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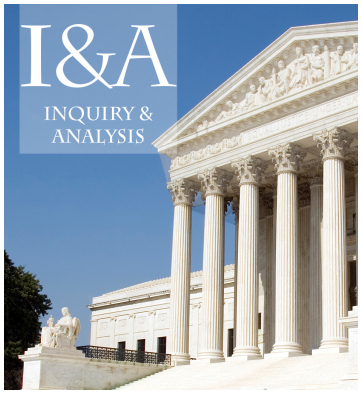

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Tammy Carter, *Editor and Senior Staff Attorney*

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National School Boards Association's Council of School Attorneys
1680 Duke Street
Alexandria, VA 22314-3493

Phone: 703.838.6722
Fax: 703.548.5613
E-mail: cosainfo@nsba.org
Web site: www.nsba.org/cosa
NSBA Connect: http://community.nsba.org

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Monell Liability for Following State Law: Emerging Consensus and Unanswered Questions

By David B. Rubin, Attorney, David B. Rubin, P.C., Metuchen, NJ

Can school districts be held liable under 42 U.S.C. § 1983 ("Section 1983") for following state law? The U.S. Supreme Court has not addressed the issue, but this article will summarize the evolving case law in the lower federal courts on this important question, and discuss the competing legal and policy concerns.

The Supreme Court's 1978 decision in *Monell v. Department of Social Services of the City of New York*,[1] established the cornerstone principles of entity liability under Section 1983 that still govern today. The statute authorizes a cause of action against a "person" who, "under color of" state law, "subjects, or causes to be subjected any other person ... to the deprivation of any rights" under federal law. The Court had earlier held, in *Monroe v. Pape*,[2] that municipal entities were not "person[s]" under Section 1983. In *Monell*, the Court reversed course, finding that Congress was concerned about vicarious liability for employees' behavior, but never intended to absolve government entities themselves from responsibility for violations of federal rights.

The challenge was to identify a threshold of official activity that constitutes an act of the entity itself, not just unlawful behavior by a rogue employee. The trigger settled upon by the Court, in *Monell*, was conduct that "implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers," or when "deprivations [are] visited pursuant to governmental 'custom' even though such a custom has not received formal approval through the body's official decision-making channels."[3] This is so, whether the relief sought is money damages or injunctive relief.[4]

In 1986, in *Pembaur v. City of Cincinnati*,[5] the Court clarified *Monell*'s "official policy" requirement. In a plurality opinion, Justice Brennan wrote that entity liability attaches under *Monell* "where—and only where—a deliberate choice to follow a course of action is made from among various alternatives by the official or officials responsible for establishing final policy with respect to the subject matter in question."[6] But the existence of such a policy alone is not enough. *Monell* also requires that the policy be the "moving force" behind the violation of federal rights,[7] and, the Court later observed in *City of Canton, Ohio v. Harris*,[8] there must be a "direct causal link" between the policy and the violation.

The Court's analytical framework for Section 1983 liability has significant policy implications when the offending party was merely implementing state law. The state itself, and those agencies or individuals acting as arms of the state *per se*, enjoy Eleventh Amendment immunity from suit in federal court. Government officials, in their individual capacities, most likely will enjoy qualified immunity if they are enforcing a reasonable interpretation of state law. That leaves local government entities (e.g., municipalities, school districts, counties) as the only viable source of recovery for many plaintiffs.

Section 1983 is a fault-based statute when money damages are sought,[9] and it arguably would offend notions of fairness if local taxpayers had to foot the bill when a government agency acted under authority explicitly conferred by a presumptively valid state law. On the other hand, the "just following orders" defense has been viewed with disfavor in much of our

jurisprudence,[10] and if local government entities can escape liability just by showing that they followed state law, deserving plaintiffs often would be left without a remedy for violations of their federal rights.[11]

One commentator, shortly after *Monell* was decided, argued that the problem of a state or federal law imposing an absolute obligation on a local government entity "is not ... the problem to which *Monell's* requirement of an 'official policy' was addressed, for *Monell* was concerned only to exclude vicarious liability for the acts of errant employees. ... If the Forty-second Congress had thought it inappropriate that cities be held liable for carrying out state mandated policies, it would not have permitted suits against cities at all, for that Congress regarded everything a city did as merely implementing such policies. ..."[12]

Pembaur's "deliberate choice" requirement was a helpful development for local government entities, but the scenario the Court had most squarely in mind was a government entity weighing the pros and cons of various policy alternatives in deliberative fashion, and exercising discretion to choose one. There was no discussion of whether strict obedience to a state mandate constitutes a "deliberate choice" for purposes of *Monell* liability, or whether government entities will be immune as long as their conduct is authorized by state law. Nor has any subsequent decision of the Court addressed these issues. This has left the circuits to develop their own approaches, with varying results.

In *Familias Unidas v. Briscoe*,[13] decided after *Monell* but before *Pembaur,* the Fifth Circuit considered a Section 1983 claim involving a school district that applied to a county judge for an order directing an advocacy group, sponsoring a student boycott, to disclose information about its members and activities. The application was made, and granted, pursuant to a state statute authorizing such applications against organizations interfering with the "peaceful operations" of the schools. The court found that the district trustees' discretionary request for implementation of the statute was a "policy" decision under *Monell*, but that the county judge's grant of the application "may more fairly be characterized as the effectuation of the policy of the State of Texas embodied in that statute, for which the citizens of a particular county should not bear singular responsibility."[14]

In *Evers v. Custer County*,[15] also decided before *Pembaur*, the Ninth Circuit addressed a Section 1983 claim by a property owner whose due process rights allegedly were violated by a county declaration that a road running through her property was public. The county argued that no *Monell* claim could lie because it was merely acting in accordance with state law and not implementing any county policy. The court rejected the argument, citing the Supreme Court's holding in *Owen*,[16] that government entities have no good faith immunity from Section 1983 liability.

In *Davis v. City of Camden*,[17] decided shortly after *Pembaur*, a New Jersey federal district court held that a city could be sued under Section 1983 for implementing a local strip search policy that the city claimed was mandated by state law. The court rejected the city's defense that it was merely obeying state law, adopting the view that a *Monell* "policy" existed as long as the specific action was directed by a city official with final policymaking authority, regardless of whether the action was required by state law. *Pembaur* was cited in passing, but there was no discussion of Justice Brennan's "deliberate choice" requirement.[18]

Most cases decided after *Pembaur* have, for the most part, taken a different tack. In *Surplus Store and Exchange, Inc. v. City of Delphi*,[19] the Seventh Circuit considered whether a police officer's reliance on state statutes regarding seizure of stolen property could support a Section 1983 claim against the city that employed him. The plaintiff argued that the city could be held liable for the deprivation of its property because the city had a "policy" of having its police officers enforce the statutes in question. The court rejected the claim, finding it "difficult to imagine a municipal

policy more innocuous and constitutionally permissible, and whose causal connection to the alleged violation is more attenuated, than the 'policy' of enforcing state law. If the language and standards from *Monell* are not to become a dead letter, such a 'policy' simply cannot be sufficient to ground liability against a municipality."[20]

The Sixth Circuit, in *Garner v. Memphis Police Dept.*,[21] addressed a Section 1983 claim against the city following the police shooting of a fleeing burglary suspect. The police department had a formal policy authorizing the use of deadly force when apprehending felony suspects, but the city challenged *Monell* liability on the ground that it did not make a "deliberate choice ... from among various alternatives,"[22] but relied on a state statute explicitly authorizing the policy at issue. The court rejected the argument, holding that the statute did not require the city to use deadly force, but merely authorized it in certain cases. The city could have adopted a more restrictive policy (and actually had done so in this case), or could have refrained from using deadly force altogether. The deliberate choice made by the city, in this case, was the sort of "policy" that *Monell* and *Pambaur* had in mind.

In another Seventh Circuit case, *Bethesda Lutheran Homes and Services, Inc. v. Leean*,[23] Judge Posner, citing both *Surplus Store* and *Garner*, drew a distinction between "the state's ***command*** (which insulates the local government from liability) and the state's ***authorization*** (which does not)."[24] He acknowledged that this position "admittedly is anomalous from the standpoint of conventional tort law, in which obedience to a superior's orders is not a defense to liability,"[25] but "[w]hen the municipality is acting under compulsion of state or federal law, it is the policy contained in that state or federal law, rather than anything devised or adopted by the municipality, that is responsible for the injury. Apart from this rather formalistic point, our position has the virtue of minimizing the occasions on which federal constitutional law, enforced through section 1983, puts local government at war with state government."[26]

The Sixth Circuit took up the issue again, in *Brotherton v. Cleveland*,[27] involving a Section 1983 claim against a county coroner who had harvested corneas for medical use. A state statute authorized the practice, but left considerable discretion to local officials to fashion specific standards and procedures. Citing *Garner*, the court framed the issue in terms of whether the county "could have chosen not to use [its] authority under the state statute[,] ... could have opted to act differently, or not to act[.]"[28] The court found that the coroner likely was not compelled by state law to implement the practice, but, even if he was, he had control over the manner in which it was exercised, and the claim was permitted to go forward.

The Eleventh Circuit, in *Cooper v. Dillon*,[29] considered a Section 1983 claim by a newspaper publisher against a city police department after his arrest for disclosing details of an internal police investigation, in violation of a state statute criminalizing such disclosures. The court found the statute to be an unconstitutional infringement of the publisher's free speech rights, then turned to the question of the municipality's liability under *Monell*. Here again, the statute in question authorized an arrest, but did not require it. Based on the police chief's discretionary decision to enforce this unconstitutional state law, the court found a "policy" choice sufficient to find Section 1983 liability.

The Fourth Circuit, in *Bockes v. Fields*,[30] took a different approach. A county, defending a wrongful termination Section 1983 claim by a fired county employee, argued that its action was based on standards set forth in a comprehensive personnel handbook issued by the state social services board, which had ultimate decision-making authority for local personnel decisions. The firing in that case was not mandated, and local officials exercised judgment in determining whether the state's performance criteria had been met, but the court found that "[s]uch bounded, state-conferred discretion is not the 'policymaking authority' for which a county may be held responsible under Section 1983."[31]

A somewhat similar analysis was adopted by the Tenth Circuit in *Whitesel v. Sengenberger*.[32] That case involved a Section 1983 claim against a county for implementing a policy, created by the state judiciary, authorizing issuance of restraining orders prior to a hearing before a judge. The county employees' actions apparently were not mandated, but, rather than dwell on that aspect of their conduct, the court focused on whether the county was the "the moving force" behind what occurred, and found that the county "cannot be liable for merely implementing a policy created by the state judiciary."[33]

In *Vives v. City of New York*,[34] the Second Circuit reviewed many of the circuit court decisions discussed above, and took the most nuanced approach of all. A city resident was arrested under a state statute criminalizing mailings "likely to cause annoyance or alarm[,]" and brought a Section 1983 claim seeking damages from the police officials and the city for enforcing the statute, which he claimed was unconstitutional. In analyzing the "conscious choice" element of *Monell* liability, the court observed that "[f]reedom to act is inherent in the concept of 'choice[,]'" and agreed with all circuits addressing the matter that obedience to a state mandate is not a "conscious choice."[35] However, a decision to enforce a statute where authorized, but not required to do so, may reflect a policy choice sufficient for Section 1983 liability, but not necessarily if the only policy is to enforce state law generally:

> While it is not required that a municipality know that the statute it decides to enforce as a matter of municipal policy is an unconstitutional statute, ... it is necessary, at a minimum, that a municipal policymaker have focused on the particular statute in question. ...[36]

The court reserved on whether incentives or penalties imposed by the state or federal government on a municipality as a consequence of a decision can be coercive enough to transform a "choice" into an "obligation."[37] The decision also left open the possibility of liability where state statutes "are so obviously and deeply unconstitutional that the mere fact of their enforcement gives rise to a strong inference that the municipality must have made a 'conscious choice' to enforce them."[38]

The principles discussed above have been applied, from time to time, in the school district setting where a broad range of state and federal laws mandate certain conduct, or permit discretion within closely circumscribed parameters. In *N.N., a minor, by S.S. v. Madison Metropolitan School District*,[39] for example, a Wisconsin federal district court considered a Section 1983 claim by white students denied transfer to another district under a provision of their home district's open enrollment program requiring rejection where racial imbalance would result. The district tacitly conceded that its racial balancing plan did not meet the Supreme Court's rigorous standards laid down in *Parents Involved in Community Schools v. Seattle School Dist. No. 1*,[40] but argued that it was merely obeying a state statute requiring it to reject any transfer applications that "would increase racial imbalance in the school district."

Wisconsin's statute left districts with considerable discretion to determine how to calculate racial imbalance, but the court found that any conceivable method the district could have chosen still would have violated the standards of *Parents Involved*. Since there was no realistic choice to be made between constitutional and unconstitutional interpretations of the statute's requirements, and the district's only other option was to violate a clear mandate of state law, the Section 1983 claim was dismissed.

In conclusion, the weight of circuit court authority, at this point, holds that strict obedience to a mandate of state law will not expose a school district, or other local

government entity, to liability under Section 1983. When a state statute authorizes particular conduct, but does not require it, there may well be Section 1983 liability, unless the state was effectively the "moving force" behind the action taken. Given the divergent analytical approaches taken by the circuits, school district counsel are well advised to monitor developments in their own jurisdictions until the Supreme Court issues a definitive ruling on these important questions.

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[1] *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978).

[2] *Monroe V. Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961).

[3] *Id.*, at 690-91, 98 S.Ct. 2018 (footnote omitted).

[4] *Los Angeles County, Cal. v. Humphries*, 562 U.S. 29, 131 S.Ct. 447, 178 L.Ed.2d 460 (2010).

[5] *Pembaur v. City of Cincinnati*, 475 U.S. 469, 106 S.Ct. 1291, 89 L.Ed.2d 452 (1986).

[6] 475 U.S. at 483, 106 S.Ct. at 1300. Although this portion of the opinion was not endorsed by a majority of the Court, it has since been cited approvingly by the Court in *Connick v. Thompson*, 131 S.Ct. 1350, 1360, 179 L.Ed.2d 417 (2011), and is considered authoritative by the lower federal courts. *See*, *e.g.*, *Castro v. County of Los Angeles*, ___F.3d _____ (9th Cir. May 1, 2015); *Burgess v. Fischer*, 735 F.3d 462, 479 (6th Cir. 2013); *Teesdale v. City of Chicago*, 690 F.3d 829, 835 (7th Cir. 2012); *Paeth v. Worth Tp.*, 483 Fed.Appx. 956, 964 (6th Cir. 2012); *Zherka v. DiFiore*, 412 Fed.Appx. 345, 348 (2nd Cir. 2011); *Brammer-Hoelter v. Twin Peaks Charter Academy*, 602 F.3d 1175, 1188 (10th Cir. 2010); *Walden v. City of Providence, R.I.*, 596 F.3d 38, 55-56 (1st Cir. 2010); *Gallo v. Washington County*, 363 Fed.Appx. 171, 174 (3d Cir. 2010); *Trammell v. Thomason*, 335 Fed.Appx. 835, 845 (11th Cir. 2009); *Goodman v. Harris County*, 571 F.3d 388, 396 (5th Cir. 2009); *Brockinton v. City of Sherwood, Arkansas*, 503 F.3d 667, 674 (8th Cir. 2007); *Rodriguez-Garcia v. Municipality of Caguas*, 495 F.3d 1, 13 (1st Cir. 2007); *Ledbetter v. City of Topeka, Kansas*, 318 F.3d 1183, 1189 (10th Cir. 2003); *Carter v. Morris*, 164 F.3d 215, 218 (4th Cir. 1999).

[7] *Monell*, 436 U.S. at 386.

[8] *City of Canton, Ohio v. Harris*, 489 U.S. 378, 386, 109 S.Ct. 1197, 103 L.Ed.2d 412 (1989).

[9] *See City of Oklahoma City v. Tuttle*, 471 U.S. 808, 818, 105 S.Ct. 2427, 2433, 85 L.Ed.2d 791 (1985)(observing that § 1983 "provides a fault-based analysis for imposing municipal liability.").

[10] As far back as the early Nineteenth Century, in *Little v. Barreme*, 6 U.S. (2 Cranch) 170, 178-79, 2 L.Ed. 243 (1804), the Supreme Court upheld a judgment against an American ship commander for unlawfully seizing a foreign vessel, acting under a superior's orders. *See also Negusie v. Holder*, 555 U.S. 511, 129 S.Ct. 1159, 1169, 173 L.Ed.2d 20 (2009)(Scalia, J., concurring)("The culpability of one who harms another under coercion is, and has always been, a subject of intense debate, raising profound questions of moral philosophy and individual responsibility[]"); *O'Rourke v. Hayes*, 378 F.3d 1201, 1210 n.5 (11th Cir. 2004) ("[S]ince World War II, the 'just following orders' defense has not occupied a respected position in our jurisprudence.").

[11] *See* Dina Mishra, Comment, *Municipal Interpretation of State Law as "Conscious Choice,"* 27 Yale L. & Pol'y Rev. 249, 250 (Fall 2008). *See also Owen v. City of Independence*, 445 U.S. 622, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980)(holding that government entities have no good faith immunity under § 1983 liability, but not elaborating on what constitutes a "policy" or "custom" sufficient to trigger entity liability under *Monell*).

[12] Eric Schnapper, *Civil Rights Litigation After Monell*, 79 Colum. L. Rev. 213, 225-26 (1979).

[13] *Familias Unidas v. Brisco*, 619 F.2d 391 (5th Cir. 1980).

[14] *Id.* at 404.

[15] *Evers v. Custer County*, 745 F.2d 1196 (9th Cir. 1984).

[16] *Supra*, n.11.

[17] *Davis v. City of Camden*, 657 F. Supp. 396 (D.N.J. 1987).
[18] *Id.*
[19] *Surplus Store and Exchange, Inc. v. City of Delphi*, 928 F.2d 788 (7th Cir. 1991).
[20] *Id.* at 791.
[21] *Garner v. Memphis Police Dept.*, 8 F.3d 358 (6th Cir. 1993).
[22] *Pembaur*, *supra*, 475 U.S. at 483, 106 S.Ct. at 1300.
[23] *Bethesda Lutheran Homes and Services, Inc. v. Leean*, 154 F.3d 716 (7th Cir. 1998).
[24] *Id.* at 718.
[25] *Id.* (citing RESTATEMENT 2D TORTS § 888 [1979]).
[26] *Id.*
[27] *Brotherton v. Cleveland*, 173 F.2d 552 (6th Cir. 1999).
[28] *Id.* at 566.
[29] *Cooper v. Dillon*, 403 F.3d 1208 (11th Cir. 2005).
[30] *Bockes v. Fields*, 999 F.2d 788 (4th Cir. 1993).
[31] *Id.* at 791.
[32] *Whitesel v. Sengenberger*, 222 F.3d 861 (10th Cir. 2000).
[33] *Id.* at 872.
[34] *Vives v. City of New York*, 524 F.3d 346 (2nd Cir. 2008).
[35] *Id.* at 353.
[36] *Ibid.*
[37] *Id.* at 353, n.4.
[38] *Id.* at 356, n.8.
[39] *N.N., a minor, by S.S. v. Madison Metropolitan School District*, 670 F.Supp.2d 927 (W.D. Wisc. 2009).
[40] *Parents Involved in Community Schools v. Seattle School Dist. No. 1* 551 U.S. 701, 127 S.Ct. 2738, 168 L.Ed.2d 508 (2007).

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Pray at Your Own Risk: The Constitutionality of Prayer at School Board Meetings

By Alexandra Garcia, NSBA Law School Intern, National School Boards Association, Alexandria, VA

It is the practice of many school districts around the country to begin their school board meetings with prayer. Some prayers are led by school board members, others by members of the public and some even by students from the district. Some prayers invoke Christianity, while others touch on various religious and secular themes. Despite the extent of this practice, the constitutionality of such an act is widely contested. Several districts are currently making headlines after being sued for maintaining a practice of prayer at school board meetings.[1] Additionally, many school districts have reinstated or re-evaluated their policies of prayer at the beginning of school board meetings in light of the Supreme Court's recent decision in *Town of Greece, N.Y. v. Galloway*.[2]

A school board meeting is difficult for courts to classify. It bears similarities to a legislative assembly and yet is necessarily intertwined with the public school system. Various federal circuit courts have approached prayer at school board meetings with various legal frameworks. The Supreme Court has yet to rule on the constitutionality of prayer at school board meetings, leaving the area unsettled and uncertain. Last term, in *Town of Greece, N.Y. v. Galloway*, the Court held that prayer before a municipal town council meeting was constitutional,[3] applying the historical legislative assembly rationale of *Marsh v. Chambers*.[4] Both proponents and critics of prayer at school board meetings have attempted to extend the rationale of *Town of Greece* to apply to school board meetings, finding both support and opposition in the plurality opinion. Until the Court is faced with a case directly dealing with prayer at school board meetings, the subject will continue to be considered an area of ambiguity with arguments on either side.

This article will discuss the constitutionality of prayer at school board meetings. First, it will address the various federal circuits that have decided on prayer at school board meetings either as being unconstitutional in all or certain circumstances. Then, it will review the Supreme Court's holding in *Town of Greece, N.Y. v. Galloway* and discuss whether or not school board meetings would be covered by the holding of the case. Lastly, the article will provide some suggestions on how to advise school board members to proceed with caution if they choose to incorporate prayer into their meetings, especially in states where the respective federal circuit courts have yet to rule on the issue.

I. Direction from the Federal Circuit Courts

Without clear guidance from the Supreme Court, federal circuit courts are faced with the dilemma of how to approach school board prayer cases. So far, four circuits have confronted such cases and two have held that prayer at school board meetings is unconstitutional.

In *Coles v. Cleveland Bd. of Educ.*, the Sixth Circuit reasoned that because school board meetings are intertwined with public schools, prayer at school board meetings is more analogous to prayer in a school setting than a governmental body setting.[5] After analyzing the Supreme Court's decisions dealing with prayer in public schools, the Sixth Circuit concluded that two common elements, coercion of young minds and endorsement of religion, were present in all cases and in the current instance of prayer at school board meetings.[6] The court applied the test in *Lemon v. Kurtzman*,[7] instead of the *Marsh* exception, and held that prayer at school board meetings is unconstitutional.[8] *Marsh* held that prayer before a legislative assembly is constitutional by relying on

historical precedent and the intent of the Framers of the Constitution.[9] While the Supreme Court in the *Marsh* decision referenced "other deliberative public bodies" as maintaining a history and tradition of prayer, the Court did not expand its holding beyond legislative assemblies.[10] The Sixth Circuit, therefore, rejected such an extension to prayer at school board meetings, citing characteristics of school board meetings such as the location on school property, the constituency comprised of students, a focus on school related matters, and the likelihood of student attendees.[11]

The Third Circuit followed suit twelve years later in *Doe v. Indian River School Dist.*, rejecting the *Marsh* legislative prayer exception for school board prayer.[12] The court focused on the coercion of impressionable children and high student attendance at the meetings.[13] Additionally, like the Sixth Circuit, the unique characteristics of school board meetings, such as the location on school property and the role in the public school system, distinguish it from the legislative prayer like in *Marsh*.[14] Prayer at school board meetings in states within the jurisdictions of the Sixth and Third Circuits is therefore unconstitutional, pending any further clarification from the Supreme Court.

Two other circuits have faced cases addressing the constitutionality of prayer at school board meetings, but have issued much more narrow opinions than those of the Third and Sixth Circuits. Both the Fifth and Ninth Circuits have held that the instances of prayer at school board meetings were unconstitutional based on certain characteristics of the prayer.

In *Doe v. Tangipahoa Parish Sch. Bd.,* the Fifth Circuit held that school board prayer that preferences Christianity is not permitted under *Marsh*.[15] The prayers by the school board were found to consistently further and promote Christian belief and therefore were not constitutional.[16] However, the Fifth Circuit emphasized the narrow holding of the opinion and noted that no decision was being made about prayer at school board meetings outside the scope of this case.[17] After a rehearing *en banc*, the Fifth Circuit vacated the decision and instructed the district court to dismiss due to a lack of standing on the part of the plaintiff.[18] Even so, the decision provides insight into the permissibility of school board prayer. In states within the Fifth Circuit, there may still be some opportunity for school board prayer that does not show a preference for one religion or another.

In *Bacus v. Palo Verde Unified Sch. Dist. Bd. of Educ.* (an unpublished opinion), the Ninth Circuit declined to decide the issue of whether *Marsh* applies to prayer at school board meetings and instead held that under either *Marsh* or *Lemon*, prayer that is consistently "in the name of Jesus" is unconstitutional.[19] Such prayer, the circuit court concluded, has the effect of advancing one faith and makes religion relevant to one's standing in the community.[20] Because the Constitution prohibits the favoring of one religious denomination over another, this prayer practice was deemed unconstitutional.[21]

The remaining federal circuits have yet to decide on the constitutionality of school board prayer. Much of the outcome of a circuit court's decision would likely rest on the choice between applying *Marsh*'s legislative prayer exception or the *Lemon* test. If a court decides that school board meetings fall under the "other deliberative bodies" umbrella mentioned in *Marsh*, more instances of prayer at school board meetings would be found constitutional. If a court rejects *Marsh*, the religious coercion of students and the role of the school board within the public school system are likely to weigh against the constitutionality of school board prayer.

II. *Town of Greece v. Galloway*: What Does it Mean for School Boards?

During the 2013-2014 term, the Supreme Court held that prayers offered at Greece's town council meetings do not violate the Constitution.[22] The Court's decision was justified by the legislative prayer exception of *Marsh*.[23] The Court focused on various aspects of the town council's prayer

practice including their policy of nondiscrimination, calling on congregations in the community to supply clergy to recite the prayer, the town council's lack of guidance or review of the prayers, the direction of the prayer towards the members of the town council, and the ability of the audience members to leave or decline to participate.[24] While this case does not speak directly to the issue of prayer at school board meetings, it is being read both to support and refute a school board's ability to pray at meetings.

A. The Constitutionality of School Board Prayer

Extending the holding of *Town of Greece* to prayer at school board meetings may be possible. There are several clues in both the plurality opinion by Justice Kennedy and Justice Alito's concurrence that support this idea:

- The Court does not distinguish between types of governmental bodies.[25] While the Court acknowledged the small size of town council meetings, the differences in size and type did not distinguish the case from *Marsh*. School board meetings can be analogized to town council meetings because of their size and community focus. Because this was not a distinguishing factor for the Court for town council meetings, it is unlikely to be used to distinguish school boards as governmental entities.

- The Court distinguishes the town council meeting from a graduation prayer where students are closely supervised by the school.[26] This distinction could also be extended to a school board meeting where students may be present but are not being monitored or supervised by the school board members.

- Justice Alito's concurrence points out that it would not be unusual for students in the community to attend town council meetings.[27] Critics of school board prayer have cited student attendance as a potential reason why the Court would deem it to be unconstitutional. However, this characteristic of school board meetings may not be enough on its own to distinguish the situation in *Town of Greece* from a prayer at a school board meeting.

It is especially crucial to closely examine Justice Kennedy's opinion as he would likely be the deciding vote if a school board prayer case comes before the Supreme Court.

B. The Unconstitutionality of School Board Prayer

Groups and individuals that advocate against school board prayer can also find support in the holding of *Town of Greece*. Parts of Justice Kennedy's opinion can be used to distinguish school board meetings from the town council meeting at issue in this case.

- The plurality opinion in *Town of Greece* holds that whether someone is compelled to engage in religious observance is a fact-sensitive inquiry based on the setting of the prayer and the audience to whom it is directed.[28] If the Court finds the setting and audience of a school board meeting to be analogous to a public school, it is more likely that compulsion would be found and therefore the prayer would be unconstitutional.

- In the majority opinion of *Marsh*, the Court used the word "adult" to describe someone who is not readily susceptible to religious indoctrination.[29] The presence of mature adults in the audience is also emphasized in *Town of Greece*.[30] This suggests that part of the rationale of both opinions hinges on only adults being present, which is not the case at school

board meetings where students are more likely to be in attendance.

III. Proceeding with Caution: Tips for Prayer at School Board Meetings

Unless a federal circuit court that has jurisdiction over your state has issued an opinion on point, the constitutionality of school board prayer remains uncertain. School board members who wish to include a prayer at their meetings should proceed with caution, as it is unclear how the Supreme Court would rule should it be presented with the issue. Groups opposing prayer at school board meetings[31] are quick to challenge these practices in court, which can result in stressful, costly, and time-consuming litigation for a school district. The following tips provide some suggestions should school boards decide to proceed with prayer at their meetings:

1. The prayer should be led by clergy members, not school board members or students. When prayers are conducted by members outside of the board, the speech resembles more private than public speech.
2. Clergy of all faiths should be invited and given the opportunity to lead prayer. Even if the community has clergy mostly of one religion, school board members should extend an invitation to individuals of various faiths in order to be nondiscriminatory. For some school districts, this may mean extending invitations to clergy outside of the community in order to remain as inclusive as possible.
3. Do not require or ask anyone to participate in the prayer or any accompanying ritual. Audience members should feel free to leave the room at any time. The person giving the prayer should be mindful of this policy and avoid asking the audience to bow their heads or stand.
4. The prayer should be directed at the school board members, not members of the audience. Advise the clergy member giving the prayer of such direction.
5. School districts that have students as school board members should be even more cautious about instituting any policy of prayer. If possible, place students in the audience as representatives, rather than on the board as a member. This will lessen any compulsion or religious influence argument, especially if the prayer is directed at the school board itself.[32]
6. The safest option is a moment of silence. Any use of a moment of silence should have a clear secular purpose, such as meditation, reflection, or focusing the board members on the school matters before them.[33]

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[1] *See Chino Valley Unified School District Target of Lawsuit Over Prayer at Board Meetings*, CBS LOS ANGELES (Nov. 20, 2014, 11:39 AM), http://losangeles.cbslocal.com/2014/11/20/chino-unified-school-district-target-of-suit-over-prayer-at-board-meetings/; Eric Griffey, *Birdville ISD sued over Christian Prayer*, FORT WORTH WEEKLY (May 18, 2015), http://www.fwweekly.com/2015/05/18/birdville-isd-sued-over-christian-prayer/.

[2] Marie Elizabeth Wicks, *Prayer is Prologue: The Impact of Town of Greece on the Constitutionality of Deliberate Public Prayer at the Start of School Board Meetings*, SOCIAL SCIENCE RESEARCH NETWORK (Jan. 9, 2015), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2547761.

[3] *Town of Greece, N.Y. v. Galloway*, 134 S. Ct. 1811, 1828 (2014).

[4] *Marsh v. Chambers*, 463 U.S. 783, 792 (1983).

[5] *Coles ex rel. Coles v. Cleveland Bd. of Educ.*, 171 F.3d 369, 381 (6th Cir. 1999).

[6] *Id.* at 379.

[7] The test for analyzing statutes under the Establishment Clause was developed by the Supreme Court in

Lemon v. Kurtzman, 411 U.S. 192 (1973): (1) the statute must have a secular legislative purpose, (2) its primary effect must be one that neither advances nor inhibits religion, and (3) the statute must not foster excessive government entanglement with religion. For a full discussion of religion in schools, see NSBA's school law primer, RELIGION: LEGAL POINTERS FOR PUBLIC SCHOOLS, NAT'L SCH. BDS ASS'N (updated by A. Dean Pickett & Deryl A. Wynn March 2015), available to COSA members at www.nsba.org.

[8] *Coles*, 171 F.3d at 389.

[9] *Marsh*, 463 U.S. at 792.

[10] *Coles*, 171 F.3d at 380.

[11] *Id.* at 381-82.

[12] *Doe v. Indian River Sch. Dist.*, 653 F.3d 256, 275 (3d Cir. 2011).

[13] *Id.* at 277.

[14] *Id.* at 278-79.

[15] *Doe v. Tangipahoa Parish Sch. Bd.*, 473 F.3d 188, 202 (5th Cir. 2006).

[16] *Id.* at 203.

[17] *Id.* at 205.

[18] *Id.* at 202 (an *en banc* court subsequently dismissed the case for lack of standing at 494 F.3d 494 (5th Cir. 2007)).

[19] *Bacus v. Palo Verde Unified Sch. Dist. Bd. of Educ.*, No. CV-98-00001-RJT, 2002 WL 31724273 at *357 (9th Cir. Dec. 3, 2002).

[20] *Id.*

[21] *Id.*

[22] *Town of Greece*, 134 S. Ct. at 1828 (2014).

[23] *See id.* at 1827.

[24] *Id.* at 1826-27.

[25] *Id.* at 1831.

[26] *Id.* at 1827.

[27] *Id.* at 1832 (Alito, J., concurring).

[28] *Id.* at 1827 (plurality opinion).

[29] *Marsh*, 463 U.S. at 792.

[30] *Town of Greece*, 134 S. Ct. at 1827.

[31] For examples of groups that have expressed a willingness to challenge prayer at school board meetings, see *State/Church FAQ*, FREEDOM FROM RELIGION FOUNDATION (Sept. 2014), https://ffrf.org/faq/state-church/item/21715-school-board-prayer ("If your school board is praying ... report this violation to FFRF. FFRF has staunchly defended student and parental rights in this area, including by challenging them in court."); Jerry Davich, *River Forest Parents Insist They're Not Against Prayers, Only Persecution*, CHI. TRIB., June 5, 2015, http://www.chicagotribune.com/suburbs/post-tribune/opinion/ct-ptb-davich-river-forest-aclu-lawsuit-st-0607-20150607-story.html ("The ACLU jumped into the fray because they rightly believe that coach-led prayers, school board prayers and graduation ceremony prayers all violate the First Amendment. The law is the law, they insist.").

[32] *See* note 2.

[33] *See Wallace v. Jaffree*, 472 U.S. 38, 60 (1985) (applying the secular purpose element of the *Lemon* test to an Alabama statute requiring observance of a moment of silence in public schools).