No. 05-30294

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

BRIEF *AMICUS CURIAE* OF THE ANTI-DEFAMATION LEAGUE 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 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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The Anti-Defamation League ("ADL") respectfully files this brief *amicus curiae* in support of Appellee, John Doe ("Appellee" or "Doe"), and asks this Court to affirm the holding of the United States District Court for the Eastern District of Louisiana.[1]

I.

NATURE OF ADL'S INTEREST

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, including *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000), *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and *Engel v.*

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[1]Both Appellants and Appellee have consented to ADL appearing as *amicus curiae* in support of Appellee and filing this brief.

Vitale, 370 U.S. 421 (1962). *See generally* <http://www.adl.org/civil_rights/ab/> (visited Aug. 26, 2005) (containing a complete list of ADL's *amicus* briefs).

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 practice and beliefs in America and the protection of minority religions and their adherents. From its day-to-day experience serving its constituents, ADL can testify that 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*, 370 U.S. at 431.

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 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. ADL has developed and implemented training programs to help children and adults challenge prejudice and discrimination and to learn to live and work successfully and civilly in our increasingly diverse world. *See generally* <http://www.adl.org/education/>

(visited Aug. 26, 2005) (explaining ADL's education programs). Because of these strongly held beliefs, 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.

II.

SUMMARY OF ARGUMENT

Presented with a resolution to limit their opening prayers to a brief nonsectarian, non-proselytizing invocation, Appellants, the Tangipahoa Parish School Board, its members, superintendent, and the Tangipahoa Parish School System (collectively the "Board"), resolved instead to begin their meetings with a definitively sectarian prayer. The Board *unanimously* rejected the resolution and, thereby, reaffirmed its commitment to the endorsement of a particular faith by opening its meetings with sectarian prayer. The Board's decision plainly demonstrates its true motive of seeking to promote religion in its schools, something which this Board has repeatedly sought to do.

In a series of opinions, the Supreme Court of the United States has vigilantly protected our Nation's public schools from just such state-sponsored religious activity. 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 its 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 otherwise. In particular, *Marsh* represents an exceedingly narrow exception to the Supreme Court's *Lemon* test, which the Supreme Court based on the "unique history" of legislative prayer. Neither the Supreme Court nor the lower federal courts have ever extended the *Marsh* exception to school board prayer or, for that matter, beyond the unique circumstances present in *Marsh*. This Court should not accept the Board's constitutionally infirm invitation to become the first court to do so. Indeed, school boards neither share the unique history that motivated *Marsh*, nor are their functions analogous to those of 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 towards 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 ADL respectfully urges 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: Does 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 that precedent created by *Marsh v. Chambers*, 463 U.S. 783 (1983), for nonsectarian legislative prayer apply? The Board does not even attempt to justify its practice of beginning its meetings with sectarian prayer under

the competing rule established by the Supreme Court in *Lemon*. Thus, the Board effectively concedes that if that rule applies, as the District Court correctly held, this Court must find its practice unconstitutional.

Indeed, in asking "why should school boards be treated differently from other legislative/deliberative bodies whose business also concerns school activities," the Board not only ignores the plain answer but asks the wrong question. Appellants' Br. at 15. The Supreme Court has consistently acknowledged that the "Establishment Clause must be applied with special sensitivity in the public-school context." *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573, 620 n.69 (1989) (citing *Edwards v. Aguillard*, 482 U.S. 578, 583-84 (1987)). The proper question, then, is why should school boards be singled out from the rest of the school system and permitted to begin their meetings with prayers when such conduct is not permitted elsewhere in the schools. The answer is that this Court should not treat school boards differently.

1. 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*."[2] 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 – plainly attend and participate in the meetings.[3] *See Jager v. Douglas County Sch. Dist.*, 862 F.2d 824, 832 (11th Cir.) ("whether the complaining individual's presence was voluntary is not relevant to the Establishment Clause analysis"), *cert. denied*, 490 U.S. 1090 (1989); *Doe v. Aldine Indep. Sch. Dist.*, 563 F. Supp. 883, 887 (S.D. Tex. 1982) ("voluntariness is not relevant to a first amendment inquiry").

The Board meetings are not merely open to the public, but they 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.

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

[3]In *Freiler v. Tangipahoa Parish Board of Education*, 185 F.3d 337 (5th Cir. 1999), *cert. denied*, 530 U.S. 1251 (2000), 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. *Id.* at 341 (emphasis added).

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, this Board and others establish academic and other policies for Louisiana's schools, which on more than one occasion have run afoul of the First Amendment. *See, e.g., Freiler*, 185 F.3d at 348 (declaring disclaimer of evolution unconstitutional under *Lemon*); *Karen B. v. Treen*, 653 F.2d 897, 902 (5th Cir. 1981) (holding Louisiana school-prayer law and school board resolution implementing it unconstitutional under *Lemon*), *aff'd*, 455 U.S. 913 (1982).

The Board should not therefore be separated from the rest of the school system it oversees as the Board asks this Court to do. 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 ex rel. Coles v. Cleveland Bd. of Educ., 171 F.3d 369, 382 (6th Cir. 1999). 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). The Board has failed to demonstrate that this Court should treat it differently from the rest of the school system.

2. The Supreme Court's School Prayer Cases Apply Outside of the Classroom to Other School-Related Activities.

Contrary to the Board's suggestion, the Supreme Court and lower federal courts have not limited the application of their school-prayer decisions to prayers said in classrooms and at high school graduations. *See* Appellants' Br. at 9. The Board wrongly seeks to limit the effect of this jurisprudence because its practice cannot survive the special care 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 Ed. of Sch. Dist. No. 71*, 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. The public schools are supported entirely, in most communities, by public funds – funds exacted not only from parents, nor alone from those who hold particular religious views, nor indeed from those who subscribe to any creed at all. 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 the lower federal courts have sought broadly to prevent the state from endorsing or becoming entangled in religion through its schools. *See, e.g., Santa Fe*, 530 U.S. at 312, 317 (holding

student-led prayer before high school football games – "traditional gatherings of a school community," including teachers, parents, and students – violated First Amendment); *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*, 185 F.3d at 348 (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); *Jager*, 862 F.2d at 832 (holding religious invocations before high school football games unconstitutional because they "convey[ed] the message that the state endorses religions believing in prayer and denigrates those religions that do not").

As these holdings demonstrate, the Supreme Court's school prayer cases do not reflect simply a concern for the coercive pressures that may exist in schools. Indeed, contrary to Appellants' suggestion that coercion is the Supreme Court's "primary concern," Appellants' Br. at 9, the Supreme Court has observed, on numerous occasions, that 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."[4] *Engel*, 370 U.S. at 430; *see also Wallace v. Jaffree*, 472 U.S. 38, 60 n.51 (1985); *Schempp*, 374 U.S. at 223. Rather, these cases reveal the federal courts' concern for 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 Edwards*, 482 U.S. at 584; *Lemon*, 403 U.S. at 622; *cf. North Carolina Civil Liberties Union Legal Found. v. Constangy*, 947 F.2d 1145, 1152 (4th Cir. 1991) (declaring judge's practice of saying prayer in court unconstitutional and recognizing that "[a]nother kind of entanglement may result when the challenged practice leads to divisiveness along religious lines"), *cert. denied*, 505 U.S. 1219 (1992) (citation omitted).

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

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[4]Of course, even if the direct or indirect coercive effect of the sectarian prayers at issue must be considered, the Board ignores the undisputed fact that students do attend its meetings and are necessarily subject to the coercive effect of its explicitly sectarian prayers. The number of students who attend the meetings is unimportant because "the heightened review given to school-sponsored prayer does not turn on any particular children-to-adults ratio, above which prayers are prohibited, but below which they are constitutionally permissible." *Coles*, 171 F.3d at 382.

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*, 171 F.3d at 378.

B. This Court Should Not Extend the *Marsh* Exception for Legislative Prayer to School Board Prayer.

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

Appellants premise their entire appeal on extending the Supreme Court's holding in *Marsh* to school board prayer. In doing so, Appellants espouse, and ask this Court to adopt, a constitutionally infirm position that no other federal court has chosen to adopt. The lower federal courts have recognized *Marsh* to be a narrow exception to the *Lemon* rule and, along with the Supreme Court, have not extended it beyond legislative prayer. 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 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 the "unique history" of legislative prayer that served as the basis for its holding. *See, e.g.*, *Allegheny*, 492 U.S. at 596 n.46 (*Marsh* "sustained the practice of legislative prayer based on its unique history"); *Edwards*, 482 U.S. at 583 n.4 (same); *Wallace*, 472 U.S. at 63 n.4 (Powell, J., concurring) (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."), *cert. denied*, 541 U.S. 1019 (2004); *Freiler*, 185 F.3d at 344 ("Although widely criticized and occasionally ignored, the *Lemon* test

continues to govern Establishment Clause cases."); *Jager*, 862 F.2d t 829 n.9 ("*Marsh* created an exception to the *Lemon* test only for such historical practice.").

2. The Supreme Court and Lower Federal Courts Have Refused to Extend *Marsh* Beyond Legislative Prayer.

Recognizing *Marsh* as a limited and narrow exception to *Lemon*, both the Supreme Court and the lower federal courts have refused to extend it 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*, — U.S. —, 125 S. Ct. 2990 (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*." *Id.* at 596. *See also Glassroth v. Moore*, 335 F.3d 1282, 1298 (11th Cir.) (not extending *Marsh* to a case involving the constitutionality of a display of religious symbols in a judicial building), *cert. denied*, 540 U.S. 1000 (2003).

Appellants argue, however, that the Court should extend *Marsh* to the Board's openly sectarian prayers because *Marsh* applies to all deliberative bodies. *See* Appellants' Br. at 10-11. 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." 463 U.S. at 786. From this statement, Appellants reason that: (1) *Marsh* applies not just to legislative bodies but other deliberative public bodies; (2) the Board is a deliberative body; and, therefore (3) *Marsh* must apply to the Board. The Supreme Court and the lower federal courts have rejected this erroneous syllogism. *See, e.g.*, *Coles*, 171 F.3d at 380.

In fact, the Supreme Court has expressly rejected Appellants' suggestion that *Marsh* governs its prayers "[b]ecause practices similar to that of the Board existed when the First Amendment was drafted." Appellants' Br. at 9. The *Allegheny* Court held that "*Marsh* plainly does not stand for the sweeping proposition . . . that all accepted practices 200 years ago *and their equivalents* are constitutional today." 492 U.S. at 603 (emphasis added). Thus, "*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, although the federal courts may have applied

Marsh to town and city councils, they have not extended *Marsh* to other deliberative bodies. *See, e.g., id.* (not applying *Marsh* to school board prayer); *Constangy*, 947 F.2d at 1149 (not extending *Marsh* to a prayer said by a judge at the beginning of court sessions); *Newman v. City of East Point*, 181 F. Supp. 2d 1374, 1381 (N.D. Ga. 2002) (not applying *Marsh* to Mayor's Prayer Breakfast).

3. The *Marsh* Exception Does Not Apply to the Public School Context, Including School Board Prayer.

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*, 472 U.S. at 80 ("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 do not have a long-standing history of opening prayers comparable to legislative prayer.

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 state legislatures, members of the community, including teachers, parents, and students, participate in school board meetings. 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 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. School children have a resulting interest in, and incentive to attend, 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.

Lastly, this Court should not extend *Marsh* to allow the Board's opening prayers without considering the Board's purpose and the context in which that practice and this challenge to it arose. 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."[5] 530 U.S. at 315. 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. *See* Rec. 000270-71. The parties later entered into a Consent Judgment enjoining most of those practices. *See* Rec. 000187-191. Moreover, even after Doe filed this lawsuit, the Board *unanimously* rejected a policy to limit its opening prayer

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[5]In *Santa Fe*, the plaintiffs sued the school district, alleging that it had engaged in a number of proselytizing practices, including promoting attendance at a Baptist revival meeting, encouraging membership in religious clubs, and distributing bibles on school premises, and also had permitted students to read Christian invocations and prayers at graduation ceremonies and football games. 530 U.S. at 297. Ultimately, the Supreme Court considered only a revised policy permitting students to hold elections to determine whether "invocations" would be delivered at football games and, if so, to select who would deliver them. *Id.* at 298.

to "a brief non-sectarian, non-proselytizing invocation to solemnize the occasion." Rec. 000182.

As discussed below, the sectarian nature of the Board's prayers and its unanimous rejection of a policy permitting only nonsectarian prayers confirm the Board's desire to endorse Christianity in its meetings. The Board's motive is obvious especially when considered in light of its prior efforts to introduce religion into the Tangipahoa Parish School System, such as those detailed in *Freiler*. Accordingly, like the Supreme Court in *Santa Fe*, this Court should "refuse to turn a blind eye to the context in which this policy arose." 530 U.S. at 315; *see also Wallace*, 472 U.S. at 47 n.30 (scrutinizing the purpose of the challenged activity); *Jager*, 862 F.2d at 831 (considering context in which pre-game invocation speakers would be selected in predominately Protestant community). Considering this history and the important differences between school boards and state legislatures, this Court should reject the Board's request to extend the *Marsh* exception to school board prayer.

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

1. The Board Begins Its Meetings With Explicitly 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.*, 653 F.2d at 901. Prayer is, therefore, 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. In fact, just last year, the Board *unanimously* rejected a policy that would have permitted only a "brief non-sectarian, non-proselytizing invocation to solemnize the occasion" given by a board member. Rec. 00182.

That the Board's prayers are sectarian is obvious beyond peradventure. The 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 (considering the phrase "Glory to God in the Highest!" in a public crèche display). Similarly, in *Wynne*, the Fourth Circuit held that prayers sponsored by a town council that frequently contained references 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. *Marsh* Did Not Approve Sectarian Prayer.

Marsh itself did not address, let alone approve, the kind of sectarian prayer 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.

Thus, even if *Marsh* applied to the Board's prayers, the prayers would still be unconstitutional under *Marsh*. "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."). In contrast, 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. As a result, the prayers at issue do not even survive *Marsh*.

Not surprisingly, the Board does not cite a single case in which a court has upheld such sectarian prayers. Instead, the Board complains that, under *Marsh*, the District Court erred in parsing the content of its prayers. Appellants' Br. at 17. The Fourth Circuit dismissed a similar complaint, in *Wynne*, however, because "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.

The Ninth Circuit also reached the same result in a case very similar to the one before this Court. In *Bacus v. Palo Verde Unified School District Board of Education*, 52 Fed.Appx. 355, 356 (9th Cir. 2002), teachers challenged the constitutionality of prayers "in the name of Jesus" said at school board meetings.[6] The Ninth Circuit declined to decide whether to follow *Marsh* or *Coles* because:

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[6]In accordance with this Court's Local Rule 47.5.4, a copy of the *Bacus* opinion is attached, as an appendix, to this brief.

> *Marsh*, assuming without deciding that it is applicable, would not save the practice in the case at bar. In *Marsh* the legislative chaplain "removed all references to Christ" after the sectarian nature of his prayers was brought to his attention, and the prayer did not "advance any one . . . faith or belief." 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).

The Board argues further that its prayers do not run afoul of *Marsh* because they do not proselytize or advance any one religion. Appellants' Br. at 17-18. The Board is simply incorrect. At least two circuit courts have found similar sectarian prayers to advance religion in violation of *Marsh*. In *Bacus*, for example, the Ninth Circuit concluded that the school board's prayers "advanced one faith, Christianity, providing it with a special endorsed and privileged status in the school board. . . . Solemnizing school board meetings 'in the Name of Jesus' displays 'the government's allegiance to a particular sect or creed.'" 52 Fed.Appx. at 357.

Likewise, in *Wynne*, the Fourth Circuit held that a town council's sectarian prayers violated the Establishment Clause even under *Marsh*. The Fourth Circuit noted further 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:

> [T]he Town Council insisted upon invoking the name "Jesus Christ," to the exclusion of deities associated with any other particular religious faith, at Town Council meetings in public prayers in which the Town's citizens participated. Thus, the Town Council clearly "advance[d]" one faith, Christianity, in preference to others, in a manner decidedly inconsistent with *Marsh*.[7]
>
> * * *
>
> *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). The sectarian prayers recited at the Board's meetings likewise do not pass constitutional muster even under *Marsh*. Therefore, even if this Court concludes that *Marsh* extends to school board prayer, *which no federal court has done previously*, it should still hold the Board's prayers unconstitutional.

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[7]As in the present case, the town council in *Wynne* also refused requests to substitute a nonsectarian prayer for its sectarian prayers. *Id.* at 295.

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

The explicitly sectarian prayer adopted by the Board falls directly within the class of state-sponsored religious activity proscribed by the First Amendment.[8] In light of the sectarian language of its prayers and its express rejection of nonsectarian prayers, it cannot be disputed that the Board has endorsed and sought to advance Christian religion.[9] 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

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[8]The Board does not contend that its prayers withstand constitutional scrutiny under any of the Supreme Court's Establishment Clause tests other than *Marsh*. *See Wynne*, 376 F.3d at 302 n.8 (noting that, at oral argument, town council conceded it had relied exclusively on *Marsh* and if its prayers were not constitutionally acceptable under *Marsh*, its appeal would fail). The District Court correctly held that the Board's prayers fail the *Lemon* test, and Doe has persuasively defended that holding in his brief. ADL will not repeat those arguments but will address the unconstitutionality of the Board's purposeful advancement and endorsement of sectarian prayer in this section of its brief.

[9]The Board contends that it has not exploited its sectarian prayers to advance any one religion over any other but does not define the meaning of the word "advance." *See* Appellants' Br. at 18. In *Wynne*, the Fourth Circuit stated that "to 'advance' a religious belief means simply to 'forward, further, [or] promote' the belief." 376 F.3d at 300 (quoting WEBSTER'S THIRD NEW INT'L DICT. 30, 1821 (3d ed. 1993)).

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.[10] *Lee*, 505 U.S. at 596. Accordingly, in declaring

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[10]Indeed, as the Fourth Circuit observed in *Mellen*, the Supreme Court has "emphasized that the Establishment Clause prohibits a school from sponsoring any type of prayer, even a nondenominational one, since a state may not 'pass laws which aid one religion, aid all religions, or prefer one religion over another.'" 327 F.3d at 366 (quoting *Schempp*, 374 U.S. at 216).

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 confirmed, just this past term, 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. American Civil Liberties Union of Ky.*, — U.S. —, 125 S. Ct. 2722, 2742 (2005). This Court should likewise respect this principle by affirming the District Court's holding.

IV.

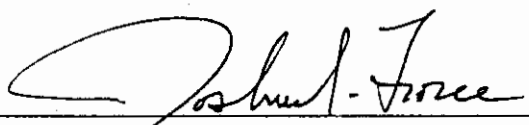
CONCLUSION

The Board has purposely adopted a policy of beginning its meetings with the recitation of explicitly sectarian prayers. This practice violates the Establishment Clause of the First Amendment, which proscribes governmental advancement or endorsement of religion. Contrary to the Board's contention, the Supreme Court's holding in *Marsh* does not save its unconstitutional practice. No court has ever extended *Marsh* to the unique context of the public school system, which the

Supreme Court has vigilantly protected from state-sponsored religious activity. Moreover, even if *Marsh* applied to school board prayer, the Board's explicitly sectarian prayer would still violate the First Amendment under that opinion's holding. Accordingly, ADL respectfully urges this Court to declare the Board's endorsement of sectarian prayer unconstitutional and affirm the holding of the District Court.

DATED: September 28, 2005.

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS AND TYPE STYLE REQUIREMENTS

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 6,907 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using WordPerfect 10 in 14-point Times New Roman font.

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Dated: September 28, 2005

CERTIFICATE OF SERVICE

Pursuant to Federal Rule of Appellate Procedure 25(d), I hereby certify that the above and foregoing BRIEF *AMICUS CURIAE* OF THE ANTI-DEFAMATION LEAGUE 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 29th day of September 2005:

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I hereby certify further that the BRIEF *AMICUS CURIAE* OF THE ANTI-DEFAMATION LEAGUE 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 29th day of September 2005.

JOSHUA S. FORCE

APPENDIX

Briefs and Other Related Documents

This case was not selected for publication in the Federal Reporter.

Please use FIND to look at the applicable circuit court rule before citing this opinion. (FIND CTA9 Rule 36-3.)

United States Court of Appeals,
Ninth Circuit.
Connie H. BACUS; Floyd Brosman,
Plaintiffs--Appellants,
v.
PALO VERDE UNIFIED SCHOOL DISTRICT BOARD OF EDUCATION; Fulton J. Fisher; Richard Babb, Defendants--Appellees.
No. 99-57020.
D.C. No. CV-98-00001-RJT.

Argued and Submitted Sept. 11, 2001.
Decided Dec. 3, 2002.

Teachers sued school board, arguing that it violated Establishment Clause by conducting prayers at board meetings. The United States District Court for the Central District of California, Robert J. Timlin, J., found for board, and teachers appealed. The Court of Appeals, held that: (1) teachers had standing to sue, and (2) board violated Establishment Clause in allowing prayers "in the name of Jesus" at board meetings.

Reversed.

West Headnotes

[1] **Constitutional Law** ⚖**42.2(1)**
92k42.2(1) Most Cited Cases
Teachers, including presidents of teachers' association and teachers' union, had standing to sue school district for allowing prayer at school board meetings, allegedly in violation of Establishment Clause, where teachers had reason to and regularly did attend board meetings. U.S.C.A. Const.Amend. 1.

[2] **Constitutional Law** ⚖**84.5(3)**
92k84.5(3) Most Cited Cases

[2] **Schools** ⚖**165**
345k165 Most Cited Cases
School board violated Establishment Clause in allowing prayers "in the name of Jesus" at board meetings, even if prayers did not disparage other religious faiths and did not proselytize, where invocation was almost always offered by same individual, and no individuals of other religions ever gave invocation. U.S.C.A. Const.Amend. 1.

*356 Appeal from the United States District Court for the Central District of California, Robert J. Timlin, District Judge, Presiding.

Before FERNANDEZ, KLEINFELD, and McKEOWN, Circuit Judges.

MEMORANDUM [FN*]

FN* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

[1] The school board and officials argue that the teachers who brought suit lack standing to represent students and claim no harm to themselves other than a general grievance about governmental conduct affecting all citizens. We need not consider the argument that the teachers lack standing to make claims on behlaf of their students, because they plainly have standing to make their claims on their own behalf. The teachers have sufficiently shown injury in fact because as teachers in the community, and as president of the teachers' association and president of the teachers' union, they have reason to and do regularly attend the school board meetings where the invocations they claim violate the

Constitution are recited. As attendees at the meetings, they have, if the prayers are unconstitutional, suffered "injury in fact" "fairly traceable" to the challenged conduct that "would be redressed" by the declaratory and injunctive relief they seek. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992).

[2] We need not determine whether prayers at school board meetings are more like prayers in state legislatures, as in *Marsh v. Chambers*, 463 U.S. 783, 103 S.Ct. 3330, 77 L.Ed.2d 1019 (1983), or more like prayers in schoolrooms, as ***Coles v. Cleveland Board of Education*, 171 F.3d 369 (6th Cir.1999)**. If prayers at a school board meeting are like prayers in a school classroom, then plainly these regular prayers "in the Name of Jesus" would be unconstitutional. On the facts of this case, even if the school board is like a state legislature for this purpose, the invocations are unconstitutional. So *Marsh*, assuming without deciding that it is applicable, would not save the practice in the case at bar. In *Marsh* the legislative chaplain "removed all references to Christ" after the sectarian nature of his prayers was brought to his attention, *id.* at 783, n. 14, 103 S.Ct. 3330, and the prayer did not "advance any one ... faith or belief." *Id.* at 782-83. 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.

And we need not decide whether the prayers "in the Name of Jesus" would be a permissible solemnization of a legislature-like body, provided that invocations were, as is traditional in Congress, rotated among leaders of different faiths, sects, and denominations. *Cf. Marsh* at 783 n. 13, 103 S.Ct. 3330. Here the record indicates that the same individual almost always offered the invocation, always "in the *357 Name of Jesus," and no individuals of other religions ever gave the invocation.

The school board argues, and we agree, that the prayers did not disparage other religious faiths, and did not proselytize. But that is not enough. Even assuming that the school board can be treated like a state legislature, which we do not decide, its invocations must not "advance any one ... faith or belief." *Marsh* at 782-83, 103 S.Ct. 3330. These prayers advanced one faith, Christianity, providing it with a special endorsed and privileged status in the school board. Some religions accept Jesus Christ as the Messiah, some do not, and some people do not believe in any religious faith. Solemnizing school board meetings "in the Name of Jesus" displays "the government's allegiance to a particular sect or creed," *County of Allegheny v. ACLU*, 492 U.S. 573, 603, 109 S.Ct. 3086, 106 L.Ed.2d 472 (1989).

The school board' practice of almost always praying "in the Name of Jesus" to commence its meetings necessarily has the effect of "making adherence to a religion relevant" to the plaintiffs' "standing in the political community." They sought to participate in and influence this political community, but they do not share the Christian religious beliefs with the school board member who generally performed the invocation and cannot honestly proceed "in the Name of Jesus." The Establishment Clause requires that "one religious denomination cannot be officially preferred over another." *Larson v. Valente*, 456 U.S. 228, 244, 102 S.Ct. 1673, 72 L.Ed.2d 33 (1982).

The school board's argument that restricting the invocations would impinge on First Amendment rights is frivolous. The First Amendment prohibits government from establishing a preferred religion, by speech or other means. Of course its members are as individuals entitled to pray as they choose, but the board is not entitled to incorporate in its agenda regular prayers that endorse and give privileged governmentally endorsed status to one religious faith. Injunctions against governmental prayers violative of the Establishment Clause are routinely granted. *See e.g., Lee v. Weisman*, 505 U.S. 577, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992).

REVERSED.

52 Fed.Appx. 355, 172 Ed. Law Rep. 24

Briefs and Other Related Documents **(Back to top)**

- 2000 WL 34001658 (Appellate Brief) Appellants'

Corrected Reply Brief (Jun. 21, 2000)Original Image of this Document (PDF)

• 2000 WL 34001659 (Appellate Brief) Appellants' Reply Brief (Jun. 13, 2000)Original Image of this Document (PDF)

• 2000 WL 34001657 (Appellate Brief) Appellees' Brief (May. 25, 2000)Original Image of this Document (PDF)

• 2000 WL 34001655 (Appellate Brief) Amicus Brief of the Progressive Jewish Alliance in Support of Appellants (Apr. 17, 2000)Original Image of this Document (PDF)

• 2000 WL 34001656 (Appellate Brief) Appellants' Opening Brief (Apr. 10, 2000)Original Image of this Document (PDF)

• 99-57020 (Docket)
(Dec. 30, 1999)

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