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ORIGINAL

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

AMERICAN HUMANIST ASSOCIATION, and ISAIAH SMITH

Plaintiffs

v.

BIRDVILLE INDEPENDENT SCHOOL DISTRICT, BIRDVILLE INDEPENDENT SCHOOL DISTRICT BOARD OF TRUSTEES, CARY HANCOCK, in his individual and official capacity, JACK MCCARTY, in his individual and official capacity, DOLORES WEBB, in her individual and official capacity, JOE TOLBERT, in his individual and official capacity, BRAD GREENE, in his individual and official capacity, RICHARD DAVIS, in his individual and official capacity, and RALPH KUNKEL in his individual and official capacity

Defendants

Case No. 4:15-cv-377-A

PLAINTIFFS' BRIEF IN SUPPORT OF THEIR RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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SUMMARY OF THE ISSUES PRESENTED

1. The Establishment Clause prohibits public schools from inviting and encouraging students to pray. The school district has had a longstanding practice of inviting and selecting students (mostly in elementary school) to deliver prayers at school board meetings. Did this practice violate the Establishment Clause?

2. Once it has been shown that a plaintiff's constitutional rights were violated, a court has no discretion to deny nominal damages. Because nominal damages are retrospective, they cannot be mooted. Plaintiff was exposed to the district's pre-amended practice described above. Is plaintiff entitled to nominal damages?

3. Under controlling authority, permitting prayer at school-sponsored events violates the Establishment Clause. This applies even when the prayers are student-led, student-initiated, and "spontaneously delivered." *Every* appellate case involving a school board invocation practice has found the practice unconstitutional. School board meetings are school-sponsored events. The district has a longstanding, ongoing practice of opening board meetings with prayer. Does this practice violate the Establishment Clause? Are plaintiffs entitled to prospective relief?

4. The Establishment Clause strictly prohibits school officials from participating in prayer with students during school-sponsored activity. It is undisputed school officials, including board members and the superintendent, regularly participate in the student-led prayer delivered at the board meetings. Does this conduct violate the Establishment Clause?

5. An amendment to a challenged practice can moot prospective relief if the challenged aspects have been remedied. Plaintiffs challenge the district's longstanding practice of (1) including prayer in school board meetings; (2) participating in those prayers with students; and (3) inviting students (and only students) to deliver prayers. Did the district's litigation-inspired actions in replacing the word "invocation" on the agenda with "student expression" moot plaintiffs' claims for prospective relief even though it continues the challenged conduct?

6. Government action violates the Establishment Clause if it lacks a secular purpose, independent of its effect. Courts evaluating government purpose must consider the history and

circumstances surrounding an amendment to a challenged practice, and whether the amendment was made simply to keep a longstanding religious practice in response to a litigation threat. Were the district's minor modifications to the practice – directly following a litigation threat – made simply to keep a longstanding religious practice?

STATEMENT OF THE FACTS[1]

Plaintiffs challenge a school board's longstanding practice of (1) opening school board meetings with prayers; (2) inviting students to deliver the prayers; and (3) participating in those prayers with the students at the meetings. (Dkt.14 ¶¶1, 31-32, 34-47, 49-50, 64-65, 67) (A.377). Plaintiffs submit that this practice (collectively "Prayer Practice") violates the Establishment Clause. (*Id.* ¶¶1, 74, 79-83) (A.377-84). Plaintiffs seek a permanent injunction, declaratory relief, damages under 42 U.S.C. § 1983, and attorneys' fees under 42 U.S.C. § 1988. (*Id.* at ¶84).

Plaintiffs are Isaiah Smith, a 2014 Birdville High School alumnus, and American Humanist Association (AHA), a national nonprofit organization with chapters throughout the country, including in Fort Worth. (Dkt.14 ¶5)(A.378) (A.566) (A.592). Smith has been a member of AHA since 2013. (A.592). Smith has attended at least four Board meetings in 2014 and 2015 and had unwelcome contact with the Board's prayers. (A.461).[2] Defendants are Birdville Independent School District ("BISD") and its Board of Trustees ("Board"). (Dkt.14 ¶¶7-15) (A.711-19).

The Board holds regular monthly meetings in the District Administration Building. (A.461) (A.711-19) (A.720-23) (A.727-949). These meetings are open to the public and are the primary means for citizens to observe and participate in District business. (A.482-83) (A.612). BISD admits that these meetings are "school-sponsored" events. (A.477).

Since at least 1997, it has been BISD's policy, practice, and custom to open School Board meetings with prayer. (A.526) (A.727-949) (A.1091-1304). From 1997 until March 2015, every public meeting agenda had a heading referring to "Invocation." (A.403) (A.417) (A.526) (A.727-935). BISD's publicized minutes also reflect the "Invocation." (A.1091-1286). It is commonly

[1] Plaintiffs cite their Appendix as ("A.") and BISD's brief as ("Br.").
[2] Smith attended meetings on 12/11/14, 03/26/15, 04/23/15, and 05/28/15. (A.461) (A.1074).

understood that "Invocation" means "prayer;" BISD's own documents reflect this fact. (A.335-40) (A.343-351) (A.356-59) (A.708). *See also* (A.658) (A.697-98). During the meetings, the "invocation" is often verbally introduced as "the prayer" or "our prayer" as well.[3]

While BISD asserts that its invocations "sometimes" take the form of prayer (Br.8) the reality is that the *overwhelming majority* of invocations delivered since 1997 until present have been prayers. (A.13-17) (A.19-330).[4] And most of BISD's prayers are Christian, making references to "Jesus" and "Christ."[5] In fact, from 1997 until present, there is evidence of only one non-Christian prayer (an "Indian Prayer) in this 20-year span, and that occurred 7 years ago. (A.13) (A.72-76). No non-Christian prayer has been delivered since. (A.13-17) (A.77-330). Over half the prayers delivered since February 28, 2008, until June 23, 2016, have made Christian references. (A.13-17). No Buddhist or Muslim prayers have been delivered (A.495), nor have any statements been given in Hebrew or Hindi. (A.553).

BISD invites students – and only students – to deliver its invocations, not outside members of the community. (A.19-330) (A.727-949). And it primarily targets elementary and middle schoolchildren.[6] Of the 101 meetings held between February 2008 and June 2016,[7] elementary or middle school students delivered the invocations 84 times. (A.13-17).

In addition to the students present to deliver the prayer and pledge, other students are regularly present at Board meetings, including groups of students summoned by the Board for other purposes, such as honoring them for academic or extracurricular achievements.[8] For

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[3] *E.g.* (A.20) (A.25) (A.51) (A.58) (A.60) (A.70) (A.80) (A.82) (A.92) (A.142) (A.145) (A.149) (A.152) (A.235) (A.258) (A.273) (A.282) (A.286)

[4] Of the 97 meetings that have audio (Feb. 2008 - June 2016) *prayers* were delivered 74 times. (A.13-17). Of the 23 poems/statements, at least 4 were religious. (*Id.*) (11/20/08, 9/24/09, 6/24/10, 3/26/15).

[5] (A.13-17) (A.19-330) (A.403) (A.495) (A.553-54)

[6] (A.13-17) (A.19-330) (A.397) (A.727-949)

[7] Audio recordings of BISD meetings are available dating back to February 2008. (A.335) (A.343).

[8] (A.406) (A.729,732,736,741,742-44,748,753-55,765-66,768,774-75,781,786-87,793,796-97,799-801, 805,807,810-14,819-20,825-27,829,833,838-39,841,845,850-51,853,857,862-63,869,874-76,882,887-88, 894-95,897,900-02,904,907,911-13,919-20,922-23,925-26,929,931-32,934-35,938-39,941-43,946,949) (A.951,956,959,963,967,969-71,973,979,981,983-84,986,990,994,996-98,1003-04,1010-13,1018,1024, 1026,1034-35,1037,1039,1041-44,1048,1052,1054,1055,1057,1060,1061,1063,1065,1067-68,1070-76, 1078-80,1082,1087-88) (A.1099,1101,1105,1111,1119,1122,1124,1134,1145,1147,1149,1151,1160,1171,

example, the Board has given recognition to Valedictorians, Salutatorians, and National Merit Scholar students at every May meeting from 1999 through 2014.[9] Likewise, a student choir or band has been invited to play at nearly every December meeting since 1997.[10] The Board presented awards to elementary or middle school students for the "Holiday Greeting Card Winner" in 2009 and 2012 through 2015.[11] And the Board recognized an elementary student as the Texas Reading Bee winner at the December 2013 meeting (A.920) (A.1061) (A.1265).

Principals and Board members regularly ask the public to participate in the prayers with phrases such as, "will you please rise," "please stand," or "remain standing" for the prayer.[12] For example, at the September 2010 meeting, an elementary principal announced, "S.S. will give the invocation tonight, so if everyone will please stand." (A.115) (A.1015). In March 2011, a different elementary school principal asked "everyone to stand" before a first grader delivered the prayer. (A.135). In December 2011, then-Board President Davis requested, "If you'll please stand with me," after the principal introduced the student delivering "the invocation." (A.168). After the pledges were delivered at the January 2013 meeting, a Board member asked the audience to "remain standing" before an elementary student delivered the prayer. (A.213).

The invocation is often delivered after the pledge when the audience is already standing.[13] To opt out, a student must affirmatively sit down or walk out of the room immediately after the pledge is recited. (*Id.*). Defendant Board member Brad Greene testified: "I am always standing because we just have finished the pledge." (A.412).

The principal of the students giving the invocation and pledge formally introduces the

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1181,1183,1194,1196,1206,1216,1218,1227,1229,1233,1239,1241,1244-45,1248,1253,1255,1265,1267-68,1271,1273,1281-82,1284-86,1290,1295,1297,1302)

[9] (A.742-43,753,765,774,786,799,811,825,838,850,862,874,887,900,912,925) (A.956,969,983,996-97, 1010,1024,1041,1054,1067) (A.1099,1122,1145,1171,1194,1216,1239,1255,1271)

[10] (A.732,748,760,770,781,793,819,833,845,857,869,882,895,907,920,932) (A.1004,1035,1048,1061, 1074,1088) (A.1111,1147,1160,1183,1206,1229,1248,1265,1302)

[11] (A.724) (A.868, 907, 920, 932, 946) (A.1003, 1061, 1048, 1074, 1087) (A.1181, 1265, 1282)

[12] (A.13-17) (A.19-313) (A.404) (A.405) (A.491-92)

[13] (A.13-17) (A.42,64,70-71,74-75,80,82,8,92,96,100,106,109,118,142,176,179,182,210,213,225,229,235, 237,246,249,252,258,261,263,270,274,276,282,285-86,288,291,294,297-98,312,315,318,325) (A.404) (A.412) (A.419) (A.426) (A.441)

students to the audience.[14] For instance, at the July 2009 meeting, a high school principal introduced the student: "and doing our prayer tonight will be Mr. A.M." (A.70). Similarly, at the August 2011 meeting, an elementary principal said, "I'd like to introduce C.A., who is going to do our prayer." (A.152). And the principal usually announces that these students are "representing" their respective school.[15] At the September 2013 meeting, for example, an elementary principal declared: "we have two wonderful fifth graders here representing us tonight for the invocation and the pledge." (A.239). At the March 2008 meeting, a principal announced: "I am delighted to be here this evening along with two of my students, and we are representing W.A. Porter [Elementary]. I am . . . the principal, and . . . it's a pleasure to introduce you to M.S. She is a 4th grade student, and she will be giving the invocation." (A.25). The invocation and pledge students at the December 2015 meeting were similarly introduced by their principal as "representing their campus tonight." (A.325).

Board members and other school officials such as the superintendent regularly participate in the prayers delivered by the students at their behest.[16] In the vast majority of the videos where members are visible, most Board members can be seen bowing their heads in prayer. (A.13-17). For example, in each of the October, November, and December 2013 meetings, they are seen bowing their heads during prayer delivered by elementary students. (A.15). In the March 2014 meeting, Board members bow their heads as a middle school student delivers the prayer. (A.16). At the August 2014 meeting, an elementary principal announced, "Our prayer will be led by H.N.," and then proceeded to bow her head while standing next to the student. (A.16)(A.273). Each board member admitted, with the exception of Kunkel, who said that he could not recall his typical behavior during the invocation, that he (or she) participates in the invocation being delivered in some way.[17] The superintendent, who has attended every meeting since 2011, admits

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[14] (A.13-17) (A.19-331) (A.361) (A.363-66) (A.608) (A.951-1089)
[15] (A.27) (A.88) (A.91) (A.113) (A.115) (A.159) (A.162) (A.239) (A.260) (A.276) (A.297) (A.311) (A.315) (A.318) (A.321) (A.325)
[16] (Dkt.14 ¶ 49) (A.13-17) (A.19-331) (A.412) (A.419) (A.426) (A.433) (A.441) (A.447) (A.453)
[17] (A.412) (A.419) (A.426) (A.433) (A.441) (A.447) (A.453)

he participates in the prayers along with the associate superintendent. (A.491)(A.494)(A.546-47).

At the "conclusion, the student will receive a certificate and will pose for a picture with a Board Member." (A.363) (A.366) (A.368-71). Then BISD sends the student a thank you letter for the invocation. (A.364) (A.368-71). For instance, Board Member Tolbert wrote: "Thank you for the beautiful Invocation you gave at the Board of Trustees Meeting on April 28, 2011 and for allowing us to have a copy. I appreciate the time and thought you put into writing the Invocation. You did an outstanding job and I know your school is very proud of you." (A.370).[18]

The Board instructs the principal to meet with the student speakers before the meeting to "go over the process and show [the students] where they will be standing to address the Board." (A.363-64). The students are told where to sit (with their campus administrator in a reserved front row seat) and how to act. (A.363) ("Students should face the Board members when speaking"). The Board's memo instructs principals: "students have a choice – prayer, devotion, poem, etc." (A.364). Each November, the Board provides principals with a schedule for the year's "Board Meeting Student Participation Invocation and Pledge Leaders" (A.373), assigning a different school to provide students each month. (A.373-75).

From 1997 until March 26, 2015, BISD's process of inviting students to deliver the invocations was entirely subjective. (A.395) (A.1353-55). For example, the principal at Richland High School stated: "Many times we have used faculty members children." (A.1354). At W.A. Porter Elementary, the "fifth grade teachers had input as to who would represent our school." (A.1355). At North Richland Middle, the "staff was involved to bring a variety of well rounded students who would represent our campus and the BISD in an honorable way." (A.1354). Likewise, the assistant principal at Hardeman Elementary "asked the 5th grade teachers to select two students that would be dependable and would do a good job to lead in the pledge of allegiance and to provide the invocation/student expression at the board meeting." (A.1315). School officials would also review the student's invocation beforehand and have even had the

[18] The February 2016 letter stated in part: "Student participation in our Board meetings is very important to our Board members and our staff. You did a great job representing Richland Elementary." (A.371)

student practice it with them beforehand. (A.1353-55).

On December 11, 2014, Smith attended his first meeting to address the Board about bullying at his high school. (A.377) (A.461-63) (A.1074). An elementary student delivered the prayer.[19] A school official asked the audience to stand for the pledges and to remain standing for the prayer. (A.285) (A.377). Smith, a self-described Christian humanist, felt affronted by the Board's prayer and that they were "favoring religion over nonreligion." (A.464) (A.612).

On December 15, 2014, AHA sent a letter to BISD informing it that including prayer in Board meetings violates the Establishment Clause. (A.377-84). The letter also warned that the Board's "actions are further unconstitutional insofar as school administrators are participating in prayer with students." (A.380). AHA asked BISD to cease these practices and provide "written assurances that prayer will not be included in future School Board meetings." (A.384).

On March 19, 2015, BISD responded, refusing to discontinue the practice of opening meetings with prayer. (A.386-88). Instead, BISD merely changed the language in the agendas from "INVOCATION" to "Student Expression" (A.387), asserting that students would now be permitted to deliver a "one-minute" "student expression," which may include "prayer," at the start of the meetings. (A.387-88) (A.391). But Board meetings already have a designated period for public expression. (A.482-83) (A.620) (A.727-949).

Since March 2015, prayers have continued to be delivered at the Board's meetings.[20] Of the 15 meetings with audio, 7 have been prayers and 1 was a religious poem on "Why God Created Teachers."[21] Of the 7 prayers, 5 made explicitly Christian references. (A.16-17) (A.293-331). No non-Christian prayers have been delivered. (A.16-17) (A.293-331).

School officials and Board members continue to participate in these prayers with students.[22] BISD does not claim to have ceased this portion of its practice. For instance, during the September 2015 meeting, Board members bowed their heads during a student prayer. (A.17).

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[19] (A.284-86) (A.386) (A.463) (A.932) (A.1074)
[20] (A.16-17) (A.294-95,298,312-13,315-16,318-19,325-26) (A.340) (A.350-51) (A.404)
[21] (A.16-17) (A.293-331) (A.404) (A.463)
[22] (A.412) (A.419) (A.426) (A.433) (A.441) (A.447) (A.453)

And the practice is still targeted at impressionable young students.[23] In fact, since March 2015, all but one the invocations have been delivered by middle and elementary students. (A.16-17) (A.293-305) (A.310-31). Most of these have been elementary students.[24] It is also undisputed the Board continues to retain authority over "Student Expression" and has the authority to "cut off" expression it deems "improper or offensive." (A.542).

BISD admits that the sole reason it changed the agendas was to avoid litigation.[25] After reading AHA's letter, Associate Superintendent Joe Cammarata advised the Board to change the agendas. (A.528). He testified: "I was concerned, because like all letters from the American Humanist Association, threatens litigation." (A.529). He recommended the change so that "we wouldn't be subject to litigation." (A.530). Susan Sorrells, a former PTA President, sent a text message to Board President Hancock, who she described "as my friend, a strong believer" in an April 28, 2015 text, expressing frustration no prayer was offered at the May 2015 meeting and that she wanted "a prayer, which is the norm." (A.658). She added: "Brown and Cammarata with their self-proclaimed concern over 'negative publicity' orchestrated that poem." (A.657-59).

ARGUMENT

I. Summary Judgment Standard

To prevail on its motion, BISD must show "that there is no genuine dispute as to any material fact" and that it "is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The Court must view "all facts and evidence in the light most favorable to the non-moving party." *Moss v. BMC Software, Inc.*, 610 F.3d 917, 922 (5th Cir. 2010). It is axiomatic that the "'evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor.'" *Tolan v. Cotton*, 134 S. Ct. 1861, 1863 (2014) (citation omitted)).

Under Fed. R. Civ. P. 56(f)(1), a court may, on its own initiative, grant summary judgment for a nonmovant. "[D]istrict courts are widely acknowledged to possess the power to

[23] (A.13-17) (A.333-41) (A.343-51) (A.353) (A.356-59) (A.1353-55)
[24] (A.16-17) (A.293-95,299,303,314,317,320,327)
[25] (A.479-480) (A.484-485) (A.524-30)

enter summary judgments *sua sponte*." *Celotex Corp. v. Catrett*, 477 U.S. 317, 326 (1986).[26] As shown below, the material facts are undisputed but BISD is not entitled to judgment as a matter of law. Thus, the Court should grant summary judgment to Plaintiffs under Rule 56(f)(1).

II. BISD is not entitled to summary judgment because its prayer practice—in both its longstanding and current iterations—violates the Establishment Clause pursuant to decades of controlling authority and a robust consensus of persuasive authority.

A. Establishment Clause Overview

The Establishment Clause requires the "government [to] remain secular, rather than affiliate itself with religious beliefs." *Cnty. of Allegheny v. ACLU*, 492 U.S. 573, 610 (1989). The Supreme Court "has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools," *Edwards v. Aguillard*, 482 U.S. 578, 583-84 (1987), where "there are heightened concerns with protecting freedom of conscience from [even] subtle coercive pressure." *Lee v. Weisman*, 505 U.S. 577, 592 (1992).

The Supreme Court has held that "permitting student-led, student-initiated prayer" at school-sponsored events unconstitutionally endorses religion and coerces students to participate in religious activity. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 301-03, 308 (2000); *Lee*, 505 U.S. at 590-96. *Lee* and *Santa Fe* are "merely the most recent in a long line of cases carving out of the Establishment Clause what essentially amounts to a per se rule prohibiting public-school-related or -initiated religious expression or indoctrination." *Doe v. Duncanville Indep. Sch. Dist.*, 994 F.2d 160, 165 (5th Cir. 1993). The Supreme Court has issued numerous decisions "that prohibits prayer in the school classroom or environs." *Id.* at 164.[27] The same is true of the Fifth Circuit.[28] The Supreme Court recently reiterated that "[o]ur Government is prohibited from

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[26] *See also Fields & Co. v. United States Steel Int'l, Inc.*, 426 F. App'x 271, 280 n.9 (5th Cir. 2011)

[27] *See Wallace v. Jaffree*, 472 U.S. 38 (1985); *Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373, 385 (1985); *Stone v. Graham*, 449 U.S. 39 (1980); *Sch. Dist. Abington v. Schempp*, 374 U.S. 203, 205 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962); *McCollum v. Bd. of Educ.*, 333 U.S. 203, 231 (1948); *Everson v. Bd. of Ed*, 330 U.S. 1, 31-32 (1947); *Karen B. v. Treen*, 653 F.2d 897 (5th Cir. 1981), *aff'd*, 455 U.S. 913 (1982)

[28] *See Doe v. Sch. Bd.*, 274 F.3d 289, 294 (5th Cir. 2001); *Doe v. Santa Fe Indep. Sch. Dist.*, 168 F.3d 806, 816 (5th Cir. 1999), *aff'd*, 530 U.S. 290 (2000); *Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274, 280 (5th Cir. 1996); *Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402, 407 (5th Cir 1995) (*Duncanville II*)); *Duncanville*, 994 F.2d at 163; *Treen*, 653 F.2d 897; *Hall v. Bd. of Sch. Comm'rs*, 656 F.2d 999, 1003 (5th Cir. 1981); *Meltzer v. Bd. of Pub. Instruction*, 548 F.2d 559, 574 (5th Cir. 1977) (en banc)

prescribing prayers to be recited in our public institutions[.]" *Town of Greece v. Galloway*, 134 S. Ct. 1811, 1822 (2014). This is especially so "in the context of" public schools;" in such a setting, an "invocation [i]s coercive." *Id.* at 1827.

The jurisprudence analyzing similar practices is decidedly against BISD. Regardless of the test employed, *every* federal appellate court that has addressed the issue of school board prayers, including the Fifth Circuit, has concluded that such prayers are unconstitutional. *See Doe v. Indian River Sch. Dist.*, 653 F.3d 256 (3d Cir. 2011); *Doe v. Tangipahoa Parish Sch. Bd.*, 473 F.3d 188, 197, 203 n.2 (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, 356-57 (9th Cir. 2002); *Coles v. Cleveland Bd. of Educ.*, 171 F.3d 369 (6th Cir. 1999). *See also Freedom From Religion Found. v. Chino Valley Unified Sch. Dist. Bd. of Educ.*, 2016 U.S. Dist. LEXIS 19995 (C.D. Cal. Feb. 18, 2016). In addition, the Fifth Circuit and sister circuits have held that school officials merely *participating* in student-led, student-initiated prayer is unconstitutional.[29]

Courts have been virtually unanimous in finding prayers unconstitutional in *any school-sponsored event*, regardless of whether they are student-led, student-initiated, uncensored, or "spontaneously initiated," including at (1) board meetings, *supra*; (2) athletic games and practices;[30] (3) graduation ceremonies; [31] (4) assemblies;[32] and (5) award ceremonies.[33] Further,

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[29] *See Duncanville*, 70 F.3d 402; *Duncanville*, 994 F.2d at 163; *Treen*, 653 F.2d 897; *Borden v. Sch. Dist.*, 523 F.3d 153 (3rd Cir. 2008); *Holloman v. Harland*, 370 F.3d 1252, 1285 (11th Cir. 2004)

[30] *E.g.*, *Santa Fe*, *supra*, *Duncanville*, *supra*; *Borden*, 523 F.3d 153; *Jager v. Douglas Cnty. Sch. Dist.*, 862 F.2d 824, 831 (11th Cir. 1989); *Doe v. Aldine Indep. Sch. Dist.*, 563 F. Supp. 883 (S.D. Tex. 1982)

[31] *E.g.*, *Lee*, *supra*; *Santa Fe*, 168 F.3d at 816; *Lassonde v. Pleasanton Unified Sch. Dist.*, 320 F.3d 979, 983 (9th Cir. 2003); *Cole v. Oroville Union High Sch.*, 228 F.3d 1092, 1104 (9th Cir. 2000); *ACLU v. Black Horse Pike Reg'l Bd. of Educ.*, 84 F.3d 1471, 1488 (3d Cir. 1996); *Harris v. Joint Sch. Dist.*, 41 F.3d 447, 454 (9th Cir. 1994), *vacated other grounds*, 515 U.S. 1154 (1995); *Workman v. Greenwood Cmty. Sch. Corp.*, 2010 U.S. Dist. LEXIS 42813 (S.D. Ind. 2010); *Doe v. Gossage*, 2006 U.S. Dist. LEXIS 34613 (W.D. Ky. May 24, 2006); *Ashby v. Isle of Wight Cnty. Sch. Bd.*, 354 F. Supp. 2d 616, 630 (E.D. Va. 2004); *Deveney v. Bd. of Educ.*, 231 F. Supp. 2d 483, 485-88 (S.D. W.VA. 2002); *Skarin v. Woodbine Cmty. Sch.*, 204 F. Supp. 2d 1195, 1198 (S.D. Iowa 2002); *Appenheimer v. Sch. Bd.*, 2001 WL 1885834, *6-9 (C.D. Ill. 2001); *Gearon v. Loudoun Cnty. Sch. Bd.*, 844 F. Supp. 1097, 1098-1100 (E.D. Va. 1993); *Lundberg v. W. Monona Cmty. Sch. Dist.*, 731 F. Supp. 331 (N.D. Iowa 1989); *Graham v. Central Cmty. Sch. Dist.*, 608 F. Supp. 531 (S.D. Iowa 1985)

[32] *E.g.*, *Ingebretsen*, 88 F.3d at 277; *Collins v. Chandler Unified Sch. Dist.*, 644 F.2d 759 (9th Cir. 1981)

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

courts have consistently held that prayer at *any* government-sponsored event, including for adults, violates the Establishment Clause, such as at a (1) military institute;[34] (2) courtroom;[35] (3) village-sponsored festival;[36] (4) police-sponsored prayer vigil;[37] (5) city's memorial prayer ceremony;[38] and (6) a mayor's community prayer breakfast.[39] In *Hall v. Bradshaw*, the court held that a nondenominational prayer on a state map, which had a "limited audience," violated the Establishment Clause, even in the absence of "compelled recitation" and even though the prayer could "seem utterly innocuous." 630 F.2d 1018, 1019-21 n.1 (4th Cir. 1980).

Nothing BISD presented in its motion demonstrates that "the instant case materially differs from this long-established line of cases." *Duncanville*, 994 F.2d at 165. BISD raises two competing and irreconcilable defenses: (1) that the practice fits within the extremely narrow exception for "legislative *prayer*" which allows *legislative* bodies to open meetings with a solemnizing invocation for the benefit of the board; and (2) the practice is not about "prayer" but rather an opportunity for students to "speak freely," regardless of solemnization, and is entirely for the benefit of the students, not the Board. (Br.19-25). As shown below, however, neither argument saves the practice and BISD's assertion of "rights of speech, association, and free exercise . . . cannot withstand analysis." *Id. See Santa Fe*, 530 U.S. at 302-03, 310-15 (student-led, student-initiated invocations were not "'private' speech."). *See infra* at 17-24.

B. This case is governed by the tests for school prayer cases.

Establishment Clause claims challenging school prayer practices are evaluated using "three complementary (and occasionally overlapping) tests" established by the Supreme Court. *Santa Fe*, 168 F.3d at 814-16. The first "is the disjunctive three-part *Lemon* test, under which a government practice is unconstitutional if (1) it lacks a secular purpose; (2) its primary effect either advances or inhibits religion; or (3) it excessively entangles government with religion." *Id.*

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

Second, under the *Lee* "Coercion Test," "school-sponsored religious activity" is analyzed to determine the extent "to which it has a coercive effect on students." *Id.* Third, the "Endorsement Test, seeks to determine whether the government" action conveys "a message that religion is 'favored,' 'preferred,' or 'promoted[.]'" *Id.* (citation omitted). Government action "violates the Establishment Clause if it fails to satisfy any" of these tests. *Edwards*, 482 U.S. at 583.

BISD's prayer practice is unconstitutional under *every* test as shown below in Section IV. It clearly "would *not* survive the *Lemon* test." *Tangipahoa*, 473 F.3d at 197. The prayers also fail the coercion test because they bear "the imprint of the State and thus put school-age children who objected in an untenable position." *Lee*, 505 U.S. at 590.

C. School board prayer does not fall within the extremely limited "legislative prayer" exception and BISD concedes as much.

Paradoxically, BISD argues that the traditional Establishment Clause tests applicable to public schools do not govern its longstanding practice of inviting students, and only students, to deliver prayers, at School Board meetings. (Br. 14-19). Rather, it argues that a *very narrow* exception to Establishment Clause jurisprudence carved out in *Marsh v. Chambers*, 463 U.S. 783 (1983) and *Greece* exclusively for certain *legislative* invocations governs. (Br. 19-25). Yet in asserting, repeatedly, that the student prayers at issue constitute private speech (BISD's *primary* argument (Br. 15-18)), it relies entirely on *school prayer* cases (albeit nonbinding and abrogated ones) governed by *Lemon*. (Br. 15-18). BISD cannot have it both ways.

The *legislative* prayer exception does not apply to the "public school context." *Lee*, 505 U.S. at 592, 596-97. The Supreme Court has expressly and repeatedly rejected application of the exception in public school cases. *Id.*[40] Nor does it apply to any other governmental contexts.[41] The "Supreme Court has not yet extended the rule of *Marsh* and [*Greece*] to nonlegislative

[40] *See also Santa Fe*, 530 U.S. at 313; *Allegheny*, 492 U.S. at 590 n.40 ("state-sponsored prayer in public schools" is "unconstitutional"); *Wallace*, 472 U.S. 38; *Edwards*, 482 U.S. at 583 n.4.

[41] *E.g.*, *Mellen*, 327 F.3d at 367-69 (military institute); *Constangy*, 947 F.2d at 1147-49 (judge prayers); *Crestwood*, 917 F.2d at 1478-79) (town festival); *Carter v. Broadlawns Med. Ctr.*, 857 F.2d 448, 453 (8th Cir. 1988) (hospital chaplaincy program); *Ocala*, 127 F. Supp. 3d at 1280 n.8 (police department prayer vigil); *Newman*, 181 F. Supp. 2d at 1378-80 (mayor's community breakfast); *Hewett*, 29 F. Supp. 3d at 629-31 (city's memorial events).

prayer practices. Instructively . . . Justices Alito and Kagan noted that hypothetical prayer practices involving other civic proceedings would not or should not come within the reach of the Court's holding in *[Greece]*." *Hewett*, 29 F. Supp. 3d at 629-31.

The legislative exception is particularly inapplicable to school board prayers. *See Indian River*, 653 F.3d at 259, 275 ("the traditional Establishment Clause principles . . . apply" not "*Marsh*'s legislative prayer exception"); *Coles*, 171 F.3d at 376, 379 ("the unique and narrow [*Marsh*] exception" does not apply). While the present case was pending, a federal court made clear: "**Legislative Exception Does Not Apply to Prayer at School Board Meetings**." *Chino Valley*, 2016 U.S. Dist. LEXIS 19995, at *31-32. *See also Pelphrey v. Cobb Cnty.*, 547 F.3d 1263, 1276 (11th Cir. 2008) ("The [Supreme] Court has recognized that there are inherent differences between public schools and legislative bodies [and] has treated legislative prayer differently from prayer at school events."); *Jager*, 862 F.2d at 828-29 n.9 (*Marsh* "has no application to" schools). Courts have found *Greece* inapposite to other school activity as well.[42]

Not a single appellate court has *held* that the legislative exception applies to school board prayers. "The only two circuit courts to address this question [Third and Sixth] have soundly, and after detailed analysis, concluded that school board prayer does not qualify for the legislative exception." *Chino Valley*, 2016 U.S. Dist. LEXIS 19995, at *31-32. BISD "offer no contrary authority on the subject." *Id.* Instead, it *completely ignores* the "Third and Sixth Circuits." *Id.*

The Sixth Circuit, the first appellate court to rule on the issue, held *Marsh* did not apply, noting the degree of student involvement and the susceptibility of children to endorsement and coercion and the differences between school boards and legislative bodies. *Coles*, 171 F.3d at 372, 379-81. The court concluded, "the fact that school board meetings are an integral component of the . . . school system serves to remove it from the logic in *Marsh*." *Id.*

The most recent appellate case, *Indian River*, likewise held *Marsh* inapplicable, even

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[42] *E.g.*, *Smith v. Jefferson Cnty. Bd. of Sch. Comm'rs*, 788 F.3d 580, 587-89 (6th Cir. 2015) ("*Greece* does not impact our approach to the case before us."); *Buford v. Coahoma Agric. High Sch.*, 2014 U.S. Dist. LEXIS 135459, at *27-28 n.10 (N.D. Miss. 2014) ("The Supreme Court's recent opinion addressing the propriety of legislative prayers . . . has no bearing on this opinion.") (citing *Pelphrey*, 547 F.3d at 1276)

though its practice expressly did not allow prayer *by students*, but rather *adult* members on a rotating basis, thus making it far more akin to a legislative practice than BISD's practice challenged here. 653 F.3d at 261. Ultimately, having carefully considered "the role of students at school boards, the purpose of the school board, and the principles underlying the Supreme Court's school prayer case law," the Third Circuit, like the Sixth Circuit before it, found school board prayer belongs under school prayer cases, not *Marsh*. *Id.* at 281. The court reasoned:

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

Id. at 275. This was so "regardless of whether the Board is a 'deliberative or legislative body.'" *Id.* at 278-79. As for the other two courts, the Ninth Circuit merely assumed, expressly *without deciding*, that *Marsh* applied, and still found the practice unconstitutional. *Bacus*, 52 Fed. App'x at 356. In *Tangipahoa*, the Fifth Circuit adopted the Ninth Circuit's approach, but expressed doubts about *Marsh*'s applicability. 473 F.3d at 197-203 (citing *Bacus*).[43] The district court had affirmatively held that the prayers fell "outside the legislative-prayer context" and violated "the Establishment Clause pursuant to the traditional analysis under *Lemon*." *Id.* at 193-94. On appeal, the "Board defend[ed] its prayer practice solely under *Marsh*." *Id.* at 197. The court explained, "[f]or *this reason*, and because this opinion assumes the Board, as a *stipulated* public deliberative body, falls under *Marsh*, this opinion looks to its legislative-prayer exception[.]" *Id.* (emphasis added). At the same time, it recognized the "exception has been sparsely applied . . . [T]he Court has continued to define *Marsh* as a narrow exception." *Id.* at 199.[44]

Accordingly, BISD's argument that "appellate courts that addressed this issue were split" (Br.20) is wrong. There is no "split." Two appellate courts definitively ruled that *Marsh* does not apply while the other two avoided the issue, *supra*. The Fifth Circuit and the Ninth Circuit did

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[43] The court repeatedly reiterated "this opinion *only assumes* that *Marsh* applies." *Id.* at 198-203 n.1.

[44] Contrary to BISD's argument (Br. 19), *Tangipahoa* was not divided on the constitutionality of the practice; a *majority* concluded it was unconstitutional. All three judges agreed the prayers would not survive *Lemon*; Judges Barksdale and Stewart agreed the prayers would not even satisfy the more deferential *Marsh* standard; Judge Clement found the prayers would satisfy *Marsh*.

not "disagree" with the Sixth and Third Circuits, but merely avoided the question entirely.

But BISD does not stop there. It goes on to assert that *Greece* "resolved" the issue of school board prayer, in its favor no less. (Br.21). On the contrary, *Greece* "further 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. To be clear, *Greece* upheld prayer given before a *town board* led by *adult* community members, not prayers before a *school board* led by *students*. *Greece* left "the school prayer cases, upon which *Indian River*, *Coles*, and [*Chino Valley*] rely, undisturbed." *Id.* Most centrally, *Greece* affirmatively reiterated that the legislative exception does *not* apply to public schools. The opinion distinguishes *Lee*, which is not surprising since Justice Kennedy authored both opinions and joined the opinion striking down the practice in *Santa Fe*. The Court stressed:

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

134 S.Ct. at 1827 (emphasis added). 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.* In fact, the Board members exercise far *greater* control over their meetings and prayers than school boards in graduation cases like *Lee*. *E.g.*, *Harris*, 41 F.3d at 452-53 (permitting student-initiated, student-led prayer at graduation unconstitutional *even though* "the senior students . . . determine[d] every element of their graduations."). Further, whereas adults in legislative meetings may feel free to come and go as they please, the young students invited to attend the board meetings to receive awards and to deliver the invocations are not considered to have this choice, as Justice Kennedy was quick to point out in *Greece*. 134 S.Ct. at 1827.

Throughout *Greece*, the Court repeatedly emphasized that the audience impacted by its decision were adults. *Id.* 1825-26 ("Our tradition assumes that *adult citizens*, firm in their own beliefs, can tolerate and perhaps appreciate a ceremonial prayer delivered by a person of a

different faith."); *id.* at 1827 ("Neither choice represents an unconstitutional imposition as to mature *adults*, who 'presumably' are 'not readily susceptible to religious indoctrination or peer pressure.'") (quoting *Marsh*, 463 U.S. at 792) (emphasis added). In short, nothing in "*Greece* indicates an intent to disturb the long line of school prayer cases . . . and there is every indication it preserves it." *Chino Valley*, 2016 U.S. Dist. LEXIS 19995, at *55-56.

BISD has not cited a single case upholding a school board prayer practice, let alone a practice that involves young schoolchildren. BISD's practice is distinctly more problematic than all of the other school board cases, and is thus an even more compelling case to apply the school prayer cases (i.e. *Santa Fe*), because BISD invites *students* and *students alone* rather than adult members of the community, to deliver "*Student* Expression." (A.391) (A.480).

The only court to find that a school board was a deliberative body was a district court, and even that court refused to *uphold* the constitutionality of the practice. *Doe v. Tangipahoa Parish Sch. Bd.*, 631 F. Supp. 2d 823 (E.D. La. 2009). In any event, an appellate court *subsequently* and *affirmatively* ruled that *Marsh* was inapplicable. *Indian River*, 653 F.3d at 280. So too did *Chino Valley*, 2016 U.S. Dist. LEXIS 19995, at *51-53. Moreover, the policy in *Doe* did not involve prayers by school-invited *students*, but rather, a rotating roster of *adult* clergy. By contrast, BISD's longstanding practice targets primarily *elementary* children, who are "vastly more impressionable than high school or university students." *Bell v. Little Axe Indep. Sch. Dist.*, 766 F.2d 1391, 1404 (10th Cir. 1985). *See Peck v. Upshur Cnty. Bd. of Educ.*, 155 F.3d 274, 288 n* (4th Cir. 1998) (equal access policy violated Establishment Clause "in the elementary schools" but not high schools). In *Morgan v. Swanson*, the Fifth Circuit agreed with the Fourth Circuit's decision in *Peck* and held that "'elementary students are different'" in "the Establishment Clause context." 659 F.3d 359, 382 (5th Cir. 2011) (citation omitted).

There is nothing *occasional* about student attendance at BISD's meetings either; it the main component the invocation practice.[45] As BISD's superintendent put it: "it is always a great

[45] (A.363,366) (A.386-87) (A.395) (A.480) (A.525,529-30) (A.690)

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." (A.480).

If "constitutional doctrine teaches that a school cannot create a pervasively religious environment in the classroom," as in *Stone*, or "at events it hosts," as in *Santa Fe* and *Lee*, it is "overly formalistic to allow a school to engage in identical practices when it acts through" a school board meeting. *Doe v. Elmbrook Sch. Dist.*, 687 F.3d 840, 856 (7th Cir. 2012) (en banc), *cert. denied*, 134 S. Ct. 2283 (2014). The "same risk that children in particular will perceive the state as endorsing a set of religious beliefs is present both when exposure to a pervasively religious environment occurs in the classroom and when government summons students to an offsite location," *id.*, and necessarily then, the administration's building.[46]

D. School board prayers are government speech, not "private speech."

BISD's only other defense to its practice is that the prayers delivered at its meetings, *at its behest*, constitute "private speech," rather than government speech. (Br.15-18). This argument must fail for four reasons. For one, it ignores Plaintiffs' claims for retrospective relief (damages) based on the iteration of the practice prior to March 2015. During that time, BISD invited students to deliver "invocations," not "share their thoughts." (Br.7-8) (A.13-17) (A.403-04).

Second, student-led, student-initiated, prayers at school-sponsored events constitute *government* speech as a matter of law. The school in *Santa Fe* also claimed that the "messages are private student speech, not public speech." 530 U.S. at 302. The Court flatly rejected this contention, reasoning that the prayers took place "at government-sponsored school-related events," *id.* at 310-15, affirming the Fifth Circuit's conclusion that giving "the ultimate choice to the students" does not eliminate school-sponsorship over the message. 169 F.3d at 817-22.[47]

Third, *every court* that has ruled on school board prayer, including the Fifth Circuit, has found that the prayers constitute government speech, even when they are delivered by citizens

[46] (A.461) (A.619) (A.711-19) (A.727-949)

[47] *See also Corder v. Lewis Palmer Sch. Dist.*, 566 F.3d 1219, 1229-31 (10th Cir. 2009) (student's speech was "school-sponsored" even though there were "fifteen valedictory speakers")

and of "their own unrestricted choosing." *Tangipahoa*, 473 F.3d at 192-93 (prayers by "teachers and students, and ministers" were government speech even though citizens could deliver "prayers of their own *unrestricted choosing*") (emphasis added); *Coles*, 171 F.3d at 373 (prayers "by a member from the local religious community"); *Chino Valley*, 2016 U.S. Dist. LEXIS 19995, at *12-13 (citizens on a "first-come, first served, or other random basis").

Fourth, even if this Court were to engage in the fiction that "Student Expression" is "legislative prayer," there is not a "single case in which a legislative prayer was treated as individual or private speech." *Turner v. City Council*, 534 F.3d 352, 355-56 (4th Cir. 2008). Even prayers by *adults* at *legislative* meetings constitute government speech, and this applies even when the legislators "do not compose or censor the prayers," have "no editorial control" over the remarks, and are delivered pursuant to a facially-neutral "all-comers" policy that allows "volunteer leaders . . . on a rotating basis." *Greece*, 134 S.Ct. at 1816, 1824-26; *Joyner v. Forsyth Cnty.*, 653 F.3d 341, 353-54, 362-63 (4th Cir. 2011); *Pelphrey*, 547 F.3d at 1269-71. Thus, to accept BISD's argument would flip First Amendment jurisprudence on its head. It is axiomatic that the First Amendment rights of students are *not* "'coextensive with the rights of adults in other settings.'" *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988) (citations omitted). Schools "do not offend the First Amendment" by prohibiting "student speech in school-sponsored expressive activities" that the "public might reasonably perceive to bear the imprimatur of the school." *Id.* at 271-73. And of course, the Supreme Court has *in fact* "treated legislative prayer differently from prayer at school events." *Turner*, 534 F.3d at 356.[48]

Not only does BISD argue–against the weight of controlling law–that the prayers are "private speech," but it takes the extreme position that it "may not prohibit students from praying" at their meetings without violating students' "free exercise of religion" and freedom of speech. (Br.18). Not one case supports this conclusion. The government not only has the right to

[48] *See Greece*, *supra*; *Lee*, 505 U.S. at 594-97 (concluding that *Engel* and *Schempp* "require us to distinguish the public school context" from a "legislature.")

limit speech at its functions to certain topics; under the Establishment Clause, it must do so.[49] Many courts, including the Supreme Court and Fifth Circuit, have rejected BISD's very argument. *E.g.*, *Santa Fe*, 530 U.S. at 302-03, 310-15; *Lee*, 505 U.S. at 629-30 (Souter, J., concurring) ("Religious students cannot complain that omitting prayers from their graduation ceremony would, in any realistic sense, 'burden' their spiritual callings."); *Ingebretsen*, 88 F.3d at 279; *Black Horse*, 84 F.3d at 1487-88 (policy "can not be justified as an accommodation [of religion]"); *Harris*, 41 F.3d at 456-59; *Collins*, 644 F.2d at 763, 792 (rejecting argument that the "denial of permission to open assemblies with prayer would violate the students' rights to free speech."). It should go without saying that a "student's right to express his personal religious beliefs does not extend to using the machinery of the state as a vehicle for converting his audience." *Chandler v. James*, 180 F.3d 1254, 1265 (11th Cir. 1999), *reinstated*, 230 F.3d 1313. In *Duncanville*, moreover, the Fifth Circuit made clear that "free expression rights must bow to the Establishment Clause prohibition on school-endorsed religious activities." 70 F.3d at 406.

Finally, the fact that the prayers are not "pre-screened" does not thereby convert them to private speech as BISD insists. (Br. 18). The student remarks in *Santa Fe* would not be pre-screened or censored, but the Court was not persuaded that they "should be regarded as 'private speech.'" 530 U.S. at 302-03, 307. *See id.* at 298 n.6 ("the prayer was to be determined by the students, without scrutiny or preapproval by school officials."). In fact, the Fifth Circuit ruled that such prayers are school-endorsed *even* if "spontaneously initiated." 168 F.3d at 823.

Nor would "pre-screening" to "eliminate references to prayer" in any way violate students' rights. (Br.18). The Fifth Circuit rejected an identical argument in *Santa Fe*:

> [W]e explicitly approved a school district's review of the content of the student-initiated, student-led graduation prayers [in *Jones*] . . . a review that would undoubtedly constitute impermissible viewpoint discrimination if the students' graduation prayers constituted purely private speech.

Id. at 821 n.12. To the contrary, a restriction on prayer is "'necessary' to avoid running afoul of

[49] *See Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 468 (2009)

the Establishment Clause." *Lassonde*, 320 F.3d at 984.[50] The Court in *Hazelwood* made clear: "A school *must* also retain the authority to refuse to sponsor student speech that might...associate the school with any position other than neutrality[.]" 484 U.S. at 272 (emphasis added). [51]

In *Cole*, for instance, the Ninth Circuit held that the Establishment Clause *required* a school to prohibit a religious graduation speech. 228 F.3d at 1103. This was so even though the court recognized that school's policy "neither encourages a religious message nor subjects the speaker to a majority vote." *Id.* The court found that "the District's plenary control over the graduation ceremony, especially student speech, makes it apparent [that her religious] speech would have borne the imprint of the District." *Id.* (citing *Lee*, 505 U.S. at 590). In *Lassonde*, the court again concluded that if "the school had not censored the speech, the result would have been a violation of the Establishment Clause." 320 F.3d at 984-85. This was so even "if a disclaimer were given." *Id.* In both cases, "the school district *had to censor* the speech in order to avoid the appearance of government sponsorship of religion." *Id.* (citing *Cole* at 1101; *Santa Fe*, 530 U.S. at 305-10). District courts have reached the same conclusion.[52]

BISD fails to explain how the present case is different from the cases above. Instead, it relies exclusively upon inapposite and non-binding cases, *infra.*

1. *Mergens* is inapplicable.

The first case BISD relies upon is *Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990). (Br.15). But *Mergens* involved interpretation of a statute (the Equal Access Act) requiring equal access for "student-initiated clubs," not prayers during a *school board meeting* which is prototypically school-sponsored. *Id.* at 250-53. Clearly, this case does not involve "the use of school property as a 'public' or 'open' forum," where "school officials allowed . . . *non-school-related meetings* to be held on school property[.]" *Harris*, 41 F.3d at 456 (emphasis added).[53]

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[50] *See also Black Horse*, 84 F.3d at 1488; *Harris*, 41 F.3d at 458-59

[51] *See also Corder*, 566 F.3d at 1229-30 (a "School District is entitled to review the content of speeches in an effort to preserve neutrality")

[52] *See Ashby*, 354 F. Supp. 2d at 629-30 ("the decision not to allow the students to [deliver a religious song] was necessary to avoid violating the Establishment Clause"); *Lundberg*, 731 F. Supp. at 34.

[53] As such, Tex. Educ. Code § 25.152 is plainly inapplicable.

Giving select access to one or two speakers to deliver the pledge followed by a one-minute, content-limited "Invocation" (now called "Student Expression") at a government-controlled event does not create a public forum. *Santa Fe*, 530 U.S. at 303. Regardless, the Supreme Court "ha[s] never held the mere creation of a public forum shields the government entity from scrutiny under the Establishment Clause." *Id.* at n.13. There is *no* "exception to the endorsement test for the public forum context." *Id. See Cole*, 228 F.3d at 1101 (even if the "ceremony was a public or limited public forum, the District's refusal to allow the students to deliver a sectarian speech" was "necessary").[54]

2. *Jones* is abrogated and inapplicable.

BISD relies exclusively on *Jones v. Clear Creek Indep. Sch. Dist.*, 977 F.2d 963 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 2950 (1993) for its assertion that "[s]tudent speech is private speech[.]" (Br.16). But the Fifth Circuit in *Santa Fe* made explicit that *Jones* did not hold that the "students' graduation prayers constituted purely private speech." 168 F.3d at 823. Besides, *Jones* was abrogated by *Santa Fe*.[55] Even before *Santa Fe*, federal courts rejected *Jones* as even persuasive authority. *See Black Horse*, 84 F.3d at 1482 ("[w]e are not, however, persuaded by that court's analysis."); *Harris*, 41 F.3d at 454 (*Jones* "addressed a school district policy similar to that involved in this case" but "[w]e are not persuaded by the reasoning in *Jones*").[56]

Apart from being abrogated, *Jones* is inapplicable. *Jones* created a "tightly circumscribed safe harbor" in the *specific context* of graduations. *Santa Fe*, 168 F.3d at 818. The Fifth Circuit refused to extend *Jones* to any non-graduation school functions. *Id.* at 823 ("Outside that nurturing [graduation] context, a [*Jones*] Prayer Policy cannot survive . . . irrespective of . . . nonsectarian, nonproselytizing restrictions."). The Fifth Circuit explained:

Regardless of whether the prayers are selected by vote or spontaneously initiated at these

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[54] *Accord Herdahl v. Pontotoc Cnty. Sch. Dist.*, 933 F. Supp. 582, 589 (N.D. Miss. 1996) (same)

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

[56] *See also Chandler v. James*, 985 F. Supp. 1068, 1086 (M.D. Ala. 1997) (*Jones* was "a departure from established Supreme Court precedent," rested "on questionable legal conclusions," and was "aberrational" among "the existing Supreme Court and federal appellate cases"); *Gearon*, 844 F. Supp. at 1100.

> frequently-recurring, informal, school-sponsored events, school officials are present and have the authority to stop the prayers . . . [O]ur decision in *[Jones]* hinged on the singular context and singularly serious nature of a graduation ceremony.

Id. Like the football games, Board meetings are "frequently-recurring, informal, school-sponsored events." *Id.*[57] *See also Santa Fe*, 530 U.S. at 299-300.

3. *Adler* is an outlier that defies binding precedent.

BISD also relies heavily upon a non-binding Eleventh Circuit case, *Adler v. Duval Cnty. Sch. Bd.*, 250 F.3d 1330 (11th Cir. 2001), for its contention the prayers at issue are private speech. (Br.17) Such reliance is very misguided though, as *Adler* contravenes *Santa Fe* and is an outlier among the circuits. *Adler* disregards *Santa Fe* in three material ways, *infra.*

First, the *Adler* policy provided that "[t]he opening and/or closing message shall be given by a student volunteer, in the graduating senior class, chosen by the graduating senior class as a whole." *Id.* at 1332. This type of majoritarian system was held unconstitutional in *Santa Fe.* 530 U.S. at 316. *See Workman*, 2010 U.S. Dist. LEXIS 42813, at *15.

Second, *Adler* "*expressly* declined to consider . . . any as-applied objection." 250 F.3d at 1332 n.1 (emphasis added). To this extent, *Adler* defies *Santa Fe* and is abrogated by subsequent Eleventh Circuit rulings. In *Santa Fe*, the Court held that even if the "plain language . . . were facially neutral, 'the Establishment Clause forbids a State to hide behind the application of formally neutral criteria and remain studiously oblivious to the effects of its actions.'" 530 U.S. at 307-08 n.21 (citation omitted). The Court admonished: "Our examination . . . [must] not stop at an analysis of the text of the policy." *Id.* at 315. *Accord Holloman*, 370 F.3d at 1284-91 (a "statute, as actually implemented," must "not have the effect of promoting . . . religion.").

Third, *Adler* misinterpreted *Santa Fe.* Critical to its holding was the mistaken contention that "*Santa Fe* only addresses one part of the *Lemon* test: . . . secular purpose." 250 F.3d at 1339. But *Santa Fe* clearly held that the policy also failed the effect prong. 530 U.S. at 305-10.

Consequently, courts confronted with policies *identical* to *Adler* have refused to follow it. *E.g.*, *Gossage*, 2006 U.S. Dist. LEXIS 34613, at *2-3, *10-14 (policy mirroring *Adler* permitting

[57] (A.477) (A.727-949) (A.951-1089) (A.1091-1304)

"opening and/or closing message" was "unconstitutional in light of *Santa Fe*.").[58] Four Eleventh Circuit justices strongly dissented in *Adler*, properly maintaining that the policy was unconstitutional under *Santa Fe*.[59] Subsequent Eleventh Circuit cases gut the core of *Adler*.[60]

Adler is also readily distinguishable in at least four material ways. First, this case is not a "facial challenge" to a *written policy*. (Dkt.14 ¶31). Second, in *Adler*, *students* chose "*whether*" to have "an opening and/or closing message" in the first place. *Adler v. Duval Cnty. Sch. Bd.*, 206 F.3d 1070, 1075 (11th Cir. 2000). This was essential. The court explained that "the absence of state involvement in each of the *central decisions–whether* a *graduation message will be delivered*, who may speak, and what the content of the speech may be–insulates the School Board's policy from constitutional infirmity *on its face*." *Id.* (emphasis added). Here by contrast, the *Board* has decided to open its meetings with invocations (now called "Student Expression.").

Third, and relatedly, the *Adler* policy imposed *no content* restrictions whatsoever. 250 F.3d at 1332-37.[61] The Eleventh Circuit stressed: "Close attention to the operative features of the Duval County policy yields the conclusion that the policy is constitutional on its face. Simply put, the selection of a graduation student speaker by a secular criterion (not controlled by the state) to deliver a message (*not restricted in content by the state*) does not violate the Establishment Clause." 206 F.3d at 1073-74 (emphasis added). In contrast, BISD's practice is laden with content restrictions. (A.361) (A.364-65) (Br.10). From 1997 until 2015, students were invited to give an "Invocation" only. In *Holloman*, the Eleventh Circuit reiterated that in *Adler* "we upheld a school's policy . . . because of 'the complete absence . . . of code words such as

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[58] *See also Newdow v. Bush*, 2001 U.S. Dist. LEXIS 25936, at *10 n.5 (E.D. Cal. 2001) ("*Adler* conflicts with the Ninth Circuit decision in *Cole*.").

[59] *See* 250 F.3d at 1344-45 (Kravitch, J., Anderson, C.J., Carnes, Barkett, J.J, dissenting) ("By considering only the terms of the policy itself, the majority fails to address contextual evidence that evinces an impermissible religious purpose."); *id.* at 1347-48 (Carnes) ("[I]n light of the additional guidance the *Santa Fe* decision has given us, . . . a school board may not delegate to the student body . . . the power to do . . . what the school board itself may not do.").

[60] *See Pelphrey*, 547 F.3d at 1267, 1271; *Holloman*, 370 F.3d at 1284-91; *Bannon v. Sch. Dist.*, 387 F.3d 1208, 1214-17 (11th Cir. 2004) (student-initiated, student-painted religious murals were "school sponsored" and upholding "censorship" to avoid "religious controversy").

[61] That policy provided: "the content of that message shall be prepared by the student volunteer and shall not be monitored or otherwise reviewed by Duval County School Board, its officers or employees." *Id.*

'invocation.'" 370 F.3d at 1289. The 2015 iteration fares no better, requiring a "student must stay on the subject, and the student may not engage in obscene, vulgar, offensively lewd, or indecent speech." (Br.10). The "fact that only one student is permitted to give a content-limited message suggests that this policy does little to 'foster free expression.'" *Santa Fe*, 530 U.S. at 309.

Fourth, BISD's practice is targeted primarily at young children, unlike high school students as in *Adler*. *See Morgan*, 659 F.3d at 382. The "symbolism of a union between church and state is most likely to influence children of tender years." *Ball*, 473 U.S. at 390.

4. *Chandler* is inapposite.

Lastly, BISD relies on yet another plainly distinguishable Eleventh Circuit case, *Chandler*, which also did not involve school board prayers. (Br.17). In *Chandler*, an injunction was held overbroad because "it eliminated any possibility of private student religious speech *under any circumstances* other than silently." 230 F.3d at 1316 (emphasis added). For example, it permitted "students to 'quietly engage in religious activity during non-instructional times, *so long as it does not unduly call attention thereto.*'" *Id.* at n.4 (emphasis added). Plaintiffs here seek only to enjoin prayer at official School Board Meetings, which constitute government speech as a matter of law, *supra.* The Eleventh Circuit itself has interpreted *Chandler II* narrowly, noting that "the fact that a student may come up with the idea of having the Lord's Prayer recited over his school's loudspeakers each day does not mean the prayer is 'student initiated,' and so constitutional, under *Chandler II*." *Holloman*, 370 F.3d at 1287.

Accordingly, BISD's motion must be denied because school board prayers do not fit within the legislative prayer exception and are not considered private speech. And as shown below, BISD has failed to show that Plaintiffs are not entitled to relief.

III. BISD does not deny that Plaintiffs are entitled to nominal damages for the longstanding, plainly unconstitutional iteration of the prayer practice.

BISD argues that Plaintiffs' "claim is moot" in light of the minor modifications it made to its longstanding prayer practice. (Br.12). This entirely overlooks Plaintiffs' claims for nominal damages. (Dkt. 14 at ¶ 84). "It is well-established that 'claims for damages . . . automatically

avoid mootness[.]'" *de la O v. Hous. Auth.*, 417 F.3d 495, 499 (5th Cir. 2005) (citation omitted). The Court "obligates a court to award nominal damages when a plaintiff establishes the violation of [a constitutional right]." *Farrar v. Hobby*, 506 U.S. 103, 112 (1992). If a plaintiff's constitutional rights were violated, a court has *no discretion* to deny nominal damages. *Id.*[62] From 1997 until March 2015, BISD was inviting and selecting (not merely "permitting") students to deliver "invocations" (not "student expression") at Board meetings. (A.727-949). Smith attended meetings before March 2015.[63] Thus, if this practice violated the Establishment Clause–which BISD seems to concede–then Plaintiffs are legally entitled to nominal damages.

Given the clarity of the jurisprudence, BISD's longstanding practice of regularly inviting students, and primarily impressionable young students, to deliver "invocations" for school board meetings clearly violated the Establishment Clause. BISD does not even deny this fact. The Supreme Court and Fifth Circuit "have *clearly ruled* that *inviting* or *encouraging* students to pray violates the First Amendment." *Herdahl*, 933 F. Supp. at 591.[64] In *Santa Fe*, the Court held that permitting uncensored, student-initiated, student-led, invocations or messages delivered by student-selected speakers at voluntary high school football games was unconstitutional, even though it was possible no prayer would ever be delivered. 530 U.S. at 296-97, 309-16. In so holding, the Court affirmed the Fifth Circuit's finding that the prayers would be school-endorsed *even if* "spontaneously initiated." 168 F.3d at 823. Necessarily then, BISD's longstanding practice of *prescribing* prayers, not merely "permitting" them, and *selecting and inviting* young students to deliver them is unconstitutional.

IV. Plaintiffs are entitled to prospective relief because BISD's practice of permitting prayers at school board meetings continues to violate the Establishment Clause.

A. Plaintiffs' claims for prospective relief are not moot because the unconstitutional aspects of the Prayer Practice have not been remedied.

BISD focuses its entire motion on the practice as implemented *since* March 2015, which

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[62] *See Schneider v. San Diego*, 285 F.3d 784, 794 (9th Cir. 2002)
[63] (A.406) (A.463) (A.697)
[64] (citing *Wallace*, 472 U.S. 38; *Treen*, 653 F.2d at 901; *Ingebretsen*, 88 F.3d 274 (emphasis added))

it asserts moots all of Plaintiffs' claims only because the word "invocation" on the agendas has been replaced with "student expression," a disclaimer is allegedly displayed somewhere,[65] and students are now allegedly selected by "neutral criteria." (Br.7).[66] But BISD continues to permit prayers, including Christian prayers, at these formal school-sponsored functions. (A.386-88). And school officials continue to participate in these prayers with students.[67]

The amendment of a challenged practice will moot relief only if "the challenged aspects of the [original practice] have been remedied." *Chapin Furniture Outlet Inc. v. Town of Chapin*, 252 Fed. Appx. 566, 570 (4th Cir. 2007). *See Ne. Fla. Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 662 n.3 (1993) (case not moot when a new ordinance "is sufficiently similar to the repealed ordinance that it is permissible to say that the challenged conduct continues").[68] Where a superseding policy "leaves objectionable features of the prior law substantially undisturbed, the case is not moot." *Naturist Soc'y, Inc. v. Fillyaw*, 958 F.2d 1515, 1520 (11th Cir. 1992). An amendment moots a claim *only* where it "completely eliminates the harm of which plaintiffs complained." *Ciudadanos Unidos de San Juan v. Hidalgo Cnty. Grand Jury Comm'rs*, 622 F.2d 807, 824 (5th Cir. 1980).

In this case, the minor modifications do *not remedy* the unconstitutionality of BISD's longstanding prayer practice. Rather, BISD's litigation-inspired maneuvers simply magnify its unconstitutional religious purpose. *See Santa Fe*, 530 U.S. at 316; *Jager*, 862 F.2d at 830 ("In choosing the equal access plan, the School District opted for an alternative that permits religious invocations, which by definition serve religious purposes"). The *sine qua non* of the Prayer

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[65] While BISD claims that it now has a "disclaimer," it has not produced any evidence surrounding the disclaimer other than vaguely saying, by affidavits, that one exists. (Br.8-9). It does not provide any evidence of *where* it is displayed and *how* it is displayed. There is no evidence of a disclaimer being stated orally before or after "Student Expression."

[66] This fact is disputed. BISD only permits "leadership" or "Student Council" students to deliver "Student Expression." (A.363) (A.391) (A.395) (A.516). Insofar as these are elected positions, the practice is indistinguishable from *Santa Fe*, as they are a product of a "majority election." 530 U.S. at 306-08.

[67] (A.13-17) (A.412) (A.419) (A.433) (A.494) (A.494-96) (A.546)

[68] *E.g.*, *Mellen v. Bunting*, 181 F. Supp. 2d 619, 633 n.5 (W.D. Va. 2002), *aff'd* 327 F.3d 355 (4th Cir. 2003) ("Because the Court finds that the current policy effectively coerces students to participate in a religious exercise, there is no need to consider the . . . mootness arguments raised by the parties.")

Practice remains unchanged – BISD continues permitting prayers at its Board meetings. (A.386-88). It also continues to participate in those prayers.[69] Therefore, and as shown in more detail below, this practice remains deficient, entitling Plaintiffs to prospective relief.

B. The school board prayers are unconstitutional under the *Lemon* test.

A school board prayer practice obviously fails "the *Lemon* test." *Tangipahoa*, 473 F.3d at 197. Applying *Lemon*, the Fifth Circuit held that "allowing a student-selected, student-given, nonsectarian, nonproselytizing invocation" at a regularly-scheduled school-sponsored event is unconstitutional. *Santa Fe*, 168 F.3d at 809. As shown below, BISD's practice fails *each* prong.

1. The prayer practice continues to lack a secular purpose.

Clearly, the "school board's practice fails to satisfy the purpose prong." *Coles*, 171 F.3d at 384. The "defendant [must] show by a preponderance of the evidence" that challenged activity has a secular purpose. *Church of Scientology Flag Serv. v. City of Clearwater*, 2 F.3d 1514, 1530 (11th Cir. 1993).[70] The secular purpose must be the "pre-eminent" and "primary" force driving the action, and must not be "a sham, and not merely secondary to a religious objective." *McCreary Cnty. v. ACLU*, 545 U.S. 844, 864 (2005). The Court must evaluate purpose through the eyes of an "objective observer" who takes into consideration the history and context of the action. *Id.* at 862-64. And the Court can infer an improper purpose where, as here, "the government action itself besp[eaks] the purpose" in that it is "patently religious." *Id.* at 862. Because "prayer is 'a primary religious activity in itself,'" BISD's practice permitting prayer "is *per se* an unconstitutional intent." *Holloman*, 370 F.3d at 1285.

Furthermore, the purpose test is violated regardless of the "possible applications of the statute." *Santa Fe*, 530 U.S. at 314. Thus, even assuming, *arguendo*, that BISD's minor modifications remedied endorsement, entanglement, and coercion, the practice remains unconstitutional if it lacks a secular purpose. "[N]o consideration of the second or third [*Lemon*] criteria is necessary if a statute does not have a clearly secular purpose." *Wallace*, 472 U.S. at 56.

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[69] (A.13-17) (A.412) (A.419) (A.433) (A.494)

[70] *See also Metzl v. Leininger*, 57 F.3d 618, 622 (7th Cir. 1995)

BISD completely failed to shoulder its burden of proving a secular purpose. Indeed, it has advanced *no* secular purpose for its practice, eschewing the *Lemon* test entirely. (Br.19). For this reason alone, the Court should deny BISD's motion. Where, as here, a school "permits religious invocations which by definition serve religious purposes," it "cannot meet the secular purpose prong." *Jager*, 862 F.2d at 830. *See also Santa Fe*, 530 U.S. at 309-10 ("infer[ring] that the specific purpose of the policy" permitting student-initiated prayer was religious). The Supreme Court affirmed the Fifth Circuit's holding that policies that permit "student" prayers during school-sponsored activity have an "obviously religious purpose." *Treen*, 653 F.2d at 901. "[C]ontrolling caselaw suggests that an act so intrinsically religious as prayer cannot meet . . . the secular purpose prong of the *Lemon* test." *Constangy*, 947 F.2d at 1150.[71]

"[A]llowing the students to decide whether to include prayer does not cure the problem." *Appenheimer*, 2001 WL 1885834 at *10. Rather than secularize the Prayer Practice, the 2015 litigation maneuvers underscore BISD's religious purpose. BISD is "simply reaching for any way to keep a religious [practice]." *McCreary*, 545 U.S. at 873. BISD even concedes that the only reason it changed the practice was to avoid litigation.[72] The Court must skeptically view any "new statements of purpose" made "only as a litigating position." *Id.* at 871. It "will matter to objective observers whether [the new policy] follows on the heels of [policies] motivated by sectarianism[.]" *Id.* at n.14. Thus, the Court must examine BISD's "latest action 'in light of [its] history of' unconstitutional practices." *Id.* at 873 n.22. *See Santa Fe*, 530 U.S. at 315. Just as in *Santa Fe*, in light of BISD's longstanding practice since 1997 of "regular delivery of a student-led prayer," it is "reasonable to infer that the specific purpose of the [new] policy [is] to preserve a popular 'state-sponsored religious practice.'" *Id.* at 308-09.

a. BISD's avowed justifications fail *Lemon*.

While BISD does not explicitly proffer *any* secular justification, it has asserted elsewhere

[71] *See also Santa Fe*, 168 F.3d at 816-17; *Ingebretsen*, 88 F.3d at 279; *Duncanville*, 994 F.2d at 164; *Black Horse*, 84 F.3d at 1484-85; *Harris*, 41 F.3d at 458; *Collins*, 644 F.2d at 760-63 ("the invocation of assemblies with prayer has no apparent secular purpose"); *Mellen*, 327 F.3d at 373-74

[72] (A.479-80) (A.484-85) (A.524-30)

that: (1) "invocations delivered at the beginning of the School Board meetings have the effect of solemnizing and opening the event" (Br.8); (2) the practice advances "free speech" (Br.15) and "free exercise of religion" (Br.18); and (3) is an opportunity for students to "hone their public speaking skills." (Dkt.17 at 15-16) (Dkt.20 at 9). None of these satisfy the purpose test, *infra.*

Solemnization does not supply BISD with a legitimate secular purpose. In fact, the Supreme Court expressly rejected this very purpose in *Santa Fe*, concluding that the policy, which authorized, but did not require, student-initiated, student-led invocations or messages at football games, failed the purpose test. 530 U.S. at 309. The school argued that the "secular purposes of the policy are to 'foster free expression of private persons . . . as well [as to] solemnize sporting events[.]'" *Id.* The Court found these insufficient to satisfy *Lemon*. *Id.* Indeed, BISD's "policy "invites and encourages religious messages" *because* the stated purpose "is 'to solemnize the event.'" *Id.* at 306-07. As the Supreme Court observed: "A religious message is the most obvious method of solemnizing an event." *Id.*

The Third Circuit in *Black Horse* similarly held that a policy permitting un-censored, student-initiated messages that could include prayer, lacked a secular purpose despite the school's argument that the policy served the purposes of "promoting free speech" and "solemnization." 84 F.3d at 1484-85. Likewise, the Fourth Circuit in *Constangy* held that a judge's prayer practice failed the purpose test even though they served a "solemnifying" function because of the "intrinsically religious" nature of prayer. 947 F.2d at 1150.

Additionally, this stated purpose is a sham. If the "stated purpose is not actually furthered . . . then that purpose is disregarded as being insincere or a sham." *Scientology*, 2 F.3d at 1527. *See Edwards*, 482 U.S. at 589. BISD's "solemnization" purpose is not actually furthered by its policy as implemented in 2015. If the Court accepts the fiction that young students understand this "Student Expression" to be an opportunity to "share thoughts" (and not a code for prayer) we must then assume that a typical first grader might see fit to use the time to share her thoughts on insects, or perhaps a vacation to Disneyland, which would hardly further solemnization purposes. It is doubtful an average elementary student even understands the meaning of "solemnization."

That BISD has chosen students, and generally young students, to deliver a "solemnizing" message, rather than adults, seriously belies their stated purpose.

Of course, the "one-minute" limitation (A.388) (A.391), coupled with the long history of including an "Invocation" only, leaves no room for doubt the 2015 version of the practice is about prayer. *See Adler*, 250 F.3d at 1346 (Kravitch, J., dissenting) ("the very terms . . . belie any purpose other than that of increasing the probability that graduation ceremonies will include prayer: the student 'messages' are to be delivered at the beginning or end of the ceremony (a time typically reserved for prayers), and are to be no longer than two minutes (a duration consistent with a prayer)."). This conclusion is reinforced by the fact that BISD already has an existing period for public comment. (A.482-83) (A.727-949).

BISD's second justification–that the practice furthers "free speech" and "free exercise" – is equally unavailing because the prayers are *not* private speech, but government speech, *supra* at 17-24. Significantly, the very same "free speech" purpose was advanced by the school in *Santa Fe* and expressly rejected by the Court. 530 U.S. at 309, 215. *See also Ingebretsen*, 88 F.3d at 279 (policy permitting student prayer lacked a secular purpose despite purpose "'to accommodate the free exercise of religious rights.'"). The Third Circuit in *Black Horse* also rejected the school's purpose of "recognizing the students' rights to free speech," stressing that "the constitutional guarantee of free speech does not secularize [the new policy's] attempt to preserve 'the long standing practice of conducting invocation and benediction.'" 84 F.3d at 1484.

Finally, allowing students to "hone their public speaking skills" does not supply BISD with a secular purpose because students can learn speaking skills without delivering a prayer. Attempting "to further an ostensibly secular purpose through avowedly religious means is considered to have a constitutionally impermissible purpose." *Holloman*, 370 F.3d at 1286. The state "cannot escape the proscriptions of the Establishment Clause merely by identifying a beneficial secular purpose." *Hall*, 630 F.2d at 1021 ("motorist's prayer" on state maps failed test, even though purpose was to promote motorist safety, which court did not dispute, because "the state has chosen a clearly religious means to promote its secular end."). For instance, in

Schempp, the school argued that Bible reading served secular purposes including "the promotion of moral values, the contradiction to the materialistic trends of our times, the perpetuation of our institutions and the teaching of literature." 374 U.S. at 222-23. Without discrediting these ends, the Court held the practice failed, noting that "[e]ven if its purpose is not strictly religious, it is sought to be accomplished through readings . . . from the Bible." *Id.*

In sum, BISD asks us to pretend that we do not recognize what every [BISD] student understands clearly – that this policy is about prayer." *Santa Fe*, 530 U.S. at 315. It wants the Court "to accept what is obviously untrue: that these messages are necessary to 'solemnize'" a meeting and that doing so is "essential to the protection of student speech." *Id.* The Court must not "turn a blind eye to the context in which this policy arose, and that context quells any doubt that this policy was implemented with the purpose of endorsing school prayer." *Id.*

b. Extrinsic evidence corroborates this improper purpose.

In light of the above, further analysis is unwarranted. The practice violates the purpose prong based on the "overtly religious character" of prayer (*Mellen*, 327 F.3d at 373), making it unnecessary to consider "extrinsic evidence." *Summers v. Adams*, 669 F. Supp. 2d 637, 658-60 (D.S.C. 2009). And BISD's religious purpose is "so clear that the court would find it controlling even if there were evidence of some other stated legislative purpose." *Id.* But there is no evidence of any other purpose. Instead, the extrinsic evidence suggests "a desire to promote Christianity." *Id.* A court can "infer[] purpose from . . . public comments of its sponsor," and other "openly available data." *McCreary*, 545 U.S. at 862-64. Indeed, "'[p]ublic comments" by government actors are "important evidence to consider in assessing government purpose." *Am. Humanist Ass'n v. City of Lake Elsinore*, 2014 U.S. Dist. LEXIS 25180, at *24 (C.D. Cal. 2014).

First, on May 19, 2015, Defendant Board Member Brad Greene shared a post on Facebook: "Religious liberty is facing a full on frontal assault. We need to prayer [sic] for our Superintendent, School Board and all of BISD." (A.706). Two months later, he shared a Fox News article about a "Mississippi school district fined $7500 for opening assembly with prayer," remarking: "Similar to what we are getting sued for." (A.704) (A.708). One of his friends

responded: "time for the people to pray any and every time possible especially when told not to." (A.705) (A.709). Greene replied: "Anyone can sign up and speak for 3 minutes and say what they want, *I thought about inviting people to come pray.*" (A.708) (emphasis added).[73]

Likewise Board President Hancock regularly posts calls to school "prayer" on his public Facebook page and Twitter. (A.622-33). A mere sample of these include:

- "To all the teachers and staff in BirdvilleISD that begin the new year please know my **prayers** and attention are with you! Expecting great gains 12/13" (A.622)
- Facebook & Twitter: "Congrats all @BirdvilleSchool grads! My **prayer** is you live **Psalm 1:1-2."** (A.622,630,633).
- "Thank you [redacted] for your **prayer** before the football game! Go @Birdville_High beat Boswell" (A.629)
- "Found a great '**First Day of School Prayer'**; God of wisdom and might, we praise you for the wonder of our being, for mind, body and spirit . . ." (A.625)

Second, and relatedly, BISD's official website boasts the Christian church membership of each board member. (A.711-18). Hancock "is a deacon at North Richland Hills Baptist Church." "McCarty teaches high school students at north Richland Hills Baptist Church." "Webb is a member of Legacy Church of Christ." Greene "is a member of North Richland Hills Baptist Church." Davis is a member "of Birdville Baptist Church, where he serves as deacon and teaches an adult Sunday school class." "Kunkel is a member of North Richland Hills Baptist Church, where he serves as a teenage bible study teacher and a deacon." "Tolbert is a board member and former president for Christ's Haven for Children, Inc." (*Id*).

Third, BISD regularly gives "business partner recognition" to churches at its meetings, as reflected in many agendas and minutes.[74] All of the churches are Christian and many have

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[73] Additionally, a student sent text messages to Hancock on May 19, 2015, regarding this lawsuit. W.Y. stated that W.Y was "praying for you all." Hancock responded: "Thank you sincerely! *We are prayerful.*" (A.664-65) (emphasis added). *See also* (A.666-69) (A.679).

[74] *E.g.*, **Birdville Baptist Church**, Aug. 1997 (A.727); **Northwood Church**, Jan. 2004 (A.794); **Richland Hills United Methodist Church**, Dec. 2004 (A.806); **Richland Hills Church of Christ**, Feb. 2007 (A.835)(A.965)(A.1115); **Northwood Church**, May 2007 (A.838)(A.969); **Birdville Baptist Church. Northeast Ministries Outreach.** Nov. 2007 (A.844)(A.976)(A.1132); **Davis Memorial United Methodist Church**, Feb. 2008 (A.847)(A.979)(A.1138); **Fossil Creek Community Church Assembly of God**, Apr. 2008 (A.849)(A.981)(A.1142); **Love Never Fails [Ministry], First Baptist Church of Fort Worth**, May 2009 (A.862)(A.996); **Legacy Church of Christ**, June 2009 (A.863)(A.998);

received repeated recognition.[75] Perhaps not surprisingly, the Board members belong to these churches, as publicized on the district's website, *supra.* No Jewish synagogues, Islamic mosques, or any other non-Christian religious entities have received such recognition by the Board.

The above evidence contributes to the impression of an objective observer that BISD has "a preference for Christianity," *Lund v. Rowan Cty.*, 103 F. Supp. 3d 712, 729 (M.D.N.C. 2015), and further belies any supposed secular purpose. *See Books v. City of Elkhart*, 235 F.3d 292, 303 (7th Cir. 2000) ("The participation of these influential members of several religious congregations makes it clear that the purpose [was religious]"). Even the "mere appearance of a joint exercise" between "Church and State" is unconstitutional. *Larkin v. Grendel's Den*, 459 U.S. 116, 125-26 (1982).

2. The Prayer Practice has the primary effect of advancing and endorsing religion, thus failing *Lemon*'s effect prong and Endorsement Test.

The lack of secular purpose here "is dispositive" and the Court need not go further. *Wallace*, 472 U.S. at 56. But regardless of the purposes motivating it, the Prayer Practice fails *Lemon's* effect prong. This prong asks whether, irrespective of the school's purpose, the practice "conveys a message of endorsement" of religion. *Santa Fe*, 168 F.3d at 817. "The Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief." *Allegheny*, 492 U.S. at 593-94. Clearly, "the practice of opening each school board meeting with a prayer has the primary effect of endorsing religion." *Coles*, 171 F.3d at 384.[76] Applying this test, the Supreme Court held that permitting student prayer at a

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Gateway Community Church, Mar. 2010 (A.872)(A.1007)(A.1190); **First Baptist Church of Hurst and Northwood Church**, Sept. 2010 (A.878)(A.1015)(A.1200); **Spring Valley Baptist Church**, Feb. 2011 (A.884)(A.1020)(A.1210); **LIFE Church**, Aug. 2011 (A.890)(A.1029)(A.1222); **St. Luke United Methodist Church**, Sept. 2011 (A.891)(A.1030)(A.1224); **Bethesda Community Church**, Nov. 2012 (A.906)(A.1047)(A.1247); **Birdville Baptist Church**, Dec. 2012 (A.907)(A.1048)(A.1248); **The Hills Church of Christ**, Mar. 2013 (A.910)(A.1051)(A.1251); **North Richland Hills Baptist Church**, Apr. 2014 (A.924)(A.1065)(A.1269); **Gateway Church,** Aug. 2015 (A.941)(A.1082)(A.1293); **Center Point Church**, Sept. 2015 (A.942)(A.1083)(A,1294); **Richland Hills Christian Church**, Oct. 2015 (A.943)(A.1085)(A.1296); **St. Luke United Methodist Church**, Feb. 2016 (A.949)(A.1304)

[75] **Birdville Baptist Church** in 1997, 2007, and 2012. **Northwood Church** in 2004, 2007 and 2010. **St. Luke United Methodist Church** in 2011 and 2016. **Richland Hills Church of Christ** in 2007 and 2013.

[76] *See also Indian River*, 653 F.3d at 284; *Chino Valley*, 2016 U.S. Dist. LEXIS 19995, at *60-61

school-sponsored event "is impermissible because it sends the ancillary message to members of the audience who are nonadherants 'that they are outsiders.'" *Santa Fe*, 530 U.S. at 309-10.

Contrary to BISD's "repeated assertions that it has adopted a 'hands-off' approach" in March 2015, the "realities of the situation plainly reveal that its policy involves both perceived and actual endorsement of religion." *Id.* at 305, 303. It has "failed to divorce itself from the religious content in the invocations." *Id.* It "has not succeeded in doing so, either by claiming that its policy is 'one of neutrality'" or "by characterizing the individual student as the 'circuit-breaker'" in "the process." *Id.* Putting "the ultimate choice to the students" does not eliminate school-sponsorship. *Santa Fe*, 168 F.3d at 817. Prayers "that a school 'merely' permits will still be delivered to a government-organized audience" at "a government-sponsored event." *Id.*

Whenever a prayer "occurs at a school-sponsored event at a school-owned facility, the *conclusion is inescapable* that the religious invocation conveys a message that the school endorses the religious invocation." *Jager*, 862 F.2d at 831-32 (emphasis added).[77] This applies "regardless of who makes the decision that the prayer will be given and who authorizes the actual wording of the remarks." *Gearon*, 844 F. Supp. at 1099. BISD's "plenary control over" meetings makes "it apparent" that prayers will bear "the imprint of the District." *Cole*, 228 F.3d at 1103. In *Santa Fe*, the Court held that allowing students to deliver an uncensored, student-initiated, invocation or message at football games would unconstitutionally endorse religion. 530 U.S. at 296-97, 308-10, 316. The student-initiated nature of the remarks did not "insulate the school from the . . . message." *Id.* at 310. This was so "even if no . . . student were ever to offer a religious message." *Id.* at 296-97, 313-16. The Court found that the "award of that power *alone*, regardless of the students' ultimate use of it, is not acceptable." *Id.* (emphasis added).

The Fifth Circuit also ruled that such prayers would impermissibly endorse religion, even "spontaneously initiated," because "school officials are present and have the authority to stop the prayers." *Santa Fe*, 168 F.3d at 823 (citing *Jager*, 862 F.2d at 832-33). The school argued much

[77] *See also Holloman*, 370 F.3d at 1288; *Crestwood*, 917 F.2d at 1478

like BISD here that its policy was constitutional because it "permits but does not require prayer." *Id.* at 818 n.10. But the Fifth Circuit found: "such 'permission' undoubtedly conveys a message . . . that the government endorses religion." *Id.* at 817-18.[78] The same is true here. The "board has control over the content of the statements given" and "if something was improper or offensive . . . the board . . . would have the authority" to "cut off" the "expression." (A.542).

The Third and Ninth circuits reached the same conclusion in *Collins*, *Black Horse*, and *Harris*. In *Collins*, the Ninth Circuit held that "merely 'permitting' students" to open voluntary student assemblies with prayer unconstitutionally endorsed religion, even though the assemblies were organized and conducted by the student body, unlike school board meetings. 644 F.2d at 760-62. The court specifically rejected the school's argument that the "denial of permission to open assemblies with prayer would violate the students' rights to free speech." *Id.* at 792.

In *Black Horse*, the school's policy permitting, but not requiring, student-initiated prayer even required that the "printed programs for the graduation include a disclaimer." 84 F.3d at 1475. Nevertheless, the Third Circuit held the policy unconstitutional because it *permitted* prayer; it was not inclined to "alter [its] analysis merely because [the policy] does not expressly allow proselytization." *Id.* at 1479. On this point, it found "the reasoning of [*Harris*]" to be particularly "persuasive." *Id.* at 1483. In *Harris*, the school was only minimally involved in the entire graduation program, far less than here, yet the unwritten practice of merely permitting prayers to be delivered was still found unconstitutional. 41 F.3d at 453. The Ninth Circuit reiterated: "no school official reviews presentations prior to commencement. No one is asked to participate in the prayer by standing, bowing their heads, or removing their hats." *Id.* In fact, the "seniors ma[d]e all decisions relating to the ceremony." *Id.* Even though any prayer would have to be initiated, selected, and delivered by students, the court found that the "state involvement in this case pervasive enough to offend Establishment Clause concerns." *Id.* at 454-55.[79]

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[78] *See also Lassonde*, 320 F.3d at 984 ("[I]f the school had not censored the [religious] speech, the result would have been a violation of the Establishment Clause."); *Treen*, 653 F.2d at 902

[79] *Harris* and *Black Horse* are "consistent with current Supreme Court precedent." *Appenheimer*, 2001 WL 1885834, at *8.

Prayers delivered at BISD's meetings, as in the above cases, have "the primary effect of promoting religion." *Mellen*, 327 F.3d at 372. Like *Santa Fe*, the prayers are "delivered to a large audience assembled as part of a regularly scheduled, school-sponsored function." 530 U.S. at 307. Students are under the supervision and direction of school officials. (A.361) (363-65). The students invited to participate are told where to sit and how to act. (*Id.*). Further, the objective observer is aware of BISD's long history of explicitly selecting and inviting students to deliver "Invocations" only. *Id.* at 308. Indeed, a much stronger impermissible link between church and state results from BISD's practice than in *Santa Fe* because (1) school officials *participate* in the prayers with students;[80] and (2) BISD's practice involves *elementary* schoolchildren who are "vastly more impressionable" and "cannot be expected to discern nuances which indicate whether there is true neutrality toward religion." *Bell*, 766 F.2d at 1404.

The practice fails the Endorsement Test for the same reasons. The "endorsement test and the second *Lemon* prong are essentially the same." *Indian River*, 653 F.3d at 282. *See id.* at 290 ("Because of the reasons we set forth for finding that the Policy did not survive the 'effect prong' of *Lemon*, we also find that the Policy fails under the endorsement test."). *See also Ingebretsen*, 88 F.3d at 280. BISD "decided to include the prayer in [their] public meetings," which alone would suggest to the reasonable person that the state has placed its imprimatur upon the prayers offered at the meetings. *Coles*, 171 F.3d at 385; *Indian River*, 653 F.3d at 289.

BISD nevertheless argues that the prayers no longer endorse religion because it has changed the agenda language, added a disclaimer, and modified the selection process. But none "of these features cures the constitutional defect." *Treen*, 653 F.2d at 901-02. It "is the act of turning over the 'machinery of the State' to the students . . . to broadcast their religion which violates the Constitution." *Herdahl*, 933 F. Supp. at 588-89.

That "invocation" has been removed from the written agendas makes no constitutional difference. Under *Santa Fe*, even "spontaneously initiated" prayers unconstitutionally endorse

[80] *See Duncanville II*, 70 F.3d at 405-06; *Duncanville*, 994 F.2d at 163; *Treen*, 653 F.2d at 899; *Holloman*, 370 F.3d at 1286-87; *Borden*, 523 F.3d at 176-77

religion. 168 F.3d at 823. This makes sense because "citizens attending Board meetings hear the prayers," not necessarily see the agenda. *Joyner*, 653 F.3d at 354. The Supreme Court and lower court "cases support no meaningful distinction between school authorities actually organizing the religious activity and officials merely 'permitting' students to direct the exercises." *Collins*, 644 F.2d at 760-62 (*permitting* students to open assemblies with prayer was unconstitutional, even though the assemblies, unlike school board meetings, were organized by students). In the following cases, a practice permitting student-led prayer was held unconstitutional even though prayers would not be screened or mentioned in a program:

- *Santa Fe*, 530 U.S. at 301 and *Santa Fe*, 168 F.3d at 821 n.12
- *Black Horse*, 84 F.3d at 1475 (student-led, student-initiated prayers would not be screened and "that printed programs for the graduation include[d] a disclaimer")
- *Harris*, 41 F.3d at 452-53 (same as *Black Horse*)
- *Collins*, 644 F.2d 759 (student-led, student-initiated prayer at voluntary student assemblies would not be screened or printed in any program or agenda)
- *Gossage*, 2006 U.S. Dist. LEXIS 34613, at *5, *19-20 (permitting students to give "opening and/or closing message" was unconstitutional "[d]espite the hands-off approach" and fact that no school official "attempted to influence the speaker with regard to the content of the remarks")
- *Gearon*, 844 F. Supp. 1097 (no screening or printed program)
- *Graham*, 608 F. Supp. at 533 (speaker had "complete control of what he will say")

Nor does the alleged disclaimer cure the problem. Many appellate courts found similar policies unconstitutional despite affirmatively requiring a printed "disclaimer" on written programs.[81] The "Establishment Clause does not limit only the religious content of the government's own communications. It also prohibits the government's support and promotion of religious communications by religious organizations." *Allegheny*, 492 U.S. at 600-01. In *Allegheny*, the Court found that the "fact that the crèche bears a sign disclosing its ownership by a Roman Catholic organization does not" eliminate endorsement, but on the contrary, "simply demonstrates that the government is endorsing the religious message of that organization." *Id.* It

[81] *See Black Horse*, 84 F.3d at 1475-79; *Lassonde*, 320 F.3d at 984; *Harris*, 41 F.3d at 455-56.

"remains to be seen whether *any* disclaimer can eliminate the patent aura of government endorsement of religion." *Smith v. Cnty. of Albemarle*, 895 F.2d 953, 958 (4th Cir. 1990).

Finally, the supposed change to the selection process does not eliminate the endorsement either. In *Santa Fe*, the Court held that the "alleged 'circuit-breaker' mechanism of the dual elections and student speaker" did not "insulate the school from the . . . message." 530 U.S. at 310. As noted above in FN 66, it is not at all clear that BISD's new "leadership" / "Student Council" selection process does not involve a majoritarian election, which was held unconstitutional in *Santa Fe*. 530 U.S. at 306-08. But the absence of such an election is immaterial: "The distinction . . . is simply one without difference. *Regardless of whether the prayers are selected by vote or spontaneously initiated* . . . school officials are present and have the authority to stop the prayers." 168 F.3d at 823 (emphasis added).

The salient facts in *Santa Fe* are present here. The messages are delivered by a student "representing the student body, under the supervision of school faculty." 530 U.S. at 302-03, 310-15. (A.361) (A.363-65) (A.368-71) (A.542). *See generally* (A.19-331) (A.727-949). And again, the circumstances of endorsement are even greater here. In addition to the fact that school officials *participate* in the prayers, *supra*, unlike in *Santa Fe*: (1) the principal introduces the student before the invocation and announces that the student is "representing" their school; (2) a school official asks audience to participate in the invocation and pledge; (3) at the "conclusion, the student will receive a certificate and will pose for a picture with a Board Member" (A.363-66); and (4) BISD sends the student a thank you letter for delivering the invocation. (A.363-64) (A.368-71). In these circumstances, an objective BISD "student will unquestionably perceive the . . . prayer as stamped with her school's seal of approval." *Id.* at 308.

Having shown that the Prayer Practice remains constitutionally defective under the first two prongs of *Lemon*, BISD's motion must be denied. But significantly, the Prayer Practice *also* fails the entanglement prong of the *Lemon* test, *and* the separate *Lee* coercion test, *infra.*

3. The Prayer Practice fosters excessive entanglement with religion.

Just like in *Indian River* and *Coles*, both of which involved school board prayer practices,

BISD's Prayer Practice fosters excessive entanglement with religion, failing *Lemon*'s third prong. *See Indian River*, 653 F.3d at 288; *Coles*, 171 F.3d at 385.[82] The "burden is upon the state to show that implementation of a [practice] will not ultimately infringe upon and entangle it in the affairs of a religion." *Surinach v. Pesquera de Busquets*, 604 F.2d 73, 75 (1st Cir. 1979). As with the other *Lemon* prongs, BISD has failed to shoulder its burden of proof.

In *Indian River*, the Third Circuit held that a school board practice failed *Lemon*'s third prong, reasoning that "[t]he Board sets the agenda for the meeting, chooses what individuals may speak and when, and in this context, recites a prayer to initiate the meeting. Thus, the circumstances surrounding the prayer practices suggest excessive government entanglement." 653 F.3d at 288. The Sixth Circuit in *Coles* reached the same conclusion. 171 F.3d at 385 (finding excessive entanglement where "the school board" "chose which member from the local religious community would give those prayers"). BISD has not shown this case is different from *Indian River* and *Coles*, but rather, ignores these cases entirely. Even the Board's participation in these prayers unconstitutionally entangles BISD with religion. *See Duncanville*, 70 F.3d at 406 (faculty's participation in "prayers improperly entangle[d] [the school] in religion").[83]

C. The prayer practice is unconstitutional under the separate Coercion Test.

Though a practice need not be coercive to violate the Establishment Clause,[84] BISD's practice is coercive, therefore constituting a "serious" Establishment Clause violation. *Santa Fe*, 530 U.S. at 300. In *Lee*, the Court declared, "at a minimum, the [Establishment Clause] guarantees that government may not coerce anyone to support or participate in religion or its exercise." 505 U.S. at 587. The Court held that a school's inclusion of a nonsectarian prayer in a graduation ceremony was unconstitutionally coercive even though the event was technically voluntary and students were not required to participate in the prayer. *Id.* at 586. The Court reasoned that a school's "supervision and control . . . places public pressure, as well as peer

[82] *See also Treen*, 653 F.2d at 902; *Mellen*, 327 F.3d at 375; *Collins*, 644 F.2d at 762

[83] *See also Constangy*, 947 F.2d at 1151-52 (when "a judge prays in court, there is necessarily an excessive entanglement of the court with religion.")

[84] *See Santa Fe*, 168 F.3d at 818; *Collins*, 644 F. 2d at 761

pressure" on students. *Id.* at 593. Since *Lee*, many courts have properly held that student-led and student-initiated graduation prayers fail the coercion test.[85]

Cases "involv[ing] student prayer at . . . different type[s] of school function[s]" are also governed "by . . . *Lee*." *Santa Fe*, 530 U.S. at 301-02. Notably, in *Santa Fe*, the Court held that student-initiated, student-led prayers at football games, which were *completely voluntary*, failed the coercion test. *Id.* at 310-12. The Court found 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 313-16. Here, as in *Lee* and *Santa Fe*, BISD's practice fails the coercion test.

Unconstitutional coercion occurs when: "(1) the government directs (2) a formal religious exercise (3) in such a way as to oblige the participation of objectors." *Santa Fe*, 168 F.3d at 814. First, student-led prayers "authorized by a government policy [to] take place on government property at government sponsored school-related events" are government-directed. *Santa Fe*, 530 U.S. at 301-02. Second, prayer is "religious exercise." *Id.* The final element is met because the prayers "oblige the participations of objectors." *Lee*, 505 U.S. at 593. If, as in *Santa Fe*, an afterschool football game is not truly a voluntary event, attendance at School Board meetings (especially if one is *invited* by the Board) is not voluntary either. 530 U.S. at 312.

Although attendance was purely voluntary in *Indian River*, the court found that the board prayed in an atmosphere that "contain[ed] many of the same indicia of coercion and involuntariness" that troubled the Court in the school prayer cases. 653 F.3d at 275. That board, as here, "deliberately made its meetings meaningful to students" through student involvement and the presentation of awards, *supra* at 3-4. *Id.* at 276-77. (A.406) The Third Circuit recognized that this would have additional implications, as a student "may feel especially coerced . . . to

[85] *See Lassonde*, 320 F.3d at 983; *Cole*, 228 F.3d at 1104; *Santa Fe*, 168 F.3d at 818; *Black Horse*, 84 F.3d at 1480; *Harris*, 41 F.3d at 457; *Workman*, 2010 U.S. Dist. LEXIS 42813 at *16-17; *Gossage*, 2006 U.S. Dist. LEXIS 34613 at *20-21; *Gearon*, 844 F. Supp. at 1099; *Comm. for Voluntary Prayer v. Wimberly*, 704 A.2d 1199, 1202-03 (D.C. 1997)

attend." *Id.*[86] The relevant facts here are identical to *Indian River*. The meetings take place on school property, and students regularly attend.[87] Other students attend meetings to be honored for their accomplishments, celebrate their extracurricular successes and perform alongside their classmates, *supra* at FN 8. (A.406).

The *Chino Valley* court agreed with "*Indian River* and *Coles*," and found that "[b]ecause of the distinct risk of coercing students to participate in, or at least acquiesce to, religious exercises in the public school context, the . . . legislative exception does not apply." 2016 U.S. Dist. LEXIS 19995, at *55-56. That policy even mirrored the policy upheld in *Greece*, as it provided "that the Board shall randomly select clergyman from the community who will be responsible for giving the prayer." *Id.* at *52. But it was still coercive under *Lee*.

BISD's practice is even more coercive than those found unconstitutional in *Chino Valley* and *Indian River* because BISD's practice is targeted exclusively at schoolchildren and mostly elementary students.[88] 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. By analogy, the Fifth Circuit in *Meltzer* held that merely making Gideon Bibles available to students during school hours failed the coercion test even though bibles were given only to students whose parents signed confirmation slips. 548 F.2d at 575. In *Lund*, the court held that a post-*Greece* legislative prayer practice was unconstitutionally coercive under the *legislative exception* because board members signaled for *adult* citizens to participate in the prayers. 103 F. Supp. at 727. There, as here, a government official "would regularly ask that everyone stand for the prayer and the Pledge." *Id.* The court recognized that the "character of the particular coerced activity is that of the government asking for public participation in a prayer exercise, so that non-adherents in the majority faith must either acquiesce to the exercise or effectively brand

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[86] *See also M.B.*, 2015 U.S. Dist. LEXIS 117289, at *16 (although the ACT awards ceremony was optional, "the event was still coercive as it unnecessarily required Plaintiff to make the difficult decision between being exposed to a religious ritual she found objectionable or not attend an event honoring her and other students for their academic excellence")

[87] (A.461) (A.711-19) (A.720-23) (A.727-949)

[88] (A.13-17) (A.19-330) (A.397) (A.727-949)

themselves as outsiders by not following along." *Id.* at 732 (citation omitted).

BISD's "new position" does "nothing to eliminate the fact that a minority of students are impermissibly coerced to participate in a religious exercise." *Gossage*, 2006 U.S. Dist. LEXIS 34613 at *20. The Court in *Santa Fe* held that the "dual elections and student speaker" did not "insulate the school from the coercive element of the final message." 530 U.S. at 310. Even if BISD could distance itself from "sponsoring" the prayers, it "cannot sanction coerced participation in a religious observance merely by disclaiming responsibility." *Black Horse*, 84 F.3d at 1482. In *Lassonde*, the Ninth Circuit likewise ruled: "[a]lthough a disclaimer arguably distances school officials from 'sponsoring' the speech," they have "*no* means of preventing the coerced participation of dissenters." 320 F.3d at 984-85 (emphasis added).

D. BISD failed to meaningfully distinguish *Lee*, *Santa Fe* and their progeny.

Remarkably, BISD relies entirely upon inapposite, nonbinding authorities, *supra*, and completely ignores *Lee* even though *Lee* is a controlling case on school prayer. In addition, BISD failed to meaningfully distinguish *Santa Fe*. (Br.15-17). Instead, it merely asserted in a conclusory fashion: "Plaintiffs have alleged no facts regarding a policy which either explicitly or implicitly encourages public prayer." (Br.17). But as shown above, BISD's practice does encourage prayer within the meaning of *Santa Fe*. 530 U.S. at 307-08.

Here, as in *Santa Fe*, the invocation is "delivered to a large audience assembled as part of a regularly scheduled, school-sponsored function conducted on school property." *Id.* "The message is broadcast over the school's [sound] system, which remains subject to the control of school officials." *Id.* (A.364). The "school's name is . . . written in large print" in the building. *Id.* (A.619-20). "It is in a setting such as this that 'the board has chosen to permit'" the student "to rise and give the 'statement or invocation.'" *Id.* The "history of this policy, moreover, reinforce[s] our objective student's perception that the prayer is, in actuality, encouraged by the school." *Id.* From 1997 until the eve of litigation, agendas were marked "Invocation" and the

public and BISD understood "invocation" to mean "prayer."[89] Indeed, many of the invocations are verbally introduced to the audience as "prayer," *id.*, *supra* at FN 3.

Noticeably absent from BISD's motion is any mention, let alone discussion, of other highly persuasive cases including *Indian River*, *Coles*, *Black Horse*, *Lassonde*, *Collins*, *Cole*, *Corder*, *Borden*, *Treen, Harris*, and *Gossage*, *supra*. Despite *Indian River*'s obvious relevance, as it is the most recent appellate decision on the issue of school board prayer, BISD ignores it completely. Its omission of these and other school prayer cases is not surprising because many involved practices that had "'*little or no [state] involvement'* in the process resulting in prayer" and yet were still found unconstitutional. *Harris*, 41 F.3d at 452-53 (emphasis added).[90]

V. BISD's past and current practice of board members and school officials participating in prayers with students constitutes a separate Establishment Clause violation.

BISD's longstanding practice of participating in prayers *with students* by standing, closing their eyes, bowing their heads, and saying amen, also violates the Establishment Clause.[91] The Establishment Clause not only prohibits school officials from permitting prayer at school functions, but also from *participating* in student-led prayers. *See Duncanville*, 70 F.3d at 405-06; *Duncanville*, 994 F.2d at 163; *Treen*, 653 F.2d at 899; *Holloman*, 370 F.3d at 1286-87; *Borden*, 523 F.3d at 176-77. School districts "have a constitutional duty" to direct employees "to 'refrain from expression of religious viewpoints in the classroom and like settings.'" *Marchi v. Bd. of Coop. Educ. Servs.*, 173 F.3d 469, 475 (2d Cir. 1999) (citing *Lemon*).

In *Duncanville*, the Fifth Circuit held that basketball coaches' mere participation in prayer with players during practices and after games was "an unconstitutional endorsement of religion." 70 F.3d at 406. The court explained that "[d]uring these activities DISD coaches and other school employees are present as representatives of the school and their actions are representative of DISD policies." *Id.* As such, "DISD representatives' participation . . . signals an

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[89] (A.335-41) (A.343-51) (A.356-59) (A.696-98) (1353-55)
[90] Courts have found "the reasoning of [*Harris*]" to be particularly "persuasive." *Black Horse*, 84 F.3d at 1483. *E.g.*, *Santa Fe*, 168 F.3d at 819
[91] (A.13-17) (A.412) (A.419) (A.426) (A.433) (A.441) (A.447) (A.453)

unconstitutional endorsement." *Id.* The Third Circuit in *Borden* reached the same conclusion, finding a coach's actions in silently taking a knee with players during student-led prayer unconstitutional even if intended to "show respect for the players' prayers." 523 F.3d at 170.[92]

Here, like *Duncanville* and *Borden*, school officials – including board members and administrators – actively participate in prayer with students at school board meetings.[93] Moreover, a reasonable observer is presumed to be aware of BISD's *longstanding* practice of not only participating in prayers with students since at least 1997 but also *initiating* the prayers by inviting students to deliver "invocations."[94] *See Borden*, 523 F.3d at 175-76 (taking into account coach's past conduct). BISD's longstanding involvement in the prayer "as a participant, an organizer, and a leader – would lead a reasonable observer to conclude that [it] was endorsing religion." *Id.* (citing *Duncanville*). BISD's practice case is in fact even more problematic for at least two reasons. First, rather than coaches, *school administrators* are participating in the student prayers here. Even BISD admitted that "[t]he position of principal could give the impression they're speaking for the entire school or school district. Where a teacher would be perceived as speaking for themselves." (A.538). *See also* (A.490) (A.1316-23). Second, Board members not only participate in prayer with students but also prominently publicize their Christian faith on the official school district website, thereby furthering this perception of religious endorsement. (A.711-19). Simply "permit[ting] [a teacher] to discuss his religious beliefs with students during school time on school grounds would violate the Establishment Clause." *Peloza v. Capistrano Unified Sch. Dist.*, 37 F.3d 517, 522 (9th Cir. 1994). BISD acknowledges this rule yet willfully and persistently defies it. (A.490) (A.1317).

BISD conveniently ignores this component of Plaintiffs' challenge. Yet BISD cannot deny that this conduct violates the Establishment Clause because its *own* "Guidance For Handling First Amendment Issues" recognizes it is prohibited. (A.1316-17). BISD also relies on

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[92] *See Roberts v. Madigan*, 921 F.2d 1047, 1056-58, 1061 (10th Cir. 1990) (religious books on teacher's desk "had the primary effect of . . . endorsement" even though "passive and *de minimis*" and "discreet")
[93] (A.13-17) (A.412) (A.419) (A.433) (A.494)
[94] (A.479-480) (A.484-485) (A.524-30) (A.1353-55)

the Department of Education Guidance on school prayer. (Br.18 n.2). But the Guidance states: "When acting in their official capacities . . . school administrators . . . are prohibited by the Establishment Clause from encouraging or discouraging prayer, and from actively *participating* in such activity with students."[95] *See also* (A.1330-31). *Mergens*, also relied upon by BISD, held that the Equal Access Act did not violate the Establishment Clause *because* it forbids employees from "participating" in student religious activity and thus "avoids the problems of 'the students' emulation of teachers as role models.'" 496 U.S. at 232-36, 249-53 (citation omitted).[96]

Because BISD has not demonstrated that Plaintiffs' claims are moot, at least with respect to participation in prayer with students, it is not entitled to summary judgment.

VI. Although the "legislative prayer" exception is plainly inapplicable to "Student Expression" at school meetings, BISD's practice even fails the *Marsh/Greece* analysis.

While the legislative exception is clearly inapplicable, *supra* at 12-17, BISD's practice is unconstitutional even under *Marsh/Greece*. *Greece* does not give legislatures a *carte blanche* for virtually any prayer practice. Tellingly, courts since *Greece* have found legislative practices unconstitutional.[97] Nor does *Marsh/Greece* impose just one "constraint" as BISD claims. (Br.22). Rather, *Marsh/Greece* "requires an inquiry into the prayer opportunity as a whole," and that "inquiry . . . considers both the setting in which the prayer arises and the audience to whom it is directed." 134 S.Ct. at 1823-25. The practice must ultimately fit "within the [*Marsh*] tradition," *id.* at 1819, which was "consistent with the manner in which the First Congress viewed its chaplains." 463 U.S. at 786, 794 n.16. In *Marsh*, the Court "granted certiorari limited to the challenge to the practice of opening sessions with prayers by a state-employed clergyman." *Id.* The Court relied almost exclusively on the fact that "Nebraska's practice is consistent with the manner in which the First Congress viewed its chaplains." *Id.* at 794 n.16.[98]

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[95] U.S. Dep't of Educ., Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools, 58 Fed. Reg. 9645 (Feb. 8, 2003) (Emphasis added).

[96] *See Duncanville*, 994 F.2d at 164 (*Mergens* was inapposite to coach participating in student prayers).

[97] *E.g.*, *Lund*, 103 F. Supp. 3d at 719-734; *Hudson v. Pittsylvania Cty.*, 107 F. Supp. 3d 524, 525 (W.D. Va. 2015)

[98] *See* 463 U.S. at 795 n.18 ("[S]everal states choose a chaplain who serves for the entire legislative session. In other states, the prayer is offered by a different clergyman each day.")

In *Greece*, central to the Court's holding was the fact that the audience "for these invocations is not, indeed, the public but lawmakers themselves . . . [T]he prayer exercise [i]s 'an internal act' directed at the [] Legislature's 'own members,'" rather "than an effort to promote religious observance among the public." 134 S. Ct. at 1825.

Under *Marsh/Greece*, a legislative prayer practice transgresses the Establishment Clause if, *inter alia*: (1) it proselytizes *or* advances *or* disparages "any one faith or belief"; (2) the board encourages the public to participate in the prayers or the prayers are for the public's benefit; (3) the selection process is not inclusive or based on an impermissible motive; (4) it is coercive; (5) the practice suggests to non-participants that "their stature in the community [is] diminished;" (6) the prayers preach conversion; (7) the practice betrays an impermissible purpose; *or* (8) does not comport with the *Marsh* tradition. *Id* at 1277-78. When such fact-specific consideration is given here, we find a school district exploiting the "legislative" prayer opportunity to promote prayer in the public schools, *infra*.

A. The prayers are directed to the public and for the student's benefit.

BISD's practice fails *Marsh/Greece* because it is not "directed at the [] Legislature's 'own members,'" but is rather "an effort to promote religious observance among the public." 134 S.Ct. at 1825-26. The practice is manifestly unlike in *Marsh* and *Greece* "'in which government officials invoke[d] spiritual inspiration *entirely for their own benefit*.'" *Id.* (citation omitted) (emphasis added). BISD concedes its practice is about "religious expression in the public schools." (Br.15). It also asserts that the purpose of its "legislative prayer" practice is to provide an "opportunity for students" (A.386), "opportunities for student expression" (Br.9), allow students to "publicly speak," (Br.7,18) (A.1342) and "hone their public speaking skills." (Dkt.17 at 15-16) (Dkt.20 at 9). BISD' maintains: "it's always about students having the opportunity to share their thoughts, express their first amendment rights." (A.529). Together, these facts make evident BISD's practice is *not* an "'an internal act' directed at the [Board's] 'own members.'" *Id.*

Additional evidence further reveals that the prayers are for the benefit of the audience and general public and not just the Board. First, the 2015 guidelines require the "Expression" to

honor "the participants, and those in *attendance*; . . . *focusing the audience*." (A.387) (A.391) (emphasis added). Second, "Invocation" (or "Student Expression") is included on the public agendas.[99] *See Wynne v. Town of Great Falls*, 376 F.3d 292, 301 n.7 (4th Cir. 2004) (prayers were directed to public where town "listed the prayers" on the "agenda"). Thus, in a very real sense, BISD has directed prayers to "the citizenry at large." *Id.*

Third, unlike in *Greece*, school officials and "board members direct[] the public to participate in the prayers." 134 S. Ct. at 1826. (A.13-17). In *Greece*, the Court stressed that:

> The analysis would be different if town board members directed the public to participate in the prayers. . . . Although board members themselves stood, bowed their heads, or made the sign of the cross during the prayer, *they at no point solicited similar gestures by the public*. [*Id.* (emphasis added)].

Practices have been invalidated under *Marsh* simply because a government official invited the public to participate. *See Joyner*, 653 F.3d at 344 (invocation by private citizen impermissible because "the Chair of the Board asked the audience to stand for the prayer."). Several courts since *Greece* have likewise found practices unconstitutional on such grounds. For instance, in *Hudson*, the court held that practice was unconstitutional under *Greece* because the "members often directed the public to participate in the prayers by asking them to stand." 107 F. Supp. 3d at 525. *Lund* also found a practice unconstitutional under *Greece* because board members often invited the public to participate. 103 F. Supp. 3d at 728-29. Although all of the "Commissioners all attested to the invocation being given for the benefit of the Board and for the purpose of solemnizing the meetings," *id.* at 716, the court found that the fact that "the Board signaled for the public to join in the prayers undercuts such an argument." *Id.* at 727.

As in the above cases, BISD's prayers are impermissibly directed to the public because a government official, usually a principal but also board members, invite the public to participate through phrases such as "will you please rise," or "remain standing" for the prayer, *supra* at FN 11. The Board even instructs principals to ask the audience, "please stand." (A.361).[100]

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[99] (A.387) (A.394-95) (A.403) (A.409) (A.463) (A.479) (A.727-949)

[100] At the December 2009 meeting for example, the principal instructed: "we'll stand for the invocation and the pledge." (A.239). Officials made similar requests in at least 19 other meetings since. (A.13-17).

Finally, "members of the public appear to view the prayers as being for public consumption." *Lund*, 103 F. Supp. 3d at 729. In December 2015, a group of citizens formed a Facebook page called "Save our Birdville Schools." (A.696-97). The group objected to the fact that BISD replaced "Invocation" with "Student Expression," declaring:

> Our school board has always (so far as we can find from online records) opened its meeting with an Invocation, which is a PRAYER . . . In the February meeting this remained the same. HOWEVER, apparently WITHOUT PUBLIC COMMENT the meeting agenda was changed removing "Invocation" and replacing it with "Student Expression". . . We need to show the current board how to stand with God and stand on sound principles.

B. The practice betrays an impermissible purpose and does not comport with the *Marsh* tradition.

A legislative prayer practice is also unconstitutional if it "betray[s] an impermissible government purpose," such as using it as an "opportunity to proselytize." *Greece*, 134 S.Ct. at 1824-26. BISD has been inviting schoolchildren, *and only schoolchildren*, to deliver the prayers at its meetings since 1997. (A.13-17) (A.19-330) (A.727-949). It is telling that throughout *Greece* and *Marsh*, "the Supreme Court consistently discussed legislative prayer practices in terms of invited ministers, clergy, or volunteers [.]" *Lund*, 103 F. Supp. 3d at 722. The Court should ask what purpose is served by inviting students, rather than clergy or community adults to deliver the prayers. It is clear the real purpose is to bring "prayer and proselytization into public schools through the backdoor." *Chino Valley*, 2016 U.S. Dist. LEXIS 19995, at *60-61.

BISD's litigation-inspired maneuver to replace "Invocation" with "Student Expression" only takes this practice further outside the *Marsh/Greece* tradition. To fit within the exception, the invocations must solemnize. *Greece*, 134 S. Ct. at 1823. The Court concluded: "Prayer that is solemn and respectful in tone, that invites lawmakers to reflect upon shared ideals and common ends before they embark on the fractious business of governing, serves that legitimate function." *Id.* But BISD now claims that students can deliver remarks on any topic they want, *regardless* of solemnization. (A.481) (A.544). In fact, BISD asserts that a student can even give a remark "disparaging the school board." (*Id*). Unmistakably, this practice falls outside *Marsh.*

Moreover, the record shows invocations that do not solemnize but rather are entirely personal or irrelevant to the "business of governing." *E.g.* (A.10) (A.13-17) (A.161-64). For example, the March 2016, "Student Expression" was a Christian prayer that provided:

> Each day brings new beginnings, decisions I must make. I'm the only one to choose the road that I will take. I can choose to take the road of life that leads to great success, or travel down the darkened road that leads to great distress. Please open up my eyes dear Lord that I might clearly see, help me stand for what is right, bring out the best in me. Help Lord, to just say no, when temptation comes my way, that I might keep my body clean and fit for life each day. When my teenage years are over, I know that I will see that life is lived its very best with you walking next to me. (A.10).

The April 2016 "Student Expression" was also a Christian prayer and not in any way directed to the Board. Instead the prayer asked "Jesus" to "grant me each day the desire to do my best, to grow mentally and morally as well as physically." (A.10) (A.17). These are decidedly not the types of *legislative* invocations contemplated by *Marsh*'s historic tradition.

C. The selection process

Marsh and *Greece* both "warned that the selection of the person who is to recite the legislative body's invocational prayer" can "itself violate the Establishment Clause." *Snyder v. Murray City Corp.*, 159 F.3d 1227, 1234 (10th Cir. 1998). *E.g.*, *Pelphrey*, 547 F.3d at 1277-78 (selection process unconstitutional).[101] BISD's selection process before 2015 undoubtedly failed *Marsh/Greece*. Because school officials "selected those who offered prayers, they were able to - and did - select only those who would advance the Christian faith." *Tangipahoa*, 473 F.3d at 204. This is borne out by the evidence. Between 1997 until present, only a single religious prayer "represented a different faith." *Id.* (A.13) (A.72-76) (A344) (A.359). BISD's selection process continues to fail *Marsh/Greece* because it is based on an impermissible motive to promote prayer in school, *supra.* A "legislature may not select invocational speakers based on impermissible motives." *Jones v. Hamilton Cnty.*, 891 F. Supp. 2d 870, 886 (E.D. Tenn. 2012).

For the foregoing reasons, BISD has failed to show it is entitled to summary judgment.

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[101] *See also Hudson*, 2014 U.S. Dist. LEXIS 106401 at *4-7

VII. Plaintiffs have established § 1983 liability against BISD.

BISD's argument that "Plaintiffs cannot establish Section 1983 liability" (Br. 25) is unavailing. BISD has a "policy" and practice since at least 1997 of opening School Board meetings with prayers and of participating in those prayers with students. (A.410) (A.418) (A.424) (A.432). This is more than sufficient for municipal liability. *See Tangipahoa*, 473 F.3d at 193 (school board was liable for its "unwritten policy" of inviting private citizens to "give prayers of their own unrestricted choosing"). BISD is the "moving force" behind the prayers in the same way the board was the moving force behind the citizen prayers in *Tangipahoa*. *Id.* Indeed, municipal liability has attached to school board prayer in many cases, such as *Indian River* and *Coles*, even when the invocations were by private citizens.[102]

VIII. Plaintiffs are entitled to the relief they seek.

Because BISD's practice has and continues to violate the Establishment Clause, the Court must deny BISD's motion. And under Fed. R. Civ. P. 56 (f)(1), the Court should grant summary judgment to Plaintiffs, *supra*. In addition to nominal damages *supra*, Section III, Plaintiffs are entitled to injunctive relief because: (1) they suffer irreparable injury; (2) monetary damages are inadequate; (3) that injury to Plaintiffs far exceeds any injury on other parties; and (4) "the public interest would not be disserved by a permanent injunction." *eBay, Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006).[103] Finally, declaratory relief is proper under 28 U.S.C. § 2201.[104]

CONCLUSION

Since BISD's prayer practice violates the Establishment Clause in every way possible, that is, under *each* prong of *Lemon* (when one is enough), under the separate coercion test, and even under the inapplicable legislative prayer *exception*, BISD has failed to demonstrate that it is entitled to summary judgment as a matter of law. Therefore, Plaintiffs respectfully request this Court to grant summary judgment in their favor under Rule 56 (f) and against BISD entirely.

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[102] *See also Lund*, 103 F. Supp. 3d at 717 (rejecting argument "municipal liability did not apply")
[103] *See Duncanville*, 994 F.2d at 166; *Gossage*, 2006 U.S. Dist. LEXIS 34613, *21-22
[104] Plaintiffs intend to bring a separate motion for summary judgment against the Board members pending the outcome of the Fifth Circuit decision.

Respectfully submitted,

July 17, 2016

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on the 18th day of July, 2016, a true and correct copy of the foregoing Opposition to Defendants' Motion for Summary Judgment has been served on all counsel of record pursuant to Federal Rules of Civil Procedure as follows:

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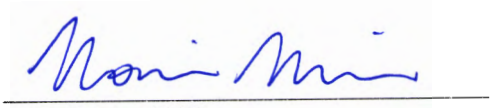

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