No. 16-55425

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FREEDOM FROM RELIGION FOUNDATION, INC.,

Plaintiff–Appellee,

vs.

CHINO VALLEY UNIFIED SCHOOL DISTRICT BOARD OF EDUCATION; and CHINO VALLEY UNIFIED SCHOOL BOARD OF EDUCATION BOARD MEMBERS JAMES NA, SYLVIA OROZCO, CHARLES DICKIE, ANDREW CRUZ, IRENE HERNANDEZ-BLAIR, in their official representative capacities,

Defendants-Appellants.

On Appeal from the United States District Court
For the Central District of California

BRIEF *AMICUS CURIAE* OF THE CONGRESSIONAL PRAYER CAUCUS FOUNDATION,

in support of Appellant,
urging Reversal

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Amicus Curiae, The Congressional Prayer Caucus Foundation, has not issued shares to the public, and it has no parent company, subsidiary, or affiliate that has issued shares to the public. Thus, no publicly held company can own more than 10% of stock.

TABLE OF CONTENTS

page

TABLE OF AUTHORITIES

INTEREST OF *AMICUS CURIAE*

The Congressional Prayer Caucus Foundation (CPCF) is an organization established to protect religious freedom, preserve America's Judeo-Christian heritage, and promote prayer, including as it has traditionally been exercised in Congress and other public places; and as such, it has an inherent interest in the prayers at issue in the instant case. CPCF reaches across all denominational, socioeconomic, political, racial, and cultural dividing lines. It diligently implements strategies that are both top-down, deploying the highest levels of national leadership, and bottom-up, mobilizing a broad base of motivated citizens. CPCF has an associated national network of citizens, legislators, pastors, business owners, and opinion leaders hailing from thirty-one states.

This Brief is filed with the consent of all Parties.

STATEMENT OF COMPLIANCE WITH FED. R. APP. P. 29(a) (4) (E)

No party's counsel authored this Brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the Brief; and no person other than *Amicus Curiae*, its members, or its counsel contributed money that was intended to fund preparing or submitting the Brief.

SUMMARY OF ARGUMENT

Prayers at school board meetings are constitutional since they are prayers of

"deliberative bodies" as that term is used in *Marsh v. Chambers*, 463 U.S. 783 (1983). This is so even if putatively coercive elements, which would be problematic under other Establishment Clause tests, are present, as has been held in prior cases. The applicability of *Marsh* is supported by the historical pedigree of school board prayers.

ARGUMENT

I. *MARSH V. CHAMBERS* CONTROLS THIS CASE.

As the Appellants (hereinafter, collectively, "the School Board") have noted, Appellants' Br. 20, the Fifth Circuit is the only Court of Appeals that has considered the controlling test for an Establishment Clause challenge to school board prayer since the Supreme Court issued its opinion in *Town of Greece v. Galloway*, 132 S. Ct. 1811 (2014). In its opinion, the Fifth Circuit decided that school board prayers are governed by the test from *Marsh v. Chambers*, 463 U.S. 783 (1983), just as, in *Town of Greece*, the Supreme Court had decided that town board prayers are governed by *Marsh*. *See, Am. Humanist Ass'n v. McCarty*, 851 F.3d 521, 525-26 (5th Cir. 2017).

In its well-reasoned opinion, the Fifth Circuit explained why school boards fall squarely within *Marsh's* rubric of "other deliberative bodies," despite concerns about the potentially coercive effect of prayer in other school-related contexts. 851 F.3d at 526-530. In some regards, accepting the proposition at *Marsh* controls

school board prayer cases—as your *Amicus* does—could be the end of the analysis. However, because the concern about the coercive nature of prayer in the school setting has animated some courts' refusal to apply *Marsh* to school board prayer cases, your *Amicus* points out that the prayers at issue in the instant case have significantly less potential for coercion than those upheld in *McCarty*. This is easily demonstrated from the facts in *McCarty*, as summarized by that court:

> Most attendees are adults, though students frequently attend school-board meetings to receive awards or for other reasons, such as brief performances by school bands and choirs.
>
> Since 1997, two students have opened each session—with one leading the Pledge of Allegiance and the Texas pledge and the other delivering some sort of statement, which can include an invocation. Those student presenters, typically either elementary- or middle-school students, are given one minute. [School Board] officials do not direct them on what to say but tell them to make sure their statements are relevant to school-board meetings and not obscene or otherwise inappropriate. At a number of meetings, the student speakers have presented poems or read secular statements. But according to [the plaintiffs], they are usually an invocation in the form of a prayer, with speakers frequently referencing "Jesus" or "Christ." [The plaintiffs] claim that sometimes the prayers are directed at the audience through the use of phrases such as "let us pray," "stand for the prayer," or "bow your heads."
>
> From 1997 through February 2015, the student-led presentations were called "invocations" and were delivered by students selected on merit.
>
> . . . .
>
> . . . . As [the school board] acknowledges, its invocations are meant to benefit students and other attendees at school-board meetings, not just board members.

851 F.3d at 524, 527 (footnotes omitted).

> Students being present, students themselves praying (especially elementary-

and middle-school-aged children), invoking the name of Jesus or Christ, the audience being directed to pray and to reverently alter its posture, and the prayers being directed at all attendees, including children, not just to the board members; *all* could raise significant issues about coercion. Yet that does not mean that *McCarty* was wrongly decided. Rather it means that the McCarty court was faithful to the holdings and teachings of *Marsh* and *Town of Greece*.

For all the reasons stated by the *McCarty* court and for all the reasons explained by the School Board in the instant case, school boards simply *are* deliberative bodies. *See*, *McCarty*, 851 F.3d at 526 (describing the legislative function of the school board in that case: "We agree with the district court that 'a school board is more like a legislature than a school classroom or event.' The [school] board is a deliberative body, charged with overseeing the district's public schools, adopting budgets, collecting taxes, conducting elections, issuing bonds, and other tasks that are undeniably legislative."); Appellants' Br. 5-7 (noting twenty-one legislative functions of the instant School Board).

II. THE PRESENCE OF STUDENTS DOES NOT RENDER *MARSH* INAPPLICABLE.

The fact that legislative bodies will sometimes have students in attendance does not remove those legislative bodies from *Marsh's* reach. If that fact *could* remove legislative bodies from *Marsh's* reach, the exception would all but swallow the rule. Judge Ryan expanded on this very point is his dissent in *Coles ex rel.*

Coles v. Cleveland Bd. of Educ., 171 F.3d 369, 387 (6th Cir. 1999) (Ryan, J., dissenting): "Prayer offered in a legislative assembly—federal, state, or even municipal for that matter—presents none of the 'dangers' the Supreme Court sees in classroom prayers."

Although, even at the time of *Coles*, the Supreme Court had already evaluated prayers in school settings besides the classroom, *e.g.*, at graduation, *Coles*—which was relied upon by the court below—is based on analogizing the boardroom to the classroom. Judge Ryan goes on:

> My colleagues recognize and acknowledge that distinction of course, and seeing it, they struggle mightily to convert the regular business meetings of the Cleveland Board of Education into the functional equivalent of a public elementary or secondary school classroom. The effort fails.
>
> In order to equate the Board of Education's business meetings with a public school classroom, the majority opinion invents the notion that the Supreme Court cases proscribing prayers in the classroom, or at a graduation exercise, really do not mean what they say; but rather, really mean that the prayer is proscribed in every "school setting" or "public school context." Presumably that would 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, including, of course, a board of education meeting. My colleagues offer no explanation as to what a "school setting" is or a "public school context" is, and cite no authority from the Supreme Court for prohibiting prayer in such "settings," because there is none.

Id. at 387 (Ryan, J., dissenting).

Having addressed various inconsistencies in the *Coles* majority opinion, Judge Ryan noted that, after the portion of the majority opinion just quoted, his colleagues had shifted their arguments and articulated the children-are-present

exception. He then noted (implicitly) how this exception would largely swallow the *Marsh* rule:

> [T]he majority opinion shifts its reasoning slightly to embrace the plaintiff's argument that because children are sometimes present at the Board of Education meetings, prayer, *for that reason,* should be forbidden. 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.

Id. at 388 (Ryan, J., dissenting) (emphasis original). Judge Ryan's focus was on one reason *why* the exception is wrong. But, inherently and logically, the exception must apply equally to all deliberative bodies, thereby virtually swallowing the *Marsh* rule.

The district court in *Doe v. Indian River Sch. Dist.*, 685 F. Supp. 2d 524, 540 (D. Del. 2010), *rev'd*, 653 F.3d 256 (3d Cir. 2011) recognized the same point. It pointed out that just as students attend school board meetings,

> students 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.

So, too, the district court in *Doe v. Tangipahoa Par. Sch. Bd.*, 631 F. Supp. 2d 823, 839, n.22 (E.D. La. 2009), recognized the same point in very similar language:

> Indeed, that 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 field trip for a political science class or civics course, or visit a courtroom, but finding that school children are present would not render unconstitutional opening those sessions with prayer.

What is more—and to take just one example—the legislative sessions of the United States Congress that are referenced in the above quotations are not just open to school children. Rather, Congress *encourages* students to come and *encourages* teachers to bring their students, including, obviously, during those times when prayers are being offered, *see* https://www.visitthecapitol.gov/plan-visit/watching-congress-session ("The Senate and House galleries are open to visitors *whenever* either legislative body is in session." (emphasis added)). In fact, the U.S. Capitol Visitor Center website has an entire section dedicated to "Education," which contains separate resources for students and teachers. *See generally*, https://www.visitthecapitol.gov/education. Surely, the encouragement of children to attend sessions of Congress, including when prayers are offered, does not render unconstitutional the prayers of the chaplains of the House and Senate. Similarly, as supported by the opinions cited above, neither does the presence of students at the School Board's meetings render unconstitutional the prayers offered there.

III. SCHOOL BOARD PRAYERS HAVE A LONG-STANDING HISTORICAL PEDIGREE.

Furthermore, the applicability of *Marsh* and the concomitant conclusion of

the constitutionality of school board prayer is supported by the historical pedigree—so important in *Marsh*—of these prayers. The Fifth Circuit in *McCarty* took particular note of this. The *McCarty* Court cited a law review article (as does the School Board here, although not for the same reasons (Appellants' Br. 23-24, 30)), 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, 30–31 (Summer 2015), for the proposition that "dating from the early nineteenth century, at least eight states had some history of opening prayers at school-board meetings." *McCarty*, 851 at 527 (citation to article contained in omitted footnote).

Wicks' article, in the relevant passage, in turn, seven times cites the *amicus* brief of Family Research Council and Louisiana Family Forum—Attorneys Resource Council in support of Defendants-Appellants' Supplemental Brief for Rehearing *En Banc*, in *Doe v. Tangipahoa Parish Sch. Bd.*, 494 F.3d 494 (5th Cir. 2007). *See*, Wicks, *supra*, nn. 184-90. And the *amicus* brief, in turn, cites numerous primary sources documenting school board prayer occurring from the 1820s to the 1850s, with related citations about other school board interactions with religion dating to the 1790s. Your *Amicus* commends the entire brief to this Court's attention (*available at* 2007 WL 2735330).

The upshot of all of this is the following: Although Wicks ultimately comes

to a school-board-prayer-is-sometimes-but-not-always-constitutional, she is intellectually honest about the historical record: prayer at school boards has a strong historical pedigree. Per the *Tangipahoa amicus* brief, school boards in at least five states[1] engaged in prayer from the early national period through the ante-bellum era. And neither the article nor the *amicus* brief stands for the proposition that school board prayer ended during the ante-bellum era. Rather, that is simply the time period that the *amicus* brief covered. Indeed, Wicks took pains to document school board prayer during later years. *See*, Wicks, *supra*, at 30 (documenting school board prayers in two school districts from 1969 until challenged and from 1973 until challenged). And surely even this does not exhaust the historical data that can be mined. The *McCarty* court was correct to take note of school board prayer's long-standing pedigree.

Simply stated, *Marsh* applies to school board prayer, and under *Marsh*,

[1] The *amicus* brief is actually more precise than Wicks' summary of it, but Wicks' minor misstatement does not undercut the point made here. Wicks, *supra*, at 30, summarizes the *amicus* brief as documenting that "[a]t least eight states demonstrate historical records of prayers that were recited during school board meetings, dating back to the early 19th century. These states include Pennsylvania, Massachusetts, Iowa, Missouri, North Carolina, Wisconsin, Michigan, and New York." In reality, the amicus brief claims that "Reliable Evidence From at Least Eight States Exists To Demonstrate The Historicity And Breadth Of School Board Connections To Religious Expression—Including Prayer," *see*, 2007 WL 2735330, at * 3 (capitalization as per persuasive heading). The *amicus* brief then documents "prayer" in five states and "connections to religion" in three states. *Id*. at *3-*11.

school board prayer, including the prayers at issue here, do not violate the Establishment Clause.

CONCLUSION

For the foregoing reasons and for other reasons stated by the School Board, your *Amicus* requests that this Court reverse the District Court's Order and grant the School Board the other relief it requests.

Respectfully submitted,
this 3rd day of April 2017

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CERTIFICATE OF COMPLIANCE

I hereby certify that, pursuant to Fed. R. App. P. 32(a)(5)(A) and 32(a)(7)(B)(i) and the corresponding local rules, the attached Brief *Amicus Curiae* has been produced using 14 point Times New Roman font which is proportionately spaced and contains 2,383 words, excluding those portions not required to be counted, as calculated by Microsoft Word 2016.

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CERTIFICATE OF SERVICE

I hereby certify that on May 3, 2017, I served the foregoing Brief *Amicus Curiae* of The Congressional Prayer Caucus Foundation in the case of *Freedom From Religion Foundation, Inc, v. Chino Valley Unified School District Board of Education, et al*., No. 16-55425, on all parties or their counsel of record through the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service on those participants will be accomplished by the CM/ECF system.

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