GRANTED

No. 99-62

IN THE
Supreme Court of the United States

SANTA FE INDEPENDENT SCHOOL DISTRICT,
Petitioner,

v.

JANE DOE, *et al.*,
Respondents.

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

BRIEF OF TEXAS PUBLIC SCHOOL STUDENTS, THEIR PARENTS, AND THE LIBERTY LEGAL INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

VIET D. DINH
SCOTT H. ANGSTREICH
600 New Jersey Ave., N.W.
Washington, D.C. 20001
(202) 662-9000

JOHN L. CARTER *
VIET D. DINH, LLC
120 S. Fairfax St., Suite 300
Alexandria, VA 22314
(703) 549-0049

Counsel for Amici Curiae

* *Counsel of Record*

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QUESTION PRESENTED

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

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INTEREST OF THE *AMICI CURIAE*[1]

Amici include Texas public school students,[2] some of whom are speakers who wish to deliver a message or invocation during the pre-game ceremony at home football games. They seek neither to clothe themselves in the garb of school administrators nor to deliver the school district's message, but rather to express their individual sentiments to solemnize the competition that has drawn together their community. They wish to have the opportunity, free from government control, to speak their own words, to deliver their own message, and, for some of them, to express their own faith. Some amici student speakers, if called upon, would use the opportunity to deliver a non-prayer message encouraging good sportsmanship and safety. The Fifth Circuit's decision invalidating the Santa Fe Independent

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[1] Letters indicating the parties' consent to the filing of this brief have been filed with the Clerk of the Court. This brief has not been authored in whole or in part by counsel for a party. No person, other than *amici*, their members, or their counsel, has made a monetary contribution to the preparation or submission of this brief.

[2] Amici students include Mindy Ackermann, Jake Allen, Cody Avalos, Nikki Bonnet, Amber Brown, Benjamin Chase Brown, Brooke Boucher, Julie Bucher, Justin Bucher, Tiffanee Bullock, Daniel Calder, Joshua Calder, Mary Alice Cansino, Chris Carrell, Wanda Davis, Jay Doty, Sterling Doty, T.J. Douglas, Shantae Douglas, Tanisha Douglas, Cody Fails, Jarad Fails, Joe Fails, Billie Jo Fanning, Branda Fanning, Dondra Fanning, Katherine Furley, Krystal Gartside, Teri Hamilton, Jessica Holt, Taylor Holt, Shannon Hughes, Jennifer Jackson, Myka Jackson, Emily Kribbs, Torey Lasater, Emily Lilljedahl, Katy Lilljedahl, Sara Lilljedahl, Micha Monson, Amy Nix, Brawnson Oliver, Remington Oliver, Wes Parham, Faith Roberts, Chelsea Rhodes, R.J. Rhodes, Marlena Robinson, Caytlin Rose, Brad Smith, Sarah Smith, Steven Smith, Melanie Spikes, Jayci Underwood, Jeremy Underwood, Alan Ward, Leigh Ann Weems, Tamantha White, Laura Wilkinson, Jason Wilson, and Justin Wilson.

School District's Pre-Game Ceremony Policy has denied them that opportunity.

Amici also include students and parents[3] who attend football games and wish to hear an expression of faith during the pre-game ceremonies. They recognize that the games are community events that provide the town with the opportunity to acknowledge its unity and to praise the accomplishments of its youth. They also recognize that a football game is a potentially dangerous event, both on the field and in the stands, and for that reason share the school district's interest in solemnizing the game, promoting good sportsmanship and safety, and establishing the appropriate environment for competition. Solemn messages, some in the form of prayers, delivered by a private individual—their friend, classmate, son, daughter, or neighbor—rather than a state official further those collective interests. The Fifth Circuit's decision has denied amici the opportunity to receive such an expression of private faith and to promote safe and healthy athletic competition.

Amicus Liberty Legal Institute is an organization committed to the defense of religious liberty and the protection of rights

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[3] Amici parents include Andy and Michelle Ackermann, Cindy Allen, Rudy Avalos, Melanie Black, Donna Bonnet, Michael Boucher, Keith Brown, Larry Wayne Brown, James M. Bucher, Doug Burns, Roderick Calder, Brandon and Cindy Carrell, Wanda Davis, Bob Doty, Lola Douglas, Kent Fails, Tim Fails, Robin Fanning, Kay Gartside, Patricia L. Hale, Cindy Holt, Lisa Hughes, Debbie Jackson, James Jackson, Denise Kribbs, Janet Lasater, Carl and Karen Lilljedahl, Ronda Monson, Lee Moore, Jan Nix, Ronnie and Mischelle Oliver, Margie Rhodes, Deborah Robinson, Lisa Rose, Carl W. Smith, Kenneth Smith, Terry Smith, Lanny Spikes, Sari Underwood, Gary Ward, Rodger Weems, Peggy Wilkinson, R.P. Wilson, and Tracey Wilson.

under the First and Fourteenth Amendments. Among its activities, the Institute assists individuals, students, and organizations in challenging state restrictions on, or discriminatory treatment on the basis of, religious beliefs or expression. By eliding the distinction between private conduct and state action, the Fifth Circuit has circumscribed the ability of the Institute to enable its clients to express their beliefs and exercise their faiths. Through other fundamental errors of law, the Fifth Circuit has frustrated the Institute's interest in an interpretation of the First and Fourteenth Amendments that properly balances the Establishment, Free Exercise, and Free Speech Clauses.

STATEMENT OF THE CASE

Amici hereby adopt the statement of the case presented in the Brief for Petitioner. For the Court's convenience, amici set forth below the facts most salient to the analysis that follows.

1. The Santa Fe Independent School District adopted in October 1995 the contested Pre-Game Ceremony Policy, which reads in pertinent part:

> The board has chosen to permit students to deliver a brief invocation and/or message to be delivered during the pre-game ceremonies of home varsity football games to solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition.
>
> Upon advice and direction of the high school principal, each spring, the high school student council shall conduct an election, by the high school student body, by secret ballot, to determine whether such a statement or invocation

> will be a part of the pre-game ceremonies and if so, shall elect a student, from a list of student volunteers, to deliver the statement or invocation. The student volunteer who is selected by his or her classmates may decide what message and/or invocation to deliver, consistent with the goals and purposes of this policy.

Pet. App. F1.

This policy establishes a four-step process. First, the student council administers an election in which the student body determines, by secret ballot and majority vote, whether to have a student speaker during the pre-game ceremony at home football games. Second, if a majority of students votes in favor of a student speaker, then any student may volunteer as a candidate to deliver the speech. Third, the student council administers a second election in which the student body, by secret ballot and plurality vote, selects a student speaker from the volunteers. Fourth, the student selected will draft and deliver a speech consistent with the goals of the policy: solemnizing the event, promoting sportsmanship and safety, and establishing an appropriate environment for the competition.

2. The school district developed its Pre-Game Ceremony Policy pursuant to a district court order in this litigation, which prohibited any campaigning on school property during the student elections. The district court order likewise prohibited the school district from exercising any scrutiny of or control over the speech the selected student chooses to deliver. See *Doe* v. *Santa Fe Indep. Sch. Dist.*, No. G-95-176, at 6 (S.D. Tex. May 10, 1995) (interim order); *Doe* v. *Santa Fe Indep. Sch. Dist.*, No. G-95-176, at 1-2 (S.D. Tex. Aug. 17, 1995) (interim order pertaining to prayer at football games). There is

no record evidence of the results of any student votes, or the content of any messages or invocations given at football games, under the contested policy.

3. The Pre-Game Ceremony Policy also provides that should a court enjoin the enforcement of the contested policy quoted and described above, an alternative policy "will automatically become the applicable policy of the school district." This alternative is identical in relevant respects to the contested policy but for one additional sentence: "Any message and/or invocation delivered by a student must be nonsectarian and nonproselytizing." Pet. App. F1-F2.

SUMMARY OF ARGUMENT

This case turns on a simple yet fundamental axiom of Establishment Clause jurisprudence: "[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." *Board of Ed. of Westside Community Sch.* v. *Mergens*, 496 U.S. 226, 250 (1990) (plurality opinion). Any religious content in the student-initiated, student-led, and student-controlled message or invocation under the contested policy results from wholly private conduct, not state action. The school district merely authorizes the students to choose whether to have a message or invocation during the pre-game ceremony and permits the student speaker to choose the content of her message or invocation. Under established principles of constitutional law, such authorization and permission do not constitute state action.

Because students initiate, lead, and control the message or invocation during the pre-game ceremony, a reasonable observer would not perceive any government endorsement of any

religious content in the message or invocation. "The proposition that schools do not endorse everything they fail to censor is not complicated." *Mergens*, 496 U.S. at 250 (plurality opinion). Students select the speaker from their peers according to secular criteria, without any involvement by or encouragement from the school district. The school district's policy enabling the students to initiate, lead, and control the message or invocation contains an express statement of secular purposes. Thus, any "aid to religion at issue here is the result of [amici's] private choice. No reasonable observer is likely to draw from the facts before us an inference that the State itself is endorsing a religious practice or belief." *Witters* v. *Washington Dep't of Servs. for the Blind*, 474 U.S. 481, 493 (1986) (O'Connor, J., concurring in part and concurring in the judgment).

Indeed, far from being a violation of the Establishment Clause, petitioner's Pre-Game Ceremony Policy charts a sensible and reasonable course between, on the one hand, the students' and parents' interest in delivering and receiving an expression of solemnity or private faith to promote friendly competition and, on the other, the constitutional prohibitions against excessive entanglement with religion and viewpoint discrimination. Invalidating the contested policy would require the school district, under the alternative policy, to police student messages and censor sectarian and proselytizing words from student prayers; such actions would raise the specter of impermissible viewpoint discrimination and excessive state entanglement with religion. Invalidating the Pre-Game Ceremony Policy in its entirety, as the Fifth Circuit did, would deprive amici and the school district of the opportunity to further, "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." *Lynch* v. *Donnelly*, 465 U.S. 668, 693 (1984) (O'Connor, J., concurring).

ARGUMENT

I. Any Religious Content in the Student-Initiated, Student-Led, and Student-Controlled Pre-Game Message Would Result from Private Choices and Not State Action.

"[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." *Mergens*, 496 U.S. at 250 (plurality opinion). For that reason, nothing in the Constitution "prohibits public school students from voluntarily praying at any time before, during, or after the schoolday." *Wallace* v. *Jaffree*, 472 U.S. 38, 67 (1985) (O'Connor, J., concurring in the judgment). Just so here, where any religious content in the pre-game ceremony results from the voluntary choices of the student body and individual student speakers.

A. The School District Does Not Control, Direct, or Influence the Content of the Message or Invocation, but Simply Permits the Students To Decide Whether and What Message They Would Voluntarily Convey.

Amici student speakers volunteer to participate in pre-game ceremonies in order to speak their own words, to deliver their own message, and, for some, to express their own faith. They seek not to become mouthpieces for the state, to relay the government's message, or to have the school's imprimatur on their sentiments. Indeed, to don the garb of a school administrator or to permit the school to adopt, co-opt, or endorse their message would defeat the purpose of the amici student speak-

ers' participation in a pre-game ceremony. That purpose is to express, in accordance with their personal beliefs, their own solemn sentiments for the occasion and their thoughts on the competition about to take place on the field.

Any religious content in amici student speakers' message, therefore, will be the "'result of the genuinely independent and private choices of' individuals," and not of any decision of the school or the state. *Agostini* v. *Felton*, 521 U.S. 203, 226 (1997) (quoting *Witters*, 474 U.S. at 487).

Student amici seek simply to exercise the freedom conferred upon them through policies like the Pre-Game Ceremony Policy. Under that policy, students have complete freedom over the message or invocation during the pre-game ceremony. They are free, as a group, to decide whether a message or invocation will be delivered at all. Each student is free to decide whether to volunteer as the speaker. The student body is free to choose the speaker from those volunteers. Finally, the student elected to speak is free to choose the content of the message or invocation she delivers in accordance with the secular goals and purposes of the policy—including to choose whether to convey that message through expressions of private faith.[4] Any endorsement of religion offered by a student speaker, should she

[4] The Pre-Game Ceremony Policy permits the student speaker to deliver a "message and/or invocation." Although some amici student speakers openly desire to express themselves during the pre-game ceremony through prayer, the term "message" carries no religious connotation and an invocation need not contain religious content. See *Doe* v. *Santa Fe Indep. Sch. Dist.*, 171 F.3d 1013, 1015 (5th Cir. 1999) (Jolly, J., dissenting from denial of rehearing en banc). Indeed, some amici student speakers would not offer prayers in their messages should they be selected as a student speaker.

be elected by her peers, would be free from government involvement because the policy provides the school district with no mechanism to control the content of the speech.[5] The pre-game ceremony, therefore, would feature student-initiated, student-led, and student-controlled speech, which may, but need not, take the form of prayer.

In the typical student religious speech case addressed by the Court, the school has created a program whereby it grants access to school facilities, services, or funds to a variety of student activities on a nondiscriminatory basis. See *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995); *Lamb's Chapel* v. *Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Mergens*, *supra*; *Widmar* v. *Vincent*, 454 U.S. 263 (1981). Emphasizing that the First Amendment commands neutrality and not hostility toward religion, the Court has consistently invalidated any attempt to restrict access to these school programs on the basis of the religious content of the student activity. See *Rosenberger*, 515 U.S. at 845-46; *Lamb's*

[5] Under the policy, the student speaker "may decide what message and/or invocation to deliver, consistent with the goals and purposes of this policy." The district adopted the policy pursuant to a court order requiring that student messages "not be subject to scrutiny or pre-approval by the District or the School Administration." *Santa Fe*, No. G-95-176, at 6 (interim order); *Santa Fe*, No. G-95-176, at 1-2 (interim order pertaining to prayer at football games). The school district thus may not review the content of student messages. Even if this policy were nonetheless interpreted to permit the school district to determine *ex post* whether the student speech was consistent with the goals of solemnity, sportsmanship, and healthy competition—for example, to ensure that the student's speech contains neither profanity nor personal attacks—the policy in no way authorizes the school district to scrutinize or control the religious content of the student speech.

Chapel, 508 U.S. at 393-94; *Mergens*, 496 U.S. at 248 (plurality opinion); *Widmar*, 454 U.S. at 277. That result holds even in a hard case, where faithful application of the neutrality principle brushes up against a competing constitutional norm. See *Rosenberger*, 515 U.S. at 847 (O'Connor, J., concurring) ("This case lies at the intersection of the principle of government neutrality and the prohibition on state funding of religious activities.").

This is not that hard case of neutral government action. It is the easy case of no government action at all. This case presents a straightforward application of the Court's unanimous decision in *Witters* v. *Washington Department of Services for the Blind*, 474 U.S. 481 (1986). There, the Court held that state funds supporting vocational training for the blind could be used for tuition at the Inland Empire School of the Bible because "vocational assistance provided under the Washington program is paid directly to the student, who transmits it to the educational institution of his or her choice. Any aid provided under Washington's program that ultimately flows to religious institutions does so only as a result of the genuinely independent and private choices or aid recipients." *Id.* at 487. Therefore, "it does not seem appropriate to view any aid ultimately flowing to the Inland Empire School of the Bible as resulting from a *state* action sponsoring or subsidizing religion." *Id.* at 488.

Indeed, the contested policy in this case distances the private choices of the students from governmental action even further than the facts presented in *Witters*. In *Witters*, there was one intervening act of private choice—the decision by Mr. Witters to attend a religious school and thus to endorse the school's religious teachings. Here, there are several intervening private decisions by the student actors. First, under the Pre-Game Ceremony Policy, the students choose whether to include a

message or invocation in the pre-game ceremony. If they do not wish to include such message or invocation, there would be no religious endorsement, private or otherwise, in the pre-game ceremony. Second, should the student body choose to have a message or invocation, individual students, like amici student speakers, may choose whether to volunteer as a prospective student speaker. Third, the students would then choose a speaker from the student volunteers. The student body makes this choice without foreknowledge of the messages or invocations each volunteer plans to give throughout the season. Indeed, the school prohibits on-campus campaigning by or on behalf of individual volunteers and thus ensures that the religious content of future messages or invocations would not be a factor during the selection process.

Finally, the selected student speaker chooses what to say in her message or invocation. She retains complete control over the religious content, or lack thereof, of the speech she is to give. This last intervening step, the student speaker's independent decision whether to invoke religious themes, is analogous to the private decision whether to attend a religious school in *Witters*. The Court held in *Witters* that the single intervening private action meant that "the decision to support religious education is made by the individual, not by the State." *Id.* This unanimous holding means *a fortiori* that the multiple intervening private decisions here render any endorsement of religion the result of private choices made by the students, not by the State.

Lee v. *Weisman*, 505 U.S. 577 (1992), is not to the contrary. The graduation prayer in that case violated the Establishment Clause because it "bore the imprint of the State." *Id.* at 590. There, the school principal decided that the graduation ceremony would include an invocation and a benediction; he chose

the religious figure to give those speeches; and he "directed and controlled the content of the prayers." *Id.* at 587-88. In these three ways, the school substantially involved itself in the graduation prayer. Here, students decide whether to have a message or invocation; students select the speaker from their peers to deliver the message or invocation; and the student speaker chooses and controls the content of the message or invocation. In each way the school controlled the prayer offered in *Lee*, therefore, Petitioner has renounced control here.

Three Justices recognized in *Lee* that "[i]f 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 630 n.8 (Souter, J., concurring, joined by Stevens & O'Connor, JJ.) (citing *Witters*, *supra*). Under the contested policy, student speakers would be selected according to secular criteria and would choose individually whether to deliver a religious message. And the message or invocation that the student speakers would deliver is even more free from government control than that hypothesized by the concurring Justices in *Lee*: It is the students, not the school, who would decide whether to have a message or invocation in the first place. In short, any endorsement of religion that the student speakers may offer during the pre-game ceremonies would result from the private choices of the students, with no input, interference, or control by the administration.

B. The Court's State Action Jurisprudence Under the Due Process Clause of the Fourteenth Amendment Reinforces the Crucial Distinction Between Private Expression and State Endorsement Under the First Amendment.

The distinction between private choice and state action here parallels the Court's jurisprudence applying the Due Process Clause of the Fourteenth Amendment.[6] In that context, "the conduct of a private actor is not subject to constitutional

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[6] The question presented is whether the district's Pre-Game Ceremony Policy violates the Establishment Clause, and that clause applies to the States only through its incorporation into the Due Process Clause of the Fourteenth Amendment. See *Everson* v. *Board of Ed. of Township of Ewing*, 330 U.S. 1, 15 (1947); *Cantwell* v. *Connecticut*, 310 U.S. 296, 303 (1940). Accordingly, cases distinguishing private decisions from state action for purposes of the Fourteenth Amendment reinforces the analysis here. See *United Bhd. of Carpenters & Joiners of Am., Local 610* v. *Scott*, 463 U.S. 825, 832 (1983) (holding that because the First Amendment is binding upon the states through the Fourteenth Amendment's Due Process Clause, "a conspiracy to violate First Amendment rights is not made out without proof of state involvement"); *Montano* v. *Hedgepeth*, 120 F.3d 844, 848 (8th Cir. 1997) (same for a Free Exercise claim). Finding state action concomitant with a private decision, however, is a necessary but not sufficient condition for an Establishment Clause violation. Only if the state action also constitutes endorsement of religion or leads to excessive entanglement with religion has a violation occurred. See John H. Garvey, *The Architecture of the Establishment Clause*, 43 WAYNE L. REV. 1451, 1461-62 (1997). Requiring state endorsement or excessive entanglement, in addition to state action under the Due Process Clause, ensures that the rights of private individuals under the Free Exercise and Free Speech Clauses are given sufficient protection.

challenge if such conduct is 'fundamentally a matter of private choice and not state action.'" *Lebron* v. *National R.R. Passenger Corp.*, 513 U.S. 374, 409 (1995) (O'Connor, J., dissenting) (quoting *Edmonson* v. *Leesville Concrete Co.*, 500 U.S. 614, 632 (1991) (O'Connor, J., dissenting)).[7] That is so because of the essential dichotomy "between deprivation by the State, subject to scrutiny under its provisions, and private conduct, 'however discriminatory or wrongful,' against which the Fourteenth Amendment offers no shield." *Jackson* v. *Metropolitan Edison Co.*, 419 U.S. 345, 349 (1974) (quoting *Shelley* v. *Kraemer*, 334 U.S. 1, 13 (1948)) (citing *The Civil Rights Cases*, 109 U.S. 3 (1883)). The purpose of the Fourteenth Amendment "was to protect the people from the State, not to ensure that the State protected them from each other," *DeShaney* v. *Winnebago County Dep't of Social Serv.*, 489 U.S. 189, 196 (1989), and the state action requirement ensures "that constitutional standards are invoked only when it can be said that the State is *responsible* for the specific conduct of which the plaintiff complains." *Blum* v. *Yaretsky*, 457 U.S. 991, 1004 (1982).

The school district in this case simply authorizes and acquiesces in the students' private choices, and "[m]ere approval of or acquiescence in the initiatives of a private party

[7] Similarly, with respect to the Equal Protection Clause of the Fourteenth Amendment, this "Court has never held, of course, that discrimination by an otherwise private entity would be violative of the Equal Protection Clause if the private entity receives any sort of benefit or service at all from the State, or if it is subject to state regulation in any degree whatever." *Moose Lodge No. 107* v. *Irvis*, 407 U.S. 163, 173 (1972); see also *Reitman* v. *Mulkey*, 387 U.S. 369, 380 (1967) (stating that private discrimination violates the Fourteenth Amendment only when the State has "significantly involved itself with invidious discriminations").

is not sufficient to justify holding the State responsible for those initiatives under the terms of the Fourteenth Amendment." *Blum*, 457 U.S. at 1004-05; accord *San Francisco Arts & Athletics, Inc.* v. *United States Olympic Comm.*, 483 U.S. 522, 547 (1987); *Flagg Bros., Inc.* v. *Brooks*, 436 U.S. 149, 164 (1978). Students are not employees or designated agents of the state; they are private individuals seeking to engage in private action. Under the contested policy, students choose whether to have a speech, whether to run for the position of speaker, who to have as the speaker, and whether to include religious content in the speech. But for each of these private decisions, there would be no religious content in the pre-game message or invocation. In this entire series of decisions, all of which are fundamentally a matter of the students' private choices, the only involvement of the school district is that it abides by their result.

Simply because the school district, by adopting the Pre-Game Ceremony Policy, has erected the platform on which amici student speakers would express their private sentiments, the district "does not thereby become responsible for all that occurs upon it." *Edmonson*, 500 U.S. at 632 (O'Connor, J., dissenting). Instead, the state "can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." *Blum*, 457 U.S. at 1004; accord *Edmonson*, 500 U.S. at 632 (O'Connor, J., dissenting).[8] But the contested policy was

[8] State action, of course, can also be found when "the State's own actions (operating the forum in a particular manner and permitting the religious expression to take place therein), and their relationship to the private speech at issue, *actually convey* a message of endorsement." *Capitol Square Review & Advisory Board* v. *Pinette*, 515 U.S. 753, 777 (1995) (O'Connor, J., concurring in part

adopted pursuant to a district court order prohibiting any on-campus campaigning during the student election or any school scrutiny of or control over the student speech. Therefore, the record indicates that the school district cannot coerce, encourage, or otherwise affect any private decision whether to infuse religious content into the message or invocation.

Finally, it is irrelevant to the state action analysis that the district exercises general control over other aspects of the pre-game ceremony. Although a school may determine, say, the time of the ceremony or the order of events, it exercises no specific control over the relevant action—the content of the message that a student speaker would deliver if elected by her peers. Under settled law, a regulated entity's decision constitutes state action only to the extent that the government actually regulates that specific decision. See *San Francisco Arts & Athletics*, 483 U.S. at 547 n.29; *Rendell-Baker* v. *Kohn*, 457 U.S. 830, 841 (1982); *Moose Lodge*, 407 U.S. at 177-78; see also *Lebron*, 513 U.S. at 412 (O'Connor, J., dissenting) ("Although a number of factors indicate the Government's pervasive influence in Amtrak's management and operation, none suggest that the Government had any effect on Amtrak's decision to turn down Lebron's proposal."). Whatever control the district exercises over the pre-game ceremony generally, it has expressly disavowed any influence over the decision to have a student speech during that ceremony, over the selection of the speaker, and over the religious content of the speech. Thus, the student-initiated, student-led, and student-controlled prayer

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and concurring in the judgment). In this case, however, a reasonable observer could not view the school district's decision to permit students to speak during the pre-game ceremony as a state endorsement of religion. *See infra* Part II.

simply cannot be deemed state action violative of the Constitution.

II. Because Students Initiate, Lead, and Control the Message or Invocation During the Pre-Game Ceremony, a Reasonable Observer Would Not Perceive Any Government Endorsement of Any Religious Content in the Message or Invocation.

"The proposition that schools do not endorse everything they fail to censor is not complicated." *Mergens*, 496 U.S. at 250 (plurality opinion). Therefore, a reasonable observer would not perceive any impermissible state endorsement of religion from the pre-game message or invocation that students initiate, lead, and control. To avoid an Establishment Clause violation, it is important "that a government practice not have the effect of communicating a message of government endorsement or disapproval of religion." *Lynch*, 465 U.S. at 692 (O'Connor, J., concurring). In this case, the school district has not sent "a message to nonadherents that they are outsiders, not full members of the political community." *Id.* at 688. It has not sent a message at all, other than that it respects the students' freedom to decide for themselves whether and what message they would voluntarily convey.

Expressions of faith by private individuals, of course, may be seen as an impermissible state endorsement of religion if the government has adopted or otherwise involved itself with the private speech. See, *e.g.*, *Rosenberger*, 515 U.S. at 841-42; *Wallace*, 472 U.S. at 60 n.51. Whether there is government endorsement of religion turns on the objective perception of a reasonable, informed observer, and not on the subjective intent of government actors. See *Capitol Square*, 515 U.S. at 773 (O'Connor, J., concurring in part and concurring in the judg-

ment, joined by Souter & Breyer, JJ.); *id.* at 799 (Stevens, J., dissenting, joined by Ginsburg, J.); see also *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 620 (1989) (Blackmun, J.); *id.* at 635-36 (O'Connor, J.); *id.* at 642-43 (Brennan, J., joined by Marshall and Stevens, JJ.). In some cases, the distinction between objective perception and subjective intent may well figure prominently. Compare *Capitol Square*, 515 U.S. at 765-67 (plurality opinion), with *id.* at 774-75 (O'Connor, J., concurring in part and concurring in the judgment.). That distinction is of little moment in this case, however, because no reasonable observer would perceive a state endorsement of the private expressions of faith in the student-initiated, student-led, and student-controlled message or invocation.

The Pre-Game Ceremony Policy neither prescribes nor proscribes religious speech. Instead, it permits students to decide whether to have speech, who among them would speak, and what to say. The Fifth Circuit's decision that such permission constitutes endorsement of religion ignores the fundamental distinction between government action and private conduct. It would make schools responsible for and thus force them to censor all speech that happens on school grounds. It would turn all student speakers at all school-sponsored events—whether homecoming dances, student government elections, or drama productions—into state actors for Establishment Clause purposes. A clearer threat of education by litigation and administration through obstruction could hardly be imagined.

Amici who attend football games share the school district's interest in solemnizing the event, promoting good sportsmanship and student safety, and establishing the appropriate environment for competition. As reasonable observers, "aware of the history and context of the community and forum,"

Capitol Square, 515 U.S. at 780 (O'Connor, J., concurring in part and concurring in the judgment), amici understand that the pre-game student message or invocation exists in order to further these secular objectives. They also understand that the school district has simply permitted students to decide whether to have a message or invocation, to select the speaker, and to choose the content of the message, and acquiesced in the students' decisions in those regards. They recognize that any religious content in the message or invocation results from the students' private decisions and actions—just as surely as they recognize that when a player scores a touchdown, it is his and his teammates' achievement and not the school's action, even though the players compete on a school gridiron, under school lights, and with school uniforms. They may applaud or disparage the effort (depending on which team scores) just as they may agree or disagree with the student's message or invocation, but they would not, and cannot reasonably, attribute the action to the school district.

First, any "aid to religion at issue here is the result of [amici's] private choice. No reasonable observer is likely to draw from the facts before us an inference that the State itself is endorsing a religious practice or belief." *Witters*, 474 U.S. at 493 (O'Connor, J., concurring in part and concurring in the judgment). Although a school may censor or punish student speech to "disassociate itself" from that speech and to ensure "that the views of the individual speaker are not erroneously attributed to the school," *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271-72 (1988) (quoting *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986)) (internal quotation marks omitted), the Fifth Circuit erred in adopting the converse proposition: "[W]hen the school 'permits' sectarian and proselytizing prayers . . . such 'permission' undoubtedly conveys a message not only that the government endorses

religion, but that it endorses a particular form of religion." *Doe* v. *Santa Fe Indep. Sch. Dist.*, 168 F.3d 806, 817-18 (5th Cir. 1999).

Permission cannot "undoubtedly" equal endorsement, for education cannot occur without space for student expression that is neither enjoined nor endorsed by the school. The existence of such a space is especially important with respect to religious speech, because the "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. Amici student speakers' message would fall within that space of permission, and a reasonable, informed observer would not conclude that the school had endorsed that speech. See *Mergens*, 496 U.S. at 250 (plurality opinion) ("The proposition that schools do not endorse everything they fail to censor is not complicated."); see also *Chandler* v. *James*, 180 F.3d 1254, 1261 (11th Cir. 1999) ("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.").

Second, the student speaker is selected according to secular criteria. Students make the initial decision whether to have a pre-game message or invocation, without encouragement or endorsement by the school. Any campaigning—secular or otherwise, by school officials or by students—would be prohibited. The opportunity to volunteer as a speaker-candidate in the subsequent election is available to all students, including some who want to pray and those, like some amici, who want to offer secular words in accordance with the goals and purposes of the policy. Such openness of the forum to a wide variety of

viewpoints properly informs the judgment whether the government had endorsed any religious message ultimately expressed. See, *e.g.*, *Rosenberger*, 515 U.S. at 850 (O'Connor, J., concurring); *Mergens*, 496 U.S. at 252 (plurality opinion); *Widmar*, 454 U.S. at 274. The competition to serve as speaker is open to all students on a nondiscriminatory basis, regardless of any future messages they may give.[9] And the students choose among the volunteer speakers without regard to the content of any future messages, for the simple fact that such information is not available because candidates are prohibited from campaigning on campus.

Third, the school district adopted the Pre-Game Ceremony Policy for three express secular purposes: "to solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition." Pet. App. F1. This express statement of the secular purposes behind government action should be reviewed deferentially. See *Edwards* v. *Aguillard*, 482 U.S. 578, 586 (1987); *Wallace*, 472 U.S. at 74-75 (O'Connor, J., concurring in the judgment); *Mueller* v. *Allen*, 463 U.S. 388, 394-95 (1983). Unmindful of the deference due and without any factual support, the Fifth Circuit declared the school district's express statement of

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[9] This is not the "harder case where religious speech threatens to dominate the forum." *Rosenberger*, 515 U.S. at 850-51 (O'Connor, J., concurring); accord *Capitol Square*, 515 U.S. at 777 (O'Connor, J., concurring in part and concurring in the judgment). The complaint is a facial challenge to a policy that has yet to go into effect, and there is no "empirical evidence that religious groups will dominate [the school's] open forum." *Widmar*, 454 U.S. at 275; see also *Bowen* v. *Kendrick*, 487 U.S. 589, 623 (1988) (O'Connor, J., concurring) (denying a facial challenge because the contested statute "need not result in constitutional violations").

purpose to be a "sham." See *Santa Fe*, 168 F.3d at 816-17. But surely a school can believe that a short speech, say, to promote good sportsmanship is appropriate during a pre-game ceremony. If the school delegates to students the decision whether to have such a speech and who among them to speak, the secular purpose is not rendered a "sham" simply because a student speaker chooses to promote good sportsmanship through prayer. The lower court thus repeats here its erroneous "permission equals endorsement" approach, a mistake that no observer—at least no reasonable, informed observer—would make.

The school district's actions in adopting the Pre-Game Ceremony Policy evinced the exact opposite of an "intent to encourage children to choose prayer over other alternatives." *Wallace*, 472 U.S. at 77 (O'Connor, J., concurring in the judgment). The school district originally formulated, at the district court's direction, a Prayer at Football Games Policy permitting student "invocations." See *Santa Fe*, No. G-95-176, at 6 (interim order); *Santa Fe*, No. G-95-176, at 1-2 (interim order pertaining to prayer at football games). A few months later, the school district broadened that policy and allowed students to deliver secular "messages" and "statements." See Pet. App. F1-F2. Unlike the amendment to Alabama's moment of silence law invalidated in *Wallace*, which gratuitously reminded students of a pre-existing legal right to pray, see *Wallace*, 472 U.S. at 77, the school district here expanded the non-prayer opportunities available to the students. In addition, the district was simply attempting to advance its secular purposes in light of rapidly changing, confusing, and flatly contradictory pronouncements from different panels of the Fifth Circuit. Compare *Ingebretsen* v. *Jackson Pub. Sch. Dist.*, 88 F.3d 274 (5th Cir. 1996), and *Doe* v. *Duncanville Indep. Sch. Dist.*, 70 F.3d 402 (5th Cir. 1995), with *Jones* v. *Clear Creek Indep. Sch. Dist. (Clear Creek II)*, 977 F.2d 963 (5th Cir. 1992);

see also *Doe*, 171 F.3d at 1016 (Jolly, J., dissenting from denial of rehearing en banc) ("Upon reading *Santa Fe*, *Ingebretsen*, and *Clear Creek II*, it seems, with regard to the Establishment Clause, that panels of our court pay little regard to previous jurisprudence. One might think that a specific holding of a prior opinion is no more than a puff of wind.").

Finally, that a student speaker may convey religious sentiments over a public address system at a school-sponsored event is of little moment in the endorsement analysis. "When an individual speaks in a public forum, it is reasonable for an observer to attribute the speech, first and foremost, to the speaker," *Capitol Square*, 515 U.S. at 786 (Souter, J., concurring in part and concurring in the judgment), especially where the school has renounced all involvement in and control over the individual's speech. See *Rosenberger*, 515 U.S. at 834-35 (noting the strict separation between the University and the student groups); *id.* at 849-50 (O'Connor, J., concurring) (same). The school district here adopted the Pre-Game Ceremony Policy with an express statement of secular purposes. Students select the speaker from their peers according to secular criteria. And any religious content in the message or invocation would result solely from the intervening exercise of private choices. On these facts, there is no reasonable inference that the State itself is endorsing a religious practice or belief.

Lee v. *Weisman*, again, is not to the contrary. In a high school graduation, "the state-imposed character of an invocation and benediction by clergy selected by the school combine to make the prayer a state-sanctioned religious exercise in which the student was left with no alternative but to submit." *Lee*, 505 U.S. at 597. A student speaker, selected by students, with complete control over her speech has no "state-imposed character." Moreover, the atmosphere of a football game differs from

that of a graduation in a number of significant ways. First, a football game is a community event, drawing in people who would not attend a graduation because they are neither students nor their relatives. Such public attraction and open attendance distance the event from identification with the school or its instructional mission. Second, graduation is the culminating event of a high school education, and thus a student has little practical choice whether to attend the ceremony. See *id.* at 595. By contrast, a football game is a noninstructional extracurricular activity—one, of course, that nevertheless has much formative value. Participation in such an activity and attendance at the event is truly an exercise of voluntary choice. Even if "the possibility of *student* peer pressure remains . . . there is little if any risk of official state endorsement or coercion when no formal classroom activities are involved and no school officials actively participate." *Mergens*, 496 U.S. at 251 (plurality opinion). Third, school officials at football games exercise significantly less control over "the timing, the movements, the dress, and the decorum of the students" than at a graduation. *Lee*, 505 U.S. at 597. Students are generally free to wear what they want, sit where they like, and do as they please. Indeed, this minimal level of control reinforces the school district's interest in promoting solemnity, student safety, and friendly competition—an interest that all amici who attend football games share.

III. The Pre-Game Ceremony Policy Reasonably Reconciles the School's and Amici's Interest in Promoting Private Expression Consistent with the Purposes of the Policy and the Constitutional Prohibitions Against Excessive Entanglement with Religion and Viewpoint Discrimination.

Far from violating the Establishment Clause, the school district's Pre-Game Ceremony Policy represents a sensible and reasonable reconciliation of the interests at stake. Amici have an interest in offering and hearing an expression of solemnity or private faith that promotes safe and friendly competition. The school district, although it does not share amici's interest in religious expression, shares their interest in establishing a solemn environment for the ensuing competition. In addition, the school district has an interest in offering its students experiences that will contribute to their personal growth, as reflected in the noninstructional extracurricular activities it sponsors and the opportunities it provides students to express themselves in public.

Most important, the school district has yet a third set of interests—compliance with the constitutional prohibitions against excessive entanglement with religion and viewpoint discrimination. The Establishment Clause proscribes the state from "excessive entanglements" with religion. See *Agostini*, 521 U.S. at 233. That prohibition requires neither hostility toward religion nor a complete lack of involvement in religious matters. The former would be as offensive to the Constitution as a preference for a particular religion. See, *e.g.*, *Mergens*, 496 U.S. at 248 (plurality opinion); *County of Allegheny*, 492 U.S. at 610-11; *Lynch*, 465 U.S. at 688 (O'Connor, J., concurring). The latter is impossible in a society such as ours, in which "church and state must necessarily operate within the same

community." *Wallace*, 472 U.S. at 69 (O'Connor, J., concurring in the judgment); see *Agostini*, 521 U.S. at 233; *Lynch*, 465 U.S. at 672-73.

Moreover, the religious expression of amici student speakers "is as fully protected under the Free Speech Clause as secular private expression." *Capitol Square*, 515 U.S. at 760. The district has enabled a student, with the support of her classmates, to offer a message solemnizing the event and promoting sportsmanship and safety; it cannot discriminate against her simply because she wants to express that message from a religious viewpoint. See *Rosenberger*, 515 U.S. at 828-32.

The Pre-Game Ceremony Policy charts a careful course through these competing interests without running aground on any of them. Indeed, by offering an opportunity for student-initiated, student-led, and student-controlled speech free from both state discrimination among viewpoints and state entanglement with religion, the policy charts the best course as compared to the two known alternatives.

First, invalidating the school district's contested policy would lead to the automatic implementation of the alternative policy, which requires the student message or invocation to be nonsectarian and nonproselytizing. This alternative raises the threat of a dual constitutional violation. First, the prohibition against sectarian and proselytizing speech may require school officials to discriminate among viewpoints and thereby to infringe the students' right to express themselves through religious speech. Second, by prompting the district to police student messages and censor sectarian and proselytizing words and sentiments from student prayers, the alternative policy threatens an excessive state entanglement in matters of religion.

The experience of amicus Katherine Furley (née Hackleman) illustrates the dual danger of excessive entanglement and impermissible viewpoint discrimination. Consistent with the Fifth Circuit's decision in *Santa Fe*, the Aledo Independent School District permits only "nonsectarian and nonproselytizing" prayers at graduation ceremonies. Appended to this brief is the text of Ms. Furley's proposed graduation speech, which she was required to submit to school officials for pre-clearance. School officials and their attorney reviewed the speech and censored words they considered to violate the prayer policy; their deletions are marked by strikeouts on the appended speech. Among the changes insisted by the school are the substitution of "God" for "Heavenly Father" and the deletion of the following: "Thank you for having a plan to prosper us and not to harm us. Lord as we open this ceremony we recognize before you our sin and ask you to renew us"; "Help us to lean on you for direction and follow in your footsteps. There is no good aside from you"; "Let us take on the likeness of you"; and, finally, "We love you." See *Furley* v. *Aledo Indep. Sch. Dist.*, at 2-3, No. 4:99-CV-0416-A (N.D. Tex. Oct. 20, 1999) (memorandum opinion and order).

These prior restraints not only evince a hostility toward religion but also underscore the elusive distinctions necessary to draw the line between ecumenical and sectarian prayers. How does "God" differ from "Heavenly Father"? Why is it permissible to look to Kant or Nietzsche for guidance but not to ask God to "[h]elp us lean on you for direction and follow in your footsteps"? And what, exactly, is wrong with saying, "We love you"? Allowing—nay, requiring—school officials to make these metaphysical judgments invites excessive entanglement with religion (God versus Heavenly Father) and impermissible viewpoint discrimination (God versus Nietzsche). Indeed, because the school has extensively censored the message, a

reasonable observer would likely attribute to the school the content of the prayer—which, even after editing, invokes God's help for guidance and protection and may constitute an endorsement of religion. Confronted with such a constitutional quagmire, a school district may well decide to eliminate opportunities for student speech—including for the secular messages that would be offered by some amici student speakers.

Second, the Fifth Circuit struck down the Pre-Game Ceremony Policy in its entirety on the startling ground that the messages or invocations "are to be delivered *at football games*—hardly the sober type of annual event that can be appropriately solemnized with prayer." *Santa Fe*, 168 F.3d at 823 (emphasis in original). Not only does this decision require the school district to engage in viewpoint discrimination and excessive entanglement[10] and thwarts the school's and amici's interest in promoting student expression, but it also rests upon an absurd mischaracterization of the event at which amici wish to speak.

The Fifth Circuit's opinion bespeaks a striking lack of appreciation for commonplace displays of solemnity during sporting events. The national anthem, for example, plays before

[10] To ensure that a student speaker did not use religious words in violation of the Fifth Circuit's holding, a school official would have to stand ready to censor any such words as they are uttered or would have to punish their use after the fact. The school would thus treat student prayer and student profanity equally. The school district interpreted the Fifth Circuit's decision in just this manner. See Patty Reinert, *Battle Over School Prayer Moves to Football Fields*, HOUS. CHRON., Oct. 17, 1999, at 1 (State section) (reporting that school officials "threatened to punish any student who used the pregame 'message' to praise God, just as they would discipline a student who used the school's loudspeaker to utter a curse.").

the start of virtually every athletic contest; in a show of respect, players and spectators stand at attention while the anthem plays. Teams engage in rituals of sportsmanship before and after the game, with the athletes shaking hands to solemnize the competition. Finally, one need look only to international sporting competitions—say, the Olympics or the World Cup—to recognize the pomp and grandeur that accompany each contest of athletic skill.

A high school football game gathers together the community in support of healthy competition in a sport that promotes teamwork, leadership, and individual fortitude. It is a community event. Like all such events, the game presents the town with an opportunity to celebrate its unity and to recognize the accomplishments of its youth. It is an "occasion when many citizens feel the need for serious thoughts and words." *Santa Fe*, 168 F.3d at 835 (Jolly, J., dissenting). Private acknowledgments of religion during the pre-game ceremony 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." *Lynch*, 465 U.S. at 693 (O'Connor, J., concurring).

CONCLUSION

For the foregoing reasons, as well as those set forth in the Brief for Petitioner, the decision below should be reversed.

Respectfully submitted,

VIET D. DINH
SCOTT H. ANGSTREICH
600 New Jersey Ave., NW
Washington, DC 20001
(202) 662-9000

JOHN L. CARTER*
VIET D. DINH, LLC
120 S. Fairfax St., Suite 300
Alexandria, VA 22314
(703) 549-0049

Counsel for Amici Curiae

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**Counsel of Record*