**Case No. 16-11220**

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**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE FIFTH CIRCUIT**

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**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

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

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# APPELLANTS' REPLY BRIEF

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## SUMMARY OF THE ARGUMENT[1]

BISD, like the District Court, has not referred to so much as one case upholding the constitutionality of school board prayer. Nor has it presented any case supporting the constitutionality of school officials participating in prayer with students during school-sponsored activity.

BISD's two defenses—legislative exception and free speech—are entirely unavailing, and indeed hopelessly contradictory. The fact that BISD's practice is not an "internal act" for the Board, but is instead, by BISD's own admissions, "an *opportunity for students* to speak," disqualifies it from the exception, without more. And BISD's one-minute "Student Expression"—the period it argues is for solemnizing "Legislative *Prayer*"—cannot possibly be characterized as a public forum for debate.

## ARGUMENT

### I. The undisputed material facts entitle Smith/AHA to summary judgment.

Smith/AHA comprehensively set forth the undisputed facts and attempt not to be unduly repetitive here. (P.Br.4-13). To summarize, BISD has a longstanding practice, since 1997, of opening school Board meetings with prayers, and participating in those prayers with students ("Prayer Practice").

[1]Plaintiffs-Appellants' ("Smith/AHA") brief is cited as ("P.Br.") and Defendant-Appellee's ("BISD") brief as ("D.Br.").

BISD continues to include prayers at Board meetings held on school property to an audience assembled at its behest.[2] School officials also continue to actively participate in the prayers.[3] A principal still introduces the students and asks the audience to participate.[4] Student speakers are still told where to sit and how to act. Afterwards, they are presented with a certificate, pose for a picture with the Board, and receive a thank you letter. (ROA.1133-36)(ROA.1138-41). Other students are regularly present, often to receive awards for academic and extracurricular successes or to perform with other students.[5]

The only modifications BISD claims to have made, in March 2015 in direct response to a litigation threat, are: (1) replacing "Invocation" on the agendas to "Student Expression," (2) no longer having principals directly select the students, and (3) placing a disclaimer somewhere. (D.Br.3-4,6-8). BISD never produced said

[2] (ROA.786-87)(ROA.1156-58).
[3](ROA.786-87)(ROA.1182)(ROA.1189)(ROA.1196)(ROA.1203)(ROA.1211) (ROA.1217)(ROA.1264-66)(ROA.1316).
[4](ROA.786-87)(ROA.789-1101)(ROA.1131)(ROA.1133-36)(ROA.1378) (ROA.1721-1859).
[5](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).

disclaimer, or even explained where or how it is displayed. Rather, it merely cited its own self-serving affidavits vaguely averring one exists. (D.Br.6). Such "unsubstantiated assertions are not competent summary judgment evidence." *Ragas v. Tenn. Gas Pipeline Co.*, 136 F.3d 455, 458 (5th Cir. 1998)(citation omitted). Moreover, by focusing only on the practice as implemented since March, BISD overlooks Smith/AHA's claims for damages. (P.Br.45-46).

Besides, none of these minor gestures removes BISD's imprimatur over the prayers; neither do they insulate BISD from the coercive element of the final message. *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308-10 (2000). (P.Br.57). The remarks in *Santa Fe* were "determined by the students, without scrutiny or preapproval by school officials" and not mentioned on any written program. *Id*. at 296; *id.* at 301 n.11 ("'The state is not involved.'"). Even "spontaneously initiated" student-led prayers unconstitutionally endorse religion when delivered at a school-controlled event where school officials are present. *Doe v. Santa Fe Indep. Sch. Dist.*, 168 F.3d 806, 823 (5th Cir. 1999), *aff'd*, 530 U.S. 290 (2000).[6]

A disclaimer does nothing to prevent "the coerced participation of dissenters," *Lassonde v. Pleasanton Unified Sch. Dist.*, 320 F.3d 979, 984-85 (9th

[6] *Accord ACLU v. Black Horse Pike Reg'l Bd. of Educ.*, 84 F.3d 1471, 1475 (3rd Cir. 1996); *Harris v. Joint Indep. Sch. Dist.*, 41 F.3d 447, 452-53 (9th Cir. 1994) *vacated as moot*, 515 U.S. 1154 (1995); *Collins v. Chandler Unified Sch. Dist.*, 644 F.2d 759 (9th Cir. 1981).

Cir. 2003), or eliminate endorsement. *Cty. of Allegheny v. ACLU*, 492 U.S. 573, 600-01 (1989). (P.Br.58,60). Indeed, any disclaimer would be negated by the fact that a principal introduces the students, often announcing that they are *representing* their school.[7] A mere sample of meetings postdating March 2015 bears this out:

- (04/23/15)(Christian Prayer) Middle School Principal: "…It gives me great pleasure to introduce H.A. and her dad Harry Adacarey, and E.R. and his parents Claudia Hernandez and Vincente Rodriguez. **They are two members of our NJHS, so they are representing our warrior NJHS chapter tonight**. Two amazing students out of 760 from Watauga middle. E.R. will now lead us in the pledges, followed by H.A. who will provide an opportunity for student expression. Will you please rise."(ROA.1067).

- (08/27/15)(Christian Prayer) Middle School Vice-Principal: "…It gives me great pleasure to introduce **two of Smithfield Middle School's outstanding students**. Leading the U.S. and Texas pledge tonight will be Ms. A.C.…What I really love about her is she's a leader in our--in our school….Following A.C., would be Mr. M.B.…M. is also a great kid. M. is one of those kids, when I'm having a bad day in my office, I just have to go outside into the hall and find M.B...So we'll start off, M.B. will be providing…student expression."(ROA.1081-82).

- (09/24/15)(Christian Prayer) Elementary Principal: "…it gives me great pleasure to introduce [J.A. and W.F.]…And **our Polar Bears are honored** to be here tonight to begin **our meeting** with the pledges and **our** student expression."(ROA.1085).

- (10/22/15)(Christian Prayer) Elementary Principal: "…I am excited to be here tonight to introduce two of **our outstanding North Ridge students**..."(ROA.1088).

[7](ROA.783-87)(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)(ROA.1131)(ROA.1133-36) (ROA.1378)(ROA.1721-1859).

- (12/10/15)(Christian Prayer) Middle School Assistant Principal: "…It gives me great pleasure to present to you two **outstanding students from North Ridge Middle School**,…E.S. will **assist us in the student reflections**. Will you please rise."(ROA.1095).

(Emphasis added). BISD thus clearly "endorse[s] and sponsor[s] the speakers." *Lassonde*, 320 F.3d at 984.

Two misleading factual matters in BISD's brief must also be addressed. First, while BISD asserts its invocations are "sometimes" prayers (D.Br.5-6), the reality is that the vast majority (around 80%) are prayers (including several proselytizing religious poems).[8]

Second, BISD asserts that Board members "do not communicate with any student, parent, teacher, administrator, or other person to suggest or control the content of student expression." (D.Br.7-8). From 1997 to March 2015, however, the Board specifically prescribed "invocations." (P.Br.5 & n.8).

While this changed to "Student Expression," the one-minute limitation, coupled with BISD's long history of "invocation" only, leaves no room for doubt that the current practice "is about prayer." *Santa Fe*, 530 U.S. at 315. *E.g.*,(ROA.1478). BISD even *concedes* this by arguing that "Student Expression" is for "Legislative *Prayer*." (D.Br.13,20,24,38).

[8](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).

Furthermore, the Board's memo instructs principals: "students have a choice–prayer, devotion, poem, etc." (ROA.1134). *E.g.*, *id.* at 306 ("invocation and/or message"). And it still retains control to "cut off" student speech it deems "improper or offensive."[9]

## II. Student prayer at school-sponsored board meetings does not qualify for the rare, narrow legislative prayer exception.

It is firmly settled that "public schools may not subject their students to readings of any prayer." *Lee v. Weisman*, 505 U.S. 577, 610 (1992). This is so even if they are "student-initiated" and of the students' own unrestricted choosing at purely voluntary events. *Santa Fe*, 530 U.S. at 296-97, 301-03, 308-16.

BISD 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." *Santa Fe*, 168 F.3d at 821 n.11, 823. Such a practice is plainly unconstitutional, *id.*, and cannot be salvaged by the narrow legislative prayer exception. (P.Br.25-36). The Court in *Lee* explicitly ruled that *Engel v. Vitale*,[10] and *Sch. Dist. Abington Twp. v. Schempp*,[11] "require us to distinguish the public school context" from a "legislature." 505 U.S. at 592, 596-97.

It is beyond cavil that prayers delivered at graduation ceremonies and football games do not qualify for the legislative exception. *Santa Fe*; *Lee*.

[9] (P.Br.13)(ROA.1161)(ROA.1165)(ROA.1312-13).
[10] 370 U.S. 421 (1962).
[11] 374 U.S. 203 (1963).

Significantly, even BISD sees Board meetings as "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." *Doe v. Indian River Sch. Dist*., 653 F.3d 256, 277 (3d Cir. 2011). Namely, BISD's own policies make no distinction between student expression at Board meetings and at graduation and football games.[12]

According to BISD, however, if a school board is a "deliberative body," the legislative exception automatically applies. (D.Br.10,24). It cites no authority supporting this sweeping contention. And based on this flawed reasoning, BISD devotes most of its argument attempting to prove that school boards are "deliberative bodies." (D.Br.10,15-24).

Yet even BISD recognizes that the Third Circuit recently deemed "it irrelevant to determine whether a school board was a deliberative or legislative body." (D.Br.27). The court made clear: "*regardless* of whether the Board is a 'deliberative or legislative body,' we conclude that *Marsh* is ill-suited to this context." *Id.* at 278-79 (emphasis added). The paramount concern in school cases is protecting students from religious coercion and endorsement and "*Marsh* does not adequately capture these concerns." *Id.* at 275.

[12] (D.Br.6-8)(ROA.635,2106)(ROA.580-81)(ROA.593-94)(ROA.619).

The Sixth Circuit reached the same conclusion. *Coles v. Cleveland Bd. of Educ.*, 171 F.3d 369, 380-81 (6th Cir. 1999). In fact, it explicitly rejected BISD's very argument, noting that *Marsh* "does not support the proposition that government-sponsored prayer at all 'deliberative public bodies' is presumptively valid." *Id*. It then held that the purpose and nature of the school board removed "it from the logic in *Marsh*" and placed "it squarely within the history and precedent concerning the school prayer line of cases." *Id*.

> Simply stated, the fact that the function of the school board is uniquely directed toward school-related matters gives it a different type of "constituency" than those of other legislative bodies-namely, students. Unlike ordinary constituencies, students cannot vote. They are thus unable to express their discomfort with state-sponsored religious practices through the democratic process…

*Id*. at 381-82.

The same realities underpinning *Coles* and *Indian River* exist here. (P.Br.32-34). BISD's Superintendent confirmed: "it is always a great thing to open a school board meeting with involvement from your students since that's why you exist…we're here for our students." (ROA.1250).

Like *Indian River* and *Coles*, BISD's Board "is an integral part of the public school system." (D.Br.26)(citing *Coles*). It "honor[s] student achievements [and] hear[s] student-related concerns." (D.Br.23). It determines "the hiring and firing of teachers," and "school property tax rates." (D.Br.23-24). BISD "meetings take place on school property, the board retains control of the meeting and agenda, and

the board's purpose is to promote and support the public school system." (D.Br.27)(citing *Indian River*).

**A. BISD's "Student Expression" practice is not an "internal act."**

To even potentially qualify for the legislative exception, a prayer practice must be an "'an internal act' directed at the [] Legislature's 'own members,'" and be "'entirely for their own benefit.'" *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1814, 1819, 1825-27 (2014)(citing *Marsh v. Chambers*, 463 U.S. 783 (1983)). The practices in *Marsh* and *Greece* were upheld *because* their purpose was "to accommodate the spiritual needs of lawmakers." *Id.*

BISD's "Student Expression" practice is unmistakably not an "internal act" intended to accommodate the spiritual needs of lawmakers. BISD actually concedes the practice is not for its own benefit, but is instead an "opportunity for students," specifically for students to "hone their public speaking skills."[13] BISD proclaimed: "it's always about students having the opportunity to share their thoughts, express their first amendment rights." (ROA.1299).

BISD concedes this throughout its brief, declaring: "The inclusion of District students in school board meetings provides an *opportunity for students* to speak in front of their *parents, elected officials and community members* to open a Board meeting." (D.Br.48)(emphasis added). BISD even argues that it is for "students'

[13](ROA.53)(ROA.191-92)(ROA.248)(ROA.551,553,562)(ROA.1156)(ROA.1299) (ROA.2112)(ROA.2124).

free expression rights." (D.Br.50,56). But legislative prayer is not "free expression." *E.g. Snyder v. Murray City Corp*., 159 F.3d 1227, 1233 (10th Cir. 1998).

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.

**B. BISD's practice also lacks *Marsh*'s historical justification.**

A legislative practice must also be "consistent with the manner in which the First Congress viewed its chaplains." *Greece*, 134 S. Ct. at 1819; *Marsh*, 463 U.S. at 788-93, n.16. The exception is justified by the Court's belief that the framers were complicit with legislative prayer since they engaged in it. *Id.*

BISD's practice cannot be justified by such logic. *See Indian River*, 653 F.3d at 281. In *Edwards v. Aguillard*, the Court held 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." 482 U.S. 578, 583 n.4 (1987).

BISD cites only a single law review article, asserting, for the first time: "at least eight states have demonstrable historical records of opening prayers at school board meetings dating back to the early 19th century." (D.Br.21-22)(citing Elizabeth Wicks, *Prayer is Prologue: The Impact of Town of Greece on the*

*Constitutionality of Deliberative Public Body Prayer at the Start of School Board Meetings*, 31 J.L. & POL. 1, 30-31 (Summer 2015)). The evidence in the law review is specious at best. For instance, the author lists Massachusetts, citing only the fact that "the Common School Journal for the year 1842 explained that public school boards in Massachusetts could have clergymen as members." Wicks, at 31. More to the point, this limited nineteenth century history speaks nothing to whether the *First Congress* in the eighteenth century was complicit with "Student Expression."

Remarkably, even this very article belies BISD's position, with an entire section dedicated to: "Ensuring that Only Adults Deliver the Invocation." Wicks, at 40-41. The author recognized that student prayer falls outside the exception:

> Important to this [*Greece*] practice is the participation of adult prayer givers only. To have children or young high school students deliver the prayer would cause them to actively participate in a policy that is reserved for the benefit of the board members and would likely thrust the prayer practice towards the prohibitive ambit of *Lee* and the coercion test.

*Id.*

**C. Students are always present at BISD meetings.**

*Greece* stressed that the relevant inquiry "considers both the setting in which the prayer arises and the audience to whom it is directed." 134 S. Ct. at 1814. Throughout *Greece*, the Court emphasized that the audience impacted by its decision were adults rather than schoolchildren. *Id.* at 1825-26 ("Our tradition

assumes that *adult citizens*, firm in their own beliefs, can tolerate and perhaps appreciate a ceremonial prayer..."); *id.* at 1827 ("Neither choice represents an unconstitutional imposition as to mature *adults*...")(emphasis added). The Court reaffirmed that in a school event, where "school authorities maintain[] close supervision over the conduct of the students," an "invocation [i]s coercive." *Id.* (distinguishing *Lee* and *Santa Fe*).

BISD inexplicably argues that "*Greece* does not explicitly exclude public schools from its reasoning." (D.Br.20). Actually, *Greece* did just that. *Id. Greece* fully "supports the notion that the legislative exception is limited to houses of governance in the world of mature adults." *Freedom From Religion Found. v. Chino Valley Unified Sch. Dist. Bd. of Educ.*, 2016 U.S. Dist. LEXIS 19995, at *53 (C.D. Cal. Feb. 18, 2016). The Court explicitly distinguished *Lee* and *Santa Fe*, which is not surprising since Justice Kennedy authored *Greece* and *Lee*, and joined the majority in *Santa Fe*. 134 S.Ct. at 1827.

Still attempting to fit a square peg in a round hole, BISD contends that legislative meetings "experience the occasional presence of students." (D.Br.23). Unlike *Greece*, however, students are *essential* to BISD's "***Student*** Expression" practice. Whereas a young person might only occasionally be present at a town meeting, BISD students are present at, and *participate* in, *every* Board meeting. (P.Br.7-8,n.20).

Further distinguishing an infrequent student at a town meeting from the regular student attendance at BISD meetings is the unique relationship between the student and a school board. *See Coles*, 171 F.3d at 381-82. The Board "possesses an inherently authoritarian position with respect to the students." *Chino Valley*, 2016 U.S. Dist. LEXIS 19995, at *51.

### D. BISD fails to distinguish *Coles* and *Indian River* and its reliance on *Doe-II* is erroneous.

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.* at *31-32. BISD offers "no contrary authority." *Id.* Oddly, BISD declared: "Post-*Town of Greece*, at least one federal district court has found that the legislative prayer exception applies to school board meetings." (D.Br.11). Of course, that is the exact decision on appeal now.

The only other district court to reach such a conclusion, *Doe v. Tangipahoa Parish Sch. Bd.*, 631 F. Supp. 2d 823 (E.D. La. 2009)("*Doe-II*"), predated not only *Greece* but also *Indian River* and *Chino Valley*. And *Chino Valley* was decided after *Greece* and is consistent with *Coles* and *Indian River.* BISD's argument that *Coles* and *Indian River* are inapplicable because they predate *Greece* rings hollow. (D.Br.24,28-29). Crucially, whereas *Coles* and *Indian River* are consistent with *Greece*, *Doe-II* is not. (P.Br.34-36).

*Doe-II* is also distinguishable in two critical ways. First, *Doe-II* involved prayers by a rotating roster of clergy, identical to *Greece*. *Id.* at 826-27. Although BISD argues that *Doe-II* "also had students provide prayer in opening some of its meetings" (D.Br.32), that former practice was not before the court. *Id*.

Second, the prayer in *Doe-II* was offered "5 to 7 minutes before the Board meeting begins," which was "followed by a 3 to 4 minute break before the opening gavel and formal call to order." *Id.* at 829. The court stressed: "After the call to order, if any student guest is present to lead the Pledge of Allegiance or sing a patriotic song, the guest is introduced at that point, post-gavel, and performs." *Id.* This reduced the risk of coercion and ensured the practice was actually an "internal act," rather than an attempt to bring "prayer and proselytization into public schools through the backdoor." *Chino Valley*, 2016 U.S. Dist. LEXIS 19995, at *60-61. By contrast, BISD's prayers are part of the official public meeting. The students are even formally introduced to the *audience* by their principal, *supra.*

BISD offers no support for its contention that "*Indian River* and *Coles*…are now called into question" by *Greece*. (D.Br.28). To be clear, *Greece* upheld prayer before a *town council* by *adults*. *Greece* left "the school prayer cases, upon which *Indian River*, *Coles*, and [*Chino Valley*] rely, undisturbed." *Id.* at *53, *55-56.

BISD's sole basis for distinguishing *Coles* is that it "had a student representative who sat on the school board." (D.Br.28). But BISD has student

representatives at every single meeting. (P.Br.5-8). In *Doe v. Tangipahoa Parish Sch. Bd.*, this Court acknowledged a school board's identical argument that *Coles* was distinguishable because its board had a student member. 473 F.3d 188, 203-04 (5th Cir. 2006), *vacated on standing grounds*, 494 F.3d 494 (5th Cir. 2007)(en banc). Yet this Court called that a "distinction without a difference." *Id.*

BISD's attempt at distinguishing *Indian River* equally lacks merit. It argues that board members offered the prayers rather than students. (D.Br.26). This does not make BISD's practice more acceptable. Whereas *Indian River*'s practice was consistent with actual legislative practices,[14] BISD cited no case upholding a "Student Expression" legislative practice. BISD adds that *Indian River*'s "meetings were meaningful to students." (D.Br.28). But BISD's "***Student*** Expression" practice is clearly indistinguishable, because students are regularly invited to receive awards and perform (P.Br.65) and also deliver its prayers and pledges.

## III. BISD's Prayer Practice is unconstitutional under the traditional Establishment Clause tests.

### A. Prayers included in formal school board meetings, and even legislative sessions, constitute government speech.

BISD understands that if its Prayer Practice does not qualify for the legislative exception, it almost inexorably fails traditional Establishment Clause jurisprudence. (P.Br.45-66). *See Santa Fe*, 168 F.3d at 809, 823; *Tangipahoa*, 473

[14] *E.g. Turner v. City Council*, 534 F.3d 352, 354-55 (4th Cir. 2008)(prayers by council members).

F.3d at 197; *Snyder*, 159 F.3d at 1232. This is made acutely palpable by BISD's eleventh-hour attempt to convince this Court that *Lemon* has been overruled. (D.Br.38-39). To be sure, "'*Lemon* has never been overruled,'"[15] and remains binding in school prayer cases. *Santa Fe*, 530 U.S. at 314-20 (applying *Lemon* years after Scalia's *Lamb's Chapel dicta*).

BISD's only other option is to argue that the prayers delivered at its meetings, at its behest, and at a designated time slot on the agenda it created, are private speech. (D.Br.40-45). But every case involving school board prayers has recognized that such prayers constitute government speech, even when delivered by private citizens of "their own unrestricted choosing." *Tangipahoa*, 473 F.3d at 193. (P.Br.55).

Nor is there a "single case in which a legislative prayer was treated as individual or private speech." *Turner*, 534 F.3d at 355-56. Such prayers are government speech even when the legislators "do not compose or censor the prayers," have "no editorial control," and are delivered under an "all-comers" policy. (P.Br.55)(citing *Greece*, *Joyner*, and *Pelphrey*).

BISD's "free speech" argument is even belied by *Doe-II*, the very case BISD relies upon. BISD concedes *Doe-II*'s practice involved a neutral selection process and the "board did not review or otherwise exercise editorial control over the

[15] *Sedlock v. Baird*, 235 Cal. App. 4th 874, 886 (2015)(citation omitted); *see also Peele v. Klemm*, 2016 U.S. App. LEXIS 18626, at *6 (3d Cir. Oct. 17, 2016).

content of any prayer." (D.Br.31)(citing *Doe-II*). "Additionally, the board included a disclaimer on its agenda." (*Id.*). The court stressed that the "Board has no editorial power over the prayer's content. It keeps its distance." 631 F. Supp. 2d at 829. Nonetheless, the prayers were government speech subject to the Establishment Clause. *Id.* at 839-40.

BISD fails to explain why its student prayers constitute private speech when legislative prayers by private adult citizens of their own unrestricted choosing do not. Again, 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. Kuhlmeier*, 484 U.S. 260, 266 (1988)(citations omitted).

More fundamentally, BISD's argument is barred by *Santa Fe*, which held that even genuinely student-initiated prayers were not "'private' speech" because they were delivered under the "supervision of school faculty" at "government-sponsored school-related events." 530 U.S. at 302, 310.

A restriction on prayer is indeed "'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 even if the policy "neither encourages a religious message nor subjects the speaker to a majority vote." *Cole v. Oroville Union High Sch.*, 228 F.3d 1092, 1103 (9th Cir. 2000).

Contrary to BISD's insistence (D.Br.40-41), its one-minute period for solemnizing remarks, delivered together with the pledges (ROA.618), "cannot possibly be characterized as a public forum—limited or otherwise—at least not without fingers crossed or tongue in cheek." *Santa Fe*, 168 F.3d at 821. For instance, a public forum was not established in *Greece*, *Tangipahoa*, *Coles*, *Indian River*, *Collins*, *Harris*, *Chino Valley*, or *Doe-II.*

It "is clear that the government's proffered intent does not govern this inquiry." *Id.* at 818-22. In the typical case, "to justify a limitation it has placed on the speech of private individuals, the State asserts that it has not created a designated public forum." *Id.* In this case, the reverse is true: BISD "attempts to evade the requirements of the Establishment Clause by running for the protective cover of a designated public forum." *Id.* The Court must, "therefore, view skeptically [B]ISD's own self-serving assertion of its intent and examine closely the relationship between the objective nature of the venue and its compatibility with expressive activity." *Id.*

First, neither "its character nor its history" makes the one-minute "Student Expression" and pledge period "appropriate fora for such public discourse." *Id.* Rather, this formal part of the official meeting has traditionally been used for "invocation" only, and BISD maintains that "Student Expression" is intended to "solemnize" its meetings "in conjunction with the saying of the Pledge of

Allegiance." (D.Br.52)(ROA.619-20). In fact, BISD vehemently argues that this period is intended for "legislative *prayers*" and not for the free exchange of ideas.

Second, BISD "takes ownership"[16] of the Student Expression (D.Br.11,19), in contrast to the separate public comment period, including by reserving a space for the student speakers in the front row, having a principal introduce the students as representatives, and awarding them with a certificate, *supra*. Also militating against a public forum is the fact that the Board has ultimate authority over the remarks, including cutting off speech it deems offensive, and limits the pool of speakers to those in student council/leadership.[17]

BISD rests its argument on the fact that the "public comment agenda item at board meetings unquestionably serves as such a forum." (D.Br.42). This makes no sense. While the *public comment period* may constitute a public forum, the "ceremonial" period dedicated to "solemnizing" the meeting is not. (D.Br.5,11). Thus, BISD cannot escape the Establishment Clause by "piously wrapping itself in the false banner of 'limited public forum.'" *Id.* at 822.

### B. BISD cannot justify its practice under *Santa Fe*.

The District Court's decision cannot be reconciled with *Santa Fe*, as the salient facts in that case are present here. (P.Br.36-39). "While many may disagree

[16] *Walker v. Tex. Div., Sons of Confederate Veterans, Inc*., 135 S. Ct. 2239, 2242, 2251 (2015).
[17] (ROA.1133)(ROA.1161)(ROA.1165)(ROA.1286)(ROA.1312-13).

on the subject of prayer in public schools, our Constitution provides that the Supreme Court is the final arbiter of constitutional disputes." *Jaffree v. Wallace*, 705 F.2d 1526, 1536 (11th Cir. 1983), *aff'd*, 472 U.S. 38 (1985).

BISD's only basis for distinguishing *Santa Fe* is asserting that *Santa Fe* involved a majoritarian election. (D.Br.13-14,53). This "widely misses the mark." *Santa Fe*, 168 F.3d at 823. "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." *Id.* (emphasis added). *Accord Cole*, 228 F.3d at 1103 (student's religious speech would be unconstitutional even if the school's "policy neither encourages a religious message nor subjects the speaker to a majority vote"). Significantly though, BISD's practice involves the same majoritarian concerns, since only council/leadership students are eligible.[18]

Again, BISD's practice is far more flagrantly unconstitutional than *Santa Fe*'s practice in at least seven ways. *See* (P.Br.38-39). Whereas the "dual election" helped *distance* the *Santa Fe* school from the prayers, BISD speakers are formally

[18] BISD's policy provides in part: "Principals will solicit volunteers during the first two weeks of school from the campus *Student Council*." (ROA.1133). BISD's interrogatories confirm only "*student leadership* groups" are eligible. (ROA.1165)(ROA.1161).

introduced as representatives,[19] awarded a certificate, pose for a picture with the Board, and receive a thank you note.[20] They are told to sit with their campus administrator. (ROA.1133-36). A principal requests the audience to participate,[21] and school officials participate.[22] Thus, the school imprimatur is much greater here, regardless of any election. *See Santa Fe*, 530 U.S. at 306 (election was problematic only because it involved "the school in the selection of the speaker").

Moreover, the "election process" was only one factor and hardly dispositive. *Id.* at 307-17. In fact, it was only relevant to the policy's *facial* unconstitutionality. *Id.* at 316. But the Court made abundantly clear that it would have found the prayers unconstitutional even if the policy were "facially neutral." *Id.* at 307 n.21, 314. It was far more relevant that the prayers would be "delivered to a large audience assembled as part of a regularly scheduled, school-sponsored function." *Id.* (ROA.1247)(conceding Board meetings are "school-sponsored events."). Further, regardless of the written policy or election, the Court found that any

[19](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).
[20] (ROA.1133-36)(ROA.1138-41).
[21](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).
[22](ROA.783-87)(ROA.1182)(ROA.1189)(ROA.1196)(ROA.1203)(ROA.1211) (ROA.1217)(ROA.1264).

prayer would inevitably have "the improper effect of coercing those present to participate." *Id.* at 312 & n.21, 310.

Like *Santa Fe*, independent of any written policy or election, BISD's practice "does nothing to eliminate the fact that a minority of students," including those invited to receive awards and deliver the pledges, "are impermissibly coerced to participate in a religious exercise." *Doe v. Gossage*, 2006 U.S. Dist. LEXIS 34613, at *5, *19-20 (W.D. Ky. May 24, 2006).

### C. BISD's Prayer Practice fails the *Lemon* test.

#### 1. BISD's Prayer Practice lacks a secular purpose.

If state action fails the purpose test, it is unconstitutional regardless of its "possible applications." *Santa Fe*, 530 U.S. at 314. Because prayer is "patently religious," a religious purpose is presumed. *McCreary Cty. v. ACLU*, 545 U.S. 844, 862 (2005). And "allowing the students to decide whether to include prayer does not cure the problem." *Appenheimer v. Sch. Bd.*, 2001 WL 1885834, at *10 (C.D. Ill. 2001). *E.g.*, *Santa Fe*, 168 F.3d at 816-17; *Collins*, 644 F.2d at 762.

On the contrary, BISD's recent maneuvers only magnify its religious purpose. (P.Br.49). *See Santa Fe*, 530 U.S. at 316; *Gossage*, 2006 U.S. Dist. LEXIS 34613, at *19-20 (new policy permitting uncensored student "remarks" was "nothing more than a poorly disguised attempt to ensure that prayer will

continue"). BISD is "simply reaching for any way to keep a religious [practice]." *McCreary*, 545 U.S. at 873.[23]

Furthermore, in "light of the school's history of regular delivery of a student-led prayer" dating back to 1997, it is "reasonable to infer that the specific purpose of the [new] policy [is] to preserve a popular 'state-sponsored religious practice.'" *Santa Fe*, 530 U.S. at 308-09, 315 (citing *Lee*).

BISD's religious purpose is buttressed not only by this history, but also by "public comments" and actions of the Board. *McCreary*, 545 U.S. at 862-64. *E.g.*(P.Br.50-52). BISD argues that the Court cannot consider these statements. (D.Br.48-49). *McCreary*, however, specifically admonished that courts must not "ignore perfectly probative evidence" such as this. *Id*. at 866. *See Edwards*, 482 U.S. at 587.

Of course, BISD's religious purpose is so clear that the Court need not resort to any extrinsic evidence. *Stone v. Graham*, 449 U.S. 39, 41 (1980); *Summers v. Adams*, 669 F. Supp. 2d 637, 658-60 (D.S.C. 2009). "Recognizing that prayer is the quintessential religious practice implies that no secular purpose can be satisfied." *Wallace*, 705 F.2d at 1534.

And BISD failed to overcome this strong presumption of religious purpose. BISD offered only two justifications, neither of which are remotely sufficient to

[23](ROA.1249-50,1254-55)(ROA.1294-1300)(ROA.1478).

satisfy *Lemon*: (1) to "solemnize;" and (2) to provide "an opportunity for students to speak." (D.Br.37,47-48,52,54). This Court must not "accept what is obviously untrue: that these messages are necessary to 'solemnize'" and are "essential to the protection of student speech." *Santa Fe*, 530 U.S. at 315.

Once again, *Santa Fe* explicitly rejected the argument that solemnization satisfies *Lemon*'s purpose prong. *Id.* at 309 (P.Br.53). 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. (ROA.247). The Fourth Circuit similarly held that a judge's opening prayers failed the purpose test even though they were "solemnifying" because of the "intrinsically religious" nature of prayer. *N.C. Civil Liberties Union v. Constangy*, 947 F.2d 1145, 1150 (4th Cir. 1991). Rather than distinguish these and similar cases, BISD cited five inapposite authorities involving the legislative *exception* and *dicta* about the pledge. (D.Br.47-48).

First, BISD cited *Croft v. Perry*, which involved a facial challenge to Texas pledge statutes. 624 F.3d 157 (5th Cir. 2010). That BISD even cites *Croft* reveals its complete lack of supporting precedent. In *Croft*, the Court distinguished *Lee*, noting that *unlike prayer*, a "pledge of allegiance to a flag is not a prototypical religious activity." *Id.* at 170.

Second, BISD cited Justice O'Connor's concurrence in *Lynch v. Donnelly*, citing *Marsh* for the notion that *legislative prayers* serve "secular purposes of solemnizing." 465 U.S. 668, 693 (1984)(D.Br.47-48). Third, BISD cited *Greece*. But *Marsh* and *Greece* are *exempt* from *Lemon*, making these citations inapposite.

Fourth, BISD cited Justice O'Connor's concurrence in *Wallace v. Jaffree*, pertaining to "'under God' in the Pledge.'" 472 U.S. 38, 78 (1985)(O'Connor, concurring)(D.Br.48).

BISD's fifth citation, *Engel*, held school prayer *unconstitutional* and then *contrasted prayer* with historical patriotic references. 370 U.S. at 435 n.21.

Finally, BISD relied on *Jones v. Clear Creek Indep. Sch. Dist*., for its notion that "a law may pass *Lemon*'s secular-purpose test by solemnizing public occasions." 977 F.2d 963, 967 (5th Cir. 1992). (D.Br.48). But *Santa Fe* abrogated *Jones* for this exact proposition. 530 U.S. at 308-09. (ROA.233)(ROA.739-40).

BISD's only other avowed purpose—an "opportunity for students to speak"—does not constitute a "legitimate" secular purpose for authorizing *prayer*. (P.Br.56). *E.g.*, *Holloman v. Harland*, 370 F.3d 1252, 1286 (11th Cir. 2004). In *DeSpain v. De Kalb Cty. Cmty. Sch. Dist.*, the court held that a nondenominational "thank you" poem constituted a prayer and that its recitation in public school violated the Establishment Clause. 384 F.2d 836 (7th Cir. 1967). The school argued that the verse promoted good manners and gratitude, and the court

acknowledged it might well have had those effects. *Id.* But the court also noted that *Engel* and *Schempp* would be meaningless if the use of prayer could be justified on the grounds that it promotes secular virtues. *Id*. at 839.

**2. Prayers delivered at BISD's meetings unconstitutionally endorse religion.**

Independent of the purposes motivating it, BISD's practice emphatically fails *Lemon*'s effect prong. (P.Br.57-60). The effect of prayers delivered at school-sponsored meetings, with school officials actively participating, clearly "conveys a message of endorsement" of religion. *Santa Fe*, 168 F.3d at 817. *See Coles*, 171 F.3d at 384. To suggest otherwise would be disingenuous.

Contrary to BISD's "repeated assertions that it has [now] adopted a 'hands-off' approach," the student-initiated nature of the remarks do not "insulate the school from the…message." 530 U.S. at 305, 310.

For instance, in *Collins*, the Ninth Circuit held that "merely 'permitting' students" to open voluntary student assemblies with prayer unconstitutionally endorsed religion even though the assemblies were organized and conducted *entirely* by students, unlike Board meetings. 644 F.2d at 760-62. The students simply asked the principal if they could deliver prayers. *Id.* There was no written policy or majoritarian election on prayer. *Id.*

Similarly, in *Harris*, there was "'little or no [school] involvement' in the process resulting in prayer," yet the student-initiated prayers were unconstitutional.

41 F.3d at 452-55. 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.* Unlike here, the "seniors ma[d]e all decisions relating to the ceremony." *Id.* But 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.*

BISD made no attempt to distinguish these highly persuasive cases, which are "consistent with current Supreme Court precedent." *Appenheimer*, 2001 WL 1885834, at *8; *Black Horse*, 84 F.3d at 1483.

Instead, BISD argues that the effect prong is satisfied merely "because several students chose to use their allotted time to give secular rather than religious remarks." (D.Br.51-52). *Santa Fe* directly forecloses this argument. The policy allowed students to deliver a "brief invocation and/or message." 530 U.S. at 306. The school district averred, "until a student actually delivers a solemnizing message…there can be no certainty that any of the statements or invocations will be religious." *Id.* at 313. The Court agreed there was "no certainty" but held: "even if no Santa Fe High School student were ever to offer a religious message," the "*award of that power alone*, regardless of the students' ultimate use of it, is not acceptable." *Id.* at 313, 316 (emphasis added). Like *Santa Fe*, BISD has impermissibly awarded students the power to deliver prayers at its meetings.

BISD's argument is also foreclosed by *Lee*, which recognized that a *single* future graduation prayer would violate a student's rights under the Establishment Clause. 505 U.S. at 583-84, 594.

Attempting to distort the issues, BISD argues that if "a member of the public chose to speak during public comment (citizens' communication) and began with a prayer, any action by a board to squelch that conduct would certainly be an affront to the Constitution." (D.Br.58-59). A one-off prayer delivered during the public comment is clearly not at issue. What is at issue is BISD's policy of allotting a specific time in its agenda, *separate* from the public comment, for allowing prayer and pledges. A principal even formally introduces the student speakers and requests the audience to participate, *supra.*

Nor is it even a "legal reality," as BISD contends, that prohibiting such a prayer would violate the Constitution. *See Santa Fe*, 168 F.3d at 823. In fact, BISD already prohibits citizens from delivering "personal attacks" on "Board members, staff, or students" during the comment period.[24] *See Steinburg v. Chesterfield Cty. Planning Comm'n*, 527 F.3d 377, 385 (4th Cir. 2008)(boards may cut off public

[24](ROA.1390)(ROA.1863,1865,1869,1871,1873,1877,1879,1881,1885,1887,1892, 1896,1898,1900,1902,1904,1908,1910,1912,1915,1917,1919,1926,1928,1930, 1934,1936,1938,1941,1943,1947,1949,1951,1953,1956,1958,1960,1962,1964, 1966,1968,1970,1972,1974,1976,1978,1980,1982,1988,1990,1992,1994,1997, 1999,2001,2003,2005,2007,2011,2015,2022,2027,2029,2031,2035,2043-44,2046, 2048,2050,2055,2058,2060,2065,2067,2069,2072).

comment that threatens the "orderly and fair progress of the discussion, whether by virtue of its irrelevance, its duration, or its very tone and manner.").

BISD's argument "has as its major unarticulated premise the assumption that people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please." *Adderley v. Florida*, 385 U.S. 39, 47-48 (1966). But a "student's right to express his personal religious beliefs does not extend to using the machinery of the state." *Chandler v. James*, 180 F.3d 1254 (11th Cir. 1999).

BISD relies only upon *Croft* and *Jones* in asserting that its practice satisfies *Lemon*'s effect prong. (D.Br.50-52). Again, *Croft* did not involve prayer and *Jones* was abrogated by *Santa Fe*.[25] Even before *Santa Fe*, courts found *Jones* unpersuasive. *See Black Horse*, 84 F.3d at 1482; *Harris*, 41 F.3d at 454; *Chandler v. James*, 985 F. Supp. 1068, 1086 (M.D. Ala. 1997)(*Jones* was "a departure from established Supreme Court precedent" and rested "on questionable legal conclusions"). Apart from being abrogated, *Jones* created a tightly circumscribed "safe harbor" for "graduation" *only*. *Santa Fe*, 168 F.3d at 818, 823.

[25] *See Schultz v. Medina Valley Indep. Sch. Dist*., 2012 U.S. Dist. LEXIS 19397, at *69-70 (W.D. Tex. 2012)("*Sante* [sic] *Fe* has been interpreted as implicitly overruling the Fifth Circuit's *Jones* decision").

### D. BISD's Prayer Practice fails the Coercion Test.

Had the District Court properly applied *Lee*'s Coercion Test, it would have found that "the effect of the particular prayer that is offered in any given [meeting] will be to advance religion and coerce dissenting students." *Black Horse*, 84 F.3d at 1487. *Lee*, *Santa Fe*, and even *Greece*, make clear that public schools cannot include prayer in school functions because prayer is coercive as to objecting students. (P.Br.27,61-66). This result obtains even when the prayer is student-initiated and delivered at a completely voluntary event comprised of adult community members and students, such as a high school football game. *Santa Fe*, 530 U.S. 310-14. The risk that a student will feel coerced by the Board's practice is actually "even higher here than at football games or graduations." *Chino Valley*, 2016 U.S. Dist. LEXIS 19995, at *51. (P.Br.63-66).

Citing only its own self-serving affidavits, BISD argues: "Student attendance at a board meeting is entirely voluntary." (D.Br.15). But *Santa Fe* clearly held 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." 530 U.S. at 312. The same is true here.[26]

[26] Contrary to BISD's argument (D.Br.53), the absence of a majoritarian election is irrelevant, *supra*, at 20-22; *Cole*, 228 F.3d at 1103 (prayer unconstitutionally coercive absent "a majority vote.").

For some students though, attendance is not even "voluntary" within the meaning of *Lee.* 505 U.S. at 586-87, 593. (P.Br.61-66). The students delivering the pledges must be present for the prayer, as they are delivered together.[27] As in *Lee*, these "students could not avoid the fact or appearance of participation in prayers." (D.Br.54)(citing *Lee*). And while the "audience" may be "free to come and go" (D.Br.54), the student speakers must sit with their campus administrator in a reserved front row seat when the meeting begins. (ROA.1131)(ROA.1133-36).

The students invited by the Board to receive awards or perform also likely "feel especially coerced…to attend." *Indian River*, 653 F.3d at 276-77. (P.Br.7-8).

## IV. BISD's school officials' participation in prayers with students during Board meetings violates the Establishment Clause.

BISD cannot avoid the fact that its school officials' active participation in the prayers with students violates the Establishment Clause. (P.Br.67-70). It also cannot avoid the fact that the District Court's complete failure to address this claim, by itself, requires reversal. (*Id*).

The "State exerts great authority and coercive power…because of the students' emulation of [school officials] as role models." *Edwards*, 482 U.S. at

[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).

584. This Court has held 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." *Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402, 405-06 & n.4 (5th Cir. 1995).

BISD provides no cogent reason to depart from *Duncanville*. That the students received academic credit is irrelevant. (D.Br.57-58). Afterschool student club meetings are not for credit and yet the Establishment Clause, as well as the Equal Access Act, prohibit faculty from participating in prayer in such meetings. *Bd. of Educ. v. Mergens*, 496 U.S. 226, 232-36, 249-53 (1990).[28]

BISD argues that "[p]articipation by members of a legislative body in legislative prayer is permissible, however. To hold otherwise would negate the very concept of the legislative prayer." (D.Br.56). But this is yet another reason why the exception is unsuitable for school board meetings. (P.Br.40-41,68-69). It would defy logic and precedent to say that principals and superintendents may participate in student prayer during a school-sponsored board meeting on school property, but not at any other school-sponsored event. (*Id.*).

## CONCLUSION

BISD is unable to muster any legal support for its practice, as no such support exists. Accordingly, the District Court's judgment should be reversed.

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

Respectfully submitted,

November 7, 2016

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## CERTIFICATE OF SERVICE

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

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