Appeal No. 16-11220

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

AMERICAN HUMANIST ASSOCIATION, ET AL.,
Plaintiffs-Appellants,

v.

BIRDVILLE INDEPENDENT SCHOOL DISTRICT, ET AL.,
Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of Texas
No. 15-cv-00377 (The Honorable John McBryde)

BRIEF OF *AMICI CURIAE* AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE; AMERICAN CIVIL LIBERTIES UNION; ACLU OF TEXAS; ANTI-DEFAMATION LEAGUE; BAPTIST JOINT COMMITTEE FOR RELIGIOUS LIBERTY; CENTRAL CONFERENCE OF AMERICAN RABBIS; HADASSAH, THE WOMEN'S ZIONIST ORGANIZATION OF AMERICA; HINDU AMERICAN FOUNDATION; JEWISH SOCIAL POLICY ACTION NETWORK; UNION FOR REFORM JUDAISM; WOMEN OF REFORM JUDAISM

IN SUPPORT OF PLAINTIFFS-APPELLANTS
AND SUPPORTING REVERSAL

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Case No.: 16-11220
Case Style: American Humanist Association; Isaiah Smith, v. Birdville Independent School District; Jack McCarty, in his individual and official capacity; Joe D. Tolbert, in his individual and official capacity; Brad Greene, in his individual and official capacity; Ralph Kunkel, in his individual and official capacity; Dolores Webb, in her individual and official capacity.

American Humanist Association has set forth the interested parties in this case, at pages i-ii of its Brief. Pursuant to Fifth Circuit Rule 29.2, undersigned counsel of record certifies that, in addition to the persons listed in Appellants' brief, the following have an interest in this *amicus* brief, but no financial interest in this litigation. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Amici Curiae
Americans United for Separation of Church and State
American Civil Liberties Union Foundation
American Civil Liberties Union of Texas
Anti-Defamation League
Baptist Joint Committee for Religious Liberty
Central Conference of American Rabbis
Hadassah, The Women's Zionist Organization of America
Hindu American Foundation
Jewish Social Policy Action Network
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RULE 26.1 STATEMENT

No *amicus* is a publicly held corporation or other publicly held entity, and no such entity owns any portion of any of the *amici*.

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INTERESTS OF *AMICI CURIAE*

Amici[1] are religious and civil-liberties organizations that represent distinct faith traditions and beliefs but share a commitment to religious freedom and the separation of church and state. *Amici* believe that government-sponsored prayer disenfranchises religious minorities and is particularly harmful for vulnerable populations like 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 Foundation
- American Civil Liberties Union of Texas
- Anti-Defamation League
- Baptist Joint Committee for Religious Liberty
- Central Conference of American Rabbis
- Hadassah, The Women's Zionist Organization of America
- Hindu American Foundation
- Jewish Social Policy Action Network
- Union for Reform Judaism
- Women of Reform Judaism

Each *amicus*'s individual statement of interest is set forth in the Appendix.

[1] *Amici* file this brief with the consent of the parties. Counsel for *amici* authored this brief in whole; no counsel for a party authored this brief in any respect; and no person or entity — other than *amici* and their counsel — contributed monetarily to this brief's preparation or submission.

INTRODUCTION

The Birdville Independent School District's practice of opening its school-board meetings with prayer constitutes school-sponsored religious exercises, violating the Establishment Clause. Although there is a narrow historical exception to the strict rule against government-sponsored prayer for invocations to open the sessions of state legislatures and city- or county councils, that exception does not apply to the public schools or to meetings of public-school boards, for which no historical analog justifies the practice and the principal constituency and focus is public-school students. Hence, every federal court of appeals to consider the question has concluded that prayer at school-board meetings is unconstitutional. This Court should not split with those other circuits.

The importance of keeping public education secular, and open equally to children regardless of faith, has special salience in light of the diverse student population in Texas and across the country. Students are more susceptible than adults to social pressures. While dissenting students might be theoretically able to walk out of a school-board meeting to avoid participating in a prayer that violates their faith or beliefs, it is both unrealistic and unreasonable to expect them to do so. At best, students face substantial pressure to conform; more worrisome, they face grave risks of bullying and harassment, and they understandably fear retaliation

should they take any action demonstrating their dissent, such as declining to participate fully in the prayers

Amici therefore urge the Court to hold, consistent with the decisions of the other circuits, that school-sponsored prayer in the context of school-board meetings violates the Establishment Clause.

BACKGROUND

Texas is home to a wide variety of faiths — including Protestants, Catholics, Orthodox Christians, Mormons, Jews, Muslims, Buddhists, Taoists, Hindus, Jains, Sikhs, and Zoroastrians. *See Religious Affiliation in Texas*, The Texas Almanac, May 14, 2012, *available at* http://tinyurl.com/gupo3h8 and http://tinyurl.com/h8jv2ug (last visited Oct. 11, 2016). Additionally, some 44 percent of Texans do not identify with any denomination. *Id*. And religious affiliation is increasingly dynamic: A recent survey by the Pew Research Center of more than 35,000 Americans found that the percentage of adults identifying as Christian dropped by nearly eight percentage points since 2007; the percentage of "religiously unaffiliated" Americans increased by six points; and the percentage adhering to non-Christian faiths increased as well, driven in part by growth in the number of people identifying as Muslim or Hindu. *See* Pew Research Center, *America's Changing Religious Landscape*, May 12, 2015, *available at* http://tinyurl.com/ldnxabw (last visited Oct. 11, 2016).

The meetings of the Birdville Independent School District Board of Trustees are a mix of formal policy decisions and student-focused activities. Students frequently attend to receive recognition for special achievements in both academics and athletics (such as membership in a student honor society or participation on championship sports teams) or to perform music.[2] Since 2014, "student ambassadors" selected from the student leaders in the District's high schools participate in the meetings as the official liaisons between the Board and its student constituents.

It is in this student-focused context that the challenged prayers take place. Before this litigation began, each school-board meeting opened with an "Invocation," which in nearly every instance was a prayer led by a student, on behalf of their school and the District.[3] The students often invited the audience to

[2] For example, at the May 2016 meeting, the Board recognized the "2015-16 Student Ambassadors for the Board of Trustees," as well as the District's valedictorians, salutatorians, and National Merit Scholarship recipients. *See* Board Agenda, May 26, 2016, *available at* http://tinyurl.com/h788tuo (last visited Oct. 11, 2016). Another meeting featured a student choir performance. *See* Board Agenda, December 10, 2015, *available at* http://tinyurl.com/gsczw7a (last visited Oct. 11, 2016).

[3] Appellants' Appendix excerpts two particular instances, *see* App. at Tab 8, 9. The record contains many additional examples. *See, e.g.*, Doc. No. 81-1 ("P.App.") at 54, 60, 63, 70, 73, 78, 82, 85, 91, 95, *Am. Humanists Assoc., et al., v. Birdville Indep. Sch. Dist., et al.*, No. 15-cv-377 (N.D. Tex.), (introducing, among others, "two of our fine students from Smithville;" "an 8th grade gifted and talented student. He is in band, and he is a student council member;" "a 5th grader at Snow Heights…. [T]hese guys are awesome students, they are the cream of the crop, and that's why I wanted to bring them tonight;" "And doing our prayer tonight will be

take part in the prayers.[4] Since March 2015, the District has modified its prayer practice by allowing students to sign up to give the invocation and changing the name to "student expression." *See* App. Tab 4 ("Slip Op.") at 4, 6. In practice, most "student expressions" remain prayers or religious poems, keeping with the District's tradition of sponsoring religious invocations at the Board meetings. App. Tabs 6-7. The District also says that it now displays a "disclaimer" disassociating itself from the invocations, although it has produced no such disclaimer nor has it produced a quotation of the language in question.

… the president of the senior class and also co-captain with the Johnny Rebs;" "two fine leaders of our campus … members of our leadership team," "two of our terrific 5th graders at North Ridge Elementary. Both of these students have been with us since they were in kindergarten…. [W]e are very glad to have [their teacher] with us tonight to honor these two students;" "two outstanding students from Smithfield Middle School;" "two delightful young ladies from the Shannon Learning Center…. [T]o do our invocation is L.C., who will be graduating in November;" "I can't think of two better students to represent Jack C. Binion Elementary;" "two of Richland Elementary's finest students").

[4] *See, e.g.*, P.App. 51, 54, 58,60,70, 80, 82, 92 ("Will you please join me in a prayer;" "Please pray with me;" "Hello, will you please bow your heads in prayer with me;" "Bow our heads in prayer;" "If you'd please bow your heads in prayer;" "Now may we take a moment to bow our heads in prayer;" "Would everyone please bow their head in prayer;" "Let us pray.")

ARGUMENT

I. THE ESTABLISHMENT CLAUSE'S LIMITED EXCEPTION FOR LEGISLATIVE PRAYER DOES NOT APPLY TO SCHOOL BOARDS

The Supreme Court repeatedly has 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 unconstitutionality. *Lee v. Weisman*, 505 U.S. 577, 592 (1992). The Court has applied these principles consistently to strike down school-sponsored prayers, whether in the classroom, *see Engel v. Vitale*, 370 U.S. 421, 436 (1962), at formal school events, *see Lee*, 505 U.S. 577, or at extracurricular activities, *see Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000). It makes no difference whether a school official, an outside officiant, or a student leads the prayer. *See Santa Fe*, 530 U.S. at 305-06. Under any of the traditional inquiries that the Supreme Court has employed for more than half a century, school-sponsored prayer in any context violates the Establishment Clause.

In *Marsh v. Chambers*, 463 U.S. 783 (1983), the Supreme Court recognized a limited exception to the broader — and otherwise strict — Establishment Clause rule against government-sponsored prayer, holding that the Nebraska Legislature's practice of opening its sessions with an invocation did not violate the First Amendment. The Court based that ruling on the "unique history" of legislative

prayer, observing that the First Congress authorized payment for legislative chaplains the same week as it voted to approve the First Amendment's language. *Id.* at 788-91. In light of that unique history, and an unbroken tradition for more than two centuries of legislative prayer, the Court concluded that the First Amendment's framers intended that the particular act of opening legislative sessions with invocations would not violate the Establishment Clause. *Id.* Thus, in *Town of Greece, N.Y. v. Galloway*, 134 S. Ct. 1811 (2014), the Court held that a town board's practice of opening its meeting with prayer likewise did not offend the Establishment Clause because that prayer "fit[] within the tradition long followed in Congress and the state legislatures," *id.* at 1819, and did not coerce participation by nonadherents, *id.* at 1827.

Here, the district court erred as a matter of law in upholding the challenged school-board prayers because it transplanted this narrow legislative-prayer exception from *Marsh* and *Greece* to the entirely different context of school-board meetings, with the cursory assertion that "a school board is more like a legislature than a school classroom or event." Slip Op. at 5. In doing so, the court failed even to consider two essential differences between legislative sessions and school-board meetings: ***First***, there is no long-standing historical tradition of school-board prayers (or even of public schools or school boards) going back to the time of enactment of the First Amendment, so there can be no basis to conclude that

Congress meant to allow such prayers when it voted to adopt the Establishment Clause. ***Second***, unlike legislatures, which consist of and principally focus on adults, school boards deal with the public schools and public-school students — and they often include students as members as well as meeting attendees and honorees.

The Supreme Court has long recognized strict constitutional prohibitions that bar public schools and school officials from advancing religious messages to students or from allowing for conditions at public-school-related events that may have the effect of pressuring students to participate in religious exercises. For these reasons, the circuits that have addressed the question have straightforwardly held that the legislative-prayer exception of *Marsh* does not apply to school-board prayer. This Court should follow suit and reverse the district court's decision.

A The Legislative-Prayer Exception Depends On A Unique History That Does Not Pertain To School Boards

Unlike the unique history of legislative prayer underlying the *Marsh* exception, the history of public education offers nothing to justify prayer practices. Just the opposite is true: At the time of the founding and the framing of the First Amendment, public schools were rare; the education that was available was private 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 education carried with it a marked rejection of sectarianism.

Id. To begin with, nondenominational "common schools" were developed that sought to teach morality through "universal" Christian ideas; later, the courts and the public rejected public funding for sectarian education of any kind, so the public schools would accommodate students of all faiths. *See* Noah Feldman, *Non-Sectarianism Reconsidered*, 18 J.L. & Pol. 65 (2003).

The Supreme Court has constantly reinforced the need for public schools to remain fully separate from religious institutions. The idea was that public schools were "the most powerful agency for promoting cohesion among a heterogeneous democratic people." *McCollum*, 333 U.S. at 216 (Frankfurter, J., concurring). Hence, a "sharp" separation from religion was necessary in "recognition of the need of a democratic society to educate its children … in an atmosphere free from [religious] pressures." *Id.*

In keeping with this principle, the Supreme Court expressly has rejected application of the *Marsh* exception to prayer in public-school contexts. *See Edwards v. Aguillard*, 482 U.S. 578, 583 n.4 (1987) ("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* 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*

Mellen v. Bunting, 327 F.3d 355, 370 (4th Cir. 2003) (*Marsh* inapplicable for "public universities and military colleges," which "did not exist when the Bill of Rights was adopted"); *Doe v. Tangipahoa Par. Sch. Bd.*, 473 F.3d 188, 210 (5th Cir. 2006) (Stewart, J., concurring in part) (collecting cases). And because public schools, school boards, and school-board meetings as we know them today did not then exist, neither did school-board prayer. Those who drafted, adopted, and ratified the First Amendment could not, therefore, have intended to license that prayer. In the language of *Greece*, the prayer does not and cannot "fit[] within the tradition long followed in Congress and the state legislatures,"134 S. Ct. at 1819, so the court below erred as a matter of law in dramatically extending the *Marsh* exemption to it.

B The Role Of Students Makes School-Board Meetings Qualitatively Different From The Legislative Sessions In *Marsh* And *Greece*

Quite apart from the lack of historical justification for ripping *Marsh* from its context and express limitations, school-board prayer is different from prayer at legislative sessions because school-board meetings serve entirely different purposes and address constituencies of an entirely different character. While legislative bodies like city councils and state legislatures are populated by adults, are the subject of attendance (if at all) by adult citizens, and address a wide variety of adult issues concerning all aspects of society, school boards focus on the

interests and needs of the children who attend the public schools. And school boards' primary constituents are students, who as a matter of law receive heightened judicial protections under the Establishment Clause.

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." *Lee*, 505 U.S. at 596, 592. 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." *Id.* at 593. Even at voluntary school activities and events, students may "feel immense social pressure, or have a truly genuine desire, to be involved," and therefore may believe 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. The Establishment Clause simply does not permit school districts to force students to make the "difficult choice" "between attending these [events] and avoiding personally offensive religious rituals." *Id.* at 312.

By making a prayer ritual an integral part of the Board meetings here, the Birdville School District has created precisely those forbidden conditions. Students regularly attend and participate in the Board meetings to accept academic or athletic awards and recognition, to participate in school activities, and may

petition the Board on matters of real and immediate importance to their lives as students. To be sure, many of the reasons to attend are "voluntary" in the formal sense that a student would not be punished for failing to take part in the meetings; but some are required. And even for those that are not strictly compulsory, "[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 attending a school football game, *Santa Fe*, 530 U.S. at 311-12, so too is it impermissible to make exposure to and participation in an unwanted religious ritual the price to attend a Board meeting to perform a tuba solo with the school band, to accept an award for academic achievement, or to serve the school district as a student representative and liaison to the Board. Students will not lightly forgo these honors; nor should they. Neither should religious conformity be the price for a student to attend a Board meeting to petition for a policy change. And as for students who may be compelled to attend Board meetings as a school requirement — or, worse yet, as part of a disciplinary proceeding in which the student's academic fate hangs in the balance — it simply is not reasonable, much less constitutionally permissible, to expect the student to stay away, or single herself out as a religious dissenter (with the personal and academic costs that doing so might entail), or else participate in religious rituals contrary to her faith.

For these reasons, the two Circuits to rule on the issue have both held that the Establishment Clause prohibits school-board prayer; in doing so, both expressly held that *Marsh* does not and should not apply. *See Coles ex rel. Coles v. Cleveland Bd. of Educ.*, 171 F.3d 369 (6th Cir. 1999); *Doe v. Indian River Sch. Dist.*, 653 F.3d 256 (3d Cir. 2011).

In *Coles*, the Sixth Circuit held that an Ohio school board's practice of opening meetings with prayer violated the Establishment Clause. The court explained that school boards "are inextricably intertwined with the public school system" because they "focus solely on school-related matters." *Coles*, 171 F.3d at 377, 381. 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.

Coles recognized that, as in Birdville, the school board's key "constituency" is students, and even though not all students attend the board meetings (and students were not present at all meetings), those students who did attend because they "would simply like to have a say in their education by commenting on or otherwise influencing school policy" were a "captive audience" for the religious rituals. *Id.* at 381-83. Also, as here, the *Coles* school-board meetings offered a "public-comment portion" in which students could participate, and the meetings served as a "forum for addressing student grievances"— including those related to

disciplinary decisions; and the board "regularly invite[d] students to attend its meeting in order to receive awards for their academic, athletic, or community-service achievements." *Id.* at 372. As here, too, "a student representative" attended meetings on behalf of the student population. *Id.* The court thus recognized, based on these factors, that student attendance and participation were not genuinely voluntary. And because "coercion of impressionable young minds is to be avoided and … the endorsement of religion is prohibited in the public schools context," *id.* at 379, prayer at the meetings violated the Establishment Clause.

More recently, the Third Circuit came to the same conclusion in *Indian River*, reasoning: "Every aspect of [a school board] is intended to promote and support the public school system," including decisions regarding school policies, the levying of bonds, and determinations about which courses are offered. 653 F.3d at 279. The court also identified six separate reasons why students might attend school-board meetings, including in connection with disciplinary action for serious offenses, "to perform a piece of music or theater for the Board's benefit," and to receive recognition for special achievements. 653 F.3d at 264-65.[5] The

[5] More generally, students regularly petition their local school boards over issues of interest to them, such as dress-code policies or funding for extracurricular activities. *See, e.g.*, Lindsay Moscarello, *Student asks Douglass school board to change hair color policy*, West Georgia Neighbor, April 18, 2016, *available at* http://tinyurl.com/j3okwru (last visited Oct. 11, 2016); *Hopewell High School marching band asks School Board for additional money to cover upcoming trip*

court thus 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. Hence, while attendance is "not technically mandatory" for most students, board meetings are "meaningful to students in the district," and students experience pressure to attend. *Id.* at 276-77. In light of the vulnerability of students to social pressure to conform, therefore, the court held that the indirect coercion to participate in prayer makes the situation entirely different from what the Supreme Court deemed to warrant a special exception in *Marsh*. So too here.

No circuit has ruled to the contrary. The Ninth Circuit in an unpublished opinion and a panel of this Court in a vacated decision both assumed for the sake of argument that the *Marsh* exception applied to school boards, but they did so only by way of simplifying the issues so they could go on to hold that the prayer practices in those cases nonetheless violated the Establishment Clause. *See Bacus v. Palo Verde Unified Sch. Dist. Bd. of Educ.*, 52 F. App'x 355, 356 (9th Cir. 2002) (declining to decide whether *Marsh* applied because, "even if the school board is like a state legislature for this purpose, the invocations are unconstitutional" because of their content); *Doe v. Tangipahoa Par. Sch. Bd.*, 473 F.3d at 202 ("assum[ing] *arguendo* the Board is a *Marsh* 'legislative' or 'other deliberative

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expenses, The Progress Index, Dec. 16, 2014, *available at* http://tinyurl.com/zcydnow (last visited Oct. 11, 2016).

public body,'" based on the parties' stipulation, and holding that the content of prayers made them unconstitutional regardless of *Marsh*'s [in]applicability), *vacated en banc for lack of standing*, 494 F.3d 494 (5th Cir. 2007).

As for *Doe v. Tangipahoa Parish School Board*, 631 F. Supp. 2d 823, 839 (E.D. La. 2009), on which the court below relied in determining that *Marsh* governs school-board meetings, that lone district-court decision failed to address the actual circumstances of school-board meetings — or even to consider the Supreme Court's declaration in *Lee* that *Marsh* cannot apply in "the public school context" because the "influence and force of a formal exercise" at a school event is far more coercive for schoolchildren than is prayer for adult attendees at state legislative sessions. *Lee*, 505 U.S. at 597. And the court below did not do so either. Yet as the Sixth Circuit explained in *Coles*, there are "[i]nherent differences" between school-board meetings and legislatures that have constitutional import. *See* 171 F.3d at 381-82. Schoolchildren are not like the "mature adults," whom the Supreme Court has presumed will not be readily influenced or coerced by legislative prayer. Rather, they are highly vulnerable to such pressures, and the law takes their unique susceptibilities into account.

Finally, lest there be any doubt that the relationship of school boards to schoolchildren should be dispositive here, the Supreme Court in *Greece* repeatedly and expressly underscored that any Establishment Clause concerns raised by the

town's legislative prayers there 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." *Greece*, 134 S. Ct. at 1823 (emphasis added). Writing for three of the five Justices in the majority, Justice Kennedy further underscored that while prayer in a legislative setting may "ma[k]e [attendees] feel excluded and disrespected," "*[a]dults* often encounter speech they find disagreeable" and must sometimes put up with it or walk out. *Id.* at 1826 (emphasis added). In so reasoning, however, Justice Kennedy went out of his way to distinguish legislative prayer from prayer at school activities and events, such as the graduation at issue in *Lee v. Weisman*, because legislative prayer "does not equate to coercion" for "mature *adults*, who 'presumably' are 'not readily susceptible to religious indoctrination or peer pressure.'" *Greece*, 134 S. Ct. at 1826-27 (emphasis added); *see also Lee*, 505 U.S. at 596 (noting "[i]nherent differences between the public school system and a session of a state legislature"). Where schoolchildren are the very focus of the meetings, and where those children are routinely present and expected to participate, an adult standard of, "if you don't like it, leave," has no place. [6]

[6] That children merit special protections against subtle coercive pressure is not unique to Establishment Clause jurisprudence. Criminal law, for example, recognizes that "juveniles are more vulnerable or susceptible to negative influences

II. UNDER TRADITIONAL ESTABLISHMENT CLAUSE TESTS, PRAYER AT SCHOOL-BOARD MEETINGS VIOLATES STUDENTS' AND PARENTS' FIRST AMENDMENT RIGHTS

Binding themselves to the inapposite *Marsh* exception for legislative prayer, neither the School District nor the court below even attempted to argue below that the prayer practice can otherwise survive Establishment Clause scrutiny. It can't.

A Prayer At School-Board Meetings Violates The *Lemon* And Endorsement Tests

For governmental action to survive Establishment Clause scrutiny under the traditional test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), its preeminent purpose must be secular, *see McCreary Cty., Ky. v. American Civil Liberties Union*, 545 U.S. 844, 864 (2005), "its principal or primary effect must be one that neither advances nor inhibits religion" *Lemon*, 403 U.S. at 612, and it "must not foster an excessive government entanglement with religion." *Id*. at 613. Governmental action that fails to satisfy any one of those requirements violates the Establishment Clause. The prayer practice here violates all three.

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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. Children occupy "a very special place in life which law should reflect," and "[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." *Eddings v. Oklahoma*, 455 U.S. 104, 116, 126 n.12 (1982).

1 The District's prayer practice has a religious purpose

Prayer is inherently religious. *See Engel*, 370 U.S. at 424-25. Legislative prayers under *Marsh* may be thought to "solemnize or bring a more businesslike decorum" to an event. *Coles*, 171 F.3d at 384; *see Greece*, 134 S. Ct. at 1816. But outside the *Marsh* exception, "solemnization" is not an adequate secular purpose. If it were, it would justify prayer at any school event, such as sporting events or graduation ceremonies. That is not the law. Rather, "[a] religious message is the most obvious method of solemnizing an event," so a policy providing an opportunity for a solemnizing invocation has the purpose of "encourag[ing] the selection of a religious message" — an impermissible religious purpose as a matter of law. *Santa Fe*, 530 U.S. at 306-07. And that is clearly what the District's policy does, by directing that "prayer, devotion, poem, etc." constitutes an "appropriate" "invocation." App. Tab 14.

Besides, even if the "solemnizing" principle were valid outside the *Marsh* context, which it isn't, "the content of the prayers delivered at school-board meetings here went beyond what was necessary to "solemnize or bring a more businesslike decorum to the meetings," *Coles*, 171 F.3d at 384. As in *Coles*, the prayers "call[] for divine assistance or affirmation, sometimes by using veiled references to the Bible" and "mention[ing] Jesus by name." *Id.* Plus, here, unlike in *Coles*, students were selected to deliver the prayers and direct the audience in

praying, belying any asserted objective merely to get the adult board members into a serious frame of mind.

It does not matter that the District now calls the prayers "student expressions." A student with something to express to the Board has *always* had the opportunity to do so during the period for public comment. And public comment would truly allow students the opportunity to express a broad range of ideas. That is not the point of the so-called Student Expression. The asserted purpose of offering students a chance to speak in public is at most "secondary" and cannot withstand scrutiny as a "genuine" and preeminently secular purpose. *McCreary Cty.*, 545 U.S. at 864. In any event, the District did not argue below, and the district court did not find, that the prayers had any legitimate secular purpose.

2 The prayer practice has the effect of advancing and endorsing religion

The second prong of the *Lemon* test asks whether the governmental action "advances or inhibits" or "communicates endorsement or disapproval" of religion. *See Indian River*, 653 F.3d at 282-83. Under Supreme Court precedent regarding prayer at school events, the key question is whether an "objective [student] observer … would perceive [the prayer practice] as a state endorsement of prayer in public schools." *Santa Fe*, 530 U.S. at 308. This "endorsement test" requires reviewing courts to take into account the history of the practice as well as its present effect.

Everything about the environment of the Board meetings here communicates to observers — and especially students — that the District endorses religion and the religious content of the prayers. The invocations have remained primarily religious — even after inclusion of some secular messages since the Board changed its policy in 2015. *Cf. Indian River*, 653 F.3d at 285 ("explicit references to God or Jesus Christ or the Lord"). The board members emphasize their own religious beliefs, listing in their profiles on the District's website their church affiliations.[7] The Board also recognizes religious organizations from the community at meetings. *Cf. Coles*, 171 F.3d at 385 ("the current school board president is himself a Christian minister"). With these inherently religious associations for context, "a reasonable observer would view the content of the … prayers as promoting religion." *Indian River*, 653 F.3d at 285.

In short, the District places its stamp of approval on the prayers by creating and controlling the environment in which the prayers occur. The prayers are designated on the agenda at the board meetings, which are held on school property and involve school officials. School officials often praise the student prayer-leaders and identify them in connection with their schools. These elements

[7] *See, e.g.*, Profile of Richard Davis, *available at* http://tinyurl.com/j27fxrl (last visited October 13, 2016) ("Richard and Brenda are members of Birdville Baptist Church, where he serves as a deacon and teaches an adult Sunday school class. Both are involved in the Worship Choir, and Brenda plays with the Jubilation Ringers, a handbell choir.").

connect the District to the students' prayers because District "regulations promote an inherently religious practice" by creating the opportunity for student-led prayer. *Karen B. v. Treen*, 653 F.2d 897, 902 (5th Cir. 1981); *see also Borden v. Sch. Dist.*, 523 F.3d 153, 175-77 (3d Cir. 2008); *Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402, 406-07 (5th Cir. 1995).

The fact that students are the ones who select and say the prayers does not "divorce" the District "from the religious content in the invocations" because the District remains in control of the context and process for the prayers' delivery. *Santa Fe*, 530 U.S. at 305; *see Borden*, 523 F.3d at 175-77. And the change to a random draw from student sign-ups to deliver the prayers makes no difference. In *Santa Fe*, the school district "attempted to disentangle itself from the religious messages" of official prayer at its football games by having the student body vote on whether to have "a brief invocation and/or message" and to choose the speaker for that "message"; doing so did not vitiate the district's "perceived and actual endorsement of religion." 530 U.S. at 305-07. Though the district in *Santa Fe* may no longer have had absolute control, it still bore the legal responsibility for the resulting school-sponsored delivery of prayers. *Id.* at 306-08.

Moreover, the "history and context" of the prayer practice belie any contention that the Board is neutral toward prayer. *See Indian River*, 653 F.3d at 286; *see also Borden*, 523 F.3d at 175-80. Policy changes, or mere name changes,

that function "simply as a continuation of the previous policies" do not eliminate, but rather underscore, the constitutional violations. *Santa Fe*, 530 U.S. at 309. Changing the name from "invocation" to "expression" has not altered the inherently religious nature of the invocations. Students still deliver prayers or religious poems much of the time, and they continue to request that the audience "please stand *for the prayer*" or "please *bow your heads* for the invocation"—instructions that would make no sense if what followed was a nonreligious public-speaking engagement. *See* P.App. 404. Secularization of the name of the practice is not enough: In *Santa Fe*, the defendant school district changed its policy to "omit[] the word 'prayer' from its title, and refer[] to 'messages' and 'statements' as well as 'invocations'" at the start of the football games. *Santa Fe*, 530 U.S. at 298. Yet that did not matter; the resulting "student-led, student-initiated prayers," *id.* at 301, were flatly unconstitutional.

The addition of some nonreligious "expressions" also makes no difference. In *McCreary County v. American Civil Liberties Union*, the Supreme Court held that the Ten Commandments as part of a larger and supposedly secular "Foundations of American Law" display in county courthouses violated the Establishment Clause in part because the display had "evolved" during the course of litigation from two earlier and more overtly religious displays of the Commandments. 545 U.S. at 853-56. The Court held that the final display

"need[ed] to be understood in light of context," including the fact that the defendant counties had altered and supposedly secularized the display to preserve the Ten Commandments posting — an inherently religious item — in the face of the litigation. *Id.* at 874. *See also Borden*, 523 F.3d at 175-78 (evaluating team prayer in light of prior practices to determine whether coach changed policy to preserve unconstitutional prayer practice).

Here, the record shows that Board members responded to this lawsuit by vocally reaffirming their support for the prayer practice, including in posts on social media. *See* App. Tab 17. A reasonable, objective student observer, familiar with the history of the practice, would understand that the whole point was to "preserve a popular state-sponsored religious practice," *Santa Fe*, 530 at 309. The District's "litigating position" of adopting a modified policy cannot erase the meaning and import of the practice. *See McCreary Cty.*, 545 U.S. at 871. [8]

3 The prayer practice impermissibly entangles the District with religion

Finally, the prayer practice unconstitutionally entangles the District with religion. The institutional decision to include a period for prayer "is a choice

[8] For the same reason, also ineffective is the School District's disclaimer that the presentation is student speech. After all, it is the school board that provides the prayer opportunity and selects the students, even if only by random draw. A disclaimer will not rescue a clearly unconstitutional practice. *See Stone v. Graham*, 449 U.S. 39, 41 (1980) (per curium) ("notation in small print at the bottom of each display of the Ten Commandments" insufficient to create a secular purpose for the obviously religious display).

attributable to the state," and that alone constitutes a "level of involvement" that is "troubling." *Indian River*, 653 F.3d at 288. "[T]he circumstances surrounding the prayer practices suggest excessive government entanglement" because the board meetings "are completely controlled by the state." *Id.*; *see also Coles*, 171 F.3d at 385. "The Board sets the agenda for the meeting, chooses what individuals may speak and when, and in this context, recites a prayer to initiate the meeting." *Indian River*, 653 F.3d at 288. So too here.

Additionally, the prayer practice "makes inappropriate governmental involvement in religious affairs inevitable" because the District must implement and monitor its policy. *See Treen*, 653 F.2d at 902. The reality of the District's practice shows the effect of this involvement: Despite supposedly "significant flexibility" in the content of the "student expressions," most follow the same mold — Christian prayer — which is unsurprising, because that is the history of the practice and what the Board has sought to preserve. *Cf. Indian River*, 653 F.3d at 290.

B Prayer At School-Board Meetings Is Unconstitutionally Coercive

The Establishment Clause guarantees "at a minimum … that government may not coerce anyone to support or participate in religion or its exercise." *Lee*, 505 U.S. at 587. Prayer in the environment of school-related events, where the school controls student conduct, is inherently coercive; objecting students may face

ostracism and harassment, not to mention retaliation from the Board or other school officials.

At school events of any kind, the state necessarily "retain[s] a high degree of control" over the program and the conduct of student participants. *Lee*, 505 U.S. at 597. School-board meetings fit the bill exactly. The meetings are held by the district, and the district controls their content and conduct. "The Board retains complete control over the meeting; it sets the agenda and the schedule, for example." *Indian River*, 653 F.3d at 278. When students give invocations, they do so under the auspices of the District's policy and its selection of them for the post. That is no different from the school's control over the program at graduation in *Lee*, 505 U.S. at 593, or at football games over "message[s] … broadcast over the school's public address system, which remain[ed] subject to the control of school officials" in *Santa Fe*, where a student similarly chose and led the prayers. 530 U.S. at 307. In these circumstances, "the conformity required of the student" during a public prayer is too high to withstand scrutiny under the Establishment Clause. *Lee*, 505 U.S. at 598.

It requires little imagination to understand the challenge facing students present at school board meetings when prayer is on the agenda. First, consider the student selected to give the invocation. She knows what is expected of her. She may have attended board meetings in the past and heard principals and other

school officials praise the student prayer-givers. The student may wish to be considered an "outstanding" student, "the cream of the crop," like the other students chosen to "represent" their schools, and may be afraid to let down her teachers and principal. *See supra* n.3. Her experience of prayers at past meetings will inform her understanding of the expectations for her own address.

Or consider the student preparing to perform with his school choir, who does not share in the faith invoked by the prayer—in fact, the prayer directly contradicts his belief system. He can participate in the prayer, violating the tenets of his faith; he can stand reverently and perhaps bow his head, which he and others may understand to be participation in the prayer, *see Lee*, 505 U.S. at 588; or he can put his religious dissent on display for all to see by leaving or speaking out. But how to make the choice? Perhaps the student fears disfavor or even punishment from the teacher who directs the choir. Perhaps he worries about the disapprobation of the Board and the school official, parents, and other community members in the audience. Perhaps he does not want to forgo the honor of performing for his school district's governing body. Perhaps he wishes — as children do — to avoid singling himself out as different from his peers. And perhaps he worries about the sin of participating, or appearing to participate, in a ritual that is antithetical to his and his family's faith. Any choice about how to act with respect to the prayer carries an unacceptable cost.

Finally, students at the meetings may face abuse for objecting to, or simply declining to participate in, the prayers. Students are subjected to bullying and harassment in schools based on religion — especially if they belong to a minority faith or are nonbelievers.[9] Indeed, the problem is so bad that the U.S. Department of Education recently announced that it will collect data on religion-based bullying.[10] And social-science research demonstrates that victims of bullying are at risk of anxiety, depression, academic problems, and suicide. *See* Center for Disease Control, *Fact Sheet: Understanding Bullying* (2016), *available at* http://tinyurl.com/oveg3lc (last visited Oct. 11, 2016). The effects of being bullied extend beyond adolescence and frequently continue to affect mental health and well-being into adulthood.

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[9] *See* B. Weiser, *Swastikas, Slurs and Torment in Town's Schools: Pine Bush, N.Y., School District Faces Accusations of Anti-Semitism*, N.Y. Times, Nov. 7, 2003 (describing pervasive bullying of Jewish students), *available at* http://tinyurl.com/m66k49y (last visited Oct. 11, 2016); Neela Banerjee, *Families Challenging Religious Influence in Delaware Schools*, N.Y. Times, July 29, 2006 (discussing experience of family in *Indian River* litigation), *available at* http://tinyurl.com/hmumyfg (last visited Oct. 13, 2016); J. Tucker, *Study finds majority of Muslims have faced bullying at school*, S.F. Chron., Oct. 30, 2015, *available at* http://tinyurl.com/ju6bhmz (last visited Oct. 11, 2016); Hindu American Foundation, *Classroom Subjected: Bullying & Bias Against Hindu Students in American Schools* (one in three respondents bullied for their religious beliefs), *available at* http://tinyurl.com/hr48nsg (last visited Oct. 13, 2016).

[10] *See* U.S. Department of Education, *U.S. Department of Education Takes Actions to Address Religious Discrimination*, July 22, 2016, *available at* http://tinyurl.com/hj4e3ld (last visited Oct. 11, 2016).

School prayer practices needlessly isolate students who do not share the majority faith and expose them to these threats. Worse still, where, as here, the prayer is sponsored by the school's governing body, a dissenting student has nowhere to turn. A student who is targeted by other students for her beliefs may — quite reasonably — expect that the adults giving voice to religious expression by official policy are unlikely to be sympathetic. Indeed, a student may rationally believe that the adult who is meant to protect her would instead subject her to further disapprobation and even retaliation. Our schoolchildren deserve better.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision below and hold that prayer at school-board meetings violates the Establishment Clause.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Fed. R. App. P.32(a)(7)(B) because this brief contains 6,985 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and 5th Cir. R. 32.2. This brief complies with the typeface and style requirements of Fed. R. App. P. 32(a)(5) and 5th Cir. R. 32.1 because it was prepared in proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

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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 a 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 many thousands within the jurisdiction of this Court.

American Civil Liberties Union and American Civil Liberties Union of Texas

The American Civil Liberties Union is a nationwide, nonprofit, nonpartisan organization with approximately 500,000 members dedicated to defending the principles embodied in the Constitution and our nation's civil-rights laws. The ACLU of Texas is a state affiliate of the national ACLU, with over 10,000 members. As an organization that has been committed to preserving religious liberty for nearly a century, the ACLU has a strong interest in the proper resolution of this case.

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.

Baptist Joint Committee for Religious Liberty

The Baptist Joint Committee for Religious Liberty has vigorously supported religious liberty in the historic Baptist tradition for all of its eighty years. The BJC serves fifteen supporting organizations, including state and national Baptist conventions and conferences, and churches in Texas and throughout the country. Grounded in the historical experience of Baptists, whose religious-freedom struggles figured prominently in the fight for disestablishment in the American colonies, the BJC recognizes that religion and religious liberty are best served when government seeks neither to promote nor inhibit religion, but leaves religion

to its own merits and the voluntary efforts of adherents. The BJC addresses only religious liberty and church-state separation issues, and believes that strong enforcement of both Religion Clauses is essential to religious liberty for all Americans.

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 human and civil rights, public policy, media, academia, and interfaith

relations. Through its advocacy efforts, HAF seeks to cultivate leaders and empower future generations of Hindu Americans.

Since its inception, the Hindu American Foundation has made legal advocacy one of its main areas of focus. 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 an *amicus curiae*.

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, much like the Birdville Independent School District. There, they have been subjected personally 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 Supreme Court in *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014).

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

The Union for Reform Judaism, whose 900 congregations across North America includes 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 that represents more than 65,000 women in nearly 500 women's groups in North America and around the world come to this issue out of our longstanding commitment to the principle of separation of church and state, believing that it is the bulwark of religious freedom and interfaith amity.