No. 11-___

IN THE

Supreme Court of the United States

INDIAN RIVER SCHOOL DISTRICT, *et al.*,
Petitioners,

v.

JANE DOE and JOHN DOE, individually and as parents and next friend of JORDAN DOE and JAMIE DOE,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a school board's long-standing tradition of opening its monthly sessions with an invocation is consistent with the Establishment Clause.

PARTIES TO THE PROCEEDING

Petitioners are the Indian River School District, the Indian River School Board; Harvey L. Walls; Mark A. Isaacs; John M. Evans; Richard H. Cohee; Gregory A. Hastings; Nina Lou Bunting; Charles M. Bireley; Donald G. Hattier; Reginald L. Helms; M. Elaine McCabe, and their successors in office, in their official capacities as members of the Indian River School Board; Lois M. Hobbs, and her successors in office, in their official capacities as District Superintendents; and Earl J. Savage, and his successors in office, in their official capacities as Assistant District Superintendents. Respondents are Jane Doe; and John Doe, individually and as parents and next friend of, Jordan Doe and Jamie Doe.

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The Indian River School District and the other above-listed petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

INTRODUCTION

In an age where discontent with government is widespread, there are some legislative and deliberative public bodies that still command respect. The Indian River School Board is one such body. The ten members of this Board are charged with establishing and maintaining an educational system that meets the needs of more than 8,000 students and the demands of parents and other community members

who elect them. The Board's work has become even more challenging with increasing enrollment and decreasing budgets. Yet, the board members persevere – through long hours and without pay – because they understand that the education of our young is among the most important work any government undertakes.

The Indian River School Board meets once per month. In order to bring a sense of decorum to their proceedings, they begin each regular monthly meeting with the Presentation of Colors, followed by the Pledge of Allegiance, and then a short invocation offered by one board member on a rotating basis. According to the policy that governs this practice, the board member may offer a prayer or moment of silence, or other words of inspiration, according to his or her own conscience. The only restriction placed on the board member is that the offering must serve to solemnify the proceedings. Consistent with this Court's admonition in *Marsh v. Chambers*, 463 U.S. 783 (1983), if a board member chooses to offer a prayer, the invocation opportunity may not be used to proselytize in favor of one religion or to disparage another.

Although this Court has found legislative prayer – a time-honored tradition that routinely occurs at all levels of government – fully consistent with the Establishment Clause, the Third Circuit struck down the Board's practice because students might observe it. It made little difference to the Third Circuit that the Board is a legislative body in both form and function. The Third Circuit instead likened board meetings to a classroom or extra-curricular activity, and cast aside a long and meaningful tradition. This

Court should accept review of this matter to clarify the parameters of legislative prayer and to correct the Third Circuit's error.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App., *infra*, 3a-67a) is reported at 653 F.3d 256. The opinion of the district court (Pet. App., *infra*, 68a-119a) is reported at 685 F. Supp. 2d 524.

JURISDICTION

The judgment of the court of appeals was entered on August 5, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATEMENT

Respondents sued the Indian River School District and its school board in the United States District Court for the District of Delaware. They alleged that the Board's practice of opening its regular monthly proceedings with an invocation violated the Establishment Clause of the First Amendment. The district court granted summary judgment to petitioners, finding that the Board constitutes a deliberative body, to which *Marsh* applies, and that the Board's

practice did not violate the Establishment Clause. Pet. App. 119a. The Third Circuit reversed. Pet. App. 67a.

I. THE INDIAN RIVER SCHOOL BOARD IS A LEGISLATIVE BODY.

A. Indian River School District.

In 1969, the Indian River School District was formed through the consolidation of five different school districts. *See* C.A. App. at A0122; C.A. App at A0467. Currently, the District is divided into five separate electoral districts serving the towns of Selbyville, Frankford, Dagsboro, Gumboro, Fenwick Island, Bethany Beach, Ocean View, Millville, Millsboro, and Georgetown. *See* Del. Code Ann. tit. 14, § 1068(b) (2008). The District is composed of fourteen schools. *See* C.A. App. at A0125. The District has approximately 8,388 students and approximately 646 full-time teachers. *See* C.A. App. at A0125, ¶ 11. The District is governed by an elected ten-member school board. *See* Del. Code Ann. tit. 14, § 1068(a).

B. Indian River School Board.

1. Popular Election of Board Members.

Each of the five electoral districts within the District elects two board members. *See id.* § 1068(a); C.A. App. at A0431. Board members are elected by qualified electors of the five districts. *See* Del. Code Ann. tit. 14, § 1068(g). Board members swear the following oath before entering upon the duties of their office:

> 'I do solemnly swear (or affirm) that I will support the Constitution of the United States of America and the Constitution of the State of

> Delaware, and the laws of Delaware governing public education, and that I will faithfully discharge the duties of the office of school board member according to the best of my ability; and I do further solemnly swear (or affirm) that I have not directly or indirectly paid, offered or promised to pay, contributed, or offered or promised to contribute, any money or other valuable thing as consideration or reward for the giving or withholding a vote at the election at which I was elected to said office, so help me God (or so I affirm).'

See id. § 1053(a).[1] Each board member serves a term of three years. *See id*. § 1068(f).

2. Structure and Operations of Board.

The Board holds regular public meetings at least once per month. *See* Del. Code Ann. tit. 14, § 1048(a) ("Regular meetings of the school board shall be held each month during the year at the regular meeting

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[1] This oath is similar to the oath sworn by members of the Delaware General Assembly and all executive and judicial officers before entering upon the duties of their respective offices, which oath is set forth in the Delaware Constitution as follows:

> I, . . . (name) do proudly swear (or affirm) to carry out the responsibilities of the office of . . . (name of office) to the best of my ability, freely acknowledging that the powers of this office flow from the people I am privileged to represent. I further swear (or affirm) always to place the public interests above any special or personal interests, and to respect the right of future generations to share the rich historic and natural heritage of Delaware. In doing so I will always uphold and defend the Constitutions of my Country and my State, so help me God.

Del. Const. art. XIV, § 1.

place designated by the school board."). The Board also holds special meetings as needed. *Id.* § 1048(b) ("Special meetings of the school board may be held whenever the duties and business of the school board may require."). The Board performs numerous functions in governing the District, including, but not limited to, adopting the curriculum for each of the schools within the District; developing District-wide policies; selecting and purchasing textbooks; preparing reports required by the State Secretary of Education; appointing and dismissing District personnel; approving the use of District facilities; adjudicating significant student or employee disciplinary actions; levying taxes and adopting the District's annual budget; and monitoring the progress of construction projects. *See* C.A. App. at A0387-90, A0631, A0632-33, A0682. For the Board to transact any business at its regular monthly meetings, there must be a quorum consisting of a majority of the members of the Board. *See* Del. Code Ann. tit. 14, § 1048(c).

3. Setting Policy for District.

Among other functions, the Board develops and adopts District policies. Typically, policies emanate from the policy committee, which is a subcommittee of the entire Board. *See id.* § 1043 (school boards of the reorganized school districts "shall have the authority to determine policy and adopt rules and regulations for the general administration and supervision of the free public schools"); *see also* C.A. App. at A0125, ¶ 5. In addition to the board members, certain District personnel and community members serve on the policy committee. C.A. App. at A0125, ¶ 6. The policy committee meets separately from the full Board approximately once per month. C.A. App. at A0126, ¶ 7. In these meetings, the policy commit-

tee, among other things, studies proposed policies, analyzes the need for new policies, and prepares drafts of new policies. *Id.* In order for a new policy to be presented to the full Board for consideration, it must first be endorsed by the policy committee members. *Id.* The policy committee chair then presents the recommendations of the committee to the full Board. C.A. App. at A0126, ¶ 8. After a new policy is presented for adoption, the Board will conduct a public first reading of the proposed policy. C.A. App. at A0126, ¶ 9. At the next regularly scheduled board meeting, the Board will conduct a second reading of the proposed policy. *Id.*) After the second reading, the Board may vote to adopt the proposed policy. C.A. App. at A0126, ¶ 10. Approved policies are included in the Policy Manual.

4. Power to Levy Taxes and Authorize Expenditures.

The District, which acts through its elected Board, is empowered to levy and collect taxes for school purposes. *See* Del. Code Ann. tit. 14, § 1902 (stating that "[a]ny district may, in addition to the amounts apportioned to it by the Department of Education or appropriated to it by the General Assembly, levy and collect additional taxes for school purposes upon the assessed value of all taxable real estate in such district" except certain exempt real estate). The District fixes the rate of taxation based on the total value of all taxable property as shown on the county assessment list. *See id.* § 1916.

In addition to the money received through taxation, the District also receives appropriations from the General Assembly. *See id.* §§ 1701, 1702. The appropriations are for the support, maintenance and operation of the free public schools. *See id.* § 1702(a). The

District uses the appropriations for various purposes, including employing personnel, school costs (such as library resources), energy, and educational advancement. *See id.* § 1702. The Board also has other spending powers; for example, the Board must spend money for the maintenance of school property. *See* Del. Code Ann. tit. 14, § 1055 ("[The] school board shall make all repairs to school property, purchase all necessary furniture and provide for adequate heating and proper ventilation of the buildings."). It must also file a district report with the Department of Education, in which the Board is encouraged to include information on the expenditures, revenues, and business and financial transactions of the previous fiscal year. *See id.* § 1050.

5. Elected and Representative Body.

As members of an elected body, board members attempt to respond to constituents' needs. *See, e.g.*, C.A. App. at A0467 ("[Constituent feedback] is important to me because I represent these people and they elected me to make decisions at the Board level on their behalf."). As with other elected, deliberative bodies, constituent preferences play a role in the Board's decision-making. *See* C.A. App. at A0674 (testifying that if his constituents do not agree with his decisions, then "come election time[,] they are free to elect someone else"). In 1994, to ensure greater constituent feedback, the Board added a public comments segment to its regularly scheduled meetings. *See* C.A. App. at A0394 ("[I]t was important for people in the community to come and talk to us about things that was on their minds, concerns or anything like that or have input.").

II. INVOCATION PRACTICE AND POLICY.

A. Practice Prior to Adoption of Current Policy.

The tradition of opening school board meetings with an invocation to solemnify the proceedings predates the District itself. *See* C.A. App. at A0122, ¶¶ 3-4, 8 (stating, for example, Millsboro School Board opened its meetings with a prayer prior to 1969 consolidation); C.A. App. at A0923 ("My grandfather was on the school board when I was a young child in school, and they opened the meetings with prayer at that time, and that's over 50 years ago."). Since the formation of the District, the Board has opened each regular meeting with a prayer. (*See* C.A. App. at A0123, ¶ 8. This practice continued uninterrupted from the creation of the current district in 1969 to August 2011, when the Third Circuit issued its decision in this case. *See* C.A. App. at A0123, ¶¶ 8-9; C.A. App. at A0398; *see also* C.A. App. at A0878 ("For as long as I was a student, even back in Sussex Central High School, board meetings were always opened with a prayer."). The usual custom was for the board president to designate one person at each meeting to lead the group. *See* C.A. App. at A0399-A0400; C.A. App. at A0123. Historically, the Board did not place any restrictions relating to the content of the prayer. *See* C.A. App. at A0399; C.A. App. at A0123, ¶ 11.

B. Adoption of Board Policy.

In the summer of 2004, after receiving a complaint from Mona Dobrich (originally a plaintiff in this action, Ms. Dobrich has since dismissed her claims), the Board reviewed its policy of opening its regular board meetings with a prayer. *See* C.A. App. at A0742-45. On October 19, 2004, the Board formally adopted a

policy entitled Board Prayer At Regular Board Meetings ("Board Prayer Policy"). *See* C.A. App. at A0409. That policy provides:

> 1. In order to solemnify its proceedings, the Board of Education may choose to open its meetings with a prayer or moment of silence, all in accord with the freedom of conscience of the individual adult Board member.
>
> 2. On a rotating basis one individual adult Board member per meeting will be given the opportunity to offer a prayer or request a moment of silence. If the member chooses not to exercise this opportunity, the next member in rotation shall have the opportunity.
>
> 3. Such opportunity shall not be used or exploited to proselytize, advance or convert anyone, or to derogate or otherwise disparage any particular faith or belief.
>
> 4. Such prayer is voluntary, and it is among only the adult members of the Board. No school employee, student in attendance, or member of the community in attendance shall be required to participate in any such prayer or moment of silence.
>
> 5. Any such prayers may be sectarian or non-sectarian, denominational or non-denominational, in the name of a Supreme Being, Jehovah, Jesus Christ, Buddha, Allah, or any other person or entity, all in accord with the freedom of conscience, speech and religion of the individual board member, and his or her particular religious heritage.

C.A. App. at A0062.

C. Context of Board Prayer.

Each board meeting usually opens with a call to order and a roll call of the board members, after which the Board approves the agenda, has the Presentation of Colors, and recites the Pledge of Allegiance. *See, e.g.*, C.A. App. at A0342. Then, one board member will offer a prayer, moment of silence, or other solemnizing appeal in accordance with the policy. *See id*. This entire opening process usually takes less than a minute or two. *See, e.g.*, C.A. App. at A0124, ¶ 13. From there, the Board moves forward with the business at hand. *See, e.g.*, C.A. App. at A0342-48.

Since the adoption of the current Board Prayer Policy, customarily the board president offers a disclaimer between the Presentation of Colors and the prayer to ensure that any members of the public in attendance understand the purpose of the prayer policy. *See* C.A. App. at A0411. For example, on November 16, 2004, at the first board meeting following the policy's adoption, the board president made this statement:

> It is the history and custom of this Board that, in order to solemnize the School Board proceedings, that we begin with a moment of prayer, in accord with the freedom of conscience of the individual adult members of the Board. Further, such prayer is voluntary and just among the adult members of the School Board. No school employee, student in attendance or member of the community is required to participate in any such prayer or moment of silence.

See C.A. App. at A0349. Although the Board Prayer Policy itself does not require this disclaimer, since

November 16, 2004, a disclaimer has been read in conjunction with the opening prayer at each regular board meeting. *See* C.A. App. at A0411 (stating that, as board president, he has offered disclaimer at every meeting).

D. Non-Compulsory Nature of Prayer.

Although the Board Prayer Policy provides that the prayer will be offered by board members on a rotating basis, no board member is forced to pray or otherwise lead the board. *See* C.A. App. at A0992; *see also* C.A. App. at A0424 (stating that he has always declined to offer prayer or moment of silence based on personal preference). Moreover, the Board does not require members of the public to participate in the prayer. *See* C.A. App. at A0988 ("I have no expectation for the audience. . . . They can do whatever they wish."); C.A. App. at A0844 (describing the disclaimer portion of the Board Prayer Policy that states, "No school employee, student in attendance, or member of the community in attendance shall be required to participate in any such prayer or moment of silence" as allowing attendees to get up and leave, "just not participate," not bow their heads, or arrive after the prayer has concluded). The length of time the Board spends in the opening prayer is relatively brief in comparison to the length of the board meetings. C.A. App. at A0125, ¶ 13. For example, the June 20, 2006 meeting lasted more than five and a half hours, while the prayer lasted only sixty-two seconds. *See* C.A. App. at A0238; C.A. App. at A0125, ¶13.

E. Content of Prayers.

The Board Prayer Policy allows board members to participate as they choose, and the Board does not dictate the content of the prayers. *See* C.A. App. at

A0062 ("Any such prayers may be sectarian or non-sectarian, denominational or non-denominational, in the name of a Supreme Being, Jehovah, Jesus Christ, Buddha, Allah, or any other person or entity, all in accord with the freedom of conscience, speech and religion of the individual board member, and his or her particular religious heritage."). In some instances, the prayers have referenced historical figures. *See* C.A. App. at A0350. For example, on November 16, 2004, board member Dr. Donald Hattier quoted from George Washington's 1789 inaugural address:

> Such being the impression under which I have, in obedience to the public summons, repaired to the present station, it would be peculiarly improper to omit in this first official act, my fervent supplications to that Almighty Being who rules over the universe, who presides in the councils of nations, and whose providential aids can supply every human defect, that His benediction may consecrate to the liberties and happiness of the people of the United States a Government instituted by themselves for these essential purposes, and may enable every instrument employed in its administration to execute with success the functions allotted to his charge." As we sit here tonight, fellow Board members, I must ask for the same benedictions from the Almighty as President Washington has before. Let those primary principles guide our actions for the betterment of the students, teachers and administrators and society as a whole here in the Indian River School District and [elsewhere]. We ask this in the Lord's name.

Id. Similarly, on March 22, 2005, former board member Harvey Walls offered the following prayer to open the regular board meeting:

> At this time, I'd like to lead the Board in a moment of prayer basically on an excerpt taken from a speech given by Dr. Martin Luther King that he entitled "Not So Civil Dreams." "God does not judge us by the separate incidences or the separate mistakes that we make, but by the total bent of our lives. In the final analysis, God knows that his children are weak and they are frail. In the final analysis what God requires is that your heart is right." As we gather here this evening, let us take these words to heart and put the best interests of the students, teachers, employees and residents of the Indian River School District ahead of our own. Amen.

C.A. App. at A0364.

In other instances, board members have invoked Jesus. *See* Pet. App. 78a. For example, on February 22, 2005, board member Reginald Helms gave the opening prayer and offered the following: "Heavenly Father, Lord our God. Heavenly Father, please help the Board with the problems in the School District that we are going through right now. We ask these things in Jesus' Name." *Id.* Other times, rather than offering a prayer, the board member elected to offer a moment of silence. *See* C.A. App. at A0972 (stating preference for offering moment of silence rather than prayer).

F. Purpose of Prayers.

The purpose of opening regular board meetings with a prayer or moment of silence, as stated in the

policy itself, is to solemnify the proceedings. *See* C.A. App. at A0423 (purpose is to "ask for Divine guidance for the Board to help them make correct decisions and get them through the meeting in the proper way . . . to make the best decisions for what's best for our students"); C.A. App. at A0530 (purpose of prayer is for "guidance for the body of the school board, that [they] might make good decisions for [the] school district"); C.A. App. at A0628 (solemnizing the proceedings means "the idea that we are going to think beyond ourselves, beyond what's happening today and sit down and make absolutely the best decisions we can"); C.A. App. at A0985 (purpose of prayer is to "impress upon the importance of a regular meeting, just to ask for guidance in making the proper decisions").

In addition to seeking guidance in their decision making, board members have occasionally prayed for individual families within the District stricken by tragedy or for other community members. *See* C.A. App. at A0842 (noting that if there was a death or other tragedy, "often [the person giving the prayer] would bless that, you know, they would say, you're in our thoughts, that family, who's ever gone through this tragedy is in our thoughts"); *see also* C.A. App. at A0956 ("The prayer may be lifted for the school bus drivers or the teachers or the students, you know, however the person feels led to pray."). Board members have not used the prayer policy to proselytize their own religion or disparage other religions. *See* C.A. App. at A0842 (stating that prayer is not for "preaching any one religion to anyone"); C.A. App. at A1015 ("I don't think [the meeting or prayer] needed to be the time or place for proselytizing or trying to convert anybody.").

III. THE DISTRICT COURT DECISION.

In April 2008, the parties submitted cross-motions for summary judgment on the question of whether the board prayer policy was constitutional. Pet. App. 68a-70a. On February 21, 2010, the district court granted summary judgment in favor of petitioners and held that the "Board's Prayer Policy passes constitutional muster under *Marsh* [*v. Chambers*, 463 U.S. 783 (1983)]." Pet. App. 82a. The district court reasoned that the Board "is a deliberative body, to which *Marsh* applies." Pet. App. 91a. In rejecting all of respondents' arguments, the court specifically determined that "the fact that school children attend Board meetings does not render *Marsh* inapplicable." Pet. App. 95a. The court was "not persuaded" by respondents' argument that board meetings deserve the same treatment as a classroom setting or a graduation ceremony. *Id.* Respondents appealed.

IV. THE THIRD CIRCUIT DECISION.

The Third Circuit reversed the district court's decision. *Id.* at 67a; *see also Doe v. Indian River Sch. Dist.,* 653 F.3d 256, 290 (3d Cir. 2011). The Third Circuit understood the threshold question as a choice between the "principles established in *Lee v. Weisman*[, 505 U.S. 577 (1992),] or . . .the exception established in *Marsh v. Chambers*." Pet. App. 35a. The court first concluded that the Board's prayer policy and practice does *not* constitute legislative prayer permitted by *Marsh*. *Id.* at 35a-49a. Although the court acknowledged that the Board is akin to a legislative body, the court focused on the role of students at the board meetings and the purpose of the Board itself. *Id.* According to the Third Circuit, that "the Board has duties and powers similar to a legislative body" does not render Board

prayer constitutional. *Id.* at 43a. Such a conclusion would "ignore the Board's role in Delaware's system of public school education." *Id.* While the Third Circuit recognized that "other courts have extended *Marsh* to other legislative or deliberative bodies[,]" the court found the "very purpose" of the Board distinguishable from other cases interpreting legislative prayer. *Id.* at 46a.

After concluding that *Marsh* is inapplicable and that the case should be governed by the principles in *Lee*, the Third Circuit next turned to the question of whether the practice violated the Establishment Clause, which presented "another threshold question – what Establishment Clause 'test' to apply." *Id.* at 49a-50a. The Third Circuit noted that the *Lemon* test has been frequently criticized and ignored, and that the Third Circuit has alternatively applied the "endorsement test" advocated by Justice O'Connor in her concurrence in *Lynch v. Donnelly*, 465 U.S. 668 (1984). *Id.* at 50a (citing *Lemon v. Kutzman*, 403 U.S. 602, 612-13 (1971)). Unsure which test a "higher court" might apply, the Third Circuit applied both tests, ultimately finding the Board's practice unconstitutional. *Id.* at 51a (citing *Stratechuk v. Bd. of Educ., S. Orange-Maplewood Sch. Dist.*, 587 F.3d 597, 603 (3d Cir. 2009), *cert denied*, 131 S. Ct. 72 (2010)). While the Third Circuit accepted that the practice here had a secular purpose, the court found that the primary effect was to advance religion and that the policy fostered an excessive entanglement with religion. *Id.* at 52a-66a. Thus, according to the Third Circuit, the policy and practice failed both the *Lemon* and endorsement tests. *Id.* at 66a.

REASONS FOR GRANTING THE PETITION

This case presents an ideal vehicle for resolving the confusion among lower courts regarding the constitutionality of legislative prayer. As this Court has acknowledged, the practice of opening legislative sessions with a prayer is part of the "fabric of our society." *Marsh*, 463 U.S. at 792. This tradition dates back to our nation's infancy. It is not an improper endorsement of religion but merely a "tolerable acknowledgement of beliefs widely held among people of this country." *Id.* (citation omitted). The Indian River School Board not only embraced this tradition of legislative prayer, but it did so in a manner consistent with the highest ideals of religious pluralism and tolerance. This Court should accept review because legislative prayer involves an issue of extraordinary importance; the lower courts have reached inconsistent and often conflicting conclusions; and the Third Circuit has discarded a meaningful tradition based on a flawed application of this Court's decisions.

ARGUMENT

I. THE UNSETTLED AND CONFLICTED INTERPRETATION OF LEGISLATIVE PRAYER CALLS FOR SUPREME COURT REVIEW.

Nearly thirty years ago, in *Marsh v. Chambers*, this Court held that the Establishment Clause did not prohibit the Nebraska Legislature's practice of opening its legislative sessions with a prayer by a paid chaplain. 463 U.S. at 792. Since then, eight federal circuits have addressed legislative prayer, reaching inconsistent and often irreconcilable results. Indeed, just last month, in *Joyner v. Forsyth County,*

N.C., 653 F.3d 341 (4th Cir. 2011), *petition for cert. filed*, *Joyner v. Forsyth County, N.C.*, No. 11-546 (U.S. Oct. 27, 2011), Forsyth County filed a Petition for Certiorari requesting this Court to resolve a conflict among the circuits regarding, *inter alia*, whether sectarian references render a prayer unconstitutional. This petition offers an opportunity for the Court to resolve the split identified in the Forsyth County petition, while, at the same time, offering a vehicle for providing guidance on a related and equally vexing question, whether *Marsh* or *Lee* governs legislative prayer in the school board context.

A. This Court Has Determined that Legislative Prayer is Fully Consistent With the Establishment Clause.

The Establishment Clause provides that "Congress shall make no law respecting an establishment of religion." U.S. Const. amend. I. This Court has emphasized the importance of interpreting this clause in light of the historical circumstances that gave rise to its drafting. *See, e.g.*, *Lynch*, 465 U.S. at 673-74 ("The Court's interpretation of the Establishment Clause has comported with what history reveals was the contemporaneous understanding of its guarantees."). Accordingly, "for the men who wrote the [Establishment] Clause[] of the First Amendment the 'establishment' of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity." *Walz v. Tax Comm'n of N. Y.*, 397 U.S. 664, 668 (1970).

For the all the protections it affords, construction of the Establishment Clause has never meant to this Court the complete exclusion of any and all connections between the government and religion. *See Lee*, 505 U.S. at 597 ("We do not hold that every state

action implicating religion is invalid if one or a few citizens find it offensive."). Consequently, this Court has determined that several historical and traditional practices involving interactions of government and religion do not offend the Establishment Clause, including providing student transportation for religiously-affiliated schools, *Everson v. Bd. of Educ. of Ewing*, 330 U.S. 1, 15-16 (1947), or granting tax-exempt status to religious institutions, *Walz*, 397 U.S. at 668.

Relying on this framework, this Court held in *Marsh* that the Establishment Clause did not prohibit the Nebraska Legislature's practice of opening its legislative sessions with a prayer by a paid chaplain. *Marsh*, 463 U.S. at 792. This Court relied heavily on the unique history of prayer at legislative sessions. *Id*. at 790-91. As this Court explained, the opening of "legislative and other deliberative public bodies with prayer" is deeply embedded in the traditions of this country. *See id.* at 786. In particular, only three days after the Congress authorized the appointment of paid chaplains, final agreement was reached on the language of the Bill of Rights. *Id.* at 788. "Clearly the men who wrote the First Amendment Religion Clauses did not view paid legislative chaplains and opening prayers as a violation of that Amendment, for the practice of opening sessions with prayer has continued without interruption ever since that early session of Congress." *Id.*

This Court viewed these historical patterns as not only revealing the Framers' intentions, but also establishing their position on the constitutionality of legislative prayer, the very practice challenged in *Marsh*. *Id.* at 790. As this Court observed, it seems

improbable that the Framers intended for the First Amendment to forbid what they had declared acceptable only three days earlier. *Id.* Thus, in reaching its holding, the Court explained: "In light of the unambiguous and unbroken history of more than 200 years, there can be no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society. To invoke Divine guidance on a public body entrusted with making the laws is not, in these circumstances, an 'establishment' of religion; . . . it is simply a tolerable acknowledgment of beliefs widely held among the people of this country." *Id.* at 792. [2]

B. Courts Are Conflicted and Fractured In Analyzing Legislative Prayer.

Although this Court has not established limitations on the content of legislative prayers or the "deliberative public bodies" to which *Marsh* applies, lower courts have applied *Marsh* inconsistently. Review is therefore necessary to clarify the circumstances under which legislative prayer is permissible.

1. Review is warranted to eliminate confusion over inferred limitations in *Marsh*.

Eight federal circuits have addressed legislative prayer but have split on the interpretation and application of *Marsh*. The Tenth and Eleventh Circuits have adhered to this Court's long-standing rule that legislative and other deliberative public

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[2] This Court has affirmed the viability and applicability of *Marsh*. *See, e.g.*, *McCreary Cnty. v. ACLU*, 545 U.S. 844, 860 n.10 (2005); *Van Orden v. Perry*, 545 U.S. 677, 690 (2005) (citing *Marsh*, 463 U.S. at 792).

bodies may open their legislative sessions with prayer as long as the prayer is not used to proselytize or to advance any one, or to disparage any other, faith or belief. *See Pelphrey v. Cobb Cnty.*, 547 F.3d 1263 (11th Cir. 2008); *Snyder v. Murray City Corp.*, 159 F.3d 1227, 1234 (10th Cir. 1998) (citing *Marsh*, 463 U.S. at 793-95). The Tenth and Eleventh Circuits have upheld the challenged practices notwithstanding the inclusion of sectarian references. Guided by this Court in *Marsh*, the Tenth and Eleventh Circuits have concluded it is not the purview of the federal courts to parse the content of the prayers. *See, e.g.*, *Pelphrey*, 547 F.3d at 1274 ("we [w]ill not [p]arse or [c]ensor the [l]egislative [p]rayers").

The Fourth, Fifth, Seventh, and Ninth Circuits, on the other hand, have reached a contrary conclusion. These courts have incorporated content-based limitations on legislative prayer, finding that the inclusion of sectarian references runs counter to the practice upheld in *Marsh*. *See Joyner*, 653 F.3d 341; *Hinrichs v. Bosma*, 440 F.3d 393 (7th Cir. 2006); *Doe v. Tangipahoa Parish Sch. Bd.*, 473 F.3d 188, 202 (5th Cir. 2006), *reh'g en banc granted*, 478 F.3d 679 (5th Cir. 2007), *vacated and remanded*, 494 F.3d 494, 499 (5th Cir. 2007) (en banc); *Bacus v. Palo Verde Unified Sch. Dist. Bd. of Educ.*, 52 F. App'x 355 (9th Cir. 2002). Indeed, this division among the circuits as to whether *Marsh* compels the exclusion of sectarian references is the subject of a pending petition for certiorari. Pet. for Writ of Cert., *Joyner v. Forsyth Cnty.*, No. 11-546 (U.S. Oct. 27, 2011).

Another manifestation of doctrinal confusion among the lower courts arises in the context of school board prayer. Without denying that a school board qualifies as a legislative or other deliberative public

body, the Third and Sixth Circuits have adopted yet another analysis, declining to apply *Mars*h altogether. *See Doe v. Indian River Sch. Dist.*, 653 F.3d 256 (3d Cir. 2011); *Coles, ex rel. Coles v. Cleveland Bd. of Educ.*, 171 F.3d 369 (6th Cir. 1999). But, the Court in *Marsh* did not limit its application to state legislatures only. Nor did *Marsh* single out particular types of legislative entities, finding prayer permissible for some but not others. Indeed, the language of Marsh is expansive, referencing "legislative or *other deliberative public bodies*." *Marsh*, 483 U.S. at 786 (emphasis added). The Third and Sixth Circuits have incorporated a limitation on legislative prayer that is absent from the text of *Marsh*.

Confusion among the lower courts has led to a direct circuit split over whether legislative prayers may contain sectarian references. This confusion has also resulted in a third category of legislative prayer, thus far involving school boards, where some courts have concluded *Marsh* can be disregarded. Uncertainty has led to an increasing number of challenges to prayer polices nationwide. This Court should grant review in order to resolve a pending circuit split and to provide guidance regarding the proper scope and application of *Marsh*.

2. This Court's guidance is particularly warranted to address the application of *Marsh* in the school board context.

Whether *Marsh* should apply in the context of school board prayer has been a particularly difficult question for lower courts. While there is no circuit

split in the traditional sense,[3] a review of previous cases reveals such disarray that a school district cannot reasonably determine what is permissible and what is prohibited. Indeed, when confronting the issue of school board prayer, a court's decision of whether to follow "school" cases or "legislative prayer" cases typically determines whether the challenged practice will be upheld or struck down. Review by this Court, therefore, is necessary to provide guidance on the application of *Marsh* in this particular context.

Confusion surrounding the application of *Marsh* to school board prayer is perhaps no more evident than in *Tangipahoa*, 473 F.3d 188. In that case, a three-way divided panel of the Fifth Circuit affirmed an injunction in part that prohibited certain challenged invocations at board meetings. *Id.* at 191. In the lead opinion, written by Judge Rhesa Hawkins Barksdale, the court assumed that the challenged prayers constituted legislative prayer, but found the prayers unacceptable because they contained sectarian references. *Id.* at 202-05. Judge Barksdale found that a reasonable observer would conclude that the prayers "evoked a Christian tone, reflecting the Board's religious preference for Christianity." *Id.* at 203. Judge Barksdale went on to note that non-sectarian prayers would have been permissible,

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[3] Three circuits have addressed the constitutionality of school board prayer in published decisions. This case and *Coles* employed a similar analysis, which was contrary to *Tangipahoa,* 473 F.3d 188. On petition for rehearing in *Tangipahoa*, the en banc court vacated the decision. *Doe v. Tangipahoa Parish Sch. Bd.*, 494 F.3d 494 (5th Cir. 2007) (en banc) *vacating* 473 F.3d 188 (5th Cir. 2006) (instructing to dismiss for lack of standing).

and that prayers containing sectarian references might be permissible in some circumstances. *See id.* at 205 n. 6.

In a partial concurrence and dissent, Judge Carl E. Stewart concluded that the challenged prayers did not constitute legislative prayer at all. Instead, according to Judge Stewart, the court's threshold task was to consider "the thorny issue of *Marsh*'s place in the Supreme Court's Establishment Clause jurisprudence." *Id.* at 206. Judge Stewart presumed a narrow application of *Marsh*, and framed the issue as a decision of whether to extend *Marsh* "from its original context to this new set of circumstances." *Id.* Judge Stewart dismissed the importance *Marsh*'s reference to "other deliberative public bodies" on the basis that "this phrase appears only once in an opinion that otherwise focuses entirely on the specific factual history of legislative prayer." *Id.* In Judge Stewart's view, *Lemon* provided the proper framework for the analysis, and under the *Lemon* test the prayer practice was unconstitutional.

For her part, Judge Edith Brown Clement concurred in the judgment in part and dissented in part. *Id.* at 211. Judge Clement found that *Marsh* "applies to this deliberative body" (*i.e.*, a school board). *Id.* Her conclusion is distinct from that of Judge Barksdale, who assumed without deciding that *Marsh* applied, and Judge Clement directly contradicted Judge Stewart, who found that a school board is something other than a deliberative public body as contemplated by *Marsh*. *Id.* at 211-12. Judge Clement concluded that content-based restrictions premised on sectarian references, which were the dispositive factors for Judge Barksdale, were inconsistent with the *Marsh* Court's admonition against

parsing the prayer. *Id.* at 212-13. Instead, according to Judge Clement, the relevant questions related to whether the prayer opportunity had been exploited to advance the speaker's religion or to disparage the religions of others. *Id.* at 213-14. Judge Clement concluded that the record, despite Christian references, did not show an effort by the school board to advance Christianity or to exclude other sects or creeds. *See id.* at 215-16.

The Sixth Circuit has also recognized that *Mars*h's applicability to school board prayer "is very much in dispute" and has resulted in conflicting opinions from thoughtful jurists. *See Coles*, 171 F.3d at 381 ("Reasonable minds can differ on this issue, as indeed they have in this very case. The magistrate judge below wrote a thoughtful report and recommendation concluding that Lee was controlling. The district judge, on the other hand, wrote an equally thoughtful opinion holding that Marsh was more on point."). The Sixth Circuit stated that the issue of school board prayer "puts the court squarely between the proverbial rock and a hard place," where "the rock is *Lee*" and "[t]he hard place is *Marsh*." *Id.* Although the issue of school board prayer was reasonably viewed as a "close case that could go either way," the Sixth Circuit ultimately found "it wiser to err on the side of *Lee* . . . than to err on the side of *Marsh*." *Id.* at 383.

Further, while the *Coles* court found the school board's challenged prayer policy unconstitutional, it was not a unanimous decision. In his dissent, Judge James Leo Ryan concluded that the district court's "excellent opinion" had "gotten it precisely right." *Id.* at 386. To Judge Ryan, the school board was a deliberative public body as contemplated by *Marsh*,

and prayers offered in such a setting presented none of the dangers found in a classroom setting. *Id.* at 387. Judge Ryan not only disagreed with the majority's conclusion, but he also disagreed that the issue of school board prayer presented a close or difficult question. *Id.* at 386. In his view, "[t]his is not a complicated case; important, to be sure, but not complicated." *Id.*

In this case, the Third Circuit unanimously reversed the district court's well-reasoned, 56-page opinion. Pet. App. at 67a. While an appellate court's reversal of a trial court is not by itself significant, it is notable here because very thoughtful and respected jurists were unable to agree on which line of cases that govern the dispute. The same occurred in *Bacus*, 52 F. App'x 355. Without deciding whether *Marsh* or *Lee* provided the proper analytic framework, the *Bacus* court found that sectarian references in the prayers at issue ran afoul of *Marsh* and reversed the order of the district court. *Id.* at 357. Thus, while there may not be a direct circuit split involving school board prayer, review by this Court is warranted because some judges routinely find *Marsh* controlling, while other judges find *Marsh* utterly inapposite.

The Sixth Circuit majority in *Coles* was right about one thing: The issue presented here puts courts between a rock and a hard place. The Indian River School Board functions as a legislative body in every manner. Board members are elected by and answer to the people; they take an oath of office; the have the authority to tax and spend; and they serve as the policy-making body for the district, among other things. For those reasons, *Marsh* provides a proper framework for analyzing the constitutionality of the

Board's invocation practice. On the other hand, the Board's jurisdiction concerns students, and the Board's proceedings always take place on school property. Given this Court's rulings concerning prayer in the school setting, *see, e.g.*, *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 301-06 (2000), it is, perhaps, unsurprising that some courts might thus "err on the side of *Lee*." But to err on the side of *Lee* does not necessarily mean that *Lee* leads to the correct result.

No binding authority governs the question of school board prayer in most jurisdictions, and courts will continue to vacillate between the application of *Marsh* and *Lee* as lawsuits proliferate. School districts that seek to conform their practices to what is lawful have little guidance. They can follow the well-reasoned decisions of courts that would prohibit school board prayer, or they can follow the well-reasoned decisions of courts that would do the opposite. Uncertainty may cause some school districts to terminate a long-held and meaningful tradition, while other school districts may choose to continue what many believe is an unconstitutional Establishment of religion. This Court should accept review because the practice of school board prayer presents an issue of significant public importance, and the law in this context is unsettled. School boards should not be forced to guess on which side of the *Marsh*/*Lee* divide their jurisdictions might one day fall.[4]

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[4] Indeed, school board prayer is a common practice in jurisdictions throughout the country. *See, e.g.*, Freedom From Religion Found., *FFRF Contests Tennessee School Board Prayer*, Secular News Daily (May 13, 2011), http://www.secularnewsdaily.com/2011/05/13/ffrf-contests-tennessee-school-board-prayer-2/ (discussing school board's traditional practice of opening sessions with prayer); Merisa Green, *Polk Cnty. Sch. Bd. Adding*

II. CONFUSION REIGNS OVER WHETHER THE OPTION OF SILENT NON-PARTICIPATION CONSTITUTES COERCION FOR THE PURPOSES OF AN ESTABLISHMENT CLAUSE ANALYSIS.

As discussed above, the Third Circuit and most other courts that have addressed the issue of legislative prayer in the school-board context have approached the analysis as a choice between *Marsh* or *Lee*. Even if *Marsh* does not provide the proper framework, however, it does not necessarily follow that *Lee*, which was premised on the concept of coercion, compels a finding that the practice here is unconstitutional. While coercion typically involves forcing a person to act against his will, this Court in *Lee* recognized that coercion comes in many and often subtle forms, and under *Lee*, may exist even in the absence of force or threats. 505 U.S. at 592-93.

Prayer Disclaimer, Lakeland Ledger.com (Feb. 5, 2011, 11:15 p.m.), http://www.theledger.com/article/20110205/NEWS/102055024?p=2&tc=pg (explaining that disclaimer needed to reduce risk of costly litigation); Chris Williams, *Mercer Sch. Bd. Approves Prayer Before Meetings*, WQAD.com (Feb. 15, 2010), http://www.wqad.com/news/wqad-prayer-school-board-aledo-westmer-021510,0,2699802.story (discussing legal consultation needed to finalize prayer policy); ACLU, *ACLU Asks Stafford Sch. Bd. to Adopt Prayer Policy that Protects Religious Liberty at Meetings*, ACLU (Jan. 1, 2010), http://www.aclu.org/religion-belief/aclu-asks-stafford-school-board-adopt-prayer-policy-protects-religious-liberty-meeti (discussing school board's traditional practice of opening sessions with prayer); *see also* S. Res. 18, 112th Cong. (2011) (supporting school board prayer).

In the aftermath of *Lee*, lower courts have inconsistently applied *Lee*'s concept of indirect coercion. Some courts have reasoned that the option of non-participation removes any threat of coercion, while other courts have found such an option insufficient. This Court should grant review in order to clarify precisely when the "indirect coercion" discussed in *Lee* gives rise to a constitutional violation. In addition, this Court should accept review to correct the Third Circuit's erroneous application of *Lee*, in which this Court explicitly acknowledged that a legislative session presents no true risk of indirect coercion.

A. Courts Are Divided in Their Attempts to Apply the Indirect Coercion Standard Discussed in *Lee v. Weisman*.

Since *Lee*, courts have struggled to apply a coherent standard to claims of indirect coercion. For example, the Seventh Circuit held that the option of silent non-participation when a prayer was offered at a college graduation did not present the risk of coercion. *See Tanford v. Brand*, 104 F.3d 982, 985-86 (7th Cir. 1997). While a college graduation of young adults may be different than a high school graduation of slightly younger adults, these ceremonies are identical for purposes of analysis under *Lee*; for a college student, just like a high school student, is not likely to resolve his "conflict of conscience" by foregoing college graduation. *See Lee*, 505 U.S. at 596. The "price of resisting conformance to state-sponsored religious practice" is no smaller when paid by college students, but the Seventh Circuit dismissed any concern over the possibility of indirect coercion. *See Tanford*, 104 F.3d at 985-86.

Inconsistencies also appear in courts' attempts to apply the concept of indirect coercion to high school graduation ceremonies. For example, where a school puts the issue of graduation prayer to a student vote, the Third Circuit has held that the students faced the very coercion condemned in *Lee* in having to "conform to the model of worship commanded by the plurality." *ACLU v. Black Horse Pike Reg'l Bd. of Educ.*, 84 F.3d 1471, 1480 (3d Cir. 1996). On the other hand, the Eleventh Circuit has held that a graduation speaker who offered a prayer did not present any risk of government coercion because the speaker was chosen by a school-wide vote. *Adler v. Duval Cnty. Sch. Bd.*, 250 F.3d 1330, 1333 (11th Cir. 2001).

In another variation of this scenario, the Ninth Circuit has held that a school has a constitutional obligation to intercede when a student-selected speaker will give a religiously-oriented graduation message to avoid what "would have constituted [school] coercion of attendance and participation in a religious practice." *Cole v. Oroville Union High Sch. Dist.*, 228 F.3d 1092, 1102-04 (9th Cir. 2000) (citing *Lee* for notion that "simply standing or remaining silent can signify adherence to the views of others"). In yet another decision, where a school held its graduation in a church but did not have graduation prayer, the Seventh Circuit concluded that because "the encounter with religion here is purely passive and incidental to attendance," students would neither feel as if they were "participating in a religious exercise," nor appear so. *Doe v. Elmbrook Sch. Dist.*, No. 10-2922, slip op. at 38, --- F.3d ----, ---- (7th Cir. Sept. 9, 2011).

A coherent framework for applying *Lee*'s concept of indirect coercion is even more elusive when courts

address challenges to religious practices outside of graduation ceremonies. For example, the Fourth Circuit found that a religious group's school-permitted, *hallway* display of free Bibles did not amount to coercion because students could "simply walk past the table." *Peck v. Upshur Cnty. Bd. of Educ.*, 155 F.3d 274, 287 (4th Cir. 1998). Conversely, the Seventh Circuit held a religious group's *classroom* distribution of Bibles unconstitutional because it was unreasonable to expect a student who did not want a Bible to decline the offer. *Berger v. Rensselaer Cent. Sch. Corp.*, 982 F.2d 1160, 1169-70 (7th Cir. 1993).

Lee's concept of indirect coercion is not just applied inconsistently, but it is frequently ignored where the challenged activity involves a government-compelled political, rather than religious, orthodoxy. For example, courts have consistently rejected constitutional challenges to school-sponsored recitations of the pledge of allegiance. *See, e.g.*, *Myers v. Loudon Cnty. Pub. Schs.*, 418 F.3d 395, 408 (4th Cir. 2005). Moreover, where recitation of the pledge of allegiance conflicts with a student's religious beliefs, courts have concluded that the option of silent non-participation suffices to eliminate any concern of coercion, indirect or otherwise. *Freedom From Religion Found. v. Hanover Sch. Dist.*, 626 F.3d 1, 13-14 (1st Cir. 2010), *cert denied*, 131 S.Ct. 2992 (2011) ("[A] student who remains silent during the saying of the Pledge engages in overt non-participation by doing so.").

Because Establishment Clause controversies rarely involve *direct* coercion – i.e., compelling religious activity through threats of harm or punishment – whether a particular practice is acceptable is almost always determined based on the presence of indirect coercion as discussed in *Lee*. Based on the foregoing inconsistent application of *Lee*'s concept of indirect coercion, this Court should accept review here. It should clarify a standard that has become far too vague for school administrators who struggle daily to delineate those interactions between religious activity and public education that are permissible and those that are not.

B. The Court of Appeals Erred in Applying *Lee*'s Concept of Indirect Coercion.

The Third Circuit erred in applying *Lee* to the circumstances here. In *Lee* this Court expressly limited its holding to prayer at graduation ceremonies: "The sole question presented is whether a religious exercise may be conducted at a graduation ceremony in circumstances where, as we have found, young graduates who object are induced to conform." *Id.* at 598; *see also id.* at 599. The *Lee* Court specifically acknowledged that there will be "instances when religious values, religious practices, and religious persons will have some interaction with the public schools and their students." *Id*. at 598-99. The Court also discussed "inherent differences" between a state legislative session and a graduation ceremony that should have led the Third Circuit to find the prayer policy and practice here acceptable. *Id.* at 596.

While graduation is a momentous occasion and is in every real sense compulsory, the same is not true

for board meetings. The Third Circuit evidently recognized this, noting that a board meeting is not "one of life's most significant occasions" and that it may not even "be as exciting as a football game." Pet. App 36a-37a. To the Third Circuit, however, the fact that the Indian River School Board "has deliberately made its meetings meaningful to students" is sufficient to liken board meetings to the culmination of a student's twelve years of education. *Id.* at 39a. *Lee* does not support that conclusion.

Moreover, even if attendance at board meetings could be deemed compulsory, the atmosphere of a board meeting should dispel any concern that a person would feel obligated to participate in the invocation. This Court noted in *Lee* that graduation ceremonies are different from legislative sessions because "[people may] enter and leave with little comment and for any number of reasons." *Lee*, 505 U.S. at 597. The same holds true for school board meetings in the Indian River School District. A student's presence or absence at the start of the meeting would be unremarkable, if noticed at all. Likewise, unless a student is disruptive, his participation in the invocation or lack thereof will draw no attention. Unlike in a classroom atmosphere, teachers do not patrol the public section of the gymnasium during board meetings. Nor do they keep tabs on who is standing, sitting, whispering to their friends, sending text messages, or engaging in any number of other activities that typically occur throughout board meetings. None of the concerns addressed in *Lee* are present here.

A board meeting is nothing like a classroom setting or a graduation ceremony. It *is* a legislative session. The Third Circuit's strained effort to find the board

meetings here akin to graduation ceremonies is not just unsupported by *Lee*, it contradicts *Lee*. If *Lee*'s concept of indirect coercion can apply to a government entity, performing its duties in the evening hours, where a handful of students might be present on a voluntary basis, who can freely enter and exit the hall as they please, it is difficult to imagine *any* "interaction" between religion and public schools that could pass muster. This Court, therefore, should accept review to correct the Third Circuit's error.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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November 2, 2011

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

[Filed 09/27/2011]

No. 10-1819

JANE DOE; JOHN DOE, individually and as parents and next friend of, JORDAN DOE and JAMIE DOE

v.

INDIAN RIVER SCHOOL DISTRICT; INDIAN RIVER SCHOOL BOARD; HARVEY L. WALLS; MARK A. ISAACS; JOHN M. EVANS; RICHARD H. COHEE; GREGORY A. HASTINGS; NINA LOU BUNTING; CHARLES M. BIRELEY; DONALD G. RATTIER; REGINALD L. HELMS; M. ELAINE MCCABE, and their successors in office, in their official capacities as members of the Indian River School Board,; LOIS M. HOBBS, and her successors in office, in their official capacities as District Superintendent,; EARL J. SAVAGE, and his successors in office, in their official capacities as Assistant District Superintendent

JANE DOE, JOHN DOE and JAMIE DOE,
Appellants,

On Appeal from the United States District Court
for the District of Delaware
District Court No. 1-05-cv-00120
District Judge: The Honorable Joseph J. Farnan, Jr.

Argued January 27, 2011
Before: FUENTES, CHAGARES, and
ROTH, *Circuit Judges*

JUDGMENT

This cause came to be heard on the record submitted from the District Court for Delaware, and was argued on January 27, 2011.

On consideration whereof, it is now hereby ORDERED and ADJUDGED by this Court that the Judgment of the District Court entered on February 21, 2010 be, and the same is, hereby REVERSED. All of the above in accordance with the opinion of this Court.

ATTEST:

/s/ Marcia M. Waldron
Clerk

Dated: August 5, 2011

September 27, 2011

PRECEDENTIAL

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 10-1819

JANE DOE; JOHN DOE, individually and as parents and next friend of, JORDAN DOE and JAMIE DOE

v.

INDIAN RIVER SCHOOL DISTRICT; INDIAN RIVER SCHOOL BOARD; HARVEY L. WALLS; MARK A. ISAACS; JOHN M. EVANS; RICHARD H. COHSE; GREGORY A. HASTINGS; NINA LOU BUNTING; CHARLES M. BIRELEY; DONALD G. HATTIER; REGINALD L. HELMS; M. ELAINE MCCABE, and their successors in office, in their official capacities as members of the Indian River School Board,; LOIS M. HOBBS, and her successors in office, in their official capacities as District Superintendent,; EARL J. SAVAGE, and his successors in office, in their official capacities as Assistant District Superintendent

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ROTH, *Circuit Judges*
Filed: August 5, 2011)

OPINION OF THE COURT

FUENTES, *Circuit Judge.*

The Indian River School Board (the "Board") has a long-standing policy of praying at its regularly-scheduled meetings, which are routinely attended by students from the local school district. Appellants argue that the Board's policy is unconstitutional under the Establishment Clause of the First Amendment. The Board claims that a school board is like a legislative body and that its practice of opening board sessions with a prayer is akin to the practice that was upheld in *Marsh v. Chambers*, 463 U.S. 783 (1983). In *Marsh*, 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. The issue in this case is whether a school board may claim the exception established for legislative bodies in *Marsh*, or whether the traditional Establishment Clause principles governing prayer in public schools apply. The District Court agreed with the Board's conclusion that its actions were constitutional under *Marsh*. For the reasons that follow, we will reverse.

I.

A. Procedural History

The complaint in this case was originally brought by two sets of plaintiffs who lived and sent their children to school in the Indian River School District (the "District"), located in southern Delaware. The first set of plaintiffs, Mona and Marco Dobrich, brought suit individually and on behalf of their son, a twelve-year old. *Dobrich v. Walls*, 380 F. Supp. 2d 366, 370 (D. Del. 2005). The Dobriches were residents of the District. Their son had completed grades one through

five in the district school. The second set of plaintiffs were Jane and John Doe, who also brought suit individually and as parents of Jordan and Jamie Doe. *Id*. At the time the Complaint was filed, Jamie Doe was a student at a District elementary school. Jordan Doe, who had previously attended middle school in the District but transferred to another school, planned on returning to a District high school. *Id*. at 371, 373.

Plaintiffs brought suit pursuant to 42 U.S.C. § 1983 against multiple defendants, including the Indian River School Board and the Indian River School District.[1] The Dobriches and the Does alleged violations of the First and Fourteenth Amendments of the Constitution stemming from various Board and District actions, including the Board's practice of opening its meetings with a prayer. Plaintiffs noted that students regularly attended these meetings and argued that the Board's prayer policy was therefore unconstitutional under the Establishment Clause. In addition, the Complaint challenged other allegedly unconstitutional practices:

> Plaintiffs allege that school sponsored prayer has pervaded the lives of teachers and students in the District schools. Plaintiffs allege that prayers have been recited at graduation ceremonies, athletic events, potluck dinners, ice cream socials, awards ceremonies, and other events. Plaintiffs also allege that District employees have led three different Bible Clubs, one for sixth grade students, one for seventh grade students and one for eighth

[1] Plaintiffs also named as defendants the board members individually and the District Superintendent and Assistant Superintendent in their individual and official capacities. However, the suits against the parties in their individual capacities were later dismissed.

> grade students, and that students involved in these clubs have received "special privileges" like donuts and being able to head the lines to lunch. Plaintiffs further allege that at least one elementary school in the District distributed Bibles during the 2003 school year, and that religion has become part of the District's curriculum in that several teachers have referred to religion during their classes.

Id. at 371.

Plaintiffs sought various forms of relief, including compensatory and nominal damages, a declaratory judgment stating "that the customs, practices, and policies of the District with regard to prayer at School Board meetings and school functions are unconstitutional, both facially and as applied" and injunctive relief "banning Defendants from promoting, conducting, or permitting religious exercises or prayer at school functions, including but not limited to graduation ceremonies, athletic activities, holiday festivals, awards presentations and School Board meetings" and "requiring the District to distribute its school prayer policies publicly and to establish procedures for reviewing violations of the policy." *Doe v. Indian River Sch. Dist*., 685 F. Supp. 2d 524, 526 (D. Del. 2010).

In January 2008, the parties reached a partial settlement.[2] With the exception of those relating to the

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[2] At the motion to dismiss stage, the District Court dismissed the claims against the defendants in their individual capacities and held that some of the plaintiffs lacked standing to pursue some of the claims. The court held that the Dobrich children lacked standing to pursue claims for prospective damages and declaratory and injunctive relief, Dobrich, 380 F. Supp. 2d at 373, but had standing to pursue claims based on past constitu-

Board's practice of beginning every School Board meeting with a prayer, the parties settled all of their claims. The settlement was approved. In March of 2008, the Dobriches moved out of the District and voluntarily dismissed the remainder of their claims, leaving only Jane and John Doe, individually and as the parents of Jordan and Jamie Doe, as plaintiffs in the case. In April 2008, the Does and defendants submitted cross-motions for summary judgment on the issue of whether the Prayer Policy was constitutional. The District Court granted summary judgment in favor of defendants. It is this order that we now review.

B. The Prayer Policy

The heart of this case is, obviously, the prayer policy and practice of the Indian River School Board. The Indian River School District was created in 1969. Prayers have been recited at the meetings since that time. Although the Board prays at every public meeting, it does not pray at its closed-door or executive sessions. For thirty-five years, no written policy governed the Board's prayer practice. Then, in 2004, the Board decided to formalize this practice.

The Board's decision to write an official prayer policy was the result of a heated community debate about the propriety of prayer at local high school graduations and at School Board meetings. *See Indian*

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tional violations, *id.* at 374. However, Marco Dobrich had standing to bring an action for damages and injunctive and declaratory relief as it pertained to the Board's Prayer Policy. *Id*. at 374. As for the Doe plaintiffs, they had "standing to seek injunctive and declaratory relief with respect to the alleged religious practices of the School District and School Board" for which they were personally present. *Id*. at 373-74.

River, 685 F. Supp. 2d at 528-29. In June 2004, Mona Dobrich complained to the Board about the recitation of prayer at her daughter's high school graduation. Dobrich's complaint and the reaction it generated caused the Board to become concerned that it might be the subject of a lawsuit. *Id*. This led the Board to "solicit[] legal advice regarding the constitutionality of [its] practice of opening . . . regular meetings with a moment of prayer." *Id*. at 529. The Policy was drafted and presented to the Board's Policy Committee. In October 2004, the Board adopted the Policy by vote.

The resulting "Board Prayer at Regular Board Meetings Policy" ("the Policy"), reads as follows:

1. In order to solemnify its proceedings, the Board of Education may choose to open its meetings with a prayer or a moment of silence, all in accord with the freedom of conscience of the individual adult Board member.
2. On a rotating basis one individual adult Board member per meeting will be given the opportunity to offer a prayer or request a moment of silence. If the member chooses not to exercise this opportunity, the next member in rotation shall have the opportunity.
3. Such opportunity shall not be used or exploited to proselytize, advance or convert anyone, or to derogate or otherwise disparage any particular faith or belief.
4. Such prayer is voluntary, and it is among only the adult members of the Board. No school employee, student in attendance, or member of the community shall be required to participate in any such prayer or moment of silence.

> 5. Any such prayers may be sectarian or non-sectarian, denominational or non-denominational, in the name of a Supreme Being, Jehovah, Jesus Christ, Buddha, Allah, or any other person or entity, all in accord with the freedom of conscience, speech and religion of the individual Board member, and his or her particular religious heritage.

JA 062.[3]

While the Policy formalizes the Board's decades-long practice of praying at public meetings, the practice surrounding the recitation of the prayer is essentially the same as it was prior to the enactment of the formal policy.

The Policy reflects the long-standing tradition of the Board of rotating the responsibility for reciting the prayer (or leading the moment of silence) among the board members that have volunteered for the role. The Policy states that the prayer is "voluntary" and "among only the adult members of the Board." JA 062. In practice, the Board President asks members to volunteer to lead the prayer or the moment of silence. The Board President is responsible for keeping track of which member gave a prayer and thus ensures that the opportunity is rotated between the volunteering members. A few days before the regularly-scheduled meeting, the Board President reminds the next person on the rotation that it is his or her turn to recite a prayer. When new members are elected, the Board President asks them to inform him if they wish to participate in the prayer rotation. The Policy also ensures that a prayer or moment of silence always occurs at the meetings, because "[i]f

[3] "JA" refers to the Joint Appendix.

the member chooses not to exercise this opportunity, the next member in rotation shall have the opportunity." JA 062.

The Board meetings usually begin with a call to order and a roll call. This is followed by the presentation of the colors and delivery of the prayer. Since the official Prayer Policy was enacted, it has become customary for a board member to offer a disclaimer between the presentation of the colors and the prayer. The purpose of the disclaimer is to "ensure that any members of the public in attendance understand the purpose of the prayer policy." Appellee Br. 11. Appellees offer the following, read on November 16, 2004, as an example of a typical disclaimer:

> It is the history and custom of this Board, that, in order to solemnize the School Board proceedings, that we begin with a moment of prayer, in accord with the freedom of conscience of the individual adult members of the Board. Further, such prayer is voluntary and just among the adult members of the School Board. No school employee, student in attendance or member of the community is required to participate in any such prayer or moment of silence.

JA 0349.

C. Structure, Duties, and Practice of the Board

In support of their contention that the Board functions as a legislative body, the defendants direct our attention to the Board's composition, responsibilities, and power, which are set forth in Delaware law.

The Indian River School District serves the Delaware towns of Selbyville, Frankford, Dagsboro, Gumboro, Fenwick Island, Bethany Beach, Ocean View, Millsboro,

and Georgetown. *See* 14 Del. C. § 1068. It is divided into five electoral districts. *Id*. The District is made up of fourteen schools, employs 646 full-time teachers, and serves approximately 8,388 students. Of these fourteen schools, there are "several elementary schools, two middle schools, two high schools, and an arts magnet school." *See Indian River*, 685 F. Supp. 2d at 527.

Under Delaware law, a school district is "a clearly defined geographic subdivision of the State organized for the purpose of administering public education in that area." 14 Del. C. § 1002(5). The Indian River School Board has "the authority to administer and to supervise the free public schools of the [Indian River School District]" and has "the authority to determine policy and adopt rules and regulations for the general administration and supervision of [said schools]." *Id*. § 1043. The Board is composed of ten members, who serve three-year terms.[4] *See id*. § 1068(f). Two members are elected by the qualified electors of each district. *Id*. § 1068(b), (g). Board members are unpaid. *Id*. § 1046.

Delaware law requires the Board to hold "regular meetings . . . each month during the year." *Id*. § 1048(a). Special meetings may also be held "whenever the duties and business of the school board may require." *Id*. § 1048(b). The Indian River School Board holds its regularly-scheduled meetings on school property. The

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[4] At the time the District Court opinion was issued, the Board members were: "Robert D. Wilson and Shelly R. Wilson (District 1); Patricia S. Oliphant and Vice President Kelly R. Willing (District 2); Randall L. Hughes II and Nina Lou Bunting (District 3); President Charles M. Bireley and Dr. Donald G. Hattier (District 4); and Donna M. Mitchell and Reginald L. Helms (District 5)." *Indian River*, 685 F. Supp. 2d at 527.

policy making responsibilities of the Board are extensive and touch nearly all aspects of a student's life. The Board must: (1) "[d]etermine the hours of daily school sessions; the holidays when district schools shall be closed; the days on which teachers attend educational improvement activities;" (2) set the educational policies for the school district; (3) "prescribe rules and regulations for the conduct and management of the schools;" (4) enforce school attendance requirements; (5) "[g]rade and standardize all the public schools under its jurisdiction and . . . establish kindergartens and playgrounds and such other types of schools; (6) "[a]dopt courses of study;" (7) "[s]elect, purchase, and distribute" textbooks and other school supplies, furniture, and equipment; (8) "[p]rovide forms" for employees to make reports to the school board; (9) submit required reports to the Secretary of Education; (10) "appoint personnel," *id*. § 1049; (11) provide for the care and repair of school property, *id*. § 1055; and (12) adopt rules governing use of school property and oversee requests for use of school property, *id*. § 1056.

The District also has the power to spend money for the "support, maintenance and operation of the free public schools." *Id*. § 1702. Although the District receives funding from the state general assembly, *id*. § 1701, it is also empowered, through the Board, to levy and collect additional taxes for "school purposes." *Id*. §§ 1902, 1914.

The Board's minutes confirm that at its meetings it hears commentary, discusses, and votes on a wide variety of issues affecting local schools. For example, at any given meeting, the Board may discuss curriculum development, changing the length of the school day, capital improvements, increases or reductions in

staffing, and financial matters. The minutes also disclose that students regularly attend the Board meetings. While the number of students attending the Board meetings fluctuates during the year, at least some students attend nearly all of the meetings held during the school year. Board President Charles M. Bireley—who, with the exception of a two-year period, has sat on the board continuously since 1974—estimated that at certain meetings there may be 50 students in attendance while at others there are "very few." JA 389. In his calculation, on average "a couple of dozen" students attend each meeting. *Id.*

Generally speaking, there are six reasons why a District student might attend a Board meeting. First, students facing disciplinary action for serious offenses are permitted to speak with the Board directly in connection with their situation. The Board deals with student disciplinary actions at the closed-door portion of its public meetings.

Second, students belonging to one of the two Junior Reserve Officers' Training Corps ("JROTC") programs at the local high schools attend every meeting to perform the "presentation of the colors." This tradition started sometime in 2000, when the JROTC programs at Sussex Central and Indian River High Schools were created. Typically, the principal of the school where the meeting is being held will inform the ROTC students of the location and date of the next meeting.

Third, students attend the School Board meetings in their formal role as student government representatives. Sometime between 1993 and 1995, then-Board Member Richard Cohee submitted a motion to make presentations from student government representatives an official part of the meetings. The

motion passed; the Board now regularly devotes a section of its agenda to presentations from student government leaders and their comments are reflected in the minutes. The usual practice is for a representative from each of the two high schools in the district to attend the meetings. The Board President will "invite the student government representatives to come forward to speak." JA 395. During the school year, student government representatives address the Board at "most meetings." JA 395. However, there "ha[ve] been meetings when [the Board] did not hear from the [student government] representative." JA 500.

Fourth, students also attend the meeting to perform a piece of music or theatre for the Board's benefit. These performances are a regular feature of the meetings.

Fifth, the Board meetings are routinely used to recognize individual or team achievement. It is for this purpose that the greatest numbers of students attend the meetings. At the meeting, the student's name will be called out and he or she will be presented with a letter signed by the Superintendant and the Board President commemorating his or her accomplishment. Photographs are also taken, which may be published in the local newspaper. The Board then records each student by name in the minutes, which are posted on the school district website. Prior to 1994, these types of awards were given out at student assemblies.

The record contains countless examples of these types of awards. The Board has recognized a broad array of student activities, including Odyssey of the Mind tournament winners, art contest winners, scholarship recipients, all-state sports teams, JA 271, other athletic achievements, and musical achieve-

ments. These awards are such an important part of student life that Board President Bireley was not aware of any instance where a student declined to attend the meeting to receive an award, other than for a scheduling conflict. In fact, the awards portion of the Board meeting has become so lengthy that the Board has received complaints from its members about the excessive time spent on this portion of the meeting. There has been informal discussion about limiting the number of awards given out or eliminating this portion altogether in order to decrease the meeting time.

Finally, every Board meeting concludes with a public comments section that students may also attend. This portion of the meeting provides members of the community with an opportunity to "come and talk to [the Board] about things that [are] on their minds, concerns, or anything like that or have input." JA 394.

D. The Content of the Prayers

It is in this environment that the School Board delivers its prayers. The Policy places several limits on the prayers that are recited.[5] By its terms, it permits a wide range of prayers—they "may be sectarian or non-sectarian, denominational or non-denominational" and may refer to specific religious entities by name. JA 0062. However, the prayer may "not be used or exploited to proselytize, advance or convert anyone, or to derogate or otherwise disparage any particular faith or belief." JA 0062.

While by its terms the Policy permits nearly any type of prayer, the record shows that the prayers

[5] These limitations, of course, also apply to the moments of silence, although in practice they are obviously aimed at regulating spoken prayer.

recited at the meetings nearly always—and exclusively—refer to Christian concepts. The record contains several examples of prayers given by different Board Members. On February 22, 2005, Board Member Helms recited the following prayer: "Heavenly Father, Lord our God. Heavenly Father, please help the Board with the problems in the School District that we are going through right now. We ask these things in Jesus' Name." *Indian River*, 685 F. Supp. 2d at 530. In June 2006, a Board Member offered the following prayer:

> Dear Heavenly Father, among Your many blessings, we thank You for the beautiful summer weather and especially for the much needed rain. We thank You also for the wonderful school year that has just ended with so many successes, awards, and accomplishments of our students and staff once again. We ask Your continued blessings on those among us who have devoted so much time, energy, and expertise to the betterment of this district and who are now stepping down. Given [sic] them peace, health, and happiness in the days to come. Be with our people who have suffered illness or injury this year, and grant them a quick return to normal life. Comfort the families of those who are lost to us and give them strength in their time of grief. Protect all who are here and return them to us safely in the fall. We ask that You continue to guide and direct us in . . . our decision-making, so that every child in this district receives the educational skills to be all he/she can be. We ask these things and all others in the name of Jesus Christ, our Lord. Amen.

Id. at 547 (ellipsis in original).

As the District Court found, "[i]t is undisputed that some Board members choose to invoke the name 'Jesus,' 'Jesus Christ,' 'Heavenly Father,' or 'Lord our God' during their prayers." *Id*. at 530. This is confirmed by testimony from the Board's members. In his deposition, Bireley stated that, in the nearly thirty years he had been on the Board, he could not recall a time when three of the current Board Members regularly responsible for the prayer had given a prayer that failed to invoke the name of Jesus Christ. Similarly, Board Member Cohee, who sat on the board from 1993 through approximately 2004 "testified that the 'majority' of Board prayers have been 'Christian' during his service. *Indian River*, 685 F. Supp. 2d at 541. He acknowledged that during his time he could not recall a spoken prayer being given that did not refer to "[a] religious deity other than Jesus or the Christian God." JA 519.

At the time of the original litigation, the responsibility for reciting the prayer alternated between Board Members Reginald Helms, Nina Lou Bunting, Donald Hattier, and Donna Mitchell. Helms testified that he was responsible for six of the prayers in the fifteen Board meetings held between July 2005 and October 16, 2006, and at all six meetings he "pray[ed] in the name of Jesus Christ," JA 780. During her deposition, Bunting explained, "I could not give what I would call a non-sectarian prayer, because I would have to mention Jesus Christ in my prayer, and I would consider that a sectarian prayer. So if I gave a prayer it would have to be sectarian and not non-sectarian." JA 469. Dr. Hattier did not present any testimony of the type of prayer that he typically offers except to suggest that they are usually "historical." JA 656.

The record contains two examples of "historical" prayers recited by Board Members. At the public Board meeting that took place on March 22, 2005, Board Member Walls recited a prayer from a speech given by Martin Luther King:

> God does not judge us by the separate incidences or the separate mistakes that we make, but by the total bent of our lives. In the final analysis, God knows that his children are weak and they are frail. In the final analysis what God requires is that your heart is right.

JA 364. Board Member Walls followed this with a brief statement of the prayer's significance:

> As we gather here this evening, let us take these words to heart and put the best interests of the students, teachers, employees and residents of the Indian River School District ahead of our own. Amen.

JA 364. On August 24, 2004, at the heated public meeting about the role of prayer in the District's schools, Board Member Hattier recited a historical prayer described by the District Court as a "prayer composed by George Washington and contained in a 1783 letter to the Governors of the newly-freed states." *Indian River*, 685 F. Supp. 2d at 529.

While the Policy permits moments of silence to be offered in place of a spoken prayer, this appears to happen infrequently. In the thirty-six Board meetings held between October 2004 to October 2007, "[three] opened with a moment of silence." *Id*. at 530-31.

II.

Tasked with deciding the constitutionality of this Policy, the District Court was first obliged to tackle

the threshold question of what legal framework to employ. The parties presented two possibilities. Defendants argued that the Indian River School Board's Policy was constitutional under the legislative prayer exception set forth in *Marsh v. Chambers*, 463 U.S. 783 (1983), while plaintiffs maintained that the Supreme Court's school prayer jurisprudence provided a more suitable framework, citing specifically to *Lee v. Weisman*, 505 U.S. 577, 592 (1992). Several elements of the School Board's actions took it outside the purview of *Marsh*, plaintiffs argued: the attendance and participation of children in the Indian River 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. Plaintiffs' argument would have required the District Court to forego the special allowance for legislative bodies and examine the constitutionality of the Policy under "other Establishment Clause tests—*i.e.*, the *Lemon* test, the 'endorsement' test or the 'coercion' test." *Indian River*, 685 F. Supp. 2d at 536.

Faced with these two choices, the District Court "ha[d] little trouble concluding that the School District qualified as the type of 'deliberative body' contemplated by *Marsh*." 685 F. Supp. 2d at 537. In concluding that the legislative prayer exception applied, the court cited the following facts: (1) the Board is created by statute; (2) Board Members are popularly elected; (3) the Board's duties include "setting educational policies . . . hiring and firing administrators and teachers, creating and approving curriculum, administering the District's budget;" (4) the Board holds public meetings to vote on these issues; and (5) members of the community attend Board meetings to "express their views and concerns." *Id*. The District Court rejected plaintiffs' argument that because the

Board lacked authority to pass laws or levy taxes without a public referendum, it was not a "legislative body." *Id.* The court explained that *Marsh* did not hinge on the "level of government in which a legislative or deliberative body falls or . . . the differences in the power and responsibilities such bodies exercise." *Id*. In support, the court drew attention to cases where *Marsh* was applied beyond its traditional context, including a county commission, *see Pelphrey v. Cobb Cnty.*, 547 F.3d 1263, 1276 (11th Cir. 2008), county board of supervisors, *see Simpson v. Chesterfield Cnty. Bd. of Supervisors*, 404 F.3d 276, 278 (4th Cir. 2005), and a city council, *see Snyder v. Murray City Corp.*, 159 F.3d 1227, 1228 (10th Cir. 1998).

Plaintiffs also advanced the argument that *Marsh* was inapplicable because "public schools and public schoolboards were 'virtually nonexistent at the time the Constitution was adopted.'" *Indian River*, 685 F. Supp. 2d at 537 & n.107 (quoting *Edwards v. Aguillard*, 482 U.S. 578, 583 n.4 (1987)). The District Court rejected that argument, noting that there was no support for the proposition that the prayer exception was limited to the types of legislative bodies in existence at the time that the First Amendment was adopted. *Id*. at 537-38.

The District Court next addressed plaintiffs' contention that the relationship between the public school system and school boards rendered *Marsh* inapplicable. None of the features plaintiffs identified were particularly persuasive to the court. First, school board meetings are not "akin to a classroom setting or a graduation ceremony." *Id*. at 538-39. In the former, "attendance is involuntary and students are under the exclusive control of school personnel." *Id*. at 539. A board meeting is also dissimilar from a

school graduation, because graduations were "the one school event most important for the student to attend" and one where "the 'influence and force' exercised over the students by the school personnel is 'far greater.'" *Id*. at 539 (quoting *Lee*, 505 U.S. at 591). Second, board meetings are not analogous to school extracurricular activities, because the former are "part of a complete educational experience" and "important to many students." *Id*. (internal quotation marks omitted). Attending a board meeting, on the other hand, is "at best incidental to a student's public school experience." *Id.* "In sum, a school board meeting does not implicate the same concerns as the coercive effect of classroom prayers, graduation prayers, or prayers during extracurricular activities." *Id.*

In reaching this conclusion, the District Court distinguished the present case from the only other Court of Appeals decision to have tackled the question of whether a school board's prayer are subject to *Marsh*, *Coles v. Cleveland Board of Education*, 171 F.3d 369 (6th Cir. 1999). In *Coles*, the Sixth Circuit found in similar circumstances that school boards were distinct from legislative bodies, and thus board prayers should be analyzed under the school prayer case law, *i.e. Lee*, not *Marsh.* 171 F.3d at 379. The District Court was not persuaded by the Sixth Circuit's reasoning: "it strains credulity to equate a School Board meeting with a public school classroom" and "no Supreme Court precedent supports the proposition that the same concerns that apply in school settings . . . also apply in every 'public school setting.'" *Indian River*, 685 F. Supp. 2d at 539 n.120. The court seized on *Coles's* reference to "public school settings," which it warned could be used to invalidate prayer at "a teacher's conference in the evening or during the week," a "PTA supper in the school gym,"

or "any other activity conducted on school property." *Id*. (citing *Coles*, 171 F.3d at 387 (Ryan, J. dissenting)).

Nor did the "frequent[] attend[ance]" of students at the board meetings or the fact that "students may feel disinclined to leave during an opening prayer" render *Marsh* inapplicable, the court explained. *Id*. at 540. The court acknowledged Jane Doe's testimony that she felt "peer pressure to bow her head" which made her "feel uncomfortable and excluded." *Id.* (internal quotation marks omitted). While noting that it was "not insensitive to these concerns," *id*., the court nonetheless dismissed them. Other than Jane Doe's testimony, there was "no evidence [in the record] that any student has felt coerced or pressured to participate in a prayer given during a public Board meeting." *Id*. The court also drew attention to the perceived risk of finding that the presence of students at a legislative prayer invalidated the practice: "[S]tudents across this country attend legislative sessions, including sessions of the United States Senate and House of Representatives, for similar purposes, including field trips, presentation of the colors, and to be recognized for their accomplishments. If the mere presence of school children were enough to invalidate prayers in legislative and other deliberate bodies, such practices would be unconstitutional in virtually every setting." *Id.*

Having decided that *Marsh* applied, the District Court then tackled the question of whether the prayers were constitutional under that precedent. It ultimately found that "*Marsh* did not intend to authorize only nonsectarian" prayer, and thus the *content* of the Board's prayers was not dispositive. *Id*. at 541-42. Nevertheless, the court took issue with the plaintiffs' characterization of the prayers as "overwhelmingly

sectarian." *Id*. at 540-41. At most, the court explained, "the Board Members often reference Jesus Christ in their prayer." *Id*. Moreover, references to religious figures, including "God" and "Jesus Christ" do not necessarily render a prayer "sectarian," because "[a]ny prayer has a religious component." *Id*. at 542 (internal quotation omitted). The District Court also rejected plaintiffs' argument that the Prayer Policy was unconstitutional under *Marsh* because it "advances" Christianity and has been used to "proselytize." *Id*. at 543. The court disagreed, explaining that "the brief references to Jesus Christ in [some of the] prayers" did not "transform those prayers into an impermissible attempt to proselytize or advance Christianity." *Id*. at 544. In addition, several features of the Policy ensured the Board did not stray into constitutionally dubious territory: (1) the policy explicitly prohibits prayers that proselytize or advance Christianity; (2) the Policy explicitly permits non-sectarian prayer; (3) responsibility for the prayer is rotated among Board Members; and (4) certain Board Members choose to lead a moment of silence rather than pray.

While recognizing the fact that the Board Members themselves had the responsibility of monitoring and enforcing compliance with the Prayer Policy was an "entanglement problem" that "would be cognizable" under the Supreme Court's school prayer jurisprudence, the District Court concluded that the Policy "d[id] not run afoul of *Marsh*." *Id*. at 544-45. Similarly, the fact that the board members themselves gave the prayers did not render the Policy unconstitutional. Citing to *Snyder*, 159 F.3d at 1233, the court noted that *Marsh* is not violated simply because the government "chooses [a] particular person" to give that prayer. *Indian River*, 685 F. Supp. 2d at 549. Moreover, in this case, the Indian River Policy was even *more* inclusive than

the practice in *Marsh*, because here the "unpaid, popularly elected members" rotated the prayer opportunity among themselves without regard to the Board Members' religious beliefs. *Id.* at 549-50. Finally, the District Court rejected plaintiffs' various arguments that the school board had an impermissible motive in adopting the Policy, finding that the evidence in the record did not support that assertion.

The District Court thus granted summary judgment in favor of defendants and denied plaintiffs' motion for summary judgment. Plaintiffs timely filed this notice of appeal.[6]

III.

A. The Establishment Clause

Our starting point, naturally, is the Establishment Clause of the First Amendment. The Establishment Clause provides that "Congress shall make no law respecting an establishment of religion." Const. amend. I. The Establishment Clause was "designed as a specific bulwark against [the] potential abuses of governmental power." *Flast v. Cohen*, 392 U.S. 83, 104 (1968). It therefore prohibits the government from "promot-[ing] or affiliat[ing] itself with any religious doctrine or organization, . . . discriminat[ing] among persons on the basis of their religious beliefs and practices, . . . delegat[ing] a governmental power to a religious institution, and . . . involv[ing] itself too deeply in such an institution's affairs." *Cnty of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 590-91 (1989). The Clause "applies equally

[6] We have jurisdiction over an appeal from a final decision of the District Court pursuant to 28 U.S.C. § 1291. The District Court had subject matter jurisdiction pursuant to 28 U.S.C. § 1331.

to the states, including public school systems, through the Fourteenth Amendment." *Borden v. Sch. Dist. of Twp. East Brunswick*, 523 F.3d 153, 175 (3d Cir. 2008) (citing *Wallace v. Jaffree*, 472 U.S. 38, 49-50 (1985)).

The Supreme Court's Establishment Clause jurisprudence is vast and comprised of interlocking lines of cases applying the Clause in particular situations. However, at the very least, the Court has ascribed to the First Amendment the following general meaning:

> Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa.

Everson v. Bd. of Ed. of Ewing Twp., 330 U.S. 1, 15-16 (1947). In the present case, we focus only on two lines of Establishment Clause jurisprudence—the cases governing prayer in the public school system and the legislative prayer exception stated in *Marsh*.

1. The School Prayer Cases

The Supreme Court first tackled the question of school prayer in *Engel v. Vitale*, 370 U.S. 421 (1962). In that case, New York State implemented a regulation requiring school officials to recite a prayer aloud at the start of every day. *Id*. At 423. The prayer, which was composed by state officials, read in its entirety: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country." *Id*. at 422. The Supreme Court held that the practice of "using [the] public school system to encourage recitation of the Regents' prayer" was "wholly inconsistent with the Establishment Clause." *Id*. At 424. It reasoned that the prayer amounted to "religious activity" and served to "officially establish" the beliefs professed therein. *Id*. 424, 430. The Court warned that "it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government." *Id*. at 425. That the prayer was "nondenominational" or permitted students to remain silent or leave the classroom during the prayer did not cure its constitutional defects. This is because the Establishment Clause is violated by "enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not." *Id*. at 430.

The next year, in *School District of Abington Township, Pennsylvania v. Schempp*, 374 U.S. 203 (1963), the Supreme Court again invalidated two state policies of prayer in public schools: a Pennsylvania law requiring "[a]t least ten verses from the Holy Bible [to] be read, without comment at the opening of each public school on each school day," id. at 205, and a

policy adopted by the Board of School Commissioners of Baltimore, Maryland, that called for every school day to open with a reading "of a chapter in the Holy Bible and/or the use of the Lord's Prayer," *id*. at 211. In both cases, children could be excused from participating or observing the prayer. *Id*. at 207, 211 n.4.

Neither practice withstood the Supreme Court's scrutiny. Three aspects of the states' policies rendered them unconstitutional: the fact that the state was "requiring the selection and reading at the opening of the school day of verses from the Holy Bible and the recitation of the Lord's Prayer by the students in unison," the fact that the practice was "prescribed as part of the curricular activities of students who are required by law to attend school," and finally, that the prayer was recited "in the school buildings under the supervision and with the participation of teachers employed in those schools." *Id*. at 223. Citing *Engel*, the Court explained that the fact that students could absent themselves from the prayer did not remedy the policy's unconstitutionality. *Id*. at 225.

By the time the Court decided its next school prayer case, *Wallace v. Jaffree*, 472 U.S. 38 (1985), it had already announced the well-known "*Lemon* test" as the standard for determining the constitutionality of state action under the Establishment Clause. In *Lemon v. Kurtzman*, the Court identified three factors that assist it in determining whether government action violates the Establishment Clause: (1) whether the government practice had a secular purpose; (2) whether its principal or primary effect advanced or inhibited religion; and (3) whether it created an excessive entanglement of the government with religion. 403 U.S. 602, 612-13 (1971). Applying those factors, the *Wallace* Court held that an Alabama

statute authorizing "a period of silence for 'meditation or voluntary prayer,'" in public schools, 472 U.S. at 41, was unconstitutional. Specifically, the Supreme Court found that the statute failed the "purpose prong" of the *Lemon* test: the evidence of legislative intent revealed that the explicit purpose of the statute was to return voluntary prayer to schools. *Id*. 57-60.

The key case in this series—and the one plaintiffs primarily rely on—is *Lee v. Weisman, supra.* In *Lee*, the Supreme Court held that a Rhode Island policy of permitting principals to choose clergymen to give nonsectarian prayers at school graduations was unconstitutional. The Court identified several aspects of the state's control over the prayer that were constitutionally problematic: First, because "[a] school official, the principal decided that an invocation and a benediction should be given; . . . . from a constitutional perspective it is as if a state statute decreed that the prayers must occur." 505 U.S. at 587. Second, the principal chose *who* should give a prayer, a "choice [that] is also attributable to the State . . . [that has] the potential for divisiveness." *Id*. Third, because the principal provided the selected clergyman with guidelines for the prayer, the state "directed and controlled the content of the prayers." *Id*. at 588. In effect, the government itself composed the prayer, a fact completely incompatible with the Establishment Clause. *Id*. Fourth, school officials' "effort to monitor prayer w[ould] be perceived by the students as inducing a participation they might otherwise reject." *Id*. at 590. In sum, "[t]he degree of school involvement here made it clear that the graduation prayers bore the imprint of the State and thus put school-age children who objected in an untenable position." *Id.*

The *Lee* Court wrote at length about the "heightened concerns," regarding prayers in the public school educational system, which "carry a particular risk of indirect coercion." *Id*. at 592. Although that concern exists outside of the context of schools, "it is most pronounced there." *Id*. Thus, courts must be careful to "protect[] freedom of conscience from subtle coercive pressure in the elementary and secondary public schools." *Id*. In emphasizing the special nature of the school context, the Court compared the case to *Marsh:* "Inherent differences between the public school system and a session of a state legislature distinguish this case from [*Marsh v. Chambers*]." *Id.* at 596. First, "[t]he atmosphere at the opening of a session of a state legislature where adults are free to enter and leave with little comment and for any number of reasons cannot compare with the constraining potential of the one school event most important for the student to attend." *Id*. at 597. Second, a school graduation has "far greater" "influence and force" than the "prayer exercise we condoned in *Marsh*." *Id*. At a high school graduation, where school administrations "retain a high degree of control over the precise contents of the program, the speeches, the timing, the movements, the dress, and the decorum of the students," the school's involvement in the invocation and benediction "combine to make the prayer a state-sanctioned religious exercise in which the student was left with no alternative but to submit." *Id*. This, too, distinguished *Marsh* from *Lee.*

The Court again rejected the argument that the prayer was constitutional because students had the choice to stand silently during the benediction or refuse to attend the graduation altogether. Although the pressure to "stand as a group" during the invocation might be "subtle and indirect," it was "as real as

any overt compulsion." *Id*. at 593. The Court acknowledged that although standing silently might be interpreted as a personal act of dissent, the "reasonable perception" would be that any student standing or remaining silent during the prayer was *participating* in the prayer. *Id*. In support, *Lee* drew from research showing that "adolescents are often susceptible to pressure from their peers towards conformity, and that the influence is strongest in matters of social convention." *Id*. at 593-94.

Of course, a student could always *choose* to absent herself from the graduation ceremony altogether. But this "choice" was no choice at all. While the parties had stipulated that attendance at the graduation was "voluntary," the Court disagreed with this characterization. "[T]o say a teenage student has a real choice not to attend her high school graduation is formalistic in the extreme." *Id*. at 595. "Law reaches past formalism." *Id*. Graduations have significant personal and cultural meaning; they are an opportunity for the student and her family to "celebrate success and express mutual wishes of gratitude and respect." *Id*. To require a student to absent herself from her graduation in order to express her disapproval of the school prayer policy would contradict the First Amendment. This is because "the State cannot require one of its citizens to forfeit his or her rights and benefits as the price of resist[ance.]" *Id*. at 596.

The "heightened concerns" attendant to students more recently led the Supreme Court to strike down school policies permitting prayer at events where attendance is even more "voluntary." *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000). In *Santa Fe*, the Court tackled the question of whether student-led and student-initiated invocations authorized by

school policy that were given prior to a football game violated the Establishment Clause. *Id*. at 294. Under that policy, the senior class elected the students responsible for delivering a "brief invocation and/or message," the purpose of which was to "solemnize" the "home varsity football games." *Id*. at 296-97 & n.6.

With the principles of *Lee* in mind, *id*. at 301-02, the Court found that, despite student involvement in selecting and composing the invocation, the state was in fact extensively "entangled" in this religious activity, *id*. at 305-08. The school had crafted the policy permitting student prayer and thus was responsible for selection of the speakers and their messages; the prayer was delivered "as part of a regularly scheduled, school-sponsored function conducted on school property" and "the message [wa]s broadcast over the school's public address system, which remain[ed] subject to the control of school officials" and the prayers took place at football games replete with school symbols. *Id*. at 307.

The Supreme Court also rejected the school's argument that *Lee's* warnings about the coercive aspects of school graduations were absent in extracurricular events like football games. While accepting the proposition that attendance at a football game was in some ways more voluntary than attendance at a high school graduation, the Court noted that for some students—the players, cheerleaders, band members—attendance was essentially mandatory. For others, football games were important "traditional gatherings." *Id*. at 312. Citing *Lee*, 505 U.S. at 596, Justice Stevens reiterated that the First Amendment does not permit the school to "force" students to make the "difficult choice" between "attending these games and

avoiding personally offensive religious rituals." 530 U.S. at 312.

2. The Legislative Prayer Exception in *Marsh*

In *Marsh v. Chambers*, 463 U.S. 783 (1983), the Supreme Court addressed the constitutionality of the Nebraska legislature's practice of opening each session with a prayer given by a chaplain who was paid with public funds. *Marsh* is atypical within the Establishment Clause jurisprudence in that the Supreme Court did not employ its usual Establishment Clause "tests" to analyze the contested state practice. Rather, the Court's decision, which found that the practice was constitutional, is premised on the long history of prayer by legislative and deliberative bodies in the United States.

Writing for the Court, Justice Burger set forth that history:

> The opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country. From colonial times through the founding of the Republic and ever since, the practice of legislative prayer has coexisted with the principles of disestablishment and religious freedom. . . .
>
> The tradition in many of the colonies was, of course, linked to an established church, but the Continental Congress, beginning in 1774, adopted the traditional procedure of opening its sessions with a prayer offered by a paid chaplain.

Marsh, 463 U.S. at 787 (internal citations omitted). *Marsh* paid particular attention to the timing of the enactment of the Bill of Rights, which played a

pivotal role in the Court's reasoning. The Court observed that while "prayers were not offered during the Constitutional Convention, the First Congress, as one of its early items of business, adopted the policy of selecting a chaplain to open each session with prayer." *Id*. at 787-88. This led the Senate to create a committee to appoint a suitable chaplain on April 7, 1789. *Id*. at 788. On April 9, 1789, the House of Representatives created a similar committee. *Id.* The Senate elected its first chaplain on April 25, 1789, while the House did the same a few days later on May 1, 1789. *Id*. On September 22, 1789, a statute providing for the payment of these chaplains was enacted. *Id*. A mere three days after Congress authorized payment for the chaplains, "final agreement was reached on the language of the Bill of Rights." *Id*.

The Supreme Court ascribed to this chronology great significance, explaining that this series of events "shed[] light . . . on how [the draftsmen] thought that [the Establishment] Clause applied to the practice" of legislative prayer. *Id*. at 790. The fact that the First Amendment was written only days after the Senate had authorized payment for the chaplains suggested to the Court that legislative prayer did not offend the First Amendment. The history was evidence of the following:

> Clearly, the men who wrote the First Amendment Religion Clause did not view paid legislative chaplains and opening prayers as a violation of that Amendment, for the practice of opening sessions with prayer has continued without interruption ever since that early session of congress.
>
> . . .

> It can hardly be thought that in the same week Members of the First Congress voted to appoint and to pay a Chaplain for each House and also voted to approve the draft of the First Amendment for submission to the States, they intended the Establishment Clause of the Amendment to forbid what they had just declared acceptable.

Id. at 788, 790. Given this "unambiguous and unbroken history of more than 200 years" of Congressional prayer, the Court explained, "there can be no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society." *Id*. at 792. Nebraska's century-old practice of legislative prayer was "consistent with two centuries of national practice" and thus would not "be cast aside." *Id*. at 790. However, the Court did not define a "legislative" or "deliberative" body anywhere in its opinion.

The second issue in *Marsh* was whether the specific prayers offered by the Nebraska Legislature violated the Establishment Clause. The Court found that they did not, again drawing from the history of legislative prayer in the First Congress. The Court identified three potentially problematic aspects of the Nebraskan prayer practice: (1) the prayers were given by "a clergyman of only one denomination-Presbyterian-[who] has been selected for 16 years;" (2) "the chaplain is paid at public expense;" and (3) "the prayers are in the Judeo-Christian tradition." *Id*. at 793.

None of these factors, considered against the "unique history" of legislative prayers, rendered the Nebraska practice unconstitutional. *Id*. Again, the Court explained that at the First Congress, "delegates did not consider opening prayers as a proselytizing activity or as symbolically placing the government's official

seal of approval on one religious view." *Id*. at 792 (internal quotation marks and citation omitted). Moreover, there was no evidence that the chaplain's long tenure "stemmed from an impermissible motive" and thus his reappointment did "not in itself conflict with the Establishment Clause." *Id*. at 793-94. That the chaplain was paid from public funds was similarly "grounded in historic practice" and thus not unconstitutional. *Id*. at 794. The content of the prayer was "not of concern" because "there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief." *Id.* at 794-95. In sum, the prayers were "simply a tolerable acknowledgment of beliefs widely held among the people of this country." *Id*. at 792.

B. Application to the Indian River School Board

In light of this jurisprudential background, we must determine whether our analysis of the Indian River School Board's Prayer Policy is guided by the principles endorsed in *Lee v. Weisman* or by the exception established in *Marsh v. Chambers.* For the reasons below, we conclude that *Marsh's* legislative prayer exception does not apply and find that *Lee* provides a better framework for our analysis.[7]

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[7] We review a district court's grant of summary judgment de novo. *Pichler v. UNITE*, 542 F.3d 380, 385 (3d Cir. 2008). In doing so, we apply the same standard as the district court. *Id*. That is, summary judgment should be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In deciding whether summary judgment is warranted, we "must view the facts in the light most favorable to the nonmoving party and draw all inferences in that party's favor." *Stratechuk v. Bd. of Educ., South Orange-Maplewood*

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. This reflects the fundamental guarantee of the First Amendment that "government may not coerce anyone to support or participate in religion or its exercise." *Lee*, 505 U.S. at 587. The risk of coercion is heightened in the public school context: "prayer exercises in public schools carry a particular risk of indirect coercion." *Id*. The possibility of coercion is greater in schools because children are more "susceptible to pressure from their peers." *Id*. at 593; *see also Edwards v. Aguillard*, 482 U.S. 578, 584 (1987) ("Students in [elementary and secondary schools] are impressionable . . . . The State exerts great authority and coercive power . . . because of . . . the children's susceptibility to peer pressure."). Thus, the Supreme Court has "recognized a distinction when government-sponsored religious exercises are directed at impressionable children who are required to attend school, for then government endorsement is much more likely to result in coerced religious beliefs." *Wallace*, 472 U.S. at 81 (O'Connor, J., concurring).

Marsh does not adequately capture these concerns. The Indian River School Board carries out its practice of praying in an atmosphere that contains many of the same indicia of coercion and involuntariness that the Supreme Court has recognized elsewhere in its school prayer jurisprudence. While there is no doubt that school board meetings do not necessarily hold the same type of personal and cultural significance as a high school graduation or perhaps even a football

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Sch. Dist., 587 F.3d 597, 603 (3d Cir. 2009) (citing *Norfolk S. Ry. v. Basell USA. Inc*., 512 F.3d 86, 91 (3d Cir. 2008)).

game, we take to heart the Supreme Court's observation that, in this respect, "[flaw reaches past formalism." *Lee*, 505 U.S. at 595. In *Lee*, although the parties stipulated that attendance at the graduation was "voluntary," the Court rejected that characterization:

> Attendance may not be required by official decree, yet it is apparent that a student is not free to absent herself from the graduation exercise in any real sense of the term "voluntary," for absence would require forfeiture of those intangible benefits which have motivated the student through youth and all her high school years. Graduation is a time for family and those closest to the student to celebrate success and express mutual wishes of gratitude and respect, all to the end of impressing upon the young person the role that it is his or her right and duty to assume in the community and all of its diverse parts.

505 U.S. at 595.

In *Santa Fe*, the school district also argued that attendance at a high school game was distinguishable from the "involuntary" nature of graduation exercises that *Lee* recognized. 530 U.S. at 311. The Supreme Court agreed that "[a]ttendance at a high school football game . . . is certainly not required in order to receive a diploma," but rejected the formalism inherent in the district's argument. *Id*. For certain students, namely the "cheerleaders, members of the band, and of course, the team members themselves," attendance at the football game is mandatory as part of their "seasonal commitment." *Id*. The Supreme Court cautioned against "minimiz[ing] the importance . . . of attending and participating in extracurricular activities as part of a complete educational experience." *Id*. Of course, some students may choose not to attend the

games. However, for a second group of students—those who have no formal role at the football games—the event still is nonetheless a meaningful one and "the choice between attending these games and avoiding personally offensive religious rituals is in no practical sense an easy one." *Id*. at 312.

The Indian River Board meetings are akin to those events. It is true that attendance at the Indian River School Board meetings is not technically mandatory. Nevertheless, the meetings bear several markings of "involuntariness" and the implied coercion that the Court has acknowledged elsewhere.

First, like graduations, the Board's recognition of student achievement allows "family and those closest to the student to celebrate success." *Id*. For years, the Indian River School Board has used its regular meeting to recognize student accomplishment of various types. These are awards that were previously given out at student assemblies, but the Board deliberately decided to change the location of the awards to its meetings. This change had the effect of ensuring student attendance at nearly all the Board meetings that take place during the school year. Over the years, hundreds of individual students and students groups have attended a Board meeting in order to be recognized for their academic, athletic, or artistic skills and achievements. Their families are asked to join them in the celebration. At the meeting, the student's name is called and they are presented with a letter commemorating the experience. The award is reflected in the minutes and may be published in the local newspaper. Thus, by virtue of the way in which it gives out these awards, the Board does more than casually celebrate student accomplishments; it effectively cloaks them in official recognition.

Therefore, like commencement exercises, a student who decides not to attend the meeting will "forfeit . . . intangible benefits" that "have motivated the student." *Lee*, 505 U.S. at 595. They will be giving up an opportunity to "celebrate success and express mutual wishes of gratitude and respect." *Id*. Of course, attendance at a meeting of the Board does not bear all of the same hallmarks of personal and cultural significance that a high school graduation ceremony does. It may not be "one of life's most significant occasions." *Id*. at 595. It may not be as exciting an event as a football game. But the Indian River School Board has deliberately made its meetings meaningful to students in the district. The significance of the awards portion of the meeting is borne out by Bireley's testimony. Bireley testified that it was an "honor for [the students] to come to receive an award" at the meetings. JA 393. These awards are such an important part of student life that Bireley was not aware of any instance where a student declined to attend the meeting to receive an award, other than for a scheduling conflict.

Thus, for these students, the meetings are a culmination of their extracurricular activities.[8] This has additional implications for awards given out to

[8] For example, the Board "recognized and presented certificates" to the following individuals and teams "for their accomplishments" at the April 26, 2005 meeting: 28 students belonging to the 2005 Odyssey of the Mind Team; four members of the JROTC State Champion Shooting Team and three members of the JROTC State Champion Color Guard of the Indian River High School; two state wrestling champions from Indian River High School, two students who won first place at the "Science Olympiad;" four students who won first place at a Future Farmers of America competition; and ten members of the Academic All-State Wrestling Team from the Indian River High School.

teams. In situations where entire teams are honored, a student may feel especially coerced to attend a meeting where the Board recites a prayer. A student may feel pressure to attend the meeting with their team; to do otherwise could be construed as abandoning the team. At the very least, a team member who absents herself will not receive the same tangible and intangible benefits as her teammates.

In this context, the Supreme Court's observation that students are particularly vulnerable to peer pressure in social context is an important one. *Santa Fe*, 530 U.S. at 311-12 ("We stressed in *Lee* the obvious observation that adolescents are often susceptible to pressure from their peers towards conformity, and that the influence is strongest in matters of social convention.") (internal citations and quotation marks omitted). Given this pressure, we question whether an individual team member will feel free to choose *not* to attend the meeting in order to avoid participating in the prayer when the rest of the team is being honored at the meeting. The existence of such pressure is borne out by a critical fact in the record: students have never decided *not* to attend the meetings, other than for a scheduling conflict.

Moreover, for at least some students, attendance at the Board meetings is more formally *part* of their extracurricular activities, and thus is closer to compulsory. JROTC members are one example. Every Board meeting begins with a "presentation of the colors" of the high school where the Board meeting is taking place. There are only two such JROTC programs, and thus the students in the JROTC must attend the meetings.

Attendance also borders on compulsory for student government representatives. Student government

members are invited to the Board meetings in their official capacity as representatives of the two local high schools. Their presentations to the Board are a specific part of the Board's agenda. The record confirms that student government leaders routinely attend the meetings and speak on a wide variety of issues relating to the student experience in the Indian River School District. Thus, they directly represent student interests at the Board's meeting. The meeting gives student government representatives—and therefore all the students—an opportunity to draw attention to issues that affect their educational experience. As befits their role, student representatives may speak on a number of different issues. An example from the minutes illustrates the nature of these presentations. At the March 22, 2005 Board meeting, a student representing Sussex Central Student Council gave a lengthy presentation identifying the issues affecting the student body, including students' reactions to the new school lunch menu, the themes and locations of the school's upcoming prom, the result of efforts to raise funds for disaster relief, problems with the athletic fields, accomplishments at various athletic competitions, efforts by the guidance office to assist with college applications, and the administration of state educational exams.

To say that the attendance of student government representatives is not part of their extracurricular obligations is to undermine the contributions these students make to their school and their communities. In this regard, they are more like the "cheerleaders, members of the band, and, of course, the team members themselves, for whom seasonal commitments

mandate their attendance" at football games. *Santa Fe*, 530 U.S. at 290.[9]

The Board argues that its meetings are distinguishable from graduations because "audience members, including students, may freely enter and exit—and they do. If Appellants or anyone else finds it truly intolerable to hear a brief prayer they can easily absent themselves for that short portion of the meeting." Appellee Br. 29. They point out that, under Lee, "the ability to come and go freely without notice or interference is highly relevant to the inquiry." *Id*.

Appellees misunderstand the lesson in *Lee*. Simply put, giving a student the option to leave a prayer "is not a cure for a constitutional violation." *Lee*, 505 U.S. at 596; *see also Engel*, 370 U.S. at 425; *Santa Fe*, 530 U.S. at 312. "It is a tenet of the First Amendment that the State cannot require one of its citizens to forfeit his or her rights and benefits as the price of resisting conformance to state-sponsored religious practice." *Lee*, 505 U.S. at 596. The First Amendment does not allow the state to force this kind of choice upon a student.

Additional contextual elements of the Board meetings betray the possibility that students will feel coerced into participating in the prayer practice. The meetings take place on school property. The Board retains complete control over the meeting; it sets the agenda and the schedule, for example. *Cf Lee*, 505 U.S. at 597 ("At a high school graduation, teachers and principals must and do retain a high degree of

[9] For these reasons, we also disagree with the District Court's conclusion that school board meetings are unlike extracurricular activities because they are not "important" or "part of a complete educational experience."

control over the precise contents of the program, the speeches, the timing, the movements, the dress, and the decorum of the students."). It is in this context that the Board itself composes and recites the prayer. Thus, the Board is involved in every aspect of the prayer. In these circumstances, it is particularly difficult to imagine that a student would not feel pressure to participate in the practice, or at least appear to agree with it—particularly a student appearing in front of the Board to contest a disciplinary action.

Second, 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. The District Court's starting position was that *Marsh* applied because the School Board was a "legislative body." We find this analysis unpersuasive. To conclude that, merely because the Board has duties and powers similar to a legislative body *Marsh* applies, is to ignore the Board's role in Delaware's system of public school education.

Every aspect of the Indian River School Board is intended to promote and support the public school system. By statute, the Board's purpose is to "administer and to supervise the free public schools of the . . . school district" and "determine policy and adopt rules and regulations for the general administration and supervision" of the schools. 14 Del. C. § 1043. All of the Board's policy making responsibilities are aimed at educating students or otherwise administering the public school system. For example, the Board determines the number of hours in a school day, enforces school attendance, evaluates schools within the District, decides whether to establish kindergartens, sets

the "educational policies" of the school, "adopt[s] courses of study; purchases textbooks and other equipment," and "appoint[s] personnel." 14 Del. C. § 1049. More generally, the Board also has the responsibility of "prescrib[ing] rules and regulations for the conduct and management of the schools." *Id*. at § 1049(2). Even the power to levy taxes—which the Board points out is a hallmark of a legislative body—is limited to "school purposes." *Id*. at § 1902.

The Board's responsibilities serve to further highlight the compulsory nature of student attendance at Board meetings. A student wishing to comment on school policies or otherwise participate in the decision-making that affects his or her education *must* attend these meetings. Thus, while such meetings may technically be "voluntary," in practice they are not. The First Amendment does not require students to give up their right to participate in their educational system or be rewarded for their school-related achievements as a price for dissenting from a state-sponsored religious practice. *Lee*, 505 U.S. at 593-94 (recognizing that, for elementary and secondary school students, the government cannot force one to choose between appearing to participate in state-sponsored religious practice or protesting). As the presence of hundreds of students, parents, teachers, and community members at the Board's contentious August 24, 2004 meeting makes plain, Board meetings are the site of community discussion about school policies and events.

In this respect, we find the Sixth Circuit's discussion of the role of school boards instructive. In *Coles v. Cleveland Board of Education*, 171 F.3d 369, 371 (6th Cir. 1999), the Court of Appeals confronted the same question we have before us: "Are the prayers in

question more like 'school prayers' prohibited by *Lee* or closer to 'legislative prayer' permitted by *Marsh*?" The Sixth Circuit held that the purpose and nature of the school board "remove[d] it from the logic in *Marsh* and . . . place[d] it squarely within the history and precedent concerning the school prayer line of cases." *Id*. at 381. The court identified several features of the school board's structure that distinguished it from a traditional legislative body:

> Although the school board, like many other legislative bodies, is composed of publicly elected officials drawn from the local community, that is where the similarity ends. . . . Simply stated, the fact that the function of the school board is uniquely directed toward school-related matters gives it a different type of "constituency" than those of other legislative bodies—namely, students. Unlike ordinary constituencies, students cannot vote. They are thus unable to express their discomfort with state-sponsored religious practices through the democratic process. Lacking a voice in the electoral process, students have a heightened interest in expressing their views about the school system through their participation in school board meetings. . . .
>
> [U]nlike officials of other legislative bodies, school board members are directly communicating, at least in part, to students. They are setting policies and standards for the education of children within the public school system, a system designed to foster democratic values in the nation's youth, not to exacerbate and amplify differences between them. . . .
>
> Meetings of the board serve as a forum for students to petition school officials on issues affect-

> ing their education. 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.

Id. at 381-82.

We agree with the Sixth Circuit's analysis. The very purpose of the Indian River School Board distinguishes it from other deliberative bodies. For this reason, the fact that other courts have extended *Marsh* to other legislative or deliberative bodies is not relevant. *See Pelphrey v. Cobb Cnty*., 547 F.3d at 1276 (county commission meetings); *Simpson v. Chesterfield Cnty. Bd. of Supervisors*, 404 F.3d 276, 281 (4th Cir. 2005) (county board of supervisors); *Snyder*, 159 F.3d at 1228 (city council).[10]

We begin by noting that the District Court's reasoning ignores *Marsh's* suggestion that the presence of children would affect its calculus. In its historical

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[10] Other Courts of Appeals have also been cautious in extending *Marsh* beyond legislative sessions. *See, e.g*., Coles, 171 F.3d at 381 ("As far as *Marsh* is concerned, there are no subsequent Supreme Court cases. *Marsh* is one-of-a kind."); *Mellen v. Buntin*, 327 F.3d 355, 370 (4th Cir. 2003) (refusing to apply *Marsh* to daily "supper prayer" at state-operated military college because "*Marsh* is applicable only in narrow circumstances" and supper prayer at the military institute "does not share *Marsh's* 'unique history.'"; *Warner v. Orange Cnty. Dep't of Prob.*, 115 F.3d 1068, 1076 (2d Cir. 1997) (expressing reluctance to apply *Marsh* to inmate's compulsory participation in Alcoholics Anonymous program because *Marsh* "relied heavily on the long tradition of public prayer in the [legislative context]").

analysis of legislative prayer, the *Marsh* Court cited to several statements and letters from the Founding Fathers, concluding that this "interchange emphasizes that the delegates did not consider opening prayers as a proselytizing activity or as symbolically placing the government's official seal of approval on one religious view." 463 U.S. at 792 (internal citations and quotations omitted). Yet the Court expressed a note of caution: "Here, the individual claiming injury by the practice is an adult, presumably not readily susceptible to religious indoctrination, or peer pressure." *Id*. (internal citations and quotations omitted).

Moreover, although the *Marsh* Court referenced "other" deliberative bodies, *Marsh's* entire approach rests on the long-standing and "unique" history of legislative prayer. There may be some truth to the District Court's conclusion that, "nothing in *Marsh* . . . suggests that the Court intended to limit its approval of prayer . . . to those [legislative and deliberative bodies] that were in existence when the First Amendment was adopted." *Id.* at 537-38. However, at least one Supreme Court decision after *Marsh* suggests that *Marsh's* analysis is not suitable to public schools. In *Edwards v. Aguillard*, 482 U.S. 578 (1987), the Court addressed the question of whether Louisiana's "Creationism Act," which forbade the teaching of the theory of evolution in public elementary and secondary schools unless accompanied by instruction in the theory of "creation science," violated the Establishment Clause. *Id*. at 581-82. Explaining that the appropriate legal test was *Lemon*, the Court warned that *Marsh's* historical approach "is not useful in determining the proper roles of church and state in public schools, since free public education was virtually nonexistent at the time the Constitution was adopted." *Id*.

We find additional support in the Supreme Court's subsequent treatment of *Marsh*. The Court has consistently emphasized the narrow, historical underpinnings of *Marsh* and has proven reluctant to extend *Marsh* outside of its narrow historical context. *See, e.g., McCreary Cnty., Ky. v. Am. Civil Liberties Union*, 545 U.S. 844, 860 n.10 (2005) (describing *Marsh* as a "special instance[]"); *Allegheny*, 492 U.S. at 603-05 (1989) (while *Marsh* recognized a "unique history" of legislative prayer, it "plainly does not stand for the sweeping proposition . . . that all accepted practices 200 years old and their equivalents are constitutional today"); *Wallace*, 472 U.S. at 63 & n.5 (explaining that since *Lemon* was adopted, only *Marsh* has been decided "without resort to [the] three-pronged test" and *Marsh* was "based primarily on . . . long historical practice") (Powell, J., concurring). Only one Supreme Court case has drawn extensively on *Marsh's* historical analysis, and, even in that case, the Court ultimately applied the *Lemon* test to determine that a city's display of the nativity scene violated the Establishment Clause. *See Lynch v. Donnelly*, 465 U.S. 668, 673-74 (1984).

Appellees argue that "to suggest that Board prayer becomes unconstitutional simply because a handful of students . . . attend a monthly meeting where a sixty-second prayer is offered, is absurd." Appellee Br. 31. This overstatement does not reflect our holding.[11] The "mere presence" of students at a legislative session is

[11] Moreover, we question whether the length of the prayer would even be a relevant consideration. *See Engel*, 370 U.S. at 436 (fact that 22-second prayer was "brief" or "general" did not render it constitutional); *see also Schempp*, 374 U.S. at 225 ("[I]t is no defense to urge that the religious practices here may be relatively minor encroachments on the First Amendment.").

not what makes the Indian River policy unconstitutional. Our decision is premised on careful consideration of 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. It does not endanger the centuries-long practice of prayer at legislative sessions.[12] We are tasked with "protect[ing] freedom of conscience from subtle coercive pressure in the elementary and public schools." *Lee*, 505 U.S. at 592. In the public school context, the need to protect students from coercion is of the utmost importance.

In sum, because we find that the type of potentially coercive atmosphere the Supreme Court asks us to guard against is present here, because of the nature of the relationship between the Board and Indian River students and schools, and in light of *Marsh's* narrow historical context, we hold that the District Court erred in applying the legislative exception to the Indian River Prayer Policy.

V.

A. The Establishment Clause Tests

Having decided that this case is controlled by the principles in *Lee v. Weisman*, we must next decide whether the Indian River Policy violates the Establishment Clause.[13] In this regard, we confront

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[12] For the same reason, we reject the District Court's conclusion that, if "the mere presence of school children were enough to invalidate prayers in legislative and other deliberative bodies," then the practice of prayer "would be unconstitutional in virtually every setting."

[13] In the District Court, both parties moved for summary judgment. On appeal, there are no disputed issues of material fact and the parties briefed the constitutionality of the Policy under

another threshold question—what Establishment Clause "test" to apply. In the public school context, the Supreme Court has been inclined to apply the *Lemon* test. *See Grand Rapids Sch. Dist. v. Ball*, 473 U.S. 373, 383 (1985) (noting that the Court has "particularly relied on *Lemon* in every case involving the sensitive relationship between government and religion in the education of our children"). However, we note that *Lemon* has "been the subject of critical debate in recent years." *Am. Civil Liberties Union of New Jersey v. Black Horse Pike Reg'l Bd. of Educ.*, 84 F.3d 1471, 1484 (3d Cir. 1996). "[I]ts continuing vitality has been called into question by members of the Supreme Court and by its noticeable absence from the analysis in some of the Court's recent decisions." *Id.*; *see also Van Orden v. Perry*, 545 U.S. 677, 686 (2005) (describing Supreme Court's reluctance to apply *Lemon*). Under *Lemon*, a three-part inquiry determines whether a challenged government action is constitutional under the Establishment Clause: "(1) whether the government practice had a secular purpose; (2) whether its principal or primary effect advanced or inhibited religion; and (3) whether it created an excessive entanglement of the government with religion." 403 U.S. at 612-13.

The "endorsement test" advocated by Justice O'Connor in her concurrence in *Lynch v. Donnelly*, 465 U.S. 668 (1984), has emerged as an alternative. Under the endorsement test, "[w]hat is crucial is that a government practice not have the effect of communicating a message of government endorsement or disapproval of religion." *Lynch*, 465 U.S. at 692

Lemon. Therefore, we find it appropriate to address the merits of this issue.

(O'Connor, J., concurring). This analysis adopts the viewpoint of a "reasonable observer familiar with the history and context of the display" and asks whether they "would perceive the display as a government endorsement of religion." *Borden v. Sch. Dist. of Twp. East Brunswick*, 523 F.3d 153, 175 (3d Cir. 2008) (citing *Modrovich v. Allegheny Cnty., Pa.*, 385 F.3d 397, 400 (3d Cir. 2004)). The Supreme Court applied the "endorsement test" in its most recent school prayer case. *Santa Fe*, 530 U.S. at 308. The endorsement test and the second *Lemon* prong are essentially the same. *Black Horse Pike*, 84 F.3d at 1486 ("Whether 'the endorsement test' is part of the inquiry under *Lemon* or a separate inquiry apart from it, the import of the test is the same."); *see also Freethought Soc. of Greater Philadelphia v. Chester Cnty.*, 334 F.3d 247, 269 (3d Cir. 2003) (describing "effect" prong of *Lemon* as a "cognate to endorsement").

This Court has applied both tests. *See Busch v. Marple Newtown Sch. Dist.*, 567 F.3d 89, 100-01 (3d Cir. 2009) (applying *Lemon*); *Borden*, 523 F.3d at 175 (applying endorsement test); *Black Horse Pike*, 84 F.3d at 1484 (applying *Lemon* but noting that it had been "the subject of critical debate in recent years"). Because *Lemon* has not been overruled, we will apply it here. However, as we have done elsewhere, "[i]n light of the critique of the *Lemon* test," we will "also consider [the] claim that the [Board's Policy] fails the 'endorsement test.'" *Stratechuk v. Bd. of Educ., South Orange-Maplewood Sch. Dist.*, 587 F.3d 597, 603 (3d Cir. 2009); see also *Modrovich*, 385 F.3d at 406 ("we will apply both the endorsement test and the *Lemon* test, in case a higher court prefers to apply the traditional *Lemon* test").

B. The *Lemon* Test[14]

Proceeding under *Lemon*, "the challenged action is unconstitutional if (1) it lacks a secular purpose, (2) its primary effect is to either advance or inhibit religion, or (3) it fosters an excessive entanglement of government with religion. *Modrovich*, 385 F.3d at 401 (citing *Lemon*, 403 U.S. at 612-13).

1. The Secular Purpose Prong

"In applying the purpose [prong]," we ask "whether government's actual purpose is to endorse or disapprove of religion." *Wallace*, 472 U.S. at 56 (internal quotations marks omitted). Under *Lemon*, if the statute has *some* secular purpose, then it survives the first prong. *Freethought*, 334 F.3d at 262 ("[T]he purpose prong of *Lemon* only requires some secular purpose, and not that the purposes . . . are exclusively secular.")

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[14] We find it useful to begin by commenting on one aspect of the District Court's application of *Marsh* to the present case. The District Court acknowledged that Doe felt "pressured" to participate in the Board's prayer by bowing her head but "nonetheless conclude[d] that" plaintiff's testimony "d[id] not render the Board's Prayer Policy unconstitutional." 685 F. Supp.2d at 594. The Court also stated that "[p]laintiffs have offered no evidence that any student has felt coerced or pressured to participate in a prayer given during a public Board meeting." 685 F. Supp.2d at 594. We disagree with this analysis. Plaintiff Doe clearly claimed that she felt coerced into participating in the prayer. Therefore, the court erred in relying on the absence of additional evidence of injury to find the Board Prayer Policy constitutional. There is no "de minimis" defense to a First Amendment violation. *Elrod v. Burns*, 427 U.S. 347, 374 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."); *see also Schempp*, 374 U.S. at 225 ("[I]t is no defense to urge that the religious practices here may be relatively minor encroachments on the First Amendment.").

(quotations omitted). The stated secular purpose, however, must be sincere and not a mere sham. *Edwards*, 482 U.S. at 586.

The Board argues that the purpose of the Prayer Policy is to "solemnify" its meetings, and thus that the Government has a secular purpose in promoting prayer. We will not take issue with the appellees' characterization of their policy, which we note is "entitled to some deference." *Santa Fe*, 530 U.S. at 308. However, even assuming the Board's primary purpose is to solemnify the meetings, we nonetheless hold that the Policy violates the Establishment Clause because, as we determine below, its primary effect is to advance religion and it fosters excessive government entanglement in religion. *See Stone v. Graham*, 449 U.S. 39, 41 (1980) ("If a statute violates any of these three principles [of *Lemon*], it must be struck down under the Establishment Clause.").

2. The Primary Effect Prong

Under the second prong of *Lemon*, a state's practice "can neither advance, nor inhibit religion." *Black Horse Pike*, 84 F.3d at 1486. This means that "regardless of its purpose," the government practice "cannot symbolically endorse or disapprove of religion." *Busch*, 567 F.3d at 100. As explained earlier, the second prong of *Lemon* is akin, if not identical, to the endorsement test. [15] *Black Horse Pike*, 84 F.3d at 1486. This Court "must determine whether, under the totality of the circumstances, the challenged practice conveys a message favoring or disfavoring religion." *Id*. In doing

[15] For that reason, cases discussing both are useful. *See, e.g., Stratechuk*, 587 F.3d at 606 (using case law and language describing the endorsement test to set forth the "effect prong" of the *Lemon* test).

so, we adopt the viewpoint of the reasonable observer and may take into account "the 'history and ubiquity' of [the] practice," since it "'provides part of the context in which a reasonable observer evaluates whether a challenged governmental practice conveys a message of endorsement of religion.'" *Id*. (quoting *Sch. Dist. of Grand Rapids v. Ball*, 473 U.S. 373, 390 (1985)).

Appellees concede that the Prayer Policy has "the incidental effect of advancing religion." Appellee Br. 52. They argue nonetheless that there is "no evidence from which a reasonable observer could conclude that advancing religion is the prayer policy's primary effect." Rather, the primary purpose of the Policy is to solemnify the Board's proceedings. For the two reasons that follow, we find that the Policy impermissibly endorses religion.

First, the largely religious content of the prayers would suggest to a reasonable person that the primary effect of the Policy is to promote Christianity. Of course, by its very terms, the Policy permits references to any religious figure and allows non-sectarian prayer. As discussed earlier, the majority of the prayers delivered by the Board are—by the Board Members' own admission—sectarian. Only occasionally have Board Members used this opportunity to propose a moment of silence. These prayers therefore constitute "religious activity." *Lee*, 505 U.S. at 603 (Blackmun, J., concurring) ("In the words of *Engel*, the Rabbi's prayer is a solemn avowal of divine faith and supplication for the blessings of the Almighty. The nature of such a prayer has always been religious.") (citation omitted). We will again cite to the following example as an illustration:

> Dear Heavenly Father, among Your many blessings, we thank You for the beautiful summer

> weather and especially for the much needed rain. We thank You also for the wonderful school year that has just ended with so many successes, awards, and accomplishments of our students and staff once again. We ask Your continued blessings on those among us who have devoted so much time, energy, and expertise to the betterment of this district and who are now stepping down. Given them peace, health, and happiness in the days to come. Be with our people who have suffered illness or injury this year, and grant them a quick return to normal life. Comfort the families of those who are lost to us and give them strength in their time of grief. Protect all who are here and return them to us safely in the fall. We ask that You continue to guide and direct us in . . . our decision-making, so that every child in this district receives the educational skills to be all he/she can be. We ask these things and all others in the name of Jesus Christ, our Lord. Amen.

Indian River, 685 F. Supp. 2d at 547.

Given that the prayers recited are nearly exclusively Christian in nature, including explicit references to God or Jesus Christ or the Lord, we find it difficult to accept the proposition that a "reasonable person" would not find that the primary effect of the Prayer Policy was to advance religion.

Appellees maintain that the purpose and effect of the prayer is to solemnify the meetings. It is true, as the previous example reveals, that the prayers ask for guidance on school-related matters. In this respect the Indian River policy is similar to the policy the Supreme Court considered in *Santa Fe*, whose stated purpose was also to "solemnize the event." 530 U.S. at 306. The Court acknowledged that "[a] religious

message is the most obvious method of solemnizing an event." *Santa Fe*, 530 U.S. at 306. However, the fact that the purpose of the policy is to solemnify the Board meetings does not mean that it does not also impermissibly endorse religion. The two are separate components of our inquiry. *See Borden*, 523 F.3d at 177-78 ("First, the inquiry is not whether Borden intends to endorse religion, but whether a reasonable observer, with knowledge of the history and context of the display, would conclude that he is endorsing religion."). The second prong of the *Lemon* test asks us to adopt the viewpoint of a reasonable observer, regardless of what purpose the Board might have had. In light of that obligation, we find that a reasonable observer would view the content of the Board's prayers as promoting religion.[16]

We are also instructed to consider the "history and ubiquity" of the challenged practice in assessing how a reasonable person would view it. Our decision in *Borden* showcases the significance of the history and context of a contested practice to its constitutionality. In *Borden*, we tackled the head high school football coach's practice of "engag[ing] in the silent act[] of bowing his head during his team's pre-meal grace and taking a knee with his team during a locker-room prayer." *Id*. at 158. Borden, who had been the

[16] Since enacting the Policy, the Board recites a disclaimer prior to delivering the prayer (although the disclaimer is not mandated by the Policy). However, the disclaimer does not render the Board's practice constitutional. *See Black Horse Pike*, 84 F.3d at 1482 ("The disclaimer required . . . does help to recapture some of the separation between church and state that has been obscured by the state's control over the graduation. However, the Board cannot sanction coerced participation in a religious observance merely by disclaiming responsibility for the content of the ceremony.").

head football coach since 1983, had a long history of engaging in similar conduct:

> For twenty-three years, Borden led the team in a pre-game prayer in the locker room. During that same period of time, Borden orchestrated a pre-meal grace for his team. He originally had a chaplain conduct the pre-meal grace. This practice changed only after school officials asked him to stop; then he had the chaplain write the grace and he selected seniors on the team to recite it. Additionally, during at least three seasons, Borden led the team in the first prayer of the season. Both of these activities, the locker room preparations and the pre-game meals, were school-sponsored events.

Id. at 176. Relying in part on "the history of Borden's conduct with the team's prayers" we found that "his acts cross the line and constitute an unconstitutional endorsement of religion." *Id*. at 178. We drew support from *Santa Fe*, where in addressing the constitutionality of a prayer recited over loud speakers at football games, the Supreme Court "considered the many years of pre-game prayers at the school, and the evolution of the policy, including the name 'Prayer at Football Games' and its stated purpose." *Id*. at 176 (citing *Santa Fe*, 530 U.S. at 308-09).

The history and context of the Indian River Policy is similarly revealing. Prayer in school and at school events has been a contentious issue in the Indian River School District for some time. In fact, the Board's decision to write an official prayer policy grew out of this debate and efforts to stall a possible civil action against the Board. The original event to kindle this heated debate was the Indian River School District's policy of permitting official prayer at

school graduations. While that claim eventually settled, the underlying events inform our understanding of the history of prayer in the District. In 2004, recall, the School District invited a pastor to recite an "invocation and benediction" at one of the district high school graduation ceremonies. *Indian River*, 685 F. Supp. 2d at 528. The benediction "explicitly invoked Jesus Christ. For example, in the benediction, Reverend Fike stated: 'Heavenly Father . . . direct [graduates] into the truth, and eventually the truth that comes by knowing Jesus.'" *Id.*

Mona Dobrich, one of the original plaintiffs, complained about the prayer during the Board's regularly-scheduled meeting on June 14, 2004. *Id*. at 529. Dobrich's complaint garnered significant media attention from Delaware newspapers. News that the ACLU was threatening to sue the District spread quickly and the complaint was widely reported by the local news media. At the Board's July 27, 2004 meeting, "[t]hirteen residents, including five religious leaders, spoke up both for and against allowing prayer at the district's functions, particularly graduation ceremonies."[17] JA 81. "[M]ore than 100 people attended [the meeting] with the majority interpreting Dobrich's request as a move to stifle their religious freedom and to degrade the moral fiber of the community." JA 81. One newspaper described some of the comments made:

> Pastor Richard Blades . . . spoke of Biblical mandate for prayer in Jesus' name, adding, "our school district has prayed in Jesus' name for many, many years." Pastor Marvin Morris received

[17] A different newspaper report stated that 11 people made statements.

> hardy applause after suggesting doing away with prayer will lead to an erosion of [the] community's foundations. Another offered the opinion that if it hadn't been for prayer, the school district could be in a greater mess than it currently is.
>
> Those on the other side of the debate argued for tolerance and acceptance of all faiths . . . .
>
> Mona Dobrich, the Jewish mother who first brought the issue to the public's attention, read a prepared speech, charging the district with a legal obligation to do away with secular prayer.

JA 81.

The Board grew concerned that it would be the subject of a lawsuit. *Dobrich*, 380 F. Supp. 2d at 371. The District Court explained what happened next:

> On August 23, 2004, the Board convened a special meeting to discuss prayer at the beginning of Board meetings. According to the minutes of that session, which lasted several hours, "several board members expressed that their constituents d[id] not want the Board to change its practice of opening the meetings with a prayer."

Indian River, 685 F. Supp. 2d at 529. The Board's next regularly-scheduled meeting took place the next day. This meeting:

> attracted more than twice the attendance of a typical public meeting. At the beginning of the meeting, then-Board President Walls asked Board Member Hattier to "lead the Board in a moment of prayer." Several members of the crowd applauded. President Walls gaveled the room back to order. [Board] Member Hattier then

> gave [another prayer] During the portion of the meeting devoted to public comments, several attendees spoke in favor of continuing the practice of having an invocation at public school graduations and other school events.

Id.

A newspaper reported that approximately 800 people attended the meeting, "a majority . . . [of whom] supported the board's decision to open with prayer and continue the practice at commencement." JA 202. Jane Doe testified that attendees were shouting "Amen" and "hallelujah" during the meeting. JA 135. The newspaper article confirmed this: attendees "shouted out 'Amen' or 'Praise Jesus' after scripture passages were quoted during the public comment period." JA 202. The article goes on to describe the attendees holding signs reading "Jesus is the Light of the Word" and "Let us Pray, God is Listening." JA 202. In addition, "[l]ocal churches and community members organized a prayer vigil before the meeting." JA at 203. One community member "present[ed] the board with a petition signed by 320 people who want to see prayer continued at graduation." JA at 203. The meeting was also attended by several state representatives. During the public comment period, one of them stated to the Board, "You have the public behind you . . . If you do not do the right thing, the public will take you out, not the ACLU." JA 87. Board Member Bireley conceded that the vast majority of comments at the meeting were "probably" intended to be intimidating to opponents of school board prayer. JA 415.

This history is illuminating. This sequence of events shows that the Board's Prayer Policy is closely linked to the desire to maintain prayer at Indian

River school events, including at graduations. After all, it was in response to this community uproar that the Board was compelled to draft a formal Prayer Policy. *Indian River*, 685 F. Supp. 2d at 529. These events also show how the public viewed the prayer issue. As exemplified by the August 24, 2004 meeting, there was clearly broad support among community members for the practice of prayer at the School Board meetings and District graduations. Not only did most of the attendees support the Board's practice, but their conduct reveals that in the minds of many, the issue of prayer at the Board meetings and graduations was closely intertwined with religion. In Board Member Helms's words, "it was apparent to me that not only did they want to take away prayer before graduation, but they wanted to take my right to pray at a Board meeting." JA 767. The Policy was drafted in order to safeguard against a potential lawsuit challenging the Board's unwritten practice of praying at every public meeting. The Policy was also drafted in an atmosphere of contention and hostility towards those who wanted prayers to be eliminated from school events. A reasonable person aware of this history would conclude that the primary effect of the Board's Policy was to endorse religion.

3. The Excessive Entanglement Prong

Part three of the *Lemon* test provides that government conduct may "not foster an excessive government entanglement with religion." *Lemon*, 403 U.S. at 613. "[T]o assess entanglement, we have looked to 'the character and purpose of the institutions that are benefitted, the nature of the aid that the State provides, and the resulting relationship between the government and religious authority.'" *Agostini v. Felton*, 521 U.S. 203, 233 (1997) (quoting *Lemon*, 403

U.S. at 615). We must also bear in mind that "excessive entanglement" "requires more than mere li]nteraction between church and state,' for some level of interaction has always been 'tolerated.'" *Child Evangelism Fellowship of N.J. Inc. v. Stafford Twp. Sch. Dist.*, 386 F.3d 514, 534 (3d Cir. 2004) (Alito, J.) (quoting *Agostini*, 521 U.S. at 233).

Several institutional aspects of the recitation of the prayer are troubling. The prayers are not spontaneous, but a formal part of the Board's activities. The Board explicitly decided that a prayer or a moment of silence should be part of every School Board meeting. The "decis[ion] that an invocation and a benediction should be given . . . is a choice attributable to the State." *Lee*, 505 U.S. at 587. That level of "involvement," the Supreme Court cautions, is "troubling." *Id*. In this case, the Policy resulted from, and was sanctioned by, the Board's institutional authority in that it was enacted through a vote.

Second, the prayers are recited in official meetings that are completely controlled by the state. The 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.

The practice and the Prayer Policy bear two additional hallmarks of state involvement: the Board composes and recites the prayer. Government participation in the composition of prayer is precisely the type of activity that the Establishment Clause guards against. *See Lee*, 505 U.S. at 590 ("[O]ur precedents do not permit school officials to assist in composing prayers as an incident to a formal exercise for their students."). In this case, the Board always composes the

prayers recited at the public meetings. Per the Policy's stated terms, only Board Members are permitted to "offer a prayer or request a moment of silence." The Policy ensures that a prayer or moment of silence is offered at every meeting, since the duty rotates in the case that a member declines to "exercise this opportunity." Unsurprisingly, Board Members who volunteer for this duty take their responsibility seriously, carefully choosing the words and message they wish to deliver.

The composition of the prayer is "a hallmark of state involvement." *See Adler v. Duval Cnty. Sch. Bd.*, 250 F.3d 1330, 1337 (11th Cir. 2001) ("The ability to regulate the content of speech is a hallmark of state involvement."). The Supreme Court has found that when government has been involved in the *composition* of prayer recited in front of students, this violates the principles of the Establishment Clause. In *Engel*, the Supreme Court struck down a school prayer that was composed by New York State officials. The Court found it significant that the "prayer was composed by government officials as part of a governmental program to further religious beliefs." *Engel*, 370 U.S. at 425. At the very least, the Court explained, "the constitutional prohibition against laws respecting an establishment of religion must . . . mean that in this country it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government." *Id*. In *Lee*, the Court again drew attention to the excessive control of the state over the content of the prayer, explaining that "[t]he State's role did not end with the decision to include a prayer and with the choice of a clergyman. [The principal] provided [the rabbi] with a copy of the 'Guidelines for Civic Occasions,'

and advised him that his prayers should be nonsectarian. Through these means the principal directed and controlled the content of the prayers." 505 U.S. at 588. Citing *Engel*, the *Lee* Court confirmed that the government could play "no part" in the composition of "official prayers." *Id*.

Another element of the Policy revealing excessive entanglement is that the Board recites the prayer. In doing so, the state's involvement goes further than in *Santa Fe*, where the student body elected a student volunteer, and in *Engel*, where students recited a prayer composed by the state. Because of the Board President's procedure for implementing the Policy, there is never a meeting where a prayer or a moment of silence is not given.

These circumstances are akin to those considered by the Fourth Circuit in *Mellen v. Bunting*, where the Court of Appeals tackled the constitutionality of a daily prayer recited before dinner at a state military college. 327 F.3d 355 (4th Cir. 2003). In *Mellen*, the prayer was delivered by a chaplain employed by the state, and thus, as in this case, the government both composed and recited the prayer. The Fourth Circuit found that the military college's prayer policy was unconstitutional under the *Lemon* test. In assessing the "excessive entanglement" prong, the court found that the state "composed, mandated, and monitored a daily prayer for its cadets" and that, in doing so, "[the school] has taken a position on what constitutes appropriate religious worship—an entanglement with religious activity that is forbidden by the Establishment Clause." *Id*. at 375. "[T]he Establishment Clause prohibits a state from promoting religion by authoring and promoting prayer for its citizens." *Id*.

Coles is also instructive. The Sixth Circuit found that the school board practice of reciting a prayer at every meeting violated all three prongs of the *Lemon* test. Discussing the excessive entanglement prong, the Court of Appeals found the board's involvement "indistinguishable from the situation in *Lee*." *Coles*, 171 F.3d at 385. The following features revealed the imprimatur of the state: "The school board decided to include prayer in its public meetings, chose which member from the local religious community would give those prayers, and has more recently had the school board president himself compose and deliver prayers to those in the audience." *Id.*

The Board directs us to four aspects of the Prayer Policy which, in its view, show that there is no excessive entanglement. First, the Board Policy permits all types of prayers. Second, all Board Members are permitted to "lead the group in accordance with his own conscience." Appellee Br. 52. Third, Board Members and the public are not required to participate in the prayer—"[t]hey are free to listen, to stand in respectful silence, or simply to think of something else. Those who are truly bothered . . . may temporarily leave." Appellee Br. 53. Fourth, the Policy does not require the expenditure of public funds.

We are not persuaded that these elements of the prayer practice disentangle the Board from its involvement in religion. While it is true that Board Members have significant flexibility in deciding what the prayer should say, they are still government actors composing and delivering prayer. Moreover, the record shows that for the most part, the prayers recited refer to one particular faith. We earlier rejected the Board's argument that a student's ability to dissent from the prayer transforms the practice

into a constitutional one. Finally, we have never required that public spending be an element of excessive state entanglement in religion.

In short, the indicia of state involvement in the Board's Prayer Policy are overwhelming. Therefore, we find that the Board's complete control over the Policy, combined with its explicit sectarian content, rises above the level of interaction between church and state that the Establishment Clause permits.

C. The Endorsement Test

The endorsement test is essentially "the same" as the second *Lemon* prong. *Black Horse Pike*, 84 F.3d at 1486. 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.

V.

If the history of this litigation has shown us anything, it is that the proper role of prayer in the Indian River school system has been the subject of sincere and passionate debate. Yet "[t]he question is not the good faith of the school in attempting to make the prayer acceptable to most persons, but the legitimacy of its undertaking that enterprise at all." *Lee*, 505 U.S. at 588-89. In arriving at this outcome, we recognize, as the Supreme Court has, that "religion has been closely identified with our history and government." *Schempp*, 374 U.S. at 212. But we take to heart the observation in *Engel* that "[i]t is neither sacrilegious nor antireligious to say that each separate government in this country should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves." 370 U.S. at 435. In this regard, the

Indian River School Board Prayer Policy rises above the level of interaction between church and state that the Establishment Clause permits.

For the reasons above, we will reverse the District Court and grant summary judgment in favor of appellants.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

[Filed 02/21/10]

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Civil Action No. 05-120-JJF

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JANE DOE, *et al*.,
Plaintiffs,

v.

INDIAN RIVER SCHOOL DISTRICT, *et al*.,
Defendants.

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OPINION

/s/ Joseph J. Farnan
Farnan, District Judge.

Presently before the Court are the parties' cross-Motions for Summary Judgment on the constitutionality of the Indian River School District's policy of opening public School Board meetings with a prayer or moment of silence. For the reasons set forth below, the Court will grant Defendants' Motion, deny Plaintiffs' Motion, and enter summary judgment in favor of Defendants.

BACKGROUND

I. Procedural Background

Plaintiffs Mona and Marco Dobrich, individually and as the parents of Alexander Dobrich, and Jane and John Doe, individually and as the parents of

Jordan and Jamie Doe,[1] filed the instant action on February 28, 2005, pursuant to 42 U.S.C. § 1983, against (1) the Indian River School Board Members, the District Superintendent, and the Assistant Superintendent, in both their individual and official capacities; and (2) the School Board and the District themselves. Plaintiffs brought claims based on alleged violations of the First and Fourteenth Amendments of the United States Constitution arising out of the alleged school sponsored prayer at school functions and School Board meetings in the Indian River School District. As relief, Plaintiffs sought (1) compensatory and nominal damages for the alleged emotional distress and pecuniary loss suffered by Plaintiffs; (2) an injunction (i) banning Defendants from promoting, conducting, or permitting religious exercises or prayer at school functions, including but not limited to graduation ceremonies, athletic activities, holiday festivals, awards presentations and School Board meetings, and (ii) requiring the District to distribute its school prayer policies publicly and to establish procedures for reviewing violations of the policy; and (3) a declaratory judgment that the customs, practices, and policies of the District with regard to prayer at School Board meetings and school functions are unconstitutional, both facially and as applied.

In August 2005, the Court granted Defendants' motion to dismiss Plaintiffs' claims against Defendants in their individual capacities.[2] Thereafter, the Court

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[1] In November 2006, the Court approved a protective order limiting the disclosure of information that could be used to identify the Does. (D.I. 200.)

[2] *See Dobrich v. Walls*, 380 F. Supp. 2d 366, 375-78 (D. Del. 2005). In May 2006, the Court denied Defendant Board Member Reginald Helms' motion to be represented by a separately

bifurcated the discovery process, with the first phase to focus on the issues surrounding the School Board's policy of opening its public meetings with a prayer or moment of silence, and the second phase to cover Plaintiffs' remaining constitutional claims.[3] In January 2008, the Parties agreed to settle all claims except those related to the Board's prayer policy. The Court approved that settlement in February 2008.[4] In March 2008, the Dobriches voluntarily dismissed their claims after they moved outside the District.

The Does and Defendants have each moved for summary judgment on the constitutionality of the Board's Prayer Policy. The matter has been fully briefed and is ripe for decision.

II. Factual Background

A. The Indian River School District and School Board

The Indian River School District (the "District" or the "School District") is located in Southeastern Sussex County and serves the towns of Selbyville, Frankford, Dagsboro, Gumboro, Fenwick Island, Bethany Beach, Ocean View, Millsboro, and Georgetown.[5] The District was formed in 1969 through the consolidation of five different school districts.[6] The District is composed of

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retained lawyer and litigate this matter on behalf of himself and independent of the School Board. *Dobrich v. Indian River Sch. Dist.*, No. 05-120, 2006 WL 1173896, at *1 (D. Del. May 2, 2006).

[3] *See* D.I. 128, 129; *Dobrich v. Walls*, No. 05-120, 2006 WL 2642218, at *1 (D. Del. Sept. 14, 2006).

[4] (D. I. 237.)

[5] *See* Del. Code Ann. tit. 14, § 1068(b).

[6] Def.'s Mot. for Summ. J., Ex. A ¶ 4 (Declaration of former Board Member Charles H. Mitchell).

fourteen schools (including several elementary schools, two middle schools, two high schools, and an arts magnet school), with approximately 8,400 students and 650 full-time teachers.[7]

The District is governed by a School Board (the "Board") composed of ten unpaid members elected by qualified electors from the five districts into which the District is divided.[8] Each Board Member serves a term of three years.[9] Before assuming office, Board Members are required to take an oath, similar to that taken by members of the Delaware General Assembly,[10] affirming that they will "support the Constitution of the United States of America [and] the Constitution of the State of Delaware."[11] As of this writing, the School Board Members are: Robert D. Wilson and Shelly R. Wilson (District 1); Patricia S. Oliphant and Vice President Kelly R. Willing (District 2); Randall L. Hughes II and Nina Lou Bunting (District 3); President Charles M. Bireley and Dr. Donald G. Hattier (District 4); and Donna M. Mitchell and Reginald L. Helms (District 5).[12]

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[7] *Id*., Ex. C ¶¶ 11-12 (Declaration of Board Member Susan Bunting).

[8] *See* Del. Code Ann. tit. 14, § 1068(g); *id*. § 1046 ("A school board member shall receive no compensation for that member's services.").

[9] *Id*. § 1068(f).

[10] *See* Del. Const. art. XIV, § 1.

[11] Del. Code Ann. tit. 14, § 1053(a).

[12] *See* Indian River School District, Indian River Board of Education, http://www.irsd.net/discover-irsd/board-education.htm (last visited February 18, 2010).

Delaware law grants the School Board broad powers to manage and establish policy for the District.[13] By statute, the Board is vested with the authority to "administer and to supervise" public schools within the district and "determine policy and adopt rules and regulations for the general administration and supervision" of public schools.[14] Pursuant to its policy making authority, the School Board is specifically charged with: (1) determining the hours of daily school sessions; (2) setting "education policies" for the District, and prescribing "rules and regulations for the conduct and management of the schools"; (3) enforcing school attendance; (4) "grad[ing] and standardiz[ing]" the public schools in the District; (5) adopting courses of study; (6) selecting and distributing textbooks and other educational materials; (7) appointing personnel; and (8) making "all reports required" by the Delaware Secretary of Education.[15]

In addition to these responsibilities, the Board exercises "control, management and custody" over "[a]ll property, estate, effects, money, funds, claims and state donations vested by law in the public school authorities of any public school."[16] The School Board

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[13] *See generally McHugh v. Bd. of Educ. of the Milford Sch. Dist*., 100 F. Supp. 2d 231, 238 (D. Del. 2000).

[14] Del. Code Ann. tit. 14, § 1043 ("Authority").

[15] *Id*. § 1049 ("Policy making"). The Board has constituted a policy subcommittee, composed of Board Members, district personnel, and members of the community. *See* Bunting Dec. at ¶ 5. This subcommittee meets separately at least once a month, and typically recommends new policies before they are submitted to the full Board for consideration. *See id*. at 11 5-7. Once a policy is submitted to the full Board, it typically is publicly announced at two consecutive regular Board meetings, after which the Board may vote to adopt the policy. *Id*. at ¶ 10.

[16] Del. Code Ann. tit. 14, § 1056(b).

holds in trust any "real or personal estate granted, conveyed, devised or bequeathed" for the use of any public school.[17] Through referendum, the School District may "levy and collect additional taxes for school purposes," and the School Board may, "without the necessity of a referendum," levy any taxes necessary to support the School District's contribution where such a contribution is required by state law.[18] Finally, the School Board controls the School District's budget, and manages "[a]ppropriations for the support, maintenance and operation" of schools, including appropriations for employee salaries, school costs and energy, and educational advancement.[19]

B. The Board's Practice Of Opening Public Meetings With Prayer

The Board is required to hold public meetings at least once a month,[20] and may hold "[s]pecial meetings . . . whenever the duties and business of the school board [so] require."[21] Before the Board may conduct business in any regular meeting, a quorum of a majority of active Board Members must be present[22]

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[17] *Id.*

[18] *Id*. § 1902; *see also Steward v. Jefferson*, 3 Del. (3 Harr.) 335, 1841 WL 394, at *2 (1841) (holding that statute authorizing school districts to levy taxes by referendum was not an unconstitutional delegation of legislative power; "There is in fact no instance in which the legislature does act directly in the imposition of taxes, except in the single case of State taxes . . . a In all other cases; county, road, poor, ditch, marsh, military and all other taxes are laid through the intervention of some other body, acting on principles fixed by law.").

[19] Del. Code Ann. tit. 14, § 1702.

[20] *Id*. § 1048(a).

[21] *Id*. § 1048(b).

[22] *Id*. § 1048(c).

Public Board Meetings are held in the cafeterias or gyms of public schools within the School District. In addition to conducting the business of the School District, the Board has added a public comments segment to the agenda for each of its regular public meetings.[23]

1. Past Practice

The Board's practice of opening its regular public meetings with a moment of prayer dates back to the Board's formation in 1969.[24] Until 2004, it was the Board's practice that the President would designate one person at each meeting to give a prayer.[25] Before this time, only a few of the Board's ten members alternated the responsibility of offering a prayer at meetings.

2. Adoption Of The New Policy In 2004

During the 2004 graduation ceremony at Sussex Central High School, Reverend Jerry Fike offered an invocation and benediction that explicitly invoked Jesus Christ. For example, in the benediction, Reverend Fike stated: "Heavenly Father . . . direct [graduates] into the truth, and eventually the truth that comes by knowing Jesus."[26] The prayer upset Plaintiff Mona Dobrich, whose daughter was among those graduating. Accordingly, Ms. Dobrich complained about

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[23] *See* Bireley Dep. at 36-37.

[24] *See* C. Mitchell Dec. at ¶¶ 3-4, 8; D. Mitchell Dep. at 12; Bireley Dep. at 52; Isaacs Dep. at 25.

[25] Bireley Dep. at 57-59; C. Mitchell Dec. at ¶ 10-11.

[26] (D.I. 134 at ¶ 30; D.I. 150 at ¶ 30.)

the graduation prayers during a June 15, 2004 public Board meeting.[27]

On August 23, 2004, the Board convened a special meeting to discuss prayer at the beginning of Board meetings.[28] According to the minutes of that session, which lasted several hours, "several board members expressed that their constituents d[id] not want the Board to change its practice of opening the meetings with a prayer."[29]

The Board held its next regularly-scheduled public meeting on August 24, 2004, which attracted more than twice the attendance of a typical public meeting.[30] At the beginning of the meeting, then-Board President Walls asked Board Member Hattier to "lead the Board in a moment of prayer."[31] Several members of the crowd applauded. President Walls gaveled the room back to order.[32] Member Hattier then gave a prayer composed by George Washington and contained in a 1783 letter to the Governors of the newly-freed states.[33] During the portion of the meeting devoted to public comments, several attendees spoke in favor of continuing the practice of having an

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[27] Pls.' Mot. for Summ. J., Ex, 61 at 11 (minutes of June 15, 2004 Board meeting).

[28] *See id*., Ex. 30.

[29] *Id*.

[30] *See* Hastings Dep. at 78; Isaacs Dep. at 22.

[31] Pls' Mot. for Summ. J., BPD 1288 (Video of August 24, 2004 Indian River School Board Meeting).

[32] *Id*.

[33] *Id*.

invocation at public school graduations and other school events.[34]

Following the August 2004 Board Meeting, the Board solicited legal advice regarding the constitutionality of the Board's practice of opening its regular meetings with a moment of prayer.[35] In October 2004, the Board adopted a new policy governing "Board Prayer at Regular Board Meetings."[36] This policy (the "Prayer Policy") provides as follows:

1. In order to solemnify its proceedings, the Board of Education may choose to open its meetings with a prayer or moment of silence, all in accord with the freedom of conscience of the individual adult Board member.

2. On a rotating basis one individual adult Board member per meeting will be given the opportunity to offer a prayer or request a moment of silence. If the member chooses not to exercise this opportunity, the next member in rotation shall have the opportunity.

3. Such opportunity shall not be used or exploited to proselytize, advance or convert anyone, or to derogate or otherwise disparage any particular faith or belief.

4. Such prayer is voluntary, and it is among only the adult members of the Board. No school employee, student in attendance, or

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[34] *Id*.

[35] Hattier Dep. at 190-92; Helms Dep. at 76. The Board chose not to adopt then-Board Member Mark Isaacs' suggestion that the Board could pray in private, or pray silently before the Board meeting began. *See* Isaacs Dep. at 67-68.

[36] Defs.' Mot. for Summ. J., Ex. H.

member of the community in attendance shall be required to participate in any such prayer or moment of silence.

5. Any such prayers may be sectarian or non-sectarian, denominational or non-denominational, in the name of a Supreme Being, Jehovah, Jesus Christ, Buddha, Allah, or any other person or entity, all in accord with the freedom of conscience, speech and religion of the individual Board member, and his or her particular religious heritage.

Since the adoption of the policy in October 2004, the Board President has offered at every public Board meeting a disclaimer, consistent with the language of the Board Prayer Policy, similar to the following:

> It is the history and custom of this Board that, in order to solemnify the School Board proceedings, that we begin with a moment of prayer, in accord with the freedom of conscience of the individual adult members of the Board. Further, such prayer is voluntary and just among the adult members of the School Board. No school employee, student in attendance or member of the community is required to participate in any such prayer or moment of silence.[37]

This disclaimer is read after the Presentation of the Colors and before the prayer or moment of silence. Following the prayer or moment of silence, the Board moves forward to the business at hand, beginning

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[37] *Id*., Ex. J (transcribed minutes of Nov. 16, 2004 Board meeting); Bireley Dep. at 104-05.

with the approval of the minutes from the previous Board meeting.[38]

3. Content of Board Prayers

Consistent with the adoption of the Board Prayer Policy in October 2004, the Board has rotated the opportunity to open a meeting with a prayer or moment of silence among its members. It is undisputed that some Board members choose to invoke the name "Jesus," "Jesus Christ," "Heavenly Father," or "Lord our God" during their prayers. For example, on February 22, 2005, Board Member Helms gave the following prayer: "Heavenly Father, Lord our God. Heavenly Father, please help the Board with the problems in the School District that we are going through right now. We ask these things in Jesus' Name."[39]

In other instances, Board Members have quoted from prayers offered by historical figures, such as on November 16, 2004, when Board Member Dr. Donald Hattier read an excerpt from President George Washington's 1789 inaugural address, as well as quotations by Mahatma Ghandi and Mark Twain.[40] Similarly, on March 22, 2005, former Board Member Harvey Walls, who typically chose not to give a prayer, opened a meeting by quoting from a speech given by Dr. Martin Luther King, Jr., entitled "Not So Civil Dreams." Although this speech includes

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[38] *See id*., Ex. I (prepared minutes of Nov. 16, 2004 Board meeting).

[39] Pls.' Am. Compl. ¶ 144.

[40] Defs.' Mot. for Summ. J., Ex. J (transcribed minutes of Nov. 16, 2004 Board meeting).

a reference to Jesus Christ, Walls omitted that reference.[41]

Other Board Members prefer to open Board Meetings with a moment of silence. For example, Board Member Oliphant chooses only to lead the Board in a moment of silence because she does not wish to pray publicly.[42] Board Member Charles Bireley prefers to pray privately and does not participate in the rotation, as did former Board Member Walls.[43] However, it is undisputed that a majority of Board Members choose to exercise their rotation opportunity by offering a prayer—from October 2004 to October 2007, 33 public meetings opened with a prayer, and 3 opened with a moment of silence.[44]

4. Student Attendance at Board Meetings

Students did not begin attending public Board meetings until the mid-1990s.[45] Students attend Board meetings for a variety of reasons, including to receive a certificate commemorating an award they have won, or, in the case of student government representatives, to address the Board directly. In addition, since 2001, JROTC students have presented the colors at the start of each public Board meeting held during the academic year. Board Member Bireley testified that he cannot remember a student ever declining an invitation to accept an award during

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[41] *Id*., Ex. N (minutes of Mar. 22, 2005 Board meeting).

[42] *See* Oliphant Dep. at 33-35.

[43] Bireley Dep. at 154-55, 180-81.

[44] *See, e.g*., Pls.' Mot. for Summ. J., Exs. 23-25.

[45] Hobbs Dep. at 34; Bireley Dep. at 27, 39.

a Board meeting, other than due to a scheduling conflict.[46]

However, the Board does not require students to attend any Board meeting.[47] In addition, students are not always in attendance at Board meetings—for example, during the summer months (when school is out of session), public Board meetings are usually not attended by students.[48]

STANDARD OF REVIEW

A party is entitled to summary judgment only "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."[49] The standard for cross-motions for summary judgments is the same as for individual motions for summary judgment. The court handles cross-motions as if they were two distinct, independent motions.[50] Thus, in evaluating each motion, the court must consider the facts and inferences in the light most favorable to the

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[46] Bireley Dep. at 33.

[47] *See* Bireley Dep. at 25 (explaining that students are typically invited to attend Board meetings by the school principal); Hobbs Dep. at 37 (explaining that students "could come and be honored or they might not, or their principal might accept the award and they could stay home"); Bunting Dep. at 77 (explaining that even if a student does not attend, "[t]hey get their honor anyway"); D. Mitchell Dep. at 152 (explaining that students who are recognized for awards "come to get their award and they leave, or some don't show up at all . . . It's not a real serious thing").

[48] *See* Bireley Dep. at 28-30.

[49] Fed. R. Civ. P. 56(c)(2).

[50] *Rains v. Cascade Indus. Inc*., 402 F.2d 241, 245 (3d Cir. 1968).

non-moving party.[51] "Facts that could alter the outcome are 'material,' and disputes are 'genuine' if evidence exists from which a rational person would conclude that the position of the person with the burden of proof on the disputed issue is correct."[52]

The movant bears the burden of proving that no genuine issue of material fact exists.[53] Once the movant offers such proof, the non-movant "must come forward with 'specific facts showing [a] genuine issue for trial.'"[54] The mere existence of some evidence in support of the non-movant will not be sufficient to support a denial of a motion for summary judgment; there must be enough evidence to enable a jury to reasonably find for the non-movant on that issue.[55] Thus, in ruling on a summary judgment motion, the court must perform the "threshold inquiry of determining whether there is the need for a trial—whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party."[56]

DISCUSSION

Defendants argue that the School Board's Prayer Policy is constitutional under the Supreme Court's

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[51] *Goodman v. Mead Johnson & Co*., 534 F.2d 566, 573 (3d Cir. 1976).

[52] *Horowitz v. Fed. Kemper Life Assurance Co*., 57 F.3d 300, 302 n. 1 (3d Cir. 1995) (internal citations omitted).

[53] *Matsushita Elec. Indus. Co. v. Zenith Radio Corp*., 475 U.S. 574, 586 n. 10 (1986).

[54] *Id*. (*quoting* Fed. R. Civ .P. 56(e)).

[55] *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 249 (1986).

[56] *Id*. at 250.

1983 decision in *Marsh v. Chambers*.[57] As explained below, the Court agrees, and concludes that the School Board's Prayer Policy passes constitutional muster under *Marsh*.

I. Law of the Case

As an initial matter, Defendants argue that the question whether *Marsh* applies to the School Board's Prayer Policy has already been decided—and thus may not be reconsidered—under the "law of the case doctrine." In August 2005, the Court granted Defendants' motion to dismiss Plaintiffs' claims against Defendants in their individual capacities because, *inter alia*, the Board Members' actions were legislative acts, entitling them to absolute immunity.[58] In the alternative, the Court also briefly discussed the Supreme Court's decision in *Marsh*, and concluded that "Plaintiffs cannot prevail on a claim based on a prayer being said before a School Board Meeting" because, "[a]s the *Marsh* decision makes clear, the practice of opening legislative sessions with a prayer is acceptable under the Constitution."[59] Defendants first argue that the law of the case doctrine prohibits the Court from revisiting the issue of whether *Marsh* controls in this matter.

> As the Supreme Court has explained,
>
> Unlike the more precise requirements of res judicata, law of the case is an amorphous concept. As most commonly defined, the doctrine posits that when a court decides upon a rule of law, that

[57] 463 U.S. 783 (1983).

[58] *Dobrich*, 380 F. Supp. 2d at 375-78.

[59] *Id*. at 377.

> decision should continue to govern the same issues in subsequent stages in the same case.[60]

However, the law of the case doctrine does not "'restrict a court's power[,] but rather governs its exercise of discretion.'"[61] Thus, the law of the case doctrine does not prevent courts from clarifying an earlier ruling.[62]

In adjudicating Defendants' motion to dismiss, it was not the Court's intention to finally rule on the issue of the constitutionality of the School Board's Prayer Policy under *Marsh*. Although the Court concludes, consistent with its prior decision, that *Marsh* applies, the question whether the School Board's Prayer Policy is constitutional under that decision requires a more in-depth inquiry, aided by the extensive discovery the parties have taken on the issue.[63] Accordingly, the Court concludes that the law of the case doctrine does not preclude it from clarifying its conclusion that Marsh applies to the School Board's Prayer Policy, and will address the merits of the par-

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[60] *Arizona v. California*, 460 U.S. 605, 618 (1983).

[61] *In re Pharmacy Benefit Managers Antitrust Litig.*, 582 F.3d 432, 439 (3d Cir. 2009) (*quoting Pub. Interest Research Group of N.J., Inc. v. Magnesium Elektron, Inc.*, 123 F.3d 111, 116 (3d Cir. 1997)); *see also Messinger v. Anderson*, 225 U.S. 436, 444 (1912) (Holmes, J.) (noting that the law of the case doctrine "merely expresses the practice of courts generally to refuse to reopen what has been decided, [and is] not a limit to their power").

[62] *Pharmacy Benefit*, 582 F.3d at 439 (*citing Swietlowich v. County of Bucks*, 610 F.2d 1157, 1164 (3d Cir. 1979)).

[63] *See Hamilton v. Leavy*, 322 F.3d 776, 787 (3d Cir. 2003) ("Reconsideration of a previously decided issue may . . . be appropriate in certain circumstances, including when the record contains new evidence.") (internal citation omitted).

ties' Motions for Summary Judgment in light of the evidence each party has produced during discovery.

II. The Establishment Clause

The Establishment Clause of the First Amendment states: "Congress shall make no law respecting an establishment of religion."[64] The Establishment Clause applies to the states through the Fourteenth Amendment.[65]

As the Supreme Court has explained, "[t]he touchstone for [the Court's Establishment Clause] analysis is the principle that the 'First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion."[66] At the same time, analysis under the Establishment Clause "lacks the comforts of doctrinal absolutes," and the Supreme Court has, in "special instances," found "good reason to hold governmental action legitimate even where its manifest purpose was presumably religious."[67] Indeed, "[w]e are a religious people whose institutions presuppose a Supreme Being,"[68] and there is "an unbroken history of official acknowledg-

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[64] U.S. Const. amend I.

[65] *See Everson v. Bd. of Educ. of Ewing Twp.*, 330 U.S. 1, 8 (1947).

[66] *McCreary County v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 860 (2005) (*quoting Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)); *see also County of Allegheny v. Am. Civil Liberties Union Greater Pittsburgh Chapter*, 492 U.S. 573, 605 (1989) ("Whatever else the Establishment Clause may mean[,] . . . it certainly means at the very least that government may not demonstrate a preference for one particular sect or creed (including a preference for Christianity over other religions.").

[67] *McCreary County*, 545 U.S. at 860 (2005).

[68] *Zorach v. Clauson*, 343 U.S. 306, 313 (1952).

ment by all three branches of government of the role of religion in American life from at least 1789."[69]

A. *Marsh v. Chambers*

The Supreme Court's decision in *Marsh v. Chambers* is the paradigm of a "special instance" where governmental action has been held not to run afoul of the Establishment Clause despite the fact that "its manifest purpose [is] presumably religious."[70] In *Marsh*, the Supreme Court considered an Establishment Clause challenge to the Nebraska Legislature's practice of beginning each session with a prayer offered by a chaplain that was (1) selected by the Executive Board of the Legislature's Legislative Council, and (2) paid out of public funds.[71] The Supreme Court upheld the practice, but declined to apply the general three-part test announced in *Lemon v. Kurtzman*.[72] Rather, the Court focused on the history of the practice at issue:

> [t]he opening of sessions of legislative and other *deliberative public bodies* with prayer is deeply embedded in the history and tradition of this country. From colonial times through the founding of the Republic and ever since, the practice of legislative prayer has coexisted with the principles of disestablishment and religious freedom.[73]

Relying on the "unique history" of prayer at legislative sessions, including the First Continental Con-

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[69] *Lynch v. Donn*elly, 465 U.S. 668, 674 (1984).

[70] *McCreary Cou*nty, 545 U.S. at 860.

[71] 463 U.S. at 785-86.

[72] 403 U.S. 602 (1971)

[73] *Marsh*, 463 U.S. at 786 (emphasis added).

gress, the Court concluded that "[c]learly the men who wrote the First Amendment Religion Clauses did not view paid legislative chaplains and opening prayers as a violation of that Amendment."[74] Accordingly, the Court held that the practice of opening legislative sessions with a prayer "[t]o invoke Divine guidance on a public body . . . is not, in these circumstances, an 'establishment' of religion or a step toward establishment."[75]

Against this backdrop, the Supreme Court determined that the Nebraska Legislature's practice of employing a Protestant chaplain, who consistently gave prayers in the "Judeo-Christian tradition," did not violate the Establishment Clause.[76] First, the Court determined that "[a]bsent proof that the chaplain's reappointment stemmed from an impermissible motive," the chaplain's sixteen-year tenure did "not itself conflict with the Establishment Clause."[77]

Second, the Court declined to evaluate the content of the prayers in determining whether there was an Establishment Clause violation. As the Court explained,

> The content of the prayer is not of concern to judges where, as here, *there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief*. That being so, it is not

[74] *Id*. at 788.

[75] *Id*. at 792.

[76] *Id*. at 793.

[77] *Id*. at 793-94.

> for us to embark on a sensitive evaluation or to parse the content of a particular prayer.[78]

The Court concluded that the chaplain's faith, tenure, and the Judeo-Christian nature of his prayers did "not serve to invalidate" the Nebraska Legislature's practice when "[w]eighed against the historical background" of legislative prayer.[79]

The *Marsh* Court cautioned that, "[s]tanding alone, historical patterns cannot justify contemporary violations of constitutional guarantees.[80] The Court reasoned, however, that legislative prayer constituted more than "simply [a] historical pattern[]."[81] Rather, in the context of legislative prayer, "historical evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause applied to the practice authorized by the First Congress—their actions reveal their intent."[82]

B. Supreme Court Decisions After *Marsh*

Although the Supreme Court has never squarely applied *Marsh* in a subsequent case, certain of its decisions help to illuminate its contours.

In *County of Allegheny v. ACLU Greater Pittsburgh Chapter*,[83] the Court applied the "endorsement" test to strike down the display of a Christian religious symbol in a public building. Under the "unique cir-

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[78] *Id*. at 794-95 (emphasis added).

[79] *Id*. at 793.

[80] *Id*. at 790.

[81] *Id*.

[82] *Id*.

[83] 492 U.S. 573 (1989).

cumstances" of that case, the Court determined that displaying a creche had the effect of endorsing religion, while the display of a minorah did not.[84] In his dissent, Justice Kennedy argued that display of the creche was permissible in light of *Marsh*.[85] In response to Justice Kennedy, the Majority reasoned that *Marsh* recognized that historical practices such as legislative prayer may still run afoul of the Establishment Clause if they have "the effect of affiliating the government with any one specific faith or belief."[86] The Majority also rejected the proposition that "all accepted practices 200 years old and their equivalents are constitutional today."[87]

In *Lee v. Weisman*,[88] the Supreme Court held that asking a rabbi to give a "nonsectarian" invocation at a high school graduation ceremony violated the Establishment Clause. *Lee* rejected the applicability of *Marsh* in those circumstances, noting the "[i]nherent differences between the public school system and a session of a state legislature":

> The atmosphere at the opening of a session of a state legislature where adults are free to enter and leave with little comment and for any number of reasons cannot compare with the constraining potential of the one school event most important for the student to attend. The influence and force of a formal exercise in a school graduation are far greater than the prayer exercise we condoned in

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[84] *Id*. at 595-602.

[85] *See id*. at 665 (Kennedy, J., dissenting).

[86] *Id*. at 603.

[87] *Id.*

[88] 505 U.S. 577 (1992).

> *Marsh*. . . . At a high school graduation, teachers and principals must and do retain a high degree of control over the precise contents of the program, the speeches, the timing, the movements, the dress, and the decorum of the students. In this atmosphere the state-imposed character of an invocation and benediction by clergy selected by the school combine to make the prayer a state-sanctioned religious exercise in which the student was left with no alternative but to submit.[89]

The *Lee* Court also found it objectionable that the school principal had "directed and controlled the content" of the rabbi's prayers.[90] The Court stated, "[i]t is a cornerstone principle of our Establishment Clause jurisprudence that 'it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government.'"[91]

The Supreme Court most recently recognized the ongoing validity of *Marsh* in *Van Order v. Perry*[92] and *McCreary County v. Am. Civil Liberties Union of Kentucky*.[93] In *Van Orden*, the Court held that the erection of a monument to the Ten Commandments on the grounds of the Texas State Capitol did not violate the Establishment Clause. The Court, as it had done in *Marsh*, declined to apply the *Lemon* test, finding it "not useful in dealing with the sort of pas-

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[89] *Id*. at 596-97 (internal citations omitted).

[90] *Id*. at 588.

[91] *Id*. (*quoting Engel v. Vitale*, 370 U.S. 421, 425 (1962)).

[92] 545 U.S. 677 (2005).

[93] 545 U.S. 844 (2005).

sive monument that Texas has erected on its Capitol grounds."[94] Rather, the Court's analysis was "driven both by the nature of the monument and by our Nation's history."[95] The Court explained that "[r]ecognition of the role of God in our Nation's heritage has . . . been reflected in our decisions," and that "[t]his recognition has led us to hold that the Establishment Clause permits a state legislature to open its daily sessions with a prayer by a chaplain paid by the states."[96] Citing *Marsh*, the Court reaffirmed that "[s]imply having religious content or promoting a message consistent with a religious doctrine does not run afoul of the Establishment Clause."[97]

By contrast, in *McCreary*, the Court applied the *Lemon* test and determined that the posting of the Ten Commandments in county courthouses in Kentucky violated the Establishment Clause.[98] The Majority rejected the dissent's argument that the displays were a "mere acknowledgment of religion 'on par with the inclusion of a creche or a menorah' in a holiday display, or an official's speech or prayer."[99] The Majority reasoned that "[c]reches placed with holiday symbols and prayers by legislators do not insistently call for religious action on the part of citizens," whereas posting of the Ten Commandments "express[es] a purpose to urge citizens to act in prescribed ways as a personal response to divine

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[94] 545 U.S. at 685.

[95] *Id.*

[96] *Id*. at 687-88 (citing Marsh, 463 U.S. at 792).

[97] *Id*. at 690 (*citing Marsh*, 463 U.S. at 792).

[98] 545 U.S. at 850-51.

[99] *Id*. at 877 n.24.

authority."[100] Citing *Marsh*, the Court noted that "[i]n special instances [it has] found good reason to hold governmental action legitimate even where its manifest purpose was presumably religious," but found no such "good reasons" in the context of the counties' display of the Ten Commandments.[101]

III. Application of Marsh

The parties vigorously dispute whether the framework of *Marsh*, or the Supreme Court's other Establishment Clause tests—*i.e.*, the *Lemon* test, the "endorsement" test, or the "coercion" test—applies to this case. In Plaintiffs' view, *Marsh* is merely an "aberration" that should be limited to its unique facts. However, as explained below, the Court concludes that *Marsh* applies to the School Board's Prayer Policy, and that the policy is constitutional under *Marsh*.[102]

A. The School Board is a "Deliberative Body" to Which *Marsh* Applies

Marsh recognized that "[t]he opening of sessions of legislative and other *deliberative public* bodies with prayer is deeply embedded in the history and tradition of this country."[103] The School Board is a statuto-

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[100] *Id.*

[101] *Id*. at 859 n.10 (*citing Marsh*, 463 U.S. 783); *but see id*. at 905 (Scalia, J., dissenting) (arguing that the displays were "no more of a step toward establishment of religion than was the practice of legislative prayer [the Court] approved in *Marsh*").

[102] *See Simpson v. Chesterfield County Bd. of Supervisors*, 404 F.3d 276, 281 (4th Cir. 2005) ("Marsh, in short, has made legislative prayer a field of Establishment Clause jurisprudence with its own set of boundaries and guidelines.").

[103] *Marsh*, 463 U.S. at 786 (emphasis added).

rily-created, popularly-elected deliberative body that conducts the business of the School District. As noted above, its duties include setting educational policies for the District, hiring and firing administrators and teachers, creating and approving curriculum, administering the District's budget, and the like. It holds public meetings at which it discusses and votes on District affairs, and at which parents and other members of the community may express their views and concerns. In sum, the Court has little trouble concluding that the School District qualifies as the type of "deliberative body" contemplated by *Marsh*.[104]

Plaintiffs nonetheless contend that *Marsh* does not apply to the School Board because it is not similar to a state legislature, as the Board has no authority to pass laws or levy taxes without a public referendum. The Court is not persuaded by Plaintiffs' argument that *Marsh* applies differently depending on the level of government in which a legislative or deliberative body falls, or based on differences in the powers and responsibilities such bodies exercise.[105] Indeed, numerous other courts have held that *Marsh* applies to

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[104] *See Doe v. Tangipahoa Parish Sch. Bd.*, 631 F. Supp. 2d 823, 838 (E.D. La. 2009) (holding that public school board was a "deliberative body" under *Marsh*, and noting that "it strains reason to conclude otherwise").

[105] *See Pelphrey v. Cobb County*, 547 F.3d 1263, 1276 (11th Cir. 2008) ("The decisions of the Supreme Court have not applied varying [Establishment Clause] standards based on the level of government, and we find no reason to adopt this artificial distinction now."); *Van Zandt v. Thompson*, 839 F.2d 1215, 1219 (7th Cir. 1988) ("We read *Marsh* to derive partly from the traditions of the nation and of the states and partly from a degree of deference to the internal spiritual practices of another branch of government or of a branch of the government of another sovereign.").

deliberative and legislative bodies other than state legislatures.[106]

Plaintiffs also argue that *Marsh* does not apply because, unlike state legislatures, public schools and public school boards were "virtually nonexistent at the time the Constitution was adopted."[107] However, there is nothing in *Marsh* that suggests that the Court intended to limit its approval of prayer in "legislative and other deliberative bodies" to those that were in existence when the First Amendment was adopted.[108] Plaintiffs have cited no authority for

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[106] *See Pelphrey*, 547 F.3d at 1271 (applying *Marsh* to two county commissions); *Turner v. City Council of City of Fredericksburg*, 534 F.3d 352, 356 (4th Cir. 2004) (applying *Marsh* to a city council); *Doe v. Tangipahoa Parish Sch. Bd.*, 473 F.3d 188, 197 (5th Cir. 2006) (assuming that "the [School] Board, as a stipulated public deliberative body, falls under *Marsh*"); Simpson, 404 F.3d at 278 (applying *Marsh* to a county board of supervisors); *Bacus v. Palo Verde Unified Sch. Dist. Bd. of Educ.*, 52 F. App'x 355, 356 (9th Cir. 2002) (not precedential) (assuming, without deciding, that *Marsh* applies to a school board as a deliberative body); *Snyder v. Murray City Corp.*, 159 F.3d 1227, 1228 (10th Cir. 1998) (applying *Marsh* to a city council).

[107] *Edwards v. Aguillard*, 482 U.S. 578, 583 n.4 (1987).

[108] *See Pelphrey*, 547 F.3d at 1276 ("Nothing in *Marsh* suggests that the tolerance of legislative prayer, under the Establishment Clause, applies unequally to legislative bodies based on the date the legislative body was formally established.").

Plaintiffs have moved to strike the declaration of former Board Member Charles H. Mitchell, which Defendants attached as Exhibit A to their Opening Brief in Support of their Motion for Summary Judgment. In that declaration, Mr. Mitchell averred that he could not recall any time since the formation of the Indian River School Board in 1969 that a public Board Meeting was not opened with a moment of prayer. Plaintiffs complain that (1) Mitchell was not identified by Defendants in their Rule 26(a) disclosures; and (2) that Defendants identified Board Member Charles M. Bireley, and not Mitchell, as the

their argument, and the Court is aware of none. Notably, the Sixth Circuit—the only Court of Appeals to weigh in on the precise issue presented and hold that school board prayer policies should not be analyzed under *Marsh*—adopted no similar position.[109]

School District's Rule 30(b)(6) witness as to the topic of the "History and Tradition of Board Prayer Since 1969." Accordingly, Plaintiffs argue that the Court should strike the Mitchell Declaration because Defendants' reliance on this declaration "created genuine surprise," and was "willfully injected into the case well after the close of discovery on the School Board Prayer Issue." Pls.' Mot. to Strike ¶ 7.

The Court will deny Plaintiffs' Motion. During his deposition, Board Member Bireley (1) testified that the Board had opened its public meetings with a moment of prayer since 1974, when he first became a Board Member; and (2) specifically identified Mitchell as a Board Member who had told him that the Board had employed this practice since 1969, when the Board was created. Bireley Dep. at 51-53. Accordingly, Defendants were not required to supplement their disclosures with Mitchell's declaration. See Fed. R. Civ. P. 26(e)(1) ("A party who has made a disclosure under Rule 26(a) . . . must supplement or correct its disclosure or response . . . in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or inaccurate, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process . . . .") (emphasis added). Moreover, even if Defendants had violated Rule 26, Plaintiffs will not be prejudiced by the Court considering this declaration. At most, the Mitchell Declaration confirms that the Board's prayer practice dates back to 1969 instead of 1974. This potential difference of six years is simply not determinative of the constitutionality of the Board's practice under *Marsh*.

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

B. The Fact That School Children Attend Board Meetings Does Not Render Marsh Inapplicable

Plaintiffs further contend that *Marsh* does not apply because a school board—unlike a city council, county board of commissioners, or a state legislature—is "intimately connected with the public school system."[110] Accordingly, Plaintiffs argue that the Court may not apply *Marsh* because "prayers given or sanctioned by school officials in the presence of students anywhere on public grounds—not merely in the classroom—are unconstitutional."[111] Plaintiffs emphasize that the *Marsh* Court noted that "the individual claiming injury by the [Nebraska Legislature's] practice [was] an adult, presumably not readily susceptible to religious indoctrination or peer pressure."[112]

The Court is not persuaded by Plaintiffs' attempt to characterize School Board meetings as more akin to a classroom setting or a graduation ceremony. A public meeting of a school board, even those where students are present, is not similar to a classroom setting, where attendance is involuntary and students are under the exclusive control of school personnel.[113] Nor is a public school board meeting similar

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[110] Pls.' Ans. Br. at 28.

[111] *Id*. at 19.

[112] *Marsh*, 463 U.S. at 792 (internal quotation marks and citations omitted).

[113] *See, e.g*., *Lee*, 505 U.S. at 592; *Edwards*, 482 U.S. at 583-84 ("The Court has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools. . . . Students in such institutions are impressionable and their attendance is involuntary.").

to a graduation ceremony—"the one school event most important for the student to attend"—where the "influence and force" exercised over students by school personnel is "far greater."[114]

Similarly inapposite are the circumstances presented in *Borden v. School District of the Township of East Brunswi*ck,[115] where the Third Circuit applied the endorsement test and held that a public school football coach had violated the Establishment Clause by (1) bowing his head during the team's pre-meal prayer in the school cafeteria, and (2) taking a knee during a student-led locker room prayer. There, the Court found it significant that the coach himself had led the team in pre-meal prayers for twenty-three years, which would lead a "reasonable observer [to] conclude that [he] is showing not merely respect when he bows his head and takes a knee with his teams and is instead endorsing religion."[116] The Court nonetheless recognized that "[n]ot every religious display of a school official will have the necessary 'history and context' to be an Establishment Clause violation[.]"[117]

Just as a public school board meeting is not similar to a graduation ceremony, it is not similar to extra-

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[114] *Lee*, 505 U.S. at 597; *see also Am. Civil Liberties Union of N.J. v. Black Horse Pike Regional Bd. of Educ*., 84 F.3d 1471, 1480 (3d Cir. 1996) ("A high school graduation is distinguishable from forums such as a legislative session where prayer has been upheld.").

[115] 523 F.3d 153 (3d Cir. 2008).

[116] *Id*. at 178.

[117] *Id*. at 166.

curricular activities such as sports team events.[118] Unlike extracurricular activities, which are important "to many students . . . as part of a complete educational experience,"[119] attending school board meetings are, at best, incidental to a student's public school experience. In sum, a school board meeting does not implicate the same concerns as the coercive effect of classroom prayers, graduation prayers, or prayers during extracurricular activities, and the Court cannot agree that *Marsh* is rendered inapplicable simply because a school board, and not a legislature or other political unit of a state or municipality, is at issue in this case.[120]

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[118] *Compare Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 311 (2000) (holding that practice of beginning high school football games with a prayer led by a "Student Chaplain" violated the endorsement test, even though "attendance at an extracurricular event, unlike a graduation ceremony, is voluntary," because for some students, "such as cheerleaders, members of the band, and . . . the team members themselves, . . . seasonal commitments . . . mandate their attendance [at football games], sometimes for class credit").

[119] *Id*. at 311.

[120] Plaintiffs rely on a decision by the Court of Appeals for the Sixth Circuit that Marsh does not apply to school boards. *See Coles*, 171 F.3d 369. This decision is not binding on the Court, and the Court does not find it persuasive. *Coles* concluded that a school board is not similar to a state legislature because "the function of a school board is uniquely directed toward school related matters," *id*. at 381, and Marsh does not apply in a "public school setting." *Id*. at 379 ("[W]e find that the policy of the . . . School Board is so inextricably intertwined with the public schools that it must be evaluated on the same basis as the schools themselves.").

In the Court's view, it strains credulity to equate a School Board meeting with a public school classroom, and the Court is aware of no Supreme Court precedent that supports the proposi-

The Court recognizes that School Board meetings are frequently attended by students, and that in some circumstances, those students may feel disinclined to leave during an opening prayer, even if they do not subscribe to the religious character of the prayer being offered. For example, Plaintiff Doe testified in deposition that, during prayers before School Board meetings, "[e]veryone's bowing their head," that she felt "peer pressure" to bow her head, and that declining to bow her head made her feel "uncomfortable and excluded."[121]

While the Court is not insensitive to these concerns, it nonetheless concludes that they do not render the Board's Prayer Policy unconstitutional. First, other than Plaintiff Doe's testimony, Plaintiffs have offered no evidence that any student has felt coerced or pressured to participate in a prayer given during a public Board meeting. In any event, like school board meetings, students across this country attend legislative sessions, including sessions of the

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tion that the same concerns that apply to prayer in school settings such as graduations also apply in every "public school setting." Indeed, this theory would presumably "include a teacher's conference in the evening or during a weekend, a training session for school administrators, a PTA supper in the school gym, or any other activity conducted on school property." *Id*. at 387 (Ryan, J., dissenting). It arguably would also serve to invalidate neutral school policies authorizing private religious speech on school grounds-a practice the Supreme Court has explicitly upheld. *See Good News Club v. Milford Centr. Sch*., 533 U.S. 98, 115 (2001) (noting that the Court has "never extended [its] Establishment Clause jurisprudence to foreclose private religious conduct during nonschool hours merely because it takes place on school premises where elementary school children may be present").

[121] Doe Dep. at 16-17.

United States Senate and House of Representatives, for similar purposes, including field trips, presentation of the colors, and to be recognized for their accomplishments. If the mere presence of school children were enough to invalidate prayers in legislative and other deliberate bodies, such practices would be unconstitutional in virtually every setting.[122]

C. The Sectarian References In Some Board Members' Prayers Do Not Render the Board's Prayer Policy Unconstitutional

Plaintiffs contend that the School Board's Prayer Policy is unconstitutional under *Marsh* because the prayers given by members of the Board have been "overwhelmingly sectarian."[123] Although it is undisputed that several Board Members usually reference Jesus Christ in their prayers,[124] the Court takes issue with Plaintiff's characterization. Citing to the deposition testimony of Board Members Bireley, Cohee, and McCabe, Plaintiffs assert that "Board Members could

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[122] *See Doe*, 631 F. Supp. 2d at 839 n.22 ("[T]hat school children may participate in school board meetings cannot be dispositive of the constitutional analysis: students may well visit a state or federal legislative session, or some municipal body session as part of a field trip . . . but finding that school children are present would not render unconstitutional opening those sessions with prayer."); *accord Coles*, 171 F.3d at 386 (Ryan, J., dissenting).

[123] Pl.'s Br. in Support of Mot. for S.J. at 5.

[124] Board Members Helms, Donna Mitchell, Bunting, and former Board Member Evans each testified that they refer to Jesus Christ by name in their prayers. Helms Dep. at 195; Mitchell Dep. at 54; Bunting Dep. at 126; Evans Dep. at 54-55. However, it appears that at least one of these Members-Ms. Bunting-has chosen on occasion to offer a moment of silence instead of a prayer. See Mitchell Dep. at 54; Pls.' Mot. for Summ. J., Ex. 24 at 1 (minutes of April 26, 2005 Board meeting).

not recall a single non-Christian prayer ever being given at a public Board meeting.[125] However, Board Member Bireley did not testify as to the types of prayer given—rather, he testified that he could not recall a non-Christian having served on the School Board.[126] Similarly, Board Member McCabe testified that some Board Members referenced "God," "Jesus," and "the Lord" in their prayers, but did not testify as to the frequency of these references.[127] Finally, although Board Member Cohee testified that the "majority" of Board prayers have been "Christian," he did not explain how he defined that term (*i.e.*, whether he considered non-denominational prayers to be "Christian" prayers), and did not testify as to the frequency with which Board Members specifically referenced Jesus Christ in their prayers [128]

In addition, the record confirms that some Board Members have chosen not to refer specifically to Jesus Christ in their prayers. For example, in March 2005 former Board Member Harvey Walls quoted from a speech given by Dr. Martin Luther King, Jr., but excised the reference to Jesus Christ from that speech.[129] And at least one Board Member, Ms.

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[125] Pl.'s Br. in Support of Mot. for S.J. at 14.

[126] Bireley Dep. at 60.

[127] McCabe Dep. at 74.

[128] Cohee Dep. at 114. In the context of Cohee's deposition, Plaintiffs' counsel defined "Christian" prayer not as a prayer specifically referring to Jesus Christ, but as one referring to "any . . . religious deity besides Jesus or the Christian God." *Id*.

[129] Defs.' Mot. for Summ. J., Ex. N (minutes of March 22, 2005 Board meeting).

Oliphant, chooses to lead the Board in a moment of silence because she does not wish to pray publicly.[130]

In any event, even viewing the evidence in the light most favorable to Plaintiffs, the Court concludes that the fact that Board Members often reference Jesus Christ in their prayers does not render the Board's Prayer Policy unconstitutional under *Marsh*. Plaintiffs argue that *Marsh* does not authorize the School Board's Prayer Policy because, in *Marsh*, "sectarian prayer was not an issue . . . because the legislature removed all references to Christ after receiving a complaint."[131] The *Marsh* Court did not premise its holding on the nonsectarian nature of the chaplain's prayers, however. Rather, the Court described the nature of the chaplain's prayers only in a footnote, noting that the chaplain had "removed all references to Christ" after 1980, and had since offered "nonsectarian" prayers.[132] The Court did not draw a distinction between sectarian and nonsectarian prayer in explaining why the Nebraska Legislature's practice was constitutional, and did not seek to define the terms "sectarian" and "nonsectarian." Rather, the Court emphasized that the content of the prayer was "not of concern" in determining whether the practice was constitutional.[133]

Accordingly, the Court agrees with those courts that have concluded that *Marsh* did not intend to authorize only nonsectarian legislative prayer.[134]

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[130] Oliphant Dep. at 33-34.

[131] Pl.'s Br. in Support of Mot. for S.J. at 39.

[132] *Marsh*, 463 U.S. at 793 n.14.

[133] *Id*. at 794.

[134] *See Doe*, 631 F. Supp. 2d at 839; *Pelphrey*, 547 F.3d at 1271 ("[T]he Court never held that the prayers in *Marsh* were consti-

Indeed, considering the content of Board Members' prayers would run afoul of the *Marsh* Court's directive that courts not "embark on a sensitive evaluation or . . . parse the content of a particular prayer."[135] As the Sixth Circuit has explained:

> Any prayer has a religious component, obviously, but a single-minded focus on the religious aspects of challenged activities—which activities, in an Establishment Clause case, are religiously-oriented by definition—would extirpate from public ceremonies all vestiges of the religious acknowledgments that have been customary at civic affairs in this country since well before the founding of the Republic. The Establishment Clause does not require—and our constitutional tradition does not permit—such hostility toward religion. The people of the United States did not adopt the Bill of Rights in order to strip the public square of every last shred of public piety.[136]

In sum, the Court cannot agree that the brief sectarian references in many of the Board Members' prayers renders *Marsh* inapplicable. If the Court were to accept Plaintiffs' view, a reference to a particular religious deity in any prayer offered in a legislative or deliberative body would automatically

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tutional because they were 'nonsectarian. . . . The 'nonsectarian' nature of the chaplain's prayers was one factor in [the Court's] fact-intensive analysis; it did not form the basis for a bright-line rule."); *see also Turner*, 534 F.3d at 356 ("[T]he Establishment Clause does not absolutely dictate the form of legislative prayer.").

[135] *Marsh*, 463 U.S. at 794-95; *accord Pelphrey*, 547 F.3d at 1271.

[136] *Chaudhuri v. State of Tennessee*, 130 F.3d 232, 236 (6th Cir. 1997) (internal citation omitted).

render the practice unconstitutional.[137] This conclusion cannot be squared with the reasoning in Marsh.[138]

Moreover, the Court questions whether the mere reference to a deity or religious figure—whether it be "Jesus Christ," "God," "Allah," "Mohammed," or "Yahweh"—necessarily renders a prayer "sectarian." For example, the Fourth Circuit has approved of a county's practice of inviting clergy from diverse faiths to offer "a wide variety of prayers" at the meetings of its governing body.[139] Although the county had subsequently directed clergy to omit specific references to Jesus Christ, the Fourth Circuit determined that the prayers given at these meetings—which included references to "wide and embracive terms" such as "'Lord God, our creator,' 'giver and sustainer of life,' 'the God of Abraham, Isaac and Jacob,' 'the God of Abraham, of Moses, Jesus, and Mohammad,' 'Heavenly

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[137] Indeed, if Plaintiffs' theory were correct, similar prayers recently given in the United States House of Representatives would also violate the Establishment Clause. *See* 108 Cong. Rec. H4767 (daily ed. June 23, 2004) (prayer of Rev. Dr. Jack Davidson) ("Endow our leaders with wisdom and knowledge, that by Your power, they will make God-pleasing decisions for the welfare of our citizens; through Jesus Christ Your Son Our Lord, who lives and reigns with You and the Holy Spirit, one God, world without end. Amen."); 109 Cong. Rec. H1899 (daily ed. April 13, 2005) (prayer of Dr. Curt Dodd) ("Father, may they experience what it really means to be in peace because of a relationship with You through Your Son Jesus, for it is in Jesus' name we pray. Amen.").

[138] *See Doe*, 631 F. Supp. 2d at 839 ("Fidelity to *Marsh* commands not a content-based approach, or an inquiry into whether prayers are sectarian or nonsectarian at the outset, but, rather, focuses on exploitation of the prayer opportunity and efforts . . . to proselytize; to promote or sell a religion.").

[139] *Simpson*, 404 F.3d at 284.

Father,' 'Lord our Governor,' 'mighty God,' [and] 'Lord of Lords, King of Kings, creator of planet Earth and the universe and our own creator'"—were constitutional under *Marsh*.[140] Notably, the Fourth Circuit expressed no disagreement with the lower court's finding that the prayers were "not controversial nor confrontational but for, at most, mention of specific Judeo-Christian references that are nevertheless clearly recognized as symbols of the universal values intended to be conveyed."[141] Similarly, the Eleventh Circuit has explained that the distinction between sectarian and nonsectarian prayers is anything but a bright line.[142]

The Court recognizes that other courts have reached different conclusions.[143] However, these decisions are not binding, and as explained, the Court does not read Marsh as authorizing only non-sectarian prayer.[144]

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[140] *Id*

[141] *Id*. at 279.

[142] *Pelphrey*, 547 F.3d at 1272 ("We would not know where to begin to demarcate the boundary between sectarian and nonsectarian expressions.").

[143] *See, e.g., Hinrichs v. Bosma*, 440 F.3d 393, 399 (7th Cir. 2006) (reading Marsh as "hinging on the nonsectarian nature of the invocations at issue").

[144] The Court recognizes that in *Allegheny*, the Supreme Court suggested that legislative prayers may still run afoul of the Establishment Clause if they have "the effect of affiliating the government with any one specific faith or belief," and that "the legislative prayers involved in *Marsh* did not violate this principle because the particular chaplain had 'removed all references to Christ.'" 492 U.S. at 603. However, the Court agrees with other courts that have declined to interpret this statement as limiting Marsh to permit only nonsectarian prayer. *See Pelphrey*, 547 F.3d at 1271-1272 (reasoning that reading *Marsh*

D. The Board's Prayer Policy Has Not Been Used To Proselytize Or Adance Religion

Marsh nonetheless makes clear that courts may consider the content of prayers to determine whether the prayer opportunity "has been exploited to proselytize or advance any one, or to disparage any other, faith or belief."[145] The Board's Prayer Policy, consistent with *Marsh*, facially prohibits such prayers, as it provides that the prayer opportunity "shall not be used or exploited to proselytize, advance or convert anyone, or to derogate or otherwise disparage any particular faith or belief." And in their depositions, Board Members could not recall any instance where the opportunity to give a prayer was used to proselytize or disparage any religion.[146]

Plaintiffs nonetheless argue that the Prayer Policy "advances" Christianity, and has been used to "proselytize," because the Board's "typical" prayer "includes an invocation to Jesus and several references to the Heavenly Father."[147] As discussed, the record before the Court demonstrates that, at most, certain Board Members briefly refer to Jesus Christ by name in concluding their prayers. The Court does not agree that these references, by themselves, constitute

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to permit only nonsectarian prayers "is contrary to the command of *Marsh* that courts are not to evaluate the content of prayers absent evidence of exploitation"); *Simpson*, 404 F.3d at 281 n.3 ("Nothing in *Allegheny* suggests that it supplants *Marsh* in the area of legislative prayer.").

[145] *Marsh*, 463 U.S. at 794-95; *see also Pelphrey*, 547 F.3d at 1281 ("The central concern of *Marsh* is whether the prayers have been exploited to create an affiliation between the government and a particular belief or faith.").

[146] *See, e.g.*, Hobbs Dep. at 198; Walls Dep. at 159.

[147] Pls.' Ans. Br. at 31-32.

"proselytizing" or the "advancement" of religion.[148] As the Tenth Circuit has explained, "all prayers 'advance' a particular faith or belief in one way or another," but *Marsh* "underscores the conclusion that the mere fact a prayer evokes a particular concept of God is not enough to run afoul of the Establishment Clause. Rather, what is prohibited by the clause is a more aggressive form of advancement, *i.e.*, proselytization."[149]

In sum, the Court concludes that the brief references to Jesus Christ in certain Board Members' prayers does not transform those prayers into an impermissible attempt to proselytize or advance Christianity. Although the Prayer Policy expressly permits sectarian prayers, the type of sectarian prayers that Board Members have given cannot be classified as proselytizing or advancing Christianity, particularly in light of the fact that (1) the prayer opportunity is rotated among Board Members, and (2) some Board Members choose to give a moment of silence or decline to include specific sectarian references in their prayers.[150]

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[148] *Compare Snyder*, 159 F.3d at 1234 (upholding city's refusal to let a citizen give an invocation that derided Christianity, and noting that *Marsh* prohibits prayer that proselytizes or "aggressively advocates" one religion); *see also N.C. Civil Liberties Union Legal Found. v. Constangy*, 947 P.2d 1145, 1149 (4th Cir. 1991) (noting that "[l]egislative prayer does not urge citizens to engage in religious practices, and on that basis . . . [is] distinguishable from an exhortation from government to the people that they engage in religious conduct").

[149] *Snyder*, 159 F.3d at 1234 n.10.

[150] *Compare Wynne v. Twp. of Great Falls*, 376 F.3d 292 (4th Cir. 2004) (holding that town council's prayer practice was unconstitutional under *Marsh*, where town leaders insisted on referring to Jesus Christ by name in all prayers).

Plaintiffs further contend that the Prayer Policy—which prohibits Board Members from using the prayer opportunity to "proselytize, advance or convert anyone, or to derogate or otherwise disparage any particular faith or belief"—creates an entanglement problem. That is, by prohibiting prayers that proselytize or disparage a particular faith, Board Members are required to consider the content of prayers to determine whether a given prayer has violated the policy. As evidence of this potential problem, Plaintiffs note that, in their depositions, certain Board Members disagreed as to whether hypothetical prayers posed by Plaintiffs' counsel—prayers that have never been given at any Board meeting—would or would not violate the Prayer Policy. *See, e.g.*, Isaacs Dep. at 39-41 (Plaintiffs' counsel: "I am going to give you a prayer and ask you if it would have been given it would have violated the policy. Okay? 'Oh, Lord, please convert the Jews in the audience and ensure that they come to know our Lord Jesus Christ.").

To the extent the Board's Prayer Policy requires Members to be cognizant of the content of prayers to enforce its terms, any resulting entanglement problem does not run afoul of *Marsh*. Indeed, accepting Plaintiffs' theory would require the Court to conclude that Marsh inherently contradicts itself—*i.e.*, although *Marsh* holds that legislative prayer may not be exploited to proselytize, any effort by a legislative or deliberative body to enforce that requirement would necessarily render its prayer practice unconstitutional. Nothing in *Marsh* suggests that legislative prayer is rendered unconstitutional simply because the contours of what constitutes a permissible prayer must be enforced by the legislative or deliberative body itself, and the Court declines to accept a theory that would lead to such an absurd result. While

Plaintiffs' entanglement argument would be cognizable under the Lemon test, the Supreme Court has made clear that a different analysis applies in the context of legislative prayer.

E. There Is No Evidence That The School Board Had An Impermissible Motive In Adopting The Prayer Policy

In *Marsh*, the Supreme Court determined that "[a]bsent proof that the chaplain's reappointment stemmed from an impermissible motive," the chaplain's sixteen-year tenure did "not itself conflict with the Establishment Clause."[151] Plaintiffs offer several arguments for why the stated purpose of the Board's Prayer Policy—*i.e.*, to "solemnize" public Board meetings—is a "sham," and contend that the Prayer Policy was adopted as a "post hoc rationalization" to shield the Board's true motivation (*i.e.*, advancing Christianity).[152] The Court does not find any of Plaintiffs' arguments persuasive, and concludes that there is no genuine issue of material fact as to whether the School Board adopted its Prayer Policy with an impermissible motive.

1. The Fact That The Prayer Policy Only Applies to Public Board Meetings Is Not Indicative Of An Impermissible Motive

First, Plaintiffs find it significant that unlike general Board meetings that are open to the public, Board Members do not open their special meetings with a prayer or moment of silence. According to Plaintiffs, "[b]y having a practice of prayer only at meetings attended by the public, the Board

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[151] *Marsh*, 463 U.S. at 793-94.

[152] Pls.' Ans. Br. at 23-24.

demonstrates that the stated purpose of the Policy is a sham—because special meetings equally require solemnity, but the Board does not pray at those meetings."[153] In addition, Plaintiffs rely on the deposition testimony of Board Member Rattier, who agreed that prayer is "nice, but not necessary" to solemnize general Board Meetings.[154]

Plaintiffs' argument strikes the Court as a *non sequitur*. That Board Members do not open special meetings with prayer or a moment of silence does not demonstrate that the stated purpose of the Prayer Policy is a pretext for the advancement of religion. Indeed, under Plaintiffs' theory, all legislative prayer would be invalid unless legislatures (including Congress), in addition to opening their regular, public sessions with a prayer, also opened all committee meetings, subcommittee meetings, caucus meetings, and informal meetings with a moment of prayer.

Moreover, Plaintiffs' theory finds no basis in *Marsh*, which did not purport to apply the kind of strict scrutiny to legislative prayer that Plaintiffs appear to advance.[155] The *Marsh* Court did not premise its holding on whether prayer was, as a factual matter, "necessary" to solemnize public sessions of the Nebraska Legislature, but on the ground that the practice of opening sessions of legislatures and other

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[153] *Id*. at 24.

[154] Hattier Dep. at 111.

[155] *Cf. Nasir v. Morgan*, 350 F.3d 366, 374 (3d Cir. 2003) (explaining, in the context of a First Amendment free speech claim, that to satisfy strict scrutiny, a governmental regulation must "further an important or substantial government interest," and "be no greater than necessary for the protection of that interest").

deliberative bodies with prayer was a historical practice that the Framers were aware of, and did not intend to invalidate, when they passed the First Amendment.

2. Plaintiffs Have Produced No Evidence That The Purpose Of The Prayer Policy Is To Achieve Public Participation In Prayer Rather Than Solemnize Board Meetings

The Prayer Policy provides that the moment of silence or moment of prayer "is among only the adult members of the Board," and that "[n]o school employee, student in attendance, or member of the community in attendance shall be required to participate in any such prayer or moment of silence." Consistent with the terms of the Policy, Board Members consistently testified in deposition that the purpose of the Prayer Policy is to solemnize public Board meetings for the benefit of Board Members.[156] In addition, Board Members testified that they have no expectation for attendees to participate, and that

[156] *See, e.g.*, Walls Dep. at 40 (the purpose of the prayer opportunity is to "impress upon the importance of a regular meeting, just to ask for guidance in making the proper decisions"); Evans Dep. at 39 (the purpose of the prayer opportunity is to ask for "guidance for the body of the school board, that [it] might make good decisions for [the] school district"); Bireley Dep. at 151 (the purpose of the prayer opportunity is to "ask for Divine guidance for the Board to help them make correct decisions and get them through the meeting in the proper way . . . to make the best decisions for what's best for our students"); Hattier Dep. at 114 (solemnizing means "the idea that we are going to think beyond ourselves, beyond what's happening today and sit down and make absolutely the best decisions we can").

members of the public are free to leave during the prayer or otherwise not participate.[157]

Plaintiffs emphasize the deposition testimony of Board Member Wilson, who testified that (1) the Board "want[s] the public to take part in the prayer," and (2) the vast majority of public attendees participate in the prayers.[158] According to Plaintiffs, Wilson's testimony confirms that the "true purpose of the prayer policy" is religious, not secular. The Court disagrees.

Wilson was responding to questions regarding why the Board does not hold its moment of prayer outside the presence of the public.[159] Wilson explained as follows:

> I don't think it shows the same kind of unity. We want the public to take part in the prayer. That's the whole thing behind the public board meeting. If a person wants to come forward after a meeting and say that there was an issue with that, I can see us changing it, rewording it, working with them, maybe even offering them to say a prayer.[160]

In the Court's view, this testimony fairly read does not establish that the School Board had an imper-

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[157] *See, e.g.*, Walls Dep. at 52 ("I have no expectation for the audience . . . They can do whatever they wish"); Hobbs Dep. at 207-08 (explaining that he views the Prayer Policy as allowing audience members to get up and leave before the prayer begins, "just not participate," decline to bow their heads, or choose to arrive only after the prayer has concluded).

[158] Wilson Dep. at 31.

[159] *Id.*

[160] *Id*. at 31-32.

missible motive in adopting the Prayer Policy. It is not surprising that legislative and other deliberative bodies view their public meetings as occasions of greater significance than their private or informal meetings, or that they choose to solemnize those meetings in the presence of the public. The Court discerns little more from Board Member Wilson's deposition testimony than a recognition of the fact that a moment of prayer does not have the same solemnizing effect if done in private—*i.e.*, it does not "show[] the same kind of unity," and does not serve the purposes "behind [having a] public board meeting.[161] However, even viewing Wilson's testimony in the light most favorable to Plaintiffs, Plaintiffs have not explained why the subjective desire of a single Board Member—who was not a member of the Board at the time the Prayer Policy was adopted—that public attendees participate in prayers renders the Prayer Policy unconstitutional.[162]

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[161] Plaintiffs also argue that certain prayers have explicitly invited the public to participate. In support, Plaintiffs cite the prayer given by Board Member Hattier in August 2004—in which he quoted a letter written by General George Washington in 1783—which Hattier prefaced by "asking all of those here tonight *to join me in thinking about and understanding his words*." Again, in the Court's view, to characterize Board Member Hattier's request that the audience "join [him] in thinking about and understanding [General Washington's] words" as proselytizing or advancing religion, or as indicative of an impermissible motive in offering prayer at Board meetings, is not plausible.

[162] *Cf. Bd. of Educ. of Westside Cmty. Schs. v. Mergens*, 496 U.S. 226, 249 (1990) ("Even if some legislators were motivated by a conviction that religious speech in particular was valuable and worthy of protection, that alone would not invalidate the Act, because what is relevant is the legislative purpose of the

As further evidence that the Prayer Policy is intended to directly involve public attendees (rather than solemnize public meetings to benefit the work of the Board Members), Plaintiffs note that certain prayers given by Board Members have explicitly identified non-Board Members as the intended beneficiaries of the prayers. It is undisputed that in some instances, Board Members have offered prayers referring to District families that have suffered a tragedy.[163] For example, in June 2006 a Board Member opened a public meeting with the following prayer:

> Dear Heavenly Father, among Your many blessings, we thank You for the beautiful summer weather and especially for the much needed rain. We thank You also for the wonderful school year that has just ended with so many successes, awards, and accomplishments of our students and staff once again. We ask Your continued blessings on those among us who have devoted so much time, energy, and expertise to the betterment of this district and who are now stepping down. Given them peace, health, and happiness in the days to come. Be with our people who have suffered illness or injury this year, and grant them a quick return to normal life. Comfort the families of those who are lost to us and give them strength in their time of grief. Protect all who are here and return them to us safely in the fall. We

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statute, not the possibly religious motives of the legislators who enacted the law.") (emphasis in original).

[163] *E.g.*, Hobbs Dep. at 198 (testifying that when a District family has undergone a death or some other tragedy, "often [the person giving the prayer] would bless that, you know, they would say, you're in our thoughts, that family, who's ever gone through this tragedy is in our thoughts").

> ask that You continue to guide and direct us in . . . our decision-making, so that every child in this district receives the educational skills to be all he/she can be. We ask these things and all others in the name of Jesus Christ, our Lord. Amen.[164]

In the Court's view, it would be a perverse result if the fact that Board Members acknowledge their constituents in their prayers rendered the Board's Prayer Policy unconstitutional. Indeed, under Plaintiffs' theory, any prayer given to open a session of a legislative or deliberative body that does anything other than ask for guidance for the members of that body—*i.e.*, a prayer that references an international, national, or local tragedy or event effecting the body's constituents—would be unconstitutional. The Court can find nothing in Marsh or any other Supreme Court precedent that supports such a conclusion.

3. The Circumstances Surrounding The Board's Adoption Of The Prayer Policy Do Not Suggest An Impermissible Motive

Plaintiffs argue that the circumstances surrounding the Board's adoption of the Prayer Policy demonstrate that it was "enacted to erect a superficially plausible legal rationale for the Board's Christian prayers,"[165] and that the Board intentionally "made Christianity and Christian prayer political issues in the District."[166] The Court recognizes, of course, that this litigation has been contentious, and has aroused strong feelings in members of the public. It does not

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[164] Defs.' Reply to Pls.' Ans. Br. at 5, Ex. Y (recording of prayer offered at June 26, 2006 Board meeting).

[165] Pls.' Ans. Br. at 3.

[166] Pls.' Br. in Support of Mot. for Summ. J. at 18.

follow, however, that the Board's adoption of the Prayer Policy was motivated by a desire to advance Christianity.

As originally filed, this lawsuit challenged the constitutionality of prayer in the context of several different types of events within the Indian River School District, including graduation ceremonies, athletic activities, and holiday festivals. As Plaintiffs themselves describe, members of the public who attended the August 2004 public Board meeting "believed the debate to be about prayer in school, . . . not prayer at Board meetings or District events."[167] However, there is no evidence that Board Members adopted the Prayer Policy with an impermissible motive, even if members of the public were motivated to support the Board's prayer practice because of their religious beliefs.

For example, Plaintiffs assert that "[n]umerous Board members conceded that District residents consider the defense of this suit to be a defense of 'Christian values.'"[168] However, while Board Member Hastings testified in deposition that it was a common sentiment within the District that the case was about protecting "Christian values," he also testified that no one had told him that specifically.[169] More importantly, Hastings and other Board Members testified that they had never heard the sentiment expressed that the defense of the Board's Prayer Policy was meant to protect "Christian values."[170]

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[167] *Id*. at 8.

[168] *Id*. at 18.

[169] Hastings Dep. at 130-31.

[170] *Id*. at 131-32; *accord* Hughes Dep. at 88-89 (testifying that he did not recall ever hearing anyone say that the Board's

In sum, Plaintiffs' suggestion that the School District was solely interested in advancing Christianity in defending the issue of School Board prayer is belied by the record. Notably, the parties agreed to settle portions of this lawsuit with respect to other challenged practices, and Defendants adopted a new graduation policy prohibiting prayer at graduation ceremonies.[171] Plaintiffs are essentially asking the Court to presume that Board Members had an impermissible motive when they adopted the Prayer Policy because, if they had a permissible motive, they would have prohibited prayer at public Board meetings altogether. Plaintiffs' conclusion simply does not follow from their premise, and the Court cannot presume an impermissible motive on the part of Defendants simply because they did not resolve the issue of prayer at public Board meetings to Plaintiffs' liking.

The Court also rejects Plaintiffs' argument that an impermissible motive can be inferred from the fact that Board Members sought outside legal advice that apparently conflicted with the opinion offered by the Board's regular attorney. During its special meeting in August 2004, the Board's then-regular attorney—Mr. James Griffin, Esq.—discussed with the Board the constitutionality of the prayer practice, and whether the School Board could be considered a legislative body.[172] After speaking with Griffin, the Board decided to seek a second opinion from an attorney with more experience dealing with First Amendment issues. For example, Board Member Hattier testified

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prayer practice was about protecting Christian values); Helms Dep. at 214 (same).

[171] *See* Hattier Dep. at 303-04; Helms Dep. at 160-61.

[172] *See* Hattier Dep. at 190-92; Helms Dep. at 76.

that Griffin is "a general attorney" who typically focused on "contract law," but "First Amendment issues are not the sort of thing that routinely come across his desk."[173] In these circumstances, the Board's decision to ask for legal advice from an attorney experienced in First Amendment law does not establish that it adopted the Prayer Policy with an impermissible motive.

F. That Board Members Themselves Give The Prayers Does Not Render The Prayer Policy Unconstitutional

The most obvious difference between the legislative prayers the Marsh Court approved of and those at issue in the instant case is that Board Members themselves give the prayers, rather than employing or inviting clergy members to do so. The Court determines that this difference does not serve to render *Marsh* inapplicable or the Board's Prayer Policy unconstitutional.

As the Tenth Circuit has explained, "as a consequence of the fact that [legislative prayer] cannot exist without the government actually selecting someone to offer such prayers, . . *Marsh* also must be read as establishing the constitutional principle that a legislative body does not violate the Establishment Clause when it chooses a particular person to give its invocational prayers."[174] The Indian River School

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[173] Hattier Dep. at 191; *see also* Helms Dep. at 74, 77 ("My opinion was that we had not received information that said that what we were doing was illegal and breaking the law.").

[174] *Snyder*, 159 F.3d at 1233; *see also Simpson*, 404 F.3d at 286 ("The [Supreme Court], neither in *Marsh* nor in *Allegheny*, held that the identity of the prayer-giver . . . was what would 'affiliat[e] the government with any one specific faith or belief.'").

Board—composed of unpaid, popularly elected members—rotates the prayer opportunity among its members without regard to their religious beliefs or whether they prefer to open meetings with a prayer or a moment of silence. Thus, in one sense, the Board's Prayer Policy is more inclusive than the Nebraska Legislature's practice upheld in *Marsh*: instead of employing one clergyman of a particular faith to open Board meetings with a solemnizing prayer, that opportunity is rotated among Board Members who are elected by the public, rather than appointed by the State. Accordingly, the Court concludes that the fact that the School Board is not composed of Members of diverse faiths does not render its Prayer Policy unconstitutional.[175]

CONCLUSION

As Marsh teaches, invocations at the beginning of sessions of legislative and other deliberative bodies constitute "a tolerable acknowledgment of beliefs widely held among the people of this country," being as we are "'a religious people whose institutions presuppose a Supreme Being.'"[176] Legislative prayer thus belongs among "[t]hose government acknowledgments of religion [that] serve, in the only ways reasonably possible in our culture, the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society."[177]

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[175] *Cf. Pelphrey*, 547 F.3d at 1281 ("The 'impermissible motive' standard does not require that all faiths be allowed the opportunity to pray. The standard instead prohibits purposeful discrimination.").

[176] *Marsh*, 463 U.S. at 792 (*quoting Zorach*, 343 U.S. at 313).

[177] *Lynch*, 465 U.S. at 693 (O'Connor, J., concurring).

Thus, the Court concludes that the Indian River School Board's Prayer Policy appropriately serves these goals and remains within the contours outlined in *Marsh* for constitutionally permissible legislative prayer.

"Establishment Clause doctrine lacks the comfort of categorical absolutes."[178] This insight rings particularly true in the context of legislative prayer, where what is determinative is not the religious nature of legislative prayer, but the fact that such practices have coexisted with the prohibition on government-established religion since the founding of this nation. Although reasonable people can differ as to whether the Board's policy is wise, could be more-inclusive, or is actually necessary to solemnize board meetings, "too much judicial fine-tuning of legislative prayer policies risks unwarranted interference in the internal operations of a coordinate branch.[179] Because the School Board has not exploited its Prayer Policy to proselytize or advance religion, the Court may not demand anything further.

For the foregoing reasons, the Court concludes that the Indian River School Board's Prayer Policy is constitutional, and that Defendants are entitled to summary judgment.

An appropriate Order will be entered.

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[178] *McCreary County*, 545 U.S. at 860 n.10.

[179] *Simpson*, 404 F.3d at 287.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

[Filed 02/21/10]

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Civil Action No. 05-12-JJF

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JANE DOE, *et al*.,
Plaintiffs,

v.

INDIAN RIVER SCHOOL DISTRICT, *et al.,*
Defendants.

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ORDER

At Wilmington, this 21 day of February 2010, for the reasons set forth in the Memorandum Opinion issued this date, IT IS HEREBY ORDERED that:

1. Defendants' Motion for Summary Judgment (D. I. 249) is GRANTED;
2. Plaintiffs' Motion for Summary Judgment (D. I. 251) is DENIED;
3. Plaintiffs' Motion to Strike Exhibit A and Footnote 13 to Defendants' Opening Brief in Support of Motion for Summary Judgment (D. I. 261) is DENIED.

/s/ Joseph J. Farnan Jr.
UNITED STATES DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

[Filed 03/02/10]

Civil Action No. 05-120-JJF

JANE DOE, *et al*.,
Plaintiffs,

v.

INDIAN RIVER SCHOOL DISTRICT, *et al*.,
Defendants.

JUDGMENT IN A CIVIL CASE

For the reasons set forth in the Court's Memorandum Opinion and Order dated February 21, 2010;

IT IS ORDERED AND ADJUDGED that judgment be and is hereby entered in favor of Defendants and against Plaintiffs on the constitutionality of the Indian River School District's policy of opening public School Board meetings with a prayer or moment of silence.

[Illegible]
UNITED STATES DISTRICT JUDGE

Dated: March 2, 2010

[Illegible]
(By) Deputy Clerk