**Case No. 15-11067**

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

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**AMERICAN HUMANIST ASSOCIATION; ISAIAH SMITH,**
Plaintiffs – Appellees

v.

**JACK MCCARTY, in his individual and official capacity; JOE D. TOLBERT, in his individual and official capacity; BRAD GREENE, in his individual and official capacity; RICHARD DAVIS, in his individual and official capacity; RALPH KUNKEL, in his individual and official capacity; CARY HANCOCK, in his individual and official capacity; DOLORES WEBB, in her individual and official capacity,**
Defendants – Appellants

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

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# APPELLEES' BRIEF

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## CERTIFICATE OF INTERESTED PERSONS

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

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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

11. Birdville Independent School District, Defendant;

12. Edwards Claims Administration, insurer for Defendants;

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

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

## STATEMENT REGARDING ORAL ARGUMENT

This case presents a straightforward question: whether the district court properly denied school board members qualified immunity because they have been inviting students to deliver prayers, and participating in those prayers with students, at school board meetings, a school-sponsored activity, in violation of the Establishment Clause pursuant to both controlling authority and a robust consensus of persuasive authority. Since the law is so clear, and because Appellees' brief and the record adequately present the legal and factual issues presently before this Court, Appellees do not believe oral argument will assist the Court's resolution of these issues. However, if this Court should schedule oral argument, Appellees ask that they be allowed to participate in such oral argument.

## TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS ..... i

STATEMENT REGARDING ORAL ARGUMENT ..... iii

TABLE OF AUTHORITIES ..... viii

JURISDICTIONAL STATEMENT ..... 1

STATEMENT OF ISSUES PRESENTED FOR REVIEW ..... 2

STATEMENT OF THE CASE ..... 4

SUMMARY OF THE ARGUMENT ..... 6

ARGUMENT ..... 9

I. STANDARD OF REVIEW ..... 9

II. THE DISTRICT COURT PROPERLY DENIED QUALIFIED IMMUNITY BASED ON THE APPLICABLE TEST. ..... 9

III. APPELLANTS' LONGSTANDING PRAYER PRACTICE IS THE ONLY FOCUS OF THIS QUALIFIED IMMUNITY APPEAL. ..... 11

IV. THE PRAYER PRACTICE VIOLATES THE ESTABLISHMENT CLAUSE PURSUANT TO DECADES OF CONTROLLING AUTHORITY AND A ROBUST CONSENSUS OF PERSUASIVE AUTHORITY ..... 13

A. Courts have clearly ruled that inviting or encouraging students to pray violates the Establishment Clause. ..... 13

B. This case is governed by the tests for school prayer cases. ..... 19

C. School board prayer does not fall within the extremely limited "legislative prayer" exception. ..... 20

1. The legislative exception does not apply to public schools. ..... 21

2. *Greece* reaffirmed that the Legislative Exception is inapplicable to public schools. ..... 26

3. Appellants' practice is more egregious than any other school board prayer practice decided to date. ..... 28

V. THE PRAYER PRACTICE VIOLATES THE ESTABLISHMENT CLAUSE UNDER THE APPLICABLE TESTS. ..... 29

A. The Prayer Practice lacks a primary secular purpose. ..... 30

1. Appellants have failed to satisfy their burden. ..... 31

2. The belated purpose is also a sham. ..... 34

B. The Prayer Practice has the primary effect of advancing and endorsing religion. ..... 36

C. The Prayer Practice fosters excessive entanglement with religion. ..... 38

D. The Prayer Practice is unconstitutional under the Coercion Test. ..... 40

E. Appellants fail to meaningfully distinguish *Lee* and *Santa Fe.* ..... 43

VI. APPELLANTS' PARTICIPATION IN PRAYERS WITH STUDENTS CONSTITUTES A SEPARATE ESTABLISHMENT CLAUSE VIOLATION. ..... 45

VII. SCHOOL BOARD PRAYERS ARE GOVERNMENT SPEECH. ..... 48

VIII. APPELLANTS RELY UPON INAPPOSITE, NON-BINDING, AND OVERRULED CASES. ..... 51

A. *Jones* is abrogated and inapplicable. ..... 51

B. *Adler* is an outlier that defies binding precedent. ..... 54

C. *Chandler* is inapposite. ..... 57

IX. RATHER THAN CEASE A CLEARLY UNCONSTITUTIONAL PRACTICE, APPELLANTS HAVE PERSISTED IN VIOLATING THE ESTABLISHMENT CLAUSE. ..... 57

X. THE PRAYER PRACTICE WOULD BE UNCONSTITUTIONAL EVEN IF THE "LEGISLATIVE PRAYER" EXCEPTION APPLIED. .... 61

XI. APPELLANTS' ACTIONS WERE OBJECTIVELY UNREASONABLE. ..... 63

CERTIFICATE OF COMPLIANCE WITH RULE 32(a) ..... 67

CERTIFICATE OF SERVICE ..... 68

# TABLE OF AUTHORITIES

## Cases

*ACLU v. Black Horse Pike Reg'l Bd. of Educ.*, 84 F.3d 1471 (3d Cir. 1996) . passim

*Adler v. Duval Cnty. Sch. Bd.*, 250 F.3d 1330 (11th Cir. 2001) ..... passim

*Am. Humanist Ass'n v. City of Ocala*, 2015 U.S. Dist. LEXIS 115443 (M.D. Fla. 2015)..... passim

*Am. Humanist Ass'n v. United States*, 63 F. Supp. 3d 1274 (D. Or. 2014)..... 10, 64

*Appenheimer v. Sch. Bd.*, 2001 WL 1885834 (C.D. Ill. 2001) ..... 16, 59

*Ashby v. Isle of Wight Cnty. Sch. Bd.*, 354 F. Supp. 2d 616 (E.D. Va. 2004) ..... 16

*Atheists of Fla., Inc. v. City of Lakeland*, 779 F. Supp. 2d 1330 (M.D. Fla. 2011).... ..... 62, 63, 65

*Atteberry v. Nocona Gen. Hosp.*, 430 F.3d 245 (5th Cir. 2005)..... 9, 28

*Bacus v. Palo Verde Unified Sch. Dist. Bd. of Educ.*, 52 F. App'x 355 (9th Cir. 2002)..... 21, 25

*Bannon v. Sch. Dist.*, 387 F.3d 1208 (11th Cir. 2004)..... 56

*Barrow v. Greenville Indep. Sch. Dist.*, 332 F.3d 844 (5th Cir. 2003)..... 10

*Barton v. Clancy*, 632 F.3d 9 (1st Cir. 2011) ..... 10

*Bell v. Little Axe Indep. Sch. Dist.*, 766 F.2d 1391 (10th Cir. 1985) ..... 28

*Berger v. Rensselaer Cent. Sch. Corp.*, 982 F.2d 1160 (7th Cir. 1993) ..... 29, 50

*Bishop v. Aronov*, 926 F.2d 1066 (11th Cir. 1991)..... 46

*Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990) ..... 47, 48

*Borden v. Sch. Dist.*, 523 F.3d 153 (3rd Cir. 2008) ..... 15, 17, 45, 46

*Byar v. Lee*, 336 F. Supp. 2d 896 (W.D. Ark. 2004) ..... 65

*Carlino v. Gloucester City High Sch.*, 57 F. Supp. 2d 1 (D.N.J. 1999)..... 65

*Carter v. Broadlawns Med. Ctr.*, 857 F.2d 448 (8th Cir. 1988) ..... 22

*Carver Middle Sch. Gay-Straight Alliance v. Sch. Bd. of Lake Cnty.*, 2015 U.S. Dist. LEXIS 109489 (M.D. Fla.) ..... 51

*Chandler v. James*, 180 F.3d 1254 (11th Cir. 1999) ..... 49

*Chandler v. James*, 985 F. Supp. 1068 (M.D. Ala. 1997) ..... 53

*Chandler v. Siegelman*, 230 F.3d 1313 (11th Cir. 2000) ..... 36, 49, 57

*Chew v. Gates*, 27 F.3d 1432 (9th Cir. 1994) ..... 58

*Church of Scientology Flag Serv. v. City of Clearwater*, 2 F.3d 1514 (11th Cir. 1993) ..... 30

*Cnty. of Allegheny v. ACLU*, 492 U.S. 573 (1989) ..... 13, 22

*Cole v. Oroville Union High Sch.*, 228 F.3d 1092 (9th Cir. 2000) ..... passim

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

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

*Corder v. Lewis Palmer Sch. Dist. No. 38*, 566 F.3d 1219 (10th Cir. 2009) ... passim

*Corder v. Lewis Palmer Sch. Dist. No. 38*, 568 F. Supp. 2d 1237 (D. Colo. 2008) ... ..... 56

*de la O v. Hous. Auth.*, 417 F.3d 495 (5th Cir. 2005) ..... 12

*Deveney v. Bd. of Educ.*, 231 F. Supp. 2d 483 (S.D. W.VA. 2002) ..... 16

*Doe v. Aldine Indep. Sch. Dist.*, 563 F. Supp. 883 (S.D. Tex. 1982) ..... 15, 16, 63

*Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402 (5th Cir 1995) ..... passim

*Doe v. Duncanville Indep. Sch. Dist.*, 994 F.2d 160 (5th Cir. 1993) ..... passim

*Doe v. Gossage*, 2006 U.S. Dist. LEXIS 34613 (W.D. Ky. 2006) ..... passim

*Doe v. Indian River Sch. Dist.*, 653 F.3d 256 (3d Cir. 2011) ..... passim

*Doe v. S. Iron R-1 Sch. Dist.*, 453 F. Supp. 2d 1093 (E.D. Mo. 2006) ..... 12

*Doe v. Santa Fe Indep. Sch. Dist.*, 168 F.3d 806 (5th Cir. 1999) ..... passim

*Doe v. Sch. Bd.*, 274 F.3d 289 (5th Cir. 2001) ..... 15

*Doe v. Tangipahoa Parish Sch. Bd.*, 473 F.3d 188 (5th Cir. 2006) ..... passim

*Doe v. Tangipahoa Parish Sch. Bd.*, 631 F. Supp. 2d 823 (E.D. La. 2009) ..... 28

*Doe v. Village of Crestwood, Ill.*, 917 F.2d 1476 (7th Cir. 1990) ..... 18, 22

*Doe v. Wilson Cnty. Sch. System*, 564 F. Supp. 2d 766 (M.D. Tenn. 2008) ..... 17

*Edwards v. Aguillard*, 482 U.S. 578 (1987) ..... 13, 20, 22

*Engel v. Vitale*, 370 U.S. 421 (1962) ..... 15, 33, 36, 51

*Everson v. Bd. of Educ.*, 330 U.S. 1 (1947) ..... 15

*Freedom From Religion Found., Inc. v. Chino Valley Unified Sch. Dist. Bd. of Educ.*, 2016 U.S. Dist. LEXIS 19995 (C.D. Cal.) ..... passim

*Gearon v. Loudoun Cnty. Sch. Bd.*, 844 F. Supp. 1097 (E.D. Va. 1993) ..... 16, 53

*Graham v. Central Cmty. Sch. Dist.*, 608 F. Supp. 531 (S.D. Iowa 1985) ..... 17

*Hall v. Bd. of Sch. Comm'rs*, 656 F.2d 999 (5th Cir. 1981) ..... 15

*Hall v. Bradshaw*, 630 F.2d 1018 (4th Cir. 1980) ..... 18

*Hansen v. Ann Arbor Pub. Schs*, 293 F. Supp. 2d 780 (E.D. Mich. 2003) ..... 65

*Harris v. Joint Sch. Dist.*, 41 F.3d 447 (9th Cir. 1994) ..... passim

*Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988) ..... 51

*Herdahl v. Pontotoc Cnty. Sch. Dist.*, 933 F. Supp. 582 (N.D. Miss. 1996) ... passim

*Hewett v. City of King*, 29 F. Supp. 3d 584 (M.D.N.C. 2014) ..... 18, 22

*Holloman v. Harland*, 370 F.3d 1252 (11th Cir. 2004) ..... passim

*Hope v. Pelzer*, 536 U.S. 730 (2002) ..... 10

*Hudson v. Pittsylvania Cnty.*, 2014 U.S. Dist. LEXIS 106401 (W.D. Va. 2014) ..... 61, 62

*Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274 (5th Cir. 1996) ..... passim

*Inouye v. Kemna*, 504 F.3d 705 (9th Cir. 2007) ..... 64

*Jager v. Douglas Cnty. Sch. Dist*., 862 F.2d 824 (11th Cir. 1989) ..... passim

*Johnson v. Epps*, 479 Fed. Appx. 583 (5th Cir. 2012) ..... 12

*Jones v. Clear Creek Indep. Sch. Dist*., 977 F.2d 963 (5th Cir. 1992) ..... passim

*Jones v. Hamilton Cnty.*, 891 F. Supp. 2d 870 (E.D. Tenn. 2012) ..... 62

*Joyner v. Forsyth Cnty.*, 653 F.3d 341 (4th Cir. 2011) ..... 50, 52

*Karen B. v. Treen*, 653 F.2d 897 (5th Cir. 1981) ..... passim

*Kinney v. Weaver*, 367 F.3d 337 (5th Cir. 2004) ..... 10, 13

*Lassonde v. Pleasanton Unified Sch. Dist.*, 320 F.3d 979 (9th Cir. 2003) ..... passim

*Lee v. Weisman,* 505 U.S. 577 (1992) ..... passim

*Lemon v. Kurtzman*, 403 U.S. 602 (1971) ..... passim

*Lund v. Rowan Cnty*., 103 F. Supp. 3d 712 (M.D.N.C. 2015) ..... 42, 43, 61

*Lundberg v. W. Monona Cmty. Sch. Dist*., 731 F. Supp. 331 (N.D. Iowa 1989) ..... 16, 23

*Lynch v. Donnelly*, 465 U.S. 668 (1984) ..... 33

*M.B. v. Rankin Cnty. Sch. Dist*., 2015 U.S. Dist. LEXIS 117289 (S.D. Miss. 2015) ..... 17, 42

*Marchi v. Bd. of Coop. Educ. Servs*., 173 F.3d 469 (2d Cir. 1999) ..... 45

*Marsh v. Chambers*, 463 U.S. 783 (1983) ..... passim

*McCreary Cnty. v. ACLU*, 545 U.S. 844 (2005) ..... 30, 32

*McKee v. Lang*, 393 Fed. Appx. 235 (5th Cir. 2010) ..... 9

*Mellen v. Bunting*, 327 F.3d 355 (4th Cir. 2003) ..... 18, 22, 31, 39

*Meltzer v. Bd. of Pub. Instruction,* 548 F.2d 559 (5th Cir. 1977) ..... 15

*Morgan v. Swanson*, 659 F.3d 359 (5th Cir. 2011) ..... 10, 28

*N.C. Civil Liberties Union Legal Found. v. Constangy*, 947 F.2d 1145 (4th Cir. 1991)..... 18, 22, 31, 39

*Nartowicz v. Clayton Cnty. Sch. Dist.*, 736 F.2d 646 (11th Cir. 1984) ..... 17

*Newdow v. Bush*, 2001 U.S. Dist. LEXIS 25936 (E.D. Cal. 2001) ..... 55

*Newman v. City of East Point*, 181 F. Supp. 2d 1374 (N.D. Ga. 2002) ..... 18, 22

*Newman v. Guedry*, 703 F.3d 757 (5th Cir. 2012) ..... 1

*Nurre v. Whitehead*, 580 F.3d 1087 (9th Cir. 2009)..... 17, 44

*Peck v. Upshur Cnty. Bd. of Educ.*, 155 F.3d 274 (4th Cir. 1998) ..... 28

*Peloza v. Capistrano Unified Sch. Dist.*, 37 F.3d 517 (9th Cir. 1994) ..... 46, 47

*Pelphrey v. Cobb Cnty.*, 547 F.3d 1263 (11th Cir. 2008)..... 23, 50, 55, 62

*Pugh v. Goord*, 571 F. Supp. 2d 477 (S.D.N.Y. 2008)..... 65

*Rich v. City of Jacksonville*, 2010 U.S. Dist. LEXIS 143973 (M.D. Fla. 2010) ..... ..... 10, 65

*Roberts v. Madigan*, 921 F.2d 1047 (10th Cir. 1990)..... 45

*Ryan v. Mesa Unified Sch. Dist.*, 64 F. Supp. 3d 1356 (D. Ariz. 2014) ..... 10, 64

*Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) ..... passim

*Santamaria v. Dallas Indep. Sch. Dist.*, 2006 U.S. Dist. LEXIS 83417 (N.D. Tex.) ..... 57, 58

*Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203 (1963) ..... 15, 51

*Sch. Dist. v. Ball*, 473 U.S. 373 (1985)..... 15

*Schultz v. Medina Valley Indep. Sch. Dist.*, 2012 U.S. Dist. LEXIS 19397 (W.D. Tex. 2012) ..... 52

*Skarin v. Woodbine Cmty. Sch.*, 204 F. Supp. 2d 1195 (S.D. Iowa 2002) ..... 16

*Smith v. Jefferson Cnty. Bd. of Sch. Comm'rs*, 788 F.3d 580 (6th Cir. 2015)..... 23

*Smith v. Wade*, 461 U.S. 30 (1983) ..... 57

*Snyder v. Murray City Corp.*, 159 F.3d 1227 (10th Cir. 1998) ..... 29, 62

*Stone v. Graham*, 449 U.S. 39 (1980) ..... 15

*Summers v. Adams*, 669 F. Supp. 2d 637 (D.S.C. 2009) ..... 29, 64

*Sundquist v. Nebraska*, 2015 U.S. Dist. LEXIS 104601 (D. Neb. 2015) ..... 64

*Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014) ..... passim

*Turner v. City Council of Fredericksburg*, 534 F.3d 352 (4th Cir. 2008) ..... 49

*Wallace v. Jaffree*, 472 U.S. 38 (1985) ..... 13, 15, 22, 58

*Warrior v. Gonzalez*, 2013 U.S. Dist. LEXIS 165387 (E.D. Cal.) ..... 65

*Workman v. Greenwood Cmty. Sch. Corp.*, 2010 U.S. Dist. LEXIS 42813 (S.D. Ind. 2010) ..... 16, 54, 56

*Wynne v. Town of Great Falls*, 376 F.3d 292 (4th Cir. 2004) ..... 62

*Zantiz v. Seal*, 602 Fed. Appx. 154 (5th Cir. 2015) ..... 9

**Statutes**

28 U.S.C. § 1331 ..... 1

28 U.S.C. § 1343(a)(3) ..... 1

20 U.S.C. § 4071 ..... 47

Tex. Educ. Code § 25.152 ..... 50

**Constitutional Provisions**

U.S. CONST., amend. I ..... passim

**Regulations**

U.S. Dep't of Educ., Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools, 58 Fed. Reg. 9645 (Feb. 8, 2003) ..... 47

## JURISDICTIONAL STATEMENT

The district court has jurisdiction because this case arises under the First Amendment and therefore presents a federal question pursuant to 28 U.S.C. §§ 1331 and 1343(a)(3). (ROA.135-149). This Court has jurisdiction to review the district court's interlocutory denial of qualified immunity only to the extent that this appeal turns on an issue of law. *Newman v. Guedry*, 703 F.3d 757, 761 (5th Cir. 2012).

## STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the district court properly denied school board members qualified immunity because:

   a) a school board's longstanding practice of *inviting* and *selecting* students (mostly in elementary and middle school) to deliver prayers at school board meetings violates the Establishment Clause, and specifically: 1) lacks a secular purpose; *or* 2) has a primary effect of advancing or endorsing religion; *or* 3) fosters excessive entanglement with religion; *or* 4) coerces students to participate in prayer;

   b) the Establishment Clause has long prohibited public schools from inviting, initiating, endorsing, or encouraging prayer, as well as coercing students to participate in prayer;

   c) *every* appellate case involving a school board invocation practice has found the practice unconstitutional; and

   d) a school board's longstanding practice of *participating* in prayer with students during school-sponsored activity violates the Establishment Clause.

2. Whether school board members' actions in direct response to the threat of litigation, changing the language on the agendas from "Invocation" to "Student

Expression," while expressly continuing to authorize "prayer" and now a one-minute "student expression:"

a) underscore their reckless indifference to the Establishment Clause;

b) independently violates the Establishment Clause because, *inter alia*, their purpose is to promote prayer; and

c) shields them from damages arising from their longstanding and plainly unconstitutional practices, independent of whether the practice continues to violate the Establishment Clause.

## STATEMENT OF THE CASE

Appellees challenge a school board's longstanding practices of including prayers in school board meetings, and specifically selecting and inviting students to deliver prayers at their meetings ("Prayer Practice"), and of participating in those prayers with the students.(ROA.135-145).

Appellee Isaiah Smith, a 2014 Birdville High School alumnus and member of Appellee American Humanist Association ("AHA"), has attended numerous School Board meetings, including in 2014 and 2015, and had unwelcome contact with the Board's prayers. (ROA.137¶6;144¶68,69).

Appellants are members of the Birdville Independent School District ("District") Board of Trustees ("Board").(ROA.28-35;137-39). The Board holds monthly meetings in the District Administration Building.(ROA.139¶¶24,27). These meetings are open to the public and are the primary means for citizens to observe and participate in District business.(ROA.137¶¶26,29).

Since at least 1997, it has been Appellants' policy, practice, and custom to open Board meetings with prayer.(ROA.139-45). From 1997 until March 26, 2015, every meeting agenda had a heading referring to "Invocation." (ROA.139¶30;140-41). During this time, Appellants selected and invited students to deliver the prayers.(ROA.139-40;144). Most of the students were in elementary and middle school.(ROA.139-43). The students were not selected at random, but rather

because Appellants believed they would deliver prayers.(ROA.46;139-40¶32;144;177-78).

The Board's prayers are typically Christian, making specific references to "Jesus" and "Christ."(ROA.140¶33). There is no evidence of any non-Christian prayer or secular invocation being delivered prior to March 2015.(ROA.142¶51). The prayers are directed to the public by their listing on the public agenda, *supra*, and through phrases such as "please stand for the prayer," and "please bow your heads."(ROA.142). Appellants regularly participate in the prayers delivered by the students at their behest.(ROA.142).

In addition to the students present to deliver prayers, 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)(ROA.142-43).

On December 15, 2014, AHA sent an eight-page letter to Appellants informing them that the Prayer Practice violates the Establishment Clause. (ROA.37-44;144¶70). On March 19, 2015, Appellants responded, refusing to discontinue their practice of opening meetings with prayer.(ROA.46-48;145¶71). Instead, they merely changed the language in the agendas from "INVOCATION AND PLEDGES OF ALLEGIANCE" to "Pledges of Allegiance" and "Student Expression," (ROA.142¶48) and said that students would now be permitted to

deliver a "one-minute" "student expression," which may include "prayer," at the start of the meetings.(ROA.47-48)(Appellants' Brief (hereafter "Br.__") ix;1;6;7;26). However, meetings already have a designated period for public expression to the Board.(ROA.139).[1]

## SUMMARY OF THE ARGUMENT

The sole legal issue before the Court is whether the district court properly denied school board members qualified immunity for their longstanding practices of: (1) selecting and inviting students – typically in elementary and middle school – to deliver prayer at school meetings; and (2) participating in these prayers with students. The Court need not decide whether superficial changes made to the longstanding Prayer Practice in 2015 cure its constitutional deficiencies, because damages for past violations cannot be rendered moot.

The court properly denied Appellants qualified immunity because their longstanding Prayer Practice is unconstitutional pursuant to a *long line* of controlling precedent and a robust consensus of persuasive precedent. The challenged conduct lies so obviously at the very core of what the Establishment Clause prohibits that the unlawfulness of Appellants' conduct would be readily apparent *even in the absence* of such fact-specific law.

[1] *See, e.g.*, Agenda, BISD Board of Trustees Meeting (Sept. 25, 2014), http://www.birdvilleschools.net/cms/lib2/TX01000797/Centricity/Domain/4885/2014/SEPT252014RM.pdf.

Indeed, both this Court and the Supreme Court have determined that the Establishment Clause prohibits prayer in far less egregious circumstances. For instance, both have held that a policy which merely permitted, but did not require, student-led, *student-initiated* invocations or messages at completely voluntary high school football games violated the Establishment Clause on its face and as applied, even if the prayers were "spontaneously initiated" and even though it was possible no prayer would ever be delivered.

Notably, *every* single appellate case involving a school board prayer practice has found the practice unconstitutional, irrespective of the test applied. Further, the two appellate courts that determined the applicable test both concluded that the test used in school prayer cases applied and that the narrow and unique legislative prayer exception was inapplicable. This conclusion is supported by *Santa Fe*, *Lee*, *Marsh*, and *Greece*.

Furthermore, Appellants' longstanding practice of participating in prayers with students during school meetings constitutes an independent Establishment Clause violation. Even the authorities Appellants rely upon support this conclusion.

Despite Appellants' claims, this case has nothing to do with private speech or free exercise. As in *Santa Fe* the prayers are clearly government speech, as they are delivered to an audience assembled as part of a regularly scheduled, school-

sponsored function. Further, *every* court to rule on a school board prayer practice or legislative prayer practice held that the prayers constituted government speech.

Appellants have intentionally persisted in violating the Constitution in the face of well-settled Establishment Clause authorities presented to them. While the 2015 changes are immaterial to damages for past violations, these litigation-inspired actions reveal Appellants' religious purpose, knowledge of and their continued reckless disregard for constitutional rights. Of course, the practice remains blatantly unconstitutional, as this Court and the Supreme Court made abundantly clear in *Santa Fe*, student-initiated prayer does not insulate a school from sponsorship or the coercive element of the prayer.

## ARGUMENT

### I. STANDARD OF REVIEW

This Court reviews "*de novo* the denial of a motion to dismiss, taking all well-pleaded facts as true." *Zantiz v. Seal*, 602 Fed. Appx. 154, 159 (5th Cir. 2015)(citation omitted). The Court also reviews the "denial of the qualified immunity defense *de novo*, accepting all well-pleaded facts as true and viewing them in the light most favorable to the plaintiff." *McKee v. Lang*, 393 Fed. Appx. 235, 237 (5th Cir. 2010)(citation omitted). The Court does "not consider 'the correctness of the plaintiff's version of the facts.'" *Atteberry v. Nocona Gen. Hosp.*, 430 F.3d 245, 251-52 (5th Cir. 2005)(citations omitted). Dismissal "is inappropriate 'unless the plaintiff would not be entitled to relief under any set of facts or any possible theory that he could prove consistent with the allegations in the complaint.'" *Id.* (citation omitted).

### II. THE DISTRICT COURT PROPERLY DENIED QUALIFIED IMMUNITY BASED ON THE APPLICABLE TEST.

To defeat Appellants' qualified immunity defense, Appellees need only plead "sufficient facts to make it plausible that" Appellants: (1) "committed a constitutional violation under current law;" and (2) their "actions were objectively unreasonable in light of the law that was clearly established at the time of the actions complained of." *Id.* at 253.

The question is simply whether the law gave Appellants "fair warning." *Barrow v. Greenville Indep. Sch. Dist*., 332 F.3d 844, 848 (5th Cir. 2003). A "case directly on point" is not required. *Morgan v. Swanson*, 659 F.3d 359, 372 (5th Cir. 2011). The Court "should search the relevant authorities both in circuit and out of circuit." *Barton v. Clancy*, 632 F.3d 9, 22 (1st Cir. 2011).

"[O]fficials can still be on notice that their conduct violates established law even in novel factual circumstances." *Hope v. Pelzer*, 536 U.S. 730, 741 (2002). *See Kinney v. Weaver*, 367 F.3d 337, 372 (5th Cir. 2004)(denying qualified immunity, despite lack of direct precedent, because officers showed "no relevant, legitimate interests" for their conduct while plaintiff presented a strong case for his First Amendment interests, and "[the Court's] cases show that it is entirely appropriate to deny qualified immunity when the balance of cognizable interests weighs so starkly in the plaintiff's favor."). This applies to Establishment Clause cases in particular. *E.g.*, *Am. Humanist Ass'n v. City of Ocala*, 2015 U.S. Dist. LEXIS 115443, at *37-39 (M.D. Fla. 2015)(lack of factually similar cases was not dispositive where the alleged conduct would clearly violate the Establishment Clause); *Am. Humanist Ass'n v. United States*, 63 F. Supp. 3d 1274, 1286-87 (D. Or. 2014)(same); *Ryan v. Mesa Unified Sch. Dist*., 64 F. Supp. 3d 1356, 1363 (D. Ariz. 2014)(same); *Rich v. City of Jacksonville*, 2010 U.S. Dist. LEXIS 143973 (M.D. Fla. 2010)(same).

Appellees amply demonstrated that both prongs are satisfied, based on cases directly on point and a strong body of persuasive cases (ROA.206-228), and the district court agreed, based on "the record, and applicable authorities." (ROA.249).

## III. APPELLANTS' LONGSTANDING PRAYER PRACTICE IS THE ONLY FOCUS OF THIS QUALIFIED IMMUNITY APPEAL.

Appellants grossly misconstrue the legal issue presented to this Court, asserting it is whether they are entitled to immunity because "[t]he Establishment Clause…does not prohibit student remarks, which may include prayer, to open school board meetings." (Br.ix). In their Statement of the Case and brief, Appellants continue to mislead the Court, presenting the practice as one of merely "permitting student speakers to offer remarks."(Br.1;7)(emphasis added). But the question is much more straightforward: whether the Establishment Clause prohibits school officials from selecting and inviting students to pray at school-sponsored activity (and relatedly, their participation in those prayers).

From at least 1997 until March 2015, Appellants were inviting and selecting (not merely "permitting") students to deliver prayer and *only* prayer at school board meetings and further, were participating in these *Board-initiated* prayers with students. (ROA.139-144). On the heels of AHA's letter, Appellants adopted a superficial change to include "one-minute" "student expression" in addition to "prayer."(ROA.46-47;142¶48;180)(Br.1;4;6-7;26).

The complaint seeks, *inter alia*, damages based upon the longstanding prayer-only practice, as well as injunctive relief against the practice as currently implemented. (ROA.146-48). Qualified immunity "would apply only to the claims for damages." *Johnson v. Epps*, 479 Fed. Appx. 583, 591 (5th Cir. 2012). And "[i]t 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). Since Appellees' damages stem from the *longstanding* practice, the Court need not determine the constitutionality of the practice as *currently* implemented. *See Doe v. S. Iron R-1 Sch. Dist*., 453 F. Supp. 2d 1093, 1099 (E.D. Mo. 2006)("defendants are not entitled to qualified immunity for the *past violations* of the [Establishment Clause]")(emphasis added).

Nonetheless, the policy as implemented remains unconstitutional, and the disingenuous 2015 maneuvers simply magnify Appellants' unconstitutional religious purpose to promote prayer in public schools. *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 316 (2000)(policy permitting uncensored student-led, student-initiated "invocation and/or message" at football games unconstitutional); *Jager v. Douglas Cnty. Sch. Dist*., 862 F.2d 824, 830 (11th Cir. 1989)("In choosing the equal access plan, the School District opted for an alternative that permits religious invocations, which by definition serve religious purposes"); *Doe v. Gossage*, 2006 U.S. Dist. LEXIS 34613, at *19-20 (W.D. Ky. 2006)(new policy

permitting uncensored student "remarks" was "nothing more than a poorly disguised attempt to ensure that prayer will continue").

## IV. THE PRAYER PRACTICE VIOLATES THE ESTABLISHMENT CLAUSE PURSUANT TO DECADES OF CONTROLLING AUTHORITY AND A ROBUST CONSENSUS OF PERSUASIVE AUTHORITY.

### A. Courts have clearly ruled that inviting or encouraging students to pray violates the Establishment Clause.

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 caselaw is "starkly" in Appellees' favor, making it "entirely appropriate to deny qualified immunity." *Kinney*, 367 F.3d at 371-374. (ROA.206-230). "The courts have *clearly ruled* that *inviting* or *encouraging* students to pray violates the First Amendment." *Herdahl v. Pontotoc Cnty. Sch. Dist*., 933 F. Supp. 582, 591 (N.D. Miss. 1996)(citing *Wallace v. Jaffree*, 472 U.S. 38 (1985); *Karen B. v. Treen*, 653 F.2d 897, 901-02 (5th Cir. 1981), *aff'd*, 455 U.S. 913 (1982); *Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274 (5th Cir. 1996))(emphasis

added).

The Supreme Court has held that "permitting student-led, student-initiated prayer" at voluntary school-sponsored events unconstitutionally endorses religion and coerces students to participate in religious activity. *Santa Fe*, 530 U.S. at 301-03, 308; *see also Lee*, 505 U.S. at 590-96. The Court recently reiterated that "[o]ur Government is prohibited from 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.

In *Santa Fe*, the Court ruled that a policy 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 this Court's finding that the prayers would be unconstitutionally school-endorsed *even if* "spontaneously initiated" because school "officials are present and have the authority to stop the prayers." *Doe v. Santa Fe Indep. Sch. Dist.*, 168 F.3d 806, 823 (5th Cir. 1999).

*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, 164-65 (5th Cir. 1993). The Supreme Court has issued numerous decisions "that prohibit[] prayer in the school classroom *or environs*." *Id.*(emphasis added).[2] The same is true of this Court. *See Doe v. Sch. Bd.*, 274 F.3d 289 (5th Cir. 2001)(statute authorizing prayer in classrooms); *Santa Fe*, 168 F.3d at 816; *Ingebretsen*, 88 F.3d 274 (student-led prayers at school-sponsored events); *Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402 (5th Cir 1995)(prayers preceding basketball games); *Duncanville*, 994 F.2d at 163; *Treen*, 653 F.2d 897 (voluntary classroom prayer); *Hall v. Bd. of Sch. Comm'rs*, 656 F.2d 999, 1003 (5th Cir. 1981)(permitting students to conduct morning devotional readings over public address system); *Meltzer v. Bd. of Pub. Instruction,* 548 F.2d 559, 574 (5th Cir. 1977)(en banc)(same).

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

(1) School board meetings, *infra* at 21;

(2) Athletic games and practices; *e.g.*, *Santa Fe*, *supra*, *Duncanville*, *supra*; *Borden v. Sch. Dist.*, 523 F.3d 153 (3rd Cir. 2008); *Jager*, 862 F.2d at 831; *Doe v.*

[2] *See Wallace*, 472 U.S. 38; *Sch. Dist. v. Ball*, 473 U.S. 373 (1985); *Stone v. Graham*, 449 U.S. 39 (1980); *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962); *Everson v. Bd. of Educ.*, 330 U.S. 1 (1947).

*Aldine Indep. Sch. Dist.*, 563 F. Supp. 883, 888 (S.D. Tex. 1982);

(3) Graduation; *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)("if the school had not censored the [religious] speech, the result would have been a violation of the Establishment Clause); *Cole v. Oroville Union High Sch.*, 228 F.3d 1092, 1104 (9th Cir. 2000)(same); *ACLU v. Black Horse Pike Reg'l Bd. of Educ*., 84 F.3d 1471, 1488 (3d Cir. 1996)(policy that "permits" prayer unconstitutional); *Harris v. Joint Sch. Dist.*, 41 F.3d 447, 454 (9th Cir. 1994), *vacated other grounds*, 515 U.S. 1154 (1995)("merely 'permitting' students to direct the exercises'" unconstitutional); *Workman v. Greenwood Cmty. Sch. Corp*., 2010 U.S. Dist. LEXIS 42813 (S.D. Ind. 2010); *Gossage*, 2006 U.S. Dist. LEXIS 34613; *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)(the "Supreme Court cases [] bar prayer from public school graduation ceremonies"); *Appenheimer v. Sch. Bd.*, 2001 WL 1885834, *6-9 (C.D. Ill. 2001)("allowing student-led prayer violates the First Amendment"); *Gearon v. Loudoun Cnty. Sch. Bd.*, 844 F. Supp. 1097, 1098-1100 (E.D. Va. 1993)("permitting prayer in a…graduation is a violation" even if "student-initiated, student-written and student-delivered"); *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); *see also Corder v. Lewis Palmer Sch. Dist.*, 566 F.3d 1219, 1231 (10th Cir. 2009); *Nurre v. Whitehead*, 580 F.3d 1087, 1098 (9th Cir. 2009);

(4) Student assemblies; *e.g.*, *Ingebretsen*, 88 F.3d at 277 (permitting "student-initiated" prayer at "non-compulsory" events, including "student assemblies" unconstitutional); *Nartowicz v. Clayton Cnty. Sch. Dist*., 736 F.2d 646, 647 n.1 (11th Cir. 1984)(school "may not authorize religion promoting assemblies"); *Collins v. Chandler Unified Sch. Dist*., 644 F.2d 759, 760-63 (9th Cir. 1981)(student-led, student-initiated prayers unconstitutional even though *students* controlled the agenda and assembly); and

(5) Award ceremonies; *M.B. v. Rankin Cnty. Sch. Dist*., 2015 U.S. Dist. LEXIS 117289 (S.D. Miss. 2015).

In addition, this Court and others have clearly held that school officials merely *participating* in student-led, student-initiated prayer is unconstitutional. *See Duncanville*, 70 F.3d 402; *Duncanville*, 994 F.2d at 163; *Treen*, 653 F.2d 897; *See also Borden*, 523 F.3d at 174 (coach silently bowing head while team prayed unconstitutional); *Holloman v. Harland*, 370 F.3d 1252, 1285 (11th Cir. 2004); *Doe v. Wilson Cnty. Sch. System*, 564 F. Supp. 2d 766, 795 (M.D. Tenn. 2008).

Indeed, courts have consistently held that prayer at *any government*-sponsored event, including for adults, violates the Establishment Clause (outside

the narrow legislative context). *See Mellen v. Bunting*, 327 F.3d 355, 367-69 (4th Cir. 2003)(military institute); *N.C. Civil Liberties Union v. Constangy*, 947 F.2d 1145, 1150 (4th Cir. 1991)(courtroom prayers); *Doe v. Village of Crestwood*, 917 F.2d 1476 (7th Cir. 1990)(village-sponsored festival); *Ocala*, 2015 U.S. Dist. LEXIS 115443, at *1 (M.D. Fla. July 2, 2015)(police-sponsored community prayer vigil); *Hewett v. City of King*, 29 F. Supp. 3d 584, 596, 636 (M.D.N.C. 2014)(mayor's participation in promoting a memorial "prayer ceremony"); *Newman v. City of East Point*, 181 F. Supp. 2d 1374 (N.D. Ga. 2002)("Mayor's Community Prayer Breakfast"). In *Hall v. Bradshaw*, 630 F.2d 1018, 1019-21 n.1 (4th Cir. 1980), 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."

The above cases are "sufficiently specific as to give the defendants 'fair warning.'" *Holloman*, 370 F.3d at 1278. Indeed, the challenged "conduct 'lies so obviously at the very core of what the Establishment Clause prohibits that the unlawfulness of the conduct'" would be readily apparent to Appellants *even in the absence* "'of fact-specific law.'" *Ocala*, 2015 U.S. Dist. LEXIS 115443, at *37-39 (denying qualified immunity for novel police prayer vigil)(citations omitted). As "'the quintessential religious practice', the state cannot advance prayer activities

without the implication that the state is violating the Establishment Clause." *Id.* (citation omitted).

Because "[n]o factually particularized, pre-existing case law was necessary for it to be obvious" that *inviting* and *selecting* students to deliver prayers in a school activity "would violate the Establishment Clause," *id.*, and because there is ample particularized controlling precedent, Appellants' immunity defense is particularly farfetched. *See Herdahl*, 933 F. Supp. at 591 (citing controlling cases as of 1996 for notion that "[t]he courts have *clearly ruled* that *inviting* or *encouraging* students to pray violates the First Amendment")(emphasis added).

Nothing Appellants presented demonstrates that "the instant case materially differs from this long-established line of cases." *Duncanville*, 994 F.2d at 165. Their assertion of "rights of speech, association, and free exercise…cannot withstand analysis. Acceptance of [their] argument would produce an unwieldy result foreclosed by precedent." *Id.*

### 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*. Under the *Lee* "Coercion Test," "school-sponsored religious activity is analysed to determine the extent, if any, to which it has a coercive effect on students." *Id.* 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.

As shown below, the Prayer Practice is unconstitutional pursuant to *each* test. It clearly "would *not* survive the *Lemon* test." *Doe v. Tangipahoa Parish Sch. Bd*., 473 F.3d 188, 197 (5th Cir. 2006), *vacated on standing grounds*, 494 F.3d 494 (5th Cir. 2007)(en banc). 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. Moreover, contrary to Appellants' primary defense, their prayers constitute, as a matter of well-settled law, government speech. *See Santa Fe*, 530 U.S. at 302-03, 310-15 (student-led, student-initiated prayers and messages were "not properly characterized as 'private' speech.").

### C. School board prayer does not fall within the extremely limited "legislative prayer" exception.

Appellants argue that the traditional Establishment Clause tests applicable to public schools do not govern their longstanding practice of inviting students, and

only students, to deliver prayers, at School Board meetings. Rather, they claim 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.5;12-15;20-25)(ROA.188-94;233;235-37;240-41). Yet, in asserting, repeatedly, that the prayers constitute private speech (their *primary* argument), they rely exclusively on several nonbinding and abrogated graduation prayer cases (governed by *Lemon*).(Br.7-8;11;15-19)(ROA.182-85;234). Appellants cannot have it both ways.

Regardless of the test employed, *every* federal appellate court that has addressed the issue of school board prayers, including this Court, has concluded that such prayers are unconstitutional. *See Doe v. Indian River Sch. Dist*., 653 F.3d 256 (3d Cir. 2011); *Tangipahoa*, 473 F.3d at 197, 203 n.2; *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)(school board prayers unconstitutional).

**1. The legislative exception does not apply to public schools.**

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. 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.

Nor does it apply to any other governmental context. *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*, 2015 U.S. Dist. LEXIS 115443, at *28 & n.8 (police department); *Newman*, 181 F. Supp. 2d at 1378-80 (mayor's community breakfast); *Hewett*, 29 F. Supp. 3d at 629-31 (city's memorial events). The "Supreme Court has not yet extended the rule of *Marsh* and *[Greece]* to nonlegislative 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]*." *Id.*

The legislative exception is specifically 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). Even while this appeal was pending, a court made abundantly 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 Jager*, 862 F.2d at 828-29, n.9 (*Marsh* "has no application to" school prayers); *Lundberg*, 731 F. Supp. at 346 ("the *Marsh* exception is not controlling" to graduation prayer).

Courts have also found the legislative exception inapposite to other school board activity. For instance, in *Smith v. Jefferson Cnty. Bd. of Sch. Comm'rs*, 788 F.3d 580, 587-89 (6th Cir. 2015), the court noted that *Greece* found the legislative exception inapplicable to school boards and thus held, "*Greece* does not impact our approach to the case before us." *See also 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 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] has treated legislative prayer differently from prayer at school events.")).

Not a single appellate court has *held* that *Marsh/Greece* is applicable to school board prayers. Of the four appellate courts that have decided such cases, two *affirmatively held Marsh* did not apply (Third and Sixth), while the Fifth and Ninth *did not reach the issue*. The *Chino Valley* court agreed, observing as Appellees did below (ROA.209-213): "The only two circuit courts to address this question have soundly, and after detailed analysis, concluded that school board

prayer does not qualify for the legislative exception." 2016 U.S. Dist. LEXIS 19995, at *31-32. Appellants "offer no contrary authority on the subject." *Id.* Instead, they *completely ignore* the "Third and Sixth Circuits." *Id.*

The Sixth Circuit, the first to rule, 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 though its practice expressly did not allow prayer by students, but rather adult members on a rotating basis, thus making it more akin to a legislative practice. 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 (emphasis added).

The Ninth Circuit merely assumed, expressly without deciding, that *Marsh* applied, and still found the practice unconstitutional. *Bacus*, 52 Fed. Appx. at 356 ("We need not determine whether prayers at school board meetings are more like prayers in state legislatures...or more like prayers in schoolrooms...[because] the invocations are unconstitutional."). In *Tangipahoa*, this Court adopted the Ninth Circuit's approach, but expressed doubts about *Marsh*'s applicability. 473 F.3d at 197-203 (citing *Bacus*). The Court repeatedly reiterated "this opinion *only assumes* that *Marsh* applies." *Id.* at 198-203 n.1(emphasis in original).

The district court 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. This 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, the Court recognized the "exception has been sparsely applied…[T]he Court has continued to define *Marsh*

as a narrow exception." *Id.* at 199.[3]

The District Court thus correctly determined *Tangipahoa* did not shield Appellants from immunity.(ROA.249-50). In any event, the Third Circuit subsequently and affirmatively ruled *Marsh* did not apply, in contrast to *Tangipahoa*, which did not reach this question. 653 F.3d at 280.

**2. *Greece* reaffirmed that the Legislative Exception is inapplicable to public schools.**

Appellants argue *Greece* "resolved" the issue of school board prayer, in their favor no less. (ROA.190)(Br.21). In truth, *Greece* "further supports the notion that the legislative exception is limited to houses of governance in the world of mature adults." *Id. Greece* upheld prayer given before a *town board*, by adult community members, not students, leaving "the school prayer cases, upon which *Indian River*, *Coles*, and [the district court] rely, undisturbed." *Id.*

Most centrally, *Greece* affirmatively reiterated 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 Justice Stevens' opinion striking down the practice in *Santa Fe*:

[3] Contrary to Appellants' argument (ROA.192-93)(Br.12), *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.*

> 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.* Appellants emphasize this very passage (ROA.236)(Br.25), overlooking the fact they exercise far *greater* control over their meetings and prayers than school boards in graduation cases. *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.").

Throughout *Greece*, the Court repeatedly emphasized that the audience impacted by its decision were adults. 134 S.Ct. at 1823, 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 both).

In sum, 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 *53-56.[4]

### 3. Appellants' practice is more egregious than any other school board prayer practice decided to date.

Appellants' actions are especially "unreasonable," as they have not cited a single case upholding a school board prayer practice, let alone a practice that involves young schoolchildren." *Atteberry*, 430 F.3d at 253. Appellants' practice is distinctly more problematic than *Tangipahoa* and the other school board cases, and is thus an even more compelling case to apply student prayer cases (i.e. *Santa Fe*), because Appellants invite students and students alone, to deliver prayers, rather than adult members of the community, as in a legislative prayer practice.[5]

Indeed, Appellants' longstanding practice is to invite elementary children to deliver prayers, 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*, this Court agreed with *Peck*, holding

[4] Even assuming, *arguendo*, the legislative exception were applicable, Appellants fail to justify the constitutionality of their sectarian prayers (ROA.140) between *Tangipahoa* (2006), finding sectarian prayers unconstitutional, and *Greece* (2014).

[5] The only court to *hold* a school board was a deliberative body was *Doe v. Tangipahoa Parish Sch. Bd*., 631 F. Supp. 2d 823 (E.D. La. 2009), and even that court refused to uphold the practice. Moreover, the policy did not involve prayers by *school-invited students*, but rather, a rotating roster of adult clergy.

that "'elementary students are different'" in "the Establishment Clause context." 659 F.3d at 382 (citation omitted). *See also Berger v. Rensselaer Cent. Sch. Corp*., 982 F.2d 1160, 1170 (7th Cir. 1993)("we must be even more worried about the pressures on ten- and eleven-year-old fifth graders").[6]

It "takes little imagination or legal expertise to put the principles addressed above together and conclude" the Prayer Practice "constitutes a violation of the Establishment Clause." *Summers v. Adams*, 669 F. Supp. 2d 637, 670 (D.S.C. 2009).

## V. THE PRAYER PRACTICE VIOLATES THE ESTABLISHMENT CLAUSE UNDER THE APPLICABLE TESTS.

The Prayer Practice clearly fails "the *Lemon* test." *Tangipahoa*, 473 F.3d at 197. *See Snyder v. Murray City Corp*., 159 F.3d 1227, 1232 (10th Cir.1998)("the kind of legislative prayers at issue in *Marsh* simply would not have survived the traditional Establishment Clause tests"). Applying *Lemon*, this Court expressly held that "allowing a student-selected, student-given, nonsectarian, nonproselytizing invocation" at a school-sponsored event is unconstitutional. *Santa Fe*, 168 F.3d at 809, *affirmed*, 530 U.S. at 308.

[6] Appellants make much of *Greece dicta* about "*high school* athletes" and Justice Alito's *concurring* remark: "Nor is there anything unusual about the *occasional* attendance of students[.]"(ROA.237)(Br.26). However, there is nothing *occasional* about student attendance here; it is the *sine qua non* of their practice.

### A. The Prayer Practice lacks a primary 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). This secular purpose must be the "pre-eminent" and "primary" force driving the government's 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 test is violated where "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,'" an "administrator's intent to facilitate or encourage prayer in a public school is *per se* an unconstitutional intent." *Holloman*, 370 F.3d at 1285.

Where, as here, a school policy "permits religious invocations which by definition serve religious purposes," it "cannot meet the secular purpose prong." *Jager*, 862 F.2d at 830. The Supreme Court affirmed this Court's holding that policies intended to permit "student" prayers during school-sponsored activity have an "obviously religious purpose." *Treen*, 653 F.2d at 901. *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); *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 ("the purpose of an official school prayer 'is plainly religious in nature.'").

**1. Appellants have failed to satisfy their burden.**

Appellants advanced no secular purpose in their motion. (ROA.170-196). After Appellees pointed this out (ROA.214-15), Appellants asserted – in single sentence no less – as they do here, that it "is clear that remarks to open a school board meeting serve 'the legitimate secular purposes of solemnizing public occasions.'"(Br.27)(ROA.238).

But 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.*

The Third Circuit in *Black Horse* also held that a facially-neutral policy, which permitted un-censored, student-initiated, graduation prayers along with other messages, 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, in *Constangy*, the Fourth Circuit held that a judge's

prayer practice failed the purpose test despite the judge's argument that the practice served the secular purpose of "solemnifying" court proceedings because of the "intrinsically religious" nature of prayer. 947 F.2d at 1150.

Of course, this "new statement[] of purpose w[as] presented only as a litigating position[.]" *McCreary*, 545 U.S. at 871. Appellants apparently read the "cases as if the purpose enquiry were so naive that any transparent claim to secularity would satisfy it, and [it] would cut context out of the enquiry, to the point of ignoring history[.]" *Id.* at 863-64. It "will matter to objective observers whether [the new policy] follows on the heels of [policies] motivated by sectarianism[.]" *Id*. at n.14.

Here, as in *McCreary* and *Santa Fe*, "it makes sense to examine [Appellants'] latest action 'in light of [their] history of' unconstitutional practices." *Id*. at 873. Just as in *Santa Fe*, in light of Appellants' 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.'" 530 U.S. at 308-09 (citing *Lee*).

Appellants' decision to refuse to cease their practice, but to add a "one-minute" "Student Expression" (ROA.46-48;139-145;180)(Br.1;4), makes their religious purpose even more apparent. This shows Appellants are "simply reaching for any way to keep a religious [practice]." *McCreary*, 545 U.S. at 873. *See*

*Gossage*, 2006 U.S. Dist. LEXIS 34613, at *19-20.

The cases Appellants rely upon in arguing that solemnization satisfies "secular purpose" are not persuasive and do not trump the above authorities: a concurrence in a crèche case (*Lynch*); an abrogated and inapposite case involving graduation prayer (*Jones*)(*infra* at 51-53); *dicta* from a footnote in *Engel*, 370 U.S. 421, regarding "patriotic or ceremonial occasions," in *contrast* to prayer; and *Greece*, a legislative prayer case not subject to *Lemon* purpose, *supra.*(Br.27).

Significantly, the passage Appellants quote from *Jones v. Clear Creek Indep. Sch. Dist*., 977 F.2d 963, 967 (5th Cir. 1992)("*Jones*"), stated *in full*: "a law *may* pass *Lemon's* secular-purpose test by solemnizing public occasions, *yet still be stricken…under another test mandated by the Court*."(emphasis added). In any event, *Jones* has been abrogated, *infra*, and this Court subsequently and explicitly ruled in *Santa Fe*:

> SFISD argues that, as in *[Jones]*, its July Policy is designed to solemnize its graduation ceremonies…Here we simply cannot fathom how permitting students to deliver sectarian and proselytizing prayers can possibly be interpreted as furthering a solemnizing effect.

168 F.3d at 816. As to the football practice, this Court ruled that solemnization could not satisfy the secular purpose prong even as to nonsectarian prayers, finding *Jones* inapplicable. *Id.* at 823. The Supreme Court agreed "solemnization" was not a proper secular purpose. 530 U.S. at 306-09.

**2. The belated purpose is also 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. Appellants' "solemnization" purpose is not actually furthered by its policy as implemented in 2015. (Again, this 2015 maneuver has no bearing on Appellees' entitlement to damages under the longstanding prayer-only policy). In particular, Appellants assert that they have created an opportunity for students to "speak freely" for "one-minute" to "share their thoughts."(ROA.47-48)(Br.15;19;29).

If we accept the fiction that young students would 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 Appellants have chosen students, and generally young students, to deliver a "solemnizing" message, rather than adults, seriously belies their stated purpose.

Of course, the new "one-minute" limitation, 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 v. Duval Cnty. Sch. Bd.*, 250 F.3d 1330, 1346 (11th Cir. 2001)(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 Appellants have failed to explain how this new period for "Student Expression" is any different from its period for public comment, *supra.*

Indeed, "the policy, by its terms, invites and encourages religious messages" *because* the stated purpose "is 'to solemnize the event.'" *Santa Fe*, 530 U.S. at 306-07.(Br.27). As the Supreme Court observed:

> A religious message is the most obvious method of solemnizing an event. Moreover, the requirements that the message "promote good citizenship" and "establish the appropriate environment for competition" further narrow the types of message deemed appropriate, suggesting that a solemn, yet nonreligious, message, such as commentary on United States foreign policy, would be prohibited.

*Id.* The same is true with regard to the 2015 iteration.(ROA.47).

Appellants ask the Court "to pretend that [it] do[es] not recognize what every [BISD] student understands clearly – that this [2015] policy is about prayer." *Id.* at 315. They ask 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. The Prayer Practice has the primary effect of advancing and endorsing religion.

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

In *Santa Fe*, the Court merely "reaffirmed that the Establishment Clause…prohibits a school district from taking affirmative steps to create a vehicle for prayer to be delivered at a school function…This principle has been established for more than *thirty years*." *Chandler v. Siegelman*, 230 F.3d 1313, 1315 (11th Cir. 2000)(citing *Engel*)(emphasis added).

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). *See also Holloman*, 370 F.3d at 1288.

Even with the more hands-off policy in *Santa Fe*, which involved *student-selected* speakers, the Court decisively held that a policy allowing students to

deliver an *uncensored* student-initiated "invocation and/or message" at football games would unconstitutionally endorse religion. 530 U.S. at 296-97, 308-10, 316. Here, the prayers are *not* student-initiated and the students are selected by the Board. (ROA.139-140). Thus, "an objective observer" would inevitably "perceive [the prayers] as a state endorsement of prayer." *Id*.

This Court reached the same conclusion even if the prayers are "spontaneously initiated." *Santa Fe*, 168 F.3d at 823 (citing *Jager*, 862 F.2d at 832-33). The school argued that its policy was constitutional because it "permits but does not require prayer." *Id.* at 818 n.10. The Court rejected this, observing: "such 'permission' undoubtedly conveys a message…that the government endorses religion." *Id.* at 817-18. *See also Lassonde*, 320 F.3d at 984 (censorship of religious speech was necessary to avoid endorsement); *Treen*, 653 F.2d at 902; *Ingebretsen*, 88 F.3d at 277 (statute providing that "nonsectarian, nonproselytizing student-initiated voluntary prayer shall be *permitted* during…school-related student assemblies" unconstitutional)(emphasis added).

Necessarily, Appellants' longstanding practice of *prescribing* prayers, not merely "permitting" them, and *selecting and inviting* young students to deliver them, fails the effect test.

The Prayer Practice fails the Endorsement Test for the same reasons. *See id.* at 280; *Indian River*, 653 F.3d 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."). Appellants "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 religious prayers offered at the meetings. *Coles*, 171 F.3d at 385; *Indian River*, 653 F.3d at 289.

Appellants fail to justify their practice under the effect prong or endorsement test. Their analysis (or lack thereof) amounts to a single paragraph in which they rely on a single abrogated decision involving *graduation* prayer (*Jones*), *infra* at 51-53. Resting on *Jones*, they assert: "Allowing students to give remarks, which may be religious or include prayer, does not have the primary effect of advancing religion."(Br.28)(ROA.182;238). Again, this pertains at most only to the 2015-iteration, and not the longstanding prayer-only policy.

Regardless, *Jones* clearly does not stand for this sweeping proposition, but instead created "tightly circumscribed safe harbor" in the *specific context* of graduations. *Santa Fe*, 168 F.3d at 818. This Court expressly and repeatedly 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.").

### C. The Prayer Practice fosters excessive entanglement with religion.

The Prayer Practice also fosters excessive entanglement with religion,

failing *Lemon*'s third prong. *See Santa Fe*, 530 U.S. at 307; *Indian River*, 653 F.3d at 288; *Coles*, 171 F.3d at 385 (finding excessive entanglement where "the school board" "chose which member from the local religious community would give those prayers"); *Duncanville*, 70 F.3d at 406 (faculty's participation in "prayers improperly entangle[d] [the school] in religion"); *Treen*, 653 F.2d at 902; *Ingebretsen*, 88 F.3d at 279; *Mellen*, 327 F.3d at 375; *Collins*, 644 F.2d at 762; *Constangy*, 947 F.2d at 1151-52 (when "a judge prays in court, there is necessarily an excessive entanglement of the court with religion.").

In *Treen*, this Court held that a program that permitted student prayer during school activity violated the Establishment Clause pursuant to the entanglement prong. 653 F.2d at 902. That policy had "yet to be put into effect" and thus, unlike here, "the nature and extent of state involvement in religious activity [wa]s in some measure speculative[.]" *Id.* But the Court found entanglement "inevitable." *Id.* The law authorized a teacher to "select among any student volunteers" and invite them to pray and "enforce the one minute time limitation." *Id*.

Appellants' entanglement section relies entirely on *Jones* and erroneously assumes the 2015 maneuvers moot damages. At the same time, Appellants concede, "[u]nconstitutional entanglement has been shown where a school district directed that a prayer be given, chose a clergy member to deliver the prayer, and requested that the prayer be nonsectarian and non-proselytizing." (Br.28)

(ROA.239). Yet they fail to explain how the present case is materially different. Here, as in *Indian River*, "[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.

**D. The Prayer Practice is unconstitutional under the Coercion Test.**

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 (emphasis added). 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. *Id.* at 586. The Court reasoned that a school's "supervision and control…places public pressure, as well as peer pressure" on students. *Id.* at 593.

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.

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 prayers. *Santa Fe*, 530 U.S. at 301-02. Second, prayer clearly constitutes a formal "religious exercise." *See Treen*, 653 F.2d at 901. The final element is met because the prayers "oblige the participations of objectors." *Lee*, 505 U.S. at 593. If, as the Court held 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 not mandatory 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. *Id.* at 276-77.(ROA.142-43). The Third Circuit recognized that this would have additional implications, as a student "may feel especially coerced…to attend." *Id*. *See also*

*M.B.*, 2015 U.S. Dist. LEXIS 117289, at *16(same).

The salient facts here are identical to *Indian River*. The meetings take place on school property, and students regularly attend. (ROA.139-44). Other students attend meetings to be honored for their accomplishments, celebrate their extracurricular successes and perform alongside their classmates. (ROA.142-43).

In *Chino Valley*, the 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. Like *Indian River*, it also did not involve Board members selecting and inviting particular young students to deliver the prayers, as here.

The facts here with regard to coercion are therefore even more flagrant than *Chino Valley* and *Indian River* (ROA.139-140;144;146;218-19). *See M.B.*, 2015 U.S. Dist. LEXIS 117289, at *30 ("What fifth grader, who is lead [sic] to the Gideons by his teacher, would view as optional the receipt of a Bible thrust upon her by those Gideons? Certainly, no reasonable fifth grader."). In *Lund v. Rowan Cnty.*, 103 F. Supp. 3d 712, 728 (M.D.N.C. 2015), the court held that a post-*Greece legislative* practice was unconstitutionally coercive to *adults*, recognizing:

"an invitation from a government authority issued to the public often carries more weight and an expectation of compliance than other invitations."

Nothing in Appellants' brief compels a different conclusion. In fact, the *only* case Appellants rely upon in their coercion test section is *Greece* (Br.29)(ROA.239-40), but as noted extensively above, *Greece* expressly held that *Lee* did not govern legislative prayer.

### E. Appellants fail to meaningfully distinguish *Lee* and *Santa Fe.*

Appellants fail to meaningfully distinguish *Lee* and *Santa Fe*.(Br.29-30). Instead, they continue to reiterate: "the District has provided an opportunity [in 2015] for students to speak to open and solemnize the meeting."(Br.29)(ROA.239-40). The sole basis upon which Appellants attempt to distinguish *Santa Fe* is that it involved a *student* "election."(Br.29). But they utterly fail to explain why this makes their policy *more acceptable*. In fact, the Court rejected this very argument, reasoning:

> The distinction to which SFISD points 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.

*Santa Fe*, 168 F.3d at 823 (emphasis added).

The only noteworthy difference is that the practice here is more flagrantly unconstitutional. Unlike in *Santa Fe*, where students had full control over selecting the student-speaker and message, the longstanding practice here involved the

*Board selecting* the students and the content (prayers). Even in *Santa Fe*, 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.

The Supreme Court also made abundantly clear that the "election" was *only* relevant to its *facial* analysis, and even then, not dispositive. *Id.* at 316-17. The Court noted the "'myriad'" of ways in which the Establishment Clause is violated: "*One* is the mere passage by the District of a policy that has the purpose and perception of government establishment of religion. *Another* is the implementation of a governmental electoral process[.]" *Id.* at 313-14 (emphasis added). The Court stressed these are "different, yet *equally important*, constitutional injuries." *Id.* (emphasis added).

Noticeably absent from Appellants' brief is any mention, let alone discussion, of many highly persuasive cases including but not limited to *Coles*, *Black Horse*, *Lassonde*, *Collins*, *Cole*, *Corder*, *Nurre*, *Harris*, and *Gossage*. Despite *Indian River's* obvious relevance, as it is the most recent appellate decision on the issue of school board prayer, Appellants only cite it once and for irrelevant *dicta* on entanglement.(Br.28). Their 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). In *Harris*, for

example, it was "the senior students themselves, not the principal, who determine[d] every element of their graduations." *Id.* 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 (citing *Harris* and *Black Horse*).

## VI. APPELLANTS' PARTICIPATION IN PRAYERS WITH STUDENTS CONSTITUTES A SEPARATE ESTABLISHMENT CLAUSE VIOLATION.

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*). When a school official's "conduct endorses a particular religion…the activity infringes on the rights of others and must be prohibited." *Roberts v. Madigan*, 921 F.2d 1047, 1056-58, 1961 (10th Cir. 1990)(citation omitted)(teacher's display of religious books on his desk "had the primary effect of…endorsement" even though "passive and *de minimis*" and "discreet").

Controlling and persuasive authorities make clear that the Establishment Clause not only prohibits school officials from *initiating* prayer, but also from *participating* in student-led or student-initiated 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.

In *Duncanville*, this Court 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 unconstitutional endorsement of religion." *Id.*

The Third Circuit in *Borden* reached the same conclusion, finding that a coach's actions in *silently* taking a knee with players during student-led prayer was unconstitutional even if it was "intended to promote solidarity…and show respect for the players' prayers." 523 F.3d at 170.

Here, unlike in *Duncanville* and *Borden*, school officials are not merely participating in prayer with students but are *initiating* the prayers by inviting students to deliver them, making this case objectively more egregious. Furthermore, this case involves the school administration itself. *Cf. Bishop v. Aronov*, 926 F.2d 1066, 1073 (11th Cir. 1991)("a teacher's [religious] speech can be taken as directly and deliberately representative of the school").

This impermissible effect of religious endorsement is heighted by the fact that Appellants prominently publicize their Christian faith on the official District website. (ROA.29-35;138-139). Even "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).

Appellants argue their longstanding prayer practice is justified, and even compelled by, the Department of Education Guidance on prayer. (Br.19,n.6) (ROA.185). The *reverse* is true. The Guidance, dated 2003, states in clear terms:

> 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.[7]

The Guidance further states that the "Supreme Court's decisions over the *past forty years*" make clear that "school officials" may not "attempt to *persuade or compel students* to participate in prayer." (Emphasis added). This alone demonstrates that Appellants cannot have objectively believed the Prayer Practice, which encouraged prayer, did not violate the Establishment Clause.

Appellants also rely on *Bd. of Educ. v. Mergens*, 496 U.S. 226, 232-36, 249-53 (1990), but the Court there held that the Equal Access Act did not violate the Establishment Clause *because* it expressly forbids employees from "participating" in student religious activity such as prayer and thus "avoids the problems of 'the

[7] U.S. Dep't of Educ., Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools, 58 Fed. Reg. 9645 (Feb. 8, 2003), http://www2.ed.gov/policy/gen/guid/religionandschools/prayer_guidance.html.

students' emulation of teachers as role models.'" (citation omitted). *See Duncanville*, 994 F.2d at 164 (*Mergens* was inapposite).

## VII. SCHOOL BOARD PRAYERS ARE GOVERNMENT SPEECH.

Appellants' primary argument is that they are entitled to qualified immunity because the prayers delivered at their meetings, *at their behest*, constitute "private speech," rather than government speech.(Br.15-19)(ROA.182). This argument cannot seriously be maintained. For one, the entire argument ignores the longstanding practice, *giving rise to Appellees' damages*, where Appellants invited students to deliver prayers, not "share their thoughts" per the 2015 iteration.(ROA.47)(Br.15).

Furthermore, even 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 this Court's conclusion that giving "the ultimate choice to the students" does not eliminate school-sponsorship over the message. 169 F.3d at 817-22. *See also Corder*, 566 F.3d at 1229-31 (student's speech was "school-sponsored" even though there were "fifteen valedictory speakers").

What's more, *every court* that has ruled on the issue of school board prayer,

including this Court, has found such prayers constitute government speech, *regardless of who delivers them*. *See Tangipahoa*, 473 F.3d at 192-93; *Coles*, 171 F.3d at 373 (prayers "by a member from the local religious community"). And 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).

In the face of these cases, Appellants take the extreme position that they "may not prohibit students from praying" at their meetings without violating students' "free exercise of religion" and freedom of speech.(Br.4;7;15;**18**-19;27-28;30)(ROA.182;184;235-36;238;240)(citing *Chandler*). Of course 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. *E.g.*, *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.").

Appellants are "also wrong as a matter of law that the First Amendment interest in free expression…trumps the First Amendment prohibition on state-sponsored religious activity. The reverse is true." *Berger*, 982 F.2d at 1168. In *Duncanville*, this Court made clear that "free expression rights must bow to the Establishment Clause prohibition on school-endorsed religious activities." 70 F.3d at 406. *Accord Santa Fe*, 530 U.S. at 302.

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).[8] *But see Herdahl*, 933 F. Supp. at 589 (holding *even if* a school "established a limited open forum" "prayer…would still violate the First Amendment").

Appellants' argument that student prayers delivered at school-sponsored meetings, at their behest, are not government speech (Br.15-18), flips First Amendment jurisprudence on its head. Even prayers by *adult* citizens at legislative meetings constitute government speech, and this applies even when the legislators "do not compose or censor the prayers," have "no editorial control" and the prayers are delivered pursuant to a facially-neutral "all-comers" policy. *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.

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

It is axiomatic that the First Amendment rights of students in public schools are *not* "'coextensive with the rights of adults in other settings.'" *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988)(citations omitted). "[E]ducators 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, or that is "'unsuitable for immature audiences.'" *Carver Middle Sch. Gay-Straight Alliance v. Sch. Bd. of Lake Cnty.*, 2015 U.S. Dist. LEXIS 109489, at *36-37 (M.D. Fla. 2015)(quoting *Hazelwood*). *See also Lee*, 505 U.S. at 594-97 (concluding that *Engel* and *Schempp* "require us to distinguish the public school context" from a "legislature.").

## VIII. APPELLANTS RELY UPON INAPPOSITE, NON-BINDING, AND OVERRULED CASES.

Appellants rely almost exclusively upon inapposite, non-binding school prayer cases. Ironically, they rely most heavily upon two graduation prayer cases (*Jones* and *Adler*), while insisting this case differs materially from *Santa Fe*, *Lee*, and their progeny, specifically because it does not involve "a graduation, sporting event, or other extracurricular activity."(Br.8;11;16-17;27-28)(ROA.182-84;234;238).

### A. *Jones* is abrogated and inapplicable.

Appellants rely most extensively upon *Jones*, including for their claim that "[s]tudent speech is private speech[.]"(Br.8,n.3;16;27-28)(ROA.182-83;234;238).

Yet this Court in *Santa Fe* made explicit that *Jones* did not hold that the "students' graduation prayers constituted purely private speech." 168 F.3d at 823. In any event, *Jones* was abrogated by the Supreme Court's *Santa Fe* holding, and arguably, this Court's *Santa Fe* holding. *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").[9]

Further, *Jones* only decided the policy's facial constitutionality, leaving open the possibility for an as-applied challenge. 977 F.2d at 969 n.10. Subsequent caselaw makes clear that even if a policy is facially neutral, "[the court] cannot turn a blind eye to the practical effects of the invocations." *Joyner*, 653 F.3d at 348,354. 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). *See also Holloman*, 370 F.3d at 1284-91 (a "statute, as actually implemented," must "not have the effect of promoting or inhibiting religion.").

The fact that *Jones* refused to consider the policy as-applied, alone, put it diametrically at odds with *Santa Fe*, *supra. See* 530 U.S. at 307 ("The actual or perceived endorsement of the message, moreover, is established by factors beyond

[9] The *Santa Fe* dissent had *no doubts* the majority was overruling *Jones*. 171 F.3d at 1015-16 (Jolly, J., dissenting).

just the text of the policy."); *id.* at n.21 ("Even if the plain language of the October policy were facially neutral" it would still be unconstitutional); *id.* at 315 ("Our examination…[must] not stop at an analysis of the text of the policy.").

Even before *Santa Fe*, courts consistently rejected *Jones*, finding it incompatible with Supreme Court precedent. *See Black Horse*, 84 F.3d at 1482 (*Jones* "reached a result contrary to the one we reach today," but "[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*"); *Gearon*, 844 F. Supp. at 1100 (rejecting *Jones*' "reasoning"); *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").

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 Court refused to extend *Jones* to non-graduation events. *Id.* at 823. The Court explained:

> Regardless of whether the prayers are selected by vote or spontaneously initiated at these 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, School Board meetings are "frequently-recurring, informal, school-sponsored events." *Id*. (ROA.139). The Supreme Court recognized that "in later cases the Fifth Circuit *made it clear* that the *[Jones]* rule applied *only* to *high school graduations*." 530 U.S. at 299-300(emphasis added).

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

Appellants also rely on *Adler*, another non-binding Eleventh Circuit case.ROA.183;Br.17. Such reliance is misguided, as *Adler* conflicts with Fifth Circuit and Supreme Court precedent, is a graduation prayer case (which was previously *sui generis*), and is an outlier among the circuits.

*Adler* is entirely inconsistent with *Santa Fe.* The policy upheld in *Adler* 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." 250 F.3d at 1332. This type of majoritarian system was found unconstitutional in *Santa Fe.* 530 U.S. at 316. *See Workman*, 2010 U.S. Dist. LEXIS 42813, at *15. Four *Adler* justices in a strong dissent properly maintained that the policy was unconstitutional pursuant to *Santa Fe* for numerous reasons. *See* 250 F.3d at 1344-45 (Kravitch, J., Anderson, C.J., Carnes, and 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.").

Importantly, like *Jones*, *Adler* "*expressly* declined to consider…any as-applied objection." 250 F.3d at 1332 n.1 (emphasis added). Thus, *Adler* ignored *Santa Fe* by "considering only the terms of the policy itself." *Id.* at 1344-45 (Kravitch J., dissenting). *Adler* also misinterpreted *Santa Fe.* Critical to *Adler*'s conclusion was its mistaken contention that "*Santa Fe* only addresses one part of the *Lemon* test:…secular purpose." *Id.* at 1339. However, *Santa Fe* clearly held that the policy failed the effect prong of *Lemon* also. 530 U.S. at 305-10.

Consequently, courts confronted with facts *identical* to *Adler* have chosen not to follow it. *E.g.*, *Gossage*, 2006 U.S. Dist. LEXIS 34613, at *2-3, *10-14 (amended policy mirroring *Adler*, permitting uncensored "opening and/or closing message" was "unconstitutional in light of *Santa Fe*."). *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*.").

Even subsequent *Eleventh Circuit* cases effectively gut the core of *Adler*. *See Pelphrey*, 547 F.3d at 1267, 1271 (citizen prayers pursuant to *facially-neutral* policy were government speech, even though government did not "compose or censor the prayers."); *Holloman*, 370 F.3d at 1284-91 (contrary to *Adler*, a "statute, as actually *implemented*," must not have effect of promoting religion)(emphasis

added); *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").

*Adler* is also plainly distinguishable. The students here are selected by the Board (ROA.139-40;144), whereas *Adler* and even *Santa Fe* involved "a student speaker *not* chosen by the school." *Corder v. Lewis*, 568 F. Supp. 2d 1237, 1246 n.5 (D. Colo. 2008). This distinction is important. *See Santa Fe*, 530 U.S. at 306 (finding the two-step election process problematic *because* it involved "the school in the selection of the speaker"); *Corder*, 566 F.3d at 1229 n.5 ("*Adler* is distinguishable" because the speaker "was chosen by the school" based on her "4.0 [GPA]."). The 2015 iteration remains unconstitutional as it only extends to students in "leadership" such as student council (i.e., majoritarian election)(ROA.47). *See Workman*, 2010 U.S. Dist. LEXIS 42813, at *23-24 (distinguishing *Adler* because student was selected based on class rank).

Moreover, students were expressly asked to deliver a *prayer* and the programs were marked with "Invocation." In *Holloman*, the Eleventh Circuit clarified that in *Adler* "we upheld a school's policy…because of 'the complete absence…of code words such as 'invocation.'" 370 F.3d at 1289. Even the 2015 iteration would not survive *Adler* because it expressly allows "prayer" and is laden with content restrictions. (ROA.46-48)(Br.viii;ix;2-7;27-29). Finally, the practice

here involves very young children, unlike *Adler*, *supra* at 28-29.

### C. *Chandler* is inapposite.

Appellants rely on yet another plainly distinguishable Eleventh Circuit case, *Chandler,* which did not involve school board prayers, for their "private speech" argument.(Br.18)(ROA.184). However, 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). Appellees seek only to enjoin prayer at school-sponsored School Board Meetings, which constitute government speech, *supra.* The court even upheld the injunction that prohibited the "district from 'aiding, abetting, commanding, counseling, inducing, ordering, or procuring' *school organized* or *officially sanctioned* religious activity." *Id.*(emphasis added). *See Holloman*, 370 F.3d at 1287 ("School personnel may not facilitate prayer simply because a student requests or leads it.").

## IX. RATHER THAN CEASE A CLEARLY UNCONSTITUTIONAL PRACTICE, APPELLANTS HAVE PERSISTED IN VIOLATING THE ESTABLISHMENT CLAUSE.

Although the 2015 recharacterization of the Prayer Practice is not before the Court, Appellants' litigation-inspired maneuvers underscore their "reckless and callous indifference to the federally protected rights of others," *Smith v. Wade*, 461 U.S. 30, 56 (1983), elevating the need "to deter future egregious conduct." *Santamaria v. Dallas Indep. Sch. Dist*., 2006 U.S. Dist. LEXIS 83417, at *166-170

(N.D. Tex. 2006)(citation omitted)(punitive damages appropriate where principal's conduct "reflected a reckless indifference," and post-litigation conduct was probative that "she was not acting in good faith," including her actions in attempting to "mask the segregation" by "altering the graduation ceremony…from the way it was conducted in prior years.").[10]

The Board's "plenary control over the" meetings makes "it apparent" that prayers delivered at their meetings will continue to bear "the imprint of the District." *Cole*, 228 F.3d at 1103. Contrary to the Board'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." *Santa Fe*, 530 U.S. at 305, 303. As in *Santa Fe*, this policy permitting prayer fails "even if no…student were ever to offer a religious message." *Id*. at 296-97, 313-16. The "award of that power *alone*, regardless of the students' ultimate use of it, is not acceptable." *Id*. (emphasis added). *See also Wallace*, 472 U.S. at 41-42, 60 (unimplemented statute which authorized "a period of silence for 'meditation or voluntary prayer'" unconstitutional).

This Court in *Santa Fe* also made clear: "such "permission" undoubtedly conveys a message…that the government endorses religion." 168 F.3d at 817-18 (emphasis added). The Third Circuit in *Black Horse* also declined to "alter [its]

[10] The 2015 iteration may, however, give rise to a separate damage award. *E.g.*, *Chew v. Gates*, 27 F.3d 1432, 1437 (9th Cir. 1994).

analysis merely because [the policy] does not expressly allow proselytization," finding *Harris* "persuasive." 84 F.3d at 1475, 1479, 1483. *Harris* and *Black Horse* are "consistent with current Supreme Court precedent." *Appenheimer*, 2001 WL 1885834, at *8.

Appellants nevertheless suggest their 2015 litigation-inspired maneuvers are "not constitutionally infirm because they are entirely content-neutral and because student participation in the daily prayer is purely voluntary." *Treen*, 653 F.2d at 901-02. (ROA.46-48;182-183;237-39)(Br.15-16). But as this Court held in *Treen*, "[n]either of these features cures the constitutional defect." *Id.* 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.

Appellants' assertion that the prayers will not be government-endorsed because they will not be "prescreened" is also erroneous.Br.18-19. Such prayers are government-endorsed *even* if "spontaneously initiated." *Santa Fe*, 168 F.3d at 823. In *Santa Fe*, the Court expressly disposed of this very argument:

> [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. *See also Santa Fe*, 530 U.S. at 296, 298 n.6 ("the prayer was to be determined by the students, without scrutiny or preapproval"); *Corder*, 566 F.3d at

1229-30(same); *Harris*, 41 F.3d at 453-55(same); *cf. Tangipahoa*, 473 F.3d at 192-93 (prayers were "of their own *unrestricted choosing*")(emphasis added). In *Lassonde* and *Cole*, the Ninth Circuit "did not hold that, in censoring the [religious graduation] speech, the school had done more than what was required; rather, [it] held that the steps taken were 'necessary'" to "avoid the appearance of government sponsorship of religion." 320 F.3d at 983-84 (emphasis added).

Furthermore, the purpose prong is violated regardless of the "possible applications of the statute." *Santa Fe*, 530 U.S. at 314. As discussed above, the policy continues to lack a secular purpose, made more evident by the 2015 actions, *supra* at pp.30-36.

Finally, these maneuvers do "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. In *Santa Fe*, the Court 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 310-12.

Even if Appellants could distance themselves from "sponsoring" the prayers, they "cannot sanction coerced participation in a religious observance merely by disclaiming responsibility[.]" *Black Horse*, 84 F.3d at 1482. In *Lassonde*, the Ninth Circuit made clear: "[a]lthough a disclaimer arguably distances school officials from 'sponsoring' the speech," they have "*no* means of preventing the coerced

participation of dissenters" other than prohibiting the prayers. 320 F.3d at 984-85 (emphasis added).

## X. THE PRAYER PRACTICE WOULD BE UNCONSTITUTIONAL EVEN IF THE "LEGISLATIVE PRAYER" EXCEPTION APPLIED.

While the legislative exception is inapplicable, it is noteworthy the 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. *See Lund*, 103 F. Supp. 3d 712, 719-734 (M.D.N.C. 2015); *Hudson v. Pittsylvania Cnty.*, 2015 U.S. Dist. LEXIS 69427, *3 (W.D. Va. 2015).

Nor does *Marsh/Greece* impose just one "constraint." (Br.23-24). 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.

Central to the Court's holding in *Greece*, as in *Marsh*, was the fact that the audience "for these invocations is not…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 1825-26. Conversely, Appellants concede their practice is about "religious expression in the public school," "student prayers at school-related functions." (ROA.182-83;185;221)(Br.11;17). "Invocation" was included on their public agendas. *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"). Appellants further assert the 2015 iteration is for students to "publicly speak," and "hone their public speaking skills," (ROA.185;241), requiring the "Expression" to honor "the participants, and those in attendance;…focusing the audience" (ROA.47), making evident this is not an "'an internal act' directed at the [Board's] 'own members.'" *Id*.

*Marsh*, as well as *Greece*, "warned that the selection of the person who is to recite the legislative body's invocational prayer" can "itself violate the Establishment Clause." *Snyder*, 159 F.3d at 1234. *See Pelphrey*, 547 F.3d at 1277-78 (selection process unconstitutional); *Hudson v. Pittsylvania Cnty.*, 2014 U.S. Dist. LEXIS 106401, at *4-7 (W.D. Va. 2014)(selection process unconstitutional post-*Greece*); *Jones v. Hamilton Cnty.*, 891 F. Supp. 2d 870, 886 (E.D. Tenn. 2012) ("a legislature may not select invocational speakers based on impermissible motives"); *Atheists of Fla., Inc. v. City of Lakeland*, 779 F. Supp. 2d 1330, 1343 (M.D. Fla. 2011), *aff'd in part*, 713 F.3d 577 (11th Cir. 2013).

"Because Board members 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 and the eve of litigation, "[t]here [was] no evidence of any prayers that represented a different faith or were secular in tone." *Id.*(ROA.142). For this reason alone, qualified immunity should be denied. *See Lakeland*, 779 F. Supp. 2d at 1343 ("if Plaintiffs' accusations that Defendant Fields executed a policy of categorically excluding non-Christians from…Meetings are true, then Defendant Fields will not be shielded…by qualified immunity.").

Finally, a legislative prayer practice is unconstitutional if it "betray[s] an impermissible government purpose," such as an "opportunity to proselytize." *Greece*, 134 S.Ct. at 1824-26. 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.

## XI. APPELLANTS' ACTIONS WERE OBJECTIVELY UNREASONABLE.

Appellees have unmistakably set forth a constitutional right as to which the law has been perfectly clear for decades but Appellants nevertheless violated, *supra*. *E.g.*, *Santa Fe*, 168 F.3d at 809; *Herdahl*, 933 F. Supp. at 591; *Aldine*, 563 F. Supp. at 885-87. Accordingly, Appellees satisfy the final qualified immunity prong.

Appellants' "argument that government officials are entitled to blanket qualified immunity in cases involving student prayer is untenable." *Ryan*, 64 F. Supp. 3d at 1363 (denying qualified immunity and despite school official's argument that "'[t]he law on student prayer is not established with sufficient clarity.'"). While Appellees acknowledge "Establishment Clause jurisprudence remains in a degree of flux," this is not "to say that there are no clearly established principles under the Establishment Clause." *Summers*, 669 F. Supp. 2d at 666-70. A "reasonable person with a basic understanding of Establishment Clause jurisprudence would easily have predicted that this proceeding would conclude with a determination that the [longstanding prayer practice] was unconstitutional." *Id.* Appellants recognized as much by making superficial changes to their practice.

Revealingly, numerous courts have denied qualified immunity in Establishment Clause cases, including in entirely novel circumstances, school prayer cases, and legislative prayer cases. *See Inouye v. Kemna*, 504 F.3d 705, 717 (9th Cir. 2007); *Holloman*, 370 F.3d at 1263 (teacher was "not even potentially entitled to summary judgment on qualified immunity grounds against [student's] Establishment Clause claims"); *Ocala*, 2015 U.S. Dist. LEXIS 115443, *37-39 (denying qualified immunity regarding community prayer, "'notwithstanding the lack of fact-specific law.'"); *Sundquist v. Nebraska*, 2015 U.S. Dist. LEXIS 104601, *21-22 (D. Neb. 2015); *Ryan*, 64 F. Supp. 3d at 1363; *United States*, 63 F.

Supp. 3d at 1286-1287 (denying qualified immunity to federal prison officials for refusing to authorize a Humanist study group, despite novelty of issue and no case directly on point); *Warrior v. Gonzalez*, 2013 U.S. Dist. LEXIS 165387, *27-28 (E.D. Cal. Nov. 19, 2013); *Lakeland*, 779 F. Supp. 2d at 1343; *Rich*, 2010 U.S. Dist. LEXIS 143973, at *15-16; *Pugh v. Goord*, 571 F. Supp. 2d 477 (S.D.N.Y. 2008); *Byar v. Lee*, 336 F. Supp. 2d 896 (W.D. Ark. 2004); *Hansen v. Ann Arbor Pub. Schs*, 293 F. Supp. 2d 780 (E.D. Mich. 2003); *Carlino v. Gloucester City High Sch.*, 57 F. Supp. 2d 1 (D.N.J. 1999), *aff'd*, 44 F. App'x 599 (3d Cir. 2002).

## CONCLUSION

For the foregoing reasons, Appellees ask the Court to affirm the District Court's order in its entirety.

Respectfully submitted,

March 7, 2016

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## CERTIFICATE OF SERVICE

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

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