No. 99-62

IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

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

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BRIEF OF *AMICI CURIAE* CONGRESSMAN STEVE LARGENT AND CONGRESSMAN J.C. WATTS IN SUPPORT OF PETITIONER

JOSEPH DORTA
NEW JERSEY LEGAL RESOURCE COUNCIL
40 Baldwin Rd.
Parsippany, N.J. 07054
(973) 263-5258

BRETT M. KAVANAUGH
Counsel of Record
KIRKLAND & ELLIS
655 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 879-5043

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INTEREST OF AMICI CURIAE[1]

Congressman Steve Largent represents the First District of Oklahoma in the United States House of Representatives. Congressman J.C. Watts represents the Fourth District of Oklahoma in the United States House of Representatives. Both Mr. Largent and Mr. Watts played professional football; Mr. Largent is a member of the Hall of Fame.

Congress has substantial authority to enact legislation and vote on constitutional amendments regarding student religious speech, particularly in the Nation's public schools. *See generally Board of Ed. of Westside Community Schools v. Mergens*, 496 U.S. 226 (1990). As citizens and Members of Congress, Mr. Largent and Mr. Watts have a deep interest in ensuring appropriate protection for student religious speech in our public schools and in preventing discrimination against religious organizations, religious persons, and religious speech. Mr. Largent and Mr. Watts thus have a strong interest in this case and submit that Santa Fe High School's religion-neutral policy for a brief student statement before varsity football games is entirely appropriate and consistent with the Constitution.

SCHOOL POLICY INVOLVED

The Santa Fe Independent School District in Galveston County, Texas, maintains the following policy for Santa Fe High School:

> 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

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[1] The parties have consented in writing to the filing of this brief in letters that have been submitted to the Clerk. *See* S. Ct. R. 37.3(a). Counsel for a party did not author this brief in whole or in part. *See* S. Ct. R. 37.6. No person or entity other than the amici curiae and counsel made a monetary contribution to the preparation or submission of this brief. *See id.*

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 (emphases added).

SUMMARY OF ARGUMENT

Santa Fe High School allows a student to make a brief statement to the crowd before home varsity football games "to solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition." Santa Fe High School's policy does not *require* or even *encourage* the student speaker to invoke God's name, to utter religious words, or to say a "prayer" of any kind. Nor, on the other hand, does the school policy *prevent* the student from doing so. The policy is thus entirely neutral toward religion and religious speech.

Respondents nonetheless claim that the school policy *on its face* violates the Establishment Clause because an individual student (not a school or government official) might invoke God's name, utter religious words, or say a prayer in his or her pre-game statement. Respondents' Establishment Clause theory directly conflicts with this Court's settled jurisprudence. The Court has held that the Establishment Clause permits a *neutral* school speech policy in which individuals may engage in religious or other speech as they see fit in a school forum. *See Rosenberger v. Rector and Visitors of Univ. of Va.*, 515

U.S. 819 (1995); *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993); *Board of Ed. of Westside Community Schools v. Mergens*, 496 U.S. 226 (1990); *Widmar v. Vincent*, 454 U.S. 263 (1981). In these cases, the Court has stressed the critical distinction "between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Rosenberger*, 515 U.S. at 841 (quoting *Mergens*, 496 U.S. at 250).

Similarly, in *Lee v. Weisman*, 505 U.S. 577 (1992), a case striking down *government*-led and *government*-composed prayer at school graduations, the Court repeatedly distinguished government religious speech from private religious speech. Indeed, in concurrence, Justice Souter, joined by Justices Stevens and O'Connor, foreshadowed and effectively answered in advance the question presented in this case: "If the State had chosen its . . . 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) (emphasis added) (citing *Witters v. Washington Dept. of Services for the Blind*, 474 U.S. 481 (1986)).

The Court's cases show, moreover, that respondents' theory of the Constitution is exactly backwards. If Santa Fe High School took steps to *prevent* the student speaker from invoking God's name or uttering religious words or saying a prayer in his or her pre-game statement, then the school *would* violate the Constitution – the Free Speech and Free Exercise Clauses of the First Amendment. The Constitution protects the Santa Fe student speaker who chooses to mention God just as much as it protects the Santa Fe student speaker who chooses not to mention God. The school cannot force the student to "say a prayer," nor can the school prohibit the student from "saying a prayer." By adhering scrupulously to this principle

of neutrality, the Santa Fe High School policy for pre-game student statements satisfies the Constitution.

As seven Justices indicated in *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753 (1995), the school need not issue any sort of "disclaimer" because this case involves an individual's verbal *speech* (in contrast to a case such as *Pinette* involving a *fixed* visual display in a public area). That said, we understand that a disclaimer is currently read over the public address system at Santa Fe High School football games. Given that fact and, in any event, given that this case involves a facial challenge, the Court can uphold the Santa Fe policy without considering whether and/or under what circumstances a school disclaimer ever might be necessary.

The forum's scarcity (namely, the fact that only one student per game speaks) does not alter the constitutional analysis. The Court explained in *Rosenberger* that "nothing" in the Court's decisions suggests that "scarcity would give the State the right to exercise viewpoint discrimination that is otherwise impermissible." 515 U.S. at 835.

Finally, respondents' theory would cause severe practical harm. Schools would have to monitor and censor religious words by all non-governmental speakers (a high school football player in a pre-game pep rally, a student newspaper writer, the guest speaker at a school speakers' series, the valedictorian at graduation). This Court, however, has never forced or even allowed the public schools of this country to censor students and speakers who happen to be religious or wish to speak religious words at a school event. On the contrary, as the Court has said, the absolutist legal theory of those who seek to cleanse public school events of all *private* religious expression evinces a pervasive "hostility to religion" that is neither required nor permitted under the Religion Clauses. *Rosenberger*, 515 U.S. at 846.

ARGUMENT

I. A PUBLIC HIGH SCHOOL CONSTITUTIONALLY NEED NOT – INDEED, CONSTITUTIONALLY CANNOT – BAN A STUDENT'S RELIGIOUS SPEECH, BECAUSE IT IS RELIGIOUS, FROM A SCHOOL EVENT.

Respondents do not dispute that a public high school may set aside a moment before a football game for a student to deliver a public message solemnizing the event, promoting good sportsmanship and student safety, and establishing the appropriate environment for the competition. The sole question is whether, as respondents submit, the high school must actively *prohibit* that student speaker from invoking God's name, uttering religious words, or saying a prayer.

A. This Court's First Amendment Jurisprudence Validates the School's Neutral Speech Policy.

Three mutually reinforcing strands of this Court's jurisprudence demonstrate that a public high school such as Santa Fe constitutionally need not (indeed, constitutionally *cannot*) prohibit the student from religious speech in his or her pre-game statement to the crowd.

First, the Court's cases striking down *government* school prayer have carefully distinguished governmental religious speech from protected private religious speech. *Second*, in a series of related cases, the Court has held that student religious speech in a school forum is not attributable to the State and therefore does not violate the Establishment Clause. Indeed, it is constitutionally impermissible for the government to discriminate against religion and prevent a student from engaging in religious speech at a school event. *Third*, the Court has similarly held that decisions by *private individuals* to use neutrally available government aid for religious purposes are not attributable to the State for purposes of the Establishment

Clause, a principle akin to the theory of neutrality employed in the student speech cases.

1. The Court has held that the Establishment Clause prohibits government-composed, government-delivered, or government-required prayer in classes or at graduation ceremonies.[2]

The facts in the leading case, *Engel v. Vitale*, 370 U.S. 421 (1962), are well-known. A school board in New York had directed that teachers and students begin each school day with an official prayer: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country." *Id.* at 422. The Court struck down the policy, stating that "it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government." *Id.* at 425.

In concurrence, Justice Douglas emphasized a critical theme that would recur in the Court's decisions in subsequent years: "Under our Bill of Rights free play is given for making religion an active force in our lives. But if a religious leaven is to be worked into the affairs of our people, *it is to be done by individuals and groups*, not by the Government." *Id.* at 442-43 (Douglas, J., concurring) (quotation omitted; emphasis added).

[2] The Establishment Clause generally does not prohibit governmental religious speech at *non-school* events so long as no one is compelled to speak or indicate agreement with the religious message. *See Lynch v. Donnelly*, 465 U.S. 668 (1984); *Marsh v. Chambers*, 463 U.S. 783 (1983); *see also County of Allegheny v. ACLU*, 492 U.S. 573, 655 (1989) (Kennedy, J., concurring and dissenting). The examples of such governmental religious speech are pervasive and long-standing. The President issues Thanksgiving Day proclamations; this Court starts its sessions with a plea that "God save the United States and this Honorable Court"; both Houses of Congress begin the day with official prayer; the phrase "In God We Trust" adorns our currency; the list goes on.

"The First Amendment leaves the Government in a position not of hostility to religion but of neutrality." *Id.* at 443.

In *Lee v. Weisman*, 505 U.S. 577 (1992), the Court held that *Engel* applied to public school graduation ceremonies. The Court pointed to the following "dominant facts": The school had "decided that an invocation and a benediction should be given; this is a choice attributable to the State, and from a constitutional perspective it is as if a state statute decreed that the prayers must occur." *Id.* at 586-87; *see also id.* at 588 (State made "decision to include a prayer"). Moreover, the school principal selected the clergy member and "directed and controlled the content of the prayers." *Id.* at 588. The degree of school involvement "made it clear that the graduation prayers bore the imprint of the State." *Id.* at 590. In concurrence, Justice Blackmun, joined by Justices Stevens and O'Connor, reiterated the critical facts: The "government composes official prayers, selects the member of the clergy to deliver the prayer, [and] has the prayer delivered at a public school event." *Id.* at 603 (Blackmun, J., concurring) (quotation omitted).

But the *Lee* Court cabined its holding in a way important to this case by stressing the critical distinction between (i) individual religious speech in schools, which is protected by the Constitution, and (ii) government-required religious speech in schools, which the Court held to be prohibited by the Constitution. The Court stated, for example, that "*the First Amendment does not allow the government to stifle prayers.*" *Id.* at 589 (emphasis added). The Court explained that "religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State." *Id.*

The problem the Court identified in *Lee*, therefore, was not that students were exposed to religious speech, but that they were exposed to *governmental* religious speech. "In religious debate or expression the government is not a prime participant . . . . A *state-created orthodoxy* puts at grave risk

that freedom of belief and conscience which are the sole assurance that religious faith is real, not imposed." *Id.* at 591-92 (emphasis added). The First Amendment thus is not concerned with actions that do not "so directly or substantially involve *the state* in religious exercises or in the favoring of religion." *Id.* at 598 (quotation omitted; emphasis added).

Given that private individuals can engage in religious speech in school settings, the Court recognized that "there will be instances when religious values, religious practices, and religious persons will have some interaction with the public schools and their students." *Id.* at 598-99. But that is hardly some constitutional vice; to the contrary, it is a constitutional virtue. Indeed, the Court expressly warned that "[a] relentless and all-pervasive attempt to exclude religion from every aspect of public life could itself become inconsistent with the Constitution." *Id.* at 598.

In a concurring opinion, Justice Souter, joined by Justices Stevens and O'Connor, elaborated by distinguishing the situation in *Lee* from a hypothetical policy that presumably would satisfy the Constitution (a policy that happens to be precisely akin to that employed by Santa Fe High School for football games): "If the State had chosen its graduation day speakers according to wholly secular criteria, *and if one of those speakers (not a state actor) had individually chosen to deliver a religious message*, it would have been harder to attribute an endorsement of religion to the State." *Id.* at 630 n.8 (Souter, J., concurring) (emphasis added) (citing *Witters v. Washington Dept. of Services for the Blind*, 474 U.S. 481 (1986)).

The opinions and analyses of the *Engel* and *Lee* Courts foreshadowed – and effectively approved in advance – the Santa Fe High School policy at issue here. The Establishment Clause permits a student speaker to deliver a religious message in a neutrally available school forum, so long as the school

itself does not select, compose, deliver, or require a religious message.

2. We need not rely solely on statements in *Lee* and *Engel*, however, to support our argument. In a series of cases over the last two decades, the Court has held that the government does not violate the Establishment Clause when private speakers avail themselves of a neutrally available school forum to engage in religious speech. Indeed, the Court has held that the Constitution *prohibits* the government from excluding private religious speech, because it is religious, from a school event.

These cases arose after certain schools and plaintiffs read *Engel* and other decisions as license (or judicial compulsion) to eradicate all traces of religion, *government and private*, from the public schools. The Court has rejected these homogenizing efforts to cleanse public schools of private religious expression, emphasizing time and again the critical distinction "between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Rosenberger*, 515 U.S. at 841 (quoting *Mergens*, 496 U.S. at 250).

The cases affirming this dispositive principle are by now familiar: *Widmar*, *Mergens*, *Lamb's Chapel*, *Rosenberger*, and *Pinette*. Because of their importance to this case, we briefly review each.

In *Widmar v. Vincent*, the Court held that the Constitution "forbids a State to enforce certain exclusions [of religious speakers] from a forum generally open to the public, even if it was not required to create the forum in the first place." 454 U.S. 263, 267-68 (1981). A public university had justified its exclusion of religious speakers by citing the Establishment Clause as interpreted in *Tilton v. Richardson*, 403 U.S. 672 (1973), but the Court in *Widmar* reaffirmed "the right of religious speakers to use public forums on equal terms with

others." 454 U.S. at 273 n.12. As the Court stated, "by creating a forum the [State] does not thereby endorse or promote any of the particular ideas aired there." *Id.* at 272 n.10.

In *Board of Ed. of Westside Community Schools v. Mergens*, 496 U.S. 226 (1990), the Court extended the principle of *Widmar* to the high school context – in a case where Congress through the Equal Access Act had mandated equal treatment of religious speech in public schools. A high school religious group sought permission to meet at the high school, as other groups did. The school denied the request, arguing that "official recognition of [the students'] proposed club would effectively incorporate religious activities into the school's official program, endorse participation in the religious club, and provide the club with an official platform to proselytize other students." *Id.* at 247-48. The Court, without dissent on the constitutional issue, rejected that Establishment Clause argument. The Court relied on the "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." *Id.* at 250 (plurality). The Court added that "*[t]he proposition that schools do not endorse everything they fail to censor is not complicated.*" *Id.* (emphasis added). And if a state "refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion." *Id.* at 248 (plurality).

The Court reached the same conclusion in *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993). The Court struck down a school board rule that allowed schools to open their facilities except to religious uses. The Court unanimously concluded that the policy violated the Free Speech Clause and stated that "there would have been no realistic danger that the community would think that the

District was endorsing religion or any particular creed" by allowing religious uses in the school. *Id.* at 395.

The Court again relied on the neutrality principle in *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1995). The University of Virginia authorized the payment of printing costs for a variety of student organization publications, but withheld payment for a religious group on the ground that the group's student paper "primarily promotes or manifests a particular belief in or about a deity or an ultimate reality." *Id.* at 823.

The Court first held that the University had engaged in impermissible viewpoint discrimination by excluding those "student journalistic efforts with religious editorial viewpoints." *Id.* at 831. As to the Establishment Clause analysis, the Court began with the "central lesson": A "significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion." *Id.* at 839. In the speech context, the Court stated: "[M]ore than once have we rejected the position that the Establishment Clause even justifies, much less requires, a refusal to extend free speech rights to religious speakers who participate in broad-reaching government programs neutral in design." *Id.*

The Court found that a program including payments for expenses of the religious magazine as well as other student publications would be "neutral toward religion." *Id.* at 840. Such a program would respect the "critical 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." *Id.* at 841 (quotation omitted); *see also id.* at 834 (speech of "private persons" and "University's own speech" controlled "by different principles"); *id.* (referring to "distinction between the University's own favored message and the private speech of students").

The Court applied those same principles of neutrality outside the educational context in *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753 (1995). The State there had excluded a private religious display (a cross) from a public square generally open to private displays.

The Court stated that "private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression." *Id.* at 760. A plurality stated that the Establishment Clause "was never meant, and has never been read by this Court, to serve as an impediment to purely *private* religious speech connected to the State only through its occurrence in a public forum." *Id.* at 767 (plurality opinion of Scalia, J., joined by Rehnquist, C.J., Kennedy and Thomas, JJ.).

In a concurring opinion, Justice Souter, joined by Justices O'Connor and Breyer, largely agreed with those principles, albeit finding that a state disclaimer might be necessary in cases of fixed visual displays. *Id.* at 784 (Souter, J., concurring). As to the need for a disclaimer, the concurring Justices distinguished a fixed visual display from an individual's verbal speech: "When an individual speaks in a public forum, it is reasonable for an observer to attribute the speech, first and foremost, to the speaker, while an unattended display (and any message it conveys) can naturally be viewed as belonging to the owner of the land on which it stands." *Id.* at 786.

In sum, as this series of cases makes clear, state action prohibiting a student speaker from engaging in religious speech, because it is religious, is a First Amendment violation. But even if it were not a First Amendment free speech/free exercise violation to *exclude* religious speech, these cases show that it is surely not a First Amendment Establishment Clause violation for a school to *permit* religious speech on a neutral basis at a school event. As Justice Kennedy has explained, "in some circumstances the First Amendment may *require* that

government property be available for use by religious groups, *and even where not required, such use has long been permitted.*" *County of Allegheny v. ACLU*, 492 U.S. 573, 667 (1989) (Kennedy, J., concurring and dissenting) (citations omitted; emphasis added).

3. The principle that the government does not violate the Establishment Clause when it enacts a neutral program available to religious and non-religious alike finds additional doctrinal support in a separate strand of this Court's Establishment Clause jurisprudence. The Court has rejected challenges to government programs through which a "religious" individual or religious organization may take advantage of a neutrally available government benefit (the analytic equivalent of the neutrally available school speech forum). Four cases illustrate this principle.

In *Mueller v. Allen*, 463 U.S. 388 (1983), the Court considered a tax deduction program that allowed deductions for school expenses, including for parents who sent their children to religious schools. Citing *Widmar*, the Court held that where religion is advanced only "as a result of decisions of individual parents 'no imprimatur of state approval' can be deemed to have been conferred on any particular religion, or on religion generally." *Id.* at 399 (quoting *Widmar*, 454 U.S. at 274).

The Court applied the same principle in *Witters v. Washington Dept. of Services for the Blind*, 474 U.S. 481 (1986). The government provided financial assistance to blind students, one of whom used the assistance to attend a seminary. The Court, through Justice Marshall, stated: "Nor does the mere circumstance that petitioner has chosen to use neutrally available state aid to help pay for his religious education confer any message of state endorsement of religion." *Id.* at 488-89.

Mueller and *Witters* laid the constitutional foundation for the Court's decision in *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1 (1993). There, the school district provided

sign-language interpreters to students, but refused to provide them to students attending religious schools on the ground that the assistance would violate the Establishment Clause. The Court rejected that defense: "[T]he statute ensures that a government-paid interpreter will be present in a sectarian school only as a result of the private decision of individual parents." *Id.* at 10.

Finally, in *Agostini v. Felton*, 521 U.S. 203 (1997), the Court relied on *Mueller*, *Witters*, and *Zobrest* in concluding that Title I's aid program did not violate the Establishment Clause. The Court held that the Constitution permits government aid to students on "a neutral basis" – aid available regardless whether the student attends a sectarian or non-sectarian school. *Id.* at 234-35. Such a program "cannot reasonably be viewed as an endorsement of religion." *Id.* at 235.

4. The decisions in *Widmar*, *Mergens*, *Lamb's Chapel*, *Rosenberger*, and *Pinette* – when read together with *Lee v. Weisman* and cases such as *Mueller*, *Witters*, *Zobrest*, and *Agostini* – establish two critical principles that speak directly to the issue in this case. *First*, the Establishment Clause permits a citizen or student or religious group to utilize a neutrally available school forum to speak religious words or invoke God's name or say a prayer. *Second*, if the government were to prevent citizens or students at a school event from religious speech, because it is religious, the government would violate the free speech and free exercise[3] rights of the speakers.

These principles, which validate the policy at issue in this case, should not be controversial. The President of the ACLU, for example, has correctly analyzed the issue presented here:

[3] *See Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993) ("protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs").

> [T]he First Amendment would protect the right of a student speaker to voluntarily make religious statements even at a school-sponsored event. . . . [I]f the student were truly expressing his or her own views, that should be protected. Justice Souter made precisely this point in his concurring opinion in *Weisman*. . . . "If the State had chosen its graduation 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."

Nadine Strossen, *How Much God in the Schools? A Discussion of Religion's Role in the Classroom*, 4 Wm. & Mary Bill Rts. J. 607, 631 (1995) (quoting *Lee*, 505 U.S. at 630 n.8 (Souter, J., concurring)).

B. A Disclaimer is Not Constitutionally Necessary Here; In Any Event, the Court Need Not Consider That Issue in the Context of This Facial Challenge.

This case involves a student's verbal speech at a school event, as opposed to a fixed visual display in a public square. As a result, the school need not issue a disclaimer to eliminate any claimed audience misperception of government endorsement of a student's private speech.

Seven Justices suggested as much in *Pinette*, with Justice Souter, joined by Justices O'Connor and Breyer, explaining the rationale in concurrence: "When an individual speaks in a public forum, it is reasonable for an observer to attribute the speech, first and foremost, to the speaker, while an unattended display (and any message it conveys) can naturally be viewed as belonging to the owner of the land on which it stands." 515 U.S. at 786 (Souter, J., concurring). A four-Justice plurality added that the Court's "Religion Clause jurisprudence is complex enough without the addition of th[e] highly litigable feature" of sometimes-mandatory government disclaimers. *Id.*

at 769 n.4 (Scalia, J., joined by Rehnquist, C.J., and Kennedy and Thomas, JJ.).

That said, the Court in this case need not consider whether and/or under what circumstances a disclaimer ever might be necessary, for two reasons.

First, this is a facial challenge to the Santa Fe High School football game policy. The Court thus could uphold the school's policy against the facial attack and simply leave for another day the question whether and/or under what circumstances a disclaimer ever might be necessary. *See Pinette*, 515 U.S. at 784, 794 n.2 (Souter, J., concurring) (even a *fixed* display in the public square would not violate the Establishment Clause "in large part because of the possibility of affixing a sign to the cross adequately disclaiming any government sponsorship or endorsement of it"; "there is no reason to presume that an adequate disclaimer could not have been drafted"); *Mergens*, 496 U.S. at 270 (Marshall, J., concurring) (voting to uphold program at issue in *Mergens* because school could allow private "religious speech" and affirmatively "disclaim[] any endorsement" of the private speech when necessary).

Second, and buttressing the first point, we understand that Santa Fe High School in fact issued the following oral disclaimer over the public address system at games after October 15 of this past season:

> 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 pregame message. The purpose of the message is to solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition.[4]

[4] This statement is recited in an October 15, 1999, letter agreement between (continued...)

As the Court concluded in *Pinette* and *Mergens*, this kind of disclaimer, while not constitutionally necessary, would leave the audience (even the "unreasonable" listeners) with absolutely no doubt that the student's speech is not approved or endorsed by the government. *See Pinette*, 515 U.S. at 776 (O'Connor, J., joined by Souter and Breyer, JJ., concurring) ("In context, a disclaimer helps remove doubt about state approval of respondents' religious message."); *id.* at 769 (plurality opinion of Scalia, J., joined by Rehnquist, C.J., and Kennedy and Thomas, JJ.) ("If Ohio is concerned about misperceptions, nothing prevents it from requiring all private displays in the square to be identified as such."); *id.* at 784 (Souter, J., joined by O'Connor and Breyer, JJ., concurring) ("I vote to affirm in large part because of the possibility of affixing a sign to the cross adequately disclaiming any government sponsorship or endorsement of it."); *Mergens*, 496 U.S. at 251 (plurality opinion of O'Connor, J.) ("To the extent a school makes clear that its recognition of respondents' proposed club is not an endorsement of the views of the club's participants, . . . students will reasonably understand that the school's official recognition of the club evinces neutrality toward, rather than endorsement of, religious speech.").[5]

In short, a disclaimer is *not* constitutionally required here. But given that this is a facial challenge and given the current practice at Santa Fe High School, the Court could leave for

[4] (...continued)
counsel in a separate case involving student pre-game speech at Santa Fe High School football games. *See Ward v. Santa Fe Independent School District*, No. G-99-556 (S.D. Tex., Houston Division). We have been informed that the letter agreement reciting that statement is part of the record in that case.

[5] In this case, moreover, any chance of widespread audience confusion is all but nonexistent given that the students themselves elect the speaker and are thus necessarily aware of the school policy.

another day the question whether and/or under what circumstances a disclaimer ever might be necessary.

C. The Scarcity of the Forum Does Not Alter the Constitutional Analysis.

The forum in this case is scarce, in the sense that only one student uses it at each home varsity football game, and there are only three to six home games a year. But the fact of scarcity does not alter the neutrality analysis.

First, as the Court in *Rosenberger* explained, the government's provision of a neutral forum does not suddenly become problematic if only a few speakers can utilize the forum. In such circumstances, it is "incumbent on the State . . . to ration or allocate the scarce resources on some acceptable neutral principle; but nothing in our decision [in *Lamb's Chapel*] indicated that scarcity would give the State the right to exercise viewpoint discrimination that is otherwise impermissible." 515 U.S. at 835. The Court thus flatly rejected the suggestion that scarcity provided a rationale for discrimination against religious speech: "The government cannot justify viewpoint discrimination among private speakers on the economic fact of scarcity. Had the meeting rooms in *Lamb's Chapel* been scarce, had the demand been greater than the supply, our decision would have been no different." *Id.*

Justices Marshall and Brennan also helpfully analyzed the possible effects of scarcity in their separate opinion in *Mergens*. Considering the possibility of a forum that did not "include the participation of more than one advocacy-oriented group," 496 U.S. at 268 (Marshall, J., concurring), those two Justices still did not suggest that such a development would be unconstitutional. Rather, that fact would simply make the school responsible, they said, to "affirmatively disclaim any endorsement" of the private speech. *Id.*

Second, and this is important, the school here does not decide whether the speaker will utter religious words, nor does

the school premise availability of the forum on whether the speaker will utter religious words. The forum is neutral, and the choice whether to invoke God's name or speak religious words is within the sole discretion of the student.

Compare, by contrast, a situation where the government could allow only a single school group to meet on school grounds. Suppose that a number of clubs applied for the facility. Suppose further that the school chose a religious club – because it was religious – rather than allocating the scarce facility on a religion-neutral basis. In that case, an Establishment Clause issue would arise. In this case, however, the school has done nothing to favor or promote a speaker who may choose to speak religious words over a speaker who may choose not to speak religious words.

D. The Sole Issue Here is the Facial Constitutionality of a High School Policy That Permits, But Does Not Require, Student Religious Speech at Extracurricular Football Games.

The Court has stated that Establishment Clause jurisprudence is "delicate and fact-sensitive," *Lee*, 505 U.S. at 597, and that "[e]very government practice must be judged in its unique circumstances," *Lynch v. Donnelly*, 465 U.S. 668, 694 (1984) (O'Connor, J., concurring). In this case, that principle suggests particular attention to the following points.

First and most importantly, as we have already explained, this case involves a facial challenge to a student speech policy where the student is free to speak a religious message – *or not* – as he or she sees fit.

Second, as we have said, the Court could uphold the student speech policy without reaching the question whether and/or under what circumstances a disclaimer ever might be necessary.

Third, this case involves a high school. The Court need not consider whether the same principles would apply to elementary school events.

Fourth, the speech policy before the Court applies only to football games. A football game is extracurricular and more in the nature of a student event than are curricular, school-dominated events such as graduations and daily classes. While graduations and classes unmistakably bear "the imprint of the State," *Lee*, 505 U.S. at 590, extracurricular activities generally provide an opportunity for students to participate without the same degree of school control. To be sure, faculty advisors or coaches are important, but the football team, the debate team, the cheerleading squad, the newspaper, the yearbook, the school play are activities designed to give students an extra degree of freedom to grow and learn and err in a less autocratic, less structured environment. In short, the coercive, state-dominated atmosphere described in *Lee* simply does not translate to extracurricular events such as football games. *Cf. Mergens*, 496 U.S. at 267 (Marshall, J., concurring) ("To the extent that a school emphasizes the autonomy of its students, . . . there is a corresponding decrease in the likelihood that student speech will be regarded as school speech.").

II. RESPONDENTS' POSITION WOULD REQUIRE PUBLIC SCHOOLS TO ACT AS AGGRESSIVE "RELIGION CENSORS."

By allowing the student speaker to say what he or she chooses (so long as the message is within the very broad bounds of the school policy), the Santa Fe school district avoids entangling itself in the difficult task of determining what is religious speech and what is not. Respondents' position, by contrast, would generate enormous practical problems that only highlight the flaws in their argument.

If the student speaker must avoid "prayer," as respondents demand, does that mean all references to God? What about

references to the "Father"? The "Father above"? Must the student avoid a reference to "our Creator"? Can the student ask the crowd to observe a moment of silence for the crowd members "to pray" as they wish? Can the student refer to the afterlife? Can the student, without invoking God, use phrases that originated in the Bible? Is the word "bless" ok?

Who knows. What we do know is that the public schools – and then the courts – would have to monitor the private speech of individuals to make these and hundreds of other nuanced judgments and try to draw a line between religious and non-religious speech. But just as this Court is "ill-equipped to sit as a national theology board," *County of Allegheny*, 492 U.S. at 678 (Kennedy, J., concurring and dissenting), so too Santa Fe High School is ill-equipped to sit as a local Religion Censor, ordered by this Court to painstakingly eliminate all traces of private religious expression from its school. *See Mergens*, 496 U.S. at 253 (plurality) (denial of the forum to religious groups "might well create greater entanglement problems in the form of invasive monitoring to prevent religious speech at meetings at which such speech might occur"); *cf. Lee*, 505 U.S. at 616-17 (Souter, J., concurring) (regarding judicial review of speech for sectarian influences: "I can hardly imagine a subject less amenable to the competence of the federal judiciary, or more deliberately to be avoided where possible.").

And the school would need to play the role of Religion Censor not just at football games, but at all school events and gatherings. What to do about: A student running for student council who wants to say at a pre-election debate that the philosopher most influential to her was Jesus Christ and to explain why? A student at an awards banquet who wants to give thanks to God? A football captain who speaks to the team before the game and wishes to say a prayer and to ask God to bless the team? A student newspaper writer who wishes to write why his religion is important to him?

Logically at least, all are *prohibited* in respondents' Orwellian world. The schools throughout the country would have to review statements and messages at all school events to ferret out religious content. Schools would necessarily engage in "government censorship, to ensure that all student [speech] meet some baseline standard of secular orthodoxy." *Rosenberger*, 515 U.S. at 844. As the Court stated in *Rosenberger*, however, the "first danger to liberty lies in granting the State the power to examine publications to determine whether or not they are based on some ultimate idea and, if so, for the State to classify them." *Id.* at 835.

There should be no mistake, then, about what's at stake here. If the theory advanced by respondents is to become enshrined in this Court's case law, the full extermination of private religious speech from the public schools would be well on its way. *See Adler v. Duval County School Bd.*, 174 F.3d 1236, 1256-57 (11th Cir. 1999) (Marcus, J., dissenting) ("[T]he majority opinion has come perilously close to pronouncing an absolute rule that would excise all private religious expression from a public graduation ceremony . . . .").

The Court should adhere to the principle of neutrality, avoid entangling schools in the review of student speech for religious words and influences, and uphold the Santa Fe policy.

III. THE SCHOOL POLICY SERVES LEGITIMATE PUBLIC PURPOSES.

The express purpose of the Santa Fe policy for football games is "to solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition." Pet. App. F1. Those are "legitimate secular purposes." *Lynch*, 465 U.S. at 693 (O'Connor, J., concurring) ("solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society" are legitimate secular purposes).

The policy also provides an opportunity for the individual student speakers to express themselves publicly, thereby improving their own confidence and skills. And it allows the student speakers to seek unity within and reflection among the student body, thereby helping to heal some of the schisms and frustrations that inevitably develop in high schools. One need not reflect long on some of the horrific events in this country's public high schools in the past year to appreciate the desirability and validity of such goals.

The court of appeals did cast negative aspersions on the fact that the school policy states that the student may give a "message and/or invocation." But that language is neutral toward religious speech – and thus is entirely permissible. As Justice O'Connor explained in *Wallace v. Jaffree*, even if a "statute specifies that a student may choose to pray silently during a quiet moment, the State has not thereby encouraged prayer over other specified alternatives." 472 U.S. 38, 73 (1985) (O'Connor, J., concurring). Thus, Justice O'Connor noted that a neutral moment of silence law "that is clearly drafted and implemented so as to permit prayer, meditation, and reflection within the prescribed period, without endorsing one alternative over the others," would pass muster. *Id.* at 76.

Chief Justice Burger and Justice White both concurred with Justice O'Connor's analysis on this point. Chief Justice Burger explained: "To suggest that a moment-of-silence statute that includes the word 'prayer' unconstitutionally endorses religion, while one that simply provides for a moment of silence does not, manifests not neutrality but hostility toward religion." *Id.* at 85 (Burger, C.J., dissenting). The Chief Justice agreed with Justice O'Connor that it "makes no sense to say" that a state "endorse[s] prayer" by specifying that "voluntary prayer is *one* of the authorized activities." *Id.* And Justice White noted that the student who asked whether he can pray during a moment of silence must be told "yes," and "[i]f that is the case, I would not invalidate a statute that at the outset

provided the legislative answer to the question, 'May I pray?'" *Id.* at 91 (White, J., dissenting).

As Justice O'Connor suggested in *Wallace*, it would be a bizarre rule, to put it charitably, that condemned a school policy where a student could give a "message and/or invocation," but allowed a policy where a student could give a "message" – when in fact the student was free under both policies to speak religious words. If the Constitution turned on such a strange distinction, the school here surely would re-adopt its policy without the word "invocation" and then school officials would spend their time answering "yes" to students asking whether they could utter religious words. That makes no sense, as the three Justices who addressed the issue concluded in *Wallace*.

In that regard, we note that the five-Justice majority opinion in *Wallace* never said that inclusion of the word "prayer" as a mere alternative rendered the Alabama statute unconstitutional. Rather, there was "unrebutted evidence of legislative intent," *id.* at 58 – evidence that "ma[de] it unnecessary, and indeed inappropriate, to evaluate the practical significance of the addition of the words 'or voluntary prayer' to the statute." *Id.* at 61.

Santa Fe's policy carefully follows the path charted by Justice O'Connor in *Wallace*. The policy's neutral phrase "message and/or invocation" makes clear that the student *may* – but need not – choose to invoke God's name or speak religious words.

But "the neutral language is itself skewed," respondents no doubt will argue. To begin with, such a suggestion borders on the incoherent, particularly in the context of a facial challenge. More to the point, a fundamental problem to which student speech policies such as Santa Fe's must respond is that many people have misread *Engel* and *Lee v. Weisman* to require the wholesale elimination of religious speech – *even private religious speech* – from the public schools. Indeed, the Court

can take judicial notice of the fact that those cases led to such widespread misinterpretation by public school officials that the President in 1995 ordered the Secretary of Education to distribute guidelines nationwide explaining that student religious speech is not only permitted, but protected, in public schools. *See* Secretary Riley's Statement on Religious Expression, http://www.ed.gov/Speeches/08-1995/religion.html (May 1998) ("The purpose of promulgating these presidential guidelines [in 1995] was to end much of the confusion regarding religious expression in our nation's public schools . . . . Schools may not discriminate against private religious expression by students . . . .").

The Santa Fe policy also combats that widespread misinterpretation by clarifying in a neutral way that religious speech is simply an alternative that is permitted, but not required, from student speakers at football games – akin to what the presidential guidelines stated and this Court held in *Widmar*, *Mergens*, *Lamb's Chapel*, and *Rosenberger*.

IV. CONJURING UP SOME FUTURE "PARADE OF HORRIBLES" IS NOT A BASIS FOR STRIKING DOWN THE POLICY ON ITS FACE.

Respondents may suggest that most speakers at football games ultimately will choose to say religious words. But in this facial challenge to the policy, with no record to analyze, there is no basis to assume that the forum in fact will be used primarily by speakers employing religious words. *See United States v. Salerno*, 481 U.S. 739, 745 (1987). The Court here has only to determine "whether it is possible for the [policy] to be implemented in a constitutional manner." *Mergens*, 496 U.S. at 260 (Kennedy, J., concurring); *see also Bowen v. Kendrick*, 487 U.S. 589, 612 (1988).

In any event, if most speakers express religious words, that development could raise (at most) claims of audience confusion over whether the government had somehow encouraged or

endorsed religion. Of course, a disclaimer making clear that the private speech is not approved or endorsed by the state, while not constitutionally necessary with respect to an individual's verbal speech, *see Pinette*, 515 U.S. at 786 (Souter, J., concurring), would eliminate any conceivable problem, *see Mergens*, 496 U.S. at 266-70 (Marshall, J., concurring).

There is a more direct and persuasive answer, however, to this kind of argument. The fact that some percentage (even 100%) of the speakers at a public school event may choose to engage in religious speech in a neutrally available forum cannot be a constitutional problem any more than if 100% of government workers donate a portion of their salaries to religious organizations. *Cf. Witters*, 474 U.S. at 486; *see also Agostini*, 521 U.S. at 229 ("Nor are we willing to conclude that the constitutionality of an aid program depends on the number of sectarian school students who happen to receive the otherwise neutral aid."); *Mueller*, 463 U.S. at 401 ("We would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of private citizens claimed benefits under the law.").

Consider the following practical example of the problems with this kind of approach: If High School A has events where 10% of the students utter religious words, High School B holds events where 50% of the students utter religious words, and High School C has events where 95% of the students utter religious words, what result? Do the percentages matter? Do the *relative* percentages matter? How? Does High School C have to tell some students to stop speaking religious words? Which ones? (And what exactly are sufficiently "religious words" to use in making this calculation, in any event?)[6]

[6] Respondents may also raise the specter that school officials will in fact coerce students into providing religious messages. If so, that will provide (continued...)

V. THE COURT'S PRECEDENTS HAVE LONG FOUND GOVERNMENT NEUTRALITY TOWARD RELIGION CONSISTENT WITH THE ESTABLISHMENT CLAUSE.

In Establishment Clause cases, the search for an overarching test is not always necessary, *see Lee*, 505 U.S. at 586, and can sometimes be counterproductive or even harmful, *see Board of Ed. of Kiryas Joel Village School Dist. v. Grumet*, 512 U.S. 687, 718 (1994) (O'Connor, J., concurring) ("Any test that must deal with widely disparate situations risks being so vague as to be useless. . . . *Lemon* has, with some justification, been criticized on this score.").

The Court, of course, has been closely and deeply divided regarding the appropriate test and way to analyze government practices (i) that favor or promote religion over non-religion and (ii) that are deeply rooted in our history and tradition. *See Lee*, 505 U.S. at 632 (Scalia, J., dissenting) (decision "lays waste a tradition that is as old as public-school graduation ceremonies themselves"); *County of Allegheny*, 492 U.S. at 657 (Kennedy, J., concurring and dissenting) ("A test for implementing the protections of the Establishment Clause that, if applied with consistency, would invalidate longstanding traditions cannot be a proper reading of the Clause."); *Lynch*, 465 U.S. at 674 (upholding government's nativity display: "There is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789."); *Marsh*, 463 U.S. at 792 (legislative prayer constitutional because it has become "part of the fabric of our society"); *Engel*, 370 U.S. at 446 (Stewart, J.,

[6] (...continued)
occasion for an as-applied challenge to the school's implementation of its policy. *See Bowen*, 487 U.S. at 618-21; *Pinette*, 515 U.S. at 766 (plurality opinion of Scalia, J.) (discussing hypothetical applications where a "governmental entity manipulates its administration of a public forum").

dissenting) ("What is relevant to the issue here is . . . the history of the religious traditions of our people . . . .").

But those deep juridical divisions about the proper Establishment Clause "test" and analysis have by and large disappeared – or been muted as irrelevant – when the Court has analyzed laws *neutral* toward religion in cases such as *Widmar*, *Mergens*, *Lamb's Chapel*, and *Witters*. As Justice Thomas has explained, while the Court's Establishment Clause jurisprudence arguably is "in hopeless disarray" in several areas, the principle that government neutrality satisfies the Establishment Clause "has enjoyed an uncharacteristic degree of consensus." *Rosenberger*, 515 U.S. at 861 (Thomas, J., concurring). No matter what Establishment Clause test might be employed, the Court generally has held that a law neutral toward religion satisfies Establishment Clause scrutiny (with a limited exception not relevant to this case[7]).

It is true, of course, that some citizens hostile to religion in any form may argue that even government neutrality toward private religion is still "too favorable" toward religion. These citizens may not want to see private displays of religion in the open public square (as in *Pinette*), to hear private individuals express religion in the public square (as here), to read religious speech as an expressly listed alternative in a student speech policy, to know that religion is obtaining taxpayer-funded assistance on a neutral basis (as with police and fire protection for churches), to see places of worship built alongside other buildings in residential communities (as most zoning ordinances allow). Some citizens may want to be free of

[7] The Court has suggested that neutrality may not suffice in that limited class of cases where government monies in a neutral benefits program would go directly to religious institutions. Of course, that exception is of questionable validity and is inconsistent with the thrust of the Court's modern jurisprudence establishing neutrality as an Establishment Clause safe harbor. *See Rosenberger*, 515 U.S. at 852-63 (Thomas, J., concurring). But this case, in any event, does not involve a funding program.

private religious speech and organizations just as much as they want to be free from the *government's* "exercise of religion." But offense at one's fellow citizens is not and cannot be the Establishment Clause test, at least not without relegating religious organizations and religious speakers to bottom-of-the-barrel status in our society – below socialists and Nazis and Klan members and panhandlers and ideological and political advocacy groups of all stripes, all of whom may use the neutrally available public square and receive neutrally available government aid.

The Religion Clauses, of course, do not require any such "hostility to religion, religious ideas, religious people, or religious schools." *Kiryas Joel*, 512 U.S. at 717 (O'Connor, J., concurring). On the contrary, the Constitution, this Court's precedents, and our traditions demand that government accord religious speech, religious people, and religious organizations *at least* the same treatment as their secular counterparts. This Court therefore has stated time and again, and often unanimously, that government neutrality toward religion – meaning no discrimination between religious and non-religious organizations, people, and speech – is not an Establishment Clause violation. Striking down a law neutral toward religion, the Court has said, would reflect the "hostility to religion" that the Constitution neither requires nor permits. *Rosenberger*, 515 U.S. at 846; *see generally* Eugene Volokh, *Equal Treatment is Not Establishment*, 13 Notre Dame J. L. Ethics & Pub. Pol'y 341 (1999).

Respondents ask this Court to ignore the neutrality of the school policy and, as a necessary result, to cleanse public schools throughout the country of *private* religious speech. The Court should reject respondents' submission and affirm, as it has done many times before, that a neutral government policy of the kind maintained by Santa Fe High School satisfies the Establishment Clause.

CONCLUSION

For the foregoing reasons, as well as those set forth in petitioner's brief, the decision of the court of appeals should be reversed.

Respectfully submitted.

JOSEPH DORTA
NEW JERSEY LEGAL
RESOURCE COUNCIL
40 Baldwin Rd.
Parsippany, N.J. 07054
(973) 263-5258

BRETT M. KAVANAUGH
Counsel of Record
KIRKLAND & ELLIS
655 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 879-5043

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QUESTION PRESENTED

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