No. 16-55425

In the United States Court of Appeals For the Ninth Circuit

FREEDOM FROM RELIGION FOUNDATION, INC.,
Plaintiff-Appellee,
v.

CHINO VALLEY UNIFIED SCHOOL DISTRICT BOARD OF EDUCATION; JAMES NA, Chino Valley Unified School District Board of Education Board Member in his official representative capacity; SYLVIA OROZCO, Chino Valley Unified School District Board of Education Board Member in her official representative capacity; CHARLES DICKIE, Chino Valley Unified School District Board of Education Board Member in his official representative capacity; ANDREW CRUZ, Chino Valley Unified School District Board of Education Board Member in his official representative capacity; IRENE HERNANDEZ-BLAIR, Chino Valley Unified School District Board of Education Board Member in her official representative capacity,
Defendants-Appellants.

On Appeal from the United States District Court
for the Central District of California
Hon. Jesus G. Bernal
Case No. 5:14-cv-02336-JGB-DTB

BRIEF OF *AMICUS CURIAE*, THE AMERICAN CENTER FOR LAW AND JUSTICE, IN SUPPORT OF DEFENDANTS-APPELLANTS AND URGING REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 29(a)(4)(A), the *amicus curiae*, the American Center for Law and Justice, makes the following disclosures: it is a non-profit organization that has no parent corporation and no publicly held corporation owns any portion of it.

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CERTIFICATION PURSUANT TO FED. R. APP. P. 29(A)(4)(E)

Pursuant to Fed. R. App. P. 29(a)(4)(E), the American Center for Law and Justice affirms that no counsel for a party authored this brief in whole or in part and that no person other than the amicus, its members, or its counsel has made any monetary contributions intended to fund the preparation or submission of this brief.

IDENTITY AND INTEREST OF *AMICUS CURIAE*

Amicus curiae, the American Center for Law and Justice ("ACLJ"), is an organization dedicated to defending constitutional liberties secured by law. It regularly litigates in the areas of free speech and religious liberty. ACLJ attorneys have argued before the Supreme Court of the United States, this Court, and other federal and state courts in numerous cases involving constitutional issues. *E.g.*, *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *LivingWell Med. Clinic v. Harris*, 2016 U.S. App. LEXIS 18532 (9th Cir. 2016); *ACLU of Ky. v. Mercer Cnty.*, 432 F.3d 646 (6th Cir. 2005). The ACLJ has also participated as *amicus curiae* in numerous cases involving constitutional issues, including legislative prayer, before the Supreme Court, this Court, and other federal courts. *E.g.*, *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014); *FEC v. Wis. Right to Life*, *Inc.*,

551 U.S. 449 (2007); *Van Orden v. Perry*, 545 U.S. 677 (2005); *Washington v. Trump*, 847 F.3d 1151 (9th Cir. 2017); *Little Sisters of the Poor v. Burwell*, 799 F.3d 1315 (10th Cir. 2015).

The ACLJ submits this *amicus curiae* brief to support Defendant-Appellant's position on appeal and to urge this Court to reverse the decision of the district court, holding that the invocation policy in this case is unconstituitonal. Counsel for Plaintiffs (Attorney Robert Tyler) and Counsel for Defendants (Attorney Andrew Seidel) have consented to the filing of this *amicus curiae* brief. The brief is timely filed in accordance with Fed R. App. Civ. P. 29(a)(6).

SUMMARY OF ARGUMENT AND INTRODUCTION

Chief Justice Rehnquist observed that the Supreme Court's Establishment Clause jurisprudence is "Janus-like," with one face looking "toward the strong role played by religion and religious traditions throughout our Nation's history," and the other looking "toward the principle that governmental intervention in religious matters can itself endanger religious freedom." *Van Orden v. Perry*, 545 U.S. 677, 683 (2005). That Janus-like jurisprudence is very much at play in this case. While the Supreme Court has struck down teacher-led prayer in public schools, *Engel v. Vitale*, 370 U.S. 421 (1962), and religious invocations at graduation exercises, *Lee v. Weisman*, 505

U.S. 577 (1992), it has upheld legislative prayer on both the state and local levels, as in *Marsh v. Chambers*, 463 U.S. 783 (1983), and *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014).

Thus, in determining the constitutionality of Chino Valley Unified School District's ("Chino Valley") invocation policy, this Court must choose between two separate lines of jurisprudence: cases dealing with prayer and legislative bodies, on the one hand, and those dealing with prayer and students, on the other. While a school board seeks to serve the best interests of students and parents, it is first and foremost a deliberative body that principally engages in policy-making and administrative functions.

To date, the Fifth Circuit is the only court of appeals to decide the constitutionality of prayers offered before a school board session after the Supreme Court's decision in *Galloway*. In a recent decision, that court held that "a school board is more like a legislature than a school classroom or event." *Am. Humanist Ass'n v. McCarty*, Nos. 15-11067, 16-11220, 2017 U.S. App. LEXIS 4922, at *10 (5th Cir. Mar. 20, 2017). For that reason, the Fifth Circuit ruled that a challenge to a school board's policy of inviting students to deliver statements, which can include invocations, prior to school board meetings was essentially more of a "legislative-prayer case" than a "school-prayer matter." *Id*. at *9.

The Fifth Circuit's decision is both sound and persuasive and should be embraced by this Court. A school board is not like a principal, teacher, or any other school employee hired by a school district to undertake the education of children. Like the education committee of a state legislature, a school board is a deliberative, elected public body that sets school policies and makes administrative decisions. A school board meeting, moreover, does not entail student-centered, school-sponsored activities like classroom instruction, graduation exercises, and student athletic events. Like a session of a state legislature or town council, a school board meeting sets an agenda and conducts public business pursuant to that agenda, discussing, deliberating, and deciding matters related to the needs and future of the public schools within its authority. "In no respect," therefore, is a school board "less a deliberative legislative body than was the town board in *Galloway*." *Id.* at *10.

Because school boards are deliberative public bodies, Supreme Court decisions addressing legislative prayer—*Marsh* and *Galloway*—should control this case, and not cases dealing with student prayer. The location of a school board meeting does not alter the fact that it is a deliberative public body. While children might often be present at school board meetings, they do not constitute the principal audience of the meeting. Children were present at town council meetings in *Galloway*, but that fact did not change the outcome.

Additionally, students on class trips are certainly present at state and local legislative meetings, including those addressing educational matters, but that does not change the applicable legal framework for such meetings (*Marsh* and *Galloway*).

The decision of the court below, rejecting the applicability of *Marsh* and *Galloway* to this case, is therefore erroneous and should be reversed.

ARGUMENT

I. THE LEGISLATIVE PRAYER TRADITION

The Supreme Court's articulation of the tradition of legislative prayer and its constitutionality is found in two cases: *Marsh* and *Galloway*. Those cases stand for the clear proposition that a state or local deliberative body is permitted to begin sessions with an invocation, sectarian or not. To best understand why Chino Valley's invocation policy falls within the reach of *Marsh* and *Galloway*, a thorough discussion of those cases is appropriate.

A. *Marsh v. Chambers*

Marsh involved the question of "whether the Nebraska Legislature's practice of opening each legislative day with a prayer by a chaplain paid by the State violates the Establishment Clause of the First Amendment." 463 U.S. at 784. A legislative board selected the chaplain every other year, although the same person had been the chaplain for 16 years by the time the case reached

the Supreme Court. The chaplain was paid as a public employee and considered his prayers to be "nonsectarian," Judeo-Christian, and part of the American civil religion.

The Supreme Court began its discussion of the issue by noting:

> 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.

Id. at 786 (emphasis added). The Court acknowledged the fact that "the Continental Congress, beginning in 1774, adopted the traditional procedure of opening its sessions with a prayer offered by a paid chaplain." *Id.* at 787. The United States Congress elected chaplains and authorized the payment of their salaries within months of the passage of the Constitution. As the Court explained, "[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, for the practice of opening sessions with prayer has continued without interruption ever since that early session of Congress." *Id.* at 788. Most state legislatures have also opened with prayer since the time they were created.

The Court noted the importance of historical practice in constitutional analysis stating, "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." *Id.* at 790. The Court held that "legislative prayer presents no more potential for establishment" than other practices upheld against Establishment Clause challenge. *Id.* at 791. The Court added:

> 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 laws is not, in these circumstances, an "establishment" of religion or a step toward establishment; it is simply a tolerable acknowledgement of beliefs widely held among the people of this country. As Justice Douglas observed, we are a religious people whose institutions presuppose a Supreme Being.

Id. at 792 (citations omitted).

After holding that legislative prayer in general is not unconstitutional, the Court upheld the specific practices of the Nebraska legislature. The fact that one chaplain served for a long time did not, by itself, create an Establishment Clause problem; the U.S. Senate had only two different chaplains from 1949 to 1981. Nebraska's chaplain was "reappointed because his performance and personal qualities were acceptable to the body appointing him" rather than out of a desire to advance the beliefs of a particular denomination.

Regarding the permissible content of legislative prayers, and forecasting what it held nearly 30 years later in *Galloway*, the Court stated:

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

Id. at 794-95.

B. *Town of Greece v. Galloway*

In *Galloway*, Supreme Court's most recent decision addressing prayer in the governmental context, a town selected clergy from local congregations to give the opening prayer at its monthly board meetings, where adults and children were present. 134 S. Ct. at 1816, 1831. The clergy were free to compose their own prayers. *Id.* at 1816. Nearly all of the prayer-givers were Christian. *Id.* A typical invocation "asked the divinity to abide at the meeting and bestow blessings on the community." *Id.* Some of the prayers were sectarian in nature, such as: "Lord we ask you to bless us all, that everything we do here tonight will move you to welcome us one day in your kingdom as good and faithful servants. We ask this in the name of our brother Jesus. Amen." *Id.* Before giving the invocations, clergy would sometimes ask those in attendance to stand and bow their heads. *Id.* at 1818. Objecting individuals sued, alleging a violation of the Establishment Clause and claiming that the

prayers should be "inclusive and ecumenical" and refer only to a "generic God." *Id.* at 1817.

The Court explained that, in *Marsh*, it stated that "legislative prayer, while religious in nature, has long been understood as compatible with the Establishment Clause." *Galloway*, 134 S. Ct. at 1818. It noted that legislative prayer has been a practice in this country since the framing of the Constitution. *Id.* Importantly, the Court observed that while "*Marsh* is sometimes described as 'carving out an exception' to the Court's Establishment Clause jurisprudence," that case "must not be understood as permitting a practice that would amount to a constitutional violation if not for its historical foundation." *Id*. at 1818, 1819. What *Marsh* teaches, according to *Galloway*, is that "the Establishment Clause must be interpreted 'by reference to historical practices and understandings.'" *Id*. at 1819 (citation omitted).

Because "history supported the conclusion that legislative invocations are compatible with the Establishment Clause," the Supreme Court upheld the town's legislative prayer practice. *Id.* at 1815, 1818. And in upholding that practice, the Court did not draw the line at sectarian prayer. As it noted: "[a]n insistence on nonsectarian or ecumenical prayer as a single, fixed standard is not consistent with the tradition of legislative prayer outlined in the Court's cases." *Id*. at 1820. In fact, a government insistence on what invocations can or

cannot say would unduly entangle the government, including courts, in making religious determinations:

> To hold that invocations must be nonsectarian would force the legislatures that sponsor prayers and the courts that are asked to decide these cases to act as supervisors and censors of religious speech, a rule that would involve government in religious matters to a far greater degree than is the case under the town's current practice of neither editing or approving prayers in advance nor criticizing their content after the fact.

Id. at 1823.

II. CHINO VALLEY'S INVOCATION POLICY FALLS WITHIN THE TRADITION OF PERMISSIBLE LEGISLATIVE PRAYER.

The Chino Valley school board, undoubtedly "a deliberative public body," *Marsh*, 463 U.S. at 786, has chosen to participate in the longstanding tradition of opening school board meetings with an invocation, a practice that "lends gravity to public business, reminds lawmakers to transcend petty differences in pursuit of a higher purpose, and expresses a common aspiration to a just and peaceful society," *Galloway*, 134 S. Ct. at 1818.

While school board invocations may not date back to the founding of the country, and while the Chino Valley school board's resolution may be of only recent vintage, that point is irrelevant under *Galloway*. After all, in *Galloway*, the Town of Greece commenced its prayer practice only in 1999, at the suggestion of a newly elected town supervisor. *Id*. at 1816.

As the Fifth Circuit recently noted:

> School-board prayer presumably does not date back to the Constitution's adoption, since "free public education was virtually nonexistent at the time." Nonetheless, dating from the early nineteenth century, at least eight states had some history of opening prayers at school-board meetings. And *Chambers* and *Galloway* show that there was a well-established practice of opening meetings of deliberative bodies with invocations. Such practices date from the First Congress, which suggests that "the Framers considered legislative prayer a benign acknowledgement of religion's role in society."

McCarty, 2017 U.S. App. LEXIS 4922, at *12 (citations omitted).

The resolution adopted by the Chino Valley school board authorizing invocations falls squarely within the tradition and principles articulated in *Marsh* and *Galloway*. The purpose of the invocations is not to proselytize or preach but to "solemnize proceedings . . . for the benefit of the Board of Education and the community." EOR 72. No one, including Board members, is required to participate in the invocation. *Id*. In fact, the resolution goes so far as to provide that "[t]he prayer shall not be listed or recognized as an agenda item for the meeting so that it may be clear the prayer is not considered a part of the public business." *Id*. As in *Galloway*, "[t]he principal audience for these invocations is not, indeed, the public but lawmakers themselves, who may find that a moment of prayer or quiet reflection sets the mind to a higher purpose and thereby eases the task of governing." 134 S. Ct. at 1825.

To best reflect the diversity of thought and belief of the greater Chino Valley community, the resolution invites local religious leaders to offer any prayer or invocation of their choosing. EOR 72. The resolution does not require that these leaders belong to any specific religious denomination or profess any particular creed. And while neither the school board nor anyone else is authorized to control the content of the prayer or invocation (the speaker is "free to offer the invocation according to the dictates of [his or her] own conscience"), the resolution requests "that the prayer opportunity not be exploited as an effort to convert others to the particular faith of the invocational speaker, nor to disparage any faith or belief different from that of the invocational speaker." EOR 73. The policy thus takes seriously *Galloway*'s admonition against an ongoing practice of "invocations [that] denigrate nonbelievers or religious minorities, threaten damnation, or preach conversion." 134 S. Ct. at 1823. In fact, to ensure that this does not happen, and in order to respect the religious differences of invocational speakers, the resolution dictates that "no invocational speaker shall be scheduled to offer a prayer at consecutive meetings of the Board of Education or at more than three (3) Board of Education meetings in any calendar year." EOR 74. This is not a goal, but a firm rule.

In sum, the resolution furthers two longstanding and traditional practices in this country: to have "a prayer before the beginning of its meetings, for the benefit and blessing of the Board of Education," EOR 73, and to show "respect for the diversity of religious denominations and faiths represented and practiced among the citizens who reside in the Chino Valley Unified School District." EOR 74.

"In no respect is [the Chino Valley school board] less a deliberative legislative body than was the town board in *Galloway*." *See McCarty*, 2017 U.S. App. LEXIS 4922, at *10. Its choice to offer an invocation at the beginning of its sessions, and the resolution implementing that choice, are constitutionally sound under *Marsh* and *Galloway*.

III. SCHOOL BOARD INVOCATIONS ARE NOT GOVERNED BY THE LINE OF SCHOOL PRAYER CASES.

A. School Boards Are Not Teachers and School Board Meetings are not Student-Centered Events.

According to the court below, Chino Valley's invocation policy does not fall within the tradition of legislative prayer as described by the Supreme Court in *Marsh* and *Galloway*. Relying on decisional law regarding prayers within public school classrooms, *Engel v. Vitale*, 370 U.S. 421 (1962), the reading of the Bible to begin the school day, *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203 (1963), invocations at graduation exercises, *Lee v. Weisman*, 505 U.S.

577 (1992), and student prayers at football games, *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000), the lower court held that *Marsh* and *Galloway* were inapplicable and applied, instead, the much-criticized test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971)[1]—a test not applied by the Supreme Court in decades and one that *Galloway* has significantly undermined, if not eradicated *sub silentio*. *See*, *e.g.*, *Elmbrook Sch. Dist. v. Doe*, 134 S. Ct. 2283, 2284 (2014) (Scalia, J., dissenting from denial of certiorari) ("*Town of Greece* abandoned the antiquated 'endorsement test.'"); *Galloway*, 134 S. Ct. at 1834 (Alito, J., concurring) ("In the case before us, the Court of Appeals appeared to base its decision on one of the Establishment Clause 'tests' set out in the opinions of this Court . . . but if there is any inconsistency between any of those tests and the historic practice of legislative prayer, the inconsistency calls into question the validity of the test, not the historic practice.").

There are several flaws in the lower court's rationale and holding.

[1] "Our jurisprudence provides no principled basis by which a lower court could discern whether *Lemon*/endorsement, or some other test, should apply in Establishment Clause cases." *Utah Highway Patrol Ass'n v. Am. Atheists, Inc.*, 565 U.S. 994 (2011) (Thomas, J., dissenting from denial of certiorari). As the late Justice Scalia noted back in 1993, "I agree with the long list of constitutional scholars who have criticized *Lemon* and bemoaned the strange Establishment Clause geometry of crooked lines and wavering shapes its intermittent use has produced." *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 399 (1993) (Scalia, J., concurring in the judgment).

First and foremost, the nature of a school board, such as Chino Valley's, is different in kind from a public school principal, teacher, or some other school employee. School boards do not teach or instruct students on a day-to-day basis in a classroom setting. They do not have the same relationship with students as do the teachers of those students and the principals of their schools. School boards, such as that which governs Chino Valley, deliberate and decide matters such as budgets, curricula, staffing, calendars, and other areas of concern related to the maintenance of schools within a school district. *See* App. Br. at 5-7. Unlike the typical school employee, school board members are elected into office and are thus directly accountable to the voting public.

Second, the place where a school board happens to convene does not alter the deliberative nature of what a school board is and what it does. In the pre-*Galloway* case of *Coles v. Cleveland Bd. of Educ.*, 171 F.3d 369 (6th Cir. 1999), Judge Ryan correctly noted in his dissent:

> Obviously, the Cleveland Board of Education's business meetings are meetings of a "deliberative public body." They do not become less so because they are conducted on real estate owned by the school board, and that is so whether the meetings are held in the school district administrative building in downtown Cleveland or, from time-to-time for the convenience of the public, in public school classroom buildings. Wherever it conducts its business, the Cleveland Board of Education is indisputably a "deliberative public body."

Id. at 388 (Ryan, J., dissenting); *see also Good News Club v. Milford Cent. Sch*., 533 U.S. 98, 116 (2001) (noting that in *Lee v. Weisman*, "[w]e did not place independent significance on the fact that the graduation exercise might take place on school premises.").

Indeed, nothing in *Galloway* suggests that if a city council, for whatever practical reason, were to hold a meeting in a public school auditorium, an invocation commencing that meeting would somehow be transformed into an unconstitutional exercise.

Third, a school board meeting is not a student-centered event, function, or activity. While a school board is always concerned with the best interests of students, students themselves are typically not the "principal audience" of a school board meeting, let alone the "principal audience" of an invocation offered at such a meeting. As one scholar has put it: "Naturally, school boards look after the well-being of students, but that is no different from other legislative bodies concerned with education, including the Nebraska state legislature." Paul Imperatore, *Solemn School Boards: Limiting* Marsh v. Chambers *to Make School Board Prayer Unconstitutional*, 101 Geo. L.J. 839, 849 (2013). A "school board meeting is not a school-sponsored function. Rather, it is sponsored by an elected body that oversees the schools." *Id*. at 848.

For these reasons, *Engel* and its progeny have no place in determining the constitutionality of a school board invocation. In *Lee*, for example, the prayer was meant to solemnize the occasion of students graduating high school, students who "for all practical purposes, [were] obliged to attend." 505 U.S. at 589. While families and friends were undoubtedly present and their presence expected, the graduation ceremony, obviously enough, was focused on the graduating students. For this reason, the invocation in *Lee* naturally focused on the students present for the commencement exercise. *Id*. at 581-82.

Moreover, in *Lee*, the "school authorities maintained close supervision over the conduct of the students and the substance of the ceremony." *Galloway*, 134 S. Ct. at 1827. That is not the case here, where students are neither compelled to attend nor to remain at school board meetings, and where invocational speakers are free to speak according to the dictates of their conscience.

In *Santa Fe*, while the focus of the prayers at the high school football games may or may not have been principally directed at students (the school did not control the content of the prayers, which was offered by a student), a high school football game, like a high school graduation, is a student-centered event. *See* 530 U.S. at 307 (noting that the game was a "school-sponsored function" where not just the team, "but also cheerleaders and band members

dressed in uniforms sporting the school name and mascot" were also present). While friends, family, fans, and alumni are present at such games, a student athletic event is focused, naturally enough, on the student athletes participating in the sport and their fellow students.

Despite being (incorrectly) reversed on appeal, pre-*Galloway*, the district court in *Doe v. Indian River Sch. Dist.*, 685 F. Supp. 2d 524 (D. Del. 2010), *rev'd* 653 F.3d 256 (3d Cir. 2011), accurately observed that "[j]ust as a public school board meeting is not similar to a graduation ceremony, it is not similar to extracurricular activities such as sports team events. Unlike extracurricular activities, which are important 'to many students . . . as part of a complete educational experience,' attending school board meetings are, at best, incidental to a student's public school experience." *Id*. at 539 (citations omitted).

To compare a meeting of a school board with a student-centered event such as a classroom exercise, graduation, football game, or any other student function (such as a dance, field trip, *etc*.), is to overstep the boundaries of logic. A better, and more straightforward logic, runs as follows:

Major Premise:	*Marsh* and *Galloway* permit "legislative and other deliberative public bodies" to begin sessions with sectarian prayers.

Minor Premise: Chino Valley School District is a deliberative public body.

Ergo: *Marsh* and *Galloway* permit Chino Valley School District to begin sessions with a sectarian prayer (subject, of course, to the admonitions laid out in *Galloway*).

If this Court created an exception to the legislative prayer doctrine for public school boards, it would unnecessarily create an exception to an exception. *See Galloway*, 134 S. Ct. at 1818 (noting that *Marsh* has been described as creating an exception to the Supreme Court's Establishment Clause jurisprudence). Under the clear teaching of *Marsh* and *Galloway*, however, there is no need for this Court to riddle current Establishment Clause jurisprudence with further confusion. *See Mercer Cnty.*, 432 F.3d at 636 (noting that after *Van Orden* and *McCreary County v. American Civil Liberties Union of Ky.*, 545 U.S. 844 (2005), "we remain in Establishment Clause purgatory").

As an additional scholar has concluded:

> *Town of Greece* has simplified what was once a difficult question: whether *Marsh* applied to school boards as deliberative bodies, or whether they fell instead within the context of public schools. Justice Kennedy's application of *Marsh* to the intimate setting of a town council, whose prayer practice did not affect the substance of its deliberations and was not affected by the occasional presence of students, supports the extension of the *Marsh* analysis to school board prayer.

Marie Elizabeth Wicks, *Prayer Is Prologue: The Impact of Town of Greece on the Constitutionality of Deliberative Public Body Prayer at the Start of School Board Meetings*, 31 J.L. & POL. 1, 34-35 (Summer 2015).

B. The Presence of Children at School Board Meetings Does Not Change the Analysis.

The lower court invoked case law respecting school prayer in part because some students attend or participate in school board meetings. That fact alone, however, does not warrant forsaking the analysis governing legislative prayer in favor of jurisprudence concerning school prayer.

In *Galloway*, the Greece town council meetings were not adult-only events. The plaintiffs in that action alleged in their complaint that the town board prayers "have a coercive effect on children present at Town Board meetings." *Galloway v. Town of Greece*, 732 F. Supp. 2d 195, 209 (W.D.N.Y. 2010). On appeal, the Second Circuit noted that "at times, children are among the residents attending town meetings; members of Boy Scout troops and other student groups have led the Pledge of Allegiance, and high school students may fulfill a state-mandated civics requirement necessary for graduation by going to Board meetings." *Galloway v. Town of Greece*, 681 F.3d 20, 23 (2d Cir. 2012).

The Supreme Court itself noted the presence of students at town council meetings:

> In the town of Greece, the prayer is delivered during the ceremonial portion of the town's meeting. Board members are not engaged in policymaking at this time, but in more general functions, such as swearing in new police officers, *inducting high school athletes into the town hall of fame*, and presenting proclamations to volunteers, civic groups, and senior citizens.

134 S. Ct. at 1827 (emphasis added).

In her dissent, Justice Kagan observed that "the setting is intimate: There are likely to be only 10 or so citizens in attendance. *A few may be children or teenagers, present to receive an award or fulfill a high school civics requirement.*" *Id*. at 1846 (Kagan, J. dissenting) (emphasis added). In discussing the context in which the invocation was offered at Greece town council meetings, she wrote that "[r]emember that the chaplain of the month stands with his back to the Town Board; his real audience is the group he is facing—the 10 or so members of the public, *perhaps including children*." *Id.* at 1848.

Justice Alito chided the dissent about its observation that "ordinary citizens (and even children!) are often present" at town-board meetings. 134 S. Ct. at 1831 (Alito, J., concurring); *see also McCarty*, 2017 U.S. App. LEXIS 4922, at *13 ("[T]he presence of students at board meetings does not transform this into a school-prayer case. There were children present at the

town-board meetings in *Galloway*, as the dissenting and lower court opinions noted; the Court nonetheless applied the legislative-prayer exception.").

While *Galloway* noted that "[o]ur tradition assumes that *adult* citizens, firm in their own beliefs, can tolerate and perhaps appreciate a ceremonial prayer delivered by a person of a different faith," *Town of Greece*, 134 S. Ct. at 1823 (emphasis added), the presence of children at town council meetings, of which the Supreme Court was well aware, did not alter the Court's analysis or ultimate ruling. Moreover, the record in this case is clear that most attendees at Chino Valley school board meetings are adults. App. Br. at 21-22.

Responding to the argument "that because children are sometimes present at the Board of Education meetings, prayer, for that reason, should be forbidden," Judge Ryan in *Coles* persuasively observed:

> The problem with that tack is that just as the spectators—children included—in the galleries of our national House and Senate, and in our states' 50 legislatures may come and go freely as they please while the business of the public body is being conducted, so too may they choose to attend or not attend meetings of the Cleveland Board of Education, and if they do attend, come and go as they wish. Stated differently, no amount of federal judicial opposition to the principle of prayer being recited in government assemblies can logically make the reason for proscribing prayers in public school classrooms fit the context of meetings of an elected public school board.

171 F.3d at 388 (Ryan, J., dissenting).

C. The Decisions of the Third and Sixth Circuits on School Board Prayer are Fundamentally Flawed.

For these reasons, the lower court's reliance on the pre-*Galloway* decisions of *Coles* and *Doe v. Indian River Sch. Dist.*, 653 F.3d 256 (3d Cir. 2011), is seriously misplaced. Those decisions are factually, and therefore legally, distinguishable from the case at bar, *see* App. Br. at 30-32, but more fundamentally, they are erroneous decisions, especially in the wake of *Galloway*.

In *Coles*, the Sixth Circuit held that school board meetings "might be of a 'different variety' than other school-related activities . . . they are part of the same 'class' as those other activities in that they take place on school property and are inextricably intertwined with the public school system." 171 F.3d at 377. And in *Indian River*, the Third Circuit observed that a comparison between a school board and a municipal body is "ill-suited," because the board's "entire purpose and structure . . . revolves around public school education." 653 F.3d at 278-79.

These decisions, decided before *Galloway* explicitly recognized that local governmental bodies are on the same footing as state legislative bodies when it comes to invocations, fail to appreciate that the government action at issue in permitting a school board prayer is markedly different than the government

action at issue in *Engel* and its line of cases. When *Marsh* and *Galloway* recognized the longstanding tradition of state and local bodies commencing deliberative sessions with a prayer, they did not note any exceptions to this rule. School boards fall squarely within the ambit of *Marsh*'s "other deliberative public bodies." 463 U.S. at 786. They are, after all, strikingly similar, in nature and activity, to a town or city council, or a state legislature. *See* Wicks, 31 J.L. & Pol. at 20-27 (detailing the ways that school boards are identical to town boards). And an elected deliberative body is an elected body no matter where it convenes and no matter the content of what it deliberates and decides. While there is no doubt that some religious activities taking place on school grounds can raise serious Establishment Clause concerns, that is not the case here. *Coles* and *Indian River* thus miss what this Court correctly assumed to be the case in *Bacus v. Palo Verde Unified Sch. Dist. Bd. of Educ.*, 52 Fed. Appx. 355 (9th Cir. 2002) (unpublished op.): that a school board is similar in kind to a state legislature, and for purposes of the Establishment Clause, should be treated as such.

CONCLUSION

Marsh and *Galloway* allow deliberative public bodies to begin sessions with an invocation, even a sectarian one. Because the Chino Valley school board is undeniably a deliberative public body, it should be permitted to begin

its sessions with an invocation. This Court should reverse the judgment below holding that Chino Valley's invocation policy is unconstitutional.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing Brief:

1. Complies with the type-volume limitation of Fed. R. App. P. 28.1(e). This brief contains 5,585 words excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B). Microsoft Word 2010 was used to calculate the word count; and

2. Complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6). This brief has been prepared in proportionally-spaced typeface using Microsoft Word 2010 in 14-point Calisto MT type style.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was electronically filed with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit on May 3, 2017, using CM/ECF, which will send notification of such filing to counsel of record.

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