

No. 16-11220

**In the United States Court of Appeals
for the Fifth Circuit**

AMERICAN HUMANIST ASSOCIATION; ISAIAH SMITH,

Plaintiffs-Appellants,

v.

BIRDVILLE INDEPENDENT SCHOOL DISTRICT; JACK MCCARTY, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY; JOE D. TOLBERT, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY; BRAD GREENE, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY; RICHARD DAVIS, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY; RALPH KUNKEL, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY; CARY HANCOCK, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY; DOLORES WEBB, IN HER INDIVIDUAL AND OFFICIAL CAPACITY,

Defendants-Appellees.

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

**AMICUS BRIEF OF THE STATES OF TEXAS, ALABAMA,
ARIZONA, ARKANSAS, INDIANA, LOUISIANA, NEBRASKA,
NEVADA, NORTH DAKOTA, OKLAHOMA, SOUTH CAROLINA,
SOUTH DAKOTA, AND UTAH; THE COMMONWEALTH OF
KENTUCKY BY AND THROUGH GOVERNOR MATTHEW G.
BEVIN; AND GOVERNOR PHIL BRYANT OF MISSISSIPPI**

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SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS

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

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INTRODUCTION

“[L]egislative prayer 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.” *Town of Greece, N.Y. v. Galloway*, 134 S. Ct. 1811, 1818 (2014).

Appellees have persuasively explained why BISD’s actions do not violate the Establishment Clause and amici states agree fully with those arguments. School boards, like the other deliberative bodies that the Supreme Court directly addressed in cases such as *Town of Greece* and *Marsh v. Chambers*, 463 U.S. 783 (1983), are permitted to open their meetings with an invocation or prayer that will solemnize their proceedings. School boards, like other deliberative bodies, are headed by elected officials; deliberate and act on matters of local interest, and have a history of opening their meetings with a ceremonial prayer for the benefit of the members of the board. Accordingly, amici agree with Appellees that BISD’s policies and procedures do not violate the Establishment Clause.

Amici simply wish to emphasize that, even if prayers at school board meetings did not fall within our nation’s long history of legislative prayer, BISD’s policy of allowing a randomly selected volunteer student speaker to express a message of his or her own choosing does not violate the Constitution. To the contrary, if the government were to actually prohibit student speakers from choosing to express their religious beliefs at BISD board meetings, that prohibition would violate the students’ First Amendment rights.

INTEREST OF AMICI CURIAE

Amici curiae are the States of Texas, Alabama, Arizona, Arkansas, Indiana, Louisiana, Nebraska, Nevada, North Dakota, Oklahoma, South Carolina, South Dakota, and Utah; the Commonwealth of Kentucky by and through Governor Matthew G. Bevin; and Governor Phil Bryant of the State of Mississippi. Amici have an interest in protecting the constitutional rights of their citizens to express themselves and conduct their lives in accordance with deeply held moral beliefs. This includes allowing elected officials to invite members of the public to open their public deliberations with a ceremonial invocation or a personal expression of their choice, either of which can include a prayer. This also includes allowing students to express a message of their choice in a limited public forum, even if that message includes religious content. The decision below upholds these constitutional rights and should be affirmed.¹

¹ “[A] state may file an amicus-curiae brief without the consent of the parties or leave of court.” Fed. R. App. P. 29(a). Nonetheless, all parties have consented to the filing of this amicus brief. Additionally, counsel for amici authored this brief in whole. No party or any party’s counsel authored any part of this brief, and no person or entity, other than amici, made a monetary contribution for the preparation or submission of this brief. Fed. R. App. P. 29(c)(5).

ARGUMENT

BISD does not open its meetings with a prayer offered by a governmental official, nor has BISD made an affirmative governmental decision to invite someone else to conduct a prayer on their behalf. Rather, BISD has enacted a policy permitting randomly chosen students to deliver remarks of their own choosing at a board meeting. Accordingly, even if the board meetings are determined to be school-sponsored events, the “student expressions” that BISD currently permits are the private speech of the students and thus do not violate the Establishment Clause.

Indeed, unless Appellants are seeking to ban any and all students from speaking on any topic of their choice at a board meeting, what they are truly seeking is a ban on allowing students to express a religious message during their remarks. But such a ban would violate the students’ fundamental right to speak freely and freely exercise their religious beliefs.

I. BISD’s Current Policy Permits “Student Expressions” By Student Volunteers Who Are Randomly Selected to Speak at Board Meetings and Express a Message of Their Own Selection.

Since March of 2015, BISD has established a policy permitting “student expressions” during board meetings. Students at BISD campuses can sign up to deliver a “student expressions.” Whenever a board meeting comes up, a random drawing is held to select a student speaker from the list of individuals who have signed up. *See, e.g.*, ROA.580, ROA.601, ROA.604, ROA.607, ROA.610, ROA.613, ROA.616, ROA.619, ROA.622.

The students are instructed that their “student expression” is their own speech and that they are allowed to select both the message and content of that speech, so long as they do not exceed the time allotted. The only other restriction on the message or content of the student’s speech is found in BISD’s published policy on “Student Expression,” which provides that:

The subject of the student introductions must be related to the purpose of the event and to the purpose of marking the opening of the event; honoring the occasion, the participants, and those in attendance; bringing the audience to order; and focusing the audience on the purpose of the event. A student must stay on the subject, and the student may not engage in obscene, vulgar, offensively lewd, or indecent speech. The District shall treat a student’s voluntary expression of a religious viewpoint, if any, on an otherwise permissible subject in the same manner the District treats a student’s voluntary expression of a secular or other viewpoint on an otherwise permissible subject and may not discriminate against the student based on a religious viewpoint expressed by the student on an otherwise permissible subject.

ROA.593-94.

II. The “Student Expressions” Are the Private Speech of the Student, Not Government Speech or School-Sponsored Speech.

In student speech cases, there are “three recognized categories of speech: government speech, private speech, and school-sponsored speech.” *Pounds v. Katy Indep. Sch. Dist.*, 730 F. Supp. 2d 636, 642 (S.D. Tex. 2010).

Government speech is the school’s “own speech.” *Id.* at 642-43. It exists *only* when the government itself “is the speaker or when it enlists private entities to convey its *own* message.” *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995) (emphasis added). Relevantly, government

speech is “not subject to scrutiny under the Free Speech Clause.” *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 464 (2009)—after all, the message in question is that of the government, so no individual has a First Amendment right with respect to the message.

Private speech is speech that happens to occur on school premises, but is not “affirmatively . . . promote[d]” by the school. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 270-71 (1988). Private speech in the school context is governed by the *Tinker v. Des Moines Independent Community School District* line of cases—which have held that school officials may only restrict private, personal expression to the extent the expression “materially and substantially interfere[s] with the requirements of appropriate discipline in the operation of the school” or “impinge[s] upon the rights of other students.” 393 U.S. 503, 509 (1969).

The final category, school-sponsored speech, is unique to the school environment. It exists when student speech is “supervised by faculty members *and* designed to impart particular knowledge or skills to student participants and audiences.” *Hazelwood*, 484 U.S. at 271 (emphasis added). School-sponsored speech is governed by the *Hazelwood* line of cases—which have held that school officials may restrict such speech “so long as their actions are reasonably related to legitimate pedagogical concerns.” *Id.* at 273.

This case involves student expression that is their own private speech—or, at most, school-sponsored speech. Under either scenario, there is no

grounds for the government to prohibit a student from choosing to include a religious message in their speech before the school board.

A. The “Student Expressions” Are Not Government Speech.

Government speech only exists when it is the government’s own message. Here, it is undisputed that the students select the content of their speech. Accordingly, the “student expressions” are not government speech.

This conclusion is fully consistent with *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000). In that case, the Court held that student-led prayers before a football game were actually government speech and, accordingly, violated the Establishment Clause. But the *Santa Fe* majority was motivated by their finding that the school was directing the expression of a specific message—in that case, a religious prayer. *See* 530 U.S. at 308. Here, however, BISD is not directing any specific message from the student speaker, but rather allowing the student to select a message of his or her own choosing—which, as the record evidence demonstrates, is sometimes religious, but is sometimes not religious. *See, e.g.*, ROA.580, ROA.601, ROA.604, ROA.607, ROA.610, ROA.613, ROA.616, ROA.619, ROA.622.

Moreover, the *Santa Fe* majority thought the speech was government speech because, among other things, the message was “by a speaker representing the student body.” 530 U.S. at 310. Here, students are selected through a random drawing and explicitly told that they are speaking on their own behalf. *See* ROA.580, ROA.601, ROA.604, ROA.607, ROA.610, ROA.613, ROA.616, ROA.619, ROA.622.

Unsurprisingly, then, we have not found a single case where a student speaking a message of his or her own choice was deemed a government speaker.² This Court should not be the first.³

B. The “Student Expressions” Are Private Speech, Not School-Sponsored Speech.

Speech is school-sponsored, instead of private, if it (a) occurs in the context of activities that “may fairly be characterized as part of the school curriculum,” and (b) is perceived to bear the imprimatur of the school. *Hazelwood*, 484 U.S. at 270-71. Neither requirement is present in this case.

An activity is curricular if it is “supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences.” *Id.* at 271. That is plainly not the case here.

Nor is the second aspect of school-sponsored speech present: the messages conveyed by the students who choose to give a prayer do not bear the

² See, e.g., *Doe v. Silsbee Indep. Sch. Dist.*, 402 F. App’x 852, 855 (5th Cir. 2010) (unpublished) (analyzing cheerleader cheers at a school sporting event as either private or school-sponsored speech, not government speech); *Taylor v. Roswell Indep. Sch. Dist.*, 713 F.3d 25, 36 n.7 (10th Cir. 2013) (“A third standard addresses speech in public schools that can be characterized as ‘government speech, such as the principal speaking at a school assembly.’ As the current case involves student speakers, this standard is not relevant.”) (citation omitted); *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1285 (10th Cir. 2004) (“The second type of speech in the school setting is ‘government speech, such as the principal speaking at a school assembly.’ Axson-Flynn is a student, not a school official, and recitation of the play is not being advanced as government speech. Therefore, this speech does not fit into this category either.”) (citation omitted).

³ Even if the students’ speech is somehow determined to be government speech, amici agree with Appellees that the student expression is still constitutional under the standard set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). See Br. of Appellees at 45-59.

imprimatur of the school. As this Court has explained, the relevant considerations to determining whether the messages conveyed bear the imprimatur of the school include: “(1) where and when the speech occurred; (2) to whom the speech was directed and whether recipients were a ‘captive audience’; (3) whether the speech occurred during an event or activity organized by the school, conducted pursuant to official guidelines, or supervised by school officials; and (4) whether the activities where the speech occurred were designed to impart some knowledge or skills to the students.” *Morgan v. Swanson*, 659 F.3d 359, 376 (5th Cir. 2011) (en banc) (citations omitted).

In this case, the first, second, and fourth factors clearly weigh in favor of this being private speech. The speech is occurring outside of school hours and in a separate BISD administration building; the speech is directed to the members of the board and no fellow students constitute a “captive audience” during the student expression; and, as discussed above, the activities of the board are not intended to impart knowledge or skills to the students.

The third factor is more complicated. To be sure, BISD board meetings are organized by the district and supervised by district officials. But the specific conduct at issue—the messages in the “student expressions”—have significantly less supervision and organization than other student activities. Moreover, this factor should properly be understood as the least indicative of the four. Outside of private activities or organizations that happen to take place on school property, the majority of situations where an analysis of stu-

dent speech is necessary will involve events that would be organized or supervised by school officials—after all, the speaker is defined by his or her status as a student for a reason. Similarly, if the mere fact that an event is supervised or organized by a school renders student speech to be school-sponsored speech, then almost all student speech would be school-sponsored speech.

That is why courts have held that student speech in situations with even more school supervision than present here—namely, school-related or school-sponsored events directly organized supervised by school officials, attended by a bevy of students, and focused on imparting a message to students—is private speech, because the student’s expression did not bear the “imprimatur” of the school. *See, e.g., id.* at 410-11 (majority) (elementary school student’s decision to include a religious message in gift bags given to fellow classmates at a “winter break” party organized and supervised by the school was private speech and not school-sponsored speech); *O.T. ex rel. Turton v. Frenchtown Elementary Sch. Dist. Bd. of Educ.*, 465 F. Supp. 2d 369, 377 (D.N.J. 2006) (student’s performance of a religious song in after-school talent show supervised by school officials “was the private speech of a student and not a message conveyed by the school itself”); *Behymer-Smith ex rel. Behymer v. Coral Acad. of Sci.*, 427 F. Supp. 2d 969, 973 (D. Nev. 2006) (student’s recitation of a poem at competition supervised by school officials was private speech).

* * *

BISD is merely tolerating—not affirmatively promoting—the students’ speech. *See Axson-Flynn*, 356 F.3d at 1285 (explaining that school-sponsored

speech is “speech that a school ‘affirmatively . . . promotes,’ as opposed to speech that it ‘tolerates’” (alteration in original) (quoting *Hazelwood*, 484 U.S. at 270-71)). The students select the message that they wish to convey at the board meeting. They could, for example, choose a wholly secular message, and BISD would treat their expression precisely the same as it does a religious message. Thus, BISD is not promoting any particular speech from the students and there is little risk that observers would consider a specific sectarian message to bear the “imprimatur” of the school. Accordingly, the “student expressions” are the private speech of the student speaking.

III. The Government Cannot Prohibit Students from Including Religious Expression in their “Student Expressions”, Regardless of Whether the “Student Expressions” Are Private or School-Sponsored Speech.

Banning students from including religious messages in their “student expressions” at board meetings would violate their constitutional rights, regardless of whether the speech is ultimately determined to be private or school-sponsored.

Private speech in the school context can only be restricted if it “materially and substantially interfere[s] with the requirements of appropriate discipline in the operation of the school” or “impinge[s] upon the rights of other students.” *Tinker*, 393 U.S. at 509. Neither of those scenarios is present here, and Appellants do not seriously allege otherwise. Accordingly, if the “student expressions” are the private speech of the students, banning the students from including religious messages would violate the First Amendment.

The same is true if the “student expressions” are school-sponsored speech, which can only be restricted if doing so is “reasonably related to legitimate pedagogical concerns.” *Hazelwood*, 484 U.S. at 273. There are no such grounds to restrict the speech here. Prohibiting students from including a religious message in remarks that they have volunteered to prepare and deliver to a group of elected officials has no pedagogical benefit. Indeed, it has the opposite effect: Students should be taught that, as they enter public life, they are free to express their deeply held religious beliefs to their elected representatives in public forums without any restriction from the government. *See also Morgan*, 659 F.3d at 408 (majority) (“Like all exceptions to the First Amendment’s protections, the *Hazelwood* exception should be construed narrowly.”).

* * *

In sum, the prayers that are sometimes uttered at Birdville Independent School District board meetings as part of the board’s allowance of “student expressions” are legislative prayers no different than the ones the Supreme Court blessed in *Town of Greece* and *Marsh*. But even if the meetings do not fall within the ambit of that long-standing tradition of legislative prayer, the “student expressions” are the private speech of the students (or, at most, school-sponsored speech)—not government speech of the school. Accordingly, they do not run afoul of the Establishment Clause.

CONCLUSION

The Court should affirm the district court’s judgment.

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On November 3, 2016, this brief was served via CM/ECF on all registered counsel and transmitted to the Clerk of the Court. Counsel further certifies that: (1) any required privacy redactions have been made in compliance with Fifth Circuit Rule 25.2.13; (2) the electronic submission is an exact copy of the paper document in compliance with Fifth Circuit Rule 25.2.1; and (3) the document has been scanned with the most recent version of Symantec Endpoint Protection and is free of viruses.

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CERTIFICATE OF COMPLIANCE

This brief complies with: (1) the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 2,834 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii); and (2) the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface (14-point Equity) using Microsoft Word (the same program used to calculate the word count).

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