# RECORD 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; ICHARD 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**

---

## PETITION FOR REHEARING EN BANC

---

**Monica L. Miller**
**CA Bar: 288343**
**DC Bar: 101625**
**AMERICAN HUMANIST ASSOCIATION**
**1821 Jefferson Place NW**
**Washington, D.C. 20036**
**Phone: (202) 238-2099**
**Fax: (202) 238-9003**
**mmiller@americanhumanist.org**

***Counsel for Appellants***

**Patrick A. Luff**
**TX Bar: 24092728**
**LUFF LAW FIRM, PLLC**
**3123 NW Loop 410**
**San Antonio, TX 78230**
**Phone: (210) 504-7575**
**Fax: (830) 584-0628**
**luff@lufflaw.com**

***Counsel for Appellants***

**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. Cary Hancock, Defendant/Appellee;
5. Jack McCarty, Defendant/Appellee;
6. Dolores Webb, Defendant/Appellee;
7. Joe Tolbert, Defendant/Appellee;
8. Brad Greene, Defendant/Appellee;
9. Richard Davis, Defendant/Appellee;
10. Ralph Kunkel, 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 Cary Hancock, Jack McCarty, Dolores Webb, Joe Tolbert, Brad Greene, Richard Davis, and Ralph Kunkel.

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

## FRAP 35(b)(1) AND LOCAL RULE 35.2.2 STATEMENT

This case seeks to uphold decades of binding Establishment Clause jurisprudence governing prayer in the public school context. The panel sustained a school district's practice of inviting students to deliver prayers in a quintessential school-sponsored setting. The panel's decision is contrary to holdings of the Supreme Court of the United States and other Courts of Appeals. En banc review is necessary to maintain uniformity in federal law and to consider constitutional questions of exceptional importance.

The Birdville Independent School District's ("BISD") school board begins every meeting with student participation. One student delivers the pledges and then another delivers a prayer. Both students are under the supervision of their principal, who introduces them to the audience as student representatives. Just after the prayers, other students often appear before the board to perform for school credit or to receive awards for academic or extracurricular accomplishments. Further, six students are appointed to serve as Student Ambassadors at board meetings each semester.

The Supreme Court has repeatedly held that the Establishment Clause prohibits school districts from including prayer as part of any school-sponsored event. Hence, every federal court of appeals to consider the question has concluded

that prayer at school board meetings is unconstitutional.[1] The narrow historical exception to the strict rule against government-sponsored prayer for invocations to solemnize the sessions of state legislatures and city- or county councils —the "legislative prayer" exception[2] — does not apply to the public school context where the need to protect students from subtle coercive pressures is of the utmost importance.[3] The only two circuit courts to address the merits of whether school board prayers qualify for the exception soundly, and after a detailed analysis, concluded that they do not. *See Doe v. Indian River Sch. Dist*., 653 F.3d 256 (3d Cir. 2011); *Coles v. Cleveland Bd. of Educ*., 171 F.3d 369 (6th Cir. 1999).

The panel's opinion is completely unprecedented, being: (1) the only circuit court to hold that the legislative prayer exception applies to school board meetings; (2) the first court ever to hold that the exception applies to student expression; and (3) the first court ever to hold that the exception allows principals and superintendents to participate in prayer with students in their official capacities. Each

---

[1] *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).

[2] *Marsh v. Chambers*, 463 U.S. 783 (1983); *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014). *See Jager v. Douglas Cty. Sch. Dist*., 862 F.2d 824, 829 n.9 (11th Cir. 1989)("*Marsh* created an exception to the *Lemon* test only for such historical practice" and not public school activity).

[3] *Lee v. Weisman*, 505 U.S. 577, 592 (1992).

of these rulings runs counter to Supreme Court and Fifth Circuit precedent, as well as precedent from the other Courts of Appeals.

1. First, the panel's holding that the legislative prayer exception applies to student prayer is contrary to Supreme Court precedent. The Supreme Court and this Court have made clear that school prayer cases are governed by the traditional Establishment Clause tests enunciated in *Lee v. Weisman*, 505 U.S. 577 (1992) and *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000): the tripartite *Lemon* test, and the coercion test.[4] Moreover, the Supreme Court has repeatedly and consistently held that the legislative prayer exception is inapplicable to the "public school context." *Lee*, 505 U.S. at 592, 596-97; *see also Edwards v. Aguillard*, 482 U.S. 578, 583 n.4 (1987). In *Greece*, the Court emphasized that the legislative exception remains inappropriate in a school setting because students are impressionable and susceptible to peer pressure. 134 S. Ct. at 1825-27. The panel's opinion extending

[4] *See Doe v. Santa Fe Indep. Sch. Dist.*, 168 F.3d 806, 814-16 (5th Cir. 1999), *aff'd*, 530 U.S. 290 (2000). 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. See also Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274, 278-79 (5th Cir. 1996)(finding these tests controlling in school prayer cases); *Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402, 405-06 (5th Cir. 1995)(same).

the legislative prayer exception to the public school context conflicts with the aforementioned authorities.

2. Second, the panel's expansion of the legislative prayer exception to student prayer is irreconcilable with Supreme Court and Fifth Circuit precedent holding that prayers delivered before captive student audiences are unconstitutionally coercive.[5]

In *Santa Fe*, the Supreme Court held that permitting students to deliver a brief "invocation and/or message" at informal football games was unconstitutionally coercive as to students voluntarily attending such games. 530 U.S. 290, 301-03, 310-12. If, as *Santa Fe* holds, student prayers at voluntary, extracurricular school events comprised of adult community members and older students are unconstitutionally coercive, then so too are prayers at formal school board meetings where students (and often very young students) are always present and sometimes required to attend for their grade.

3. Third, the panel's unprecedented holding that the legislative prayer exception allows principals and superintendents to participate in prayer with students

[5] *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 301-03, 308 (2000); *Lee v. Weisman*, 505 U.S. 577, 588 (1992); *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203, 224-25 (1963); *Engel v. Vitale*, 370 U.S. 421, 430-31 (1962); *Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274, 279-80 (5th Cir. 1996); *Hall v. Bd. of Sch. Comm'rs*, 656 F.2d 999, 1000 (5th Cir. 1981); *Meltzer v. Bd. of Pub. Instruction*, 548 F.2d 559, 574 (5th Cir. 1977), *aff'd on rehearing*, 577 F.2d 311 (1978)(en banc)("we find that it is the daily Bible reading to students in a 'captive audience' situation over the public address system each morning, which is violative of the First and Fourteenth Amendments").

conflicts with controlling precedent. The Fifth Circuit and Supreme Court have held that the Establishment Clause prohibits school officials from participating in prayer with students.[6] No court has ever held that the legislative prayer exception applies to school official participation in student prayers. The panel's decision also conflicts with the persuasive decisions of other circuit courts[7] and federal statutory law.[8]

4. Fourth, the panel's holding that the legislative exception applies to school board prayers created a circuit split. Its option is directly contrary to the unanimous circuit court opinions addressing this issue.[9] It also directly conflicts with the opinion of the only other court to have addressed this issue since *Greece*.[10]

5. Fifth, the panel's holding conflicts with *Greece* itself. For the legislative exception to apply, a practice must be an "internal act" solely "to accommodate the

---

[6] *See Bd. of Educ. v. Mergens*, 496 U.S. 226, 232-36, 249-53 (1990); *Edwards v. Aguillard*, 482 U.S. 578, 583-84 (1987); *Karen B. v. Treen*, 653 F.2d 897 (5th Cir. 1981), *aff'd*, 455 U.S. 913 (1982)(faculty participation in prayers with students unconstitutional); *Ingebretsen v. Jackson Pub. Sch. Dist*., 88 F.3d 274, 277 (5th Cir. 1996)(school officials' participation in prayer with students unconstitutional); *Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402, 405-06 & n.4 (5th Cir. 1995)(coach's participation in prayers with students unconstitutional).

[7] *See Borden v. Sch. Dist.*, 523 F.3d 153 (3d Cir. 2008)(coach participation in student prayers unconstitutional); *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1285-1286 (11th Cir. 2004); *Roberts v. Madigan*, 921 F.2d 1047, 1056-58 (10th Cir. 1990), *cert. denied*, 112 S. Ct. 3025 (1992).

[8] Equal Access Act, 20 U.S.C. §§ 4071 *et seq*. (prohibiting school officials from participating in religious activity with students in student clubs).

[9] *See Coles v. Cleveland Bd. of Educ.*, 171 F.3d 369 (6th Cir. 1999); *Doe v. Indian River Sch. Dist.*, 653 F.3d 256 (3d Cir. 2011).

[10] *See 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).

spiritual needs of lawmakers." *Greece*, 134 S. Ct. at 1825-26 (citing *Marsh*). The primary purpose for BISD's "Student Expression" practice, according to BISD, is to provide an opportunity for students to express their First Amendment rights.

6. Sixth, the constitutional question raised in this case is one of substantial jurisprudential importance.[11] Every other circuit court that has had the occasion to merely determine the scope of *Greece* in the actual legislative prayer context has granted en banc review. *See Bormuth v. Cnty. of Jackson*, 2017 U.S. App. LEXIS 3564 (6th Cir., Feb. 27, 2017); *Lund v. Rowan Cnty.*, 2016 U.S. App. LEXIS 19805 (4th Cir. Oct. 31, 2016). And *Bormuth* and *Lund* are much more like *Greece* than the case at bar; both involve legislative prayers delivered at county meetings rather than student expression delivered at school board meetings. This case is the first occasion for a circuit court to determine whether the legislative prayer exception extends to student expression and to school officials participating in prayer with students. It is also the first occasion for a circuit court to determine what, if any, impact *Greece* has on school board prayers.

7. Lastly, sustaining the panel's opinion will yield two incongruous results: (1) An elementary student delivering the pledges at a school board meeting can be subjected to a proselytizing, degrading prayer, but if that same prayer is delivered at a football game to an audience comprised of older students and adult community

[11] *E.g.*, *Doe v. Tangipahoa Parish Sch. Bd.*, 494 F.3d 494 (5th Cir. 2007)(en banc).

members, it is unconstitutional under *Santa Fe*. (2) Under Fifth Circuit precedent, it is unconstitutional for a teacher to participate in a prayer with her students before an off-campus recital, but under the panel's ruling, that same teacher can actively participate in a prayer with her students at a formal school board meeting where the students must perform for the board as part of their choir grade.

Because students participating in school board meetings, under the supervision of school officials, are no less susceptible to religious indoctrination and peer pressure than students merely attending high school football games, and because the heightened protection given to students in school prayer cases does not turn on any particular adult-to-student ratio, students attending school board meetings should be entitled to the same Establishment Clause protections as students attending any other school event.

Rehearing en banc is therefore necessary (i) to assure uniformity across the Supreme Court's and this Court's precedents (ii) to avoid an unnecessary circuit split, and (iii) to resolve an important issue of constitutional law.

# TABLE OF CONTENTS

**Page:**

# TABLE OF AUTHORITIES

**Page(s):**

**Cases:**

**Statute:**



**Constitutional Provisions:**



**Rule:**

**Other:**

## STATEMENT OF ISSUES PRESENTED

1. Is the context of school board meetings—with student participation, student recognition, and the board's central role in the school district—such that student prayers at those meetings should be analyzed under the school prayer cases, or do they qualify for the extremely narrow legislative prayer exception?

2. Is the panel's opinion upholding school officials' participation in student prayers contrary to controlling precedent?

3. Did the panel err in finding BISD's "Student Expression" practice consistent with the way the First Congress viewed its chaplains?

## STATEMENT OF THE COURSE OF PROCEEDINGS

On June 15, 2015, plaintiffs Isaiah Smith and American Humanist Association filed suit challenging BISD's practices of: (1) opening school board meetings with student prayers; and (2) school officials participating in prayers with students. (ROA.142-56). On August 14, BISD moved to dismiss. (ROA.174-76). The district court denied the motion (ROA.256-57), and the individual-capacity defendants appealed. (ROA.282-83). On June 23, 2016, BISD moved for summary judgment, and on July 18, AHA/Smith filed a cross motion.[1] On August 1, the court granted BISD's motion, holding that the student prayers qualified for the legislative exception. (ROA.2185-91). On August 8, AHA/Smith appealed. (ROA.2193-95).

[1] (ROA.475-87)(ROA.541-44)(ROA.545-72)(ROA.642-65)(ROA.707-2125).

Oral argument was held on February 7, 2017. On March 20, the panel affirmed the district court's ruling on summary judgment.[2]

## STATEMENT OF FACTS

Since 1990, BISD's Board of Trustees ("Board") meetings have opened with prayers and pledges delivered by students under the supervision of principals.[3] The Board meets monthly on school district property.[4]

Multiple students participate in every meeting. In addition to the two student representatives delivering pledges and the invocation, students frequently attend to receive recognition for academic and extracurricular accomplishments or to perform.[5] In 2014 and 2015, 18 out of 24 meetings involved some student

---

[2] *Am. Humanist Ass'n v. McCarty*, 2017 U.S. App. LEXIS 4922 (5th Cir. Mar. 20, 2017). Citations herein are based on the Lexis pagination.

[3](ROA.606)(ROA.783-86)(ROA.1105-10)(ROA.1113-21)(ROA.1126-29)(ROA.1131)(ROA.1133-1136)(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).

[4] (ROA.35-42)(ROA.146)(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.1497-1719)(ROA.1721-1859)(ROA.1861-2081).

[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,

performance or recognition.[6] Moreover, since 2014, six "student ambassadors" are selected by principals from each high school to participate in meetings as official liaisons between the Board and student constituents.[7]

It is in this student-focused context that the challenged prayers take place. Each November, the Board provides principals with a schedule for the year's "Student Participation Invocation and Pledge Leaders."(ROA.1143-45). Approximately 85% of the prayers and pledges are delivered by elementary and middle schoolchildren.[8]

The Board instructs the principals to meet with their students before the meeting to "go over the process." (ROA.1133-36). The students are told where to sit (with their principal in a reserved front-row seat) and how to act. (ROA.1134). The two students join their principal at the podium. (ROA.1133-36)(ROA.814). The principal announces that the students are "representing" their school,[9] and instructs the audience stand.[10] The prayer is delivered after the pledges.[11]

---

1951,1953,1964,1966,1976,1986,1988,1997,1999,2003,2009,2035,2037-38,2041,2043,2051-52,2054-57,2060,2065,2067,2072).

[6] (ROA.1691-1716)(ROA.1832-1858).

[7] (ROA.1176)(ROA.1399)(ROA.2048)(ROA.2053)(ROA.2056)(ROA.2065).

[8] (ROA.783-87)(ROA.789-1100)(ROA.1105-10)(ROA.1113-21)(ROA.1123)(ROA.1126-29).

[9](ROA.783-87)(ROA.797,858,861,883,885,929,932,1009,1030,1046,1067,1081,1085,1088,1091,1095)(ROA.1131,1133-36)(ROA.1378)(ROA.1721-1859).

[10] (ROA.1105-10)(ROA.1131)(ROA.1133)(ROA.783-87)(ROA.85-56,885,905,919,922,926,929,938,941,946,949,955,956,962,972,976,983,995,1009,1013,1016)(ROA.1105-10)(ROA.1174-75)(ROA.1261-62).

[11](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-

School officials, including the Superintendent, principals, and Board Members, actively participate in the prayers.[12] At the "conclusion, the student will receive a certificate and will pose for a picture with a Board Member."[13] A student performance or awards ceremony often follows the prayer.[14] After that, students, parents, and other citizens have an opportunity to voice their concerns about the operation of the public school system during the open forum.[15]

Before litigation, each meeting opened with an "Invocation,"[16] which was normally a prayer.[17] In March 2015, in response to a litigation threat,[18] BISD changed the language in the agendas from "Invocation" to "Student Expression" and

---

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).

[12](ROA.783-787)(ROA.922)(ROA.1043)(ROA.1840)(ROA.1182)(ROA.1189)(ROA.1196)(ROA.1203,1211,1217,1223)(ROA.1261,1264-66)(ROA.1316-17)(ROA.24).

[13] (ROA.1133,1136)(ROA.1138-41).

[14] *E.g.*,(ROA.1725-26,1729-30,1743,1766-68,1781-82,1796,1805,1857-58,1894-95,1914-15,1921,1949,1951,2071-72).

[15] *E.g.*,(ROA.1726,1732,1747,1750,1766-67,1770,1777,1949,1951).

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

[17](ROA.1105-10)(ROA.1113-21)(ROA.1126-29)(ROA.1173)(ROA.1428)(ROA.1467)(ROA.1478);(ROA.783-87,790,795,821,828,830,834,840,850,852, 862,912,915,919,922,1005,1028,1043,1052,1056)(ROA.1064-65,1067-68,1082-83,1085-86)(ROA.1088-89)(ROA.1095-96)(ROA.1110)(ROA.1120-21)(ROA.1174)(ROA.1233).

[18] (ROA.1147-54)(ROA.1249-50,1254-55)(ROA.1294-1300).

announced that students will be selected from student council[19] to deliver a "one-minute" "student expression," which can include "prayer."[20] Most "student expressions" remain prayers or religious poems.[21]

## REASONS FOR GRANTING REHEARING EN BANC

### I. The panel's unprecedented expansion of the legislative prayer exception to student prayer conflicts with seminal Supreme Court and Fifth Circuit precedent.

The Supreme Court "has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools," *Edwards*, 482 U.S. at 583-84, where "there are heightened concerns with protecting freedom of conscience from [even] subtle coercive pressure." *Lee*, 505 U.S. at 592. "[P]rayer exercises in public schools carry a particular risk" of unconstitutional coercion. *Id*.

It is well settled that "public schools may not subject their students to readings of any prayer." *Id.* at 610. This is so even if they are "student-initiated" at purely voluntary events such as football games. *Santa Fe*, 530 U.S. at 296-97, 301-03, 308-16. In *Lee*, the Court held that a school's inclusion of a nonsectarian prayer in a graduation was unconstitutionally coercive even though the event was voluntary and students could abstain from the prayer. 505 U.S. at 586-87.

---

[19](ROA.518)(ROA.1133)(ROA.1161,1165)(ROA.1157).
[20] (ROA.1157-58)(ROA.1161-62)(ROA.2188,ROA.2190).
[21] (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).

Establishment Clause challenges are evaluated using "three complementary (and occasionally overlapping) tests" established by the Supreme Court: *Lemon*, the endorsement test, and the coercion test. *Santa Fe*, 168 F.3d at 814-16. These are controlling in cases involving student prayers. *Id.*

The panel properly recognized that "like *Santa Fe*, this case is about school-district-sanctioned invocations delivered by students on district property."(*10). It also acknowledged that "[a]s distinguished from legislative-prayer cases," the "Supreme Court, in school-prayer cases…has applied the conventional Establishment Clause tests."(*9). Nonetheless, it concluded that these student prayers are not governed by student prayer cases but rather the narrow legislative exception carved out in *Marsh*.(*8-10).

**A. The panel's decision conflicts with Supreme Court precedent.**

The panel's extraordinary extension of the legislative exception to "school-district-sanctioned invocations delivered by students" (*10) directly conflicts with Supreme Court precedent. The Court has explicitly held that the legislative prayer exception does not apply to the "public school context." *Lee*, 505 U.S. at 592, 596-97. *See also Edwards*, 482 U.S. at 583 n.4.

Contrary to the panel's conclusion that *Greece* altered this analysis, *Greece* fully "supports the notion that the legislative exception is limited to houses of governance in the world of mature adults." *Chino Valley*, 2016 U.S. Dist. LEXIS 19995, at *53.

*Greece* "was not a sea change across all lines of First Amendment jurisprudence; rather, it extended *Marsh* from the statehouse to town halls, and held that *legislative* prayers delivered therein need not be non-sectarian." *Id.*

The Court repeatedly emphasized that the audience impacted by this decision are adults:

> Our tradition assumes that *adult* citizens, firm in their own beliefs, can tolerate and perhaps appreciate a ceremonial prayer…
>
> *Adults* often encounter speech they find disagreeable; and an Establishment Clause violation is not made out any time a person experiences a sense of affront from the expression of contrary religious views in a legislative forum.

*Greece*, 134 S. Ct. at 1823, 1826 (emphasis added). Justice Kennedy, the author of *Lee*, reiterated:

> Should nonbelievers choose to exit the room during a prayer they find distasteful, their absence will not stand out as disrespectful or even noteworthy. And should they remain, their quiet acquiescence will not, in light of our traditions, be interpreted as an agreement with the words or ideas expressed. Neither choice represents an unconstitutional imposition as to *mature adults*, who "presumably" are "not readily susceptible to religious indoctrination or peer pressure."

*Id*. at 1827 (quoting *Marsh*, 463 U.S. at 792)(emphasis added). Such a choice *does*, however, represent an unconstitutional imposition as to students. *Santa Fe* held that the Constitution "demands that the school may not force this difficult choice upon these students." 530 U.S. at 312. *Lee* also firmly held that the state must not place "primary and secondary school children" in this position. 505 U.S. at 593.

Instructively, *Greece* distinguished *Lee* and *Santa Fe*, making clear that its ruling did not impact those decisions:

> This case can be distinguished from the conclusions and holding of *Lee*…where school authorities maintained close supervision over the conduct of the students and the substance of the ceremony…*see also Santa Fe*…

134 S. Ct. at 1827. In short, nothing in *Greece* "indicates an intent to disturb the long line of school prayer cases outlined above, or the 'heightened concern' they express for children forced to confront prayer in their public school, and there is every indication it preserves it." *Chino Valley*, 2016 U.S. Dist. LEXIS 19995, at *54-56 (quoting *Lee*, 505 U.S. at 592).

The circumstances that controlled *Lee* and *Santa Fe* did not exist in *Greece*, but they do exist here. As in *Lee*, and unlike *Greece*, "school authorities maintain[] close supervision over the conduct of the students and the substance of the [meeting]." *Id*.[22] Moreover, like a graduation the "Board's recognition of student

[22](ROA.1131)(ROA.1133-36)(ROA.1312-13)(ROA.2048)(ROA.1157-58)(ROA.1161-62). *See also*(ROA.795,858,861,883,885,929,932,1009,1030,1046,1067,1081,1085,1088,1091,1095)(ROA.1138-41)(ROA.1143-45)(ROA.1497-1501,1503-10,1512,1514-81,1583-94,1596-1648,1650-61,1663-87,1689,1702,1704-13,1715-17,1719,1721-24,1726-38,1740,1742-52,1754-64,1766,1768-78,1780-81,1783-93,1796,1798-1800,1803-10,1812-23,1825-36,1838-54,1856-57,1859,1862,1865,1867,1869,1871,1873,1875,1876-77,1879,1881,1883,1885,1887,1889,1892,1894,1896,1898,1900,1902,1904,1906,1908,1910,1912,1914,1917,1919,1921,1923,1924,1926,1928,1930,1932,1934,1936-38,1940,1943,1945-47,1949,1951,1953-55,1958,1960-62,1964,1966,1968,1970-72,1974,1976-82,1984,1986,1988-92,1994-96,1998,2000,2002,2004,2006-07,2009,2011-

achievement allows 'family and those closest to the student to celebrate success.'" *Indian River*, 653 F.3d at 276.[23] And like *Santa Fe*, BISD's prayers are "delivered to a large audience assembled as part of a regularly scheduled, school-sponsored function conducted on school [district] property." 530 U.S. at 307. The messages are delivered over the district's sound system, "which remains subject to the control of school officials." *Id.* at 307.[24]

As the salient facts in *Lee* and *Santa Fe* are present here, the panel's conclusion that "the presence of students at board meetings does not transform this into a school-prayer case" cannot be maintained. (*12-13). At least six key

---

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).

[23] (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, 952,961-62,965,972,975,979,986,991,998-99,1001,1004,1009,1013,1019,1022,1027,1033,1043,1049,1055,1058,1061,1064,1067,1070,1074,1077,1088,1091-92,1095,1098)(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).

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

distinctions between the school board and a town council puts this case squarely in line with school prayer cases:

***First***, unlike a town meeting, BISD has "deliberately made its meetings meaningful to students." *Indian River*, 653 F.3d at 275-77.[25] BISD's practice ensures that at least two students speak in every meeting. Additionally, six Student Ambassadors are expected to attend meetings for an entire semester.[26] Other students are consistently present to receive awards or to perform.[27]

For many students, participation is compulsory. Every December, a student musical group, such as Haltom Singers or Richland Rebellaires, performs for the Board.[28] These ensembles are graded classes held during 6th period; all performances

[25] *E.g.*(ROA.1133-36)(ROA.1138-41)(ROA.1176).
[26] (ROA.1176)(ROA.1399)(ROA.2048)(ROA.2053)(ROA.2056)(ROA.2065).
[27] (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).
[28] (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).

"scheduled outside of the regular school day" are mandatory.[29] According to the 2015-16 Richland High School Choir Handbook, "[s]tudents are required to attend the entire concert as part of a concert etiquette grade. No one is permitted to arrive late or leave early without prior permission of the director."[30] The 2016-17 Haltom High School Choir Handbook states that attendance at all performances "is required and graded."[31] The Haltom Singers performed in 2009, 2011, 2012, and 2015.[32] The Rebellaires performed in 1999, 2003, 2006, 2007, 2010, 2013, and 2016.[33]

It is true that there "were children present at the town-board meetings in *Galloway*." (*12-13). But *Greece* referred only to "occasional" presence of minors. 134 S. Ct. at 1832 (Alito, J., concurring). There are at least nine reasons students are present at BISD meetings:

---

[29] http://richlandhschoir.weebly.com/uploads/2/4/2/1/24212542/beginning_of_year_rhs_handbook._2016-17.pdf (viewed 04/01/2017); http://www.birdvilleschools.net/site/handlers/filedownload.ashx?moduleinstanceid=42115&dataid=81538&FileName=VOH%20Handbook%201617.pdf (last viewed 04/01/2017). The Court can take judicial notice of these handbooks under FED. R. EVID. 201(b)-(d). *E.g.*, *Ali v. Stephens*, 822 F.3d 776, 782 n.5 (5th Cir. 2016)(taking judicial notice of handbook available on government website); *United States v. Herrera-Ochoa*, 245 F.3d 495, 501 (5th Cir. 2001).

[30] http://richlandhschoir.weebly.com/uploads/2/4/2/1/24212542/beginning_of_year_rhs_handbook._2016-17.pdf

[31] http://www.birdvilleschools.net/site/handlers/filedownload.ashx?moduleinstanceid=42115&dataid=81538&FileName=VOH%20Handbook%201617.pdf

[32] (ROA. 1639)(ROA.1665)(ROA.1677)(ROA.1716,1858,2072)

[33] (ROA.1518)(ROA.1563)(ROA.1603)(ROA.1615)(ROA.1652)(ROA.1690) (http://schools.birdvilleschools.net/cms/lib2/TX01000797/Centricity/Domain/4885/16120801RM.pdf) (2016).

- Pledge Leader (every meeting)
- Student Expression Leader (every meeting)
- Student Ambassador (entire semester)
- Choir/Band Performances (December)
- Holiday Greeting Card Winner (November/December) [34]
- Disciplinary matters[35]
- Valedictorians, Salutations, and National Merit Scholars (May)[36]
- Special Olympics Student Athletes/State Finalist Athletes (June)[37]
- Other Awards (cheerleading, bowling, volleyball, art, etc.)[38]

And whereas *Greece* was limited to adult prayer-givers, BISD's "*Student* Expression" practice is for students *only*. Curiously, the panel relied on a law review article[39] that devoted an entire section to: "Ensuring that Only Adults Deliver the Invocation," recognizing:

> 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

[34] (ROA.1494)(ROA.1638,1677,1690,1702,1716,1773,1818,1831,1844,1857) (ROA.1951,2018,2035,2052,2071).
[35] (ROA.1543); FNG(LOCAL)-X, available at https://1.cdn.edl.io/PGSo6mdNU5xDkL1h27vtHMUzqQQuS5lQ268OrVKNvC64UAF3.pdf.
[36] (ROA.1513,1523,1535,1544,1556,1569,1581-82,1595,1608,1620,1632,1644, 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).
[37] *E.g.*,(ROA.1545,1583,1597,1609,1621,1633,1754,1812,2027).
[38] *E.g.*,(ROA.1511-12,1545,1577,1599,1622,1639,2053).
[39] (*12 n.15)(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)).

> practice towards the prohibitive ambit of *Lee* and the coercion test. [Wicks, at 40-41].

***Second***, unlike a town, the Board possesses an inherently authoritarian position over students. *See Coles*, 171 F.3d at 381-82; *Chino Valley*, 2016 U.S. Dist. LEXIS 19995, at *51. The Board "metes out discipline and awards at these meetings, and sets school policies that directly and immediately affect the students' lives." *Id*.[40] "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*.

***Third,*** school officials, including the superintendent, principals, and faculty are present. And students participating in meetings are under the supervision of these officials. *Cf. Greece*, 134 S. Ct. at 1827.

***Fourth,*** school officials actively participate in the prayers with students. The Court has held that 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 recognized that a coach's participation in student prayers "no doubt 'will be perceived by the students as inducing a participation they might otherwise reject.'" 994 F.2d at 165 (quoting *Lee*, 505 U.S. at 590).

***Fifth***, school board meetings are integral to the public school system and have all the earmarks of any other public school event:

---

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

- They are held on school district property
- They are conducted by school officials
- Faculty and administrators are present
- Students are always present and participating

*See Coles*, 171 F.3d at 377. 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).

***Sixth***, "[u]nlike 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.

### B. The panel's opinion creates a paradoxical outcome foreclosed by *Santa Fe* and *Lee*.

Supreme Court precedent establishes that prayers delivered at graduation and football games do not qualify for the legislative exception. (*Lee*, *Santa Fe*). Significantly, BISD's own polices make no distinction between student expression at school board meetings, graduation, and football games.[41] If the panel's ruing is sustained, a student randomly selected to deliver the pledges at a formal school board meeting will be accorded less constitutional protection than a student selected to deliver the pledges at a football game.

[41] (ROA.553,580-81,593-94)(ROA.635,2106)(ROA.619)(ROA.2157).

The heightened review given to school-sponsored prayer does not turn on any particular children-to-adults ratio. If such were the case, then many school events such as football games and graduations would be subject to lesser scrutiny than classrooms simply because of the large presence of adults. This reasoning, of course, runs counter to *Santa Fe* and *Lee*.

*Santa Fe* made clear that *Lee*'s coercion analysis applies to school prayer cases regardless of the "type of school function." 530 U.S. at 301-02. Whenever a school district creates an opportunity for students, it cannot condition participation upon being subjected to prayer. "It is a tenet of the First Amendment that the State cannot require *one* of its citizens to forfeit his or her rights and benefits as the price of resisting conformance to state-sponsored religious practice." *Lee*, 505 U.S. at 596 (emphasis added). This is so even when the prayer is delivered at an event comprised largely of adult community members. *Santa Fe*, 530 U.S. 310-14.

BISD forces students, such as those selected to deliver the pledges or serve as ambassadors, to choose between participating in an educational opportunity or risk being subjected to a prayer that is "offensive to the student." *Lee*, 505 U.S. at 594. *Santa Fe* recognized "the difficult choice between attending [the] games and avoiding personally offensive religious rituals." 530 U.S. at 292, 311-12. The Court further 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." *Id.* at 312.

Just like in *Lee* and *Santa Fe*, a student who ultimately attends a meeting "is placed in the untenable position of having to choose either to" participate in the prayer, or protest and "thereby risk actual or perceived opprobrium and ostracism from [] administrators and faculty, not to mention from his peers." *Doe v. Beaumont Indep. Sch. Dist.*, 173 F.3d 274, 290 (5th Cir. 1999).

For instance, an elementary student pledge-leader must stand at the podium with her principal and another student.[42] As soon as she finishes, the prayer is delivered. If she wishes to leave, her principal and peers will undoubtedly notice, and besides, she will have to come right back in to receive her certificate and pose for a picture with the Board.[43] As in *Lee* and *Santa Fe*, "[f]inding 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, 588. Certainly she is not "'free to enter and leave with little comment and for any number of reasons'" as in *Greece*. 134 S. Ct. at 1827 (citing *Lee*, at 597).

---

[42] *E.g.*,(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.1133-36)(ROA.1182)(ROA.1189)(ROA.1196)(ROA.1211)(ROA.1217).

[43] (ROA.1133-36)(ROA.1138-41).

## II. The panel's opinion conflicts with the authoritative decisions of the other Courts of Appeals.

The panel's decision creates a circuit split. *See Indian River*, 653 F.3d at 259-75; *Coles*, 171 F.3d at 376-79. The other circuit courts to address this question, the Third and Sixth, "soundly, and after detailed analysis, concluded that school board prayer does not qualify for the legislative exception." *Chino Valley*, 2016 U.S. Dist. LEXIS 19995, at *31-32. And the only court to address this issue after *Greece* agreed that the "**Legislative Exception Does Not Apply to Prayer at School Board Meetings**." *Id*.

The Court must begin "with trepidation" in the face "federal courts of appeals" that have reached the same conclusion, because the Court is "always chary to create a circuit split." *Alfaro v. Comm'r*, 349 F.3d 225, 229 (5th Cir. 2003). The panel's proffered reasons for splitting cannot overcome the "high hurdle" of preserving the uniformity of the circuits. *Id.* at 230.

First, the panel's suggestion that *Coles* and *Indian River* are questionable merely because they predate *Greece* rings hollow. (*14). *Greece* left "the school prayer cases, upon which *Indian River*, *Coles*, and [*Chino Valley*] rely, undisturbed." 2016 U.S. Dist. LEXIS 19995, at *53, *55-56.

Second, the panel's sole basis for distinguishing *Coles* was that it "involved a school board that always had at least one student member."(*14). It distinguished *Indian River* on the ground that "student representatives attended board meetings 'in

their formal role as student government representatives.'"(*14). But neither case is distinguishable on such grounds because at least two student council students participate in every BISD meeting "as student government representatives." *Id.*[44] In addition to these speakers, six high school students serve as Student Ambassadors, analogous to *Coles.*

## III. The panel's extension of the legislative exception to allow school officials to participate in prayer with students contravenes Supreme Court and Fifth Circuit precedent.

Under Supreme Court and Fifth Circuit precedent, a coach is prohibited from praying with students during an evening basketball game held off-campus. *E.g.*, *Duncanville*, 70 F.3d at 405-06 & n.4.[45] But under the panel's opinion, that same coach, along with the *principal* and *superintendent*, can participate in the same prayer with the same team at a formal school board meeting wherein the team is presented an award.(*15-16).

This Court has held, however, 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." *Id*. Judge Jones agreed that there "is practically no doubt" that the Supreme Court cases support "the majority's decision insofar as it prevents teachers from actively joining

[44] (ROA.518)(ROA.1133)(ROA.1161,1165)(ROA.1157).
[45] *See also Mergens*, 496 U.S. at 232-36, 249-53.

in the student-led prayers." *Id.* at 409 (Jones, J., concurring and dissenting). Even BISD's *own* guidelines recognize that school officials "may not or participate in any prayer or religious activity with students."[46]

The panel offered no cogent reason to depart from *Duncanville*. It merely noted that in *Duncanville*, "a member of the team was mocked."(*15). But that fact was not mentioned in the Court's analysis of the merits. *See id.* at 406. Tellingly, the Third Circuit in *Borden* relied extensively upon *Duncanville* in holding that a coach's participation in student prayer was unconstitutional and did not assign significance to that fact. 523 F.3d at 170, 175-76.

Regardless, in *Ingebretsen*, this Court again held: "To the extent that school administrators participate in prayers in their official capacity…the School Prayer Statute excessively entangles government with religion." 88 F.3d at 277.

The only other basis the panel offered for distinguishing *Duncanville* was that this case "concerns legislative prayers."(*15). But the legislative prayer exception has never been extended to allow principals and superintendents to participate in prayer with students.

## IV. The panel misapplied *Greece.*

To even potentially qualify for the legislative exception, a legislative prayer practice must be an "'an internal act' directed at the [] Legislature's 'own

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

members,'" and be "'*entirely* for their own benefit.'" *Greece*, 134 S. Ct. at 1814, 1819, 1825-27 (quoting *Marsh*). The purpose must be "to accommodate the spiritual needs of lawmakers." *Id.* A practice is unconstitutional if it is "an effort to promote religious observance among the public." *Id.* at 1825-26 (citing *Marsh*).

The primary purpose of BISD's "Student Expression" practice, according to BISD, is to provide an "opportunity for students" to "hone their public speaking skills."[47] BISD proclaimed: "it's always about students having the opportunity to share their thoughts, express their first amendment rights." (ROA.1299).

Nevertheless, the panel accepted BISD's assertion in its brief "that the board members are the invocations' primary audience."(*11). This is not enough. The practice overall must be "consistent with the manner in which the First Congress viewed its chaplains." *Id.* at 1819. BISD's practice is nothing of the sorts. For one, it is called "Student Expression." Moreover, the Board already solemnizes its meetings with a prayer during the closed-session portion of the meeting. (ROA.1247). Further, "Student Expression," unlike solemnizing legislative prayer, can even be "disparaging [to] the school board." (ROA.1251)(ROA.1314).

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

## V. The issues in this case are of exceptional importance.

The panel is the first and only circuit court to hold that the legislative prayer exception applies to school boards and the first court ever to expand it to student expression. The panel acknowledged that it was deciding "an issue of first impression to this court." (*8). This alone is reason to grant en banc review.

Establishment Clause jurisprudence is "a complicated body of law." *Morgan v. Swanson*, 659 F.3d 359, 364 (5th Cir. 2011)(en banc). Since *Greece* was decided, the two circuit courts that have faced challenges to actual legislative prayer practices (rather than student expression) have granted en banc review. *See Bormuth*, 2017 U.S. App. LEXIS 3564; *Lund*, 2016 U.S. App. LEXIS 19805. "This case is more than a factual wrinkle on *Town of Greece* [.] It is a conceptual world apart." *Lund v. Rowan Cnty*., 837 F.3d 407, 431 (4th Cir. 2016)(Wilkinson, C.J., dissenting). The panel itself acknowledged that it presents a "tough question." (*13-14).

## CONCLUSION

The petition for panel rehearing or rehearing en banc should be granted.

Respectfully submitted,

April 3, 2017

s/ Monica L. Miller
MONICA L. MILLER
American Humanist Association
1821 Jefferson Place NW
Washington, DC, 20036
(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. 35(b)(2)(A) because this brief contains 3,889 words, excluding the parts of the brief exempted by FED. R. APP. P. 32.
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.

April 3, 2017

s/ Monica L. Miller
MONICA L. MILLER
American Humanist Association
1821 Jefferson Place NW
Washington, DC, 20036
(202) 238-9088; Fax: (202) 238-9003
mmiller@americanhumanist.org
CA Bar: 288343 / DC Bar: 101625

**COUNSEL FOR APPELLANTS**

## CERTIFICATE OF FILING AND SERVICE

I hereby certify that on April 3, 2017, I electronically filed the foregoing with the Clerk of Court using the CM/ECF System, which will send notice of such filing to all registered CM/ECF users.

I further certify that, upon acceptance and request from the Court, the required paper copies of the foregoing will be deposited with United Parcel Service for delivery to the Clerk.

The necessary filing and service were performed in accordance with the instructions given to me by counsel in this case.

/s/ Karen R. Taylor
Karen R. Taylor
GIBSON MOORE APPELLATE SERVICES, LLC
206 East Cary Street
Richmond, VA 23219
(804) 249-7770

# ADDENDUM

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

United States Court of Appeals
Fifth Circuit

**FILED**
March 20, 2017

Lyle W. Cayce
Clerk

No. 15-11067

AMERICAN HUMANIST ASSOCIATION; ISAIAH SMITH,

Plaintiffs–Appellees,

versus

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–Appellants.

* * * * * * * * *

No. 16-11220

AMERICAN HUMANIST ASSOCIATION; ISAIAH SMITH,

Plaintiffs–Appellants,

versus

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.

No. 15-11067 c/w
No. 16-11220

Appeals from the United States District Court
for the Northern District of Texas

Before SMITH, CLEMENT, and SOUTHWICK, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

The American Humanist Association ("AHA") and Isaiah Smith appeal a summary judgment for defendants, the Birdville Independent School District and its seven board members (collectively, "BISD"). AHA and Smith allege that BISD's policy of inviting students to deliver statements, which can include invocations, before school-board meetings violates the First Amendment's Establishment Clause. Because the practice falls more nearly within the recently reaffirmed legislative-prayer exception to the Supreme Court's Establishment Clause jurisprudence, we affirm the summary judgment in favor of the school district and, in the accompanying consolidated appeal, we reverse and render on the denial of qualified immunity to the school board members.

I.

BISD is a public school district. Smith is a 2014 graduate of Birdville High School and a member of AHA, an organization that "advocate[es] progressive values and equality for humanists, atheists, and freethinkers."[1] While a student at Birdville High School and as an alumnus, Smith attended BISD board meetings, some of which included student-led prayers. At a board meeting in December 2014, with a student-led invocation, Smith said that he felt

[1] *See* American Humanist Association, https://americanhumanist.org (last visited Mar. 17, 2017).

affronted by the prayer and that it meant that BISD was "favoring religion over nonreligion." Smith is and has been an adult at all relevant times.

BISD's board holds monthly meetings in the District Administration Building, which is not located within a school. The meetings include sessions open to the public. Attendees are free to enter and leave at any time. Most attendees are adults, though students frequently attend school-board meetings to receive awards or for other reasons, such as brief performances by school bands and choirs.

Since 1997, two students have opened each session—with one leading the Pledge of Allegiance and the Texas pledge and the other delivering some sort of statement, which can include an invocation. Those student presenters, typically either elementary- or middle-school students,[2] are given one minute. BISD officials do not direct them on what to say but tell them to make sure their statements are relevant to school-board meetings and not obscene or otherwise inappropriate. At a number of meetings, the student speakers have presented poems or read secular statements. But according to AHA and Smith, they are usually an invocation in the form of a prayer, with speakers frequently referencing "Jesus" or "Christ." AHA and Smith claim that sometimes the prayers are directed at the audience through the use of phrases such as "let us pray," "stand for the prayer," or "bow your heads."[3]

From 1997 through February 2015, the student-led presentations were

---

[2] Of the 101 meetings from February 2008 to June 2016, elementary- and middle-school students delivered the presentations 84 times.

[3] According to AHA and Smith, these requests typically come from the student speakers, though on occasion a board member or other school official has asked the audience to stand for the invocation. At the summary-judgment stage, "we must assume the facts as alleged by the [plaintiff]." *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 76 (1998).

called "invocations" and were delivered by students selected on merit.[4] In March 2015, in an apparent response to AHA's concerns about the invocations,[5] BISD began referring to them as "student expressions" and providing disclaimers that the students' statements do not reflect BISD's views.[6] BISD began randomly selecting, from a list of volunteers, the students who would deliver the expressions.[7]

II.

AHA and Smith sued BISD under 42 U.S.C. § 1983 for monetary damages from the individual school-board members and declaratory and injunctive relief. In their amended complaint, AHA and Smith alleged that BISD has a "policy, practice, and custom of permitting, promoting, and endorsing prayers delivered by school-selected students" at board meetings, in violation of the

---

[4] Each BISD campus selected students on a rotational basis (school-board members did not participate in the selection process). Campus officials took into account academic achievement, leadership, citizenship, extracurricular activities, and other factors.

[5] In late 2014, AHA sent BISD a letter complaining of the invocations and asking BISD to provide "written assurances that prayer will not be included in future School Board meetings." BISD's associate superintendent later testified that he recommended the policy changes so that the district "wouldn't be subject to litigation."

[6] The published policy, in its entirety, reads,

> The subject of the student introductions must be related to the purpose of the event and to the purpose of marking the opening of the event; honoring the occasion, the participants, and those in attendance; bringing the audience to order; and focusing the audience on the purpose of the event. A student must stay on the subject, and the student may not engage in obscene, vulgar, offensively lewd, or indecent speech. The District shall treat a student's voluntary expression of a religious viewpoint, if any, on an otherwise permissible subject in the same manner the District treats a student's voluntary expression of a secular or other viewpoint on an otherwise permissible subject and may not discriminate against the student based on a religious viewpoint expressed by the student on an otherwise permissible subject.

[7] Though student speakers are chosen randomly from a pool of volunteers, that pool may not be representative of the BISD student body: It consists only of members of the student leadership at the respective campuses.

Establishment Clause. BISD answered that the student-led invocations either qualify as private speech, satisfy the conventional Establishment Clause tests, or fit within the legislative-prayer exception to those tests.

BISD moved to dismiss, alleging that AHA and Smith had failed to state a claim and that the school-board members were entitled to qualified immunity. The district court denied the motion. The individual-capacity defendants filed an interlocutory appeal challenging the denial of qualified immunity.

BISD moved for summary judgment. The district court granted that motion, finding that the legislative-prayer exception applies. AHA and Smith filed a separate appeal, bringing an issue of first impression to this court.[8]

## III.

The Supreme Court generally applies at least one[9] of three tests under the Establishment Clause: the *Lemon* test,[10] the endorsement test,[11] and the coercion test.[12] But in *Marsh v. Chambers*, 463 U.S. 783, 784–85 (1983), a

---

[8] The qualified-immunity and summary-judgment appeals have been consolidated. Because there is no constitutional violation, we do not address qualified immunity except summarily to reverse the denial of immunity.

[9] *See Lynch v. Donnelly*, 465 U.S. 668, 679 (1984) ("[W]e have repeatedly emphasized our unwillingness to be confined to any single test or criterion in this sensitive area.").

[10] Under the *Lemon* test, for a government practice to be constitutional, it must (1) have a secular purpose, (2) have a primary effect that neither advances nor inhibits religion, and (3) not foster excessive government entanglement with religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971).

[11] Under the endorsement test, a "[g]overnment unconstitutionally endorses religion whenever it appears to take a position on questions of religious belief, or makes adherence to a religion relevant in any way to a person's standing in the political community." *Ingebretsen ex rel. Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274, 280 (5th Cir. 1996). "The government creates this appearance when it conveys a message that religion is favored, preferred, or promoted over other beliefs." *Id.*

[12] Under the coercion test, unconstitutional coercion occurs where "(1) the government directs (2) a formal religious exercise (3) in such a way as to oblige the participation of

member of the Nebraska Legislature sued state officials, claiming that the practice of opening each session with a chaplain's prayer violated the Establishment Clause. The Court upheld the practice without applying any of the conventional tests,[13] observing that "[t]he opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country." *Id.* at 786.

The Court revisited the issue in *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1827–28 (2014), stating unequivocally that the legislative-prayer exception in *Chambers* extends to prayers delivered at town-board meetings. Those prayers, however, must not "denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion." *Id.* at 1823. Moreover, "[t]he principal audience for these invocations is not . . . the public but lawmakers themselves, who may find that a moment of prayer or quiet reflection sets the mind to a higher purpose and thereby eases the task of governing." *Id.* at 1825.

As distinguished from legislative-prayer cases, however, the Supreme Court, in school-prayer cases such as *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000), *Lee v. Weisman*, 505 U.S. 577 (1992), and *County of Allegheny v. ACLU*, 492 U.S. 573 (1989), has applied the conventional Establishment Clause tests. In *Weisman*, a graduation-prayer case, the Court, 505 U.S. at 592, explained that "there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools" and that "prayer exercises in public schools carry a

---

objectors." *Doe ex rel. Doe v. Beaumont Indep. Sch. Dist.*, 173 F.3d 274, 285 (5th Cir. 1999) (quoting *Jones v. Clear Creek Indep. Sch. Dist.*, 977 F.2d 963, 970 (5th Cir. 1992), *abrogated on other grounds by Doe v. Santa Fe Indep. Sch. Dist.*, 168 F.3d 806 (5th Cir. 1999)).

[13] *Chambers*, 463 U.S. at 796 (Brennan, J., dissenting) ("The Court makes no pretense of subjecting Nebraska's practice of legislative prayer to any of the formal 'tests' that have traditionally structured our inquiry under the Establishment Clause.").

particular risk" of unconstitutional coercion. The Court distinguished *Weisman* from *Chambers*, noting that the legislative-prayer exception does not apply in "the public school context." *Id.* at 597. In *ACLU*, the Court opined that "state-sponsored prayer in public schools" is "unconstitutional."[14]

The key question, then, is whether this case is essentially more a legislative-prayer case or a school-prayer matter. Like *Galloway*, this dispute is about the constitutionality of permitting religious invocations at the opening, ceremonial phase of a local deliberative body's public meetings. But like *Santa Fe*, this case is about school-district-sanctioned invocations delivered by students on district property.

We agree with the district court that "a school board is more like a legislature than a school classroom or event." The BISD board is a deliberative body, charged with overseeing the district's public schools, adopting budgets, collecting taxes, conducting elections, issuing bonds, and other tasks that are undeniably legislative. *See* TEX. EDUC. CODE § 11.1511. In no respect is it less a deliberative legislative body than was the town board in *Galloway*.

The invocations are appropriately "solemn and respectful in tone." *Galloway*, 134 S. Ct. at 1823. Most attendees at school-board meetings, including Smith, are "mature adults," and the invocations are "delivered during the ceremonial portion of the [school board's] meeting." *Id.* at 1827. "Nothing in the record suggests that members of the public are dissuaded from leaving the meeting room during the prayer, arriving late, or even . . . making a later protest." *Id.* Occasionally, BISD board members and other school officials will ask the audience, including any students in the audience, to stand for the

[14] *ACLU*, 492 U.S. at 590 n.40 (1989) (citing *Abington Sch. Dist. v. Schempp*, 374 U.S. 203 (1963)).

invocation. Those polite requests, however, do not coerce prayer.

AHA and Smith advance three colorable theories for why this should be understood as a school-prayer case. First, they claim that legislative prayers must be "internal acts" that are "entirely" for the benefit of lawmakers. As BISD acknowledges, its invocations are meant to benefit students and other attendees at school-board meetings, not just board members. But in *Galloway*, *id.* at 1825, the Court explained that lawmakers were merely the "principal audience" for the invocations, suggesting that the audience may be made up of various groups, as well as unaffiliated individuals, so long as lawmakers are the main one. In its brief, BISD explains that the board members are the invocations' primary audience. AHA and Smith have not shown otherwise.

Second, AHA and Smith claim that BISD's invocation policy does not fit within the legislative-prayer exception because it lacks a "unique history." In *Galloway*, *id.* at 1819, the Court drew on historical evidence, describing its inquiry as "determin[ing] whether the prayer practice . . . fits within the tradition long followed in Congress and the state legislatures." In *Chambers*, 463 U.S. at 790, the Court emphasized the long history of legislative prayer, explaining that Nebraska's custom was "consistent with two centuries of national practice" and would not "be cast aside."

School-board prayer presumably does not date back to the Constitution's adoption, since "free public education was virtually nonexistent at the time." *Edwards v. Aguillard*, 482 U.S. 578, 583 n.4 (1987). Nonetheless, dating from the early nineteenth century, at least eight states had some history of opening prayers at school-board meetings.[15] And *Chambers* and *Galloway* show that

[15] *See* Marie 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*,

there was a well-established practice of opening meetings of deliberative bodies with invocations. *See Galloway*, 134 S. Ct. at 1819.[16] Such practices date from the First Congress, which suggests that "the Framers considered legislative prayer a benign acknowledgement of religion's role in society." *Id.*[17]

We do not overlook AHA and Smith's notion that the presence of students at BISD board meetings distinguishes this case from *Chambers* and *Galloway*. That is significant, because courts must consider "both the setting in which the prayer arises and the audience to whom it is directed." *Galloway*, 134 S. Ct. at 1825. Children are especially susceptible to peer pressure and other forms of coercion. *See*, *e.g.*, *Weisman*, 505 U.S. at 592. Nonetheless, the presence of students at board meetings does not transform this into a school-prayer case. There were children present at the town-board meetings in *Galloway*, as the dissenting[18] and lower court[19] opinions noted; the Court nonetheless applied

---

31 J.L. & POL. 1, 30-31 (Summer 2015).

[16] Arguably, BISD's practice of student-led invocations undermines its claim that its practice is consistent with the historical practice, given that, historically, legislative invocations were delivered by chaplains. *See Chambers*, 463 U.S. at 787–88. But the long history of chaplain-led invocations is relevant only insofar as it suggests that the Framers approved of them.

Although chaplains may be better at giving appropriately solemnizing invocations, the fact of their institutional religious affiliations risks the perception that the governmental body responsible for inviting them is affiliating itself with institutional religion. Allowing a student to give a Jewish prayer does not create the same perception of institutional entanglement that might result from a prayer from a rabbi. Thus, BISD's practice of allowing students to deliver invocations fits within the legislative-prayer exception, notwithstanding its departure from the historical practice of chaplain-led invocations.

[17] *See also id.* at 786 (stating that "[t]he opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country.").

[18] *Galloway*, 134 S. Ct. at 1846, 1848 (Kagan, J., dissenting).

[19] *Galloway v. Town of Greece*, 681 F.3d 20, 23 (2d Cir. 2012) (stating that "members of Boy Scout troops and other student groups have led the Pledge of Allegiance, and high school students may fulfill a state-mandated civics requirement necessary for graduation by

the legislative-prayer exception.[20] Moreover, here, as in *Galloway*, "the prayer is delivered during the ceremonial portion of the . . . meeting." *Galloway*, 134 S. Ct. at 1827.

IV.

Although the Supreme Court has not addressed whether the legislative-prayer exception applies to school-board invocations, two circuits have. Both found that the legislative-prayer exception does not apply. In *Coles ex rel. Coles v. Cleveland Board of Education*, 171 F.3d 369, 383 (6th Cir. 1999), the court held that the legislative-prayer exception does not extend to invocations at school-board meetings. Although such meetings "might be of a 'different variety' than other school-related activities . . . they are part of the same 'class' as those other activities in that they take place on school property and are inextricably intertwined with the public school system." *Id.* at 377. Nevertheless, the court acknowledged that it is a tough question: "This case puts the court squarely between the proverbial rock and a hard place." *Id.* at 371.

The court in *Doe v. Indian River School District*, 653 F.3d 256 (3d Cir. 2011), reached a like conclusion. It described comparisons between the school board and municipal bodies as "ill-suited," because the board's "entire purpose and structure . . . revolves around public school education." *Id.* at 278–79.

*Coles* and *Indian River* predate *Galloway* and are factually, and therefore legally, distinguishable from the circumstance at BISD.[21] *Coles* involved

---

going to Board meetings.").

[20] *See Galloway*, 134 S. Ct. at 1831 (Alito, J., concurring) (rejecting the dissent's concern that "ordinary citizens (and even children!) are often present" at town-board meetings).

[21] Establishment Clause cases often hinge on facts peculiar to each situation. *See Weisman*, 505 U.S. at 597 ("Our Establishment Clause jurisprudence remains a delicate and fact-sensitive one . . . .").

a school board that always had at least one student member. *Coles*, 171 F.3d at 383. In *Indian River*, student representatives attended board meetings "in their formal role as student government representatives." *Indian River*, 653 F.3d at 264. In contrast, no students sit on the BISD board, BISD board members do not deliver the invocations, and the student representatives are not expected to attend board meetings.

At least two other circuit-court decisions—including one by this court—have touched on these issues.[22] Both predate *Galloway* and turn on an argument the Court rejected there.

In *Bacus v. Palo Verde Unified School District Board of Education*, 52 F. App'x 355, 356–57 (9th Cir. 2002) (per curiam), the court assumed *arguendo* that the legislative-prayer exception applies to school-board invocations but held the district's policy unconstitutional because of the sectarian nature of the invocations. In *Doe v. Tangipahoa Parish School Board*, 473 F.3d 188 (5th Cir. 2006), *vacated on reh'g en banc*, 494 F.3d 494 (5th Cir. 2007), a split panel of this court struck down a school board's invocation policy.[23] One of the judges in the majority did so on account of the sectarian nature of the invocations. *Id.* at 202–04. But in *Galloway*, 134 S. Ct. at 1820–23, the Court said the Constitution does not require invocations to be non-sectarian.[24]

---

[22] Two district courts (in addition to the court *a quo*) have discussed the issue. In *Freedom from Religion Foundation v. Chino Valley Unified School District Board of Education,* 2016 U.S. Dist. LEXIS 19995, at *31–32 (C.D. Cal. Feb. 18, 2016), the court found that the legislative-prayer exception does not apply to a school board's practice of beginning its meetings with invocations. In *Doe v. Tangipahoa Parish School Board*, 631 F. Supp. 2d 823, 839 (E.D. La. 2009), the court found that the legislative-prayer exception did apply to a school board's practice of beginning school-board meetings with invocations.

[23] The en banc court vacated that decision for lack of standing.

[24] BISD's case is factually distinguishable from *Bormuth v. County of Jackson*, 849 F.3d 266 (6th Cir. 2017), *vacated for reh'g en banc*, 2017 U.S. App. LEXIS 3564 (6th Cir.

V.

BISD board members often stand and bow their heads during the student-led invocations. AHA and Smith claim that violates the Establishment Clause regardless of whether the invocation policy itself is constitutional. They point to *Doe v. Duncanville Independent School District*, 70 F.3d 402, 406 (5th Cir. 1995), holding that a high-school basketball coach's participation in team prayers, on the basketball court at games, was an "unconstitutional endorsement of religion." AHA and Smith note that unlike that case, this one concerns high-level school district officials (such as principals and board members), some of whom publicize their religious affiliation on the district's website. Moreover, in *Duncanville* a member of the team was mocked and "required to stand by while the team prayed and was confronted by spectators who asked, "Aren't you a Christian" and by a teacher who, in class, called her a "little atheist." *Id.* at 404.

This case, by way of stark contrast, concerns legislative prayers. It is distinguishable from *Duncanville* for that reason alone. Legislative prayers are recited for the benefit of legislative officers. It would be nonsensical to permit legislative prayers but bar the legislative officers for whom they are being primarily recited from participating in the prayers in any way. Indeed, the Supreme Court did not take issue with the fact that Town of Greece board members bowed their heads during invocations. *Galloway*, 134 S. Ct. at 1826.[25]

---

Feb. 27, 2017), which also involved the legislative-prayer exception. *Bormuth* concerned a county board whose members personally delivered religious invocations and "affirmatively excluded non-Christian prayer givers." *Id.* at 287. The record suggests that board members "singled out [the plaintiff] for opprobrium" and may have denied him a spot on a particular committee in retaliation for his criticisms of the board's invocation policy. *Id.* at 286.

[25] We do not reach BISD's arguments that the student-led invocations are private

VI.

"[L]egislative prayer lends gravity to public business, reminds lawmakers to transcend petty differences in pursuit of a higher purpose, and expresses a common aspiration to a just and peaceful society." *Galloway*, 134 S. Ct. at 1818 (citing *Donnelly*, 465 U.S. at 693). Although it is possible to imagine a school-board student-expression practice that offends the Establishment Clause, this one, under its specific facts, does not.[26] In No. 16-11220, the summary judgment is AFFIRMED. In No. 15-11067, the order denying summary judgment is REVERSED, and a judgment of dismissal is RENDERED.

speech and that the district's policy satisfies the conventional Establishment Clause tests.

[26] It is thus unnecessary for us to decide whether a contrary practice, which would prohibit student speakers from religious expression at school-board meetings, would offend the Free Exercise Clause. Nor do we opine on the assertion, by thirteen states and two state governors, appearing severally as *amici curiae*, that "what [AHA and Smith] are truly seeking is a ban on allowing students to express a religious message during their remarks."