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School Board Prayer: Reconciling the Legislative Prayer Exception and School Prayer Jurisprudence

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SCHOOL BOARD PRAYER: RECONCILING THE LEGISLATIVE PRAYER EXCEPTION AND SCHOOL PRAYER JURISPRUDENCE

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I. INTRODUCTION

Throughout the United States, many public school boards regularly open meetings with a prayer.[1] As a result of these opening invocations, citizens, students, teachers, and board members have questioned whether these prayer practices violate the Establishment Clause of the First Amendment, especially in light of the public school context these prayers are given in.[2] Because the Supreme Court has not yet heard a case involving prayers at school board meetings, a circuit split has emerged. The Third, Sixth, and Ninth Circuits each hold that the legislative prayer exception, established by the Supreme Court in *Marsh v. Chambers* (1983), does not apply to opening prayers at school board meetings. Therefore, applying the Supreme Court's reasoning in cases involving school prayer to find such prayers unconstitutional.[3] The Fifth Circuit, however, has applied the legislative prayer exception to uphold school board prayers.[4]

If the Supreme Court decides to extend the legislative prayer exception to school board meetings, it should establish clear guidelines that focus on context-specific factors. The Court should limit the exception's applicability to board meetings that more closely resemble a public deliberative body, like a town board, instead of a classroom or school-sponsored event. School board meetings that are primarily focused on administrative or policy-making matters and where the audience is mostly composed of mature adults are similar to town board meetings where the Court has upheld opening prayers.[5] On the other hand, the legislative prayer exception should not apply to school board meetings that involve a large student audience and active student participation, which are similar to a classroom or a school event. In these student-centric environments, prayers can place coercive pressure on students to

1. 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*, 31 J.L. & POL. 1, 3 (2015) (noting that prayers at school board meetings are not a unique problem and that courts have struggled placing school board prayer cases between the prohibition on school prayer and the legislative prayer exception).

2. *Id.* at 4; *See* Paul Imperatore, *Solemn School Boards: Limiting* Marsh v. Chambers *to Make School Board Prayer Unconstitutional*, 101 GEO. L.J. 839, 841 (2013).

3. Coles *ex rel.* Coles v. Cleveland Bd. of Educ., 171 F.3d 369, 381–83, 85 (6th Cir. 1999); Doe v. Indian River Sch. Dist., 653 F.3d 256, 275, 290 (3rd Cir. 2011); Freedom from Religion Found., Inc. v. Chino Valley Unified Sch. Dist. Bd. of Educ., 896 F.3d 1132, 1142 (9th Cir. 2018).

4. Am. Humanist Ass'n v. McCarty, 851 F.3d 521, 529–30 (5th Cir. 2017).

5. Town of Greece v. Galloway, 572 U.S. 565, 591–92 (2014).

participate, and in many cases, the school is using a prayer practice to advance or endorse particular religious beliefs.[6]

The setting and content of opening prayers at school board meetings differ significantly between school boards. Recently, in 2018, the Ninth Circuit Court of Appeals struck down the Chino Valley Unified School District Board of Education's prayer practice as unconstitutional.[7] Chino Valley school board members prayed, preached, and read Christian scripture during meetings. Invited clergy, and even school board members at times, delivered prayers at school board meetings in front of students who were obligated to attend meetings to give presentations, participate in musical performances, and receive awards.[8] In Birdville, Texas, in contrast, courts have upheld the local school board's policy of allowing students to open meetings with a prayer.[9] In Flagler County, Florida, the Chair of the Flagler County School Board recently invited a local pastor to deliver invocations before meetings.[10] Lastly, in Nashua, New Hampshire, the local school board reads a prayer at the beginning of meetings that asks for unity and understanding among board members.[11]

The First Amendment's Establishment Clause states that "Congress shall make no law respecting an establishment of religion."[12] The Framers included the Establishment Clause to "erect 'a wall of separation between church and state'"[13] and to prevent Congress from creating a national

6. Engel v. Vitale, 370 U.S. 421, 431–33 (1962); Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 223 (1963); Wallace v. Jaffree, 472 U.S. 38, 60–61 (1985); Lee v. Weisman, 505 U.S. 577, 586–99 (1992); Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 305–12 (2000).

7. *Freedom from Religion*, 896 F.3d at 1142; *See* Maura Dolan, *9th Circuit Court Panel Rejects Prayer at Chino Valley School Board Meetings*, L.A. TIMES (July 25, 2018, 2:15 PM), https://www.latimes.com/local/lanow/la-me-ln-school-prayer-9thcircuit-20180725-story.html [https://perma.cc/7Q4H-CP9L].

8. *Freedom from Religion*, 896 F.3d. at 1138–41.

9. Ray Bogan, *Prayers Can Continue at Texas School Board Meetings After US Supreme Court Declines to Hear Case*, FOX NEWS NETWORK (Nov. 29, 2017), https://www.foxnews.com/politics/prayers-can-continue-at-texas-school-board-meetings-after-us-supreme-court-declines-to-hear-case [https://perma.cc/D7EH-275S].

10. Aaron London, *Flagler School Board Split on Pre-Meeting Prayers*, DAYTONA BEACH NEWS-JOURNAL (Sept. 18, 2019, 4:40 PM), https://www.news-journalonline.com/news/20190918/flagler-school-board-split-on-pre-meeting-prayers [https://perma.cc/CQ6Q-78LB].

11. Kimberly Houghton, *Prayer Will Stay at Nashua School Board Meetings*, UNION LEADER (Aug. 29, 2019), https://www.unionleader.com/news/education/prayer-will-stay-at-nashua-school-board-meetings/article_30673c73-aa8a-55fc-ab27-eaec67df867a.html [https://perma.cc/2DDC-QWRJ].

12. U.S. CONST. amend. I.

13. Everson v. Bd. of Educ., 330 U.S. 1, 16 (1947) (quoting Reynolds v. United States, 98 U.S. 145, 164 (1878)).

religion or church.[14] However, the Framers' intended "separation between church and state" has never been a reality. Throughout American history, religion has permeated public life. Nearly every President of the United States has claimed to be a Christian, frequently concluding their speeches with "God bless America" or another similar phrase.[15] We pledge allegiance "under God" and pay with money that states, "In God we trust."[16] In the courtroom, witnesses commonly conclude their oaths with "so help me God."[17] Finally, Congress, state legislatures, county boards, town boards or councils, and even public school boards commonly open meetings with a prayer.[18]

In *Marsh v. Chambers*, the Supreme Court established the legislative prayer exception. Opening prayers at legislative sessions and other public deliberative bodies did not violate the Establishment Clause because of their longstanding history and tradition.[19] Over three decades later, in *Town of Greece v. Galloway* (2014), the Supreme Court extended the exception to a town board meeting. The town of Greece's practice of opening meetings with prayer comported with the legislative prayer tradition of Congress and did not "coerce participation by nonadherents."[20] However, in contrast to the presence of religion and prayer at legislative sessions and other government meetings, the Supreme Court has struck down prayer in public schools as violations of the Establishment Clause.[21] Although prayers in public schools are unconstitutional, the Court has never held that moments of silence for voluntary meditation or prayer in public schools are unconstitutional.[22]

14. Krista M. Pikus, *Hopeful Clarity or Hopeless Disarray?: An Examination of* Town of Greece v. Galloway *and the Establishment Clause*, 65 CATH. U. L. REV. 387, 390–91 (2015) (citing DONALD L. DRAKEMAN, CHURCH, STATE, AND ORIGINAL INTENT 213–18 (2010)).

15. James J. Knicely & John W. Whitehead, *In God We Trust: The Judicial Establishment of American Civil Religion*, 43 J. MARSHALL L. REV. 869, 873 (2010).

16. *Id.*

17. *Id.* at 874.

18. Eric J. Segall, *In God We Trust: The Judicial Establishment of American Civil Religion* 63 U. MIAMI L. REV. 713, 713–14 (2009).

19. Marsh v. Chambers, 463 U.S. 783, 795 (1983).

20. Town of Greece v. Galloway, 572 U.S. 565, 591–92 (2014).

21. Mary Ellen Quinn Johnson, *School Prayer and the Constitution: Silence is Golden*, 48 MD. L. REV. 1018, 1018 (1989).

22. *See* Wallace v. Jaffree, 472 U.S. 38, 58–61 (1985) (holding that an Alabama statute allowing teachers to lead their classes in moments of silence for voluntary meditation or prayer violated the Constitution after the state legislature had replaced a previous statute that had permitted teachers to provide moments of silence for voluntary meditation). *See also* Michael A. Umayam, Santa Fe Independent School District v. Doe: *Can Moment of Silence Statutes Survive?*, 50 CATH. U. L. REV. 869, 899–900 (2001) (explaining that many states have passed laws allowing moments of silence at the start of school days for meditation, prayer, or reflection and that most lower courts have upheld these statutes as constitutional).

The circuits that have concluded that the *Marsh-Greece* framework was not applicable to school board prayer cases determined that unlike legislative prayer, prayers at school board meetings do not have the same longstanding tradition since public education did not even exist during the framing of the Bill of Rights. Likewise, these circuits have reasoned that public school board prayer cases are more analogous to school prayer cases due to the presence of students, the public school context, and the relationship between board members and students.[23]

The Fifth Circuit disagrees[24] and holds that prayers at school board meetings and other deliberative public bodies have a longstanding history and are constitutional as long as they are consistent with the tradition followed in Congress and the state legislatures.[25] Furthermore, the Fifth Circuit concludes that "a school board is more like a legislature than a school classroom or event."[26]

Section II of this article provides background on the legislative prayer exception and the Supreme Court's school prayer jurisprudence. Section III examines the Third, Sixth, and Ninth Circuits' approach to school board prayer cases before *Town of Greece*. Section III also addresses the circuit split between the Fifth and Ninth Circuits on the application of the legislative prayer exception to school board meetings after *Town of Greece*. Section IV analyzes the circuit split, examines the applicability of the legislative prayer exception to school board meetings, and then recommends how the Supreme Court should approach school board prayer. Section V briefly concludes.

II. BACKGROUND

A. The Legislative Prayer Exception

Since the Framing of the Constitution, Congress and many state legislatures have opened sessions with a prayer administered by a paid chaplain.[27] The first legislative prayer was given at the First Continental Congress in 1774 and remained a fixture of Congressional meetings until

23. Coles *ex rel.* Coles v. Cleveland Bd. of Educ., 171 F.3d 369, 381–83 (6th Cir. 1999); Doe v. Indian River Sch. Dist., 653 F.3d 256, 278–79 (3rd Cir. 2011); Freedom from Religion Found., Inc. v. Chino Valley Unified Sch. Dist. Bd. of Educ., 896 F.3d 1132, 1145–48 (9th Cir. 2018).

24. Am. Humanist Ass'n v. McCarty, 851 F.3d 521, 523 (5th Cir. 2017).

25. *Id*. at 527.

26. *Id.* at 526.

27. Marsh v. Chambers, 463 U.S. 783, 787–90 (1983).

the Constitutional Convention in 1787.[28] Although there is no record of any legislative prayers being offered at the Constitutional Convention, the First United States Congress selected a chaplain to open Congressional sessions with a prayer as one of its first items of business. Congress's legislative prayer practice has continued uninterrupted until today, and many state legislatures have adopted similar practices. [29]

1. *Marsh v. Chambers*

The legislative prayer practice went unchallenged for over two centuries until a member of the Nebraska State Legislature sought to enjoin the state's practice of paying a Presbyterian minister to give an opening invocation at the start of legislative sessions.[30] In *Marsh v. Chambers* (1983), the Supreme Court concluded that since the final language of the Bill of Rights was agreed upon only three days after Congress authorized the installation of paid chaplains to give opening invocations at legislative sessions, "[c]learly the men who wrote the First Amendment Religion Clause did not view paid legislative chaplains and opening prayers as a violation of that Amendment."[31] Additionally, the Court noted that legislative prayer was not a violation of the Establishment Clause given that the practice of opening legislative sessions with prayers had been commonplace for more than 200 years. Legislative prayer was "part of the fabric of our society."[32] The *Marsh* Court did not examine the content of the prayers since there was "no indication that the prayer opportunity ha[d] been exploited to proselytize or advance any one, or to disparage any other, faith or belief."[33]

2. *Town of Greece v. Galloway*

Three decades later in *Town of Greece v. Galloway*, the Supreme Court confronted the issue of whether predominantly Christian opening prayers at town board meetings were consistent with *Marsh*.[34] The Court held that such prayers were consistent with *Marsh*, even though the

28. Chad West, *Legislative Prayer: Historical Tradition and Contemporary Issues*, 2019 UTAH L. REV. 709, 709–10 (2019).

29. *Id.* at 710.

30. Scott W. Gaylord, *When the Exception Becomes the Rule:* Marsh *and Sectarian Legislative Prayer Post-Summum*, 79 U. CIN. L. REV. 1017, 1023 (2011).

31. *Marsh*, 473 U.S. at 788.

32. *Id.* at 792.

33. *Id.* at 794–95.

34. Town of Greece v. Galloway, 572 U.S. 565, 569 (2014).

prayers were sectarian.[35] Since the First Congress approved invocations that included religious themes, the *Marsh* Court held that sectarian prayers could "coexis[t] with the principles of disestablishment and religious freedom."[36] However, the Court reiterated that although sectarian legislative prayers are permissible, they must not "denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion."[37]

The Court also concluded that Greece's prayer practice did not compel its citizens to participate in a religious practice. As in *Marsh*, legislators or lawmakers were the principal audience of legislative prayer, not citizens who were in attendance.[38] But "if town board members directed the public to participate in the prayers, singled out dissidents for opprobrium, or indicated that their decisions might be influenced by a person's acquiescence in the prayer opportunity," the town's policy would likely have violated the Establishment Clause.[39] Nevertheless, although audience members may be offended by the inclusion of a prayer at public meetings, "[o]ffense . . . does not equate to coercion."[40]

B. Prayer in Public Schools

One of the most controversial debates in the United States is about whether religion should be permitted in public schools. Since the early 1960s, the Supreme Court has consistently held that denominational and oral prayers in the classroom or at school sponsored events violate the Constitution, prompting states and school boards to test the bounds of religion in public schools.[41] Many Americans believe that prayer in public schools would instill morals in students, but the Supreme Court has stated that this would be an impermissible government endorsement of one religion over another.[42]

35. *Id.* at 578.
36. *Id.* (quoting *Marsh*, 473 U.S. at 786).
37. *Id.* at 583.
38. *Id.* at 587.
39. *Id.* at 588.
40. *Id.* at 589.
41. Mark W. Cordes, *Prayer in Public Schools After* Santa Fe Independent School District, 90 KY. L.J. 1, 1–2 (2001–2002).
42. Carolyn Hanahan & David M. Feldman, *Religion in Public Schools: "Let Us Pray"—Or Not*, 32 ST. MARY'S L.J. 881, 884–86 (2001).

1. *Engel v. Vitale*

In *Engel v. Vitale* (1962), the Supreme Court considered a prayer approved by the New York Board of Regents for use in public schools.[43] When a school district adopted a policy of having teachers recite the Regents' prayer at the beginning of each school day, the American Civil Liberties Union brought a suit on behalf of parents and students who opposed the policy.[44] The Court held that the Regents' prayer embodied an unconstitutional establishment of religious beliefs.[45] Moreover, the Court reiterated that "government in this country should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves."[46]

2. *School District of Abington Township. v. Schempp*

A year following the *Engel* decision, the Supreme Court further emphasized that the government should stay out of religion. In *School District of Abington Township v. Schempp* (1963), the Court considered whether state statutes requiring schools to start school days with readings from the Bible violated the First Amendment.[47] The Court held that the statutes were unconstitutional because "[i]n the relationship between man and religion, the State is firmly committed to a position of neutrality."[48] Therefore, the government cannot require individuals to participate in religious exercises.[49]

3. *Wallace v. Jaffree*

In *Wallace v. Jaffree* (1985), parents of students sued school board members and other school officials to enjoin the school district from allowing teachers to hold a one-minute period of silence for "meditation or voluntary prayer" at the beginning of school days pursuant to a state statute.[50] The Court held that the statute violated the First Amendment because the statute "was intended to convey a message of state approval

43. Steven D. Smith, *Constitutional Divide: The Transformative Significance of the School Prayer Decisions*, 38 PEPP. L. REV. 945, 950 (2011) (citing BRUCE J. DIERENFIELD, THE BATTLE OVER SCHOOL PRAYER: HOW *ENGEL V. VITALE* CHANGED AMERICA 67–68 (2007)).

44. *Id.* at 950 (citing DIERENFIELD, *supra* note 43, at 72).

45. Engel v. Vitale, 370 U.S. 421, 430 (1962).

46. *Id.* at 435.

47. Sch. Dist. of Abington Twp. v. Schempp, 374 U.S. 203, 205 (1963).

48. *Id.* at 226.

49. *Id.* at 224.

50. Wallace v. Jaffree, 472 U.S. 38, 41–42 (1985).

of prayer activities in the public schools."[51] The Court determined that the " actual purpose" behind the government's enactment of the statute was to "endorse or disapprove of religion."[52] Not only are school districts barred from mandating students to participate in a prayer or a Bible reading, but the government cannot "characterize prayer as a favored practice" because the government must maintain a neutral relationship with religion.[53] However, the Court determined that a statute or policy that permitted students to engage in silent meditation would be constitutional if the policy was not based on a religious purpose.[54]

4. *Lee v. Weisman*

In *Lee v. Weisman* (1992), the Supreme Court held that a public school's practice of inviting a rabbi to administer an invocation during graduation ceremonies violated the Establishment Clause. The school's practice was unconstitutional because the practice induced graduating students to participate in a religious exercise. [55] Students who opposed the practice were obligated to attend and participate in their graduation ceremony since they would never choose to miss "one of life's most significant occasions," although their attendance was not entirely mandatory to receive their diplomas.[56] In addition, "[s]tate officials direct[ed] the performance of a formal religious exercise," resulting in a state endorsement of religion.[57]

The Court noted that the setting of a graduation ceremony was "analogous to the classroom setting, where . . . the risk of compulsion is especially high."[58] Justice Kennedy, writing for the majority, emphasized that "there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public

51. *Id.* at 61.

52. *Id.* at 57 (citing Lynch v. Donnelly, 465 U.S. 668, 690 (1984)).

53. *Id.* at 60.

54. *Id.* at 57–60. The Court struck down the Alabama statute because the legislative history indicated that the state legislature intended to reintroduce prayer to public schools. There was no evidence of any secular purpose. Under a previous statute, students were permitted to engage in silent meditation during a moment of silence at the start of the school day. The new statute permitted students to engage in silent meditation or voluntary prayer during a moment of silence, adding the words "or voluntary prayer," indicating that the state legislature wanted to encourage prayers in public schools. Therefore, a statute that permitted students to pray during a moment of silence would not be unconstitutional as long as the legislature had a neutral religious purpose. *Id.*

55. Lee v. Weisman, 505 U.S. 577, 580, 599 (1992)

56. *Id.* at 595.

57. *Id.* at 586.

58. *Id.* at 596.

schools."[59] Consequently, the government may not coerce anyone to support or participate in religion or its exercise or otherwise act in a way which "establishes a [state] religion or religious faith, or tends to do so."[60]

5. *Santa Fe Independent School District v. Doe*

In *Santa Fe Independent School District v. Doe* (2000), the Supreme Court considered whether a public school district's policy of permitting high school students to elect a "student council chaplain" to deliver prayers before varsity home football games over the public address system violated the Establishment Clause.[61] The Court held that the school district's policy was unconstitutional because the prayers "[were] authorized by a government policy and [took] place on government property at government-sponsored school-related events."[62] The school district policy was unconstitutional because the district enacted the policy with the purpose of endorsing student prayer.[63]

The Court also rejected the school district's argument that the policy did not coerce students to participate in a religious exercise.[64] Although the policy was a product of the students' choice, since the student body voted to approve the policy and elected a student chaplain to deliver the prayer, the policy was "constitutionally problematic" because the majority of the student population had effectively silenced minority views.[65] Like in *Lee*, although students' attendance was not mandatory, the students were under "immense social pressure" to participate in football games.[66] Some students were also obligated to attend football games such as football team members, band members, and cheerleaders.[67] The Constitution prohibits schools from forcing students to choose between attending football games and "avoiding personally offensive religious rituals," for "[i]t 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."[68]

59. *Id.* at 592.
60. *Id.* at 587 (quoting Lynch v. Donnelly, 465 U.S. 668, 678 (1984)).
61. Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 294 (2000).
62. *Id.* at 302.
63. *Id.* at 316.
64. *Id.* at 312.
65. *Id.* at 304.
66. *Id.* at 311.
67. *Id.*
68. *Id.* at 312 (quoting Lee v. Weisman, 505 U.S. 577, 596 (1992)).

III. SCHOOL BOARD PRAYER CASES

A. Before Town of Greece*, the Third, Sixth, and Ninth Circuits held that the legislative prayer exception does not apply to school board prayers.*

Before *Town of Greece*, all the circuit courts that heard cases involving school board prayers did not extend the legislative prayer exception to school board meetings because the settings of school board meetings were far different from the settings of legislative sessions, which rendered *Marsh* inapplicable.[69] Notably, school boards are an "integral part of the public school system" where prayers are barred.[70] Therefore, these courts looked to the Supreme Court's school prayer cases, especially *Lee*, instead of *Marsh*, emphasizing the coercive pressure on children to participate in prayers at school board meetings.[71]

1. *Coles ex rel. Coles v. Cleveland Board of Education* (Sixth Circuit)

The Cleveland Board of Education held public meetings approximately twice a month during the school year.[72] During a portion of the meetings open to public comments, audience members expressed their opinions on a wide range of topics pertaining to the operation of the school district.[73] Board meetings also functioned as a forum for addressing student complaints.[74] In addition, a student representative who sat on the board reported on student activities, such as student council meetings, and voiced any concerns held by the student body.[75] Students often attended meetings to receive recognition for their academic, athletic, and community service accomplishments.[76]

Until 1992, school board meetings were never opened with a prayer.[77] However, a local election resulted in sweeping changes to the makeup of the board, as over half of the previous board was replaced.[78]

69. Coles *ex rel.* Coles v. Cleveland Bd. of Educ., 171 F.3d 369, 382–83 (6th Cir. 1999); Doe v. Indian River Sch. Dist., 653 F.3d 256, 278–82 (3rd Cir. 2011).
70. *Coles*, 171 F.3d at 381.
71. *Id.* at 383; *Indian River*, 653 F.3d at 275–78.
72. *Coles*, 171 F.3d at 372.
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.*
78. *Id.*

After the election, a new board president announced that all future board meetings would be opened with a prayer to reduce conflict between board members at meetings.[79] According to the president, "[t]hrough solemnization of the proceedings, both members of the school board and attendees [had] taken on a greater respect for the process and certainly attach[ed] importance to its School Board's activities."[80] The new board president usually selected members of the local religious community to deliver prayers.[81] Nearly all the clergy who were invited to offer prayers were Christians, and prayers often carried religious overtones.[82] In 1996, a local reverend was elected as the new board president.[83] Instead of inviting local religious leaders to deliver an invocation, the new president began to offer opening prayers or moments of silence himself.[84]

A former student and a teacher sued the school board, alleging that the board's practice of opening meetings with a prayer violated the Establishment Clause.[85] The Sixth Circuit held that the school board's prayer policy violated the Constitution, finding that the opening prayers did not fall under the legislative prayer exception.[86] The Court stated that they thought it was wiser to err on the side of the school prayer cases to keep church and state separate instead of applying *Marsh*, which it viewed as an aberration.[87] The Court interpreted *Marsh*'s holding as extending only to legislative sessions and the courts.[88] Furthermore, the Sixth Circuit determined that a public school board was not a deliberative public body because a school board "unlike other public bodies, is an integral part of the public school system."[89] Unlike other legislative bodies, school board members communicate with students, as students actively participate in discussions on school-related matters.[90] Therefore, the majority distinguished the incidental presence of students at legislative sessions with active student participation at school board meetings.[91]

79. *Id.* at 373.
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id*.
84. *Id.* at 374.
85. *Id.*
86. *Id.* at 383.
87. *Id.*
88. *Id.* at 380.
89. *Id.* at 381.
90. *Id.* at 381–82.
91. James Mann Wherley, Jr., *Transforming a School Board Meeting into a Student Council Meeting: Coles v. Cleveland Board of Education*, 68 U. CIN. L. REV. 1359, 1376 (2000).

In addition, the Sixth Circuit decided that the Cleveland Board of Education's policy of opening meetings with a prayer or moment of silence violated the Establishment Clause because "the school-board setting is arguably more coercive to participating students than the graduation ceremony at issue in Lee."[92] Compared to graduation ceremonies, "students are a far more captive audience."[93] Some students are required to attend board meetings such as students who wish to challenge a disciplinary action or the student representative.[94]

In the dissenting opinion in *Coles*, Judge Ryan argued that *Marsh* should apply.[95] The coercive effects of prayers in classrooms were not present at school board meetings since the setting of school board meetings are "light years away from a classroom full of elementary or secondary school students."[96] The Cleveland Board of Education "is an administrative/legislative unit of government that has the power of taxation and eminent domain, and it is mandated by statute to conduct the business affairs of the Cleveland Public Schools."[97] The school board bought and sold real estate, established educational policy, negotiated with labor unions, hired and fired teachers and other school district employees, and oversaw the construction of school buildings.[98] The fact that children are sometimes present at school board meetings should not forbid opening prayers at meetings.[99] Since a school board more closely resembles a legislative or a deliberative public body, Judge Ryan viewed the Cleveland Board of Education's practice as more analogous to *Marsh* than the school prayer cases.[100]

2. *Bacus v. Palo Verde Unified School District Board of Education* (Ninth Circuit)

In *Bacus v. Palo Verde Unified School District Board of Education* (2002), teachers sued a public school district, alleging that opening invocations at school board meetings were unconstitutional. In a brief opinion, the Ninth Circuit concluded that the opening prayers at school board meetings were like prayers in a classroom and thus were

92. *Coles*, 171 F.3d at 383.
93. *Id.*
94. *Id.*
95. *Id.* at 389 (Ryan, J., dissenting).
96. *Id.* at 387.
97. *Id.*
98. *Id.*
99. *Id.* at 388.
100. *Id.* at 389.

unconstitutional. Because the prayers contained references to Jesus Christ, the prayers were plainly unconstitutional because they advanced one faith.[101] And instead of inviting members of other religions, sects, or creeds, the same individual always offered the prayers.[102] Therefore, the Ninth Circuit declared that it was unnecessary to determine whether school boards are more like legislatures or classrooms, when, such as in this case, "[s]olemnizing school board meetings . . . displays 'the government's allegiance to a particular sect or creed.'"[103]

3. *Doe v. Indian River School District* (Third Circuit)

Parents of students sued the Indian River School District for violating the First Amendment.[104] The Indian River School Board had recited prayers at meetings since the school district was formed in 1969. Eventually, in 2004, the board decided to adopt an official prayer policy out of fear of a potential lawsuit. On a rotating basis among individual board members, a particular board member could choose to open meetings with a prayer or moment of silence. If a board member did not wish to deliver a prayer, the next board member would have the same opportunity to choose to deliver a prayer. [105] The policy further held that the prayer shall not be used to "proselytize, advance or convert anyone, or to derogate or otherwise disparage any particular faith or belief."[106] The prayer was supposed to be voluntary, among only the board members, and could be sectarian or non-sectarian "all in accord with the freedom of conscience, speech and religion of the individual Board member, and his or her particular religious heritage."[107]

The board's prayer policy ensured that a prayer or a moment of silence occurred at nearly every board meeting because at least one board member in attendance always elected to exercise the opportunity to do so.[108] Although the school board's prayer policy permitted any type of prayer, nearly all the prayers at board meetings referred to Christian concepts.[109] Since the prayer policy was adopted, a board member recited a historical secular prayer, such as a prayer from a speech given by Martin

101. Bacus v. Palo Verde Unified Sch. Dist., 52 F.App'x. 355, 356 (9th Cir. 2002).
102. *Id.* at 356–57.
103. *Id.* at 357 (quoting Cty. of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter, 492 U.S. 573, 603 (1989)).
104. Doe v. Indian River Sch. Dist., 653 F.3d 256, 260 (3rd Cir. 2011).
105. *Id.* at 261.
106. *Id.*
107. *Id.* at 261–62.
108. *Id.* at 262.
109. *Id.* at 265.

Luther King, Jr., on only two occasions, and a board member chose to have a moment of silence instead of prayer on only three occasions.[110]

At the school board's regular monthly meetings, board members discussed a variety of rules and regulations governing the school district including the determination of daily school hours, school attendance requirements, the standardization of all the public schools within the district's jurisdiction, school curriculum, the selection and purchase of textbooks and other school supplies, employment decisions, and the maintenance of school property.[111] At the end of every meeting, the board held a session for citizens to voice their concerns or give their input on school district policies.[112]

However, Indian River School Board meetings involved more than educational policymaking. According to the board president, roughly two dozen students on average attended board meetings. Students attended meetings if they were facing disciplinary action or were members of the Junior Reserve Officers' Training Corps (JROTC) who attended every meeting to present the colors.[113] In addition, high school student representatives attended most board meetings. On many occasions, students gave musical or theatrical performances for board members. Board members also invited students to attend meetings to be recognized for their educational, athletic, or extracurricular achievements.[114] During these lengthy awards portions of board meetings, students were presented with a certificate noting their accomplishments, and the local newspaper took photographs for occasional publication.[115]

The Third Circuit concluded that the Supreme Court's school prayer cases, especially *Lee*, not *Marsh*, provided a better framework to analyze Indian River's school board prayer policy. In particular, the Third Circuit argued that *Marsh* did not take into account that government-sponsored religious exercises are likely to result in coerced religious beliefs when directed at children.[116]

The Court analogized the Indian River School Board's practice with prayers at graduation ceremonies. Like graduation ceremonies, students will not forfeit the official recognition they receive for their academic, athletic, and extracurricular achievements at school board meetings

110. *Id.* at 266.
111. *Id.* at 263.
112. *Id.* at 265.
113. *Id.* at 264.
114. *Id.*
115. *Id.*
116. *Id.* at 275.

despite any objections they may have to the school board's prayer policy.[117] Although the awards portions of school board meetings were not as significant as graduation ceremonies, the Indian River School Board deliberately chose to make their meetings meaningful to students.[118] In fact, except for a scheduling conflict, school board members could not recall a single instance where a student did not attend a board meeting where they were to be recognized because students attached such significant meaning to school board meetings.[119]

In addition, the Third Circuit noted that students may have felt especially coerced to attend board meetings where their teams or organizations received recognition to avoid missing out on the "intangible benefits" that their peers would receive, and for other students, their attendance at school board meetings was nearly involuntary. [120] For instance, JROTC members had to attend meetings to conduct the "presentation of the colors."[121] Student government representatives were also obligated to attend meetings to present the students' perspectives on school-related issues.[122]

The Third Circuit further recognized aspects of Indian River School Board meetings that created the possibility of students feeling coerced to participate in the prayer practice. School board meetings took place on school property and were completely under the control of board members.[123] Since the board itself composed and recited the prayer, the Third Circuit found it "particularly difficult to imagine that a student would not feel pressure to participate in the practice, or at least appear to agree with it."[124]

Marsh was ill-suited for analyzing school board prayer "because the entire purpose and structure of the Indian River School Board revolves around public school education."[125] By Delaware statute, "the Board's purpose is to 'administer and to supervise the free public schools of the . . . school district' and 'determine policy and adopt rules and regulations for the general administration and supervision' of the schools.'"[126] Even though a school board has legislative functions, such as the power to levy

117. *Id.* at 276.
118. *Id.* at 276–77.
119. *Id.* at 277.
120. *Id.* at 276.
121. *Id.*
122. *Id.*
123. *Id.* at 278.
124. *Id.*
125. *Id.*
126. *Id.* at 278 (quoting DEL. CODE ANN. tit. 14, § 1043 (West 2019)).

and collect taxes, a school board's legislative powers are limited to school purposes.[127] Moreover, the Third Circuit recognized that the Supreme Court in *Edwards v. Aguillard* (1987) warned that *Marsh* was "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."[128] Thus, the Third Circuit held that the Indian River School Board's prayer policy was an unconstitutional "level of interaction between church and state."[129]

B. After Town of Greece, *a circuit split emerged between the Fifth and Ninth Circuits regarding school board prayer.*

Town of Greece has resulted in a split between the Fifth and Ninth Circuits regarding the application of the legislative prayer exception to school board meetings. The Fifth Circuit, relying on *Town of Greece*, concludes that school boards are similar to legislatures and deliberative bodies, and thus the legislative prayer exception could apply to particular school board meetings.[130] Furthermore, the Fifth Circuit argues that just as there is a well-established tradition and longstanding history of opening legislative sessions with a prayer, there is also a longstanding history of opening school board meetings with a prayer dating back to the early nineteenth century.[131] The Ninth Circuit held that a school board's prayer practice was unconstitutional.[132] A school board's meetings functioned more like extensions of the schools rather than legislatures or pubic deliberative bodies because of the presence of numerous students in the audience and student participation in meetings.[133] Unlike the Fifth Circuit, the Ninth Circuit contends that school board prayer does not have a longstanding history like legislative prayer because free public education did not exist at the time of the Constitution's framing.[134]

1. *American Humanist Association v. McCarty* (Fifth Circuit)

In *American Humanist Ass'n v. McCarty* (2017), the American Humanist Association and a former student sued the Birdville

127. *Id.*
128. *Id.* at 281 (quoting Edwards v. Aguillard, 482 U.S. 578, 581–82 (1987)).
129. *Id.* at 290.
130. Am. Humanist Ass'n v. McCarty, 851 F.3d 521, 526 (5th Cir. 2017).
131. *Id.*
132. Freedom from Religion Found., Inc. v. Chino Valley Unified Sch. Dist. Bd. of Educ., 896 F.3d 1132, 1142 (9th Cir. 2018).
133. *Id.* at 1145.
134. *Id.* at 1147–48.

Independent School District and its board members, alleging that the school district's policy of allowing students to give opening prayers at monthly public school board meetings violated the Establishment Clause. Although the audience at board meetings primarily consisted of adults, students often attended meetings to receive awards and give brief musical performances.[135]

Since 1997, two students open the board meetings. One student led the Pledge of Allegiance and the Texas pledge, and the other student gave an opening statement, which could include a prayer. School officials allowed student presenters to say whatever they wanted as long as their statement was relevant to school board meetings and not inappropriate. However, student presenters generally chose to give a prayer and often referenced "Jesus" or "Christ."[136]

The Fifth Circuit concluded that a school board meeting is more like a legislative session than a classroom or school-sponsored event.[137] The Birdville School Board was 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" and was "[i]n no respect . . . less a deliberative legislative body than was the town board in [Town of Greece]."[138]

The Fifth Circuit determined that the school board's "student expression" practice was similar to the Town of Greece's prayer practice.[139] Like Town of Greece, the student prayers were "solemn and respectful in tone."[140] Furthermore, most attendees of school board meetings were adults, and the student invocations were given during the ceremonial portion of the meetings.[141] Although the student statements were directed at everyone in attendance at board meetings, not just board members, the Fifth Circuit upheld the school board's practice because, like in Town of Greece, the lawmakers were the "principal audience" of the prayers, not the sole audience.[142] Even though there were children at board meetings, "the presence of students at board meetings does not transform [the case] into a school-prayer case" because "[t]here were children present at the town-board meetings in [Town of Greece]."[143]

135. *McCarty*, 851 F.3d at 523.
136. *Id.*
137. *Id.* at 526.
138. *Id.*
139. *Id.*
140. *Id.* (quoting Town of Greece v. Galloway, 572 U.S. 565, 583 (2014)).
141. *Id.*
142. *Id.* at 527.
143. *Id.* at 527–28.

The Fifth Circuit also asserted that opening prayers at school board meetings were consistent with the historical tradition of legislative prayer.[144] Unlike legislative prayer, prayer at school board meetings does not date back to the Constitution's adoption since "public education was virtually nonexistent at the time."[145] Still, at least eight states had a history of opening school board meetings with prayers since the nineteenth century.[146] In Town of Greece, the Supreme Court emphasized that there was a long-established history of opening meetings of public deliberative bodies, like school boards, with prayers and that "[s]uch practices date from the First Congress, which suggests that 'the Framers considered legislative prayer a benign acknowledgment of religion's role in society.'"[147] Additionally, the *Marsh* Court upheld the Nebraska State Legislature's prayer policy because, even though the legislature's practice did not have as long of a history as U.S. Congressional prayers, the Legislature's practice was consistent with Congress's history of legislative prayer. Therefore, although the Birdville School District did not have a long history of opening school board meetings with prayers, the school board's policy was consistent with the history and tradition of Congressional legislative prayer.[148]

2. *Freedom From Religion Foundation, Inc. v. Chino Valley Unified School District Board of Education* (Ninth Circuit)

The Freedom From Religion Foundation, students' parents, school district employees, and other local citizens challenged the Chino Valley Board of Education's practice of opening public school board meetings with a prayer.[149] For several years, board members regularly invoked their Christian beliefs, read from the Bible, and prayed at board meetings.[150] Board members often stressed that they viewed "religious engagement as central to the mission and life of the school community."[151]

Chino Valley's public board meetings began with the school board president reporting on the board members' decisions made during a closed meeting that preceded the public session. Then, a member of the school

144. *Id.* at 527.
145. *Id.* (quoting Edwards v. Aguillard, 482 U.S. 578, 583 n.4 (1987)).
146. *Id.* (citing Wicks, *supra* note 1, at 30–31).
147. *Id.* (quoting Town of Greece v. Galloway, 572 U.S. 565, 576 (2014)).
148. *Id.*
149. Freedom from Religion Found., Inc. v. Chino Valley Unified Sch. Dist. Bd. of Educ., 896 F.3d 1132, 1137 (9th Cir. 2018).
150. *Id.* at 1140.
151. *Id.*

community, sometimes a student, recited the Pledge of Allegiance, and JROTC members conducted the "presentation of the colors." [152] At the conclusion of this ceremonial portion of board meetings, a local member of the clergy usually delivered an opening prayer.[153] However, on occasion, a board member or an audience member led the prayer.[154] At board meetings, classes and student organizations gave presentations.[155] Sometimes, the board dedicated time to recognize students' academic and extracurricular accomplishments.[156] And a student government representative, who sat on the board and voted with board members during the open portion of board meetings, made comments regarding the students' interests.[157] The board also allowed audience members to make comments.[158]

Board members included an opening prayer at meetings at least since 2010.[159] After the Freedom From Religion Foundation sent the school board a letter in 2013, asking the board to stop scheduling prayers at meetings, the school district adopted an official prayer policy.[160] The policy required that a member of the clergy or a religious leader within the area of the school district deliver the prayer.[161] On an annual basis, the board selected individuals from a list of eligible local chaplains and religious leaders that was created by looking through a commercial phone book for churches, conducting internet research, and consulting with "local chambers of commerce."[162] Furthermore, any religious assembly within Chino Valley was eligible, and the policy called for the board to schedule a variety of speakers.[163]

The policy also prohibited local clergy from being scheduled for consecutive meetings and being scheduled more than three times a year.[164] If the selected religious leader did not appear, the policy stated that a board member or an audience member could volunteer to deliver a prayer.[165] Although an invited member of the clergy usually gave the prayer, a board

152. *Id.* at 1138.
153. *Id.*.
154. *Id.*
155. *Id.* at 1139.
156. *Id.*
157. *Id.*
158. *Id.* at 1138–39.
159. *Id.* at 1139.
160. *Id.* at 1138–39.
161. *Id.*
162. *Id.*
163. *Id.* at 1139–40.
164. *Id.* at 1140.
165. *Id.* at 1139.

member gave the prayer at least four times, and an audience member gave the prayer at least two times.[166] Many times, board members also commented on the content of the opening prayers.[167]

The Ninth Circuit concluded that the prayer policy violated the Establishment Clause because the board's practice did not fall within the legislative prayer tradition.[168] In particular, the Court determined that the audience of the board meetings as well as the board members' religious preaching during meetings were inconsistent with the legislative prayer tradition.[169]

The Ninth Circuit focused on the setting of the board meetings, emphasizing that the audience of legislative prayer "comprises 'mature adults' who are 'free to enter and leave with little comment and for any number of reasons.'"[170] Unlike a legislative body, "[t]he Board's meetings [were] not solely a venue for policymaking, they [were] also a site of academic and extracurricular activity."[171] As a result, a large portion of the audience constituted children "whose attendance [was] not truly voluntary and whose relationship with the Board [was] unequal."[172] Considering that the meetings functioned more like extensions of the district's public schools than like legislative sessions, the legislative prayer tradition was incompatible with the setting of Chino Valley's school board meetings.[173]

The Court also noted that courts have been "particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools."[174] Children's beliefs are "more vulnerable to outside influence."[175] Since children lack the experience of adults, their beliefs "are the function of environment as much as of free and voluntary choice."[176] Moreover, the relationship between students and a school board is different from the relationship between a legislature and its constituents. In addition to exercising direct physical control over students at board meetings, "the school district also holds a more subtle power over the students' academic and professional futures." [177] The Chino Valley

166. *Id.* at 1140.
167. *Id.*
168. *Id.* at 1142.
169. *Id.* at 1144.
170. *Id.* at 1145 (quoting Town of Greece v. Galloway, 572 U.S. 565, 590 (2014)).
171. *Id.*
172. *Id.*
173. *Id.*
174. *Id.* (quoting Edwards v. Aguillard, 482 U.S. 578, 583–84 (1987)).
175. *Id.* (quoting Lee v. Weisman, 505 U.S. 577, 593–94 (1992)).
176. *Id.* at 1145–46 (quoting Sch. Dist. of Grand Rapids v. Ball, 473 U.S. 373, 390 (1985)).
177. *Id.* at 1147.

school board had the power to suspend and expel students and controlled graduation requirements.[178]

Unlike the equal relationship between a town board or a legislature and its adult citizens, a school board wields undemocratic authority over its students. Due to the academic and social pressures on Chino Valley students, their attendance was not truly voluntary. Student representatives and student presenters were obligated to attend board meetings as part of their extracurricular and academic duties.[179] The coercive pressure students face to attend board meetings and participate in the prayer practice, the unequal relationship between students and board members, and the composition of the audience distinguishes the legislative prayer tradition from opening prayers at public school board meetings.[180]

In addition to the different settings of legislative prayer in *Marsh-Greece* and prayers at school board meetings, the Ninth Circuit argued that opening prayers at school board meetings are inconsistent with the historical tradition of legislative prayer.[181] Since "free public education was virtually nonexistent" at the time of the Constitution's framing,[182] "[t]he Framers consequently could not have viewed the Establishment Clause as relevant to local schools' and school boards' actions."[183] Therefore, "*Marsh*'s 'historical approach is not useful in determining the proper roles of church and state in public schools.'"[184] Consequently, the Ninth Circuit struck down the Chino Valley Board of Education's prayer practice and policy as a violation of the Establishment Clause.[185]

IV. ANALYSIS

The Fifth Circuit's protection of prayers at school board meetings in *McCarty* created a circuit split with the Ninth, Third, and Sixth Circuits.[186] The Ninth Circuit concluded that *Marsh*'s historical approach to allow prayers in the legislatures is not useful because public education was nonexistent at the time of the Framing.[187] On the other hand, the Fifth Circuit argued that the Birdville School District's prayer policy was

178. *Id.*
179. *Id.*
180. *Id.*
181. *Id.*
182. *Id.* at 1148 (quoting Edwards v. Aguillard, 482 U.S., 578, 583 n.4 (1987)).
183. *Id.*
184. *Id.* (quoting *Edwards*, 482 U.S. at 583 n.4).
185. *Id.* at 1149–50.
186. Am. Humanist Ass'n v. McCarty, 851 F.3d 521, 529–30 (5th Cir. 2017).
187. *Freedom from Religion*, 896 F.3d at 1148.

consistent with the legislative prayer tradition.[188] The Fifth Circuit concluded that the Birdville School District's prayer policy did not coerce students in attendance to participate in a religious exercise.[189] But the circuits that consider school board prayers as violations of the Establishment Clause determine that certain aspects of school board meetings coerce students to participate in prayer.[190] In all of the cases that school board prayers were struck down, meetings included a large student audience and active student participation. These meetings were similar to a classroom, graduation ceremony, or school-sponsored event where prayers are unconstitutional.[191] The Third, Sixth, and Ninth Circuits assert that the exception does not extend to school board meetings because school boards are an integral part of the public school system.[192] However, the Fifth Circuit contends that school boards are more like legislative sessions or other public deliberative bodies. Thus, the legislative prayer exception could apply to particular school board meetings.[193]

A. The legislative prayer exception is applicable to school board meetings that are similar to legislative sessions or meetings of other public deliberative bodies.

1. There is a longstanding history and tradition of prayers at school board meetings.

In *Marsh*, the Supreme Court held that the legislative prayer exception applied to legislatures and "other deliberative public bodies" because of the "deeply embedded" history and tradition of opening prayers in the United States.[194] In *Town of Greece*, the Court concluded that the legislative prayer exception also applied to a town board meeting

188. *McCarty*, 851 F.3d at 527.

189. *Id.* at 527–28.

190. Doe v. Indian River Sch. Dist., 653 F.3d 256, 276–28 (3rd Cir. 2011); Coles *ex rel.* Coles v. Cleveland Bd. of Educ., 171 F.3d 369, 383 (6th Cir. 1999); *Freedom from Religion*, 896 F.3d at 1145–47.

191. *Coles*, 171 F.3d at 381–82; *Indian River*, 653 F.3d at 278; *Freedom from Religion*, 896 F.3d at 1145.

192. *Freedom from Religion*, 896 F.3d at 1145–48; *Coles*, 171 F.3d at 377 ("Although meetings of the school board might be of a 'different variety' than other school-related activities, the fact remains that they are part of the same 'class' as those other activities in that they take place on school property and are inextricably intertwined with the public school system."); *Indian River*, 653 F.3d at 278–79 ("[R]egardless of whether the Board is a 'deliberative or legislative body,' we conclude that Marsh is ill-suited to this context because the entire purpose and structure of the Indian River School Board revolves around public school education.").

193. *McCarty*, 851 F.3d at 526.

194. Marsh v. Chambers, 463 U.S. 783, 786 (1983).

even though a town board is not a legislative body.[195] The Fifth Circuit noted in *McCarty* that school boards and town boards share many functions possessed by public deliberative bodies including the authority to adopt budgets, collect taxes, and conduct elections.[196] The Tennessee Code specifically grants boards of education the power to manage public schools, hire teachers, fix salaries, purchase supplies, and dismiss district employees, which are all legislative or administrative duties akin to the duties of a town board.[197]

Although prayers at school board meetings do not have as extensive of a history as Congressional or legislative prayer, "[a]t least eight states demonstrate historical records of prayers that were recited during school board meetings, dating back to the early 19th century."[198] In Pennsylvania, historical records show that public school board meetings included a clergy-led opening prayer from as early as 1820,[199] and "The Journal of the Board of Education of the State of Iowa contains several references to invocations delivered during school board sessions in the year 1859."[200] In addition, historical records show that opening prayers at school board meetings took place as far back as 1857 in Wisconsin.[201] The historical reasoning foundational in the Court's creation of the legislative prayer exception is applicable to school board meetings.

2. The legislative prayer exception should be applied to prayers at school board meetings as long as such prayer practices are consistent with the *Marsh-Greece* framework.

a. Lawmakers are the principal audience of legislative prayers.

In *Town of Greece*, the Supreme Court noted that "[t]he principal audience for . . . [legislative prayers] . . . 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

195. Town of Greece v. Galloway, 572 U.S. 565, 591–92 (2014).

196. *McCarty*, 851 F.3d at 526.

197. TENN. CODE ANN. § 49-2-203 (West 2019).

198. Wicks, *supra* note 1, at 30.

199. SECOND ANNUAL REPORT OF THE CONTROLLERS OF THE PUBLIC SCHOOLS OF THE FIRST SCHOOL DISTRICT OF THE STATE OF PENNSYLVANIA 7 (1820).

200. JOURNAL OF THE BOARD OF EDUCATION OF THE STATE OF IOWA, AT ITS SECOND SESSION, DECEMBER, A.D. 1859 5 (1860).

201. PROCEEDINGS OF THE BOARD OF REGENTS OF NORMAL SCHOOLS AND THE REGULATIONS ADOPTED AT THEIR FIRST MEETING HELD AT MADISON, JULY 15, 1857 6 (1857).

governing."[202] The purpose of opening prayers at legislative sessions was "to invoke Divine guidance on a public body entrusted with making the laws."[203] In *Lee*, in a concurring opinion, Justice Souter distinguished prayers at graduation ceremonies from opening prayers at legislative sessions "in which government officials invoke spiritual inspiration entirely for their own benefit without directing any religious message at the citizens they lead."[204] The legislative prayer exception does not protect opening prayers that are directed at citizens in attendance. Lawmakers, such as school board members, are prohibited from implementing a prayer practice or policy for board meetings in order to proselytize or coerce their constituents to adopt a particular faith.[205]

b. Lawmakers are prohibited from composing legislative prayers.

Furthermore, opening prayers composed by school board members are unconstitutional. In *Engel*, the Supreme Court emphatically held that "it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government."[206] Not only should school board members be prohibited from composing opening prayers, school board members should have no influence on the content of opening prayers at board meetings. Thus, board members should not edit or pre-approve invocations.

c. The purpose of legislative prayers is to unite lawmakers, not advance or disparage religion.

In *Town of Greece* the Court stated that Greece's practice of opening town board meetings with prayer would not be protected by the legislative prayer exception if the prayers "denigrate[d] nonbelievers or religious minorities, threaten[ed] damnation, or preach[ed] conversion."[207] Instead, legislative prayer is supposed "to elevate the purpose of the occasion and to unite lawmakers in their common effort."[208] An example of a prayer

202. Town of Greece v. Galloway 572 U.S. 565, 587 (2014).
203. Marsh v. Chambers, 463 U.S. 783, 792 (1983).
204. Lee v. Weisman, 505 U.S. 577, 630 n.8 (1992) (Souter, J., concurring).
205. *Town of Greece*, 572 U.S. at 587.
206. Engel v. Vitale, 370 U.S. 421, 425 (1962).
207. *Town of Greece*, 572 U.S. at 583.
208. *Id.*

that strives to unite lawmakers can be found in the very first legislative prayer given by Reverend Jacob Duche at the First Continental Congress:

> Be Thou present O God of Wisdom and direct the counsel of this Honorable Assembly; enable them to settle all things on the best and surest foundations; that the scene of blood may be speedily closed; that Order, Harmony, and Peace be effectually restored, and the Truth and Justice, Religion and Piety, prevail and flourish among the people.[209]

In contrast, in *Freedom From Religion*, school board members frequently invoked their Christian beliefs during prayers and throughout meetings, making statements like "there are very few districts of that powerfulness of having a board such as ourselves having a goal. And that one goal is under God, Jesus Christ."[210] Additionally, a previous board president had "urged everyone who does not know Jesus Christ to go and find Him" and had declared to the audience that "anything you desire, depend on God."[211] Clearly, Chino Valley board members desired to convert audience members to Christianity and used their platforms to advance their Christian beliefs. Such prayers are not primarily meant to unite lawmakers but are delivered to advance or disparage certain religious beliefs, thus falling outside the scope of protected legislative prayer.

Finally, in *Marsh* and *Town of Greece*, the Supreme Court indicated that secular opening prayers are consistent with the legislative prayer tradition if they do not advance or disparage any particular faith or set of beliefs.[212] In *Marsh*, the Court upheld the Nebraska state legislature's prayer practice even though the chaplain had delivered Christian prayers.[213] Judges should not even bother scrutinizing the content of particular legislative prayers:

> The content of the prayer is not of concern to judges where, as here, there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief. That being so, it is not for us to embark on a sensitive evaluation or to parse the content of a particular prayer.[214]

209. *Id.* at 583–84 (quoting WILLIAM J. FEDERER, AMERICA'S GOD AND COUNTRY ENCYCLOPEDIA OF QUOTATIONS 137 (Amerisearch revised ed., 2000)).

210. Freedom from Religion Found. v. Chino Valley Unified Sch. Dist. Bd. of Educ., 896 F.3d 1132, 1140 (9th Cir. 2018).

211. *Id.*

212. Marsh v. Chambers, 463 U.S. 783, 793–95 (1983); *Town of Greece*, 572 U.S. at 578–86.

213. *Marsh*, 463 U.S. at 793 n.14.

214. *Id.* at 794–95.

In *Town of Greece* the Court clarified that "[a]n insistence on nonsectarian or ecumenical prayer as a single, fixed standard is not consistent with the tradition of legislative prayer."[215] Additionally, "[t]o hold that invocations must be nonsectarian would force the legislatures that sponsor prayers and the courts that are asked to decide these cases to act as supervisors and censors of religious speech, a rule that would involve government in religious matters to . . . [an excessive] . . . degree."[216] Therefore, opening prayers at school board meetings do not have to be devoid of all religious references—such as "God," "Jesus Christ," "the Holy Spirit," or other similar references—to be consistent with the legislative prayer tradition.

B. To avoid the coercion of students, if school board prayer is to be allowed, certain guidelines are essential.

In *Lee*, the Supreme Court declared that it was an "undeniable fact" that students at their graduation ceremonies were under immense peer pressure to stand and remain silent during the rabbi's prayer.[217] Although the pressure to participate was subtle, the majority viewed the pressure "as real as any overt compulsion" given the gravity of a student's high school graduation ceremony.[218] If a dissenter was asked to stand or remain silent, they could believe that the act of standing or remaining silent signified their participation in the prayer or their approval of it.[219] A school board meeting does not pose a fraction of the significance of a student's graduation ceremony. Still, if the individual giving an opening prayer at a board meeting asked the audience to stand or remain silent for the prayer, some students in the audience could feel similar pressure to participate in an opening prayer despite their objections. Therefore, speakers who are invited to deliver opening prayers at school board meetings should refrain from requesting audience members to participate in the prayer to avoid coercing students to participate in a religious exercise they oppose.

As the Court discussed in *Lee*, the government should not place adolescents who object to a religious exercise such as a prayer in the dilemma of choosing to participate or protest.[220] Unlike adults in attendance at school board meetings, students are far more susceptible to

215. *Town of Greece*, 572 U.S. at 578.
216. *Id.* at 582.
217. Lee v. Weisman, 505 U.S. 577, 593 (1992).
218. *Id.*
219. *Id.*
220. *Id.*

peer pressure in social situations.[221] Decades of psychological research shows that adolescents are more vulnerable to peer pressure.[222] Students face immense pressure to behave in ways that conform to a group's identity.[223] A request for audience members who are mostly mature adults to stand or remain silent for an opening prayer during a legislative session or a town board meeting poses little coercive pressure. A similar request at a school board meeting might result in an unconstitutional coercion of students to participate in a religious exercise.

1. School boards should invite a variety of religious leaders to deliver prayers.

In *Engel*, the Supreme Court emphasized that government cannot endorse a particular set of beliefs because "[w]hen the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain."[224] As a result, board members should be precluded from giving opening invocations at school board meetings. Such an act sends a blatant message that the school board is endorsing religion. Given that children are more susceptible to peer pressure and thus more susceptible to coercion, the Court should clarify that a school board's practice of only inviting a single individual or exclusively inviting individuals of a particular faith is impermissible.

In *Town of Greece*, the Court determined that "*Marsh* . . . requires an inquiry into the prayer opportunity as a whole," holding that Greece's prayer policy was protected in part because "[t]he town made reasonable efforts to identify all of the congregations located within its borders and represented that it would welcome a prayer by any minister or layman

221. *Id.* at 593–94 (citing Clay Brittain, *Adolescent Choices and Parent–Peer Cross–Pressures*, 28 AM. SOC. REV. 385, 390 (1963); Donna Rae Clasen & B. Bradford Brown, *The Multidimensionality of Peer Pressure in Adolescence*, 14 J. OF YOUTH & ADOLESCENCE 451, 464 (1985); B. Bradford Brown, Donna Rae Clasen, & S.A. Eicher, *Perceptions of Peer Pressure, Peer Conformity Dispositions, and Self–Reported Behavior Among Adolescents*, 22 DEVELOPMENTAL PSYCHOL. 521, 528 (1986)).

222. Elizabeth S. Scott, *Adolescent Decisionmaking*, 37 VILL. L. REV. 1607, 1643–47 (1992). *See* Philip R. Costanzo & Marvin E. Shaw, *Conformity as a Function of Age Level*, 37 CHILD DEV. 967, 967 (1966) (verifying that the pressure on children to conform increases up to adolescence and declines thereafter).

223. Donna Rae Clasen & B. Bradford Brown, *supra* note 221, at 452. *See generally* ERIK H. ERIKSON, IDENTITY: YOUTH AND CRISIS 91–141 (W. W. Norton & Company, 1968) (examining how children have undeveloped identities that are influenced and formed by their vulnerability to peer pressure and desire to fit in with a particular group's identity).

224. Engel v. Vitale, 370 U.S. 421, 430–31 (1982).

who wished to give one."[225] However, a legislative or deliberative body need not seek to achieve religious balancing by inviting religious leaders beyond the borders of the body's jurisdiction. Such an effort "would require the . . . [government] . . . 'to make wholly inappropriate judgments about the number of religions [it] should sponsor and the relative frequency with which it should sponsor each,' a form of government entanglement with religion that is . . . troublesome."[226]

A school board that seeks to include an opening invocation at meetings should be required to invite speakers representative of a variety of faiths. As a result, children would likely feel less coerced to participate in a religious exercise that they disagree with. The school board would also avoid any implication that it was endorsing a particular set of beliefs or desired students to embrace a particular set of beliefs. Likewise, a school board should not be required to invite clergy representative of faiths beyond the district's borders because it would be unlikely that a child in the audience would be a member of that particular faith. An example of a nondiscriminatory prayer policy can be found in *Freedom From Religion* in which all clergy from any religious assembly within the Chino Valley School District were invited to deliver an invocation at board meetings.[227]

The United States has undergone a significant transformation in religious diversity. According to a study based on findings from the Public Religion Research Institute's *2016 American Value Atlas*, 43% of Americans identify as white Christians.[228] As the number of white Christians declines, non-Christian religious groups are growing, although they only account for roughly one-tenth of the population. [229] In addition, nearly 24% of Americans claim to be religiously unaffiliated, and the populations of 20 states consist of more religiously unaffiliated citizens than citizens who identify with a single religious group.[230] Finally, the average age of non-Christian Americans is far younger than the average age of Christian Americans, displaying a shift in the American population from Christianity to minority faiths or to no religion.[231]

225. Town of Greece v. Galloway, 572 U.S. 565, 585 (2014).

226. *Id.* at 586 (quoting Lee v. Weisman, 505 U.S. 577, 617 (1992)).

227. Freedom from Religion Found. v. Chino Valley Unified Sch. Dist. Bd. of Educ., 896 F.3d 1132, 1139–40 (9th Cir. 2018).

228. Robert P. Jones & Daniel Cox, *America's Changing Religious Identity: Findings from the 2016 American Values Atlas*, PUB. RELIGION RES. INST. 10 (Sept. 6, 2017), https://www.prri.org/wp-content/uploads/2017/09/PRRI-Religion-Report.pdf [https://perma.cc/3798-U5A6].

229. *Id.*

230. *Id.* at 8, 17.

231. *Id.* at 7.

If a school board elects to include opening prayers that are exclusively Christian or of a certain denomination at meetings, the likelihood that a student in attendance might feel compelled to participate in a religious exercise they disagree with is far greater today than it was 50 years ago. Courts should take into consideration America's changing religious demographics when they confront the issue of whether school boards should be required to invite individuals of minority faiths or even no faith to deliver opening invocations at school board meetings.

2. The setting of school board meetings must not be similar to a classroom or school-sponsored event.

The mere presence of students does not necessarily mean that a school board meeting is the equivalent of a classroom or a school-sponsored event. As Judge Ryan noted in his dissenting opinion in *Coles*, children are often spectators at national Congressional and state legislative sessions.[232] Yet the Supreme Court has never emphasized that prayers at legislative sessions or other public deliberative bodies pose the unconstitutional coercive pressure present in a classroom or at a school-sponsored event. Furthermore, the fact that students attended town board meetings did not prevent the Court from applying the exception in *Town of Greece*.[233] However, school board meetings that include numerous students in the audience are far more likely to introduce coercive pressure on children in attendance to participate in prayer. This requires greater judicial scrutiny for school board prayer issues.

The age of students in attendance at school board meetings should be a significant factor in determining the coerciveness of an opening prayer. Psychological research shows that young schoolchildren, children ages 6 to 14, undergo the most dramatic developmental and social changes.[234] During these formative years, a child's experiences in school and extracurricular activities shape their sense of identity and independence.[235] Therefore, elementary and middle school students are less likely to "appreciate that the . . .[school board's] . . . policy is one of neutrality toward religion."[236] The Supreme Court has also recognized that unlike adults, children are "readily susceptible to religious

232. Coles *ex rel.* Coles v. Cleveland Bd. of Educ., 171 F.3d 369, 388 (6th Cir. 1999) (Ryan, J., dissenting).

233. Town of Greece v. Galloway, 572 U.S. 565, 598 (2014) (Alito, J., concurring).

234. Jacquelynne S. Eccles, *The Development of Children Ages 6 to 14*, 9 THE FUTURE OF CHILD. 30, 30–31 (1999).

235. *Id.*at 33–36, 38–41.

236. Widmar v. Vincent, 454 U.S. 263, 274 n.14 (1981).

indoctrination"[237] and that due to children's lack of experience, their "beliefs consequently are the function of environment as much as of free and voluntary choice."[238] On the other hand, absent a request or command to participate in a religious exercise, high school students are old enough to understand that a school board's inclusion of an opening prayer at meetings does not equate to a state endorsement of religion. Accordingly, courts should not extend the legislative prayer exception to school board meetings that include a large presence of young students.

The location of school board meetings should not be a relevant factor in determining whether the setting of a school board meeting more closely resembles a school-sponsored event or a classroom setting. As Judge Ryan mentioned in his dissenting opinion in *Coles*, "[n]one of the case law prohibiting prayer in public schools has focused on the titleholder to the real estate. Instead, the focus has been on the coerciveness of the situation and on the nature of the business being conducted."[239] Likewise, courts' analysis should focus on the composition of the audience, the content of the prayer, the identity of the prayer-giver, the content and structure of board meetings, and other factors that are more pertinent.

3. Students should not actively participate in school board meetings.

One of the key factors that circuits have focused on is whether students are active participants in school board meetings.[240] School board meetings that dedicate portions of their meetings to active student involvement are unlike legislative sessions or town board meetings. They are similar to a classroom setting or school-sponsored event and therefore outside the scope of the legislative prayer exception. School boards that dedicate portions of their meetings to student presentations, musical or theatrical performances, or the recognition of students' academic or extracurricular accomplishments create a setting that is very similar to a graduation ceremony, classroom, or school-sponsored sporting event. In these situations, school boards place coercive pressure on students to participate in a religious exercise.[241]

237. Marsh v. Chambers, 463 U.S. 783, 792 (1983).

238. School Dist. of Grand Rapids v. Ball, 473 U.S. 373, 393 (1985).

239. Coles *ex rel.* Coles v. Cleveland Bd. of Educ., 171 F.3d 369, 388 (6th Cir. 1999).

240. *Coles*, 171 F.3d at 383; Doe v. Indian River Sch. Dist., 653 F.3d 256, 264 (3rd Cir. 2011); Freedom from Religion Found. v. Chino Valley Unified Sch. Dist. Bd. of Educ., 896 F.3d 1132, 1144 (9th Cir. 2018).

241. *Freedom from Religion*, 896 F.3d at 1148–51; *Coles*, 171 F.3d at 383–85; *Indian River*, 653 F.3d at 283–90.

Although most students may not be required to attend school board meetings to participate in presentations, performances, or student-recognition ceremonies, their attendance is not entirely voluntary.[242] Like in *Lee* and *Santa Fe*, students should not be forced to choose to miss receiving official recognition for their achievements or forego participating in a performance because they do not want to participate in or observe a religious exercise, such as a prayer, that they oppose.[243] On the other hand, some students may be obligated to attend board meetings, such as students who are required to give a presentation in front of the school board for one of their classes.[244] In either case, students could be subjected to unconstitutional coercive pressure to participate in a prayer.

Many public school districts include a student representative as a member of the school board. Student representatives' responsibilities and involvement at meetings varies widely among school districts. The inclusion of a student representative as part of the governance of the school district intertwines the school board with the schools themselves. Consequently, school boards including a student representative are outside the scope of deliberative public bodies contemplated by *Marsh* and *Town of Greece* and should be adjudicated more like the school prayer cases.

A student representative may be subject to greater coercive pressure to support or participate in a school board's prayer policy compared to other students in the audience. For example, a student representative who disagrees with a board's prayer practice is unlikely to voice their dissent in order to avoid conflict with the adult members of the board who wield greater power than any student representative. A dissenting student representative may also be at risk of losing the support of the adult board members and thus be at risk of losing his or her seat. In addition, student representatives, even if they possess a vote, have no power to control whether the school board includes an opening prayer at meetings or not. An opening invocation practice or policy is at the adult board members' full discretion. Even though the Fifth Circuit applied the legislative prayer exception in *McCarty*, the Fifth Circuit noted that the Birdville School Board's lack of a student representative made that case "legally distinguishable" from the school board prayer cases heard by the other circuits.[245] Therefore, "where a student is a board member, prayer at board

242. Lee v. Weisman, 505 U.S. 577, 595 (1992); Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 311–312 (2000).

243. *Lee*, 505 U.S. at 595; *Santa Fe*, 530 U.S. at 311–12 (2000).

244. *Freedom from Religion*, 896 F.3d at 1147.

245. Am. Humanist Ass'n v. McCarty, 851 F.3d 521, 528 (5th Cir. 2017).

meetings may present constitutional difficulties,"[246] namely coercive pressure on the student representative to support or participate in a religious exercise.

C. Student-delivered prayers or statements at school board meetings are constitutionally protected private speech if the school board does not interfere with the student's message.

In *McCarty*, the Birdville School District permitted students to deliver "student expressions" at the start of school board meetings.[247] The school board randomly selected student speakers from a list of volunteers, disclaiming that the "student expressions" did not reflect the school district's views. [248] School districts that allow students to deliver prayers at school board meetings without interfering with the content of the prayers present additional constitutional issues concerning private speech in the public school context.

In *Board of Education v. Mergens ex rel. Mergens* (1990), the Supreme Court noted that "there is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect."[249] In *Santa Fe*, the Court concluded that the student prayers delivered before high school football games were not protected private student speech but rather unconstitutional government speech because the invocations were "authorized by a government policy and [took] place on government property at government-sponsored school-related events."[250] In particular, the Court emphasized that the school's district policy was not indiscriminate because only one student was permitted to deliver the invocation for the entire football season.[251] In addition, the district's policy "confine[d] the content and topic of the student's message" because the policy encouraged the student to deliver Christian prayers.[252] The school district policy also resulted in the suppression of minority beliefs and views because the student speaker was

246. *Freedom from Religion*, 896 F.3d at 1144.
247. *McCarty*, 851 F.3d at 524.
248. *Id.*
249. Bd. of Educ. v. Mergens *ex rel.* Mergens, 496 U.S. 226, 250 (1990).
250. Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 302 (2000).
251. *Id.* at 303.
252. *Id.*

chosen by a majority vote of the student body.[253] As a result, the school district's policy effectively sponsored a religious message.[254]

On the other hand, private student speech is speech that is not affirmatively promoted, sponsored, or encouraged by the school district.[255] In Tinker v. Des Moines Independent Community School District, the Supreme Court held that public school officials cannot prohibit or limit student expressions unless the school district can show that the restricted student speech would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school"[256] or "impinge upon the rights of other students."[257] In cases involving student-delivered prayers at school board meetings, there is hardly any chance that a student's choice to give a prayer would materially or substantially interfere with "discipline in the operation of the school" or "impinge upon the rights of other students."

Therefore, the constitutionality of student-delivered opening invocations at school board meetings turns on whether the prayers are government speech or private student speech. If a school district adopts a policy that only authorizes a student to deliver a prayer or any other particular religious message, like in *Santa Fe*,[258] the student's prayer is impermissible government speech. Likewise, if a school district restricts the content of a student's prayer or only permits a student to give a prayer composed by the school board, the student's prayer is a government-endorsed religious message which violates the Establishment Clause.[259] If a school board decides to allow students to give opening statements at school board meetings, it must allow students to have full discretion in their choice of the message's content. Students cannot be forced to deliver a prayer or other religious message, nor can they be restricted from doing so. Instead, the school board must permit students to speak for themselves free from any interference. Thus, student-delivered prayers at public school board meetings should be constitutional as long as students have the choice to deliver a prayer without the school board's intervention.

253. *Id.* at 304.
254. *Id.* at 307–10.
255. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 270–71 (1988).
256. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509 (1969) (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)).
257. *Id.*
258. *Santa Fe*, 530 U.S. at 295–98.
259. Engel v. Vitale, 370 U.S. 421, 430–33 (1962); *Santa Fe*, 530 U.S. at 315–16.

V. CONCLUSION

A context-focused approach would protect a long-established tradition of opening legislative sessions and government meetings with a prayer and prevent school boards from advancing religious beliefs on students who are vulnerable to coercion. If the Supreme Court decides to extend the legislative prayer exception to public school board meetings, it should limit the exception's applicability to board meetings that are dissimilar to the settings of unconstitutional school prayers. Board meetings that generally focus on administrative matters, where the audience is mostly composed of mature adults, and that involve little student participation are similar to a town board meeting where prayers are protected.[260] On the other hand, board meetings that have many students in the audience and that include active student participation, such as awards ceremonies, student presentations, and musical performances, are similar to graduation ceremonies, classrooms, and extracurricular events where prayers are barred.[261] These student-focused events pose coercive pressure on students to participate in a prayer, which they might disagree with. In addition, school boards that include prayers that disparage or advance a particular faith,[262] and boards that monitor and control the content of opening prayers violate the Establishment Clause.[263]

260. Town of Greece v. Galloway, 572 U.S. 565, 591–92 (2014). *See* Am. Humanist Ass'n v. McCarty, 851 F.3d 521, 526 (5th Cir. 2017).

261. *Engel*, 370 U.S. at 421; Wallace v. Jaffree, 472 U.S. 38, 57–61 (1985); Lee v. Weisman, 505 U.S. 577, 599 (1992); *Santa Fe*, 530 U.S. at 317. *See* Freedom from Religion Found. v. Chino Valley Unified Sch. Dist. Bd. of Educ., 896 F.3d 1132, 1145–47 (9th Cir. 2018); Doe v. Indian River Sch. Dist., 653 F.3d 256, 276–78 (3rd Cir. 2011); Coles *ex rel.* Coles v. Cleveland Bd. of Educ., 171 F.3d 369, 382–83 (6th Cir. 1999).

262. *See Freedom from Religion*, 896 F.3d at 1149–51.

263. *Engel*, 370 U.S. at 436; *Santa Fe*, 530 U.S. at 314–17.