No. 12-696

In the
SUPREME COURT OF THE UNITED STATES

TOWN OF GREECE,

Petitioner,

v.

SUSAN GALLOWAY AND LINDA STEPHENS,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit

BRIEF OF *AMICUS CURIAE*, BREVARD COUNTY, FLORIDA, IN SUPPORT OF PETITIONER

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BRIEF OF *AMICUS CURIAE*, BREVARD COUNTY, FLORIDA, IN SUPPORT OF PETITIONER

Amicus Curiae, Brevard County, Florida, respectfully files its Brief in Support of Petitioner, Town of Greece, New York, in this case as follows:

STATEMENT OF IDENTITY OF *AMICUS CURIAE* AND INTEREST IN THE CASE

Brevard County presents this statement of identity and interest in support of its contention, as *amicus curiae* to this Honorable Court.

Brevard County is a political subdivision of the State of Florida located on the Atlantic coast in the state's central region. Thus, pursuant to Supreme Court Rule 37.4, Brevard County, Florida submits this brief in support of the Petitioner in this case in order to allow the County to present its arguments on the issues.

SUMMARY OF THE ARGUMENT

Though this case involves pre-meeting prayer practices validated in *Marsh v. Chambers*, 463 U.S. 783 (1983), Brevard County argues that the case at bar presents a unique opportunity to combine the various constitutional tests for establishment into a single test that subsumes every other test, factor, rationale, standard and indicia of establishment this Honorable Court has fashioned after two hundred years of wrestling with establishment issues. The opportunity is unique, argues the County, because while pre-meeting prayer is currently exempt from the prevailing test for establishment in *Lemon v. Kurtzman,* 403 U.S. 602 (1971), the existence of the *County of Allegheny v. ACLU,* 492 U.S. 573 (1989),

endorsement test applied by the lower court in this case in lieu of *Lemon*, is symptomatic of the fractured Establishment Clause jurisprudence that exhibits unpredictable twists and turns. The County argues that through the adoption of a single, overarching test derived from *Walz v. Tax Commission of the City of New York*, 397 U.S. 664 (1970), the body of establishment law can be brought into alignment.

Since this Court has recognized that Establishment Clause jurisprudence must be "tailored to the *Establishment Clause*'s purpose of assuring that the Government not *intentionally* endorse religion or a religious practice," the County argues that the consistent thrust of the Court's analysis should be the intent and effect of government actions relating to religion. Brevard County proposes an "intent and realistic effect" test culled from the Court's analysis in *Walz* as the means to provide that consistency. Such a test would retain a semblance of the *Lemon v. Kurtzman* "primary effects" test while consigning such factors as secular purpose, endorsement, excessive entanglement, promotion, advancement and the host of other establishment analysis concepts developed by the Court over the years to their rightful status as factors to be considered in evaluating the "intent and realistic effect" of government legislation or activities as they relate to the establishment or interference with religious beliefs and practices.

The County argues that the proposed test, like all past tests used by the Court, must analyze establishment issues in the context of American culture and institutions at the time of evaluation. The County further argues that in the context of current culture and the facts adduced, the existence or non-existence of intent should be weighed together

with the realistic effect of the law or activity at issue to determine whether the Establishment Clause has been violated by the pre-meeting prayer practices at issue in this case. However, the County points out that such a weighing test would apply across the board to all Establishment Law cases without the need to look to multiple tests for establishment, a circumstance that has evolved through two centuries of this Court's establishment jurisprudence. By application of the test to previously decided cases, the County shows, for example, that "intent and realistic effect" analysis would consistently apply even where secular purpose is not relevant or where the combined weight of "intent and realistic effect" might trump the non-existence of a secular purpose which, under the Court's existing precedent, results in an automatic finding of establishment.

The County then shows how the proposed "intent and realistic effect" test would apply to the pre-meeting prayer case at bar, where no violation would exist; a second pre-meeting prayer case, *Pelphrey v. Cobb County., Ga.*, 547 F.3d 1263 (11th Cir. 2008), where the proposed test would not change the actual result; and two Creationism cases which, argues the County, demonstrates the flexibility of the test in its application to every variety of Establishment Clause jurisprudence.

ARGUMENT

PRE-MEETING PRAYER SHOULD BE UPHELD UNDER AN "INTENT AND REALISTIC EFFECT" TEST DERIVED FROM *WALZ V. TAX COMMISSION OF THE CITY OF NEW YORK.*

The Plaintiffs in the district court took offense at mention of the name "Jesus Christ" by Christian

pastors invited to speak the ceremonial invocations. Offense is grounds for standing but offense is not the constitutional test for establishment of religion by a local government. Which begs the question: "What is the test for Establishment in a case involving pre-meeting prayer at a public meeting of an elected body of local government officials?" In the 21st century, the applicable constitutional test in this Honorable Court is far from clear. But this much is clear; a test that provides a consistent path through the murky depths of establishment jurisprudence is required.

In this case, the Town's "go to" decision from this Honorable Court is unquestionably *Marsh v. Chambers*, 463 U.S. 783 (1983). In *Marsh,* this Court eschewed its own three prong test for determining whether a government has established religion within the meaning of the First Amendment's Establishment Clause, a test fashioned in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Instead, the *Marsh* Court carved out a "tradition" exception to the Establishment Clause as applied to pre-meeting prayer. In creating this exception, the Court relied on historical evidence that sessions of legislative bodies have opened with prayer from the founding of the United States right up to the time the *Marsh* case was decided in 1983. *Marsh* at 786. The Court reasoned that since "the First Congress, as one of its early items of business, adopted the policy of selecting a chaplain to open each session with prayer", and because the practice has "coexisted with the principles of disestablishment and religious freedom" from the very beginning of the country, pre-meeting legislative prayer could not historically have been viewed by the founding fathers as a violation of the Establishment Clause. *Marsh* at 786, 788. Accordingly, the *Marsh* court determined that this

history established pre-meeting legislative prayer as a deeply embedded tradition in the history of the country. *Marsh* at786.

In *McCreary County v. ACLU,* Justice Souter noted that the *Marsh* Court had rejected the *Lemon* test for establishment in favor of a "good reason to hold governmental action legitimate even where its manifest purpose was presumably religious." *McCreary County* 545 U.S. 844, 859, fn. 10 (2005). Implicit in Justice Souter's footnote was the realization that the Court had refused to apply the secular purpose prong of the *Lemon* test, while being more or less oblivious to the primary effect and excessive entanglement prongs. Put another way, in *Marsh*, the Court could be viewed to have rejected the absence of secular purpose as establishment in favor of a historical context suggesting pre-meeting prayer has, for 200 years, never been seen to have the effect of establishment. It was with that backdrop that Justice Souter expressed this mild vexation with the Establishment Clause jurisprudence of this Honorable Court: "tradeoffs are inevitable, and an elegant interpretative rule to draw the line in all the multifarious situations is not to be had." *McCreary County* at 875.

A. A Reconstituted Constitutional Test for Establishment

Brevard County respectfully, but mightily disagrees with Justice Souter's assessment that "an elegant interpretative rule to draw the line in all the multifarious situations is not be had" in the Court's Establishment Clause jurisprudence. *McCreary County* at 875. A careful review of the Court's decisions addressing the Establishment Clause

reveals a myriad of tests, factors, standards, rationale and indicia for establishment devised by this Honorable Court during its many years of traversing the "tight rope" of Establishment Clause issues. But only one "test" subsumes in a single, eloquently simple question all of the factors, standards, rationales, tests and indicia of establishment the Court has promulgated in its struggle to state what is and is not government establishment of religion under the Establishment Clause.

It is a test that has been largely overlooked by this Honorable Court since its birth in the Court's 1970 decision, *Walz v. Tax Commission of the City of New York*, 397 U.S. 664 (1970). It is a test this Court, by its own assessment, has used "to chart a course that preserved the autonomy and freedom of religious bodies while avoiding any semblance of established religion." *Walz* at 672. It is a test that is the root jurisprudential DNA found in all subsequent indicia of establishment that have evolved in this Court including the secular purpose, primary effects and excessive entanglement analysis in *Lemon* and the endorsement test in *County of Allegheny v. ACLU*, 492 U.S. 573 (1989).

The test "which each value judgment under the Establishment Clause turns upon" as announced in *Walz* was this: "whether particular acts (of government) in question are *intended* to establish or interfere with religious beliefs and practices or *have the effect* of doing so?" [emphasis added] *Walz* at 669. The intent and effect test posed in the form of a question was punctuated by this observation from the *Walz* Court: "Any move that *realistically* 'establishes' a church or tends to do so can be dealt

with 'while this Court sits.'" [emphasis added] *Walz* at 678.

The County asserts the *Walz* test, as posed by the Court, requires only the slightest tinkering to reduce other Establishment Clause tests to the lesser status of factors helpful for *realistically* evaluating the existence or non-existence of establishment. *Walz* at 678. If adopted, the test will consistently conform to the interpretive guide of neutrality followed in all Establishment Clause cases since *Everson v. Board of Ed. of Ewing,* 330 U.S. 1 (1947). *See: McCreary County* at 874.

As proposed by Brevard County, the test is this: Were the particular acts of government intended to establish or interfere with religious beliefs or practices *and* did the government acts *realistically* have the effect of establishing, interfering with or religious beliefs or practices?

For purposes of establishment issues at the local level, Brevard County suggests that intent can only be viewed as involving a deliberate act or acts of establishment by or attributable to the collegial governing body. The County also asserts that under the proposed modification to the *Walz* "intent" analysis, secular purpose—the objective of a local government ordinance or practice—should be only one of many possible indicia of intent to establish or interfere with religious beliefs or practices. However, under the proposed test—unlike the secular purpose prong in the *Lemon* test, which can be dispositive of a finding of establishment, *Edwards v. Aguillard*, 482 U.S. 578 (1987)—a finding of intent or lack of intent to establish or interfere with religious beliefs or practices does not automatically equal establishment. Rather, intent must be weighed along with the realistic effect of the government's action.

This modified *Walz* test will produce analysis "tailored to the *Establishment Clause*'s purpose of assuring that government not *intentionally* endorse religion or a religious practice." [emphasis added] *Edwards* at 587.

An analysis of how the proposed *Walz* "intent and realistic effect" test would be applied to the facts in this case and another already decided case involving pre-meeting prayer, *Pelphrey v. Cobb County*, 547 F.3d 1263, 1267 (11th Cir. 2008), will be presented later in this brief. That analysis will occur in the same manner employed in this Court's review of other cases applying the various tests for establishment that have evolved over the years. It is an analysis in which context is key.

Context is Key

As with any test for establishment employed by the Court detail and context are key, *McCreary County* at 867, 874. Examples of the importance of "context" in this Court's Establishment Clause jurisprudence are evident in the previously discussed cases. *See, McCreary County* [context of a solitary display of Ten Commandments in a place of prominence on public property is establishment]; *Walz* [tax exemptions are not establishment in the historical context of two centuries of uninterrupted history of freedom from taxation]; *Marsh* [in the context of historical tradition of pre-meeting prayer is not establishment], as well as *Salazar v. Buono*, 559 U.S. 700 (2010) [courts should give sufficient consideration to the context in which a statute was enacted and the reasons for its passage].

Therefore, prior to demonstrating how the "*intent and realistic effect*" test would provide a workable rationale for the wide variety of

Establishment Clause cases brought before this Court—including the current case involving the Town of Greece—the modern context of typical pre-meeting prayer at public meetings of elected local government officials should be considered for analysis.

The Context of Pre-Meeting Prayer

One must make a purposeful and conscious effort to find religion in a 21st century America enamored with sports, social media, the Internet, video games, reality TV, negative nightly news and a film industry glorifying sex, violence, serial killers, and zombies. The last place any reasonable person with breath in their lungs would conclude that they had found religion is at a meeting of elected officials who, for better or worse in these modern times, rank at the same depth of credibility among many of their constituents as used cars salesmen and lawyers.

As anyone who has recently sat through a meeting of their local elected officials knows, elected representatives of local government gather together to hear their constituents' oft-times animated, too often agitated concerns about exclusively *secular* issues ranging from high taxes and bloated government to protection of the environment, animal rights and the community's overgrown breeding grounds for snakes, rats and other vermin. If any religion is being established or endorsed at such meetings, it is the footnote religion, Secular Humanism—the religion called out by the Honorable Mr. Justice Black in footnote 11 of the Court's opinion in *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961).

In that context, how incredulous is the claim that any religion can be "established" as the faith of

the realm by local officials within these United States on the theory that a mythical objective observer "might feel" excluded from the political community if standing, sitting or staying out of the room at the start of a meeting featuring, as its first item, an agendaed but largely ceremonial one or two minute pre-meeting invocation seeking wisdom, discernment and direction from a higher power, be it God, Jesus Christ, Allah, Apollo, the Great Spirit or Mother Earth? In these modern times any person redressing their government by reading from Scripture at a public meeting as an exercise of their constitutional right to Free Exercise during his or her allotted three minutes of agendaed Public Comment is invariably met with smirks, rolling eyeballs and knowing nods from many an unpersuaded secular skeptic sitting in the audience—with never an "Amen" being heard.

Experience teaches that elected officials of the government closest to the people are, for the most part, highly attentive to the political grievances, positions and recommendations of their constituents without inquiry into the religious affiliations, prayer preferences or lack thereof, of the potential voters with whom they have contact at a public meeting where no constituent is "forced" to attend or sit through the first item on the agenda—the invocation. To the local elected official and virtually all secular constituents who manage to arrive in time for the invocation, a moment or two of pre-meeting prayer is mere recognition of a respectful tradition; a momentary diversion in the context of the overwhelmingly secular purpose that is the business of city and county government—a secular purpose, ironically, sanctioned by Jesus Christ himself upon announcing the tenet "Render to Caesar the things

that are Caesar's, and to God the things that are God's,"[1] when questioned about the lawfulness of paying taxes to Augustus, Emperor of Rome. If pre-meeting prayer is claimed to be a mode for establishing religion within a city or county, history has proven the tactic an abysmal failure.

B. The Application of the Proposed *Walz* Intent and Effects Test to Pre-meeting Prayer Cases

With the foregoing context in mind, Brevard County invites this Honorable Court to revisit and revise the *Walz* formulation into a test of "intent and realistic effect" as the constitutional test of establishment applicable across the board to Establishment law cases, including the pre-meeting prayer case presently before the Court. Brevard County will now explain its view of how such a test would apply in the case at bar and in a short sampling of selected cases considered by this and lower courts which, with an interesting exception, would not change the results in those reviewing courts.

1. The *Town of Greece* Case

According to the recitation of evidence in the District Court opinion,[2] there appear to be none but Christian churches in the Town of Greece. The call list for volunteer clerics included a few non-Christian religious institutions among the thirty-seven compiled by three administrative staffers who

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[1] Matthew 22:15-21, (New King James Bible)

[2] *Galloway v. Town of Greece*, 732 F. Supp. 2d 195 (W.D. NY 2010).

derived the list from private informational journals in town, together with an occasional recommendation—though some of the non-Christian candidates were added after litigation commenced. Before the District Court Judge, the three town administrative assistants responsible for soliciting clerics to deliver a prayer declared no known religious affiliation and none of them had ever had the experience of hearing an invocation at the start of any meeting of the Town Council. The Town had no written pastoral selection policy nor did the Town place any limits on who could voluntarily ask to present an invocation. The town did not edit the content of any invocation given by a presenter and many, but not all, of the actual invocations referred to the name "Jesus" during or at the end of the prayer.

The record recited in the District Court reveals that Plaintiff Stephens was offended by pre-meeting prayer and Plaintiff Galloway opposed the practice, though both would be satisfied if the content of any prayer recited only "nonsectarian" references to God, Lord or Father.

If the *Lemon* test is applied to the facts recited in the District Court decision, a question will undoubtedly be raised as to whether any credible secular purpose can be articulated in support of the cleric selection process for pre-meeting invocations and, perhaps, for the actual practice of pre-meeting prayer at a public meeting of elected town officials. But the *Lemon* secular purpose prong has been of such inconsistent and limited value as a test for determining establishment that this Court has, in some cases—including the Court's only case involving pre-meeting prayer—paid little heed to the test and resolved those cases using other rationale.

Lynch v. Donnelly, 465 U.S. 668 (1984) [display of nativity scene on private property by City not establishment]; *Marsh v. Chambers,* 463 U.S. 783 (1983) [statute authorizing expenditure of public funds for chaplain providing pre-meeting prayer not establishment.]

In fact, the *Lemon* analysis was used to invalidate a Shared Time program where secular classes were taught in sectarian schools during regular school hours by publicly employed teachers, using materials purchased with public funds in *Grand Rapids School Dist.* v. *Ball,* 473 U.S. 373 (1985). Yet only twelve years later the Court receded from the *Lemon* rationale applied in *Grand Rapids* and overruled the case in light of a change in the law evidenced in the Court's decisions over the previous twelve year span. *Agostini v. Felton,* 521 U.S. 203 (1997).

It is not surprising, therefore, that the majority decision in the lower court in this case made no mention of *Lemon* while ignoring *Marsh v. Chambers* which, as previously mentioned, exempted pre-meeting prayer from the *Lemon* test thereby eliminating any need to consider secular purpose, primary effects or excessive entanglement in this case. The lower court, instead, applied the *County of Allegheny* endorsement test in combination with its own legal judgment under a "totality of circumstances" test. *Galloway v. Town of Greece,* 681 F.3d 20 24, 25, 27(8th Cir. 2012).

A test for establishment, like the *Lemon* test, that is deemed inapplicable to certain Establishment Clause cases or subject to judicially crafted exceptions created in recognition of historical practices, tradition, good reasons or judicial fiat cannot really claim status as a viable test. Likewise,

bifurcating establishment analysis by resorting to the endorsement test set forth in *County of Allegheny* demonstrates the vagaries of establishment analysis, particularly since the endorsement test can easily be viewed not as a separate test of establishment, but as one of many factors used by this Court in analyzing whether a government act evidences the *realistic effect* of establishing or interfering with a religion or religious practice—the second prong of the revision to the *Walz* test urged by Brevard County.

The proposed *Walz* "intent and realistic effect" analysis would allow the courts to continue to use secular purpose as indicia of intent, if relevant, but would also require review of other indicia of intent. The proposed test would also consign both the excessive entanglement prong of the *Lemon* test and the *County of Allegheny* endorsement test to the status of factors to be considered in the analysis of the realistic effect of government acts.

As applied to the case at bar, the "intent and realistic effect" revision of the *Walz* intent and effect test would reveal no establishment in the pre-meeting prayer practice of the Town of Greece. There is certainly evidence that the Town's governing body took deliberate action to initiate pre-meeting invocations in 1999. However, there is no evidence of an impermissible motive or purposeful discrimination since the governing body had no role in creating the selection process that evolved prior to the initial round of objections by Galloway and Stephens. Likewise, there is no evidence that the town council took any deliberate action to ask only Christian clerics to deliver pre-meeting invocations, although there is evidence that only Christian churches were located in the town. At worst, intent to commence the practice of pre-meeting prayer could

be reasonably attributed to the council. Under the *Walz* test revision, intent to establish a religious practice may be attributable to the town, but there is no indication of a deliberative intent to advance or proselytize Christianity to the exclusion of all other religions—as evidenced by pre-meeting prayers led by Muslim and Jewish adherents at public meetings of the town council.

But under the refined *Walz* test, *intent* would be weighed together with *realistic effect*. The town did not edit or pre-approve the content of any invocation presented by a cleric delivering a moment or two of prayer prior to the commencement of the overwhelmingly secular business of the town council. Not surprisingly, Christian clerics may have delivered prayers mentioning the name "Jesus Christ", but there was no evidence that the council restricted clerics to prayers mentioning Jesus' name. In fact, the evidence showed that the Town went outside its borders to seek members of other religions to provide the invocation.

Likewise, there was no evidence or claim that the council ever attempted to stop any citizen from delivering a prayer or from quoting a verse out of the holy writings used by any non-Christian religious sect or from closing any prayer in the name of any spiritual being or entity of their choice. There was no evidence that any cleric was evangelizing or that any person was evangelized by a cleric under the auspices of an invocation delivered at a town meeting. The evidence of record does not in any way demonstrate that the Town's practice of pre-meeting prayer was being exploited to advance or proselytize Christianity in a town where all churches were already Christian churches, a fact that involved no act whatsoever on the part of the Town. Those

churches were also the sole suppliers of volunteer community clerics within the town limits. Finally, there was no evidence that the pre-meeting prayer practices had the slightest effect on the otherwise secular business of the Town government.

Therefore, when weighed together with the intent of the Town council, the realistic effect of the pre-meeting prayer as practiced in the Town of Greece would not establish the religion of Christianity even if the Court determined the Town's council had intent to establish religion or a religious practice.

2. *Pelphrey v. Cobb County, Ga.*, 547 F.3d 1263 (11th Cir. 2008)

Interestingly, the application of a refined *Walz* test in another pre-meeting prayer case, *Pelphrey v. Cobb County., Ga.*, 547 F.3d 1263 (11th Cir. 2008), yields no different result than the appellate court's decision in that case. According to the facts recited by the Circuit Court of Appeal,[3] like the Town of Greece, Cobb County had no express pre-meeting prayer policy, practice or procedure demonstrating intent to establish or interfere with religious beliefs or practices. However, unlike the case at bar, in *Pelphrey* an employee working on behalf of the County Planning Commission had stricken dark, continuous lines through "Churches-Islamic," "Churches-Jehovah's Witnesses," "Churches-Jewish," and "Churches-Latter Day Saints" in the Yellow Pages she used to obtain numbers for clerics who might be willing to give a pre-meeting prayer. However, this was not the same book of Yellow Pages

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[3] *Pelphrey* at 1266-1268

or cleric selection process used by the governing body of the county, the Cobb County Commission.

After litigation was filed, the County Commission required the consolidation of the Planning Commission's selection process with their own by eliminating the use of the black lined Yellow Pages and adopting the process used by the County Commission employee who had resulted in invocations by a variety of clerics including Christian, Jewish and Muslim. Reviewing the District Court's decision, the Eleventh Circuit Court of Appeal upheld the lower court decision finding the Planning Commission process to be a violation of the Establishment Clause but approving the County Commission process under the Establishment Clause exception announced by this Court in *Marsh v. Chambers.*

Applying the revised *Walz* "intent and realistic effect" test to *Pelphrey*, the District Court record would have revealed competent substantial evidence establishing an employee's intent to exclude certain religions from the pre-meeting prayer roster of volunteer clerics, an act that was vicariously attributed to the Planning Commission. The evidence suggested deliberate, categorical exclusion of non-Christian clerics constituting an impermissible motive and establishing intent. Moreover, by intentionally preventing all but Christian clerics from delivering pre-meeting prayer, the exclusionary act attributable to the Planning Commission had the realistic effect of endorsing Christianity. Weighed together, the "intent and realistic effect" of this selection process would reproduce the reviewing courts' decisions finding a violation of the Establishment Clause without any need to consider

whether or not there was a secular purpose or excessive entanglement.

In contrast, the employee for the County Commission did not line through non-Christian religions in her Yellow Pages. Further, there was no evidence that the County Commission had taken or was aware of any deliberate act, either as a collegial body or through its employee, suggesting purposeful discrimination or impermissible motives underlying the cleric selection process. Therefore, intent to establish Christianity was not supported by any evidence. Likewise, in the context of the exclusively secular nature of the business conducted at County Commission meetings there was no evidence even hinting that the delivery of pre-meeting prayers lasting a moment or two had the realistic effect of establishing Christianity in the community. As a result, no Establishment Clause violation would exist under the revised *Walz* test. Once again, on these facts secular purpose is irrelevant to the analysis, as is excessive entanglement. Though the perception of endorsement could be viewed as a potential effect, the weight of the lack of intent combined with some evidence of neutrality and diversity in the selection process for prayer presenters would not trip over the realistic effect prong of the proposed test.

C. The *Walz* Test Variation as Applied to Two Decided Creationism Cases

The proposed *Walz* "intent and realistic effect" test can also be applied, with interesting implications, to this Court's line of decisions shielding impressionable school aged children with Establishment Clause protection because they are deemed susceptible to religious indoctrination and

peer pressure while involuntarily attending public school. In the background of that line of cases lingers the Court's admonition that public schools fall within the "strict confinement of the State to instruction other than religious, leaving to the individual's church and home, indoctrination in the faith of his choice." *Illinois Ex Rel. McCollum v. Board of Education of School Dist. No. 71, Champaign County*, 333 U.S. 203, 217 (1948). Post 1971 school related cases typically considered the *Lemon* test when invalidating a variety of practices, policies and laws enacted by school systems and legislatures in violation of the Establishment Clause. *See, Santa Fe Independent School District v. Doe*, 530 U.S. 290 [school policy allowing student led prayer at football games violates Establishment Clause]; *Lee v. Weisman*, 505 U.S. 577 (1992) [schools inviting clerics to recite prayers at graduation ceremonies violates Establishment Clause]; *Edwards v. Aguillard*, 482 U.S. 578 (1987) [statute banishing the theory of evolution from public school classrooms violates Establishment Clause]; *Grand Rapids School Dist.* v. *Ball,* 473 U.S. 373 (1985) [stopping school district's use of public school teachers in Shared Time program held in sectarian schools]; *Wallace v. Jaffree,* 472 U.S. 38 (1985) [invalidating Alabama statute authorizing moment of silence for school prayer]; *Stone v. Graham,* 449 U.S. 39 (1980) [posting copy of Ten Commandments on public classroom wall is establishment].

1. *Edwards v. Aguillard*, 482 U.S. 578 (1987)

Of particular interest among the preceding string of cited cases is *Edwards v. Aguillard*, a

decision which is helpful in understanding how the proposed *Walz* test variation would affect two similarly decided cases, the other being a District Court decision referred to in footnote 9 of the *Edwards* decision, *McLean v. Arkansas Board of Education,* 529 F. Supp. 1255 (E.D. Ark 1982).

In *Edwards,* this Court used the *Lemon* test to analyze the validity of a Louisiana Creationism Act which forbade the teaching of the theory of evolution in public schools unless accompanied by instruction in "creation science." In considering the secular purpose prong, this Court made this revealing statement: "A governmental *intention* to promote religion is clear when the State enacts a law to serve a religious purpose. This *intention* may be evidenced by promotion of religion in general...or by advancement of a particular religious belief." [emphasis added] *Edwards* at 585. The Court then noted that "[i]f the law was enacted for the purpose of endorsing religion, 'no consideration of the second or third criteria [of *Lemon*] is necessary'", *Edwards* at 587—thereby elevating the absence of a secular purpose to establishment without any consideration of effects.

In reality, the *Edwards* language honing in on "governmental *intention*" suggests that "purpose"—be it secular or religious—is actually an indicator of intention, which is the first prong in the proposed *Walz* "intent and realistic effect" test, a test where deliberative intent, impermissible motives, secular purpose and purposeful discrimination would be factors considered in determining the absence or presence of intent to establish religion or a religious practice which is then weighed together with realistic effects in the analysis of establishment.

Applying the proposed "intent and realistic effect", the Court can be seen to have essentially found an intent to promote religion based on the lack of credible evidence supporting academic freedom as the proclaimed secular purpose for the statute—a posture confirmed in Justice Black's concurring opinion where he stated "[m]y examination of the language and the legislative history of the Balanced Treatment Act confirms that the *intent* of the Louisiana Legislature was to promote a particular religious belief." [emphasis added] *Edwards* at 603. But under the proposed test, intent would have to be weighed together with the *realistic effect* of the legislation.

When the "realistic effect" component of the proposed test is applied, the Court's actual decision in *Edwards* would have been supported by its analysis of the legislative history of the statute which was deemed unpersuasive as proof of the claimed secular purpose—academic freedom. The effect of the statute, as determined by the Court, was to undermine a comprehensive scientific education and "affect the teaching of the one scientific theory that historically has been opposed by certain religious sects." *Edwards* at 587, 593. Weighing the "intent and realistic effect" prongs as applied to the *Edwards* facts and conclusions, the refined *Walz* test would reach the same establishment violation result as the *Edwards'* court without equating the absence of secular purpose, alone, to establishment.

The implications of displacing "absence of secular purpose", in and of itself, as establishment can be seen in the discussion of the next case involving the issue of creationism.

2. *McLean v. Arkansas Brd. of Education*, 529 F. Supp. 1255 (Ark E.D. 1982)

The facts in *McLean v. Arkansas Brd. of Education,* suggest an interesting application of the proposed "intent and realistic effect" test. The facts recited by the District Court show that in 1981 the State of Arkansas adopted the "Balanced Treatment for Creation-Science and Evolution-Science Act." The essential mandate of that law was stated in its first sentence: "[p]ublic schools within this State shall give balanced treatment to creation-science and to evolution-science." *McLean* at 1256. The trial court devoted several pages of its analysis of the statute to a description of the history of Christian "fundamentalism," creationism and the prominent role of fundamentalists in the legislative history of the law. Applying the *Lemon* test, the trial judge cited the legislative history for the conclusion that there was no secular purpose supporting the statute because the Act was passed with the specific purpose of advancing religion. *McLean* at 1264.

Chief among the trial court's concerns with the substance of the statute was the definition of "creation-science" set forth in section 4(a). The court noted that section 4(a) "revolves around 4(a)(1) which asserts a sudden creation 'from nothing.'" *McLean* at 1264. Section 4(a) of the Act is reproduced below showing subsection (1) in italics:

> Definitions. As used in this Act:
>
> "Creation-science" means the scientific evidences for creation and inferences from those scientific evidences. Creation-science includes the scientific evidences and related

> inferences that indicate: *(1) Sudden creation of the universe, energy, and life from nothing;* (2) The insufficiency of mutation and natural selection in bringing about development of all living kinds from a single organism; (3) Changes only within fixed limits of originally created kinds of plants and animals; (4) Separate ancestry for man and apes; (5) Explanation of the earth's geology by catastrophism, including the occurrence of a worldwide flood; and (6) A relatively recent inception of the earth and living kinds. [emphasis added]

McLean at 1264

The court drew this conclusion about "sudden creation from nothing": "[s]uch a concept is not science because it depends upon a supernatural intervention which is not guided by natural law. It is not explanatory by reference to natural law, is not testable and is not falsifiable," which were three of the five characteristics defining science, according to the evidence reviewed by the court. *McLean* at 1267. The District Court judge also concluded that "[b]oth the concepts and wording of Section 4(a) convey an inescapable religiosity" noting that "[s]ection 4(a)(1) describes 'sudden creation of the universe, energy and life from nothing" and that "[e]very theologian who testified, including defense witnesses, expressed the opinion that the statement referred to a supernatural creation which was performed by God." *McLean* at 1265. Finally, the court concluded that "[t]he ideas of 4(a)(1) are not merely similar to the literal interpretation of Genesis; they are identical and parallel to no other story of creation," M*cLean* at 1265, and that "[t]he argument that creation from

nothing in 4(a)(1) does not involve a supernatural deity has no evidentiary or rational support" being only "a concept unique to Western religions. *McLean* at 1265.

Ultimately, the court concluded that "[t]he facts that creation science is inspired by the Book of Genesis and that Section 4(a) is consistent with a literal interpretation of Genesis leave no doubt that a *major effect* of the Act is the advancement of particular religious beliefs." [emphasis added] *McLean* at 1266. The court also found that "[t]here is no way teachers can teach the Genesis account of creation in a secular manner." *McLean* at 1272. Accordingly, the court held that the Act would also have the effect of "creating an excessive and prohibited entanglement" between school officials and religion. *McLean* at 1272.

The 1982 result in *McLean* would not differ under the revised *Walz* "intent and realistic effect" test. In 2013, however, the result might be different if the statute had limited the definition of creation-science to "[s]udden creation of the universe, energy, and life[4] from nothing."

The *McLean* decision was published in 1982. Fifteen years later, in 1997, physicist Alan Guth proposed that, in fact, the laws of quantum physics suggest the universe was indeed created from

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[4] Quantum physics allows for the theoretical possibility that a universe with life could have instantaneously and retroactively collapsed into existence at any time during its history when it was first observed. McFadden, John Joe, *Quantum Evolution*, W.W. Norton & Company (2000) p. 195; *See also:* Wheeler and Zurich (Editors), *Quantum Theory and Measurement* (1983) p. 209; Rosenblum, Bruce and Kuttner, Fred (2011-07-01), "Quantum Enigma: Physics Encounters Consciousness" (Kindle Locations 4140-4141)

nothing! Guth called it "the ultimate free lunch."[5] With the advancement of quantum physics this "creation from nothing" idea has since become mainstream science, as demonstrated in the 2011 vintage Discovery Channel documentary titled "The Big Bang" aired as part of Discovery's made-for-television series titled "*How the Universe Works.*"[6] The "Big Bang" segment featured commentary by several prominent theoretical physicists including popularizers of physics, renowned physicists Stephen Hawking and Dr. Mikio Kaku. Here is one way that popular science program described the now mainstream scientific view about how the universe did indeed begin from nothing. "At the dawn of time, the universe explodes into existence, *from absolutely nothing into everything*"—including the laws of physics.[7] [emphasis added] The event is called the "Big Bang," which "*How the Universe Works*" described as the universe erupting from "a single point, infinitely small, unimaginably hot, a super-dense spec of pure energy."[8]

This evolution in scientific knowledge begs a new, though hypothetical question in the context of Brevard County's proposed revision to *Walz* requiring analysis of the "intent and realistic effect" of government actions in assessing Establishment Clause issues. How would a court analyze alleged

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[5] Lemley, Brad, April 2002, "Guth's Grand Guess", *Discover Magazine*

[6] "How the Universe Works", Narr. Mike Rowe, Discovery Communications, LLC, 2011

[7] "The Big Bang", at 3/33 00:14, 1:24, *How the Universe Works*, Narr. Mike Rowe, Discovery Communications, LLC, 2011

[8] *Id.* at 3/33, 0:24

establishment in a case where a statute required the teaching of "creation from nothing" as both a scientific and religious concept now that science has determined, setting aside the issue of cause,[9] the Judeo-Christian Bible got the description of a universe created from nothing correct in the Book of Genesis?

The answer is the context in which the "intent and realistic effect" test is applied. Clearly, because the Genesis account of creation from nothing is now supported by science, a statute simply requiring the teaching of a creation from nothing concept found in the Bible alongside a mainstream scientific theory providing evidence that the biblical concept is both an accurate historical and scientific account of creation would not, without more, violate the Establishment Clause under the proposed "intent and realistic effect" test. The purpose of any Legislature enacting such a hypothetical statute could be argued to be to maximize the comprehensiveness and effectiveness of science instruction for having encouraged the teaching of all scientific theories about the origins of humankind—a purpose condoned by this Court's Establishment Clause jurisprudence. *Edwards* at 588. With this valid secular purpose, no intent to establish religion exists.

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[9] Scientists cannot really pinpoint a cause for a Big Bang creation event other than to fall back on the random creation of particles from nothing allowed by the laws of quantum physics (which laws, problematically, break down at the Big Bang singularity and would not activate until after the Big Bang took place [Stephen Hawking, "The Beginning of Time"; http://www.hawking.org.uk/the-beginning-of-time.html]). In contrast, the Bible attributes the cause of creation to God.

Even assuming such a statute might evidence an intent to establish religion if that purpose was imputed to the Legislature by their words or acts, the non-secular purpose would be outweighed by the realistic effect of such a statute—the teaching of an accurate statement of science and history, the latter of which this Court has recognized as a permissible context in which to study the Bible in public schools without violating the Establishment Clause.[10] See, *Abington v. Schempp*, 374 U.S. 203 (1963) [study of the Bible for its literary and historic qualities and study of religion, when presented objectively as part of secular program of education, is permissible under Establishment Clause]. Thus, the hypothetical version of the statute would not violate the Establishment Clause under the test proposed by Brevard County, even where the *Lemon* secular purpose prong, as currently applied by this Court, might require invalidation of such a statute under the Establishment Clause. *Edwards v. Aguillard, supra.*

CONCLUSION

Under the proposed "intent and realistic effect" revision to the *Walz* intent and effect test, pre-meeting prayer would survive even if intent was imputed to a local government due to a lack of secular purpose for the practice. Under the proposed

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[10] The realistic effect under an "accurate historical account" analysis would also apply if, setting aside cause, the nature and sequence of events in the evolution of the universe described in Genesis chapter 1 (NIV) was determined to match the scientific account, a plausible argument when of the scientific discoveries over the past twenty years are compared to the description of events in Genesis 1.

test, the presence of intent would have to be weighed together with the realistic effect of the practice. In a case involving a moment or two of pre-meeting prayer delivered before a body of elected officials engaged in the overwhelmingly secular business of local government, no realistic effect of advancement, proselytization or endorsement of a particular religion has taken place.

As to pre-meeting prayer in general, there is no evidence the practice has had any realistic or discernible impact whatsoever on either the steady rise of secularism and a correlating steep decline in the influence of religion[11] in America. Moreover, there is absolutely no evidence that the 200 plus years of two minute pre-meeting prayers—asking for wisdom and discernment in behalf of elected officials charged with making entirely secular decisions at public meetings—have realistically established either religion in general or a specific religion in this country or in any state, county or municipality in this country including the Town of Greece.

In secular America, proponents of complete separation between church and state might view pre-meeting prayer as a breach in the wall of separation resulting in the establishment by a local government of religion, in general, or a single religion in particular. But such proponents of separation cannot seriously be viewed as "objective persons," within the meaning of the Court's use of the term in Establishment Clause cases, specifically within the

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[11] According to a May 29, 2013 Gallup poll, 77% of Americans say religion is losing its influence on American life. Newport, Frank, "Most Americans Say Religion is Losing Influence in U.S.", *Gallup. Com,* http://www.gallup.com/poll/162803/americans-say-religion-losing-influence.aspx

framework established through the multiple decisions this Court has made consistently recognizing that complete separation of church and state is a practical impossibility. *McCreary* at 875-876; *Lemon* at 614. To those opposed to pre-meeting prayer the practice may reasonably be viewed as a small stain on the wall of separation, but not as a structural defect.

Brevard County therefore urges this Court to zest the *Lemon* test by shaving off secular purpose and excessive entanglement as prongs in the test for establishment. Both concepts should be consigned to their rightful role as indicia of government intent under a more workable, encompassing and predictable *Walz*-based "intent and realistic effect" test. The County suggests that the revised *Walz* test would only implicate establishment of religion when actual proof of intent and bona fide effects would induce a *reasonable person* living in the context of a highly secular modern America to understand that (1) the government has realistically and intentionally attempted to establish religion or a religious practice through impermissible motives or purposeful discrimination *and* (2) implemented that intent through acts which, either realistically advance, proselytize or endorse religion or realistically cause excessive entanglement between religion and government.

Offense to persons hostile to a particular religion or religion in general is not and should not be the constitutional test for Establishment in a case such as pre-meeting prayer where government activity has merely spawned a largely ceremonial and respectful reminder that religion is still a patch, perhaps faded, on a corner of the crazy quilt that is America's diverse and secularized culture. Upon

resurrection and revision of the *Walz* test being urged by Brevard County, the country can rest assured that Establishment will be kept at bay as long as this Honorable Court still sits.

Respectfully submitted,

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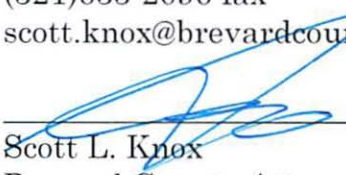

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