Case No. 16-11220

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

AMERICAN HUMANIST ASSOCIATION; ISAIAH SMITH,
Plaintiffs – Appellants

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; RICHARD DAVIS, in his individual and official capacity; RALPH KUNKEL, in his individual and official capacity; CARY HANCOCK, in his individual and official capacity; DOLORES WEBB, in her individual and official capacity,
Defendants – Appellees

On appeal from the United States District Court,
Northern District of Texas, Fort Worth Division

APPELLANTS' BRIEF

Respectfully submitted:

Monica L. Miller
CA Bar: 288343
DC Bar: 101625
American Humanist Association
1777 T St. N.W.
Washington, D.C. 20009
Phone: (202) 238-2099
Fax: (202) 238-9003
mmiller@americanhumanist.org

Patrick A. Luff
TX Bar: 24092728
Luff Law Firm, PLLC
1350 Bandera Hwy,
Ste. 803
Kerrville, TX 78028
Phone: (512) 710-6830
Fax: (830) 584-0628
luff@lufflaw.com

Roger L. Mandel
TX Bar: 12891750
Lackey Hershman, LLP
2102 Oak Lawn Ave.,
Ste. 777
Dallas, TX 75219
Phone: (214) 560-2201
Fax: (214) 560-2209
rlm@lhlaw.com

Counsel for Appellants

CERTIFICATE OF INTERESTED PERSONS

Appellate Case No. 16-11220; Interlocutory Appellate Case No. 15-11067; Trial Court Case No. 4:15-cv-377-A; *American Humanist Association, et al. v. Birdville Independent School District, 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.

1. American Humanist Association, Plaintiff/Appellant;
2. Isaiah Smith, Plaintiff/Appellant;
3. Monica L. Miller; Luff Law Firm, PLLC (Patrick A. Luff); Lackey Hershman LLP (Roger L. Mandel); attorneys for Plaintiffs/Appellants
4. Jack McCarty, Defendant/Appellee;
5. Joe Tolbert, Defendant/Appellee;
6. Brad Greene, Defendant/Appellee;
7. Richard Davis, Defendant/Appellee;
8. Ralph Kunkel, Defendant/Appellee;
9. Cary Hancock, Defendant/Appellee;
10. Dolores Webb, Defendant/Appellee;
11. Birdville Independent School District, Defendant/Appellee;

12. Edwards Claims Administration, insurer for Defendants/Appellees;

13. Walsh Gallegos Treviño Russo & Kyle P.C. (D. Craig Wood and Katie E. Payne), Attorneys for Defendants/Appellees Jack McCarty, Joe Tolbert, Brad Greene, Richard Davis, Ralph Kunkel, Cary Hancock, and Dolores Webb.

s/ Monica L. Miller
MONICA L. MILLER
Attorney of record for Appellants

STATEMENT REGARDING ORAL ARGUMENT

This case seeks to uphold decades of binding Establishment Clause jurisprudence governing prayer in the public school context. The Establishment Clause unquestionably prohibits: (1) the inclusion of prayer in public school events and (2) public school officials from participating in prayers with students during school events. It is undisputed that the school district in this case: (1) includes prayers in school board meetings where students are always present and (2) participates in those prayers with students. Therefore, the challenged practice is unconstitutional.

Although reversal in Plaintiffs-Appellants' favor will prove inevitable in light of the caselaw, Plaintiffs-Appellants nonetheless request oral argument given what is at stake: the freedom from coercion of impressionable schoolchildren in the public school context. The importance of this issue alone warrants the Court's full attention under FED. R. APP. P. 34(a). In fact, this Court already deemed the present case worthy of oral argument as to Defendants-Appellees' interlocutory appeal (Case No. 15-11067) and granted the parties' joint motion to consolidate that oral argument with the oral argument on the present appeal. (Order, Doc. No. 00513635310, August 12, 2016).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

Other Authorities

JURISDICTIONAL STATEMENT

The District Court had jurisdiction under 28 U.S.C. §§ 1331 and 1343 because this action involves constitutional claims brought under 42 U.S.C. § 1983. On August 1, 2016, the court granted Defendants-Appellees' motion for summary judgment and denied Plaintiffs-Appellants' request for summary judgment under FED. R. CIV. P. 56(f)(1). (ROA.2185-91)(ROA.2192). Plaintiffs-Appellants filed a timely notice of appeal on August 10, 2016. (ROA.2193-95). This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. The Establishment Clause prohibits school districts from permitting student-initiated, student-led, prayer by student-selected speakers as part of a school-sponsored event. Further, *every* appellate case involving a school board prayer practice has held it unconstitutional. The school district has a longstanding, ongoing practice of opening school board meetings with student prayers delivered to an audience of students, faculty, and citizens assembled at its behest. Does this practice violate the Establishment Clause?

   a. The Supreme Court and this Court have made clear that school prayer cases are governed by the traditional Establishment Clause tests enunciated in *Lemon*, *Lee*, and *Santa Fe*. Did the District Court err in holding that the school prayer practice is not governed by school prayer cases?

   b. The Supreme Court carved out a very narrow exception to Establishment Clause jurisprudence exclusively for certain legislative prayer practices that are an "internal act" solely to accommodate the religious needs of legislators. It has repeatedly held that this exception does *not* apply to public school events. The school district's practice involves student prayers at public school events. It concedes its

practice is for the benefit of students, not legislators. Did the court err in holding that the practice qualifies for the legislative exception?

2. Regardless of whether student prayers at board meetings constitute government speech or private speech, the Establishment Clause strictly prohibits school officials from participating in prayer with students during school-sponsored activities. School officials, including board members and principals, regularly participate in student prayers delivered at school-sponsored board meetings. Does such participation violate the Establishment Clause? Did the District Court err in completely ignoring plaintiffs' challenge to this practice?

STATEMENT OF THE CASE

Plaintiffs-Appellants challenge a school district's longstanding practice of: (1) opening school board meetings with prayers; (2) inviting students and only students to deliver the prayers; and (3) participating in those prayers with the students (collectively "Prayer Practice"), as violative of the Establishment Clause.[1] They seek a permanent injunction, declaratory relief, damages, and attorneys' fees and costs. (ROA.143¶2,154-55¶84).

Plaintiffs-Appellants are Isaiah Smith, a 2014 Birdville High School alumnus and local resident, and American Humanist Association ("AHA") (collectively "Smith/AHA").[2] Defendants-Appellees are Birdville Independent School District ("BISD") and its Board of Trustees ("Board"), sued in their official and individual capacities (collectively "BISD" unless otherwise noted).[3]

A. Statement of Facts

BISD's Board holds regular monthly meetings in the District Administration Building.[4] These meetings are open to the public and are the primary means for

[1] (ROA.142-43¶1,146-47¶¶31-37,149¶¶49-50,151-52¶¶63-72,153-55¶¶79-84) (ROA.1147)
[2] (ROA.143-44¶¶5-6)(ROA.1147-48)(ROA.1336)(ROA.1362)
[3] (ROA.144-45¶¶7-15)(ROA.1481-89)
[4] (ROA.35-42)(ROA.146¶¶24-27)(ROA.582)(ROA.625,628)(ROA.1133-36) (ROA.1144-45)(ROA.1230-31,1233)(ROA.1467)(ROA.1481-89)(ROA.1491-92) (ROA.1494-95)(ROA.1497-1501,1503-10,1512,1514-1661,1664-1702,1704-1713,1715-19)(ROA.1721-25,1727-38,1740,1742-52,1754-65,1768-79,1781,1783-93,1796,1798-1800,1804-10,1812-23,1825-36,1838-54,1856-57,1859)

students, faculty, and citizens to observe and participate in district business.[5] BISD admits its meetings constitute "school-sponsored" events. (ROA.1247).

Since 1997, it has been BISD's policy, practice, and custom to open Board meetings with prayer.[6] Smith attended at least four meetings between December 2014 and June 2015, and had unwelcome contact with BISD's opening prayers at three of those four meetings.[7]

Moreover, from 1997 until March 2015, BISD's agendas and minutes had a heading for "Invocation."[8] BISD's documents reflect the fact that "Invocation" means "prayer."[9] During the meetings, the "invocation" is often verbally

---

(ROA.1861,1864,1866,1868,1870,1872,1874,1876,1878,1880,1882,1884,1886, 1888,1890,1893,1895,1897,1899,1901,1903,1905,1907,1909,1911,1913,1916, 1918,1920,1922,1924-25,1927,1929,1931,1933,1935,1937,1939,1942,1944,1946, 1948,1950,1952,1954,1957,1959,1961,1963,1965,1967,1969,1971,1973,1975, 1977,1979,1981,1983,1985,1987,1989,1991,1993,1996,1998,2002,2004,2006) (ROA.2076,2081)

[5] (ROA.146¶¶26,29)(ROA.1252-53)(ROA.1382)(ROA.1491-92)(ROA.1494-95) (ROA.1497-1719)(ROA.1721-1859)(ROA.1861-2074)

[6] (ROA.783-86)(ROA.1105-10)(ROA.1113-21)(ROA.1126-29)(ROA.1131) (ROA.1134)(ROA.1140)(ROA.1143)(ROA.1173-74)(ROA.1187-88)(ROA.1233) (ROA.1296)(ROA.1428)(ROA.1497-1705)(ROA.1721-1845)(ROA.1861-2056)

[7] (ROA.786)(ROA.1054-56)(ROA.1063-68)(ROA.1231,1233)(ROA.1702) (ROA.1844)

[8] (ROA.1173)(ROA.1187-88)(ROA.1296-99)(ROA.1467-68)(ROA.1497-1705) (ROA.1721-1845)(ROA.1861-2056)

[9] (ROA.1105-10)(ROA.1113-21)(ROA.1126-29)(ROA.1428)(ROA.1467) (ROA.1478).*See also*(ROA.783-87)(ROA.790,795,821,828,830,834,840,850,852, 862,912,915,919,922,1005,1028,1043,1052,1056)

introduced as "the prayer" or "our prayer."[10]

The overwhelming majority of invocations delivered from 1997 until present have been prayers.[11] And most of BISD's prayers are Christian, making references to "Jesus" and/or "Christ."[12] Indeed, only one non-Christian prayer was delivered (the "Indian Prayer"), and that was seven years ago.[13] No non-Christian prayer has been delivered since.[14]

BISD invites students to deliver its invocations rather than adults or clergy.[15] And it primarily targets elementary and middle schoolchildren.[16] Of the 101 meetings held between February 2008 and June 2016,[17] elementary and middle

[10] (ROA.783,786)(ROA.790,795,821,828,830,834,840,850,852,862,912,915,919, 922,1005,1028,1043,1052,1056)
[11] (ROA.783-87)(ROA.789-801,806-12,817-34,839-56,860-67,872-79,895-930, 936-47,951-84,993-99,1003-23,1026-34,1038-47,1051-68,1080-89,1094-96) (ROA.1105-10)(ROA.1113-21)(ROA.1126-29)
[12] (ROA.783-87)(ROA.797-98,800-01,809,812,852-53,866-67,883,885-86,900, 905-06,912-13,915-16,922-23,938,956,959,962-63,965-66,969-70,972-73,980-81, 999,1010,1013-14,1016-17,1028,1043-44,1052-53,1061-62,1082-83,1085-86, 1088-89,1095-96)(ROA.1173)(ROA.1265)(ROA.1323-24). *See also*(ROA.819, 834,896-97,908-09,1031)
[13] (ROA.783)(ROA.845)(ROA.1265)
[14] (ROA.783-87)(ROA.847-1100)(ROA.1265)(ROA.1323-24)
[15] (ROA.44)(ROA.783-87)(ROA.789-1096)(ROA.1105-10)(ROA.1113-21) (ROA.1123-24)(ROA.1126-29)(ROA.1143-45)(ROA.1167)(ROA.1497-1719) (ROA.1721-2074)
[16] (ROA.783-87)(ROA.789-1100)(ROA.1105-10)(ROA.1113-21)(ROA.1123-24) (ROA.1126-29)(ROA.1143-45)(ROA.1167)(ROA.1497-1719)(ROA.1722-2074)
[17] Audio recordings date back to February 2008. (ROA.1105)(ROA.1113)

schoolchildren delivered the invocations 84 times.[18] BISD also invites students exclusively to deliver the pledges.[19]

In addition to the student presenters, other students regularly attend Board meetings to be honored by the Board for academic and extracurricular achievements.[20] For example, BISD has honored Valedictorians, Salutatorians, and National Merit Scholars at every May meeting between 1999 and 2014.[21] Likewise, it has invited a student choir or band to play at nearly every December meeting since 1997.[22] BISD also presented awards to elementary and middle

[18] (ROA.783-87)(ROA.789-1100)(ROA.1105-10)(ROA.1113-21)(ROA.1123) (ROA.1126-29)
[19] (ROA.783-87)(ROA.789-1100)(ROA.1123)(ROA.1167)(ROA.1497-1719) (ROA.1721-2074)
[20] (ROA.1176)(ROA.1499,1502,1506,1511-14,1523-25,1535-36,1538,1544-45,1556,1559,1566-67,1569-71,1575,1577,1580-84,1590,1595-97,1599,1603,1608-09,1611,1615,1620-21,1623,1627,1632-33,1638-39,1644-46,1652,1657-58,1664-65,1667,1670-72,1674,1677,1681-83,1689-90,1692-93,1695-96,1699,1701-02,1704-05,1708-09,1711-13,1716,1719)(ROA.1721,1726, 1729,1733,1737, 1739-41,1743,1749,1751,1753-54,1756,1760,1764,1766-68,1773-74,1780-83,1788,1794, 1796,1804-05,1807,1809,1811-14,1818,1822, 1824-25,1827,1830-31,1833,1835, 1837-38,1840-46,1848-50,1852,1857-58)(ROA.1869,1871,1875, 1881,1889,1892,1894,1904,1915,1917,1921,1930, 1941,1951,1953,1964,1966,1976,1986,1988, 1997,1999,2003,2009,2035,2037-38,2041, 2043,2051-52,2054-57,2060,2065, 2067,2072)
[21] (ROA1513,1523,1535,1544,1556,1569,1581-82,1595,1608,1620,1632,1644, 1657,1670,1682,1685)(ROA.1726,1739,1753,1766-67,1780,1794,1811,1824, 1837)(ROA.1869)(ROA.1892,1915,1941,1964,1986,2009,2025,2041)
[22] (ROA.1502,1518,1530,1540,1551,1563,1589,1603,1615,1627,1639,1652,1665, 1677,1690,1702,1716)(ROA.1732,1774,1760,1774,1805,1818,1831,1844,1858) (ROA.1881,1904,1930,1953,1976,1999,2018,2035,2052,2072)

school students for the "Holiday Greeting Card Winner" in 2009 and from 2012 to 2015.[23]

Principals and Board members regularly ask the students and citizens present to participate in the prayers with phrases such as, "will you please rise," "please stand," or "remain standing" for the prayer.[24] The Board specifically instructs principals to ask the audience to "please stand" or "please rise."[25] For example, at the September 2010 meeting, an elementary principal announced: "[S.S]. will give the invocation tonight, so if everyone will please stand." (ROA.885)(ROA.1785). At the January 2013 meeting, a Board member asked everyone to "remain standing" before an elementary student delivered the prayer.[26]

The prayer is typically delivered after the pledges when the audience is already standing.[27] To opt out, a student must affirmatively sit down or walk out of the room immediately after the pledges.

---

[23] (ROA.1494)(ROA.1638,1677,1690,1702,1716,1773,1818,1831,1844,1857) (ROA.1951,2018,2035,2052,2071)

[24] (ROA.783-87)(ROA.855-56,885,905,919,922,926,929,938,941,946,949,955-56,962,972,976,983,995,1009,1013,1016)(ROA.1105-10)(ROA.1174-75) (ROA.1261-62)

[25] (ROA.1105-10)(ROA.1131)(ROA.1133)

[26] (ROA.983)(ROA.1678)(ROA.1819)

[27] (ROA.783-87)(ROA.812,830,834,840-41,844-45,850,852-53,862,866-67,876-77,879-80,888-89,912-13,946-47,949,952-53,980,983,995,999,1005,1007,1016-17,1019-20,1022-23,1028,1031,1033-34,1040-41,1044,1046-47,1052-53,1055-56, 1058,1061-62,1064-65,1067-68,1082-83,1085-86,1088-89,1095-96)(ROA.1131) (ROA.1133,1136)(ROA.1182)(ROA.1189)(ROA.1196)(ROA.1211)(ROA.1217)

A principal formally introduces the students giving the invocation and pledges to the audience.[28] For example, at the August 2011 meeting, an elementary principal said, "I'd like to introduce [C.A.], who is going to do our prayer." (ROA.922).

The principal usually announces that these students are "representing" their respective school.[29] At the September 2013 meeting, for example, an elementary principal declared: "we have two wonderful fifth graders here representing us tonight for the invocation and the pledge." (ROA.1009)(ROA.1828). The students at the December 2015 meeting were similarly introduced as "representing their campus." (ROA.1095).

Board members and other school officials, including the Superintendent and principals, customarily participate in the student prayers.[30] At the August 2014 meeting, for instance, an elementary principal announced, "Our prayer will be led by [H.N]," and proceeded to bow her head while standing next to the student.[31] Indeed, in the vast majority of videos where they are visible, most Board members are seen bowing their heads in prayer. (ROA.783-87). All but one Board member

[28] (ROA.783-87)(ROA.789-1101)(ROA.1131)(ROA.1133-36)(ROA.1378) (ROA.1721-1859)
[29] (ROA.797)(ROA.858)(ROA.861)(ROA.883)(ROA.885)(ROA.929)(ROA.932) (ROA.1009)(ROA.1030)(ROA.1046)(ROA.1067)(ROA.1081)(ROA.1085) (ROA.1088)(ROA.1091)(ROA.1095)
[30] (ROA.24¶49)(ROA.783-87)(ROA.922)(ROA.1043)(ROA.1182)(ROA.1189) (ROA.1196)(ROA.1203)(ROA.1211)(ROA.1217)
[31] (ROA.786)(ROA.1043)(ROA.1840)

even admitted that he or she participates in the prayer.[32] The Superintendent, who has attended every meeting since 2011, admitted he participates in the prayers, as does the associate superintendent. (ROA.1261,1264-66)(ROA.1316-17).

At the "conclusion, the student will receive a certificate and will pose for a picture with a Board Member." (ROA.1133,1136)(ROA.1138-41). Then BISD sends the student a "thank you" letter. (ROA.1134-35)(ROA.1138-41). For instance, after a student offered a prayer referring to the "Father, Son and Holy Spirit," Board member Tolbert wrote: "Thank you for the beautiful Invocation you gave at the Board of Trustees Meeting on April 28, 2011 and for allowing us to have a copy. I appreciate the time and thought you put into writing the Invocation. You did an outstanding job and I know your school is very proud of you." (ROA.1140). The February 2016 letter stated in part: "Student participation in our Board meetings is very important to our Board members and our staff. You did a great job *representing* Richland Elementary." (ROA.1141)(emphasis added).

The Board instructs the principal to meet with the students beforehand to "go over the process and show [the students] where they will be standing to address the Board." (ROA.1133-36). The students are told where to sit (with their campus administrator in a reserved front row seat) and how to act. The Board's

[32] (ROA.1182)(ROA.1189)(ROA.1196)(ROA.1203)(ROA.1211)(ROA.1217) (ROA.1223)

memo instructs principals: "students have a choice – prayer, devotion, poem, etc." (ROA.1134).

Each November, the Board provides principals with a schedule for the year's "Board Meeting Student Participation Invocation and Pledge Leaders," assigning a different school to provide students each month. (ROA.1143-45). From 1997 to March 2015, BISD's process of selecting students was entirely subjective. (ROA.1165)(ROA.2123-25). The principal at Richland High School stated: "Many times we have used faculty members [sic] children." (ROA.2124). At North Richland Middle, "staff was involved to bring a variety of well rounded students who would represent our campus and the BISD in an honorable way." (*Id.*). At W.A. Porter Elementary, the "fifth grade teachers had input as to who would represent our school." (ROA.2125). Hardeman Elementary "asked the 5th grade teachers to select two students that would be dependable." (ROA.2123). Sometimes, school officials would review a student's invocation beforehand or have the student practice it with them. (ROA.2123-25).

On December 11, 2014, Plaintiff-Appellant Smith attended a meeting to address the Board about bullying at his high school.[33] A school official asked the audience to stand for the pledges and the invocation. (ROA.1055)(ROA.1147). An

[33] (ROA.1147)(ROA.1231-33)(ROA.1844)

elementary student delivered the prayer.[34] Smith felt affronted by the Board's opening prayer and that it represented BISD "favoring religion over nonreligion." (ROA.1382).

On December 15, 2014, AHA sent a letter to BISD informing it that including prayer in Board meetings violates the Establishment Clause. The letter also warned that the Board's "actions are further unconstitutional insofar as school administrators are participating in prayer with students." AHA asked BISD to cease such practices and to provide "written assurances that prayer will not be included in future School Board meetings." (ROA.1147-54).

On March 19, 2015, BISD responded to AHA stating it would not discontinue opening meetings with prayer. (ROA.1156-58). Instead, BISD merely changed the language in the agendas from "INVOCATION" to "Student Expression," asserting that students would now be permitted to deliver a "one-minute" "student expression," which can include "prayer," to open its meetings. (ROA.1157-58)(ROA.1161-62).

Since March 2015, prayers have continued to be delivered at Board meetings.[35] Indeed, over half of the so-called "student expressions" have been

[34] (ROA.1055-56)(ROA.1156)(ROA.1233)(ROA.1702)(ROA.1844)
[35] (ROA.786-87)(ROA.1064-65)(ROA.1067-68)(ROA.1082-83)(ROA.1085-86) (ROA.1088-89)(ROA.1095-96)(ROA.1110)(ROA.1120-21)(ROA.1174) (ROA.1233)

prayers or religious poems.[36] Of the prayers, most made Christian references; no explicitly non-Christian prayers have been delivered.[37]

The Board continues to retain authority over "Student Expression," including the authority to "cut off" expression it deems "improper or offensive." (ROA.1312-13). School officials, including Board members and principals, continue to participate in these prayers with students.[38] BISD does not claim that it has ceased such participation. And the Prayer Practice still targets impressionable young students.[39] Since March 2015, elementary and middle schoolchildren (mostly elementary) delivered *all but one* of the invocations.[40]

BISD admits that the sole reason it changed the agenda language was to avoid litigation.[41] The Associate Superintendent testified that he recommended the change specifically so that "we wouldn't be subject to litigation." (ROA.1300).

---

[36] (ROA.786-87)(ROA.1064-65)(ROA.1067-68)(ROA.1082-83)(ROA.1085-86) (ROA.1088-89)(ROA.1095-96)(ROA.1110)(ROA.1120-21)(ROA.1174) (ROA.1233)
[37] (ROA.786-87)(ROA.1082-83)(ROA.1085-86)(ROA.1088-89)(ROA.1095-96) (ROA.1173)
[38] (ROA.787)(ROA.1182)(ROA.1189)(ROA.1196)(ROA.1203)(ROA.1211) (ROA.1217)(ROA.1264-66)(ROA.1316)
[39] (ROA.783-87)(ROA.1105-10)(ROA.1113-21)(ROA.1123)(ROA.1126-29) (ROA.2123-25)
[40] (ROA.786-87)(ROA.1063-65,1067-68,1073,1080-89,1094-96)
[41] (ROA.1249-50,1254-55)(ROA.1294-1300)

B. Procedural History

On June 15, 2015, Smith/AHA filed their Amended Complaint. (ROA.142-56). On August 14, BISD filed a motion to dismiss, asserting failure to state a claim and qualified immunity. (ROA.174-76). On September 24, the court denied BISD's motion based on "the record, and applicable authorities." (ROA.256-57). On October 26, the individual-capacity defendants filed an interlocutory appeal. (ROA.282-83).

Notwithstanding ongoing discovery disputes and outstanding discovery due from BISD, on June 23, 2016, BISD filed its motion for summary judgment.[42] On July 18, Smith/AHA responded, opposing BISD's motion and seeking summary judgment in their favor under FED. R. CIV. P. 56(f)(1). (ROA.707-2125).[43]

On August 1, at 3:59 p.m., BISD filed its reply. (ROA.2173-84). At 4:18 p.m., the court issued its opinion granting BISD's motion in its entirety. (ROA.2185-91). On August 8, Smith/AHA timely filed their notice of appeal. (ROA.2193-95).

---

[42] (ROA.475-87)(ROA.541-44)(ROA.545-72)(ROA.642-65)

[43] On June 17, Smith/AHA had sought an extension of time until 30 days after receipt of all BISD's outstanding discovery to file their motion for summary judgment. (ROA.484¶24). Smith/AHA diligently pursued discovery, made every effort to meet the court's deadlines, and demonstrated that any delay resulted from BISD's refusal to timely produce discovery. (ROA.478¶9-483¶22). Despite being Smith/AHA's first request for an extension of the dispositive motion deadline, the court denied the request on July 11. (ROA.705-06)

SUMMARY OF THE ARGUMENT

If the Establishment Clause prohibits school districts from permitting the delivery of student prayers at voluntary, extracurricular school events, then it must also prohibit the very same prayers at formal school board meetings where students are always present and specifically invited by the board. Any other conclusion would defy precedent and logic.

Yet the District Court sustained a school district's practice authorizing students to present proselytizing prayers to students and citizens assembled at its behest in a quintessential school-sponsored setting. In *Santa Fe*, both this Court and the Supreme Court held that a nearly identical practice—permitting student-selected students to deliver a brief "invocation and/or message" at informal football games—violated the Establishment Clause. In fact, this Court held that such prayers would be unconstitutional even if "spontaneously initiated."

BISD's practice, to the extent it is distinguishable from that found unconstitutional in *Santa Fe*, is even worse. Most notably, BISD targets impressionable elementary students and in this formal, manifestly school-sponsored setting, the power imbalance between the State and students is even more pronounced than at football games. Further, unlike in *Santa Fe* where the school took a completely hands-off approach, BISD officials are heavily involved in the prayers by:

- Announcing that the student "represents" the school
- Telling students where to sit and how to act
- *Participating* in them, which is, by itself, unconstitutional

The District Court not only ignored *Santa Fe* altogether, but also an *entire claim*: that school officials participating in the student prayers constitutes an independent violation. This Court held in *Duncanville* that coaches participating in student-led prayer during basketball practices violated the Establishment Clause. Necessarily then, it is unconstitutional for principals and board members to participate in student prayers at even more formal school events. To uphold the District Court's ruling would create a paradoxical outcome foreclosed by precedent.

With BISD's entire practice unconstitutional under *Santa Fe* and *Duncanville*, no further analysis is necessary. But the court's opinion applied the incorrect legal standard, which alone requires reversal. The Supreme Court and this Court have made abundantly clear that school prayer/expression cases are governed by the traditional Establishment Clause tests: the tripartite-*Lemon* test, *Lee*'s coercion test, and the endorsement test.

The District Court thus erred by disregarding *Lemon*, *Lee*, *Santa Fe*, and *Duncanville*, opting instead for an analysis unrelated to public schools or student prayer. Specifically, it ruled that BISD's student prayer/expression practice is

governed by an extremely narrow exception carved out in *Marsh* and *Greece* exclusively for legislative prayer practices that are an "internal act" solely "to accommodate the spiritual needs of lawmakers and connect them to a tradition dating to the time of the Framers." This is a school prayer case involving young students, principals, school board members, and a so-called "Student Expression" practice for which there is no historical analog. Crucially, BISD even concedes that its Prayer Practice is not an internal act for the Board, removing it from *Marsh/Greece*'s logic.

Moreover, the Supreme Court has repeatedly and explicitly held in at least three cases—*Edwards*, *Lee* and, most recently, *Greece*—that the *legislative* prayer exception is inapplicable in the "public school context." Notably, *every* appellate court that has considered a school board prayer practice, including this Court, held it unconstitutional. The District Court completely ignored these cases, resting its entire opinion on one distinguishable, pre-*Greece* district court decision.

Regardless, even if applicable, the *Marsh/Greece* legislative exception requires a highly fact-intensive analysis, inconsistent with the District Court's *one* paragraph analysis. A proper analysis reveals that the Prayer Practice fails *Marsh/Greece* because it is not intended to accommodate the religious needs of the "Legislature's 'own members,'" but is decidedly for the benefit of students. Thus, the Court must reverse.

ARGUMENT

I. Standard of Review

Summary judgment "is reviewed de novo, under the same standards used by the district court." *Carter v. RMH Teleservices, Inc*., 205 F. App'x 214, 217 (5th Cir. 2006). BISD was required to show "that there is no genuine dispute as to any material fact" and that it "is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). It is axiomatic that the "'evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor.'" *Tolan v. Cotton*, 134 S. Ct. 1861, 1863 (2014)(citation omitted). Additionally, the court may grant summary judgment for a nonmovant under FED. R. CIV. P. 56(f)(1).

II. BISD was not entitled to summary judgment because its Prayer Practice—in both its longstanding and current iterations—violates the Establishment Clause under decades of controlling authority and unanimous appellate authority.

BISD's practice permits "students to present overtly sectarian and proselytizing religious prayers to a group of students [and citizens] clearly assembled at the behest of the government." *Doe v. Santa Fe Indep. Sch. Dist*., 168 F.3d 806, 821 n.11, 823 (5th Cir. 1999), *aff'd*, 530 U.S. 290 (2000). Such a practice does not merely cross the line between separation of church and state but "plunge[s] over the cliff." *Id.*

The Establishment Clause requires the "government [to] remain secular, rather than affiliate itself with religious beliefs." *Cty. of Allegheny v. ACLU*, 492

U.S. 573, 610 (1989). The Supreme Court "has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools," *Edwards v. Aguillard*, 482 U.S. 578, 583-84 (1987), where "there are heightened concerns with protecting freedom of conscience from [even] subtle coercive pressure." *Lee v. Weisman*, 505 U.S. 577, 592 (1992).

The Supreme Court has specifically held that "permitting student-led, student-initiated prayer" at school-sponsored events unconstitutionally endorses religion and coerces students to participate in religious activity. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 301-03, 308 (2000). In *Santa Fe*, the Court held such a practice unconstitutional even though student-selected students would deliver the messages at voluntary high school football games and it was possible no prayer would ever be delivered. *Id.* at 296-97, 309-16. Notably, this Court found that such student-led prayers would be unconstitutional *even if* "spontaneously initiated." 168 F.3d at 823.

Lee and *Santa Fe* are "merely the most recent in a long line of cases carving out of the Establishment Clause what essentially amounts to a per se rule prohibiting public-school-related or -initiated religious expression or indoctrination." *Doe v. Duncanville Indep. Sch. Dist.*, 994 F.2d 160, 165 (5th Cir. 1993)(citing five Supreme Court cases). The Supreme Court has issued numerous decisions "that prohibits prayer in the school classroom *or environs*." *Id.* at 164

(emphasis added).[44] The same is true of this Court.[45] The Supreme Court recently reiterated that in the public school setting where "school authorities maintain[] close supervision over the conduct of the students," an "invocation [i]s coercive." *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1827 (2014).

The jurisprudence analyzing similar practices is decidedly against BISD. *Every* appellate court that has addressed school board prayers, including this Court, has concluded that such prayers are unconstitutional. *See Doe v. Indian River Sch. Dist*., 653 F.3d 256 (3d Cir. 2011); *Doe v. Tangipahoa Parish Sch. Bd*., 473 F.3d 188, 197 (5th Cir. 2006), *vacated on standing grounds*, 494 F.3d 494 (5th Cir. 2007)(en banc); *Bacus v. Palo Verde Unified Sch. Dist. Bd. of Educ*., 52 F. App'x 355 (9th Cir. 2002); *Coles v. Cleveland Bd. of Educ*., 171 F.3d 369 (6th Cir. 1999). *See also Freedom From Religion Found. v. Chino Valley Unified Sch. Dist. Bd. of Educ*., 2016 U.S. Dist. LEXIS 19995 (C.D. Cal. Feb. 18, 2016).

Additionally, the Supreme Court and this Court have unequivocally held that the Establishment Clause prohibits school officials from *participating* in student-led prayer during school-sponsored activity. *See Bd. of Educ. v. Mergens*, 496 U.S.

---

[44] *E.g.*, *Santa Fe*, *supra*; *Lee*, *supra*; *Wallace v. Jaffree*, 472 U.S. 38 (1985); *Sch. Dist. Abington v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962); *McCollum v. Bd. of Educ.*, 333 U.S. 203 (1948)

[45] *E.g.*, *Santa Fe*, 168 F.3d at 816; *Ingebretsen v. Jackson Pub. Sch. Dist*., 88 F.3d 274 (5th Cir. 1996); *Doe v. Duncanville Indep. Sch. Dist*., 70 F.3d 402 (5th Cir. 1995)("*Duncanville-II*"); *Karen B. v. Treen*, 653 F.2d 897 (5th Cir. 1981), *aff'd*, 455 U.S. 913 (1982)

226, 251-52 (1990); *Duncanville-II*, 70 F.3d at 406 ("DISD representatives' participation in these prayers improperly entangles it in religion and signals an unconstitutional endorsement of religion.").

Courts have been virtually unanimous in finding prayers unconstitutional in *any school-sponsored event*, regardless of whether they are student-led, student-initiated, uncensored, or "spontaneously initiated," including at:

- board meetings, *supra*
- games and practices,[46]
- graduations,[47]
- assemblies,[48] and
- award ceremonies.[49]

Indeed, prayer delivered in virtually *any* government-sponsored context violates the Establishment Clause, including at a:

---

[46] *E.g.*, *Santa Fe*, *supra*, *Borden v. Sch. Dist.*, 523 F.3d 153 (3d Cir. 2008); *Jager v. Douglas Cty. Sch. Dist*., 862 F.2d 824, 831 (11th Cir. 1989)

[47] *E.g.*, *Lee*, *supra*; *Santa Fe*, 168 F.3d at 816; *Lassonde v. Pleasanton Unified Sch. Dist.*, 320 F.3d 979, 983 (9th Cir. 2003); *Cole v. Oroville Union High Sch.*, 228 F.3d 1092, 1104 (9th Cir. 2000); *ACLU v. Black Horse Pike Reg'l Bd. of Educ*., 84 F.3d 1471 (3d Cir. 1996); *Harris v. Joint Sch. Dist.*, 41 F.3d 447 (9th Cir. 1994), *vacated as moot*, 515 U.S. 1154 (1995); *Workman v. Greenwood Cmty. Sch. Corp*., 2010 U.S. Dist. LEXIS 42813 (S.D. Ind. 2010); *Doe v. Gossage*, 2006 U.S. Dist. LEXIS 34613 (W.D. Ky. May 24, 2006); *Appenheimer v. Sch. Bd.*, 2001 WL 1885834 (C.D. Ill. 2001); *Gearon v. Loudoun Cty. Sch. Bd.*, 844 F. Supp. 1097 (E.D. Va. 1993)

[48] *Collins v. Chandler Unified Sch. Dist*., 644 F.2d 759 (9th Cir. 1981)

[49] *M.B. v. Rankin Cty. Sch. Dist*., 2015 U.S. Dist. LEXIS 117289 (S.D. Miss. 2015)

- military institute,[50]
- village-sponsored festival,[51]
- courtroom,[52]
- police-sponsored prayer vigil,[53]
- city-sponsored memorial prayer ceremony,[54] and
- mayor's community prayer breakfast.[55]

Even a nondenominational prayer on a state map, which had limited distribution and could "seem utterly innocuous," was unconstitutional. *Hall v. Bradshaw*, 630 F.2d 1018, 1019-21 n.1 (4th Cir. 1980).

Nothing in the record indicates that "the instant case materially differs from this long-established line of cases." *Duncanville*, 994 F.2d at 165.

III. The court erroneously held that BISD's student Prayer Practice qualifies for the narrow legislative prayer exception rather than the binding and indistinguishable school prayer cases.

A. The constitutionality of BISD's school prayer practice is governed by the tests from school prayer cases.

This Court made clear that challenges to school prayer practices, as here, are evaluated using "three complementary (and occasionally overlapping) tests"

[50] *Mellen v. Bunting*, 327 F.3d 355, 367-69 (4th Cir. 2003)
[51] *Doe v. Village of Crestwood*, 917 F.2d 1476 (7th Cir. 1990)
[52] *N.C. Civil Liberties Union v. Constangy*, 947 F.2d 1145, 1150 (4th Cir. 1991)
[53] *Am. Humanist Ass'n v. City of Ocala*, 127 F. Supp. 3d 1265, 1282 (M.D. Fla. 2015)
[54] *Hewett v. City of King*, 29 F. Supp. 3d 584, 596, 636 (M.D.N.C. 2014)
[55] *Newman v. City of East Point*, 181 F. Supp. 2d 1374 (N.D. Ga. 2002)

established by the Supreme Court. *Santa Fe*, 168 F.3d at 814-16. The first "is the disjunctive three-part *Lemon* test, under which a government practice is unconstitutional if (1) it lacks a secular purpose; (2) its primary effect either advances or inhibits religion; or (3) it excessively entangles government with religion." *Id*. Second, under *Lee*'s "Coercion Test," "school-sponsored religious activity" is analyzed to determine the extent "to which it has a coercive effect on students." *Id.* Third, under the "Endorsement Test," governmental action that conveys "a message that religion is 'favored,' 'preferred,' or 'promoted,'" is unconstitutional. *Id.* (citation omitted). *See also Duncanville-II*, 70 F.3d at 405 (finding these tests controlling in school prayer cases). Government action "violates the Establishment Clause if it fails to satisfy any" of these tests. *Edwards*, 482 U.S. at 583.

BISD's school Prayer Practice is unconstitutional under *every* test, *infra* at 45-67. It clearly "would *not* survive the *Lemon* test." *Tangipahoa*, 473 F.3d at 197. *E.g. Santa Fe*, 530 U.S. at 306, 314-20 (practice permitting student-led, student-initiated "invocation and/or message" at school events failed *Lemon*). BISD failed to show otherwise. Instead, BISD argued two conflicting, yet equally insufficient, defenses:

(1) the practice is not about "prayer," but rather constitutes an opportunity for students to "speak freely," regardless of solemnization, protected by the Free Speech and Free Exercise Clauses (ROA.559-62); and

(2) the practice qualifies for the extremely narrow, historical exception to Establishment Clause jurisprudence, and *Lemon* in particular, carved out in *Marsh v. Chambers*, 463 U.S. 783 (1983) and *Greece* exclusively for "legislative *prayer*," which allows *legislatures* to open sessions with a solemnizing prayer for the *sole* benefit of legislators. (ROA.563-69)(ROA.2182). *See McCreary Cty. v. ACLU*, 545 U.S. 844, 860 n.10 (2005)(describing *Marsh* as a "special instance"); *Jager*, 862 F.2d at 829 n.9 ("*Marsh* created an exception to the *Lemon* test only for such historical practice" and not public school activity).

BISD cannot have it both ways. *E.g. Snyder v. Murray City Corp*., 159 F.3d 1227, 1233 (10th Cir. 1998)("legislative prayer" is government speech, not "equal public access" for private speech). The District Court agreed. It properly rejected BISD's first argument because "student-led, student-initiated prayers" at school-sponsored events are not "'private' speech" but government speech as a matter of law. *See Santa Fe*, 530 U.S. at 302-03, 310-15. Nonetheless, it erroneously concluded that *student prayers* are not governed by *student prayer* cases but rather the rare *legislative* exception. (ROA.2189).

This Court cannot seriously entertain the idea that BISD's *student* prayer and "*Student* Expression" practice—whereby *students* are permitted to "present overtly sectarian and proselytizing religious prayers" at quintessential *school*-sponsored events, *Santa Fe*, 168 F.3d at 821 n.11, is not governed by *student* prayer cases.

BISD even admitted this case is about "religious expression in the public schools." (ROA.559). It rested its primary argument on authorities governing schools.[56] Further, BISD concedes that its practice is for the benefit of students,[57] rather than an "internal act" for the Board, as required by the exception. *Greece*, 134 S. Ct. at 1825-26. Lest there be any doubt, however, Smith/AHA show below that the legislative exception is inapplicable to the Prayer Practice.

B. Student prayer does not qualify for the extremely limited "legislative prayer" exception.

1. The Supreme Court has repeatedly made clear that the legislative exception is inapplicable to the public school context.

The Supreme Court has consistently held that the *legislative* prayer exception does not apply to the "public school context." *Lee*, 505 U.S. at 592, 596-97. The Court treats "legislative prayer differently from prayer at school events." *Turner v. City Council*, 534 F.3d 352, 356 (4th Cir. 2008). *See Santa Fe*, 530 U.S.

[56] (ROA.180-82,189-92)(ROA.547-48,559-62)(ROA.2176-82)
[57] (ROA.191-92)(ROA.248)(ROA.551,553,562)(ROA.1156)(ROA.1299) (ROA.2112)

at 313; *Allegheny*, 492 U.S. at 590 n.40 ("state-sponsored prayer in public schools" is "unconstitutional"); *Edwards*, 482 U.S. at 583 n.4.

In *Edwards*, the Court held that the appropriate test in public school cases is *Lemon*, warning that *Marsh*'s 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." *Id.* at 581-82.

Further, the Court in *Lee* explicitly ruled that *Engel* and *Schempp* "*require* us to distinguish the public school context" from a "legislature." 505 U.S. at 592, 594-97 (emphasis added). *Santa Fe* subsequently held that cases "involv[ing] student prayer at…different type[s] of school function[s]" are governed "by…*Lee*" and *Lemon*. 530 U.S. at 301-02, 314. Notably, this Court itself observed:

> *Edwards*…deemed *Marsh* inapplicable to public schools…Likewise, in *Lee*…the Court…refused to extend its legislative-prayer exception to public school graduation ceremonies.

Tangipahoa, 473 F.3d at 199. *Edwards*, *Lee*, and *Santa Fe*, have not been overruled. Therefore, this Court is constrained by their holdings that the legislative exception is inapplicable to public schools.

Critically, *Greece* reaffirmed that the legislative exception does *not* apply to public schools and is limited "the world of mature adults." *Chino Valley*, 2016 U.S. Dist. LEXIS 19995, at *53 (citing *Greece*). The Court distinguished *Lee* and *Santa Fe*, stressing:

> This case can be distinguished from the conclusions and holding of *Lee*…[I]n the context of a graduation where school authorities maintained close supervision over the conduct of the students and the substance of the ceremony, a religious invocation was coercive as to an objecting student…*see also Santa Fe*…[T]he circumstances the Court confronted [in *Lee*] are not present in this case.

134 S. Ct. at 1827. Here, as in *Lee* and *Santa Fe*, and unlike *Greece*, "school authorities maintain[] close supervision over the conduct of the students and the substance of the [meeting]." *Id.* In fact, the Board exercises far *greater* control over its meetings than school boards in graduation cases. *E.g.*, *Harris*, 41 F.3d at 452-53 (permitting student prayer at graduation unconstitutional *even though* "the senior students…determine[d] every element of their graduations.").

Moreover, whereas adults may feel free to come and go as they please, the young students invited to BISD meetings to receive awards, perform, and deliver invocations and pledges are not considered to have this choice, as *Greece* made abundantly clear. 134 S. Ct. at 1825-26 ("Our tradition assumes that *adult citizens*, firm in their own beliefs, can tolerate and perhaps appreciate a ceremonial prayer delivered by a person of a different faith."); *id.* at 1827 ("Neither choice represents an unconstitutional imposition as to mature *adults*, who 'presumably' are 'not readily susceptible to religious indoctrination or peer pressure.'")(quoting *Marsh*, 463 U.S. at 792)(emphasis added).

Students are not ancillary to BISD's Prayer Practice either. As the Superintendent put it: "it is always a great thing to open a school board meeting

with involvement from your students since that's why you exist…[W]e're here for our students." (ROA.1250).

2. The lack of "unique history" dating back to the First Congress for "Student Expression" removes BISD's practice from *Marsh/Greece*'s logic.

The lack of "unique history" alone removes BISD's practice from the exception's narrow ambit. *Marsh*, 463 U.S. at 791-92. *Marsh* carved out a narrow exception to *Lemon* for legislative prayer based solely upon an "unambiguous and unbroken history of more than 200 years" of *Congressional* prayer. *Id*. The Court "granted *certiorari* limited to the challenge to the practice of opening sessions with prayers by a state-employed clergyman." *Id.* at 786. In upholding the practice, the Court relied on the fact that "Nebraska's practice is consistent with the manner in which the First Congress viewed its chaplains." *Id*. Several "states choose a chaplain who serves for the entire legislative session. In other states, the prayer [was] offered by a different clergyman each day." *Id.* at 795 n.18. Nebraska's century-old practice was "consistent with two centuries of national practice" and thus would not "be cast aside." *Id*. at 790.

Greece reiterated that the "Court's inquiry, then, must be to determine whether the prayer practice in the town of Greece fits within the tradition long followed in Congress and the state legislatures." 134 S. Ct. at 1819.

There is simply no "unique history" dating back to the First Congress for opening school board meetings with prayer, much less "Student Expression." *Edwards*, 482 U.S. at 581-82. *See Indian River*, 653 F.3d at 281 (recognizing lack of unique history for school board prayer). The Sixth Circuit recently concluded that *Greece* does not apply to school board practices based on this reasoning:

> *Greece* does not impact our approach to the case before us…"The simple truth is that free public education was virtually nonexistent in the late 18th century…[so] it is unlikely that the persons who drafted the First Amendment…anticipated the problems of interaction of church and state in the public schools."

Smith v. Jefferson Cty. Bd. of Sch. Comm'rs, 788 F.3d 580, 587-89 (6th Cir. 2015)(citing *Wallace* and *Edwards*). Finding a school board practice unconstitutional simply "does not endanger the centuries-long practice of prayer at legislative sessions." *Indian River*, 653 F.3d at 281. In the public school context, tradition does not take precedence. Rather "the need to protect students from coercion is of the utmost importance." *Id.* (citing *Lee*).

Nor is *Marsh/Greece* applicable to prayer in any other governmental context, such as executive and judicial.[58] "Instructively…Justices Alito and Kagan noted that hypothetical prayer practices involving other civic proceedings would not or should not come within the reach of the Court's holding in [*Greece*]." *Hewett*, 29 F. Supp. 3d at 629-31. School board meetings certainly do not.

[58] *E.g.*, *Constangy*, 947 F.2d at 1147-49; *Mellen*, 327 F.3d at 367-69

3. Adhering to Supreme Court precedent, Circuit Courts have been unanimous in holding the legislative prayer exception inapplicable to school board prayer.

The legislative exception is particularly inapplicable to prayers at school board meetings. *See Indian River*, 653 F.3d at 259-75; *Coles*, 171 F.3d at 376-79. While this case was pending, a court properly following Supreme Court precedents emphasized: "**Legislative Exception Does Not Apply to Prayer at School Board Meetings**." *Chino Valley*, 2016 U.S. Dist. LEXIS 19995, at *31-32.

"The only two circuit courts to address this question [Third and Sixth] have soundly, and after detailed analysis, concluded that school board prayer does not qualify for the legislative exception." *Id*. BISD offered "no contrary authority on the subject." *Id.* Instead, it, like the District Court, *completely ignored* the "Third and Sixth Circuits." *Id.*

The Sixth Circuit noted the degree of student involvement and the susceptibility of children to endorsement and coercion and the differences between school boards and legislative bodies. *Coles*, 171 F.3d at 372, 379-81. The court concluded: "the fact that school board meetings are an integral component of the…school system serves to remove it from the logic in *Marsh*." *Id*.

More recently, the Third Circuit held *Marsh* inapplicable to a school board practice that expressly did not allow prayer by *students* but rather *adult* community members on a rotating basis akin to *Greece*. *Indian River*, 653 F.3d at 261. Having

carefully considered "the role of students at school boards, the purpose of the school board, and the principles underlying the Supreme Court's school prayer case law," the Third Circuit, like the Sixth Circuit before it, found school board prayer belongs under school prayer cases. *Id*. at 281. The court reasoned:

> *Lee* and the Supreme Court's other school prayer cases reveal that the need to protect students from government coercion in the form of endorsed or sponsored religion is at the heart of the school prayer cases…*Marsh* does not adequately capture these concerns.

Id. at 275. This was so "regardless of whether the Board is a 'deliberative or legislative body.'" *Id.* at 278-79.

The Ninth Circuit only assumed, purposefully *without deciding*, that *Marsh* applied, and still found the practice unconstitutional. *Bacus*, 52 Fed. App'x at 356. In *Tangipahoa*, this Court adopted the Ninth Circuit's approach, but expressed further doubts about *Marsh*'s applicability. 473 F.3d at 197-203 (citing *Bacus*). The Court reiterated: "this opinion *only assumes* that *Marsh* applies." *Id.* at 198-203 & n.1. The district court correctly held that the prayers fell "outside the legislative-prayer context" and violated the Establishment Clause under "the traditional analysis under *Lemon*." *Id.* at 193-94. On appeal, the "Board defend[ed] its prayer practice *solely* under *Marsh*." *Id.* at 197 (emphasis added). The Court explained: "For *this reason*, and because this opinion assumes the Board, as a *stipulated* public deliberative body, falls under *Marsh*, this opinion looks to its legislative-prayer exception[.]" *Id.* (emphasis added). At the same time, the Court

recognized the "exception has been sparsely applied…[T]he Court has continued to define *Marsh* as a narrow exception." *Id.* at 199.

Unlike *Tangipahoa*, this Court has no reason to assume, *arguendo*, *Marsh* applies, because BISD did not defend its practice solely, or even principally, under *Marsh/Greece*. On the contrary, BISD relied *primarily* on school authorities.[59] Additionally, BISD's practice involves "Student Expression," making it distinguishable from the clergy/adult-driven practice in *Tangipahoa.* 473 F.3d at 192. More importantly, *Greece* subsequently elucidated that the legislative exception is inapplicable to public schools, *supra.*

4. The controlling facts in *Coles* and *Indian River* are present here.

The "realities" of school board meetings dictated the holdings in *Coles* and *Indian River*: "These meetings are conducted on school property by school officials, and are attended by students who actively and regularly participate in the discussions of school-related matters." *Coles*, 171 F.3d at 381. Those same "realities" exist here:

- The Board recognizes student achievements.[60]

[59] (ROA.180-82,189-92)(ROA.547-48,559-62)(ROA.2176-82)
[60] (ROA.1176)(ROA.1499,1506,1511-14,1523-25,1535-36,1538,1544-45,1556,1559,1562,1566-67,1569-71,1575,1577,1580-84,1590,1595-97,1599,1603,1608-09,1611,1615,1620-21,1623,1632-33,1638-39,1644-46,1652,1657-58,1664-65, 1667,1670-72,1674,1677,1681-83,1689-90,1692-93,1695-96,1699,1701-02,1704-05,1708-09,1711-13,1716,1719)(ROA.1721,

- Students regularly perform for the Board's benefit.[61]

- Student representatives deliver the invocation and pledges to start every meeting.[62]

- Meetings take place on school property in the District's administration building.[63]

- The Board sets educational policy, adopts courses of study, appoints or hires personnel, proscribes rules and regulations for the management of schools, evaluates schools within BISD, and purchases textbooks and other school equipment.[64]

- The Board retains control over the meeting by setting the agenda and schedule.[65]

- The Board deals with faculty disciplinary actions.[66]

1726,1729,1733,1737,1739-41,1743,1749,1751,1753-54,1756,1760,1764,1766-68,1773-74,1780-83,1788,1794,1796,1799,1804-05,1807,1809,1811-14,1818, 1822,1824-25,1827,1830-31,1833,1835,1837-38,1840-46,1848-50,1852,1857-58)(ROA.1869,1871,1875,1881,1889,1892,1894,1904,1915,1917, 1921,1941, 1951,1953,1964,1966,1976,1986,1988,1997,1999,2003,2009,2035, 2037-38,2041,2043,2051-52,2054-57,2060,2065,2067,2071)

[61] (ROA.1176)(ROA.1502,1518,1530,1540,1551,1563,1589,1603,1615,1627,1639, 1652,1665,1677,1690,1702,1716)(ROA.1733,1760,1774,1805,1818,1831,1844, 1858)(ROA.1881,1904,1930,1953,1976,1999,2018,2035,2052,2072)

[62] (ROA.783-87)(ROA.789-1096)(ROA.1497-1501,1503-10,1512,1514-81,1583-94,1596-1648,1650-61,1663-87,1689-1702,1704-13,1715-17,1719)(ROA.1721-24,1726-38,1740,1742-52,1754-64,1766,1768-78,1780-81,1783-93,1796,1798-1800,1803-10,1812-23,1825-36,1838-54,1856-57,1859)

[63] (ROA.146¶27)(ROA.1231)(ROA.1481-89)(ROA.1491-92)(ROA.1494-95) (ROA.1497-1719)(ROA.1721-1859)(ROA.1861-2074)

[64] (ROA.1491-92)(ROA.1494-95)(ROA.1497-1719)(ROA.1721-1859)(ROA.1861-2074)(ROA.2076-84)

[65] (ROA.1157-58)(ROA.1161-62)(ROA.1497-1719)(ROA.1861-2074); *Indian River*, 653 F.3d at 278 (citing *Lee*, 505 U.S. at 597)

[66] (ROA.1497-1719)(ROA.1861,1864,1866,1870,1872,1875-76,1878,1880,1882, 1884,1886,1888,1891,1894-95,1897,1899,1901,1903,1905,1907,1909,1911,1914,

See Indian River, 653 F.3d at 274-79; *Coles*, 171 F.3d at 372, 381-83, 386. Such facts demonstrate that Board meetings "are part of the same 'class' as those other [school] activities in that they take place on school property and are inextricably intertwined with the public school system." *Id.* at 377.

5. The District Court's unprecedented ruling hinges upon a single, distinguishable, pre-*Greece* district court case.

Neither BISD nor the District Court cited a single case *upholding* a school board prayer practice, let alone a practice exclusively involving schoolchildren. Of all the school board prayer cases, BISD's practice presents the most compelling case to apply the school prayer cases because BISD invites students and *students alone*–rather than clergy and adult community members as in *Greece*–to deliver the "*Student* Expression." (ROA.1161-62)(ROA.1250). No other case involved "Student Expression."

The only case that expressly held a school board prayer practice qualified for the legislative exception, *Doe v. Tangipahoa Parish Sch. Bd.*, 631 F. Supp. 2d 823 (E.D. La. 2009), still refused to uphold the constitutionality of the practice. Yet the District Court relied solely on that outlier decision, ignoring *Edwards*, *Lee*, *Santa*

1916-18,1920,1922,1924-25,1927,1929,1931,1933,1935,1937,1940,1942,1944, 1946,1948,1950,1952,1954, 1957,1959,1961,1966-67,1969,1971,1973,1975,1977, 1979,1981,1983,1986-87,1989,1991,1993,1995-96,1998,2000,2002,2004,2006, 2009-10,2012-14,2016-21,2023,2025-26,2028,2032-34,2036-39,2041-42,2044-45, 2047,2049,2051-52,2054,2056-57,2059,2061,2063-64,2066,2068,2071,2073-74)

Fe, *Lemon*, *Indian River,* and *Coles*, entirely. The court's exclusive reliance on *Doe* was erroneous for at least three reasons.

First, *Doe* predated *Greece*, which made clear that the legislative exception is inapplicable to public schools, *supra.* Indeed, a more recent Fifth Circuit district court case held *Greece* inapplicable to prayers at school events. *Rankin*, 2015 U.S. Dist. LEXIS 117289, at *17-18. The Fourth Circuit also recently cited *Marsh* and *Greece* for the notion that: "The law recognizes a meaningful distinction between children in a school setting and a legislative session." *Lund v. Rowan Cty*., 2016 U.S. App. LEXIS 17064, at *47 (4th Cir. Sep. 19, 2016)(citations omitted). And *Chino Valley* specifically concluded that *Greece* does not apply to school board prayers even by adult citizens. 2016 U.S. Dist. LEXIS 19995, at *51-53.

Second, *Doe* predated *Indian River*, where the Third Circuit, after extensive analysis, held the legislative exception was inapplicable. 653 F.3d at 280. *Indian River* is consistent with *Coles.* These unanimous appellate decisions are "highly persuasive" and certainly more so than an outlier pre-*Greece* district court case.[67] This Court has an "intermediate obligation to [its] sister federal courts of appeals." *Colby v. J.C. Penney Co.*, 811 F.2d 1119, 1123 (7th Cir. 1987). As Judge Posner declared:

[67] *In re Camilli*, 182 B.R. 247, 251 (9th Cir. 1995)("Absent a decision by our Court of Appeals or a conflict between circuits, the Panel should regard the authority of another circuit as *highly persuasive*.")(emphasis added).

> Bearing in mind the interest in maintaining a reasonable uniformity of federal law and in sparing the Supreme Court the burden of taking cases merely to resolve conflicts between circuits, we give most respectful consideration to the decisions of the other courts of appeals and follow them whenever we can.

Id. The "district judges should, of course, do likewise." *Id.*

Third, *Doe* is distinguishable. *Doe* did not involve prayers by *students*, but rather a rotating roster of *adult* clergy nearly identical to the practice in *Greece*, 134 S. Ct. at 1830-31. 631 F. Supp. 2d at 826-27. By contrast, BISD's practice targets mostly *elementary* schoolchildren, who are "vastly more impressionable than high school or university students." *Bell v. Little Axe Indep. Sch. Dist*., 766 F.2d 1391, 1404 (10th Cir. 1985). The "symbolism of a union between church and state is most likely to influence children of tender years." *Sch. Dist. v. Ball*, 473 U.S. 373, 390 (1985). *See Duncanville-II*, 70 F.3d at 407; *Peck v. Upshur Cty. Bd. of Educ*., 155 F.3d 274, 288 n* (4th Cir. 1998). In *Morgan v. Swanson*, this Court agreed with *Peck* that "'elementary students are different'" in "the Establishment Clause context." 659 F.3d 359, 382 (5th Cir. 2011)(citation omitted).

C. Acceptance of the District Court's decision would produce an unwieldy and irrational result foreclosed by precedent.

If Supreme Court cases teach that a school cannot include prayer "in the classroom," or "at events it hosts," as in *Santa Fe* and *Lee*, it is "overly formalistic to allow a school to engage in identical practices when it acts through" a school board meeting. *Doe v. Elmbrook Sch. Dist.*, 687 F.3d 840, 856 (7th Cir. 2012)(en

banc), *cert. denied*, 134 S. Ct. 2283 (2014). The "same risk that children in particular will perceive the state as endorsing a set of religious beliefs is present both when exposure" to prayer "occurs in the classroom and when government summons students to an offsite location," *id.*, and necessarily then, its own administration's building. "Law reaches past formalism." *Lee*, 505 U.S. at 595.

1. The Court can resolve this case under *Santa Fe* alone.

The District Court's decision is irreconcilable with *Santa Fe*. In *Santa Fe*, the Court held that a school district's practice of allowing student-selected students to deliver an uncensored, "brief invocation and/or message" at school events, the purpose of which was to "solemnize," violated the Establishment Clause. 530 U.S. at 306-13.

The salient facts in *Santa Fe* are present here. BISD's prayers are "delivered to a large audience assembled as part of a regularly scheduled, school-sponsored function conducted on school property." *Id.* at 307. A student "representing the student body, under the supervision of school faculty" delivers the prayers. *Id.* at 302-03, 310-15.[68] The message is recorded by the district's sound system, "which

[68] (ROA.1131)(ROA.1133-36)(ROA.1138-41)(ROA.1312-13).*See also*(ROA.795)(ROA.858)(ROA.861)(ROA.883)(ROA.885)(ROA.929)(ROA.932)(ROA.1009)(ROA.1030)(ROA.1046)(ROA.1067)(ROA.1081)(ROA.1085)(ROA.1088)(ROA.1091)(ROA.1095)(ROA.1131)(ROA.1133-36)(ROA.1138-41)(ROA.1143-45)(ROA.1497-1501,1503-10,1512,1514-81,1583-94,1596-1648,1650-61,1663-87,1689-1702,1704-13,1715-17,1719)(ROA.1721-24,1726-38,1740,1742-52,1754-64,1766,1768-78,1780-81,1783-93,1796,1798-1800,1803-10,1812-23,1825-

remains subject to the control of school officials." *Id.* at 307.[69] The "school's name is…written in large print" in the building. *Id.* at 308. (ROA.1389-90). "It is in a setting such as this that 'the board has chosen to permit'" the student "to rise and give the 'statement or invocation.'" *Id*.

The "history of this policy, moreover, reinforce[s] our objective student's perception that the prayer is, in actuality, encouraged by the school." *Id.* at 308-09. As in *Santa Fe*, the objective observer is aware of BISD's long history of explicitly selecting and inviting students to deliver "invocations" only. *Id*.[70]

Significantly, a much *stronger* unconstitutional link between church and state results from BISD's practice in at least seven ways:

1) BISD officials *participate* in the prayers with students, which by itself "signals an unconstitutional endorsement." *Duncanville-II*, 70 F.3d at 405-06.

36,1838-54,1856-57,1859)(ROA.1862,1865,1867,1869,1871,1873,1875,1876-77,1879,1881,1883,1885,1887,1889,1892,1894,1896,1898,1900,1902,1904,1906,1908,1910,1912,1914,1917,1919,1921,1923,1924,1926,1928,1930,1932,1934,1936-38,1940,1943,1945-47,1949,1951,1953-55,1958,1960-62,1964,1966,1968,1970-72,1974,1976-82,1984,1986,1988-92,1994-96,1998,2000,2002,2004,2006-07,2009,2011-14,2016-21,2023,2025,2027-28,2030-34,2036-39,2041,2043-45,2047,2049,2051-52,2054,2056-57,2060-61,2063-64,2066,2068,2071,2073-74)(ROA.2123-25)

[69] (ROA.1134)(ROA.1126-29)(ROA.1313)

[70] (ROA.783-87)(ROA.789-90,793-95,796-01,803-04,806-11,814,817-18,820-24,826-34,836,839-40,842-43,847-48,851-52,854-56,858,860-67,872-89,891,895-932,936-47,949,951-84,990,993-99,1001,1003-23,1025-34,1036,1038-47,1049,1051-68,1073,1080-89,1094-96)(ROA.1105-10)(ROA.1113-21)(ROA.1126-29)(ROA.1131)(ROA.1134-35)(ROA.1140)(ROA.1143)(ROA.1173-74)(ROA.1466-68)(ROA.2123-25)

2) In "this formal, manifestly school-sponsored setting, the power imbalance between the State and the students is even more pronounced than at football games or graduations." *Chino Valley*, 2016 U.S. Dist. LEXIS 19995, at *51.

3) BISD's practice principally involves *elementary* schoolchildren who are "vastly more impressionable." *Bell*, 766 F.2d at 1404.

4) A principal announces that the student speakers are *in fact* "representing" their school.[71]

5) A school official customarily asks the audience to participate in the prayers.[72]

6) At the "conclusion, the student will receive a certificate and will pose for a picture with a Board Member." (ROA.1133-36).

7) BISD sends the student a "thank you" letter for *representing* their school.[73]

In these circumstances, and more so than in *Santa Fe*, an objective "student will unquestionably perceive the…prayer as stamped with her school's seal of approval." 530 U.S. at 308. And, because the practice is unconstitutional under *Santa Fe*, this Court need not even bother with the full "*Lemon* analysis." *Duncanville*, 994 F.2d at 166 n.7.

[71] (ROA.797)(ROA.858)(ROA.861)(ROA.883)(ROA.885)(ROA.929)(ROA.932) (ROA.1009)(ROA.1030)(ROA.1046)(ROA.1067)(ROA.1081)(ROA.1085) (ROA.1088) (ROA.1091)(ROA.1095)
[72] (ROA.783-87)(ROA.855-56,885,905,919,922,926,929,938,941,946,949,955-56,962,972,976,983,995,1009,1013,1016)(ROA.1113-21)(ROA.1131)(ROA.1133) (ROA.1174-75)(ROA.1261-62)
[73] (ROA.1134-35)(ROA.1138-41)

2. *Without exception*, the Establishment Clause prohibits school officials from participating in prayer with students during school-sponsored activity, further rendering the legislative exception inapplicable to BISD's practice.

This Court has ruled that when school officials, including mere coaches, "manifest approval and solidarity with student religious exercises, they cross the line between respect for religion and endorsement of religion." *Duncanville-II*, 70 F.3d at 406 n.4. The Court in *Mergens* likewise held that prohibiting teachers from "participating" in afterschool student religious activity "avoids the problems of 'the students' emulation of teachers as role models,'" and thus, avoids Establishment Clause violations. 496 U.S. at 232-36, 249-53 (citation omitted). Notably, there is *no* "legislative prayer" exception to this rule.

If coaches and teachers are prohibited from participating in student prayers during basketball practices (*Duncanville-II*), and student club meetings (*Mergens*), then BISD principals, superintendents, and Board members must necessarily be prohibited from participating in student prayers during formal school meetings. Consequently, the legislative exception cannot apply to BISD's practice whereby school officials customarily participate in the student prayers.

To apply, the legislative practice must be an "'an internal act' directed at the [] Legislature's 'own members,'" and be "'entirely for their own benefit.'" *Greece*, 134 S. Ct. at 1825-26 (citing *Marsh*). Indeed, the practices in *Marsh* and *Greece* were upheld *because* their purpose was "to accommodate the spiritual needs of

lawmakers and connect them to a tradition dating to the time of the Framers." *Id.* Legislators are therefore permitted to partake in legislative prayers. But school officials cannot participate in student prayers, making *Greece* further inapposite to BISD's practice. *Compare Duncanville-II*, 70 F.3d at 406 & n.4 (school employees violate Establishment Clause when they participate in student prayers) *with Greece*, 134 S. Ct. at 1826 (upholding legislative practice whereby legislators "themselves stood, bowed their heads, or made the sign of the cross").

D. Should this Court part ways with every other Circuit Court and place school board prayer under the *Marsh/Greece* exception, BISD's prayers would still violate the restrictions *Marsh/Greece* enunciate.

Notably, BISD's Prayer Practice is unconstitutional even under the clearly inapplicable legislative exception. The *Marsh/Greece* analysis is highly "fact-sensitive," requiring a thorough examination of *all* factual details. *Id.* at 1823-25. The practice must ultimately fit "within the [*Marsh*] tradition," *id*. at 1819, meaning it must be "consistent with the manner in which the First Congress viewed its chaplains." *Marsh*, 463 U.S. at 793 n.16.

1. The District Court failed to conduct the requisite fact-intensive analysis.

Given the factually-demanding nature of *Marsh/Greece*'s analysis, and because legislative prayer represents a narrow exception, the District Court's ***single paragraph*** "analysis" is obviously deficient. *Cf. Hudson v. Pittsylvania Cty.*,

107 F. Supp. 524, 524-41 (W.D. Va. 2015).[74] Smith/AHA submitted 55 exhibits comprised of undisputed facts material to *Marsh/Greece* and the applicable *Lemon/Lee* analyses. The court did not refer to a single one, relying solely on the amended complaint. (ROA.2186-90). It also completely ignored dispositive *Marsh/Greece* factors. (ROA.2189-90).

Independent of *Marsh/Greece*, this Court has "many times emphasized the importance of a detailed discussion by the trial judge." *Heller v. Namer*, 666 F.2d 905, 911 (5th Cir. 1982). Here, a detailed discussion is "not only helpful, but essential." *Bell v. Dallas Cty*., 432 F. App'x 330, 335 (5th Cir. 2011). In "this case, where [the Court is] to draw all legitimate factual inferences in favor of the nonmovant," and "the evidence that the court arguably did not consider may be relevant under the proper analytical framework," it is "necessary to vacate the judgment and remand." *Wildbur v. Arco Chem. Co*., 974 F.2d 631, 644-45 (5th Cir. 1992).

2. BISD's "Student Expression" practice fails *Marsh/Greece* because it is not an "internal act" for its own members.

To survive *Marsh/Greece*, a legislative prayer practice must be "'an internal act' directed at the [] Legislature's 'own members,'" rather "than an effort to promote religious observance among the public." *Greece*, 134 S. Ct. at 1825-26

[74] The court's obscure reference to *Lemon*'s "excessive entanglement" prong – after finding *Lemon* inapplicable (ROA.2190) – further demonstrates its failure to grasp Establishment Clause law and the applicable standard.

(citing *Marsh*). *Greece* emphasized that the relevant inquiry "considers both the setting in which the prayer arises and the audience to whom it is directed." *Id.* at 1814. Central to the Court's holding was the fact that the audience "for these invocations is not, indeed, the public but lawmakers themselves." *Id*.

BISD's practice is obviously distinguishable from *Marsh* and *Greece* where "'government officials invoke[d] spiritual inspiration *entirely for their own benefit*.'" *Id.* at 1825 (emphasis added). Those practices were upheld because their purpose was "to accommodate the spiritual needs of lawmakers." *Id.*

BISD even concedes its practice is an "opportunity for students," and specifically an opportunity for students to "hone their public speaking skills."[75] BISD proclaimed: "it's always about students having the opportunity to share their thoughts, express their first amendment rights." (ROA.1299).

It suffices that, "when stripped of one of the foundational elements on which" *Marsh/Greece* is constructed, BISD's student "prayer policy is so constitutionally deficient that it cannot stand." *Santa Fe*, 168 F.3d at 818.

At least four additional facts bolster this conclusion. First, unlike in *Greece*, principals and "board members direct[] the public to participate in the prayers."

[75] (ROA.53)(ROA.248)(ROA.553,562)(ROA.1156)(ROA.1299)(ROA.2124)

134 S. Ct. at 1826.[76] *Greece* stressed that its holding would "be different if town board members directed the public to participate in the prayers." *Id.* Second, BISD's 2015 guidelines require the "Expression" to honor "those in *attendance…focusing the audience*." (ROA.1157)(ROA.1161)(emphasis added). Third, "Invocation"/"Student Expression" is included on the public agendas. *E.g., Wynne v. Town of Great Falls*, 376 F.3d 292, 301 n.7 (4th Cir. 2004). Fourth, the public in fact views the prayers as being for their consumption. (ROA.1466-67).

3. The Prayer Practice betrays an impermissible purpose and does not comport with the *Marsh* tradition.

A legislative practice is also unconstitutional if it "betray[s] an impermissible government purpose" such as using it as an "opportunity to proselytize." *Greece*, 134 S. Ct. at 1824-26. By inviting students alone, rather than clergy or community adults as in a true legislative prayer practice, it is clear BISD's real purpose is to bring "prayer and proselytization into public schools through the backdoor." *Chino Valley*, 2016 U.S. Dist. LEXIS 19995, at *60-61.

BISD's litigation-inspired maneuver to replace "Invocation" with "Student Expression" only takes its practice further outside of *Marsh/Greece*'s historic tradition. Legislative invocations must solemnize and be "respectful." 134 S. Ct. at 1823. But BISD contends that a student can give a remark "disparaging the school

[76] (ROA.783-87)(ROA.855-56,885,905,919,922,926,929,938,941,946,949,955-56,962,972,976,983,995,1009,1013,1016)(ROA.1113-21)(ROA.1131)(ROA.1133)(ROA.1174-75)(ROA.1261-62)

board." (ROA.1251)(ROA.1314). *See Snyder*, 159 F.3d at 1234 (disparaging remarks fall outside legislative exception).

IV. Because the legislative exception is inapplicable, BISD's school prayer practice is unconstitutional, entitling Smith/AHA to summary judgment as a matter of law.

A school board prayer practice obviously fails "the *Lemon* test." *Tangipahoa*, 473 F.3d at 197. The "kind of legislative prayers at issue in *Marsh* simply would not have survived the traditional Establishment Clause tests." *Snyder*, 159 F.3d at 1232. *See also Bacus*, 52 F. App'x at 356 ("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.").

Applying *Lemon*, this Court held that "allowing a student-selected, student-given, nonsectarian, nonproselytizing invocation" at a regularly-scheduled school-sponsored event is unconstitutional. *Santa Fe*, 168 F.3d at 809, 823. BISD's practice is *even more* egregiously unconstitutional than *Santa Fe*, *supra.* Thus, the court erred in failing to grant summary judgment to Smith/AHA.

A. Smith/AHA are entitled to the relief they seek.

1. Smith/AHA are entitled to nominal damages for the longstanding iteration of the Prayer Practice.

The Supreme Court "obligates a court to award nominal damages when a plaintiff establishes the violation of [a constitutional right]." *Farrar v. Hobby*, 506 U.S. 103, 112 (1992). The Supreme Court and this Court "have clearly ruled that

inviting or encouraging students to pray violates the First Amendment." *Herdahl v. Pontotoc Cty. Sch. Dist.*, 933 F. Supp. 582, 591 (N.D. Miss. 1996).[77] From 1997 until 2015, BISD invited students to deliver "invocations."[78] Since "permitting" student-led, student-initiated, *messages or* invocations at football games unconstitutionally endorses religion, *Santa Fe*, 168 F.3d at 823, BISD's *invocation*-only practice was necessarily unconstitutional, leaving the District Court no discretion to deny nominal damages.

2. Smith/AHA are entitled to prospective relief because BISD's ongoing practice of including prayers in School Board meetings is unconstitutional.

Smith/AHA are also entitled to declaratory and injunctive relief because the unconstitutional activity continues.[79] BISD argued that these claims were moot only because—in direct response to AHA's litigation threat—the word "invocation" was replaced with "student expression" on the agendas, a disclaimer is allegedly displayed somewhere,[80] and students are now purportedly selected by

[77] (citing *Wallace*, 472 U.S. 38; *Treen*, 653 F.2d at 901; *Ingebretsen*, 88 F.3d 274)
[78] (ROA.551)(ROA.783-87)(ROA.789-1110)(ROA.1105-10)(ROA.1113-21) (ROA.1126-29)(ROA.1131)(ROA.1134-35)(ROA.1140) (ROA.1143)(ROA.1497-1705)(ROA.1721-1845)(ROA.1861-2056)
[79] (ROA.783-87)(ROA.1156-58)(ROA.1182)(ROA.1189)(ROA.1203)(ROA.1264-66)(ROA.1316)
[80] BISD did not produce any evidence surrounding said disclaimer other than vaguely saying one exists. (ROA.552-53).

"neutral criteria." (ROA.551-53,557-58,594).[81]

The District Court was rightfully unpersuaded by BISD's mootness argument. (ROA.2188-89). An amendment to a challenged practice will moot a claim *only* where it "completely eliminates the harm of which plaintiffs complained." *Ciudadanos Unidos de San Juan v. Hidalgo Cty. Grand Jury Comm'rs*, 622 F.2d 807, 824 (5th Cir. 1980). But the *sine qua non* of BISD's practice remains unchanged. BISD continues to: (1) authorize prayers at Board meetings and (2) participate in those student prayers.[82] As discussed extensively above, BISD's *current* practice remains unconstitutional under *Santa Fe*.

Although no further undertaking is necessary, out of an abundance of caution, Smith/AHA demonstrate that BISD's practice fails the each prong of *Lemon*, as well as the endorsement and coercion tests, *infra*, making remand inescapable.

B. BISD's school board prayers are unconstitutional under *Lemon*.

1. The Prayer Practice lacks a secular purpose.

Clearly, the "school board's practice fails to satisfy the purpose prong." *Coles*, 171 F.3d at 384. *Lemon*'s secular purpose must be the "pre-eminent" and "primary" force driving the action, and must not be "a sham, and not merely

[81] BISD, however, only permits "leadership"/"Student Council" students to deliver "Student Expression." (ROA.1133)(ROA.1161)(ROA.1165)(ROA.1286)
[82] (ROA.783-87)(ROA.1156-58)(ROA.1182)(ROA.1189)(ROA.1196)(ROA.1203) (ROA.1211)(ROA.1217)(ROA.1264)

secondary to a religious objective." *McCreary*, 545 U.S. at 864. Purpose is evaluated through the eyes of an "objective observer" who considers history and context. *Id.* at 862-64.

If a practice fails the purpose test, it is unconstitutional regardless of its "possible applications." *Santa Fe*, 530 U.S. at 314. Thus, even if BISD's alleged minor modifications could remedy the Prayer Practice's unconstitutional effect, entanglement, and coercion, it remains unconstitutional if it lacks a secular purpose. *Wallace*, 472 U.S. at 56.

The Court can infer an improper purpose where, as here, "the government action itself besp[eaks] the purpose" in that it is "patently religious." *McCreary*, 545 U.S. at 862. *See Santa Fe*, 530 U.S. at 309-10 ("infer[ring] that the specific purpose of the policy" permitting student-initiated prayer was religious). When a school "permits religious invocations which by definition serve religious purposes," it "cannot meet the secular purpose prong." *Jager*, 862 F.2d at 830.

"[A]llowing the students to decide whether to include prayer does not cure the problem." *Appenheimer*, 2001 WL 1885834, at *10. *E.g.*, *Santa Fe*, 168 F.3d at 816-17; *Black Horse*, 84 F.3d at 1484-85; *Collins*, 644 F.2d at 760-63. School practices permitting student prayers during school-sponsored activity have an "obviously religious purpose." *Treen*, 653 F.2d at 901.

Indeed, rather than secularize the Prayer Practice, BISD's recent maneuvers magnify its overarching religious purpose. *See Santa Fe*, 530 U.S. at 316. BISD is "simply reaching for any way to keep a religious [practice]." *McCreary*, 545 U.S. at 873.[83] The Court must skeptically view purposes made "as a litigating position." *Id.* at 871. BISD admitted that it modified the practice solely to avoid litigation.[84]

Furthermore, it "will matter to objective observers whether [the new policy] follows on the heels of [policies] motivated by sectarianism." *Id*. at n.14. The Court must consider BISD's "latest action 'in light of [its] history of' unconstitutional practices." *Id*. at 873 n.22. BISD's refusal to discuss the purpose of its longstanding "invocation" only practice "is understandable, but the reasonable observer could not forget it." *Id.* at 870. Just as in *Santa Fe*, in light of BISD's longstanding practice of "regular delivery of a student-led prayer," it is "reasonable to infer that the specific purpose of the [new] policy [is] to preserve a popular 'state-sponsored religious practice.'" 530 U.S. at 308-09, 315.

a) Extrinsic evidence underscores BISD's unconstitutional religious purpose.

BISD's religious purpose is "so clear that the court would find it controlling even if there were evidence of some other stated legislative purpose." *Summers v. Adams*, 669 F. Supp. 2d 637, 658-60 (D.S.C. 2009). But there is no other purpose.

[83] *See also Jager*, 862 F.2d at 830 ("the School District opted for an alternative that permits religious invocations, which by definition serve religious purposes")
[84] (ROA.1249-50)(ROA.1254-55)(ROA.1294-1300)

Instead, the extrinsic evidence suggests "a desire to promote Christianity." *Id.* Three examples bear this out.

First, BISD's religious purpose can be "inferred" from "public comments" by the Board members. *McCreary*, 545 U.S. at 862-64. For example, in May 2015, Board member Greene shared a post on Facebook: "Religious liberty is facing a full on frontal assault. We need to prayer [sic] for our Superintendent, School Board and all of BISD." (ROA.1476). Two months later, he shared an article, "Mississippi school district fined $7500 for opening assembly with prayer," remarking: "Similar to what we are getting sued for." (ROA.1474)(ROA.1478). A friend responded: "time for the people to pray any and every time possible especially when told not to." (ROA.1475)(ROA.1479). Greene replied: "Anyone can sign up and speak for 3 minutes and say what they want, *I thought about inviting people to come pray.*" (ROA.1478)(emphasis added).

Board member Hancock responded to a text message about this lawsuit: "We are prayerful." (ROA.1434-35). He also regularly posts calls to school "prayer" on his public Facebook and Twitter[85] such as:

- "Congrats all @BirdvilleSchool grads! My **prayer** is you live **Psalm 1:1-2."** (ROA.1392,1400)(ROA.1403)
- "Thank you [redacted] for your **prayer** before the football game! Go @Birdville_High beat Boswell" (ROA.1399)

[85] (ROA.1392-1401)(ROA.1403)

- "Found a great '**First Day of School Prayer'**; God of wisdom and might, we praise you for the wonder of our being, for mind, body and spirit..." (ROA.1395)

Second, BISD's official website boasts the Christian church membership of each Board member:

- Hancock "is a deacon at North Richland Hills Baptist Church"
- "McCarty teaches high school students at North Richland Hills Baptist Church"
- "Kunkel is a member of North Richland Hills Baptist Church, where he serves as a teenage bible study teacher and a deacon"
- Greene "is a member of North Richland Hills Baptist Church"
- "Webb is a member of Legacy Church of Christ."
- Davis is a member "of Birdville Baptist Church, where he serves as deacon and teaches an adult Sunday school class"
- Tolbert is "former president for Christ's Haven for Children, Inc."

(ROA.1481-89).

Third, the Board regularly gives "business partner recognition" to Christian churches, as reflected in numerous agendas from 1997 until present.[86] Many such

[86] (ROA.750 n.74)(ROA.1497,1564,1576,1605,1608,1614,1617,1619,1632-33, 1642,1648,1654,1660-61,1676-77,1680,1694,1711-13,1719)(ROA.1735,1739, 1746,1749,1751,1766,1768,1777,1785,1790,1799-1800,1817-18,1821,1835,1852-53,1855)(ROA.1885,1902,1908,1912,1960,1970,1980,1992,1994,2017-18,2021,2039,2063-64,2066,2074)

churches have received repeated recognition.[87] Perhaps not surprisingly, Board members belong to these churches, as publicized on BISD's website, *supra.* No Jewish synagogues, Islamic mosques, or any other non-Christian religious entities have received Board recognition.

Together with the "patently religious" nature of prayer, this "openly available data support[s] a commonsense conclusion that a religious objective permeated the government's action." *McCreary*, 545 U.S. at 862-63.

b) BISD's avowed justifications are unavailing.

The "defendant [must] show by a preponderance of the evidence" that the challenged activity has a secular purpose. *Church of Scientology Flag Serv. v. City of Clearwater*, 2 F.3d 1514, 1530 (11th Cir. 1993). BISD completely failed to shoulder its burden by eschewing *Lemon* entirely. (ROA.563). Nonetheless, BISD asserted elsewhere: (1) "invocations delivered at the beginning of the School Board meetings have the effect of solemnizing" (ROA.552); (2) the practice advances "free speech" and "free exercise of religion" (ROA.191-92)(ROA.559,562); and (3) allows students to "hone their public speaking skills." (ROA.248). None of these satisfy *Lemon*, *infra.*

[87] (ROA.750 n.75)(ROA.1497,1564,1605,1608,1614,1648,1661,1677,1680,1719) (ROA.1735,1739,1746,1785,1800,1818,1821)(ROA.1885,1902,1970,1994,2018, 2021,2074)

Solemnization does not supply BISD with a legitimate secular purpose. In fact, the Court rejected this very purpose in *Santa Fe*, concluding that the policy, which authorized student-initiated, student-led invocations or messages, failed the purpose test. 530 U.S. at 309.[88] Indeed, like *Santa Fe*, BISD's practice unconstitutionally "encourages religious messages" in part *because* the stated purpose "is 'to solemnize the event.'" *Id.* at 306-07. "A religious message is the most obvious method of solemnizing an event." *Id.*

Additionally, if the "stated purpose is not actually furthered…then that purpose is disregarded as being insincere or a sham." *Scientology*, 2 F.3d at 1527. *See Edwards*, 482 U.S. at 589. BISD's "solemnization" purpose is not actually furthered by its "Student Expression" practice because a student can allegedly give a statement "disparaging the school board." (ROA.1251)(ROA.1314). It is also doubtful that an average elementary student even comprehends "solemnization."

Of course, the "one-minute" limitation,[89] coupled with BISD's long history of an "Invocation" only, leaves no room for doubt that the current practice "is about prayer." *Santa Fe*, 530 U.S. at 315. *See Adler v. Duval Cty. Sch. Bd.*, 250 F.3d 1330, 1346 (11th Cir. 2001)(Kravitch, J., dissenting)("[T]he very terms…belie any purpose other than that of increasing the probability that graduation ceremonies will include prayer: the student 'messages' are to be

[88] *Accord Black Horse*, 84 F.3d at 1484-85; *Constangy*, 947 F.2d at 1150
[89] (ROA.53,55)(ROA.1133)(ROA.1157-58)(ROA.1161)

delivered at the beginning or end of the ceremony (a time typically reserved for prayers), and are to be no longer than two minutes (a duration consistent with a prayer).”). This is especially so considering Board meetings already had a period set aside for public expression.[90] The Court in *Santa Fe* refused “to pretend that we do not recognize what every…student understands clearly – that this policy is about prayer.” 530 U.S. at 315. This Court must do the same. *Id.*

BISD’s second proffer is easily dispatched because student prayers at school-sponsored events constitute *government* speech. *Id.* at 309, 315. *Santa Fe* rejected this very same “free speech” justification, reasoning that the prayers took place “at government-sponsored school-related events,” *id.* at 302, 310-15, affirming this Court’s conclusion that giving “the ultimate choice to the students” does not eliminate school-sponsorship. 168 F.3d at 817-22. *See also Ingebretsen*, 88 F.3d at 279 (permitting student prayer lacked a secular purpose despite avowed

[90] (ROA.1252-53)(ROA.1390)(ROA.1497-98,1500-01,1503-06,1511,1513,1515-16,1518-22,1525-56,1558-67,1570-71,1573-79,1582,1585-89,1591-92,1595,1598,1600-03,1605-06,1609-15,1617-27,1629-31,1634-43,1645-48,1650-55,1659-61,1663-87,1689-1702,1704-12)(ROA.1722-24,1726,1729,1731-32,1734-35,1737,1743-44,1746-47,1749-51,1753,1757,1759-62,1764,1767,1769,1770-77,1783-91,1797-1800,1803-09,1811-16,1818,1820,1824-34,1837-43,1846-47,1849-51,1855,1858)(ROA.1863,1865,1867,1869,1871,1877,1879,1881,1885,1887,1889,1892,1894,1896,1898,1900,1902,1904,1908,1910,1912,1915,1917,1919,1921,1926,1928,1930,1934,1936,1938,1941,1943,1945,1947,1949,1951,1953,1955-56,1958,1960,1962,1964,1966,1968,1970,1972,1974,1976,1978,1980,1982,1988,1990,1992,1994,1997,1999,2001,2003,2005,2007,2011,2015,2020,2022,2027-31,2035,2043-2044,2046,2048,2050,2053,2055,2058,2060-61,2065,2067,2069,2072)(ROA.2076,2081)

purpose "'to accommodate the free exercise of religious rights.'"). The Third Circuit in *Black Horse* also rejected a school's avowed purpose of "recognizing the students' rights to free speech," stressing that "the constitutional guarantee of free speech does not secularize [the new policy's] attempt to preserve 'the long standing practice of conducting invocation and benediction.'" 84 F.3d at 1484.

Furthermore, every school board prayer case has found that such prayers constitute government speech even when delivered by private citizens of "their own unrestricted choosing." *Tangipahoa*, 473 F.3d at 192-93.[91] And even if this Court were to engage in the fiction that "Student Expression" is "legislative prayer," there is not a "single case in which a legislative prayer was treated as individual or private speech." *Turner*, 534 F.3d at 355-56. This applies even when the legislators "do not compose or censor the prayers," have "no editorial control," and are delivered pursuant to an "all-comers" policy allowing *adult* "volunteer leaders…on a rotating basis." *Greece*, 134 S. Ct. at 1816, 1824-26; *Joyner v. Forsyth Cty.*, 653 F.3d 341, 353-54, 362-63 (4th Cir. 2011); *Pelphrey v. Cobb Cty.*, 547 F.3d 1263, 1269-71 (11th Cir. 2008).

Accepting BISD's argument would produce a highly anomalous situation foreclosed by precedent because students' First Amendment rights are *not* "'coextensive with the rights of adults in other settings.'" *Hazelwood Sch. Dist. v.*

[91] *See also Coles*, 171 F.3d at 373

Kuhlmeier, 484 U.S. 260, 266 (1988)(citations omitted). Schools "do not offend the First Amendment" by prohibiting "student speech in school-sponsored expressive activities." *Id.* at 271-73. On the contrary, a restriction on prayer at school events is "'necessary' to avoid running afoul of the Establishment Clause." *Lassonde*, 320 F.3d at 984-85. This is so even "if a disclaimer were given" *id.*, and the policy "neither encourages a religious message nor subjects the speaker to a majority vote." *Cole*, 228 F.3d at 1103.

BISD's final explanation is meritless because students can "hone their public speaking skills" without prayer. The "state cannot employ a religious means to serve otherwise legitimate secular interests." *Treen*, 653 F.2d at 901. Attempting "to further an ostensibly secular purpose through avowedly religious means is considered to have a constitutionally impermissible purpose." *Holloman v. Harland*, 370 F.3d 1252, 1286 (11th Cir. 2004).

BISD wants this Court "to accept what is obviously untrue: that these messages are necessary to 'solemnize'" Board meetings and are "essential to the protection of student speech." *Santa Fe*, 530 U.S. at 315. But the Court must not "turn a blind eye to the context in which this policy arose, and that context quells any doubt that this [student expression] policy was implemented with the purpose of endorsing school prayer." *Id.* This lack of secular purpose "is dispositive." *Wallace*, 472 U.S. at 56.

2. BISD's Prayer Practice has the primary effect of advancing and endorsing religion.

Regardless of the purposes motivating it, BISD's practice fails *Lemon*'s effect prong. This prong asks whether, irrespective of the school's purpose, the practice "conveys a message of endorsement" of religion. *Santa Fe*, 168 F.3d at 817.

Undeniably, "the practice of opening each school board meeting with a prayer has the primary effect of endorsing religion." *Coles*, 171 F.3d at 384. *Santa Fe* held that permitting student prayer at voluntary school events unconstitutionally endorses religion "even if no…student were ever to offer a religious message." 530 U.S. at 313-16. The Court found that the "award of that power alone, regardless of the students' ultimate use of it, is not acceptable." *Id*.

Contrary to BISD's "repeated assertions that it has [now] adopted a 'hands-off' approach" the "realities of the situation plainly reveal that its policy involves both perceived and actual endorsement of religion." *Id.* at 303-05. As in *Santa Fe*, the student-initiated nature of the remarks do not "insulate the school from the…message." *Id.* 308-10. Putting "the ultimate choice to the students" does not eliminate school-sponsorship. *Santa Fe*, 168 F.3d at 817. The *Santa Fe* school argued, much like BISD, that its policy was constitutional because it "permits but does not require prayer." *Id.* at 818 n.10. But this Court flatly rejected the argument, reasoning that prayers "that a school 'merely' permits will still be

delivered to a government-organized audience" at "a government-sponsored event." *Id.* at 817-18. Such "'permission' undoubtedly conveys a message…that the government endorses religion." *Id*.

Indeed, whenever a prayer "is given via a sound system controlled by school principals and the religious invocation occurs at a school-sponsored event at a school-owned facility, the *conclusion is inescapable* that the religious invocation conveys a message that the school endorses the religious invocation." *Jager*, 862 F.2d at 831-32 (emphasis added). This Court ruled that such student prayers would impermissibly endorse religion even if "spontaneously initiated" because "school officials are present and have the authority to stop the prayers." *Santa Fe*, 168 F.3d at 823 (citing *Jager*, at 832-33). BISD concedes it "has control over the content of the statements given" and "if something was improper or offensive…the board…would have the authority" to "cut off" the "expression." (ROA.1312-13).

In *Collins*, the Ninth Circuit also held that "merely 'permitting' students" to open voluntary student assemblies with prayer unconstitutionally endorsed religion even though the assemblies were organized and conducted by students, unlike school board meetings. 644 F.2d at 760-62. Similarly, in *Black Horse*, the Third Circuit held that permitting student-initiated prayer unconstitutionally endorsed religion even though the graduation programs included a disclaimer. 84 F.3d at 1475, 1479. It found *Harris* to be particularly "persuasive." *Id.* at 1483.

In *Harris*, there was "'little or no [school] involvement' in the process resulting in prayer" and yet the school's unwritten practice of permitting student prayers at graduation was held unconstitutional. 41 F.3d at 452-53. The court reiterated: "no school official reviews presentations prior to commencement. No one is asked to participate in the prayer by standing, bowing their heads, or removing their hats." *Id.* The "seniors ma[d]e all decisions relating to the ceremony." *Id.* Nonetheless, the court concluded: "When the senior class is given plenary power over a state-sponsored, state-controlled event…it is just as constrained by the Constitution as the state would be." *Id.* at 455. *Harris* and *Black Horse* are "consistent with current Supreme Court precedent." *Appenheimer*, 2001 WL 1885834, at *8. *See Santa Fe*, 168 F.3d at 819 (finding *Harris* persuasive).

BISD's practice fails the Endorsement Test for the same reasons as above. *See Indian River*, 653 F.3d at 282, 290. That the agendas no longer state "invocation" is immaterial. Under *Santa Fe*, even "spontaneously initiated" prayers unconstitutionally endorse religion. 168 F.3d at 823. This makes sense because "citizens attending Board meetings hear the prayers," not the agenda. *Joyner*, 653 F.3d at 354. The student remarks in *Santa Fe* would not be mentioned on a program but the Court still held them to be impermissibly school-endorsed. 530 U.S. at 298 n.6, 302-03, 307. The Court admonished that even if a policy is "facially neutral, 'the Establishment Clause forbids a State to hide behind the

application of formally neutral criteria and remain studiously oblivious to the effects of its actions.'" *Id.* at 307-08 n.21 (citations omitted).

Nor does any alleged disclaimer remedy endorsement. *See Black Horse*, 84 F.3d at 1475-79; *Lassonde*, 320 F.3d at 984; *Harris*, 41 F.3d at 455-56. The "Establishment Clause does not limit only the religious content of the government's own communications." *Allegheny*, 492 U.S. at 600-01. And even if BISD could partially distance itself from "sponsoring" the prayers, it "cannot sanction coerced participation in a religious observance merely by disclaiming responsibility." *Black Horse*, 84 F.3d at 1482. A "disclaimer" does nothing to prevent "the coerced participation of dissenters." *Lassonde*, 320 F.3d at 984-85.

Finally, BISD's purported "leadership"/"Student Council" selection process[92] involves a majoritarian election, which was held unconstitutional in *Santa Fe*. 530 U.S. at 306-08. But the absence of such an election is inconsequential: "The distinction…is simply one without difference. *Regardless of whether the prayers are selected by vote or spontaneously initiated*…school officials are present and have the authority to stop the prayers." 168 F.3d at 823 (emphasis added).

[92] (ROA.1133)(ROA.1161)(ROA.1165)(ROA.1286-87)

3. The Prayer Practice fosters excessive entanglement with religion.

BISD's prayers and participation in them foster excessive entanglement with religion, failing *Lemon*'s third prong. In *Indian River*, the court held that a school board practice failed *Lemon*'s third prong, reasoning: "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." 653 F.3d at 288. *Accord Coles*, 171 F.3d at 385. *See also Collins*, 644 F.2d at 762 (student prayers at voluntary student assemblies failed *Lemon*'s third prong).

That BISD officials participate in the prayers with students unconstitutionally entangles BISD with religion, without more. *See Duncanville-II*, 70 F.3d at 406; *see also Constangy*, 947 F.2d at 1151-52 (when "a judge prays in court, there is necessarily an excessive entanglement of the court with religion.").

Having shown that "student-selected, student-given," invocations at Board meetings "violate both the *Lemon* test and the Endorsement test," the Court is "not required to determine that such public school prayer policies also run afoul of the Coercion Test." *Santa Fe*, 168 F.3d at 818. Smith/AHA "nevertheless offer the following observation for the sake of completeness." *Id.*

C. The Prayer Practice fails the Coercion Test.

Unconstitutional coercion exists when "the government imposes pressure upon a student to participate in a religious activity." *Peck*, 155 F.3d at 287 (citation

omitted). In *Lee*, the Court held that a school's inclusion of a nonsectarian prayer in a graduation was unconstitutionally coercive even though it was technically voluntary and students could abstain from the prayer. 505 U.S. at 586-87. The Court reasoned that a school's "supervision and control…places public pressure, as well as peer pressure" on students. *Id.* at 593. Since *Lee*, numerous courts have properly found that student-led graduation prayers fail the coercion test as well. *E.g.*, *Santa Fe*, 168 F.3d at 818.[93]

Notably, in *Santa Fe*, the Court held that student-initiated, student-led prayers at football games, which were *completely voluntary*, failed the coercion test. 530 U.S. at 301-02, 310-16. The Court ruled that even "if we regard every high school student's decision to attend a home football game as purely voluntary, we are nevertheless persuaded that the delivery of a pregame prayer has the improper effect of coercing those present." *Id*.

A practice fails the coercion test when: "(1) the government directs (2) a formal religious exercise (3) in such a way as to oblige the participation of objectors." *Santa Fe*, 168 F.3d at 814. Each element is met here. First, student-led prayers that "take place on government property at government sponsored school-related events" are government-directed. *Santa Fe*, 530 U.S. at 301-02. Second,

[93] *See also Black Horse*, 84 F.3d at 1480; *Harris*, 41 F.3d at 457; *Gossage*, 2006 U.S. Dist. LEXIS 34613

prayer is "religious exercise." *Id*. Third, the prayers "oblige the participations of objectors." *Lee*, 505 U.S. at 593.

Like graduations, Board "meetings take place on school property. The Board retains complete control over the meeting; it sets the agenda and the schedule, for example." *Indian River*, 653 F.3d at 278. Further, "the Board's recognition of student achievement allows 'family and those closest to the student to celebrate success.'" *Id*. at 276.[94] Surely, if, as in *Santa Fe*, student prayer at voluntary afterschool games is coercive, prayer at formal School Board meetings where students are *invited* by the Board, are coercive as well. 530 U.S. at 312.

1. BISD's practice is more coercive than *Lee* and *Santa Fe*.

The risk that a student will feel coerced by the Board's practice "is even higher here than at football games or graduations." *Chino Valley*, 2016 U.S. Dist.

[94] (ROA.790,794,797,800,803,821,824,827,849,852,858,861,869-70,873,888, 891,896,902,905,908,911,915,918-19,922,926,929,932-33,937-38,940-41,949, 952,961-62,965,972,975,979,986,991,998-999,1001,1004,1009,1013,1019,1022, 1027,1033,1043,1049,1055,1058,1061,1064,1067,1070,1074,1077,1088,1091-92, 1095,1098)(ROA.1176)(ROA.1499,1502,1506,1511-14,1523-25,1535-36,1538, 1544-45,1556,1559,1566-67,1569-71,1575,1577,1580-84,1590,1595-97,1599, 1603,1608-09,1611,1615,1620-21,1623,1627,1632-33,1638-39,1644-46,1652, 1657-58,1664-65,1667,1670-72,1674,1677,1681-83,1689-90,1692-93,1695-96, 1699,1701-02,1704-05,1708-09,1711-13,1716,1719)(ROA.1721,1726,1729,1733, 1737,1739-41,1743,1749,1751,1753-54,1756,1760,1764,1766-68,1773-74,1780-83,1788,1794, 1796,1804-05,1807,1809,1811-14,1818,1822,1824-25,1827,1830-31,1833,1835,1837-38,1840-46,1848-50,1852,1857-58)(ROA.1869,1871,1875, 1881,1889,1892,1894,1904,1915,1917,1921,1930,1941,1951,1953,1964,1966, 1976,1986,1988,1997,1999,2003,2009,2035,2037-38,2041,2043,2051-52,2054-57,2060,2065,2067,2072)

LEXIS 19995, at *51. The Board "possesses an inherently authoritarian position with respect to the students." *Id.* It "metes out discipline and awards at these meetings, and sets school policies that directly and immediately affect the students' lives." *Id.*[95] "In this formal, manifestly school-sponsored setting, the power imbalance…is even more pronounced…The student who has come before the Board is unlikely to feel free to dissent from or walk out on the body that governs, disciplines, and honors her." *Id.*

Four additional facts make BISD's practice even more coercive than *Santa Fe*. First, the prayer is often delivered after the pledges.[96] To avoid the prayer, a student must immediately exit the room after the pledges, which would be obvious to the Board and the audience. "Finding no violation under these circumstances would place objectors in the dilemma of participating, with all that implies, or protesting." *Lee*, 505 U.S. at 593.

By contrast, in *Peck*, the Fourth Circuit upheld an equal access policy allowing materials to be passively displayed by citizens "not affiliated in any way with the school." 155 F.3d at 275-82. The court reasoned that students could

[95] *E.g.*(ROA.1491-92)(ROA.1494-95)(ROA.1497-1719)(ROA.1721-1859) (ROA.1861-2074)(ROA.2076-84)

[96] (ROA.783-87)(ROA.812,830,834,840-41,844-45,850,852-53,862,866-67, 876,879-80,888-89,912-13,946-47,949,952-53,980,983,995,999,1005,1007, 1016-17,1019-20,1022-23,1028,1031,1033-34,1040-41,1044,1046-47,1052-53,1055-56, 1058,1061-62,1064-65,1067-68,1082-83,1085-86,1088-89,1095-96)(ROA.1131) (ROA.1133,1136)(ROA.1182)(ROA.1189)(ROA.1196)(ROA.1211)(ROA.1217)

"ignore or simply walk past the table" without "calling any attention to that choice." *Id.* at 287-88. Significantly, however, even that policy was unconstitutional "in the elementary schools" where "the concerns animating the coercion principle are at their strongest." *Id*. at n*.

Second, BISD has "deliberately made its meetings meaningful to students." *Indian River*, 653 F.3d at 275-77.[97] Students are often invited to be honored for their accomplishments, celebrate extracurricular successes, and perform alongside their classmates.[98] The Third Circuit recognized that this has additional implications for such students who "may feel especially coerced…to attend." *Id*.

Third, BISD officials participate in the prayers. The "State exerts great authority and coercive power…because of the students' emulation of [school officials] as role models." *Edwards*, 482 U.S. at 584. In *Duncanville* this Court held: "Coach Smith's involvement, too, no doubt 'will be perceived by the students

[97] *E.g.*,(ROA.1133-36)(ROA.1138-41)(ROA.1176)

[98] (ROA.1176)(ROA.1231)(ROA.1491-92)(ROA.1494-95)(ROA.1499,1502,1506, 1511-14,1518,1523-25,1530,1535-36,1538,1540,1544-45,1551,1556,1559,1563, 1566-67,1569-71,1575,1577,1580-84,1589-90,1595-97,1599,1603,1608-09,1611, 1615,1620-21,1623,1627,1632-33,1638-39,1644-46,1652,1657-58,1664-65,1667, 1670-72,1674,1677,1681-83,1689-90,1692-93,1695-96,1699,1701-02,1704-05,1708-09,1711-13,1716,1719)(ROA.1721,1726,1729,1732-33,1737,1739-41,1743, 1749,1751,1753-54,1756,1760,1764,1766-68,1773-74,1760,1774,1780-83,1788, 1794,1796,1804-05,1807,1809,1811-14,1818,1822,1824-25,1827,1830-31,1833, 1835,1837-38,1840-46,1848-50,1852,1857-58)(ROA.1869,1871,1875,1881,1889,1892,1894,1904,1915,1917,1921,1930,1941, 1951,1953,1964,1966,1976,1986, 1988,1997,1999, 2003,2009,2018,2035,2037-38,2041,2043,2051-52,2054-57, 2060,2065,2067,2072)

as inducing a participation they might otherwise reject.'" 994 F.2d at 165 (quoting *Lee*, 505 U.S. at 590).

Finally, BISD's practice is targeted at young schoolchildren making it even more coercive than any other school board prayer case, *supra.* For instance, *Chino Valley* held that a school board prayer practice carried a "distinct risk of coercing students" even though it mirrored *Greece* by providing "that the Board shall randomly select clergyman from the community." 2016 U.S. Dist. LEXIS 19995, at *52, *55-56.

2. The court erroneously eschewed *Lee* and *Santa Fe.*

Even though BISD's practice is more coercive than *Lee* and *Santa Fe*, the District Court inexplicably ignored these cases and the coercion test itself. (ROA.2185-91). But *Santa Fe* made clear that *Lee*'s coercion test applies to school prayer cases *regardless* of the "type of school function." 530 U.S. at 301-02. "In the context of school prayer," the Court "*must* give special consideration, under the principles discussed in *Lee* and *Santa Fe*, to whether a state has coerced religious worship." *Mellen*, 327 F.3d at 371-72 (emphasis added).

The District Court's only mention of "coercion" was in the *Greece* context, which is distinct from *Lee*. (ROA.2190).[99] And its conclusory statement that the practice is not coercive under *Greece* because Smith is now an adult fails for two

[99] *See Lund*, 2016 U.S. App. LEXIS 17064, at *47

reasons. First, the coercion test focuses on a hypothetical "reasonable dissenter," not the plaintiff. *Lee*, 505 U.S. at 593 ("What matters is that, given our social conventions, a *reasonable dissenter* in this milieu could believe that the group exercise signified her own participation or approval of it.")(emphasis added); *Santa Fe*, 530 U.S. at 312. Second, many practices confined to mature adults have been held unconstitutionally coercive under *Lee*.[100]

V. Regardless of whether the student prayers are considered government speech or private speech, BISD's practice of school officials participating in prayers with students is an independent Establishment Clause violation that the District Court completely ignored.

BISD's ongoing practice of officials participating in prayers with students during school events indisputably violates the Establishment Clause, *supra*. Smith/AHA have consistently maintained a challenge to this practice, raising it in their demand letter, complaint, response to BISD's motion to dismiss, interlocutory appellate brief, and summary judgment response.[101] Despite being a central issue in this case, the District Court—without any explanation—ignored it entirely. (ROA.2185-91). Both its failure to address the claim and its failure to award summary judgment to Smith/AHA on this issue mandate reversal.

---

[100] *E.g.*, *Marrero-Méndez v. Calixto-Rodríguez*, 2016 U.S. App. LEXIS 13178, at *18-19 (1st Cir. July 19, 2016); *Mellen*, 327 F.3d at 372; *Inouye v. Kemna*, 504 F.3d 705 (9th Cir. 2009)

[101] (ROA.44-51)(ROA.149¶49)(ROA.214,224,237)(ROA.712,761-63) (AHA/Smith's Brief at v,2,6-7,45-48)

A. BISD's participation in student prayers is unconstitutional under indistinguishable Fifth Circuit precedent.

In *Duncanville-II*, this Court held that basketball coaches' participation in prayer with students during practices and after games was "an unconstitutional endorsement of religion." 70 F.3d at 406. The Court explained: "During these activities DISD coaches and other school employees are present as representatives of the school and their actions are representative of DISD policies." *Id.* Even the dissent recognized that there "is practically no doubt" that the Supreme Court cases support "the majority's decision insofar as it prevents teachers from actively joining in the student-led prayers." *Id.* at 409 (Jones, J., concurring and dissenting).

Relying upon *Duncanville-II*, the Third Circuit in *Borden* held that a coach's actions in silently taking a knee with players during student-led prayer was unconstitutional even though he intended to "show respect for the players' prayers." 523 F.3d at 170. That the coach may not have actually been praying did not change the court's conclusion. *Id.* at 170-71.

It is undisputed: (1) BISD principals, superintendents, and Board members actively participate in the student prayers;[102] and (2) Board meetings are school-sponsored events. (ROA.1247). Therefore, as in *Duncanville-II*, their participation "signals an unconstitutional endorsement." 70 F.3d at 406. Moreover, like *Borden*,

[102] (ROA.783-87)(ROA.1182)(ROA.1189)(ROA.1196)(ROA.1203)(ROA.1211)(ROA.1217)(ROA.1264)

a reasonable observer would be aware of BISD's long history of not only participating in prayers but also *initiating* them by inviting students to deliver "invocations." 523 F.3d at 175-76 (citing *Duncanville-II*).

Importantly, BISD's practice sends an even stronger message of religious endorsement than *Duncanville-II* in at least two ways. First, instead of coaches, BISD principals and Board members participate in the student prayers. Even BISD admitted: "The position of principal could give the impression they're speaking for the entire school or school district. Where a teacher would be perceived as speaking for themselves."[103]

Second, Board members prominently publicize their Christian church membership on BISD's website. (ROA.1481-89). Even the "mere appearance of a joint exercise" between "Church and State" is unconstitutional. *Larkin v. Grendel's Den*, 459 U.S. 116, 125-26 (1982). *See Peloza v. Capistrano Unified Sch. Dist.*, 37 F.3d 517, 522 (9th Cir. 1994).

BISD cannot even deny that its officials' participation in the student prayers violates the Establishment Clause because *its own* "Guidance for Handling First Amendment Issues" recognizes that it is prohibited:

> Employees acting in their official capacity (e.g., at school, at a school-sponsored or school-related event or activity) may not discuss their

[103] (ROA.1308). *See also* (ROA.1260)(ROA.2086-93)

religious beliefs with students or lead or participate in any prayer or religious activity with students.[104]

B. The court's failure to address the participation issue mandates reversal.

Reversal and remand is generally required where, as here "there is at least one significant legal issue, not squarely addressed by the district court that remains unresolved." *Alden, Inc. v. Alden Ins. Agency of Florida, Inc*., 389 F.3d 21, 25 (1st Cir. 2004)(internal quotation marks omitted). *See Frank v. Xerox Corp*., 347 F.3d 130, 135 (5th Cir. 2003).

But remanding for a new determination "based upon the proper interpretation of the law would be only a hollow ritual. The undisputed, established facts can only support one inescapable conclusion:" BISD's practice is unconstitutional. *In re Holloway*, 955 F.2d 1008, 1015 (5th Cir. 1992). "Any other finding would be clearly erroneous." *Id.* There is "no compelling reason to subject the parties and the courts to further delays and expense by remanding the case for application of the proper legal standard to the undisputed facts." *Id*. Thus, the Court should reverse and order judgment be entered in Smith/AHA's favor, and remand only for crafting declaratory and injunctive relief, determining the amount of nominal damages and attorneys' fees and costs, and determining their eligibility for and assessment of punitive damages.

---

[104] (ROA.2086-89)(ROA.2091)

CONCLUSION

This Court is tasked with protecting freedom of conscience from subtle coercive pressure in the public schools. Affirmance would produce a paradoxical result foreclosed by *Santa Fe* and *Duncanville-II.* Because BISD's Prayer Practice violates the Establishment Clause, the District Court erred in granting summary judgment to BISD and denying it to Smith/AHA. As the facts are undisputed and the law is well-settled, Smith/AHA request this Court to REVERSE with instructions to: (1) enter judgment in Smith/AHA's favor on all claims; and (2) determine the scope of relief, amount of damages, and attorneys' fees and costs. In the alternative, they request that this Court, at a minimum, reverse and remand for a proper evaluation of their claims under the correct legal standards.

Respectfully submitted,

October 7, 2016

s/ Monica L. Miller
MONICA L. MILLER
American Humanist Association
1777 T Street N.W., Washington, D.C. 20009
(202) 238-9088; Fax: (202) 238-9003
mmiller@americanhumanist.org
CA Bar: 288343 / DC Bar: 101625

PATRICK A. LUFF
Luff Law Firm, PLLC
1350 Bandera Highway, Suite 803
Kerrville, TX 78028
(512) 710-6830; Fax: (830) 584-0628
luff@lufflaw.com
TX Bar: 24092728

ROGER L. MANDEL
Lackey Hershman, L.L.P.
3102 Oak Lawn Avenue, Suite 777
Dallas, TX 75219
(214) 560-2201; Fax: (214) 560-2209
rlm@lhlaw.com
TX Bar: 12891750

COUNSEL FOR APPELLANTS

CERTIFICATE OF SERVICE

I certify that on October 7, 2016, the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

s/ Monica L. Miller
MONICA L. MILLER
American Humanist Association
1777 T Street N.W., Washington, D.C. 20009
(202) 238-9088; Fax: (202) 238-9003
mmiller@americanhumanist.org
CA Bar: 288343 / DC Bar: 101625

PATRICK A. LUFF
Luff Law Firm, PLLC
1350 Bandera Highway, Suite 803
Kerrville, TX 78028
(512) 710-6830; Fax: (830) 584-0628
luff@lufflaw.com
TX Bar: 24092728

ROGER L. MANDEL
Lackey Hershman, L.L.P.
3102 Oak Lawn Avenue, Suite 777
Dallas, TX 75219
(214) 560-2201; Fax: (214) 560-2209
rlm@lhlaw.com
TX Bar: 12891750

COUNSEL FOR APPELLANTS

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because this brief contains 14,000 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 Microsoft® Word 12.2.8 in 14-point font size in Times New Roman.

October 7, 2016

s/ Monica L. Miller
MONICA L. MILLER
American Humanist Association
1777 T Street N.W., Washington, D.C. 20009
(202) 238-9088; Fax: (202) 238-9003
mmiller@americanhumanist.org
CA Bar: 288343 / DC Bar: 101625

COUNSEL FOR APPELLANTS