UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA
Columbia Division

Matthew Alexander Nielson; J.Z., a Minor Under age 18 by his Parent & Guardian Michelle Stephens; D.M., a Minor Under age 18 by her Parent & Guardian Victoria Reed; and the Freedom From Religion Foundation, Inc., *Plaintiffs*, ~ *vs*. ~ School District Five of Lexington & Richland Counties, *Defendant*.	CA No. 3:12-cv-01427-CMC **PLAINTIFFS' MEMORANDUM IN SUPPORT OF SUMMARY JUDGMENT**

STATEMENT OF THE CASE

This is a religious freedom case arising under the First Amendment Establishment Clause and the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.

This case presents a textbook example of the need for, and continued vitality of, the Establishment Clause of the First Amendment to the United States Constitution, as applied to the states through the Fourteenth Amendment. The United States Supreme Court has repeatedly warned that "government may not *promote or affiliate itself with* any religious doctrine or organization." *See, e.g.*, *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 590 (1989) (emphasis added). This limitation on government action is based on the clear understanding of our founders that "a union of government and religion tends to destroy government and to degrade religion." *Engel v. Vitale*, 370 U.S. 421, 431 (1962).

This is an action to remedy deprivations, actual and imminent, under color of law, of individual rights secured to Plaintiffs by the aforementioned constitutional provisions. The Court

accordingly has subject matter jurisdiction pursuant to 28 U.S.C. § 1343(a)(3) and (4). The Court further enjoys jurisdiction to award costs and reasonable fees to a prevailing plaintiff under 42 U.S.C. § 1988. This is an also action for a declaratory judgment, pursuant to 28 U.S.C. § 2201. Venue in this division is proper under 28 U.S.C. § 1391(a) and (b) and Local Rule 3.01 because all parties resided in the division at pertinent times, and the events and omissions giving rise to the stated claims occurred in the District.

In the Second Amended Complaint, Plaintiffs seek nominal damages and injunctive and declaratory relief for injuries sustained as a direct and proximate result of state-sponsored prayers at school board meetings.

QUESTION PRESENTED

I. WHETHER A SCHOOL BOARD MAY OPEN ITS MEETINGS WITH RELIGIOUS PRAYERS UNDER THE MARSH V. CHAMBERS LEGISLATIVE PRAYER EXCEPTION OR WHETHER TRADITIONAL LEMON-TEST ESTABLISHMENT CLAUSE PRINCIPLES GOVERNING PRAYER IN PUBLIC SCHOOLS APPLY.

STANDARD OF REVIEW

Summary judgment is appropriate "if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). It is well established that summary judgment should be granted "only when it is clear that there is no dispute concerning either the facts of the controversy or the inferences to be drawn from those facts." *Pulliam Inv. Co. v. Cameo Properties*, 810 F.2d 1282, 1286 (4th Cir. 1987).

ARGUMENT

I. MAY A SCHOOL BOARD OPEN ITS MEETINGS WITH RELIGIOUS PRAYERS UNDER THE MARSH V. CHAMBERS LEGISLATIVE PRAYER EXCEPTION, OR DO TRADITIONAL LEMON-TEST ESTABLISHMENT CLAUSE PRINCIPLES GOVERNING PRAYER IN PUBLIC SCHOOLS CONTROL**?**

Because the Defendant is not a public deliberative body subject to the *Marsh v. Chambers*[1] legislative prayer exception, it must be enjoined from further religious activity.

A school board is not the same as a state legislature or a city council. Rather, it is by design and activity created solely for the governance and operation of a public school system. As such, school board meeting prayers are scrutinized for constitutionality under traditional Establishment Clause jurisprudence.

A. School Boards are not Public Deliberative Bodies, They are Administrative Agencies.

The Defendant urges this Court to be the first to affirmatively extend *Marsh* to public school boards and disregard decades of *Lemon v. Kurtzman*[2] jurisprudence. Although a number of courts have found themselves at the *Marsh-Lemon* crossroads, none have actually taken that daring leap.

The Defendant's argument teeters on a precarious assumption that it is a public deliberative body equivalent to a state legislature or the U.S. Congress. Defendant's theory that the Board is a deliberative body is a sort of, "if it looks like a duck and walks like a duck . . ." argument, offering several markers or traits that purportedly make it look like a legislature: The Board members are elected, they enjoy legislative immunity, the Board makes policy, is subject

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[1] 463 U.S. 783 (1983).

[2] 403 U.S. 603 (1971).

to the S.C. Freedom of Information and Open Meeting Acts, and finally, because the South Carolina General Assembly simply says so.

In reality, the Board is simply an administrative agency with traditionally separate legislative, executive and quasi-judicial powers within the bounds of its statutory authority, a fact reflected in its own written policies:

> *Policy BBA Board Powers and Duties*
> Purpose: To establish the basic legal structure in which the board operates.
> The law of the state requires district boards to discharge certain duties and confers upon them many legislative, judicial and executive powers.
> The board takes a broad view of its required functions.

(Dist. Pol. BBA, Joint Ex. B)

The mere fact that the Board exercises *some* limited legislative power *some* of the time does not magically transmute it into a fundamentally legislative deliberative body. It is hardly different from any other state agency or commission such as the Board of Dentistry, the Election Commission, or even the Department of Revenue.

The definition of "agency" in the S.C. Administrative Procedures Act is very broad: "'Agency' means each state board, commission, department, or officer, other than the legislature, the courts, or the Administrative Law Court, authorized by law to determine contested cases." S.C. CODE ANN. § 1-23-310 (2).

South Carolina law furthers reveals that every agency, except for individual officers and agency heads, is also a public body:

> "Public body" means any department of the State, a majority of directors or their representatives of departments within the executive branch of state government as outlined in Section 1-30-10, any state board, commission, agency, and authority, any public or governmental body or political subdivision of the State, including counties, municipalities, townships, school districts, and special purpose districts, or any organization, corporation, or agency supported in whole or in part by

> public funds or expending public funds, including committees, subcommittees, advisory committees, and the like of any such body by whatever name known, and includes any quasi-governmental body of the State and its political subdivisions, including, without limitation, bodies such as the South Carolina Public Service Authority and the South Carolina State Ports Authority.

S.C. CODE ANN.§ 30-4-20(a). Thus, every single political entity of the State is a public body, and the Defendant Board looks and walks like every other administrative and regulatory "duck" so to speak, save one crucial difference: Its pervasive involvement with impressionable schoolchildren.

The simple fact that Board members may enjoy immunity from suit while exercising legislative, as opposed to executive or administrative functions, also lacks any juridical magic in this case. "[I]f legislators of any political subdivision of a state function in a legislative capacity, they are absolutely immune from being sued under the provisions of § 1983." *Bruce v. Riddle*, 631 F.2d 272 (4th Cir. 1980). In this respect, the Board members are on no different footing than the members of the S.C. Board of Veterinary Medical Examiners.

Finally, the Board is not the type of deliberative body contemplated by *Marsh* simply because the General Assembly declares so by legislative fiat.[3] Defendant places much reliance on its prayer policy and the state prayer statute. Plaintiffs attack the provisions of neither, for they are at best, peripheral to the discussion of whether school board prayer is lawful under federal law. The only value in acknowledging either is that by simple virtue of their existence, they evince the Defendant's staunch commitment to advancing state-sponsored religion, despite massive federal authority to the contrary. However, thanks to the Supremacy Clause,[4] South

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[3] S.C. CODE ANN. § 6-1-160.

[4] U.S. Const. art. VI § 2.

Carolina cannot summarily, statutorily immunize itself against what it views as unfavorable remedial Constitutional jurisprudence.

B. Marsh Recognized a Historical Exception That is Inapplicable in the School Prayer Context.

The Defendant has purposely defined itself as a public deliberative body[5] in an effort to shield its opening prayers from scrutiny under *Lemon v. Kurtzman,* 403 U.S. 602 (1971) by invoking the protection of *Marsh v. Chambers,* 463 U.S. 783, (1983), where the Supreme Court held that Nebraska's practice of opening legislative sessions with a prayer was not a violation of the First Amendment's Establishment Clause. However, "*Marsh*, . . . itself is basically a historical aberration." *Coles v. Cleveland Board of Education,* 171 F.3d 369, 383 (6th Cir. 1999), and "a historical exception to the mainstream," *Id*. at 377. *See also*, *Town of Greece v. Galloway*, 134 S.Ct. 1811, 1819 (2014): "[Marsh] teaches instead that the Establishment Clause must be interpreted 'by reference to historical practices and understandings.'"

In *Coles*, the Sixth Circuit found, in circumstances dramatically similar to this case, that school boards were distinct from legislative bodies, and thus board prayers should be analyzed under school prayer case law, *ergo* the *Lemon* test.

Likewise, in a case virtually identical to the one at hand, the Third Circuit recently rejected a *Marsh* analysis of school board prayers in *Doe v. Indian River School Dist*., 653 F.3d 256 (3d. Cir. 2011), relying in part on the Fourth Circuit's reasoning in *Mellen v. Bunting*, 653 F. 3d. at 289: "These circumstances are akin to those considered by the Fourth Circuit in *Mellen v.*

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5 The Board relies on that portion of S.C. CODE ANN. § 6-1-160, stating in pertinent part that, "'Deliberative public body' means . . . a school district . . ." The viability of this statute is not at issue in this case, however it would most surely be held unenforceable under a Supremacy Clause analysis.

Bunting . . . ," 653 F.3d. at 289.

It is no surprise that courts across the country have treated *Marsh* as a narrow exception to the traditional *Lemon* analysis. *See, e.g., Edwards v. Aguillard*, 482 U.S. 578, 583, n.4 (1987) ("The *Lemon* test has been applied in all cases since its adoption in 1971, except in *Marsh*"); *Atheists of Fla., Inc. v. City of Lakeland*, 713 F.3d 577, 590 (11th Cir. 2013) (the "Supreme Court has not extended the *Marsh* exception"); *Joyner v. Forsyth County*, 653 F.3d 341, 349 (4th Cir. 2011) ("'the exception created by *Marsh* is limited'") (citation omitted); *Card v. City of Everett*, 520 F.3d 1009, 1014 (9th Cir. 2008) ("*Marsh* . . . should be construed as carving out an exception to normal Establishment Clause jurisprudence.") (internal quotation omitted); *Pelphrey v. Cobb County*, 547 F.3d 1263, 1276 (11th Cir. 2008) ("the Supreme Court has never expanded the *Marsh* exception"); *Coles*, 171 F.3d 369, 376, 379) ("the unique and narrow exception articulated in *Marsh*"); *Jager v. Douglas County Sch. Dist.*, 862 F.2d 824, 829, n.9 (11th Cir. 1989) ("*Marsh* created an exception to the *Lemon* test only for such historical practice."); *Katcoff v. Marsh*, 755 F.2d 223, 232 (2d Cir. 1985) (referring to *Marsh* as an "exception" to *Lemon*); *Weisman v. Lee*, 908 F.2d 1090, 1094-96 (1st Cir. 1990) (Bownes, J., concurring) (twice referring to "the exception to [*Lemon*] delineated in *Marsh*."); *Bats v. Cobb County*, 410 F. Supp. 2d 1324, 1328 (N.D. Ga. 2006) (*Marsh* is an "exception"); *Glassroth v. Moore*, 229 F. Supp. 2d 1290, 1306 (M.D. Ala. 2002) (same); *Metzl v. Leininger*, 850 F. Supp. 740, 744 (N.D. Ill. 1994) (referring to "*Marsh* court's narrow 'historical exception' to traditional Establishment Clause jurisprudence."); *Albright v. Board of Educ. of Granite School Dist.,* 765 F. Supp. 682, 688 (D. Utah 1991) (*Marsh* is an "exception"); *Lundberg v. West Monona Community School Dist.,* 731 F. Supp. 331, 346 (N.D. Iowa 1989) (explaining that the plaintiffs sought to "escape the Lemon

test by invoking the *Marsh* exception" and concluding that "the *Marsh* exception is not controlling."); *Jewish War Veterans v. United States*, 695 F. Supp. 3, 11, n.4 (D.D.C. 1988) ("[T]he Supreme Court has applied the *Lemon* framework in all but one establishment clause case. The exception was *Marsh*."); *Blackwelder v. Safnauer*, 689 F. Supp. 106, 142, n. 38 (N.D.N.Y 1988) (the "*Lemon* test has been applied by the Supreme Court in all cases subsequent to its formulation with one exception. In *Marsh* . . . the Court carved out a narrow exception to the prohibitions of the establishment clause"); *cf. Marsh*, 463 U.S. at 796 (Brennan, J., dissenting) ("the Court is carving out an exception to the Establishment Clause.").

In *Town of Greece*, The Supreme Court explains that *Marsh* did not actually carve out an "exception" to any of the formal tests that have traditionally structured Establishment Clause jurisprudence. Instead,

> The Court in *Marsh* found those tests unnecessary because history supported the conclusion that legislative invocations are compatible with the Establishment Clause. The First Congress made it an early item of business to appoint and pay official chaplains, and both the House and Senate have maintained the office virtually uninterrupted since that time.

134 S.Ct. at 1818. That being said, the practical effect remains the same.

Marsh does not apply to the public school environment, and *Town of Greece* does not extend it into that realm. In fact, it does not expand *Marsh* at all: "The Court's inquiry, then, must be to determine whether the prayer practice in the town of Greece fits within the tradition long followed in Congress and the state legislatures." 134 S.Ct. at 1819, and "The inquiry remains a fact-sensitive one that considers both the setting in which the prayer arises and the audience to whom it is directed." *Id*. at 1825. "As we all recognize, this is a 'fact-sensitive' case." *Id*. at 1838 (Breyer, J., dissenting). "The facts here matter to the constitutional issue; indeed, the majority

itself acknowledges that the requisite inquiry—a 'fact-sensitive' one—turns on 'the setting in which the prayer arises and the audience to whom it is directed.'" *Id*. at 1851 (Kagan, J., dissenting). *Town of Greece* is therefore confined to its own facts and does not expand *Marsh*. Likewise, it leaves *Coles v. Cleveland Board of Education* and *Doe v. Indian River School District* undisturbed and forcefully intact. If *Town of Greece* means anything to this case, it means that it must be decided upon its own facts, which are strikingly similar to those in *Coles* and *Indian River*, the bellwether cases for controversies of this sort.

The historical aspect of *Marsh* is worthy of study. Deference to longstanding tradition provides the backbone for *Marsh* in its recognition of "Nebraska's practice of over a century, consistent with two centuries of national practice . . . ." 463 U.S. at 790. Considering that the Establishment Clause was incorporated into the Fourteenth Amendment at the late date of 1947 in *Everson v. Board of Education,*[6] it can be fairly said that some limited forms of legislative prayer were grandfathered in under the Establishment Clause by the *Marsh* Court.

The Board prayers at issue here should not enjoy such deference. While there is no bright line as to how long an unbroken tradition must persist before earning judicial deference, consider that Lexington Richland District Five was created post-*Everson* in 1951.[7] The state prayer statute, S.C. CODE ANN. § 6-1-160, was enacted by 2008 S.C. Act No. 241, Section 2, effective May 27, 2008. And the present board prayer policy, upon which Defendant so heavily relies in advancing its position, was adopted only in August of last year, and in response to this lawsuit. The Defendant's official prayer activities simply lack the sort of historical taproot enjoyed by the Nebraska legislature that was acknowledged in *Marsh*.

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[6] 330 U.S. 1 (1947).

[7] *http://www.lexrich5.org/about.cfm?subpage=1*

The Supreme Court has explicitly treated school environments as a "special" context requiring heightened constitutional protection. In *Edwards v. Aguillard,* the Supreme Court stated that the Establishment Clause issue involved the "special context of the public elementary and secondary school system" and that "[t]he Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools." 482 U.S. 578, 583, 584 (1987)(Striking down law providing that teachers educate students on "scientific creationism"). In *Lee,* the Court made clear that "there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools." 505 U.S. 577, 592. Justice Kennedy explained:

> What to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices, in a school context may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy.

Id. Demonstrative of the heightened protection in schools, the Supreme Court has long recognized elevated vigilance in reviewing religious practices on public school grounds where impressionable children are in attendance.[8] It is under this framework that the prayers by the Board of Trustees must be analyzed.

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[8] It is well settled that school districts may not lead students in prayer. For over five decades, the Supreme Court has struck down prayer in public schools. *See, e.g., Engel v. Vitale,* 370 U.S. 421 (1962) (declaring prayers in public schools unconstitutional); *Abington Township Sch. Dist. v. Schempp,* 374 U.S. 203 (1963) (declaring unconstitutional devotional Bible reading and recitation of the Lord's Prayer in public schools); *Wallace v. Jaffree,* 472 U.S. 38 (1985) (overturning law requiring daily "period of silence not to exceed one minute … for meditation or daily prayer."); *Lee v. Weisman*, 505 U.S. 577 (1992) (ruling prayers at public high school graduations an impermissible establishment of religion)*; Sante Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) (striking down a school policy that authorized students to vote on whether to hold a prayer at high school football games).

C. The Board's Activities and Role in Public Education Trigger the Application of Traditional Establishment Clause Jurisprudence.

As in *Doe v. Indian River,* several elements of District Five's actions take it outside the purview of *Marsh*: the pervasive attendance and participation of children in School Board meetings; the Board's essential role in public school education; the Board's history of promoting sectarian prayer; and *Marsh*'s unique historical context.

Children nearly *always* attend and participate in District Five meetings that take place during the school year. All of the plaintiffs in this case have attended Board meetings.

> I attended a Board meeting with my mom, Victoria Reed, on April 22, 2013. We attended, in part, to see if the Board was going to discuss any changes to its graduation prayer policy. We were at the meeting for more than an hour. I would estimate that about 50 other students were at the meeting. Many students attended because a school basketball team was being recognized by the Board that night.

(D.M. Decl. ¶ 6, Joint Ex. F) Likewise:

> I attended a Board meeting with D.M. on April 22, 2013. We attended, in part, to see if the Board was going to discuss any changes to its graduation prayer policy. There were many students in attendance at the meeting. There were Scouts there to earn merit badges, as well as more than a dozen elementary students in a troupe of dancers and a range of students from several academic levels for athletic recognition and support.

(Reed Decl. ¶ 5, Joint Ex. F).

> I attended a Board of Trustees meeting where the Board recognized the JROTC for receiving the Air Force Association Sword of Excellence. Jacob was a participant in the JROTC and we both attended the meeting, which I believe took place in the spring of 2011… I attended a Board of Trustees meeting on February 11, 2013, in part, to observe recognition of J.C., a friend of Jacob's, who received an award and was scheduled to receive recognition from the Board. Jacob and I wanted to attend to be supportive of J.C.

(Stephens Decl. ¶¶ 3, 4, Joint Ex. F).

As an Irmo High School student, I participated in the Junior ROTC. I attended a Board of

> Trustees meeting along with my fellow ROTC cadets. The ROTC was recognized by the Board for receiving the Air Force Association Sword of Excellence, which is given to the top JROTC unit in South Carolina . . . I attended a Board of Trustees meeting on February 11, 2013, in part, to observe my friend J.C. receive recognition from the Board. J.C. was scheduled to be recognized by the Board for an award she received as a "teen to watch." I wanted to attend to support my friend.

(Zupon Decl. ¶¶ 6, 7, Joint Ex. F) Finally,

> I feel that I have attended at least two. I know for a fact that I have attended one. I remember it distinctly…It was concerning the resignation or the possible resignation—basically the treatment of the Eddie Walker Gay Straight Alliance fiasco.

(Nielson Dep. 63:9-14, Joint Ex. C)

Students regularly attend meetings not just to observe the business of the Board but to receive honors during the "School Board Spotlight," which is scheduled for each meeting. The Board announces the awardees and formally recognizes them during meetings. These recognitions have included everything from state athletic champions to recognizing a student for making a prom dress out of Duct Tape. (Audio ex. 10, Joint Ex. G, (Audio ex. 2, Joint Ex. G)

Students invited to deliver the Pledge of Allegiance by the Board have included elementary school students. The Board Chair regularly asks these students questions after the Pledge of Allegiance is complete. (Audio Ex. *passim*). The Pledge and questions directed at students take place immediately after the Board prayer.

And finally, the District Five Board, through its policies and activities, is central to operating the public schools within its boundaries. The role of the District and its Board is clearly spelled out in its policy documents:

> *Policy AA School District Legal Status*
> Purpose: To establish the basic structure of public education in the district.
> The General Assembly of South Carolina has provided for school districts. A school district is an area of territory comprising a legal entity whose sole purpose is that of providing school education, whose boundary lines are a matter of public

record, and the area of which constitutes a complete tax unit.

(Dist. Pol. AA, Joint Ex. B) "The Board in its role of operating the public schools can hardly be compared to a state legislature. Inherent differences between the public school system and a session of a state legislature distinguish this case from *Marsh v. Chambers*." *Doe v. Indian River School Dist*., 653 F.3d at 271-72, *quoting Lee v. Weisman*, 505 U.S. 577, 596 (1992).

Meetings of the Board also serve as a forum for students to petition school officials on issues affecting their education. The Board meetings include a time for public comment. Simply put, students do not sit idly by as the board discusses various school-related issues. School Board meetings are therefore not the equivalent of galleries in a legislature where spectators are incidental to the work of the public body; students are directly involved in the discussion and debate at school board meetings. Most notably, although each session of the South Carolina General Assembly opens with a prayer, where spectators may not participate and must remain behind a barrier or in the gallery, General Assembly committee and subcommittee meetings, where the public does participate, are *never* opened with prayers.

The District Five Board's essential purpose in operating public schools is described clearly in its policy statements:

> *Policy AE Accountability/Commitment to Accomplishment*
> Purpose: To establish the board's vision for school district goals and objectives and the basic structure for developing a district performance-based accountability system and comprehensive plans.
> Mission statement
> The mission of School District Five of Lexington and Richland Counties, an educational community unified by an uncompromising commitment to excellence and strengthened in diversity, is to ensure that each student fulfills his or her potential and excels in a changing world by instilling integrity and virtue, stimulating critical and creative thinking, developing effective communicators and problem solvers, and fostering superior achievement and life long learning.
> The district will implement this vision by providing life-long learning

> opportunities that will develop the potential of all individuals and thereby improve the quality of life for all citizens of the district.

(Dist. Pol. AE, Joint Ex. B) This policy then goes on to enumerate specific operational and administrative goals for school operation.

> *Policy BA School Board Operational Goals*
> Purpose: To establish the basic structure for board operations.
> The board is committed to the education of students to the best of their individual abilities; to a constant awareness of the concerns and desires of the community regarding the quality and performance of the school system, with the board assuming an educational leadership role; to the employment of a superintendent who will see that the district maintains a position as an outstanding school system and under whose leadership the school personnel will carry out the policies of the board; and to the continued improvement of the district schools for the benefit of its students.
> Additionally, the board's goals are as follows:
> · to communicate the educational expectations and aspirations of the community through the formulation of policies which stimulate the learner and the learning process
> · to govern the school system in accordance with board policy
> · to provide leadership in order that the goals and objectives of the school system can be effectively carried out

(Dist. Pol. BA, Joint Ex. B) Here, the Board clearly asserts its leadership role in the direct operation of the educational system, once again distinguishing itself from a typical legislative body.

> *Policy BBA Board Powers and Duties*
> Purpose: To establish the basic legal structure in which the board operates.
> The law of the state requires district boards to discharge certain duties and confers upon them many legislative, judicial and executive powers.
> The board takes a broad view of its required functions.

(Dist. Pol. BBA, Joint Ex. B) The policy then enumerates specific actions and responsibilities inherent in its school leadership role, *e.g.*, "The board is responsible for adopting a budget which will provide the resources in terms of buildings, staff, materials, equipment and programs to

enable the school system to carry out its mission," and "The board has final authority within the law for the operation of schools."

> *Policy BEDH Public Participation at Meetings*
> Purpose: To establish the basic structure for public participation in board meetings.
> Appearance of individuals or groups before the board
> The board encourages the citizens of this community to appear and bring before the board any matter directed towards the improvement of the school system, and the agenda of the board provides for any individual or group to be heard on a subject pertaining to the policies or administration of the school system.

(Dist. Pol. BEDH, Joint Ex. B) Again, unlike a sitting legislative body, the public participates directly in the District's processes.

> *Policy IA Instructional Goals And Learning Objectives (Philosophy Of Education)*
> Purpose: To establish the board's vision for instruction in the district.
> The board recognizes that its primary responsibility is to provide an appropriate educational system in a democratic society . . .
> Students are the primary focus of all decisions.

(Dist. Pol. IA, Joint Ex. B) "Students are the primary focus of all decisions." This must certainly include the Board's most recent decision to formalize religious prayers at its meetings, assign the duty to its members to compose and deliver a prayer, and by written policy, prescribe and control the content of the prayer.[9] As stated in *Doe*, *supra*, "from a constitutional perspective it is as if a state statute decreed that the prayers must occur," *quoting Lee*, 505 U.S. at 587. That "Students are the primary focus of all decisions" is dramatically inconsistent with the Board's statement in its invocation policy that "The public invocation is for the benefit of the board." This disingenuous assertion is further betrayed by the fact that invocations have historically been recited only at public meetings on school grounds, and not at the special meetings held at district

[9] In stark contrast, the *Town of Greece* Court noted that the town board neither reviewed the prayers in advance nor provided guidance as to their tone or content. 134 S.Ct. at 1816.

offices. School children and their families are often included as subjects of the prayers. The prayer officiants also invite all in attendance to participate by saying "Let us pray" or by another call to collective prayer.

The Board's focus on students as central to its mission is clearly articulated in its basic policy documents:

> *Policy JA Student Policies Goals/Priority Objectives*
> Issued 3/10
> Purpose: To establish the board's vision for the goals and priority objectives of the district's policies pertinent to students.
> Through its policies that affect the lives of students, the board seeks to advance the following goals . . .

(Dist. Pol. JA, Joint Ex. B) It is patently clear that the student is the polar star of all board functions, and indeed its very existence. This is proper, is as it should be. However it leaves no room under the Establishment Clause for the type of public, state-sponsored proselytizing in which the Board has previously engaged and which is now officially sanctioned by the newly adopted policy. In fact, the mere existence of such a policy is constitutionally problematic.

Both the *Indian River* and *Coles* Courts undertook careful analysis of the function and role of their respective school boards, in deciding whether to apply *Marsh* or *Lee*, with the Third Circuit declaring, "regardless of whether the Board is a 'deliberative or legislative body,' we conclude that *Marsh* is ill-suited to this context because the entire purpose and structure of the Indian River School Board revolves around public school education," 653 F.3d at 278. The Sixth Circuit stated that "the practice challenged in this case does not neatly fall under the unique and narrow exception articulated in *Marsh*, because the school board is an integral part of the public school system," 171 F.3d at 376. The Court went on to say that, "Although meetings of the school board might be of a 'different variety' than other school-related activities, the fact remains

that they are part of the same 'class' as those other activities in that they take place on school property and are inextricably intertwined with the public school system. Moreover, there is no question that the Establishment Clause jurisprudence controls this case," *Id*. at 377, and, "To the extent that one sees this as a close case that could go either way, we find it wiser to err on the side of *Lee* and the long line of Establishment Clause jurisprudence that separates church and state in the context of the public school system, than to err on the side of *Marsh*, which itself is basically a historical aberration," *Id*. at 383.

There is also a single, stark phrase in *Marsh* itself that counsels against its expansion into the school prayer realm: "Here, the individual claiming injury by the practice is an adult, presumably not readily susceptible to 'religious indoctrination,' or peer pressure." 463 U.S. at 792 (citations omitted). Obviously, the *Marsh* decision might have been different had the complainant been a minor schoolchild, as in this case, and this was recognized again in *Town of Greece*: "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." 134 S.Ct. at 1823, and "Adults often encounter speech they find disagreeable . . . ." *Id*. at 1826.

In fact, the *Town of Greece* Court explicitly distinguished the case before it from seminal school prayer cases, stating that remaining silent or departing the room during an invocation or prayer does not "represent an unconstitutional imposition as to mature adults, who 'presumably' are 'not readily susceptible to religious indoctrination or peer pressure.'" *Id*. at 1827, *quoting Marsh* at 463 U.S. 792.

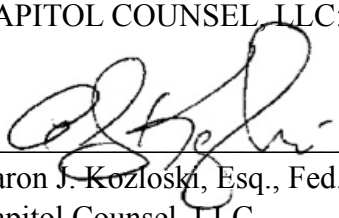
In the present matter, the facts bear such close similarity to those of both the *Doe* and *Coles* cases that the *Lemon* test and general school prayer jurisprudence must certainly apply.

CONCLUSION

Because the Defendant School District is not a deliberative public body, this case must be scrutinized under Establishment Clause jurisprudence, not *Marsh v. Chambers*.

Because the Board's meeting prayers lack a secular purpose, have the primary effect of promoting religion, and foster excessive entanglement between religion and state, the practice must be invalidated and the Defendant must be enjoined from engaging in further official religious activities, with costs and attorney's fees as complained of accordingly.

FOR THE PLAINTIFFS
CAPITOL COUNSEL, LLC:



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