No. 99-62

In The
SUPREME COURT OF THE UNITED STATES

SANTA FE INDEPENDENT SCHOOL DISTRICT,
Petitioner,

v.

JANE DOE, INDIVIDUALLY AND AS NEXT OF FRIEND FOR HER MINOR CHILDREN, JANE AND JOHN DOE, MINOR CHILDREN; JANE DOE #2, INDIVIDUALLY AND AS NEXT OF FRIEND FOR HER MINOR CHILD, JOHN DOE, MINOR CHILD, AND JOHN DOE, INDIVIDUALLY,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONER

The Rutherford Institute hereby respectfully moves the Court for leave to file the following brief *amicus curiae* in this case. The consent of counsel for the Petitioner has been obtained. The consent of counsel for the Respondents has been requested and refused.

The Rutherford Institute is an international, non-profit civil liberties organization with offices in Charlottesville, Virginia and internationally. The Institute, founded in 1982 by its President, John W. Whitehead, educates and litigates on

behalf of constitutional and civil liberties. Attorneys affiliated with the Institute have filed petitions for writ of *certiorari* in the United States Supreme Court in more than two dozen cases, and *certiorari* has been accepted in two seminal First Amendment cases, *Frazee v. Dept. of Employment Security*, 489 U.S. 829 (1989) and *Arkansas Educational Television Commission v. Forbes*, 523 U.S. 666 (1998). Institute attorneys have filed over two dozen *amicus curiae* briefs in the United States Supreme Court, including the following cases: *Burlington Industries, Inc. v. Ellerth*, 118 S. Ct. 2257 (1998); *Davis v. Monroe County*, 119 S. Ct. 29 (1998); *Kolstad v. American Dental Association*, 119 S. Ct. 2118 (1999); *Slack v. McDaniel*, Sup. Ct. No. 98-6322 (October Term 1998) and *State of Wyoming v. Houghton*, 119 S. Ct. 1297 (1999), as well as a multitude of *amicus curiae* briefs in the federal and state courts of appeals. Institute attorneys currently handle in excess of two hundred cases nationally, including numerous public school issues involving the Establishment Clause, the Freedom of Speech Clause and the Free Exercise of Religion Clause. The Institute has published educational materials and taught continuing legal education seminars in this area as well.[1]

The Rutherford Institute is submitting a brief *amicus curiae* in support of the Petitioner. In light of the important

[1] John W. Whitehead has published several dozen books and articles on constitutional and civil rights issues. *See, e.g., Beyond Establishment Clause Analysis in Public School Situations: The Need to Apply the Public Forum and Tinker Doctrines*, 28 TULSA L. REV. 149 (1992); *The Conservative Supreme Court and the Demise of the Free Exercise Clause*, 7 TEMPLE POL. & CIV. RTS. L. REV. 1 (1997); and *Eleventh Hour Amendment or Serious Business: Sexual Harassment and the United States Supreme Court's 1997-1998 Term*, 71 TEMPLE POL. & CIV. RTS. L. REV. 773 (1998). The Institute also publishes informational pamphlets and briefs addressing employment discrimination and workplace accommodation, free speech, and other civil rights topics.

issues being raised in this case, the Institute respectfully requests that its arguments be heard.

Respectfully submitted,

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December 29, 1999

QUESTIONS PRESENTED FOR REVIEW

Whether Petitioner's policy permitting student-led, student-initiated prayer at school football games violates the Establishment Clause.

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

STATEMENT OF *AMICUS CURIAE*[2]

The Rutherford Institute is an international, non-profit civil liberties organization with offices in Charlottesville, Virginia and internationally. The Institute, founded in 1982 by

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[2] The Rutherford Institute has requested consent from all parties. The Petitioner has consented to the filing of this brief; the Respondent has not. Counsel for The Rutherford Institute authored this brief in its entirety. No person or entity, other than the Institute, its supporters, or its counsel, made a monetary contribution to the preparation or submission of this brief.

its President, John W. Whitehead, educates and litigates on behalf of constitutional and civil liberties. Attorneys affiliated with the Institute have filed petitions for writ of *certiorari* in the United States Supreme Court in more than two dozen cases, and *certiorari* has been accepted in two seminal First Amendment cases, *Frazee v. Dept. of Employment Security*, 489 U.S. 829 (1989) and *Arkansas Educational Television Commission v. Forbes*, 523 U.S. 666 (1998). Institute attorneys have filed over two dozen *amicus curiae* briefs in the United States Supreme Court, including the following cases: *Burlington Industries, Inc. v. Ellerth*, 118 S. Ct. 2257 (1998); *Davis v. Monroe County*, 119 S. Ct. 29 (1998); *Kolstad v. American Dental Association*, 119 S. Ct. 2118 (1999); *Slack v. McDaniel*, Sup. Ct. No. 98-6322 (October Term 1998) and *State of Wyoming v. Houghton*, 119 S. Ct. 1297 (1999), as well as a multitude of *amicus curiae* briefs in the federal and state courts of appeals. Institute attorneys currently handle in excess of two hundred cases nationally, including numerous public school issues involving the Establishment Clause, the Freedom of Speech Clause and the Free Exercise of Religion Clause. The Institute has published educational materials and taught continuing legal education seminars in this area as well.[3]

[3] John W. Whitehead has published several dozen books and articles on constitutional and civil rights issues. *See, e.g., Beyond Establishment Clause Analysis in Public School Situations: The Need to Apply the Public Forum and Tinker Doctrines*, 28 TULSA L. REV. 149 (1992); *The Conservative Supreme Court and the Demise of the Free Exercise Clause*, 7 TEMPLE POL. & CIV. RTS. L. REV. 1 (1997); and *Eleventh Hour Amendment or Serious Business: Sexual Harassment and the United States Supreme Court's 1997-1998 Term*, 71 TEMPLE POL. & CIV. RTS. L. REV. 773 (1998). The Institute also publishes informational pamphlets and briefs addressing employment discrimination and workplace accommodation, free speech, and other civil rights topics.

STATEMENT OF THE CASE

The Court's *amicus* adopts the statement of facts and the statement of the case that Petitioner, Santa Fe Independent School District, has provided in its Opening Brief.

ARGUMENT

The Santa Fe School Board amended its policy concerning prayers at school football games to allow the students themselves to decide whether or not to accept the platform (hereinafter referred to as "Football Game Policy".) Every decision and action relating to the prayers' presentation was controlled by students. Although the students' decision was permitted by the school, it was not encouraged or coerced by the school. The Fifth Circuit panel majority erred, therefore, in concluding that the football game prayers were school-sponsored and school-controlled.

Furthermore, the court erred dramatically in holding that this Court's precedent, *Lee v. Weisman*, 505 U.S. 577 (1992) requires that only at "solemn," "significant," "once-in-a-lifetime," "frequently-recurring," and "formal" school-sponsored events can "non-sectarian, non-proselytizing" prayer be permitted constitutionally. Nowhere in this Court's Religion Clause jurisprudence, let alone *Lee*, can such a test be found requiring courts to evaluate and determine if a school event is "solemn" enough to permit citizens to express themselves publicly with prayer and then further to evaluate and determine if the proposed prayer is "non-sectarian, non-proselytizing." To the contrary, this Court's teachings, cited exhaustively by the dissent to the panel's decision, plainly prohibit the courts from engaging in these kinds of value judgments regarding the content and expression of individuals' religious beliefs.

Petitioner's Football Game Policy can be upheld as constitutional using traditional Establishment Clause and Free Speech/limited public forum analysis, without resorting to the entanglement of the courts in evaluating religious viewpoints, as advanced by the Fifth Circuit panel majority.

I. THE SANTA FE POLICY DOES NOT CONSTITUTE AN "ESTABLISHMENT OF RELIGION" IN VIOLATION OF THE FIRST AMENDMENT

A. There Can be No Violation of the Establishment Clause Where the Speech at Issue is Purely Private Speech and Not Government Action

The Establishment Clause limits the power of government to promote or engage in religious activity. Where the impetus for religious activity is purely of private initiative and design, however, there is no state action and the Establishment Clause does not proscribe the conduct. *Capital Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995). This is true even if there is government assistance, so long as the criteria for receiving that assistance is neutral with respect to religion. *See Bowen v. Kendrick*, 487 U.S. 589 (1988); *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481 (1986); *Peck v. Upshur County Bd. of Educ.*, 155 F.3d 274 (4th Cir. 1998) (no state action leading to endorsement problem where school officials merely permitted private individuals on a viewpoint-neutral basis to place Bibles on school property).

The Football Game Policy is written in such a way that it grants permission to the students to hold a secret ballot to allow prayers at football games, but it in no way requires the students to hold or participate in the voting process. Once the vote does take place, the only other action by the school is to give the platform over to the students. Therefore, the speech is purely private when given. There is no government action which compels the speech or assists in drafting its content.

B. Assuming *Arguendo* the Establishment Clause is Implicated by the Football Game Policy, It Still Passes Constitutional Muster as an Appropriate Accommodation of Student and Community Beliefs

1. There is no "endorsement" involved, as no reasonable observer could perceive a government "endorsement" of religion where the students alone directed and controlled the platform.

In *Board of Educ. of Westside Community Schs. v. Mergens*, 496 U.S. 226 (1990), this Court held that a public school does not unconstitutionally endorse religion by permitting a religious club to meet on school grounds and recruit members through the school's newspaper, bulletin boards, public address system, and annual club fair. *Id.* at 247-53.[4] The Court emphasized that:

> "[T]here 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."

[4] The Court affirmed the constitutionality of the Equal Access Act (20 U.S.C. §§ 4071-4074), which grants religious clubs the same privileges as those of other non-curricular student organizations.

Id. at 250 (emphasis in original).

The *Mergens* Court thus acknowledged that secondary school students are mature enough not to attribute official school endorsement to student religious groups merely because the school permits the groups to meet and to enjoy the privilege of disseminating information about their group. *Id.* See also *Hedges v. Wauconda Community Union Sch. Dist.*, 9 F.3d 1295, 1299-1300 (7th Cir. 1993) ("ignorant bystanders cannot make censorship legitimate. . . . Schools may explain that they do not endorse speech by permitting it. If pupils do not comprehend so simple a lesson, then one wonders whether . . . schools can teach anything at all. Free speech, free exercise, and the ban on establishment are quite compatible when the government remains neutral and educates the public about the reasons.") The same rationale clearly applies to student-initiated and directed prayer.

This distinction between government action endorsing religion and private religious speech was also critical to the Supreme Court's rationale in *Lee v. Weisman*, 505 U.S. 577 (1992). In *Lee*, the principal of a public school invited a local member of the clergy, a Jewish rabbi, to give "non-sectarian" prayers and provided the rabbi with guidelines as to the content of the prayers. *Id.* at 581. A student, Deborah Weisman, challenged the legality of these prayers on Establishment Clause grounds.

While no particular Establishment Clause approach garnered a majority, the Court's plurality held that when a public school official invites a member of the clergy to deliver a graduation prayer, and when the official advises the member of the clergy on how to deliver that prayer, there is a violation of the Establishment Clause. *Id.* at 597. However, Justice

Souter, in a concurring opinion joined by Justices Stevens and O'Connor, wrote:

> "If the State had chosen its graduation day speakers according to wholly secular criteria, and if one of those speakers (not a state actor) had individually chosen to deliver a religious message, it would have been harder to attribute an endorsement of religion to the State."

Id. at 606 (Souter, J., concurring).

Thus, these Justices have suggested it is permissible for a valedictorian to include a religious message in his or her valediction. It is difficult to see how, if this student-initiated action could be constitutional, that the decision to pray at a football game arrived at by a majority vote of the students could be any less so. It would seem irrelevant, once the school district has delegated that decision to the student body, what process the students undertake to arrive at these decisions.

Recently, in *Chandler v. James*, 1999 U. S. App. LEXIS 15608 (11th Cir. 1999), the Eleventh Circuit ruled that the district court could not constitutionally enjoin a school from permitting student-initiated religious speech in its schools. *Id.* at 8. The case concerned an Alabama statute that permitted "non-sectarian, non-proselytizing student-initiated voluntary prayer, invocation and/or benediction during compulsory or non-compulsory school-related events." *Id.* at 2. These events included student assemblies, sporting events, graduation or commencement ceremonies, and other related student events. *Id.* The Eleventh Circuit found that

> it is not the 'permitting' of religious speech which dooms [unconstitutional school policies under the Establishment Clause], but rather the *requirement* that

> the speech be religious, i.e., invocations, benedictions, or prayers.

Id. at 11 (emphasis added).

In *Chandler*, the school did not require the students' speech to be religious. The school was merely permitting its students, if they so desired, to voluntarily engage in non-sectarian, non-proselytizing prayer, action which the school believed was permitted by the First Amendment. *Id.* at 15. Permitting students to speak does not reflect a school's "endorsement" of the speech in a manner that would violate the First Amendment. This was reinforced by the court when it stated,

> [t]he suppression of student-initiated religious speech is neither necessary to, not does it achieve, constitutional neutrality towards religion. For that reason, the Constitution does not permit its suppression.

Id. at 16.

The court further emphasized that endorsement and disapproval of religion are equally unconstitutional:

> "Cleansing" our public schools of all religious expression, however, 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.

Id. at 18.

2. There is no "coercion" involved in the

Football Game Policy, as that term is understood in this Court's Establishment jurisprudence.

In *Lee*, Justice Kennedy's plurality opinion emphasized that the crucial factor in determining whether coercion exists in a prayer case is whether state officials have directed the performance of a formal religious exercise. 505 U.S. at 586-590. Justice Kennedy observed:

> [T]he school district's supervision and control of a high school graduation ceremony places public and peer pressure on attending students to stand as a group or, at least, maintain respectful silence during the Invocation and Benediction. This pressure, though subtle and indirect, can be as real as any overt compulsion.

Id. at 593.

In short, Justice Kennedy's plurality opinion in *Lee* turned on four factors. First, the case involved a public school. *Id.* at 581. Second, school officials and teachers were active in planning the graduation ceremony, inviting a person to offer graduation prayers, and advising the clergy member on the content of his prayers. *Id.* Third, a local member of the clergy offered the graduation prayers. *Id.* Fourth, the case involved a graduation ceremony that graduates and their families might have felt an obligation to attend, even though their attendance was not mandatory. *Id.* at 595.

Here, the context is not a graduation ceremony, but school football games. School officials and teachers are not involved in planning the prayers or inviting persons to offer them because the decision to pray and the presentation is left entirely to the students. No clergy are involved. Equally as

important, attendance at the football games is not mandatory or in any sense obligatory. Members of the general public can attend the games, as well as students and their parents. No one attending a game for its own sake is compelled to sit and listen to the student-led prayer. There is nothing in the record evidencing or even suggesting that an attendee's absence from the stands during the prayer would be noticed, let alone subject to some social opprobrium. The Football Game Policy, therefore, meets none of the *Lee* factors constituting "coercion" in a prayer context.

3. The Santa Fe Policy does not result in "excessive entanglement" from indirect promotion of sectarian activity.

Concerns over "indirect benefit" to sectarian activities was in part the basis for the Fifth Circuit's conclusion that the policy violated the Establishment Clause:

> "Prayers that schools "merely" permits will still be delivered ... by means of government-owned appliances and equipment, on government-owned property... thereby clearly raising Establishment Clause concerns."

Santa Fe, 168 F.3d at 817.

The Fifth Circuit's concerns in this regard are unfounded in light of this Court's modern Establishment Clause jurisprudence. For decades, this Court's sectarian school funding decisions were arguably in conflict. Recently, however, in a line of decisions which includes *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481 (1986), *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U. S. 1 (1993), and *Agostini v. Felton*, 521 U.S. 203 (1997), the Court has substantially resolved any confusion by articulating a rule that

aid to sectarian education is permissible as long as the aid is provided under religiously neutral funding criteria. *Witters*, 474 U.S. at 487; *Zobrest*, 509 U.S. at 10; *Agostini*, 521 U.S. at 234-35. This rule, however, is simply an alternative formulation of the state action test. So long as the funding conditions are religiously neutral, and the decision to commit the funds to sectarian education is made by private individuals, not the state, the Establishment Clause is not implicated. *Zobrest*, 509 U.S. at 10; *Witters*, 474 U.S. at 487; *Agostini* 521 U.S. at 226.

The issue of student-initiated prayer is directly analogous to that of state funding. In the funding cases, the state provides aid that ultimately may be used for religious purposes. Here, the state is providing a limited forum (*e.g.* a football game) which ultimately may be used for religious purposes. The Court in *Agostini* pointed out that the common thread running through the funding cases was that "any money that ultimately went to religious institutions did so 'only as a result of the genuinely independent and private choices of individuals.'" 521 U.S. at 226. The funding program's neutral eligibility criteria ensured that the religious use of the funds "was a 'result of the private decision of individual parents' and '[could] not be attributed to state decision making.'" *Id.* (citing *Zobrest*, 509 U.S. at 10). Once again, in this case, the decision whether to have prayer, or even whether to vote on having prayer, at a football game rests entirely with the students, indisputably private individuals. The students must take the initiative and ask for a vote. The school is merely providing a forum under a religiously neutral policy, which is substantially similar to the provision of indirect aid under religiously neutral criteria.

Furthermore, in the funding cases, the Court pointed out that the aid created "no financial incentive for students to

undertake sectarian education." *Witters*, 474 U.S. at 488. Likewise, in the instant case, the Football Game Policy creates no incentive for students to take a vote to pray; it only states what they should do if they want to initiate prayer. In both contexts, the key is that the decision to use the funds or the forum in a religious manner is made by private persons, not the state. Thus there is no state action and no Establishment Clause violation.

II. THE FOOTBALL GAME POLICY IS A PERMISSIBLE ACCOMMODATION OF THE STUDENTS' RIGHT OF FREE SPEECH

Any student who chooses to recite a prayer on his or her own initiative may assert his right to freedom of speech under the First Amendment.[5] Therefore, it is permissible for students to pray publicly at a school football game in accordance with the Football Game Policy. When they do so, the two elements of the *Lee* decision are missing: *first*, no school official is participating in selecting the speaker or the content of the speech; and *second*, the person offering the speech is a student rather than a member of the clergy.

A. Once the Santa Fe Independent School District Gave the Football Game Platform to the Students, The Students Possessed a First Amendment Right to Present a Prayer Free of Government Censorship as to the Content.

The Fifth Circuit panel majority erred in concluding

[5] *See generally, Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Tinker v. Des Moines Indep. Community Sch. Dist.* 393 U.S. 503 (1969); *Mergens*, 496 U.S. at 226; *Engel v. Vitale*, 370 U.S. 421 (1962); *Madison*, 147 F.3d at 832; and *Clear Creek II*, 977 F.2d at 963.

that the Supreme Court's free speech precedents were inapplicable to this dispute. The court reasoned that the school, by delegating to students virtually complete control over the decision to pray at football games and control over the content of the prayer, did not create a limited public forum. The court further concluded that football games are not "solemn," "significant," "once-in-a-lifetime," "frequently-recurring," and "formal" school-sponsored events where "non-sectarian, non-proselytizing" prayer can be permitted constitutionally. Remarkably, the court based this conclusion on *Lee*, which not only provides no support for such a judicial evaluation of the forum for religious expression, or of the proposed expression itself, but in fact prohibits it.

Assuming that Santa Fe did not create either an open or limited public forum at its high school football games, a rule prohibiting student-initiated religious expression,[6] and only religious expression, would still contravene the Supreme Court's free speech precedents. Even in non-public fora, government is prohibited from regulating expression based on viewpoint.[7] *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993), this Court unanimously held

[6] It has been suggested by one commentator that there is a distinction between verbal acts of worship, such as prayer, and religious expression. Comment, *Student-Initiated Religious Expression*, U. CHI. L. REV. 1565, 1583-84 (1994). This distinction was suggested by Justice White in his dissent in *Widmar*, 454 U.S. at 283-84 & n.2 (White, J., dissenting). This Court explicitly rejected that view, labeling it novel, unintelligible, and unprincipled. *Id.* At 269 n.6. Justice White's view articulated in *Widmar* has not resurfaced in any subsequent decisions. Although he was the sole dissenter in *Widmar*, Justice White wrote for a unanimous Court in striking down similar restrictions on religious expression on public school property in *Lamb's Chapel*, 508 U.S. at 384.

[7] *International Soc. for Krishna Consciousness v. Lee*, 505 U.S. 672, 678 (1992); *Cornelius*, 473 U.S. at 800, 806 (both cases quoting *Perry*, 460 U.S. at 45).

that a school district violated the Free Speech Clause by denying a religious group access to public school premises solely because the group intended to use the building to show a film that dealt with an otherwise permissible subject from a religious perspective. The Court held that speech restrictions that target religious expression discriminate based not only on subject matter but also impermissibly on viewpoint. *Id.* at 393-94; *see also Rosenberger v. Regents of the Univ. of Va.*, 515 U.S. 819 (1995).

The Fifth Circuit panel majority's decision also cannot be reconciled with the Supreme Court's decision in *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503 (1969). *Tinker* involved two high school students and one junior high school student who were suspended from school because they refused to remove black arm bands worn to protest the Vietnam War. The Court held that school officials could not restrict student-initiated expressive conduct unless the conduct could be shown to undermine the discipline of the school or collide with the rights of other students to be secure and let alone. *Id.* at 508.

Presumably, teachers at the high school and junior high school in *Tinker* were in a position to exercise far more control over student expression than was exercised by the Santa Fe officials at the football games. Classmates of the *Tinker* plaintiffs were no more "captive" than were those who attended the Santa Fe's football games. In *Tinker*, objecting students could (and in fact did) express their disagreement at appropriate times and in appropriate manners, but they were expected to "endure" the message that their peers sought to communicate by wearing the black arm bands. This tolerance for student speech should also apply to religious expression at Santa Fe's football games.

B. Censorship of the Students' Activities At Football Games for Religious Content Would Violate the "Excessive Entanglement" Prong of the *Lemon* Test and Constitute Impermissible Governmental Hostility Toward Religion.

The fact that student prayer at the football games may have indirectly advanced religion and were undertaken with a religious motive does not implicate the test articulated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). It may be that one purpose of prayer is to advance religion,[8] but the instant case is distinguishable from the prayer presented in *Lee* in that the religious acts and motives of the Santa Fe students were not those of the government.

The Supreme Court has repeatedly refused to construe the Establishment Clause to authorize government to censor student-initiated religious expression. *See Lamb's Chapel*, 508 U.S. at 384; *Mergens*, 496 U.S. at 247; *Widmar v. Vincent*, 454 U.S. 263, 267-70 (1981). The risk of an Establishment Clause violation is precisely the type of vague and ill-defined fear that the *Tinker* Court held insufficient to justify abridgement of students' free speech rights. *Tinker*, 393 U.S. at 513-14.

The same analysis should be applied to the instant case. The Establishment Clause is not abridged so long as no religious criterion is employed in granting access to the forum.[9] But this also is simply an alternative formulation of a state action test. So long as the grant or denial of access to the forum is not based on religious criteria, the decision to use the

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

[9] *See Lamb's Chapel*, 508 U.S. 384. *Mergens*, 496 U.S. at 226; *Widmar*, 454 U.S. at 263.

forum for religious purposes is made by one or more private individuals, not the state.

CONCLUSION

For all the foregoing reasons, this Court's *amicus* respectfully requests that this Court vacate the Fifth Circuit's decision and remand the case for further proceedings.

Respectfully submitted,

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