GRANTED

No. 99-62

IN THE

Supreme Court of the United States

SANTA FE INDEPENDENT SCHOOL DISTRICT,

Petitioner,

v.

JANE DOE, Individually and as next of friend for her Minor Children, Jane and John Doe, Minor Children; and, JANE DOE #2, Individually and as next of friend for her Minor Child, John Doe, Minor Child, and John Doe, Individually,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF *AMICUS CURIAE* THE TEXAS ASSOCIATION OF SCHOOL BOARDS LEGAL ASSISTANCE FUND IN SUPPORT OF PETITIONER

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The Texas Association of School Boards Legal Assistance Fund ("TASB LAF") respectfully submits this brief as *amicus curiae* in support of Petitioner Santa Fe Independent School District.[1]

INTEREST OF AMICUS

Nearly 750 public school districts in Texas are members of the TASB LAF, which advocates the positions of local school districts in litigation with potential state-wide impact.[2] The TASB LAF is governed by three organizations: the TASB, the Texas Association of School Administrators, and the Texas Council of Schools Attorneys.

The TASB is a non-profit unincorporated association of the public school districts of the State of Texas. Approximately 1,047 public school districts in the state, through their elected boards of trustees, have joined as members of TASB. The members of TASB are responsible for the governance of the public schools of Texas. *See* TEX. EDUC. CODE § 11.151(b) & (d).

The Texas Association of School Administrators represents the state's school superintendents and other administrators who are responsible for carrying out the education policies adopted by their local boards of trustees.

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1. The TASB LAF has received the consent of Petitioner Santa Fe Independent School District and Respondents Jane Doe and Jane Doe #2. The written consents of both parties are being filed herewith. Neither party authored this brief, in whole or part, or paid any of the costs of producing it.

2. See Appendix A for a list of participating school districts.

The Texas Council of School Attorneys is comprised of attorneys who represent more than ninety-percent of the public school districts in Texas.

The TASB Legal Assistance Fund urges this Court to reverse the decision of the court below. The Fifth Circuit's decision is too far-reaching in its condemnation of student-initiated, student-led, nonsectarian, nonproselytizing prayer at high school football games. TASB LAF maintains that a pre-game prayer policy modeled after the high school graduation Resolution upheld in *Jones v. Clear Creek Independent School District*, 977 F.2d 963 (5th Cir. 1992), *cert. denied*, 508 U.S. 967 (1993), does not offend Establishment Clause protections.

SUMMARY OF ARGUMENT

A conflict has been raging in the public schools for more than a decade concerning the extent to which prayer can be permitted during certain school-related activities without running afoul of the Establishment Clause and its protections against state-sponsored religion. School districts, unfortunately, have been caught in the crossfire of two opposing camps: those who seek to freely exercise their religious beliefs in school-sponsored venues and those who seek to eradicate religious expression entirely.

In the face of such controversy, many school districts have had no choice but to develop and implement "prayer" policies that seek to achieve some balance between the competing interests. The Fifth Circuit Court of Appeals approved of one such policy in *Jones v. Clear Creek Independent School District*, 977 F.2d 963 (5th Cir. 1992), *cert. denied*, 508 U.S. 967 (1993) ("*Clear Creek II*"). In that

decision, the court upheld a policy permitting the inclusion of student-led, student-initiated invocations or benedictions in high school graduation ceremonies, so long as the prayer is both nonsectarian and nonproselytizing in nature.[3] The Fifth Circuit's decision in *Clear Creek II* has since served as a reference point for school boards across the country in their efforts to afford those who wish to pray during school-sponsored events the opportunity to do so in a manner that does not offend the Establishment Clause.

In an apparent attempt to take the Santa Fe Independent School District to task for attempting to eliminate the "nonsectarian, nonproselytizing" element from its prayer policies, the Fifth Circuit's decision below unduly restricts the holding and analysis in *Clear Creek II* to high school graduation ceremonies. For the reasons set forth below, *amicus curiae* urges this Court to reverse, at a minimum, that portion of the Fifth Circuit's decision holding that a *Clear Creek*-type policy cannot be extended to high school football games. Specifically, the Fifth Circuit's decision erroneously concludes that a *Clear Creek*-type prayer policy

3. The Resolution at issue in *Clear Creek II* provided as follows:

> 1. The use of an invocation and/or benediction at high school graduation exercise shall rest within the discretion of the graduating senior class, with the advice and counsel of the senior class principal;
>
> 2. The invocation and benediction, if used, shall be given by a student volunteer; and,
>
> 3. Consistent with the principle of equal liberty of conscience, the invocation and benediction shall be nonsectarian and nonproselytizing in nature.

cannot exist "outside [the] nurturing context [of a graduation ceremony]." In reaching this conclusion, the Fifth Circuit failed to consider the unique context in which pre-game prayer occurs and whether the same type of considerations that justify prayer at graduation ceremonies may also be present in the context of high school football games. Additionally, the court below failed to analyze the Santa Fe "fall-back" football prayer policy under the three Establishment Clause tests enunciated by this Court in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), *Lee v. Weisman*, 505 U.S. 577 (1992), and *County of Allegheny v. ACLU*, 492 U.S. 573 (1989).[4]

ARGUMENT

I. High school football games are not inherently different in context and nature than high school graduation ceremonies.

The Fifth Circuit erroneously concluded, in summary fashion, that Santa Fe's "fall-back" policy does not pass constitutional muster because a football game is inherently different in context and nature from a graduation ceremony. In so holding, the court below failed to recognize the unique place that high school football occupies in the fabric of numerous communities across the country. In particular, the

4. Consistent with the *Clear Creek* Resolution, Santa Fe's so-called "fall-back" football policy provides for a student-initiated, student-led "brief invocation and/or message" of a nonsectarian and nonproselytizing nature "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." *Doe v. Santa Fe Indep. Sch. Dist.*, 168 F.3d 806, 812 (5th Cir. 1999).

Fifth Circuit overlooked the fact that, for many citizens, the "Friday night lights" of high school football are an "integral part of what [makes] the community strong." H.G. Bissinger, *Friday Night Lights: A Town, a Team, and a Dream*, p. 43 (1990).[5]

5. The role that high school football occupies in the "psyche" of many communities is chronicled in H.G. Bissinger's account of the 1988 season of the Odessa, Texas Permian Panthers in *Friday Night Lights* (1990).

> In the absence of a shimmering skyline, the Odessas of the country had all found something similar in which to place their faith. In Indiana, it was the plink-plink-plink of a ball on a parquet floor. In Ohio and Pennsylvania and Alabama and Georgia and Texas and dozens of other states, it was the weekly event simply known as Friday night. . . . From the twenties through the eighties, whatever else there hadn't been in Odessa, there had always been high school football.

Id. at 35.

> There were certain events in Odessa that had become time-honored traditions, essential elements in the biological clock of the town. There was the annual downtown Christmas tree-lighting ceremony sponsored by the banks. . . . There was the biennial Oil Show. . . . And, of course, in late August, there was the Permian [football] booster club's Watermelon Feed, when excitement and madness went quickly into high gear. . . . [T]he boys of Permian would come before the crowd one by one so they could be checked out and introduced. And after that, in less than two weeks, would come the glorious start of the season on the first Friday night in September.

Id. at 37-38.

Contrary to what the Fifth Circuit concluded, the "context" and "nature" of a high school football game are, in fact, very similar to that of a high school graduation ceremony in a number of important respects. First, a high school football game — like a graduation ceremony — can take on all of the trappings of a major community-wide social event, complete with the kind of attendance that is reserved for other special or "rite of passage" occurrences. Second, a high school football game affords student participants (*e.g.*, athletes, band members, cheerleaders, the pep squad) the opportunity for public recognition and support that would not otherwise be available to them. And, third, a high school football game, and all of the activity that surrounds the game, can serve as the very embodiment of a community's civic pride.

> [Football] is a game, an extracurricular activity, a community bond, the state religion, the biggest show in town every Friday night in the fall, a character builder, a revered symbol, an inspirational rallying point that offers a rare moment — more like 48 minutes — in which all races, religions, and economic strata put aside their differences to get behind the home team, a traffic generator for the local Dairy Queen, and topic A in coffee shops from Roscoe . . . to Itasca.

"Three Cheers for High School Football," *Texas Monthly Magazine*, p. 111, Oct. 1999.

Given the similarities between their context and nature, the Fifth Circuit clearly erred in holding that a *Clear Creek*-type policy cannot be extended from graduation ceremonies to high school football games. Indeed, in view of the

importance that high school football serves in the life of a community, "people should not be surprised to find the event affected by community standards." *Clear Creek II*, 977 F.2d at 972.

II. A policy permitting student-initiated, student-led, nonproselytizing, nonsectarian prayer at high school football games withstands constitutional scrutiny under this Court's Establishment Clause tests.

The Fifth Circuit failed to evaluate Santa Fe's "fall-back" policy under this Court's Establishment Clause tests, instead declaring in a conclusory fashion that football games are "hardly the sober type of event that can be appropriately solemnized with prayer." Had the Fifth Circuit undertaken such analysis, Santa Fe's "fall-back" policy would have been found to survive constitutional scrutiny under the tests announced by this Court in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), *Lee v. Weisman*, 505 U.S. 477 (1992), and *County of Allegheny v. ACLU*, 492 U.S. 573 (1989).

A. The *Lemon* Test.

Santa Fe's "fall-back" policy articulates three secular purposes for the inclusion of a pre-game prayer or invocation: (1) solemnization; (2) promotion of good sportsmanship and student safety; and, (3) establishment of the appropriate environment for the competition. Although the court below did not apply the *Lemon* test to Santa Fe's football policy specifically, the Fifth Circuit, nevertheless, questioned whether a football game is the type of event that can be solemnized with a prayer.

While, admittedly, a football game is not, in all things, the same "sober" event that a graduation ceremony is, the

Fifth Circuit's opinion discounts the importance of injecting a sobering influence into what is otherwise an emotional and often violent affair. Indeed, that is the very purpose of a pregame invocation: to cause all of those in attendance, spectators and participants alike, to pause in recognition of the need for civility in their endeavors.

Santa Fe's "fall-back" policy satisfies the effect and endorsement prongs of the *Lemon* test, as well. Unlike the prayer policies at issue in *Jager v. Douglas County Sch. Dist.*, 862 F.2d 824 (11th Cir. 1989), and *Doe v. Duncanville*, 70 F.3d 402 (5th Cir. 1995), the Santa Fe policy does not provide for inherently-religious invocations or prayers. The "fall-back" policy's requirements that a pre-game invocation be (1) "student initiated," (2) "student led," *and* (3) "nonsectarian and nonproselytizing" protect against the conveyance of any religious message that is either endorsed or disapproved of by the School District. *See Clear Creek II*, 977 F.2d at 967 (a policy "can only advance religion by increasing religious conviction . . . , which means attracting new believers or increasing the faith of the faithful").

B. *Lee's* "Coercion" Test.

In *Lee*, this Court defined unconstitutional coercion as (1) government direction (2) of a formal religious exercise (3) that obliges the participation of objectors. *See* 505 U.S. at 591-94. Employing this analysis, Santa Fe's "fall-back" policy does not implicate any of the elements of coercive effect. First, the District's policy does not serve to "direct" religious activity as defined by *Lee* because the District is not determining whether an invocation will occur; the District is not selecting a religious participant (*e.g.*, a rabbi or priest); and, the District does not direct the specific content of the prayer. *See id.*

Second, Santa Fe's "fall-back" policy does not implicate formal religious observance of any kind. To the contrary, like the Resolution at issue in *Clear Creek II*, the "fall-back" policy "tolerates nonsectarian, nonproselytizing prayer, but does not require or favor it." *See Clear Creek II*, 977 F.2d at 971.

Finally, Santa Fe's "fall-back" policy does not oblige participation. Those students who choose to attend a particular football game will not be subject to the psychological pressure that was placed on the middle school graduation attendees in *Lee* because the Santa Fe students "*after having participated in the decision of whether prayers will be given*, are aware that any prayers represent the will of their peers, who are less able to coerce participation than an authority figure from the state or clergy." *See id.* at 971 (emphasis in original). Moreover, because the Santa Fe students who are affected by the football policy are of high school age (rather than middle school), they are "mature enough and are likely to understand" the difference between state sponsorship of religion and a peer's symbolic nonsectarian, nonproselytizing speech. *See Board of Educ. of Westside Community Sch. v. Mergens*, 496 U.S. 226, 250 (1990) (recognizing that "secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis").

C. The "Endorsement" Test.

Similar in nature to *Lemon's* "effect" prong, the endorsement test analyzes the effect of a challenged governmental action to determine whether "a reasonable person would view the challenged . . . action as a disapproval

of her contrary religious choices." *Allegheny*, 492 U.S. at 631 (O'Connor, J., concurring).

Unlike the policy at issue in *Lee*, the Santa Fe "fall-back" policy does not mandate the delivery of a pre-game prayer or invocation; rather, the policy permits the inclusion of a nonsectarian, proselytizing "statement or invocation" in pre-game ceremonies, should the student body so determine by election. Moreover, the "fall-back" policy is passive in terms of government direction or involvement to the extent that the student body, rather than school officials, serves as the genesis of the invocation. After participating in an election to determine whether an invocation or statement will be included in pre-game ceremonies, the high-school aged students of Santa Fe who are affected by the District's football policy are not likely to "perceive any more government endorsement of religion . . . than do students in Westside Community schools who are regularly recruited during school hours to join a Christian club." *See Clear Creek II*, 977 F.2d at 969 (referring to *Mergens, supra*). Once again, the age of the students at issue and the voluntary, non-compulsory nature of the activity in which the pre-game prayer or invocation will be delivered also serve to diminish the likelihood that students will perceive an endorsement of religion or religious activity on the part of Santa Fe Independent School District.

III. A *Clear Creek*-type football policy balances the competing directives of the Free Exercise and the Establishment Clauses.

In the end, a *Clear Creek*-type football policy provides a reasonable means of balancing the complementary, yet competing, directives of the Free Exercise and Establishment

Clauses. On the one hand, a *Clear Creek*-type policy affords students an opportunity to engage in a form of religious — or nonreligious — expression during a community-wide sporting event, without direct government involvement or control. On the other hand, a *Clear Creek*-type policy serves to guard against the risk of concerted religious promotion by requiring that any pre-game invocation and/or message be nonsectarian and nonproselytizing in nature. At bottom, the simple precepts of a *Clear Creek*-type policy can be readily followed, for they strike not only a constitutional balance but a commonsensible one as well.