GRANTED

No. 99-62

In The

Supreme Court of the United States

SANTA FE INDEPENDENT SCHOOL DISTRICT,

Petitioner,

v.

JANE DOE, *ET AL.*,

Respondents.

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

BRIEF OF *AMICI CURIAE* SPEARMAN INDEPENDENT SCHOOL DISTRICT, CARTHAGE INDEPENDENT SCHOOL DISTRICT, DILLEY INDEPENDENT SCHOOL DISTRICT, IRAAN-SHEFFIELD INDEPENDENT SCHOOL DISTRICT, McCAMEY INDEPENDENT SCHOOL DISTRICT, MADISONVILLE INDEPENDENT SCHOOL DISTRICT, NEWTON INDEPENDENT SCHOOL DISTRICT and LORENA INDEPENDENT SCHOOL DISTRICT, IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

I.

STATEMENT OF *AMICI* INTEREST

Spearman Independent School District, Carthage Independent School District, Dilley Independent School District, Iraan-Sheffield Independent School District, McCamey Independent School District, Madisonville Independent School District, Newton Independent School District and Lorena Independent School District appear as *amici curiae* and urge the Court to reverse the decision of the Fifth Circuit.[1] *Amici curiae* have an interest in the case because the Fifth Circuit's judgment will require them to review and essentially censor student-initiated and student-given speech even though there is no state involvement in the decision that the speech occur or in the selection of the speaker. *Amici's* interest here is substantial and direct, because the holding directly governs decisions and policies adopted by these school boards. Under this decision:

- School officials will be subjected to potential litigation by students who feel their First Amendment rights are violated by requiring administration or school boards to exercise control over allowance of or the content of their pre-activity statements or graduation solemnization.

- Officials will be required to demonstrate hostility toward sectarian religion in favor of

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[1] Counsel for a party did not author this brief, in whole or in part. No person or entity, other than *amici curiae*, or its counsel, made a monetary contribution to the preparation and submission of this brief.

ecumenical religion, resulting in establishment of a state religion, that of atheism or ecumenical religion.

- The decision will require the school to exert control over the student prayers, resulting in (a) violating their First Amendment right to freedom of speech, and (b) excessive entanglement.

- The decision will require the school to outlaw student-initiated and student-led prayer, even though that is not governmental action by any definition.

This decision places the school districts in an untenable position, despite established precedent to the contrary.

The parties have given their consent to the filing of this brief, as shown in the blanket consent letter already on file with the Court. Sup. Ct. R. 37.2(a).

SUMMARY OF THE ARGUMENT

"God save the United States and this Honorable Court."

Thus begins each session of the United States Supreme Court since the days of Chief Justice Marshall.[2] If a student at a football game or graduation ceremony used this phrase, but substituted the phrase "school district" for the phrase "Honorable Court," has that student

[2] J.C. Warren, The Supreme Court in the United States History 469 (1922).

violated the Establishment Clause of the First Amendment? In fact, the Fifth Circuit has ignored the general tradition of prayer at public ceremonies that has existed since the beginning of this nation and struck down student-initiated prayer for all activities except for graduation.

If the Fifth Circuit's decision in *Doe v. Santa Fe ISD*, 168 F.3d 806 (5th Cir. 1999), is not overturned, school officials will be put in the untenable position of having to show hostility toward religion by barring any religious speech except at graduation. School officials may be forced to deny students their freedom of speech at graduation ceremonies as well since any prayers that are offered are subject to the guidelines and editing requirements of the Fifth Circuit – namely, that the prayers be nonsectarian and nonproselytizing. This decision cannot be allowed to stand for three main reasons:

1. The Fifth Circuit's decision violates the requirement that governments be neutral in the realm of religion. This decision demonstrates hostility toward secular religion and favors ecumenical religion or non-religion (atheism) over sectarian religions. This results in establishment of a state religion, that of atheism or ecumenical religion, thus violating the Establishment Clause.

2. The prayers in question at football games or other school activities or at graduation are not governmental action. They are student-initiated and student-led. The Fifth Circuit's decision requires a school district to edit the content of graduation prayers, in violation of student constitutional rights.

3. The Fifth Circuit's decision requires that school officials exert control over the content of student prayers at graduation (in addition to not allowing them at football games or other activities). This violates the freedom of speech rights of the students, and it results in excessive entanglement of school districts with religion.

ARGUMENT

I. THE FIFTH CIRCUIT'S DECISION FORCES SCHOOLS TO ABANDON THEIR CONSTITUTIONALLY REQUIRED NEUTRALITY AND SHOW HOSTILITY TO SECULAR RELIGION WHILE ADVANCING ECUMENICAL RELIGION OR ATHEISM.

The Fifth Circuit's decision ignores a long history of prayer at public gatherings and crosses the line that Justice Black warned of when he stated that courts must "be sure that [they] do not inadvertently prohibit [government] from extending its general . . . benefits to all . . . citizens without regard to their religious belief" by being overzealous in their enforcement of the Establishment Clause. *Everson v. Board of Educ. of Ewing Township*, 330 U.S. 1, 16 (1947). As mentioned in Judge Jolly's dissent in the Fifth Circuit's decision, this concern has been expressed eloquently by Justice Douglas *in Zorach v. Clauson*, as follows:

> We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary.

> We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the state . . . cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe. Government may not finance religious groups nor undertake religious instruction nor blend secular and sectarian education nor use secular institutions to force one or some religion on any person. But we find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence.

Zorach v. Clauson, 343 U.S. 306, 313-14 (1952).

Justice Scalia's dissent in *Lee v. Weisman* contains an extensive discussion of the importance of history in the analysis of Establishment Clause jurisprudence.

> As we have recognized, our interpretation of the Establishment Clause should "compor[t] with what history reveals was the contemporaneous understanding of its guarantees." *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984). "[T]he line we must draw between the permissible and the impermissible is one which accords with history

and faithfully reflects the understanding of the Founding Fathers." *School Dist. of Abington v. Schempp*, 374 U.S. 203, 294 (1963) (Brennan, J., concurring). "[H]istorical evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause applied" to contemporaneous practices. *Marsh v. Chambers*, 463 U.S. 783, 790 (1983). Thus, "[t]he existence from the beginning of the Nation's life of a practice, [while] not conclusive of its constitutionality . . . [,] is a fact of considerable import in the interpretation" of the Establishment Clause. *Walz v. Tax Comm'n of New York City*, 397 U.S. 664, 681 (1970) (Brennan, J., concurring).

> The history and tradition of our Nation are replete with public ceremonies featuring prayers of thanksgiving and petition. Illustrations of this point have been amply provided in our prior opinions, see, e.g., *Lynch*, supra, 465 U.S., at 674-678; *Marsh*, supra, 463 U.S., at 786-788; see also *Wallace v. Jaffree*, 472 U.S. 38, 100-103 (1985) (REHNQUIST, J., dissenting); *Engel v. Vitale*, 370 U.S. 421, 446-450, and n. 3 (1962) (Stewart, J., dissenting).

Lee v. Weisman, 505 U.S. 577, 632 (1992).

Justice Scalia went on to quote references or prayers to deity in the Declaration of Independence, inaugural addresses by George Washington, Thomas Jefferson, James Madison and congressional establishment of a day of thanksgiving and prayer (the day after passage of the First Amendment). Nearly every President has issued a Thanksgiving Proclamation, with a religious theme of prayerful gratitude to God. *Lynch v. Donnelly*, 465 U.S. 668, 675, n. 2 (1984); *Wallace v. Jaffree*, 472 U.S. 38, 100-103 (1985).

Justice Scalia also observed that, as detailed in *Marsh v. Chambers*, Congressional sessions have opened with a chaplain's prayer ever since the First Congress, 463 U.S. 783, 787 (1983), and that this Court's own sessions have opened with the invocation "God save the United States and this Honorable Court" since the day of Chief Justice Marshall. *Lee*, 505 U.S. at 635. In addition, prayers at high school graduations have occurred, by one account, since the first high school graduation in July of 1868. *Id.*

Additionally, our money is emblazoned with the motto "In God We Trust," and the pledge of allegiance includes the phrase "under God." Yet, the Fifth Circuit Court of Appeals refuses students (not district employees or agents) the opportunity to pray at any and all school events other than graduation, and then only after the school has edited out any reference to deity or sectarian religion.

If there is one point of law in this case that is clearly established, it is that the government must be neutral when it comes to religion. *Zorach*, 343 U.S. at 314. The government may not favor religion, but neither may it be hostile to religion. *Engel v. Vitale*, 370 U.S. 421, 443 (1962) (Douglas, J., concurring). "In the relationship between man and religion, the State is firmly committed to a position of neutrality." *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 226 (1963).

The Fifth Circuit's holding goes well beyond the established constitutional requirement of neutrality and requires schools to show hostility to religion. *See Everson*,

330 U.S. 1; *Zorach*, 343 U.S. 306; *Engel*, 370 U.S. 421; *Schempp*, 374 U.S. 203; *Board of Educ. of Westside Comm. Sch. v. Mergens*, 496 U.S. 226 (1990). This is constitutionally impermissible. The Eleventh Circuit addressed this same issue and found that "[t]he prohibition of all religious speech in our public schools implies, therefore, an unconstitutional *disapproval* of religion. If endorsement is unconstitutional because it 'sends a message to nonadherents that they are outsiders,' disapproval is unconstitutional because it 'sends the opposite message.' " *Chandler v. James*, 180 F.3d 1254 (11th Cir. 1999) (quoting *Lynch v. Donnelly*, 465 U.S. 668 at 688 (1984) (O'Connor, J., concurring)) (emphasis in original).

The prohibition of all religious speech by students during their pre-game activities implies an unconstitutional disapproval of religion. As the Eleventh Circuit stated in *Chandler*, "'[c]leansing' our public schools of all religious expression . . . inevitably results in the 'establishment' of disbelief – atheism – as the State's religion. Since the Constitution requires neutrality, it cannot be the case that government may prefer disbelief over religion." *Chandler*, 180 F.3d at 1261.

In *Schempp*, Justice Goldberg warned that an:

> untutored devotion to the concept of neutrality can lead to invocation or approval of results which partake not simply of that noninterference and noninvolvement with the religious which the Constitution demands, but of a brooding and pervasive dedication to the secular and a passive, or even active, hostility to the religious. Such results are not only not compelled by the Constitution, but, it seems to me, are prohibited by it.

Schempp, 374 U.S. at 306 (Goldberg, J., concurring). "The discriminatory suppression of student-initiated religious speech demonstrates not neutrality but hostility toward religion. . . . " *Chandler*, 180 F.3d at 1261. For these reasons, this decision must be reversed.

II. THE FIFTH CIRCUIT'S DECISION IMPROPERLY FINDS THAT STUDENT SPEECH AUTOMATICALLY BEARS THE IMPRIMATUR OF THE GOVERNMENT AND THUS BECOMES STATE ACTION.

The Fifth Circuit may not constitutionally require school districts to forbid student speech. As stated by this court 30 years ago in *Tinker v. Des Moines*, "[i]t can hardly be argued that . . . students . . . shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines*, 393 U.S. 503, 506 (1969). The Supreme Court has made it very clear that "[p]rivate religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression." *Capital Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995). "There is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Mergens*, 496 U.S. at 250 (quoting *Edwards v. Aguillard*, 482 U.S. 226, 250 (1990)) (emphasis in original). The Establishment Clause does not ban prayer, it bans state prayer. The

prayer involved in this case is not state prayer, but private prayer.

It is true that government cannot control, dictate, direct or supervise prayer. That was the basis of the constitutional infirmity in both *Engel* and *Lee*. It is the element of governmental control or direction that *prayer* would occur that violates the Constitution. However, that element is lacking in this case. The school does not merely use students as a surrogate to accomplish state sponsored prayer, as in *Lee*. The policies here clearly give a student a limited public forum to begin or solemnize school activities in any manner deemed appropriate. The student then exercises his or her choice of message, whether secular or religious.

"Because genuinely student-initiated religious speech is private speech endorsing religion, it is fully protected by both the Free Exercise and the Free Speech Clauses of the Constitution." *Chandler*, 180 F.3d at 1261; *see also Mergens*, 496 U.S. at 250. The Constitution "affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any." *Lynch*, 465 U.S. at 673.

Quoting the court in *Chandler*:

> How, then, does a school accommodate religious expression without commanding it? . . . [T]he answer is simple – it is to be 'permitted.' Not required. Not commanded. Not even suggested. Simply permitted. . . . The first principle must always be that genuinely student-initiated religious speech must be *permitted*. A student's individual decision to pray or otherwise speak religiously is not the State's command. Such speech is fully protected.

Chandler, 180 F.3d at 1264 (citing *Jones v. Clear Creek Indep. Sch. Dist.*, 977 F.2d 963, 965 (5th Cir. 1992)). *See also Mergens*, 496 U.S. at 252.

This Honorable Court should find, as the Eleventh Circuit did in *Chandler*, that this student-initiated speech is not state action, but constitutionally protected private speech, and should be permitted.

III. REQUIRING A SCHOOL DISTRICT TO EDIT OR CENSOR STUDENT-INITIATED AND STUDENT-LED GRADUATION PRAYERS CONSTITUTES DISCRIMINATION BASED ON VIEWPOINT AND NECESSARILY FORCES DEEP ENTANGLEMENT IN PRIVATE RELIGIOUS SPEECH.

The Fifth Circuit's ruling on graduation prayer places a tremendous burden on school officials to determine what words in a graduation prayer are nonsectarian and nonproselytizing. This certainly forces officials into deep entanglement in violation of *Lee*. This requirement places the school in the position of reviewing and editing the graduation prayers to ensure that they are nonsectarian and nonproselytizing. Such a task would be unwieldy, unmanageable and excessively entangle school officials in religious issues. This would place officials in the same type of impermissible entanglement that was struck down in *Widmar v. Vincent*, 454 U.S. 263 (1981). In *Widmar*, a university policy required content-based exclusion of religious speech. This required university officials and

ultimately the courts to determine which words contained religious expression in a manner that would inevitably lead to entangle State with religion in an impermissible manner.

The same was true for regulation of speech in a student newspaper in *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1995). This Court struck down the practice of requiring the university to scrutinize the content of the newspaper and interpret whether it contained religious content. The Fifth Circuit's decision, however, requires school officials to do what was forbidden officials in *Widmar* and *Rosenberger* – scrutinize the proposed speech and decide what is religious. This requires excessive entanglement and is constitutionally prohibited.

It also places the district officials at great legal peril. The slightest misstep can plunge a school district into divisive expensive litigation whichever way they choose. No better example exists than the case at bar. Litigation arose and culminated in the Fifth Circuit's decision when the school attempted to fashion an acceptable policy regarding prayer. When the school subsequently attempted to follow the Fifth Circuit's ruling and forbid prayer, a lawsuit was filed by a student who claims her right to freedom of speech and freedom of religion have been violated. As a result of the student's lawsuit, the school has been enjoined by a federal district court from disciplining the student who chose to pray, yet the school is compelled to follow the Fifth Circuit's ruling and not

permit her to pray.[3] She claims her right to Freedom of Speech has been violated. The school is caught in a "Catch 22."

CONCLUSION

For these reasons, *amici* respectfully request that the Court reverse the judgment of the Fifth Circuit Court of Appeals.

Respectfully submitted,

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[3] *Ward v. Santa Fe ISD*, Civil Action G-99-556, Southern District of Texas, Galveston Division (not reported).