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, et al.,

Respondents.

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

BRIEF *AMICI CURIAE* FOR MARIAN WARD AND OTHER STUDENTS AND PARENTS OF SANTA FE INDEPENDENT SCHOOL DISTRICT IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

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

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INTEREST OF *AMICI CURIAE*[1]

Amici Curiae[2] include Marian Ward, Stephanie Vega, and 157 other students and parents of the Santa Fe Independent School District [hereinafter "SFISD"]. Stephanie Vega and Marian Ward (as alternate runner-up) were elected by their classmates in May, 1999, to deliver a pre-game solemnization before the football games for the 1999/2000 school year. When Stephanie Vega resigned on August 25, 1999, Marian Ward took her place.

Under the Fifth Circuit's decision, a student is allowed to say virtually anything to formalize the beginning of football games, other than a prayer. Marian Ward and other *Amici* do not understand why the federal courts have become anti-God, anti-religion, and anti-prayer, and why the State is forcing viewpoint discrimination upon them. The Fifth Circuit has sent a powerful message--that the government disapproves of *Amici* and that *Amici* are outsiders.[3]

Counsel for *Amici Curiae* was hired by *Amici* to seek governmental neutrality regarding student choice and

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[1] The parties have consented to the filing of this brief and their consents are submitted herewith. Kelly Coghlan authored the brief in its entirety. No person or entity made a monetary contribution to the preparation or submission of this brief other than counsel for *Amici* and SFISD students and parents who are *Amici* herein. Kelly Coghlan is not working for, or on behalf of, any church, religious organization, association, political party, or "special interest" group.

[2] *See* App. A for list of *Amici Curiae*. *Amici* students have been limited to those presently attending Santa Fe High School (9^{th}-12^{th} grades) or who will be attending next year (i.e., students presently in the 8^{th} grade). *Amici Curiae* parents have been limited to parents of *Amici* students.

[3] If endorsement of religion is unconstitutional because it "sends a message to nonadherents that they are outsiders," disapproval is unconstitutional because it "sends the opposite message." *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J., concurring).

implementation of a "brief invocation and/or message" (or "statement") at football games and an "invocation and benediction" at graduation services--without judicial or governmental censorship, scripting, or viewpoint discrimination.

INTRODUCTION AND SUMMARY OF ARGUMENT

The civil liberties of 46,280,000[4] students attending public schools in America are at risk as a result of the Fifth Circuit panel's split-decision in the present case. Shortly after the decision, school districts began requiring students to submit their proposed graduation solemnizations to school officials for editing, to assure viewpoint conformity.[5] Within weeks of the case, another federal circuit was already citing the Fifth Circuit as supporting authority for placing harsh restrictions on the religious liberties of students under its own jurisdiction. *See Adler v. Duval County Sch. Bd.*, 174 F.3d 1236, *vacated*, 174 F.3d 1271 (11th Cir. 1999, *pending en banc*). And, as a direct result of the Fifth Circuit's decision, SFISD school officials took steps to assure the elimination of prayerful speech at SFISD football games.[6]

[4] "Nation-wide more than 52 million children are enrolled in school, from kindergarten through the twelfth grade; 89 percent go to public schools, 11 percent to private schools". NBC Nightly News: NBC News In Depth (NBC television broadcast, Feb. 10, 1999). And the number of secondary school-age students is on the rise: "The U.S. Census Department says the American teen population is on a growth spurt. From 31 million last year to an estimated 50 million by the year 2010." Dateline NBC (NBC television broadcast, July 7, 1999).

[5] *See* App. B containing Katherine Hackleman's graduation prayer reflecting the words unilaterally excised by school officials in *Hackleman v. Aledo Indep. Sch. Dist.*, No. 499-CV-0416-Y (D. Tex. filed May 20, 1999).

[6] *See* App. C which contains the Affidavit of Marian Ward filed with her Complaint in *Ward v. Santa Fe Indep. Sch. Dist.*, No. 99-CV-556 (D. Tex. filed Sept. 2, 1999).

See also App. D which contains SFISD's "Guidelines for Student Messages at Football Games (1999)" [hereinafter "Guidelines"].

In 1962, state/local legislative branches of government were prescribing and proscribing when, where, and what students could pray.[7] In 1999, with the advent of the Fifth Circuit's decision, it is now the federal judicial branch prescribing and proscribing when, where, and what students can pray.[8] "[R]eligious beliefs and religious expression are too precious to be either proscribed or prescribed by the State." *Lee v. Weisman*, 505 U.S. 577, 589 (1992) (emphasis added). It is important to *Amici*, and the additional 46 million students attending public schools in America, that this Court correct the current misinterpretation of the First Amendment.

Between August 19, 1999 and September 2, 1999, the following occurred in SFISD:

(1) On August 19, 1999, SFISD Superintendent Richard Ownby announced: "(If they do pray), they would be disciplined just as if they had cursed." Molly Lynch, *No Pregame Prayer To Be Heard In Santa Fe*, Texas City Sun, Aug. 20, 1999, at 1. As a result of this threat, on August 25, 1999, Stephanie Vega resigned her position, and the alternate, Marian Ward, took her place. Kevin Moran, *Santa Fe Gets New Speechmaker*, Houston Chronicle, Aug. 28, 1999, at A35. *See also* App. C at C2, C3.

(2) During the day of August 31, 1999, Marian Ward was summoned to appear in the Principal's office where she was met by Principal Gary Causey and Superintendent Richard Ownby, given the written Guidelines (*see* App. D), instructed to read the Guidelines while Causey and Ownby watched, and instructed to comply. *See* App. C at C3, C4.

(3) On August 31, 1999, Marian Ward was instructed by Principal Causey and Superintendent Ownby to write out the "message" she intended to give and submit it to Principal Causey the day before the football game "in case anything needs to be edited before Friday's game." *See* App. C at C4.

(4) On September 1, 1999, three SFISD High School teachers warned Marian Ward not to violate the Guidelines. *See* App. C at C4.

[illegible]

[illegible]

[7] Exerting control over the content of students' prayers in one instance and entirely proscribing students' prayers in another.

ARGUMENT AND AUTHORITIES

I. "Message"/"Invocation"/"Benediction"/"Statement" Policies Of SFISD Are Constitutional As Written

The facts do not present a prayer case but rather an "utterance" case. The Fifth Circuit's numerous references to SFISD's policies as "prayer policies" is a misnomer. *See Doe v. Santa Fe Indep. Sch. Dist.*, 168 F.3d 806, 812 & 816-18 (5th Cir. 1999) [hereinafter "*Santa Fe*"]. "Prayer" is not mentioned, much less required or encouraged under the SFISD football policy or graduation policy. SFISD's football policy speaks of a "brief invocation and/or message (or "statement"[9])...to solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition;" and the graduation policy speaks of an "invocation and benediction."[10] The definitions of "invocation" ("the action or an act of petitioning for help or support"), "benediction" ("an expression or utterance of blessing or good wishes"), "message," and "statement" have no required prayer or religious component.[11]

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[9] The Fifth Circuit's opinion reproduces only a portion of the football policy. *See Santa Fe*, 168 F.3d at 812. The football policy's second and fifth paragraphs, not reproduced in the opinion, use the additional word "statement" to describe the unfettered breadth of student choice over content. *See* App. E at E1, E2.

[10] *See* App. E for full text of the SFISD football policy and graduation policy.

[11] *See* Webster's Third New International Dictionary (3d ed., Merriam Webster Inc. 1993) at 1190, 203, 1418 & 2229. There is no evidence that SFISD intended variant meanings outside of the true definitions. *See also Jones v. Clear Creek Indep. Sch. Dist.*, 977 F.2d 963, 969 (5th Cir. 1992), *cert. denied*, 508 U.S. 967 (1993) [hereinafter "*Clear Creek II*"] ("But the Resolution permits invocations free of all religious content...."). As much as the Fifth Circuit would like to read the word "prayer" into SFISD's policies, factual support for such inclusion is lacking.

Under the SFISD policies,[12] secular messages may be selected for all SFISD football games (and graduations), and a prayer might never be uttered (*a fortiori*, from year to year, students may decide to have no student solemnizations at all). To assume that students will always (or ever) opt for prayerful messages is speculative. The definitions of "invocation," "benediction," "message," and "statement" are so broad as to include virtually any solemnizing utterance.

Under SFISD's football policy, the school district does not itself decide that there will be a student message at football games (compare this to school districts' "moment of silence" policies giving students no choice as to whether a moment of silence will be observed). Neither does SFISD decide who will give the message,[13] nor does it determine the content of the message.[14] Rather, students, by secret ballot,

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The following remarks would meet all four definitions of the terms used in the SFISD policies, yet contain no prayer or other religious component: "Welcome. We ask that everyone do his/her part in helping to make this a safe game tonight by observing good sportsmanship, both on the field and in the stands. We all join together in asking that there be no injuries. Good luck to both teams."

[12] The football policy and graduation policy were enacted by the 1995 SFISD School Board. The district court found that "SFISD had abandoned any [previous] potentially problematic policies." *See Santa Fe*, 168 F.3d at 813. There is no evidence implicating the 1995 SFISD School Board of any unconstitutional motivations in passing the two 1995 policies in issue (indeed, the policies were passed pursuant to the district court's orders and under the district court's watchful eye--*see id.* at 812).

[13] Contrary to the Fifth Circuit's implication of exclusivity (*see Santa Fe*, 168 F.3d at 820), the pool of potential speakers under the graduation policy includes every senior; and under the football policy, includes every student. Under both policies, any and all students in the respective pools are eligible to volunteer to be selected by their peers via secret ballot. *See* App. E.

[14] Both the football and graduation policies facially provide neutral accommodation of student decisions regarding solemnizations which

decide if they would like a student pre-game message at that years football games, and if so, then decide, by a second secret ballot, which volunteering student will be the student representative.[15]

The Fifth Circuit is factually incorrect in its' assertion that "school officials are present and have the authority to stop the prayers." *Id.* at 823. The texts of the policies do not support this contention;[16] there is no evidence in the record to support this contention; and, *a fortiori*, the district court's Order of May, 1995, makes it clear that such is not the case: "SFISD should play no role in selecting the students or scrutinizing and approving the content of the invocations and benedictions." *Id.* at 811.[17] "[O]nce the class of elected student speakers is chosen, SFISD maintains no power, discretionary or otherwise, to bar any duly chosen speaker from accomplishing his task." *Id.* at 831 (Jolly, J., dissenting).[18]

students choose without endorsement, coercion, or entanglement by the district (the content of which the school board neither scripts, supervises, endorses, suggests, or edits).

[15] Permitting student choice does not equate to causation and does not equate to "state action" violating the Establishment Clause. If a student gives a prayerful message, state action is separated from the presence of the prayer by at least three intervening causes: (1) students, not SFISD, determined whether to have a student message, (2) students, not SFISD, selected the student speaker, and (3) the student speaker, not SFISD, selected the message.

[16] The football policy states: "The student volunteer selected by his or her classmates may decide what message and/or invocation to deliver, consistent with the goals and purposes of this policy." *See* App. E at E1, E2 (emphasis added). It is the student's choice; not the State's.

[17] Unlike *Ingebretson v. Jackson Pub. Sch. Dist.*, 88 F.3d 274 (5th Cir.), *cert. denied*, 519 U.S. 965 (1996), nowhere do the SFISD policies allow school officials to "decide who prays and which prayers qualify" (*Id.* at 278), "inform students...that they can pray" (*Id.* at 279), "review the content of prayers" (*Id.*), "determin[e] who gets to say the prayer at each event" (*Id.*), or have "teachers, school administrators and clergy at school functions where attendance is compulsory" conduct prayers (*Id.*).

II. Solemnization As Historically Practiced In America Does Not Support Fifth Circuit's Rationale

The Fifth Circuit's rationale for prohibiting prayer at football games is that "football games [are] hardly the sober type of annual event that can be appropriately solemnized with prayer." *Id.* at 823.[19]

Webster's Third New International Dictionary (3d ed., Merriam Webster Inc. 1993) at 2168, defines "solemnize" as: "1: to hold, conduct, observe, or honor with due formal ceremony or solemn notice." The definition has no restricted applicability to only events which themselves are "a sober type of annual event" or "singularly serious" or "nurturing," as the Fifth Circuit so narrowly confines the term. *Id.*

Eating a meal would not fit within the Fifth Circuit's definition of an event that "can be appropriately solemnized with prayer," and yet, millions pray daily to solemnize the routine occasion of eating. Thousands of Rotary Clubs and similar organizations assemble weekly to eat and meet, and yet these secular organizations solemnize these common,

[18] Thus, if SFISD stopped a solemnization based on viewpoint discrimination, students would, no doubt, have legal recourse against SFISD for violating the district court's orders, breaching its own SFISD written policies, and violating students' constitutional rights. There is no evidence of SFISD ever interrupting or stopping a students' message.

[19] The Fifth Circuit's ruling singularly prohibits "prayer;" not songs or other forms of solemnization. *Millenium Prayer*, by British music legend Sir Cliff Richard, has been No. 1 on Britain's pop music charts for three weeks. The song is a version of the Lord's Prayer set to the tune of *Auld Lang Syne*. *See The Countdown Begins*, Houston Chronicle, Dec. 20, 1999, at 2A. If a student were to choose to solemnize a football game by singing a few stanzas from this popular secular song, would it be prohibited "prayer" or permissible expression? This is the type of entanglement the Fifth Circuit's ruling invites and would necessitate.

non-ceremonial events with vocal prayer. Many rodeos and other secular sporting events routinely open with vocal prayer. Congress solemnizes every session with vocal prayer--not merely its special ceremonial occasions.[20] Each day a federal court (including this honorable Court) is in session is not necessarily a "singularly serious" day of solemn ceremony (nor an "annual event"), yet a law clerk opens with a vocal solemnization that ends with the prayer, "God[,] save the United States and this Honorable Court."[21]

Why should courts restrict students' solemnizations that mention "God" to only once-in-a-lifetime events, when federal courts do not restrict their own use of daily vocal solemnizations (containing a prayer comprised of two supplications to "God") to the same standard.[22]

America's earliest leaders (many of whom were responsible for drafting and passing the First Amendment) recognized great benefit in public, vocal prayers and other public recognitions of God.[23]

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[20] *See Marsh v. Chambers*, 463 U.S. 783, 786 (1983). *See also Lynch*, 465 U.S. at 674 (emphasis added):

> It is clear that neither the 17 draftsmen of the Constitution who were Members of the First Congress, nor the Congress of 1789, saw any establishment problem in the employment of congressional Chaplains to offer daily prayers in the Congress.... It would be difficult to identify a more striking example of the accommodation of religious belief intended by the Framers.

[21] *See Lee*, 505 U.S. at 635 (Scalia, J., dissenting); *County of Allegheny v. ACLU*, 492 U.S. 573, 630 (1989); *Lynch*, 465 U.S. at 693 (O'Connor, J. concurring); *Zorach v. Clauson*, 343 U.S. 306, 313 (1952).

[22] *A fortiori*, citizens required to be present before federal courts are "captive audiences" to the solemnizations, which are State endorsed.

[23] (1) After having met for several months, by June 28, 1787, the delegates had come to an impasse at the Constitutional Convention. At that crucial juncture, Benjamin Franklin addressed the Convention:

> In the beginning of the contest with Britain, when we were sensible of danger, we had daily prayer in this room for Divine protection. Our prayers, sir, were heard and they were graciously answered.... And have we now forgotten that powerful Friend? Or do we imagine we no longer need his assistance? I have lived, sir, a long time, and the longer I live, the more convincing proofs I see of this truth--that God governs in the affairs of men. And if a sparrow cannot fall to the ground without his notice, is it probable that an empire can rise without his aid? We have been assured, sir, in the Sacred Writings, that "except the Lord build the house, they labor in vain that build it." I firmly believe this; and I also believe that without his concurring aid we shall succeed in this political building no better than the builders of Babel....
>
> I therefore beg leave to move that, henceforth, prayers imploring the assistance of Heaven, and its blessings on our deliberations, be held in this Assembly every morning before we proceed to business, and that one or more of the clergy of this city be requested to officiate in that service.

2 James Madison, The Papers of James Madison 984-86 (Henry D. Gilpen ed., Washington: Langtree & O'Sullivan 1840) (1787).

There are conflicting accounts as to whether a vote was taken on Franklin's motion. *See* Letter from William Steele to Jonathan Steele (1825), *in* 3 Records of the Federal Convention of 1787 at 472 (Max Farrand ed., Yale Univ. Press 1911) ("The motion for appointing a chaplain was instantly seconded and carried"); *but see* 2 James Madison, The Papers of James Madison 986 (Henry D. Gilpen ed., Washington: Langtree & O'Sullivan 1840) (1834) (The motion was made too "late" and "the Convention had no funds [to pay a chaplain]" so there was "adjournment without any vote on the motion"). However, it appears that the Convention may have included prayer at subsequent meetings. *See* Letter from Luther Martin to Maryland State Legislature (Jan. 27, 1788), *in* 1 Debates in the Several State Conventions on the Adoption of the Federal Constitution 373 (Jonathan Elliot ed., Washington: Printed for the Editor 1836) ("[During the Constitutional Convention] we had appealed to the Supreme Being...[and] we scarcely had risen from our knees, from supplicating his aid and protection, in forming our government....") (emphasis added); *see also* 3 Records of the Federal Convention of 1787, *supra* at 472 ("[After] three days of recess [following Franklin's motion]...as soon as the chaplain had closed his prayer...." (emphasis added)). If Franklin's proposal failed, it was not because the Convention perceived a problem with public, vocal prayer in a governmental setting on government property, but rather for logistical

reasons (i.e., lack of funds for a chaplain; midstream adoption would highlight prior omission). *See also Marsh*, 463 U.S. at 788 n.6.

One year and nine months later, on April 7, 1789, one day after the Senate of the First Congress convened with a quorum, the Senate appointed a committee "to take under consideration the manner of electing Chaplains." On April 9, 1789, a similar committee was appointed by the House. On April 25, 1789, the Senate elected its first chaplain. On May 1, 1789, the House elected its first chaplain. On September 22, 1789, Congress passed a statute providing for payment of chaplains. Three days later, on September 25, 1789, Congress reached final agreement on the language of the Establishment Clause. *See id.* at 787-89. The First Congress obviously perceived no conflict between the Establishment Clause and vocal, public prayer in a governmentally organized setting on government property.

(2) The First Congress enacted the Northwest Ordinance (signed into law on August 7, 1789, by President George Washington) for the governance of the territory northwest of the Ohio River. Article III is the only section to address either education or religion and requires the following: "Religion, morality and knowledge, being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." 1 Stat. 50 at 52, n.(a) (emphasis added). No distinction is made between private and public education. The First Congress (i.e, the framers of the First Amendment) believed that "schools" and educational systems were a proper forum to encourage "religion, morality, and knowledge." Congress applied the requirements of the Ordinance to new territories for decades thereafter.

The true meaning of the Establishment Clause can only be understood in its historical setting. It is doubtful that the same men would draft and pass a law on August 7, 1789 (in the middle of the debates on the First Amendment) that would be contrary to the intent of the Establishment Clause which they passed the following month, on September 25, 1789. Certainly, the original intent of the Establishment Clause would allow permitting a student-led, student initiated prayer in "schools."

(3) On September 24, 1789, the House approved the final wording of the First Amendment and passed a Resolution requesting President George Washington to issue a Thanksgiving Proclamation to "recommend to the people of the United States a day of public thanksgiving and prayer to be observed by acknowledging with grateful hearts, the many and signal favors of Almighty God...." *See* 1 Annals of Cong. (Joseph Gales ed., 1834) 949-50. On September 25, 1789, the Senate approved the final wording of the First Amendment and concurred with the House Resolution calling for a Thanksgiving Proclamation. *See* Journal of the First Session of the Senate 88 (Gales & Seaton 1820). On Oct. 3, 1789, George Washington issued the Thanksgiving Proclamation. *See* 12 George Washington, The Writings of George Washington 119-20 (Jarad Sparks ed., Boston: American Stationers' Co. 1838).

Presidents George Washington, John Adams, and James Madison issued federal Thanksgiving Proclamations calling for public prayers and acknowledgements of God. *See Wallace v. Jaffree*, 472 U.S. 38, 103 (1985) (Rehnquist, J., dissenting). As a member of Virginia's legislature and then as Governor of Virginia, Thomas Jefferson also issued calls and proclamations for days of prayer, fasting, and thanksgiving, but did not do so as President as he believed the "power to prescribe any religious exercise...must rest with the State" [rather than with the Federal Government]. (emphasis added). *See* 1 Thomas Jefferson, Writings of Thomas Jefferson 9-10 (Albert Bergh ed., Washington: Thomas Jefferson Memorial Assoc. 1903) (As a Virginia legislator, Jefferson called for "a day of fasting, humiliation, and prayer, to emplore Heaven"); *see also* 10 Dictionary of American Biography 18 (Dumas Malone ed., Charles Scribner's Sons 1933) (Jefferson was "one of the champions of the Resolution for a fast day"); *see also* 2 Official Letters of the Governors of the State of Virginia 64-66 (H. R. McIlwaine ed., Virginia State Library 1928); (As Governor of Virginia, Jefferson issued a thanksgiving proclamation in 1779, stating in part: "I do therefore...appoint...a day of public and solemn thanksgiving and prayer to almighty God"); *see also* 4 Thomas Jefferson, Memoir, Correspondence, and Miscellanies, From the Papers of Thomas Jefferson 104 (Thomas J. Randolph ed., Boston: Gray & Bowen 1830) (1808) (The "power to prescribe any religious exercise...must rest with the State").

Throughout America's history, prayer has been regularly employed to solemnize activities ranging from the mundane to the sublime--including high school football games. When interpreting the Constitution, "a page of history is worth a volume of logic." *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921) (Justice Holmes).

III. Secular Purposes Of Solemnization In Schools Support Constitutionality Of SFISD's Policies

In public schools, there are student activities having natural beginnings and endings--such as football games and graduations. Just prior to the beginning of these activities,

there is usually noise, walking around, talking and such. Attaining attention, silence, and focus normally entails some act to mark the beginning of the occasion. In America, solemnizations have traditionally been utilized for this purpose. Methods of solemnization vary, but all generally provide a moment conducive to reflection, focusing, and calming.[24]

Justice O'Connor has written that "acknowledgements" such as, *inter alia*, "legislative prayers...serve in the only ways reasonably possible in our culture, the legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society."[25] Prayer serves

(4) George Washington called upon America and its' citizenry to acknowledge God:

> I am sure that never was a people who had more reason to acknowledge a Divine interposition in their affairs, than those of the United States, and I should be pained to believe that they have forgotten that agency, which was so often manifested during our Revolution or that they failed to consider the omnipotence of that God who is alone able to protect them.

10 George Washington, The Writings of George Washington 222-23 (Jared Sparks ed., Boston: American Stationers' Co. 1838) (March 11, 1792, Letter to John Armstrong) (emphasis added).

[24] While ceremonial prayer is one method of solemnization, it certainly is not the only method. A moment of silence, reading a quote, singing the National Anthem or other song, reciting the Pledge of Allegiance, offering words of welcome, and various other methods have been used as techniques of solemnization, and are all available for use by students as "invocations," "benedictions," "messages," and/or "statements" under SFISD's football and graduation policies. A targeted elimination of one method of solemnization simply because it contains a religious content is not in keeping with "a course of 'neutrality' toward religion" (quote from *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 792-93 (1973)). Such targeted discrimination is not required by the Establishment Clause.

[25] *Lynch*, 465 U.S. at 692-93 (O'Connor, J., concurring); *see also Alleghany*, 492 U.S. at 595-596 n.46; *Id.* at 630 (O'Connor, J., concurring); *Engel*, 370 U.S. at 435 n.21. Implicit in this observation is

the valid secular purpose of solemnization.

It is axiomatic that in the absence of students there would be no football games or graduations. These events exist primarily for the benefit of students, not primarily for the benefit of school officials or judges. High school students (in the final stages of their required formal education) are already deemed mature enough to run their own student government, elect their officers and representatives, take college level courses, plan school events, drive automobiles, and vote and be drafted to fight wars when they reach majority during their senior year. In the past, this Court has affirmed the maturity level and abilities of high school students. *See Board of Educ. of Westside Community Schools v. Mergens*, 496 U.S. 226, 250 (1990).

There is no compelling reason for school officials or judges to be involved in conducting or scripting solemnizations of student activities when students are desirous and capable of doing this themselves. Permitting students a choice concerning the issue of brief solemnizations of some of their own student activities is a logical progression of other responsibilities already entrusted to high school students and does not put the government in a position of endorsing anything other than student choice.

There are educational benefits to allowing students the opportunity of deciding for themselves how, when, if, and by whom, they wish to solemnize, formalize, and dignify some of their own student activities. Placing this responsibility on students provides educational opportunities in, *inter alia*,

that ceremonial solemnization (including prayer) is not intended to, nor does it, have the primary effect of attracting new converts or advancing religion. The undersigned has been unable to document a single historical instance of revival breaking out as a result of a prayer at a high school football game or graduation ceremony.

speech, civics, government, and constitutional law.[26]

There are numerous other secular reasons supporting the appropriateness of solemnizing football games (with prayer as a permitted option). Not only do high school football games pose a potential for physical injuries to young players, they regularly involve longstanding rivalries between schools and towns. These games present potential for conflict, dissension, and violence between opposing fans.[27]

A moment of quiet, solemn expression (traditionally a prayer) has historically gone far to soothe turbulent atmospheres at high school football games.[28] This is an important

[26] Students selected by peers to conduct solemnizations must author, prepare, practice, and deliver a short public address, thereby providing educational opportunities in speech and presentation. Exposure to diverse student solemnizations can be educational for those listening, also promoting tolerance of other's ideas and expressions. The voting and implementation process provides all students with learning opportunities in civics, government, and constitutional law. These are all educational subjects worthy of hands-on learning in high school. Rather than merely learning about these subjects academically, the process involves the students in the operation, exercise, and practice of the subjects.

[27] Who among us has not witnessed (in person or via media) verbal or physical acts of aggression or violence between fans of opposing teams at sporting events--especially at high school football games.

[28] In Longview, Texas, during the 1970/71 school year (when the all black Womack High School was merged, under federal court order, with Longview High School) the undersigned was a senior. It was a time of tension, fear, fights, and violence. The bloodiest and most widespread fighting of the year occurred on a Friday afternoon before a high school football game. Although school officials broke up the near riot, there were injuries, and the rumor was that the racial violence would continue at the football game that night and that blacks and whites were organizing for a confrontation. Before the beginning of the game, the tension was palpable. When it was time to start the opening formalities, the President of the Student Council began a prayer over the public address system (specifically addressing the black/white issues--how all are equal, how love of each other must prevail, asking for peace and blessings on all, and seeking God's intervention). The mood changed,

tradition which has, throughout the years, fostered calm, reflection, good behavior, and safer games.

IV. Students' Religious Expression, As Opposed To Government's Religious Expression, Is Protected Speech

The Fifth Circuit fails to adequately distinguish between government speech and private speech. The First Amendment states: "Congress [meaning all levels of government, including public school governance] shall make no law [policy or act] respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the free-

tension melted, and there was a calm which continued throughout the game with no fights or confrontations.

Is there less of a need today for student solemnization (with prayer as a permitted option) than in 1970? Have the schools of 1999 become so much calmer and safer than the schools of 1970? Consider: Pearl, Mississippi, October 1, 1997, two dead, seven wounded; West Paducah, Kentucky, December 1, 1998, three dead, five wounded; Jonesboro, Arkansas, March, 1998, five dead, ten wounded; Springfield, Oregon, May, 1998, four dead, twenty-one wounded; Richmond, Virginia, May, 1998, two wounded. Dateline NBC: *Gunfire At Armstrong High* (NBC television broadcast, Sept. 25, 1998). Littleton, Colorado, April 20, 1999, fifteen dead, twenty-three wounded; Conyers, Georgia, May 20, 1999, six wounded; Fort Gibson, Oklahoma, Dec. 6, 1999, four wounded. Dateline NBC: *Morning Mayhem* (NBC television broadcast, Dec. 6, 1999).

"[T]he report issued by the Milton S. Eisenhower Foundation...said violence is much more prevalent today than 30 years ago.... From 1969 to 1998, the rate of violent crime...jumped from 800 incidents per 100,000 to 1,218, the report found." Eric Lichtblau, *Still 'A Society In Deep Trouble*,' Houston Chronicle, Dec. 6, 1999, at A1.

Barry Mano, President of the National Association of Sports Officials, states, "We are getting more reports than ever in the history of the organization with regard to referees being assaulted." 20/20 (ABC television broadcast, May 30, 1999).

More, not fewer, solemnization opportunities are needed in public schools to foster an atmosphere of calm, focus, and composure, with the goal of producing safer sporting events and safer schools.

dom of speech...." The sole focus of the First Amendment is on what "Congress" (all levels of government) may not do; not on what private citizens (students) may not do. The First Amendment does not prohibit acts by private citizens; only acts by the government (i.e., "state action"). Students are private citizens; public school officials are government.

The concept of the "wall of separation between church and state"[29] is not a "wall" between religious and non-

[29] The phrase "wall of separation between Church and State," although not expressed in the Constitution, was utilized in interpreting the First Amendment in the 1947 case of *Everson v. Board of Educ.*, 330 U.S. 1, 16 (1947). The phrase was never used in the months-long congressional debates surrounding the First Amendment. *See* 1 Annals of Cong. 440-949 (Joseph Gales ed. 1834) (debates from June 8-Sept. 24, 1789). The phrase was taken from a short, private note of courtesy dated January 1, 1802, to the Danbury Baptist Association from President Thomas Jefferson. *See* 16 Thomas Jefferson, Writings of Thomas Jefferson 281-82 (Albert Bergh ed., Washington: Thomas Jefferson Memorial Assoc. 1904). Jefferson was responding to a letter from the Association. The Association was concerned that the inclusion of the Religion Clauses in the Constitution indicated that religious liberties were deemed government-given (rather than God-given inalienable rights) and might thereby provide government the ability to interpret the Clauses in a way to "punish" or regulate religion or the religious:

> Our sentiments are uniformly on the side of religious liberty...that no man ought to suffer...on account of his religious opinions [and] that the legitimate power of civil government extends no further than to punish the man who works ill to his neighbor. But sir, our [U.S.] Constitution of government is not specific,...therefore what religious privileges we enjoy (as a minor part of the State) we enjoy as favors granted and not as inalienable rights.

See Letter of Oct. 7, 1801, from Danbury (CT) Baptist Assoc. to Thomas Jefferson (Thomas Jefferson Papers Manuscript Div., Library of Congress) (emphasis added).

It is clear from the context that Jefferson's "wall" metaphor was intended solely to allay the specific fears of the Association concerning governmental encroachment upon religion.

Although this Court has often looked to Jefferson as an authority on the Establishment Clause, Jefferson was living in France at the time the

religious students but is a wall between the government and all students.[30] While government required or instigated prayer in public schools is unconstitutional,[31] the Court has never prohibited genuinely student-led, student-initiated prayer in public schools. "[T]he Establishment Clause does not ban prayer. It bans *state* prayer." *Chandler v. James*, 180 F.3d 1254, 1258 (11th Cir.1999).

"It can hardly be argued that...students...shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 506 (1969). Nor can it be argued that students become state actors when they walk through the schoolhouse gate:[32] "First, students are not state

First Amendment was drafted and approved by Congress; Jefferson was not consulted about the language of the First Amendment; and Jefferson's letter to the Danbury Baptist Association was written more than twelve years after the wording of the First Amendment was passed by Congress. *See Jaffree*, 472 U.S. at 92 (Rehnquist, J. dissenting).

Chief Justice Rehnquist has referred to the "wall" concept as "a mistaken understanding of constitutional history...[and] Jefferson's misleading metaphor." *Id.* The Court itself has acknowledged that the "wall" "is not a wholly accurate description" (*Lynch*, 465 U.S. at 673), "is a blurred, indistinct, and variable barrier" (*Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971)), "dimly perceive[d]" (*Id.* at 612), and does "not call for total separation between church and state." (*Id.* at 614). As stated in *Lynch*, 465 U.S. at 673: "'It has never been thought either possible or desirable to enforce a regimen of total separation' (quoting *Nyquist*, 413 U.S. at 760). Nor does the Constitution require complete separation of church and state...."

[30] As long as members of the government (including the judiciary) do not "jump over the wall" and attempt to influence students' religious expressions (either instigating or stifling) the "wall" is not breached. It is for this reason that it would not be a constitutional violation for a Jewish student to share his faith with a Christian student on campus but would be unconstitutional for the principal to do the same thing. The Jewish and Christian students are private citizens on the same side of the "wall."

[31] *Engel*, 370 U.S. 421.

[32] "Religious speech by students does not become forbidden 'state

actors and, therefore, by definition, their actions cannot tend to 'establish' religion in violation of the Establishment Clause. Second, the Free Speech and Free Exercise Clauses of the First Amendment require the State to *tolerate* genuinely student-initiated religious speech in schools." *Chandler*, 180 F.3d at 1258 (referring to the school district's legal position which the court generally adopts in its opinion). Any constitutional analysis of a school prayer issue must, by definition, focus on the government's actions, not on students' actions.

The Constitution prevents government's pro-religious acts (Establishment Clause), but protects students' pro-religious acts (Free Exercise and Free Speech Clauses). As stated in *Mergens*, 496 U.S. at 250:

> [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. We think that secondary school students are mature enough and are likely to understand that a school does not endorse or support [religious] student speech that it merely permits on a non-discriminatory basis.

If student speech incidentally advances religion in some sense, this does not violate the Establishment Clause since student speech is private speech: "[T]o have forbidden 'effects' under *Lemon*, it must be fair to say that the *government itself* has advanced religion through its own activities and influence." *Corporation of Presiding Bishop of the Church of Jesus Christ v. Amos*, 483 U.S. 327, 337 (1987).

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action' the moment the students walk through the schoolhouse door. *Chandler*, 180 F.3d at 1261-62.

However, if a school district requires or instigates prayer,[33] or characterizes prayer as a favored practice,[34] it is this action ("state action") which violates the Establishment Clause. "[I]t is the *State's decision to create an exclusively religious medium* which violates the Establishment Clause;

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[33] For instance: (1) school officials writing and requiring students to recite a prayer (*Engel*, 370 U.S. 421); or, (2) school officials delegating surrogates to do what the officials themselves may not constitutionally do directly--as when school officials select clergy and/or students and direct them to pray at school events as in *Lee*, 505 U.S. 577 (principal selecting and directing clergy to pray at graduation), or as in *Karen B. Treen v. David Treen*, 653 F.2d 897 (5th Cir. 1981) (school board guidelines requiring student-led or teacher-led prayers in classrooms); or, (3) enacting school district policies permitting private parties to speak but then limiting the speech to a prayer or other religious speech as in *Jager v. Douglas County Sch. Dist.*, 862 F.2d 824 (11th Cir. 1989) (authorizing student-led "invocations" and only invocations at school sporting events), or as in *Hall v. Board of Sch. Comm'rs*,) 656 F.2d 999 (5th Cir. 1981) (school policy permitting "devotionals" and only devotionals); or, (4) where school personnel engage in active "participation in these prayers" as in *Doe v. Duncanville*, 70 F.3d 402, 406 (5th Cir. 1995).

[34] *Wallace v. Jaffree*, 472 U.S. 38 (1985) illustrates the principle: Alabama passed a law authorizing a moment of silence "for meditation or voluntary prayer" to replace its previous law authorizing a moment of silence "for meditation." While this Court spoke favorably of the prior law (which was not being challenged), the Court found the new statute unconstitutional because: "The addition of 'or voluntary prayer' indicates that the State intended to characterize prayer as a favored practice." *Id.* at 60 (emphasis added). The Court noted that the previous law "contain[ed] nothing that prevented any student from engaging in voluntary prayer during a silent moment of meditation" but did so without highlighting "prayer" as governmentally favored. *Id.* at 59. It was the State's action of elevating prayer as a favored governmental practice that made the law unconstitutional, not the fact that students prayed.

Unlike *Jaffree*, nowhere does the word "prayer" appear in either of SFISD's policies. Furthermore, there is no evidence indicating any intent on the part of SFISD (or interpretation on the part of students) that the football and/or graduation policy required or favored prayer. To assume otherwise would be speculation going beyond the record. SFISD's football and graduation policies do not characterize prayer as favored.

not the private parties' religious speech." *Chandler*, 180 F.3d at 1259. SFISD's football policy does not require, directly or indirectly, that student speech be religious. If a pre-game student solemnization has religious overtones, it is only because a student has independently decided that it have such.

V. Permitting Religious Speech Is Not Synonymous With Endorsement

"It is not the 'permitting' of religious speech which dooms these policies, but rather the requirement that the speech be religious...." *Id.* at 1259 (emphasis added). Permitting students to determine how to formalize the beginning of some of their own student activities does not place the district in a position of either supporting or opposing the students' choice (much less opposing or supporting prayer--which might never be selected by a student). And, if a student selects a prayerful solemnization and the selection is genuinely student-initiated and devoid of governmental influence, the Establishment Clause does not require the school district to stop the student's speech.[35]

> Permitting students to speak religiously signifies neither state approval nor disapproval of that speech. The speech is not the State's--either by attribution or by adoption. The permission signifies no more than that the State acknowledges its constitutional duty to tolerate religious expression. Only in this way is true neutrality achieved.

Chandler, 180 F.3d.

If a student may select a secular solemnization, neutrality dictates that a student may also select a religious solemnization--without governmental interference.[36] "What is crucial is that a governmental practice not have the effect of communicating a message of government endorsement or disapproval of religion." *Lynch v. Donnelly*, 465 U.S. 668, 692 (1984) (O'Connor, J., concurring) (emphasis added). The State does not have a positive duty to censor student speech if it is religious: "The suppression of student-initiated religious speech is neither necessary to, nor does it achieve, constitutional neutrality towards religion. For this reason, the Constitution does not permit its suppression." *Chandler*, 180 F.3d at 1261.

Furthermore, government may not favor one speaker over another based on viewpoint. "It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys...[or] favor one speaker over another.... Discrimination against speech because of its message is presumed unconstitutional.... Viewpoint discrimination is thus an egregious form of content discrimination". *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 828 (1995).[37]

[35] The First Amendment does not require the "government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence." *Zorach*, 343 U.S. at 314. *See also Mergens*, 496 U.S. at 250 ("[A] school does not endorse or support [religious] speech that it merely permits on a non-discriminatory basis"); *Chabad-Lubavitch of Georgia v. Miller*, 5 F3d 1383, 1391-92 (11th Cir. 1993) (*en banc*) ("[T]he failure to censor is not synonymous with endorsement"). If endorsement of religion is unconstitutional because it "sends a message to non-adherents that they are outsiders," "disapproval" is unconstitutional because it "sends the opposite message." *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring) (emphasis added).

[36] "[A] denial of equal access to religious speech might well create greater entanglement problems in the form of invasive monitoring to prevent religious speech...." *Mergens*, 496 U.S. at 253; *see also Widmar v. Vincent*, 454 U.S. 263, 272 n.11 (1981). Government must pursue "a course of 'neutrality' toward religion." *Nyquist*, 413 U.S. at 792-93.

[37] *See also Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993) ("the government violates the First

Even in a non-public forum, government may not discriminate based on viewpoint. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983) ("it is bound by the same standards as apply in a traditional public forum"); *Cornelius v. NAACP Legal Defense & Educ. Fund*, 473 U.S. 788, 806 (1985). "The principle that has emerged from our cases 'is that the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.'" *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. at 384, 394 (1993). If one student says, "Let us have a safe game tonight," and another student gives a similar message also focusing on safety but adds one three letter word and says, "God, let us have a safe game tonight," the government must treat both solemnizations and both students with equal dignity. The government must not exert viewpoint discrimination against either.

This Court has held that "private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression." *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995). Because religious speech is constitutionally protected speech, the government may not censor it.

As stated in *Lynch*, 465 U.S. at 673, "the Constitution...affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any." *See also Widmar v. Vincent*, 454 U.S. 263, 273-74 (1981); *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 792-93 (1973); *Zorach v. Clauson*, 343 U.S. 306, 312-15 (1952). "The first principle must always be that genuinely student-initiated religious speech must be *permitted*." *Chandler*, 180 F.3d at 1264.

Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject.").

The government "may neither prohibit genuinely student-initiated religious speech, nor apply restrictions on the time, place, and manner of that speech which exceed those placed on students' secular speech." *Id.* at 1266.

The last Supreme Court case to directly address the subject of school prayer is *Lee*, 505 U.S. 577 (1992).[38] In *Lee*, the Court invites non-government persons (obviously, in the context of the school prayer case, referring to students since students are generally the only non-governmental body of citizens in public schools) to undertake the "task" of

[38] In *Lee*, the Principal unilaterally decided to have prayer at graduation, selected a clergyman to pray, and directed the clergyman to pray according to guidelines provided by the Principal. In this five to four decision, the Court came within one vote of holding that even this degree of government involvement was constitutional. In *Lee*, not only was the vote close, but the holding was narrow.

Although the *Lee* Court had the opportunity to hold that all vocal, public prayer at public school events would violate the Constitution, the Court did not do so, but rather held that only the particular circumstances of the case were unconstitutional, stating: "These dominant facts mark and control the confines of our decision...." "Our Establishment Clause jurisprudence remains a delicate and fact-sensitive one...." "Our jurisprudence in this area is of necessity one of line drawing...." *Lee*, 505 U.S. at 586, 597, 598 (emphasis added); *see also Lynch*, 465 U.S. at 678 ("In each case, the inquiry calls for line-drawing; no fixed *per se* rule can be framed.") (emphasis added). Slightly different facts can be outcome determinative in First Amendment cases: *See id.* at 681-82; *compare with Allegheny*, 492 U.S. at 598-600. *See also Clear Creek II*, 977 F.2d at 965 & n.4 ("three plastic animals rule").

The Fifth Circuit, on the other hand, would like to fashion a *per se* rule for football games: "Prayers that a school 'merely' permits will still be delivered to a government-organized audience, by means of government-owned appliances and equipment, on government-controlled property, at a government-sponsored event, thereby clearly raising substantial Establishment Clause concerns." *Santa Fe*, 168 F.3d at 817 (emphasis added). But, if this were the test, *Lee* would have been a short opinion indeed (since all of these same factors existed in the *Lee* graduation); and *Clear Creek II* and *Chandler* and all of the Supreme Court's "neutral accommodation" cases would be wrong.

formulating "prayers" themselves:

> If common ground can be defined which permits once conflicting faiths to express the shared conviction that there is an ethic and a morality which transcend human invention, the sense of community and purpose sought by all decent societies might be advanced. But though the First Amendment does not allow the government to stifle prayers which aspire to these ends, neither does it permit the government to undertake that task for itself.
>
> The First Amendment's Religion Clauses mean that religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State.

Lee, 505 U.S. at 589 (emphasis added).

It is clear from the factual context of *Lee* that the Court is speaking of vocal "prayers" at school events, on school property, using school equipment (as was the factual context of the clergy's prayer at the graduation ceremony in *Lee*). This language appears to direct school districts to permit the student body "to undertake that [prayer] task for itself."[39]

[39] Although the Court gives no guidance as to which students should "undertake the task," a school-wide decision involving all students would seem to be the most equitable. This allows school districts to be outcome-neutral and communicates to students and to the community that the district is not endorsing, coercing, or entangling itself with student selection or content of student solemnizations.

When it is widely known, as in SFISD, that the presence and content of student solemnizations are of student choice, the issue of perceived government endorsement is dispelled as "the endorsement test necessarily focuses upon the perception of a reasonable, informed observer," "deemed aware of the community and forum," rather than "some passerby." *Pinette*, 515 U.S. at 773 & 779-780 (O'Connor, J., concurring). But, even a casual passerby should draw no more of a conclusion of government endorsement of religion if a student should say a prayer than the same passerby should draw a conclusion of government hostility toward religion if a student should say no prayer.

Nevertheless, to avoid the possibility of any confusion, SFISD reads a disclaimer prior to the student message that states:

> (Marian Ward), a Santa Fe High School student, has been selected by her peers to deliver a message of her own choice. Santa Fe ISD does not require, suggest, or endorse the contents of (Ms. Ward's) choice of a pre-game message. The purpose of the message is to solemnize the event, and to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition. At this time, (Marian Ward).

Anthony Cargile, Pre-game Announcement at SFISD Football Games, Santa Fe, Texas (Oct. 15, 1999, Oct. 29, 1999) (transcript available in offices of Kelly Coghlan).

Additionally, since the student selection process is based on wholly secular criteria (i.e., election by peers from a list of student volunteers), it is difficult to attribute an endorsement of religion to the State. *See Lee*, 505 U.S. at 630 n.8 (Souter, J., concurring).

And regarding such efforts by students, the Court directs that "the First Amendment does not allow the government to stifle prayers which aspire to these ends...." *Id.* **If students are never allowed by the schools or courts to attempt the "task," then these words in *Lee* are meaningless.** Student-initiated solemnization is a step toward what *Lee* suggests, and SFISD was simply following these *Lee* directives. Some federal appellate panels have followed *Lee* in this respect.[40]

[40] (1) *Clear Creek II*, 977 F.2d 963--recognizes the critical difference between government-initiated and student-initiated prayer: "[A] majority of students can do what the State acting on its own cannot do to incorporate prayer in public high school graduation ceremonies." *Id.* at 972.

(2) *Doe v. Madison Sch. Dist.*, 147 F.3d 832 (9th Cir. 1998), *vacated as moot*, 177 F.3d 789 (1999)--holds constitutional a policy in which the four top academically-ranked graduates are invited to deliver "an address, poem, reading, song, musical presentation, prayer, or any other pronouncement" at graduation. *Id.* at 834.

(3) *Chandler*, 180 F.3d 1254--holds invalid a federal district court's injunction that prohibited student "vocal prayer or other devotional

A school district policy (either written or practiced) prohibiting vocal, public student prayer at football games would surely be as unconstitutional as a policy requiring vocal, public student prayer at football games. Are these not the two extremes of the same unconstitutional non-neutrality?

Furthermore, a policy of "equal silence for all" is not neutral since such rule prefers and advances the atheists' agenda of silencing all religious expression. "That would be preferring those who believe in no religion over those who do believe." *Zorach*, 343 U.S. at 314. "'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." *Chandler*, 180 F.3d at 1261. Government's tolerance of disbelief does not require, or allow, atheism to be elevated over belief. The First Amendment requires that the State tolerate both, while establishing neither. Students, however, should be free to prefer one or the other and to express that preference whenever they are permitted to speak.

On September 2, 1999, Marian Ward filed suit against SFISD. In granting Marian Ward a temporary restraining order (and then a preliminary injunction), the federal district court ruled, in part, as follows:

> If, as it appears from this record, secular speech is allowed at games over the public address system by students, then the Court concludes that the Free Speech Clause of the Constitution prohibits the School District from discriminating against similar speech simply because it contains a prayerful component freely chosen by the student, even one that invokes a deity. Even in a non-public forum a government cannot discriminate against speech because of the viewpoint expressed by the speaker.
>
> The Establishment Clause of the First Amendment requires neutrality by government in matters of religion. Just as a school policy requiring student prayer would run afoul of the Establishment Clause, a school policy prohibiting prayer also runs afoul of the Establishment Clause because it amounts to state sponsorship of atheism, i.e., state establishment of disbelief in a God instead of belief in a God.
>
> If a student may select a non-religious solemnization, then neutrality requires that a student may also select a religious solemnization without government interference.[41]

speech in its schools...such as aloud in the classroom, over the public address system, or as part of the program at school-related assemblies and sporting events, or at a graduation ceremony." *Id.* at 1257.

As President William Clinton said in an address on religious liberties in public schools:

> The First Amendment, I will say it again, does not convert our schools into religion-free zones...[and] does not require students to leave their religion at the schoolhouse door.... It protects freedom of religion by allowing students to pray, and it protects freedom of

[41] *Ward v. Santa Fe Indep. Sch. Dist.*, No. 99-CV-556 (D. Tex. filed Sept. 2, 1999) (hearing on Application for Temporary Restraining Order, Sept. 3, 1999). *See* App. F for hearing transcript excerpt containing district court's ruling, Temporary Restraining Order, and Preliminary Injunction.

religion by preventing schools from telling them how and when and what to pray.[42]

VI. Judicial Censorship Or Scripting Of Student-Led, Student-Initiated Prayer Violates Students' Consciences, Amounts to Viewpoint Discrimination, And Creates A Preferred State Religion

Permitting only "non sectarian/non proselytizing" prayers creates a preferred creed and official "civic" religion of the judiciary's invention[43] (permitting students to "speak only the religious thoughts that government want[s] them to speak...and to pray only to the God that government want[s] them to pray to"[44]). The courts must then police and monitor the judicially created sect to assure adherence to its dogma and to punish aberrant utterances.[45] For the State to dictate that a student may not pray a prayer containing the words of his/her choice will not only cause the student to violate

[42] President William J. Clinton, Address at James Madison High School, Vienna, Virginia, *in* Office of the Press Secretary (The White House, July 12, 1995).

[43] "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion...." *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (emphasis added).

[44] *Engel*, 370 U.S. at 435.

[45] The Fifth Circuit's requirement that student prayer (if any) at graduations be "nonsectarian and non-proselytizing" is little different than the Principal's requirement of the clergyman in *Lee*. The *Lee* Court found that by advising the speaker to deliver "nonsectarian" prayers, the Principal "directed and controlled the content of the prayers." *Lee*, 505 U.S. at 588. *See also Ingebretson*, 88 F.3d at 279 ("[S]chool officials [involvement] in determining which prayers are 'nonsectarian and non-proselytizing'...excessively entangles government with religion"); *Mergens*, 496 U.S. at 253 ("[A] denial of equal access to religious speech might well create greater entanglement problems in the form of invasive monitoring to prevent religious speech....").

his/her conscience, but, as to at least one religion, will cause the student to violate a basic tenet of his/her faith.[46]

Too many, it seems, have adopted the philosophy, "I am offended, therefore I am." [47] The idea of a person being "offended"[48] by the expression of another's prayer may simply be a euphemism for intolerance.[49] Employing the

[46] The phrase, "in Jesus' name" is not a tag line added to proselytize or offend. When Christians use this phrase, they are obeying a basic tenet of their faith. *John* 16:24, 26, 27; *see also John* 14:13-14, 15:16; *Colossians* 3:17.

[47] "In this country, it seems to me that we are ruled by the tyranny of the sensitive." Bill Moyer, Politically Incorrect (ABC television broadcast, June 16, 1999).

[48] Anthony Griffin, lead counsel for Respondents, recently wrote an editorial for the Dallas Morning News, stating: "First, let me make a confession to you. I was the high school student who refused to stand up when the National Anthem was played or when the school song was sung." Anthony Griffin, *Pre-game Prayer*, The Dallas Morning News, Nov. 14, 1999, at J1. Mr. Griffin's right to remain seated did not extend to compelling everyone else to remain seated, or to compelling the silencing of the National Anthem, or to compelling the silencing of the school song. Yet, it is this same genre of logic upon which Respondents' case rests. If all speech, songs, and expression that offended someone were eliminated, there would be little left to sing or say (or pray).

[49] "Accommodation of religious beliefs we do not share is, however, a part of everyday life in this country.... Respect for the rights of others to express their beliefs, both political and religious, is the price the Constitution extracts for our own liberty. This is a price we freely pay. It is not coerced. Only when the speech is commanded by the State does it unconstitutionally coerce the listener." *Chandler*, 180 F.3d at 1263.

If a student elects to pray as his/her choice of solemnization, any person not agreeing with the student's selection is not compelled to stand, bow their head, close their eyes, listen, or participate. Similarly, Jehovah's Witnesses who believe it is wrong to recite the Pledge of Allegiance, do not have to participate--although the Pledge is routinely said in public schools over intercom systems to "captive audiences" of children belonging to this religion. Those not believing in the Pledge are not required to stand, salute, listen, or otherwise participate; but we continue saying the Pledge. *See Barnette*, 319 U.S. 624.

machinery of government to stifle or silence student-led, student-initiated prayerful speech when similar secular speech is permitted, would unfairly discriminate against those students who share the sentiments of Benjamin Franklin, George Washington, and the First Congress, and would not be in keeping with a fair interpretation of the Establishment Clause.

CONCLUSION

Amici Curiae respectfully request this Court to reverse the decision of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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