- Jewish Social Policy Action Network.

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[1] No counsel for a party authored this brief in whole or in part, and no one other than *amici*, their members, or their counsel made a monetary contribution intended to fund the brief's preparation or submission. The parties have consented to the filing of this brief.

- Union for Reform Judaism.
- Women of Reform Judaism.

More detailed descriptions of the *amici* appear in the Appendix.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Chino Valley Unified School District Board of Education exists to serve the needs and interests of the children in the District's schools. Twice a month, schoolchildren from the District attend Board meetings to present musical or other performances to the Board and assembled school officials and parents, to receive awards, to voice concerns, to attend mandatory disciplinary hearings, and generally to have a say in their education—the central part of their young lives. While the Board meetings address students and their needs in a variety of ways, they have one thing in common: All open with a prayer, as a matter of official School Board policy.

Opening school-board meetings with prayer constitutes school-sponsored religious exercise, which violates the Establishment Clause of the First Amendment to the U.S. Constitution. The violation is particularly clear here because the Board members, who passed the prayer policy, sometimes deliver the prayers themselves, recite Bible passages aloud at Board meetings, and urge all at the meetings—including District students—to "look up to Jesus Christ," to "know Jesus Christ," and to "focus toward the goal of pleasing Christ." ER 115, 117–18.

As the Supreme Court and this Court have repeatedly held, students in the public schools are particularly susceptible to unconstitutional religious coercion: They face substantial pressure to conform to the norms and expectations of their school communities—and most especially to the expectations that are set and conveyed by school-district officials. Students face risks of bullying and harassment as religious dissenters. And they understandably fear retaliation from school officials and others should they take any action demonstrating their dissent, such as declining to participate in the prayers. It is thus both unrealistic and unreasonable to expect Chino Valley schoolchildren to single themselves out to the Board, their teachers and administrators, other students, and the entire school community by walking out of a meeting or not participating in the prayers. And for students facing disciplinary action at the meetings, as well as for the student who officially serves as a member of the Board, walking out or not participating would be unthinkable.

To be sure, the Supreme Court has recognized a narrow historical exception to the strict rule against government-sponsored prayer for invocations to open the sessions of state legislatures and city and county councils. But as the Third and Sixth Circuits and the court below have held, that exception does not and should not apply to public schools or to meetings of public-school boards. To hold otherwise would be to license religious

coercion of public-school students—a flagrant violation of the Establishment Clause and a gross incursion on the freedom of conscience of the students and their families. This Court should therefore affirm the district court's judgment that the school-sponsored prayers at the meetings of the Chino Valley School Board violate the Establishment Clause.

ARGUMENT

The Supreme Court and this Court have repeatedly recognized that "there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools," and that "prayer exercises in public schools carry a particular risk" of violating students' rights under the Establishment Clause. *Lee v. Weisman*, 505 U.S. 577, 592 (1992); *accord, e.g.*, *Cole v. Oroville Union High Sch. Dist.*, 228 F.3d 1092, 1101–04 (9th Cir. 2000). And the Supreme Court and this Court have consistently applied these principles to strike down school-sponsored prayers, whether in the classroom, at formal school events, or at extracurricular activities. *See, e.g.*, *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000); *Lee*, 505 U.S. at 577; *Engel v. Vitale*, 370 U.S. 421, 436 (1962); *Oroville*, 228 F.3d at 1103; *Collins v. Chandler Unified Sch. Dist.*, 644 F.2d 759, 761 (9th Cir. 1981). The Chino Valley School District's prayer practice cannot be squared with this settled law or the fundamental commitment to religious freedom on which that law stands. Simply put,

prayer at school-board meetings is school-sponsored prayer that coerces religious practice and advances religion, thus violating the Establishment Clause. *See Doe v. Indian River Sch. Dist.*, 653 F.3d 256 (3d Cir. 2011); *Coles ex rel. Coles v. Cleveland Bd. of Educ.*, 171 F.3d 369 (6th Cir. 1999).

A. The School District's Prayer Practice Violates The Establishment Clause.

The School District's prayer practice is irreconcilable with constitutional imperatives: It coerces students to participate in prayer—an inherently religious exercise; and especially when viewed in the light of the statements by the Board members in the record here, it sends the clear, unambiguous, and flatly impermissible message that the District encourages religious devotions and officially prefers certain faiths and religious beliefs over others. What is more, the prayer policy here has embroiled the School District in contentious disputes over theological questions, resulting in the social discord along religious lines that the Framers sought to minimize by mandating that religion and government not be merged. *See Engel*, 370 U.S. at 431 (Establishment Clause's "first and most immediate purpose rest[s] on the belief that a union of government and religion tends to destroy government and to degrade religion"). The District's preference for religion and the divisiveness engendered by it within the school community threaten religious liberty.

1. The School District's prayer practice coerces religious observance and exercise.

"When the power . . . of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain." *Engel*, 370 U.S. at 431. This danger is particularly pronounced when schoolchildren are subjected to government-sponsored religion. *See, e.g.*, *Lee*, 505 U.S. at 592. Because the Board's prayer policy coerces public-school students to engage in religious exercise, it runs roughshod over core Establishment Clause protections.

a. The Supreme Court has long recognized that, for schoolchildren, "the risk of compulsion" to conform to and participate in officially sponsored religious practice "is especially high" and therefore merits "heightened concerns [for] protecting freedom of conscience." *Id.* at 592, 596; *accord Oroville*, 228 F.3d at 1104. Among other considerations, "adolescents are often susceptible to pressure from their peers"—not to mention, from school officials—"towards conformity," particularly in "matters of social convention." *Lee*, 505 U.S. at 593; *accord Lassonde v. Pleasanton Unified Sch. Dist.*, 320 F.3d 979, 985 (9th Cir. 2003).[2]

[2] That children merit special protections against subtle coercive pressure is not unique to Establishment Clause jurisprudence. Criminal

Even at voluntary school activities and events, therefore, students may "feel immense social pressure, or have a truly genuine desire, to be involved," and they may therefore feel that they must go along to get along—even when doing so is contrary to their, and their families', religious beliefs. *Santa Fe*, 530 U.S. at 311; *see also Borden v. Sch. Dist.*, 523 F.3d 153, 183 (3d Cir. 2008) (McKee, J., concurring) (high-school football player felt pressured to pray with team because he "was fearful that if he did not go along with what was obviously the coach's desire, he would not get playing time"). The Establishment Clause does not permit school officials to put students to the "difficult choice" "between attending these [events] and avoiding personally offensive religious rituals." *Santa Fe*, 530 U.S. at 312.[3]

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law, for example, recognizes that "juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure," in part because "the character of a juvenile is not as well formed as that of an adult." *Roper v. Simmons*, 543 U.S. 551, 569–70 (2005). "[J]uveniles have less control, or less experience with control, over their own environment." *Id.* at 569. They also occupy "a very special place in life which law should reflect." *Eddings v. Oklahoma*, 455 U.S. 104, 116, 126 n.12 (1982). Hence "[o]ur history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults." *Id.* at 115–16.

[3] The School District here cites three out-of-circuit cases (*Adler v. Duval County School Board*, 250 F.3d 1330 (11th Cir. 2001), *Chandler v. Siegelman*, 230 F.3d 1313 (11th Cir. 2000), and *Ingebretsen ex rel. Ingebretsen v. Jackson Public School District*, 88 F.3d 274 (5th Cir. 1996)) to support its assertion (at Br. 32) that there is no "per se rule of no prayers allowed at school related events." But all three cases addressed student-

By making a prayer ritual an integral part of its School Board meetings, the Chino Valley Unified School District has created precisely those forbidden conditions. Students regularly attend and participate in the Board meetings—sometimes as a school requirement. ER 43. Notably, the record establishes that students have been present, and have often participated, at virtually every regular meeting of the Board since the prayer policy was enacted. To take just one meeting as an example: At the Board meeting held on September 15, 2016, a sixth-grader led the Pledge of Allegiance; elementary-school students performed a song; two high-school students were recognized for their work with the Elementary Debate League; and the student representative selected by the District to hold the special seat on the Board to represent the interests of her fellow students provided comments and voted as a Board member on five action items. *See* Board Minutes, Sept. 15, 2016, *available at* http://tinyurl.com/zfqoyv8. In short, Chino Valley students attend Board meetings to take an active part

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initiated religious speech—not, as here, prayer that is initiated and sponsored by school-district officials, at meetings that are mandatory for at least some students, and that has been further fostered by school-board members' expressly religious, expressly sectarian directives to the students. And *Ingebretsen*, 88 F.3d at 278–280, held that a statute allowing students to deliver nonsectarian, non-proselytizing prayers at school events *was* unconstitutionally coercive, *did* unconstitutionally endorse religion, and also violated the test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971). The decision is thus antithetical to the School District's position here.

in their education—the primary and arguably most important activity in their lives—and they are subjected to school-sponsored prayer when they do.

True, many students who attend School Board meetings do so voluntarily in the formal sense that they might not be punished for failing to take part. But students are sometimes required to attend. ER 43. That is true for compulsory school activities and, most obviously, for disciplinary hearings, which are held during Board meetings. It takes no great logical leap to conclude that students who are facing potential suspension or expulsion and must attend a Board meeting to defend themselves would feel extreme pressure to participate in the prayer with the Board members who are about to determine their academic fate. For as the district court recognized, the Board has an "inherently authoritarian position with respect to the students," making compliance virtually inevitable—and certainly not readily avoidable. ER 24.

But even without those special elements of compulsion, "[a] school rule which excuses attendance is beside the point." *Lee*, 505 U.S. at 595. Just as a student has no "real choice not to attend her high school graduation" (*id.*) and cannot be put into the position of having to skip an extracurricular activity such as a school football game (*Santa Fe*, 530 U.S. at 311–12) to avoid prayer, so too is it impermissible to make exposure to and

participation in an unwanted religious ritual the price that a student must pay to perform with the school choir, to accept well-deserved recognition for academic or athletic achievements or community service, or to serve the School District and fellow students as the student representative on the Board. Students will not lightly forgo these honors; nor should they. Neither should religious conformity be the price for students to attend a Board meeting to petition for a policy change or otherwise to take an active interest in their education. And as for students who may be compelled to attend Board meetings as a course requirement—or, worse yet, for a disciplinary hearing—it simply is not reasonable, much less constitutionally permissible, to expect them to stay away or to single themselves out as religious dissenters, with the personal and academic costs that doing so might entail, or else to participate in a religious ritual contrary to their faith or their families' wishes.

b. It is precisely the coercive nature of school-board prayer that has led the Third and Sixth Circuits, as well as the district court here, to hold that prayer at school-board meetings is school-sponsored prayer prohibited by the Establishment Clause. *Indian River*, 653 F.3d at 275, 290; *Coles*, 171 F.3d at 383, 384–85; ER 27.

In *Coles*, the Sixth Circuit recognized that school boards "are inextricably intertwined with the public school system" because they "focus

solely on school-related matters." 171 F.3d at 377, 381. A school board's key "constituency" is students. *Id.* Even though not all students attend board meetings, and even if students may not necessarily be present at every single meeting, those students who do attend, whether because they are required to do so or because they "would simply like to have a say in their education by commenting on or otherwise influencing school policy," are a "captive audience" for the unwanted religious rituals. *Id.* at 383.

As here, the school-board meetings in *Coles* included a "public-comment portion" in which students could participate; the meetings served as a "forum for addressing student grievances," including those related to disciplinary decisions; and the school board "regularly invite[d] students to attend its meetings in order to receive awards for their academic, athletic, or community-service achievements." *Id.* at 372. As here, too, a "student representative" attended and served in an official capacity on behalf of the student population. *Id.* Hence, "[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." *Id.* at 377. And because " 'coercion' of impressionable young minds is to be avoided, and . . . the endorsement of religion is prohibited in the public schools context," the Sixth Circuit held that prayer at school-board meetings violates the Establishment Clause. *Id.* at 379.

The Third Circuit came to the same conclusion in *Indian River*, reasoning: "Every aspect of [a school-board meeting] is intended to promote and support the public school system," including decisions regarding school policies, the levying of taxes, and determinations about which courses are offered. 653 F.3d at 279. The court identified six reasons why students might attend school-board meetings, including, as here, in connection with disciplinary action for serious offenses, "to perform a piece of music or theatre for the Board's benefit," or to receive recognition for special achievements. *Id.* at 264–65. The court therefore held that, for students, board meetings "contain[ ] many of the same indicia of coercion and involuntariness that the Supreme Court has recognized elsewhere in its school prayer jurisprudence." *Id.* at 275. And hence, while attendance might "not technically [be] mandatory" for most students, board meetings are "meaningful to students in the district," and students experience pressure to attend. *Id.* at 276–77. Thus, in light of the vulnerability of students to official coercion and social pressure, the court held that prayers at school-board meetings are forbidden.

c. In keeping with these constitutional principles, the district court here correctly found that the meetings of the Chino Valley School Board present all the "indicia of coercion and involuntariness" that are repugnant to the Establishment Clause. ER 24. The School Board passed a policy

mandating prayer at Board meetings. ER 7. Those meetings are held on public-school property, sometimes inside a school—"a setting so replete with school symbols that a student would 'unquestionably perceive the . . . [Board's] prayer as stamped with her school's seal of approval.' " ER 20 (quoting *Santa Fe*, 530 U.S. at 307–08). Students regularly attend the meetings to perform or receive awards, for mandatory disciplinary hearings, or, in the case of the student member of the Board, to sit on the very body that has sanctioned and sponsored the prayer. ER 11–12. Student performances are regularly on the agenda and immediately follow the opening prayer. ER 11–12. For students required, or desiring, to attend and participate in their schools' governance, the Board-sanctioned prayer is inescapable. ER 24.

2. The School District's prayer practice has the purpose and effect of advancing religion and preferring certain religious beliefs.

In addition to coercing participation in religious activity, the School District's prayer practice violates the Establishment Clause because it constitutes official religious favoritism (*see Separation of Church and State Comm. v. City of Eugene*, 93 F.3d 617, 619 (9th Cir. 1996)) and has a religious purpose and a "principal or primary effect" that "advances [ ]or inhibits religion" (*Lemon*, 403 U.S. at 612).

The secular-purpose requirement is violated if the "government's actual purpose is to endorse or disapprove of religion." *Edwards v. Aguillard*, 482 U.S. 578, 585 (1987). It is not enough for the government to articulate a secular purpose: "the secular purpose required has to be genuine, not a sham, and not merely secondary to a religious objective." *McCreary Cty. v. ACLU of Ky.*, 545 U.S. 844, 864 (2005). "The eyes that look to purpose belong to an objective observer" who is "presumed to be familiar with the history of the government's actions." *Id.* at 862, 866 (internal quotation marks omitted) (quoting *Santa Fe*, 530 U.S. at 308).

Similarly, the principal-effect requirement is violated when "it would be objectively reasonable for the government action to be construed as sending primarily a message of either endorsement or disapproval of religion." *Vernon v. City of L.A.*, 27 F.3d 1385, 1398 (9th Cir. 1994).

Here, a reasonable observer would conclude that both the primary purpose and primary effect of the School District's prayer practice are to advance religion and encourage the religious exercise of prayer.

Under the plain terms of the prayer policy, only a "member of the clergy or a religious leader" may be invited to give the opening prayer at a School Board meeting. ER 8. Non-clergy (other than Board members) are flatly excluded from that opportunity. And Christian clergy have overwhelmingly delivered the prayers. ER 454. When clergy have not

appeared, members of the Board have themselves presented the prayers. ER 10.

The Board members have also repeatedly made religious and proselytizing comments, both during and outside the invocation portion of the meetings. For example, Board-member Cruz has told the attendees, including students, that "we simply need to keep a forward focus toward the goal of pleasing Jesus Christ," and he has read aloud from the Bible at many Board meetings. ER 115–17. Board-member Na has emphasized that "Pastor Frank Gonzalez was right, in his prayers, that I need [to] first look up to Jesus Christ for serving our students"; he has "urged everyone who does not know Jesus Christ to go and find him"; and he has also read Bible passages aloud at Board meetings. ER 115, 118–19. Looking at this history and context, an objective observer would conclude that the primary purpose and primary effect of the prayer practice are to convey a preference not just for religion generally but also for Christianity over other faiths. *See* ER 27 ("The largely religious content of the opening prayers, combined with undeniably religious Bible readings and references to Jesus Christ by Board members throughout the meetings, would suggest to a reasonable person

that the primary effect of the Board's Resolution and statements is to promote Christianity.").[4]

This Court should reject outright the School District's assertion (Br. 39–40) that the prayer policy is secular. The Board intended to promote Christianity and has succeeded in doing exactly that. *See* ER 28 ("Regardless of the stated purpose of the Resolution, it is clear that the Board uses it to bring sectarian prayer and proselytization into public schools through the backdoor."); *cf. McCreary*, 545 U.S. at 864 (reviewing courts must consider whether stated secular purpose for governmental action is "not a sham, and not merely secondary to a religious objective"). As Board-member Cruz put it: "You needed the right board to follow that path

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[4] Denominational preferences and religious favoritism of this sort are so contrary to our fundamental constitutional principles that they trigger strict scrutiny, just as race-based classifications do. *See Emp't Div. v. Smith*, 494 U.S. 872, 886 n.3 (1990); *Larson v. Valente*, 456 U.S. 228, 246 (1982). The legal standard is the same because the injury is similar: Both racial and religious favoritism "denigrate[ ] the dignity" of the disfavored and disadvantaged group (*J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 142 (1994)), marking the members of that group with badges of inferiority (*see* CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION 126–28 (2007)). And the policy here cannot survive strict scrutiny because it does not serve a legitimate governmental interest, much less is it narrowly tailored to achieve a compelling one. But regardless, the requirement of an opening "invocation or prayer" delivered by a "member of the clergy or a religious leader" (ER 7–8) at school-district functions would be an impermissible preference for religion even without the Board's more specific promotion of Christianity over other faiths (*see* pages 14–15, *supra*). *See generally Lee*, 505 U.S. at 587–88.

. . . there are very few districts . . . having a board such as ourselves having a goal. And that one goal is under God, Jesus Christ." ER 118.

* * *

California is a place of tremendous religious diversity. *See Religious composition of adults in California*, Pew Research Center, 2014, *available at* http://tinyurl.com/zl64co6 (last visited July 3, 2017). As the Supreme Court has explained, official sponsorship of religion "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.'" *Santa Fe*, 530 U.S. at 309–10 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring)). The School District's preference for Christianity sends an official message of religious exclusion to District students and families of other faiths. The Establishment Clause forbids that hurtful and divisive message.

3. The School District's prayer practice sows religious and civil discord.

The School District's prayer practice has also, and unsurprisingly, led to divisions along religious lines in the Chino Valley community—divisions

that are antithetical to our nation's commitment to religious freedom and are precisely what the Establishment Clause was intended to prevent.

At the heart of the Establishment Clause stands the principle that religion flourishes best when government is involved least. That view derives in large measure from the writings of Roger Williams, the Baptist minister and theologian who founded Rhode Island. *See* Timothy L. Hall, *Roger Williams and the Foundations of Religious Liberty*, 71 B.U. L. REV. 455, 458, 475 (1991). Williams taught that for religious belief to be genuine, people must come to it of their own free will; coerced belief and punishment of dissent are anathema to true faith. *See* Edward J. Eberle, *Roger Williams' Gift: Religious Freedom in America*, 4 ROGER WILLIAMS U. L. REV. 425, 443–44 (1999). In keeping with that understanding, James Madison, the principal architect of the First Amendment, explained that "religion and Govt. will both exist in greater purity, the less they are mixed together." *Letter from James Madison to Edward Livingston* (July 10, 1822), *in* JAMES MADISON ON RELIGIOUS LIBERTY 82, 83 (Robert S. Alley ed., 1985). And Thomas Jefferson emphasized that government-sponsored religion "tends . . . to corrupt the principles of that very religion it is meant to encourage." *Jefferson's Act for Establishing Religious Freedom* (1786), *in* CHURCH AND STATE IN AMERICAN HISTORY 73 (John F. Wilson & Donald L. Drakeman eds., 1987).

The Establishment Clause thus stands "as an expression of [the] principle . . . that religion is too personal, too sacred, too holy, to permit its unhallowed perversion by a civil magistrate." *Engel*, 370 U.S. at 431–32 (internal quotation marks omitted). The Clause "guarantees that government may [neither] coerce anyone to . . . participate in religion or its exercise" (*Lee*, 505 U.S. at 587), nor entangle itself in theological disputes by favoring one side in a religious debate (*see, e.g.*, *Thomas v. Review Bd.*, 450 U.S. 707, 715–16 (1981)).

Yet the Chino Valley School District has squarely placed its stamp of approval on religion, and on Christianity in particular, engendering the very divisiveness that the First Amendment was designed to forestall.

For example, soon after the Supreme Court legalized marriage for same-sex couples, a pastor stated in his opening prayer, "Lord, our country is just making some big mistakes these days"; he ended the prayer "in Jesus's name." ER 124. Later at that meeting, Board-member Cruz continued the pastor's theme, declaring that marriage should be between a man and a woman and that "children are not commodities that can be severed from their natural parentage and be traded between unrelated adults." ER 124. These sorts of official statements are not just divisive but hurtful to adopted children, LGBTQ students, and the children of gay parents. Students who attend a School Board meeting to satisfy a course

requirement, to take part in an activity, or merely to follow the debates about their education should not be forced to hear a Board member or official prayergiver condemn them or their families in the name of religious principles that they may not share.

The history of this lawsuit further illustrates the religious divisions caused by the Board's prayer policy. Plaintiffs—Christians and non-Christians alike—asked the Board to stop praying at the meetings after they were several times subjected to predominantly Christian prayers. ER 51. When the Board refused, Plaintiffs sued. One week later, at least 22 people—including Board-member Na and Board-member Cruz's pastor—spoke in favor of the prayers, even though the prayer practice was not on the meeting's agenda for discussion. ER 125. Many people at the next *four* meetings likewise spoke about the prayers, taking away time usually reserved for issues germane to public education, such as curriculum, special-education services, and teacher salaries. ER 304, 312, 321, 329, 435. The School District's prayer practice has thus led to contentious disputes over matters of faith rather than attention to student needs.

Allowing the Board to continue to press its preferred faith on the students would only further encourage the civic "divisiveness based upon religion that promotes social conflict, sapping the strength of government and religion alike" (*Van Orden v. Perry*, 545 U.S. 677, 698 (2005) (Breyer,

J., concurring)). The Establishment Clause stands as a bulwark against these types of religious divisions and incursions on families' freedom of conscience. It should remain so.

B. The *Marsh*–*Greece* Exception For Legislative Prayer Does Not Affect The Analysis Here.

In *Marsh v. Chambers*, 463 U.S. 783 (1983), and *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014), the Supreme Court recognized a limited exception to the broader—and strict—Establishment Clause rule against government-sponsored prayer, to allow for legislative invocations. That narrow exception is based on legislative prayer's unique history and the fact that legislatures serve mature adults—neither of which is true for school-board prayer. The district court thus concluded that "nothing in *Town of Greece* indicates an intent to disturb the long line of school prayer cases outlined above, or the 'heightened concern' they express for children forced to confront prayer in their public school, and there is every indication it preserves it." ER 26 (citing *Lee*, 505 U.S. at 592). That conclusion is correct and should be affirmed.

1. The Supreme Court based its rulings in *Marsh* and *Greece* on the "unique history" of legislative prayer, observing that the First Congress authorized payment for legislative chaplains the very week when it voted to approve the First Amendment's language. *Marsh*, 463 U.S. at 788–91. That

event, followed by an "unbroken history of more than 200 years" of legislative prayer, led the Court to conclude that the Framers intended that the specific act of opening legislative sessions with invocations would not violate the Establishment Clause. *Id.* at 792. In *Greece*, therefore, the Court held that a town board's practice of opening its meetings with prayers did not offend the Establishment Clause because the prayers "fit[ ] within the tradition long followed in Congress and the state legislatures" (134 S. Ct. at 1819) and did not coerce participation by nonadherents (*id.* at 1827 (controlling opinion of Kennedy, J.) (*Marsh* exception relies on presumption that "mature adults" are " 'not readily susceptible to religious indoctrination or peer pressure' ")). The Court underscored, however, that the special, narrow rule for legislative prayer does not extend to contexts in which the "setting" and "audience to whom [the prayer] is directed" are different. *Id.* at 1825.

2. This historical tradition of legislative prayer is "not present in the context of a school board." *Coles*, 171 F.3d at 382. Just the opposite is true: At the time of the founding and the framing of the First Amendment, public schools were rare; the formal education that was available was private, scarce, and "largely in the service of religion." *Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 214–17 (1948) (Frankfurter, J., concurring).

The eventual development of public schooling carried with it a marked rejection of sectarianism. *Id*. At first, nondenominational "common schools" sought to teach morality through "universal" Christian ideals; later, the courts and the public rejected public funding for religious education of any kind, so that the public schools would accommodate students of all faiths. *See* Noah Feldman, *Non-Sectarianism Reconsidered*, 18 J.L. & Pol. 65 (2002).

In keeping with this aim, the Supreme Court has consistently reinforced the need for the public schools to remain fully separate from religious institutions and instruction, because public schools are "the most powerful agency for promoting cohesion among a heterogeneous democratic people"—a function that would be impaired if not utterly derailed by official religious practices that have the effect of excluding some students and their families (*McCollum*, 333 U.S. at 216 (Frankfurter, J., concurring)). As Justice Frankfurter explained, a "sharp" separation of the public schools from religion is necessary in "recognition of the need of a democratic society to educate its children . . . in an atmosphere free from [religious] pressures." *Id.*

3. On that understanding, the Supreme Court has expressly rejected application of *Marsh* to official prayer in public-school contexts. *See Aguillard*, 482 U.S. at 583 n.4 ("Such 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."). To put it simply, the *Marsh–Greece* exception does not apply "where the activity at issue cannot be traced to the founding of the country and the adoption of the Bill of Rights." *Newdow v. Bush*, 355 F. Supp. 2d 265, 286 (D.D.C. 2005); *see Glassroth v. Moore*, 335 F.3d 1282, 1298 (11th Cir. 2003) (*Marsh* approach does not apply to religious displays); *Mellen v. Bunting*, 327 F.3d 355, 370 (4th Cir. 2003) (*Marsh* inapplicable to "public universities and military colleges," which "did not exist when the Bill of Rights was adopted"); *Cammack v. Waihee*, 932 F.2d 765, 772 (9th Cir. 1991) (*Marsh* does not excuse state's recognition of religious holiday). And because public schools, school boards, and school-board meetings as we know them today did not exist when the Bill of Rights was adopted, neither did school-board prayer. Those who drafted, adopted, and ratified the First Amendment could not, therefore, have intended to license that prayer.

4. In their opinions holding school-board prayer to be unconstitutional, therefore, the Third and Sixth Circuits explicitly determined that the *Marsh–Greece* exception does not and should not apply "in light of [the exception's] narrow historical context" (*Indian River*, 653 F.3d at 282), and because the exception "is basically a historical aberration" (*Coles*, 171 F.3d at 383). In the language of *Greece*, school-board prayer does

not and cannot "fit[ ] within the tradition long followed in Congress and the state legislatures." 134 S. Ct. at 1819. Thus, the court below correctly concluded that the *Marsh* exception ought not be extended to school boards.[5]

5. Recently, the Fifth Circuit in *American Humanist Ass'n v. McCarty*, 851 F.3d 521, 526 (5th Cir. 2017), reached the opposite conclusion by ignoring both the unique history on which the *Marsh–Greece* exception stands and the heightened Establishment Clause concerns when public-school students are subjected to religious exercises. It did so principally because of a few old instances of prayer at school-board meetings. *Id.* at 527. But *Marsh* and *Greece* specifically reject any suggestion that practices are immune from the Religion Clauses simply because they are old. *Greece*, 134 S. Ct. at 1819 ("*Marsh* must not be understood as permitting a practice that would amount to a constitutional violation if not for its historical foundation."); *Marsh*, 463 U.S. at 790; *see also Cammack*, 932 F.2d at 772 (declining to apply *Marsh* to tradition of celebrating Good Friday as a public

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[5] The School District argues (at Br. 25) that if this Court were to extend the *Marsh–Greece* exception to school-board prayer, it would merely "confirm what [the Court] assumed in *Bacus*" *v. Palo Verde Unified School District*, 52 F. App'x 355 (9th Cir. 2002). *Bacus* is an unpublished opinion that the District has cited in violation of Circuit Rule 36-3. In all events, *Bacus* did not adopt *Marsh* but instead held that the challenged prayers violated the Establishment Clause regardless of whether *Marsh* or the requirements for school-sponsored prayer applied. 52 F. App'x at 356. This Court has not decided, in *Bacus* or any other case, that *Marsh* applies to school-board meetings. Nor should it here.

holiday, though tradition dated to before Hawaii was a state, because this Court was "reluctant to extend a ruling explicitly based upon the 'unique history' surrounding legislative prayer to such a different factual setting"). Prayer and Bible-reading in the classroom were long-standing practices, too, but that did not make them constitutional. *See Engel*, 370 U.S. at 436; *Sch. Dist. v. Schempp*, 374 U.S. 203 (1963). As explained above, the *Marsh–Greece* exception is premised on a distinct showing of specific congressional intent with respect to one narrow practice that must be factored into the meaning of the Establishment Clause and its otherwise general, overarching, and consistent rule against government-sponsored prayer. School-board prayer—which the Framers never contemplated—is simply different.[6]

6. This case also presents more troubling circumstances than the Fifth Circuit considered in *McCarty*, further underscoring why the Establishment Clause should be held to forbid school-board prayer. Here, unlike in *McCarty*, a student is a member of the Chino Valley School Board and is

[6] Moreover, whatever practices there might have been in any particular locale when public schools and school boards first arose, none of that provides any insight into the meaning and original understanding of the Establishment Clause, because the Establishment Clause did not apply to the states until after passage of the Fourteenth Amendment in 1868—and the Clause's incorporation 79 years later (*see Everson v. Bd. of Educ.*, 330 U.S. 1 (1947)).

expected to attend and serve at Board meetings. Thus, the " 'principal audience' " to which the prayers are directed is not adult board members only; it *necessarily* also includes students. *McCarty,* 851 F.3d at 527. And Board members themselves are authorized to give, and have given, the invocations in lieu of clergy, while other non-clergy are denied the opportunity. *Cf. Greece*, 134 S. Ct. at 1816 (explaining that all invocations were delivered by invited guests, not town officials, and underscoring that "[t]he town at no point excluded or denied an opportunity to a would-be prayer giver").

Combine that with the Board members' directives to the audience "urg[ing] everyone who does not know Jesus Christ to go and find him" and "thank[ing] God for sending his son Jesus Christ so our sins would be forgiven" (ER 11), and the District's purpose and effect of promoting religion and the dictates of a particular faith cannot be gainsaid (*cf. Greece* at 1826 (controlling opinion of Kennedy, J.) ("[t]he analysis would be different if town board members directed the public to participate in the prayers," because that would be coercive)).

7. Lest any doubt remain about *Marsh* and *Greece*'s inapplicability where schoolchildren are concerned, the Supreme Court in *Greece* repeatedly and expressly underscored that any Establishment Clause concerns raised by the town's legislative prayers were ameliorated by the

fact that the attendees at the sessions were adults: The Court "assume[d] that adult citizens, firm in their own beliefs, can tolerate and perhaps appreciate a ceremonial prayer delivered by a person of a different faith." 134 S. Ct. at 1823. In his controlling opinion, Justice Kennedy further emphasized that legislative prayer "does not equate to coercion" for "mature adults, who 'presumably' are 'not readily susceptible to religious indoctrination or peer pressure.' " *Id.* at 1826–27 (quoting *Marsh*, 463 U.S. at 792); *see also Lee*, 505 U.S. at 596 (noting "[i]nherent differences between the public school system and a session of a state legislature"). Justice Kennedy explained that even if prayer in a legislative setting may possibly make some adult attendees "feel excluded and disrespected," mature "[a]dults often encounter speech they find disagreeable" and must sometimes put up with it or walk out. *Greece,* 134 S. Ct. at 1826.

When, however, schoolchildren are the very focus of the meetings, and when those children are routinely present and expected to participate, a standard of, "if you don't like it, walk away," has no place. *See, e.g.*, *Santa Fe*, 530 U.S. at 311; *Oroville*, 228 F.3d at 1104; *Indian River*, 653 F.3d at 276 (students have no real choice to walk away from school-board prayer because "a student who decides not to attend the meeting will 'forfeit . . . intangible benefits' that 'have motivated the student' " (quoting *Lee*, 505 U.S. at 595)); *Coles*, 171 F.3d at 383. Put another way, that

"observance on the part of the students is voluntary" cannot "free [school-sponsored prayer] from the limitations of the Establishment Clause." *Engel*, 370 U.S. at 430.

* * *

The purpose of school boards is to ensure that public-school students thrive. School-board prayer does nothing to further that goal. Quite the contrary: It sends an exclusionary message to students of minority faiths or no faith and divides the school community along religious lines, as it has in Chino Valley. The Establishment Clause, consistent with the Framers' intent, seeks to avoid these harms by prohibiting governmental sponsorship of religion. The Chino Valley School District's prayer policy violates that prohibition. The district court was right to enjoin it.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted,

/s/ *Richard B. Katskee*

DANIEL MACH
HEATHER L. WEAVER
American Civil Liberties Union Foundation
915 15th Street, NW
Washington, DC 20008

PETER ELIASBERG
ACLU of Southern California
1313 West 8th Street
Los Angeles, CA 90017

BRENDAN HAMME
ACLU of Southern California
1851 East First Street, Suite 450
Santa Ana, CA 92705

RICHARD B. KATSKEE
ERIC ROTHSCHILD*
KELLY M. PERCIVAL†
Americans United for Separation of Church and State
1310 L Street, NW, Suite 200
Washington, DC 20005
(202) 466-3234

STEVEN M. FREEMAN
DAVID L. BARKEY
MICHELLE N. DEUTCHMAN
Anti-Defamation League
605 Third Avenue
New York, NY 10158

Counsel for Amici Curiae

Date: July 3, 2017

* Admitted in Pennsylvania only. Supervised by Richard B. Katskee, a member of the D.C. bar.

† Admitted in California only. Supervised by Richard B. Katskee, a member of the D.C. bar.

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Signature of Attorney or Unrepresented Litigant: s/ Richard B. Katskee

Date: Jul 3, 2017

("s/" plus typed name is acceptable for electronically-filed documents)

CERTIFICATE OF SERVICE

I certify that on July 3, 2017, this brief was filed using the Court's CM/ECF system. All participants in the case are registered CM/ECF users and will be served electronically via that system.

/s/ *Richard B. Katskee*

APPENDIX

Americans United for Separation of Church and State

Americans United for Separation of Church and State is a national, nonsectarian public-interest organization 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 United States Supreme Court, this Court, and the other federal Courts of Appeals. Americans United has approximately 120,000 members and supporters nationwide, including thousands within the jurisdiction of this court.

American Civil Liberties Union and ACLU of Southern California

The ACLU is a nationwide, nonprofit, nonpartisan organization with over 1.5 million members dedicated to defending the principles embodied in the U.S. Constitution and our nation's civil-rights laws. The ACLU of Southern California is a state affiliate of the national ACLU and has over 100,000 members. For almost a century, the ACLU has been at the forefront of efforts to protect the constitutional right to religious freedom, including the right to pray, or to decline to do so, without coercion or other influence by the government.

Anti-Defamation League

The Anti-Defamation League was organized in 1913 to advance good will and mutual understanding among Americans of all creeds and races and to combat racial, ethnic, and religious prejudice in the United States. Today, ADL is one of the world's leading organizations fighting hatred, bigotry, discrimination, and anti-Semitism. Among ADL's core beliefs is strict adherence to the separation of church and state. ADL emphatically rejects the notion that the separation principle is inimical to religion, and holds, to the contrary, that a high wall of separation is essential to the continued flourishing of religious practice and belief in America, and to the protection of minority religions and their adherents.

Hadassah, The Women's Zionist Organization of America, Inc.

Hadassah, the Women's Zionist Organization of America, Inc., founded in 1912, is the largest Jewish and women's membership organization in the United States, with over 330,000 members, associates, and supporters nationwide. While traditionally known for its role in developing and supporting health care and other initiatives in Israel, Hadassah is a strong supporter of the free exercise of religion and the strict

separation of church and state as critical in preserving the religious liberty of all Americans, and especially of religious minorities.

Hindu American Foundation

The Hindu American Foundation is an advocacy organization for the Hindu American community. The Foundation educates the public about Hinduism, speaks out about issues affecting Hindus worldwide, and builds bridges with institutions and individuals whose work aligns with HAF's objectives. HAF focuses on the areas of education, policy, and community-building and works on a range of issues from an accurate understanding of Hinduism, civil and human rights, and addressing contemporary problems by applying Hindu philosophy. Since its inception, HAF has made religious liberty one of its main areas of advocacy. From issues of religious accommodation and religious discrimination to defending fundamental constitutional rights of free exercise and the separation of church and state, HAF has educated Americans at large and the courts about various aspects of Hindu belief and practice in the context of religious liberty, either as a party to the case or as an *amicus curiae*.

Interfaith Alliance Foundation

The Interfaith Alliance Foundation is a 501(c)(3) nonprofit organization that celebrates religious freedom by championing individual

rights, promoting policies that protect both religion and democracy, and uniting diverse voices to challenge extremism. Founded in 1994, Interfaith Alliance Foundation has members across the country who belong to 75 different faith traditions as well as no faith tradition. Interfaith Alliance Foundation has a long history of working to ensure the religious freedom of all Americans, especially when receiving government services or participating in government functions.

Jewish Social Policy Action Network

The Jewish Social Policy Action Network is a membership organization of American Jews dedicated to protecting the constitutional liberties and civil rights of Jews, other minorities, and the weak in our society. JSPAN's interest in this case stems directly from the experience of its members, many of whom have lived at times in small towns or other communities where there were few other Jews. There, they have personally been subjected to coercive pressures to conform or stifle themselves when local governments, including local school boards, have begun their proceedings with prayer—often prayer with a distinctly Christian message, and almost always with a message that is offensive to nonbelievers. JSPAN's members have also witnessed the hostility of local communities when Jewish families or others objected to being proselytized by prayer at

the school-board level, as detailed in JSPAN's *amicus* brief to the U.S. Supreme Court in *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014).

Union for Reform Judaism, Central Conference of American Rabbis, and Women of Reform Judaism

The Union for Reform Judaism, whose 900 congregations across North America include 1.5 million Reform Jews, the Central Conference of American Rabbis, whose membership includes more than 2000 Reform rabbis, and the Women of Reform Judaism, which represents more than 40,000 women in nearly 400 women's groups in North America and around the world, come to this issue out of our long-standing commitment to the principle of separation of church and state, believing that the First Amendment to the U.S. Constitution is the bulwark of religious freedom and interfaith amity. The concept of separation of church and state has lifted up American Jewry as well as other religious minorities, providing more protections, rights, and opportunities than have been known anywhere else throughout history.