Supreme Court, U.S.
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No. 99-62

IN THE

Supreme Court of the United States

SANTA FE INDEPENDENT SCHOOL DISTRICT,

Petitioner,

vs.

JANE DOE, individually and as next friend for her minor children Jane and John Doe, Minor Children; JANE DOE #2, individually and as next 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 FOR PETITIONER

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QUESTION PRESENTED

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

PARTIES

All of the parties to the proceeding in the Court of Appeals are listed in the caption. Petitioner Santa Fe Independent School District is a public school district in Galveston County, Texas. The respondents are individuals suing pseudonymously. Their true names have been listed on a separate document filed under seal with the Court.

There are no parent or subsidiary corporations required to be disclosed under Rule 29.6.

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The opinion of the U.S. Court of Appeals for the Fifth Circuit is reported as *Doe v. Santa Fe Indep. Sch. Dist.*, 168 F.3d 806 (5th Cir. 1999). The Fifth Circuit's denial of rehearing and rehearing en banc, and the dissent therefrom, are reported at 171 F.3d 1013 (5th Cir. 1999). The pertinent orders of the District Court are unreported. *See* JA 28 (dkt. 4), 41(dkt. 13), 42 (dkt. 16); Pet. App. at E1 (dkt. 29), D1 (dkt. 66).[1] A published decision of the District Court on confidentiality matters appears as *Doe v. Santa Fe Indep. Sch. Dist.*, 933 F. Supp. 647 (S.D. Tex. 1996).

JURISDICTION

The U.S. Court of Appeals for the Fifth Circuit rendered its panel decision on February 26, 1999, and denied a timely petition for rehearing and rehearing en banc on April 7, 1999. Petitioner timely filed its petition for a writ of certiorari on July 2, 1999. This Court granted the petition on November 15, 1999. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND POLICY

The pertinent part of the First Amendment to the U.S. Constitution is as follows:

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[1]"JA" means Joint Appendix, "dkt." refers to the District Court docket number, and "Pet. App." means the Appendix to the Petition for Certiorari. Other abbreviations used herein include "Pet." for the Petition for Writ of Certiorari and "Tr." for a hearing transcript (*e.g.*, Tr. 11/3/95 means "transcript of the hearing held on Nov. 3, 1995").

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech . . . .

U.S. Const. amend. I.

The first section of the Fourteenth Amendment to the U.S. Constitution provides as follows:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

The school district policy governing pre-game ceremonies at football games is set forth in its entirety in the Appendix to the Petition, Pet. App. at F1-F2, and in relevant part below.

STATEMENT OF THE CASE

In October 1995, the Santa Fe Independent School District ("Santa Fe") adopted the contested policy, entitled Pre-Game Ceremonies at Football Games ("Football Policy"). The Football Policy provides as follows:

PRE-GAME CEREMONIES AT FOOTBALL GAMES

> 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. at F1. The policy goes on to specify that if it "is enjoined by a court order," then an identical policy will automatically take effect, with the following language added: "Any message and/or invocation delivered by a student must be nonsectarian and nonproselytizing." *Id.* at F1-F2.

The school district adopted the Football Policy pursuant to a District Court order in the present litigation. *See* JA 32 (Interim Order, May 10, 1995); Tr. 8/4/95 at 12, 48; JA 42 (Interim Order Pertaining to Prayer at Football Games, Aug. 17, 1995). The school district initially adopted an "invocation-only" policy in accordance with the District Court's directive

and the governing Fifth Circuit precedent which allows for a prayer-only policy. *Jones v. Clear Creek Indep. Sch. Dist.*, 977 F.2d 963 (5th Cir. 1992), *cert. denied*, 508 U.S. 967 (1993). JA 99-101. *Jones v. Clear Creek* upheld a policy permitting nonsectarian, non-proselytizing, student-initiated, student-led invocations at graduation ceremonies. *Id.* Thus, under *Jones v. Clear Creek*, a school district may adopt an "invocation-only" policy that permits students to vote to have a student-led invocation.

Shortly thereafter, however, the school district revised and expanded its policy to the current Football Policy, which permits students to deliver *both* "invocations" and "messages." Pet. App. at F1; JA 103-05. This current Football Policy was reviewed in the courts below, *see infra* pp. 11-12, and is now before this Court.

Respondents - plaintiffs in the District Court - are two parents and four students, all suing pseudonymously. JA 43-44. When the complaint was filed in April of 1995, the students attended schools in Santa Fe Independent School District. JA 1, 44.[2] Respondents brought suit under 42 U.S.C. §1983 challenging various incidents and practices in the public schools that were alleged to violate the Establishment Clause of the First Amendment. JA 15-27 (Complaint).

[2]At that time, one of the plaintiffs was a high school student and an adult, JA 44 (Stipulations), who presumably has since graduated. One of the minor plaintiffs was in seventh grade in 1993, JA 57, and presumably has also graduated. Another of the minor plaintiffs was in third grade in May of 1994, JA 59, and is now presumably in ninth grade. The final minor plaintiff was in third grade in the 1994-95 school year, *see* JA 60; Tr. 7/25/96 at 79-80, 183-84, and is now presumably in eighth grade.

Among the matters respondents challenged in their complaint was Santa Fe's allowance of student-led prayers at football games. JA 24. Respondents broadly requested injunctive relief against "the religious acts, customs, policies, and practices set forth" in the complaint. JA 25.[3]

In addition, respondents challenged Santa Fe's allowance of prayer at graduation ceremonies. JA 19-20. Although Santa Fe's commencement policy is not before this Court, the conditions imposed by the District Court on the commencement policy were later incorporated into its order governing Santa Fe's football policy. JA 42. Respondents sought immediate relief with respect to the upcoming commencement exercises. In light of the approaching graduation date, the District Court promptly held a hearing on respondents' motion for temporary injunctive relief. Dkt. 3, 6. The District Court then issued an Interim Order, JA 28 (dkt. 4), allowing student invocations based on the *Jones v. Clear Creek* model.

In particular, the District Court allowed Santa Fe to permit a "non-denominational," "non-proselytizing" "invocation and/or benediction" at the upcoming (1995) graduation ceremony. JA 31-32. The District Court specifically required that the students would first determine, by secret ballot held outside business hours, which student would speak as part of

[3]The complaint also attacked certain specific incidents of alleged misconduct by school officials. JA 21-24. The District Court concluded after trial that Santa Fe had already taken appropriate remedial steps regarding these incidents and that the respondents had demonstrated neither compensable injury nor legal liability on the part of Santa Fe. Pet. App. at D14, D15, D17. The Fifth Circuit affirmed the denial of monetary damages, 168 F.3d at 824, and respondents did not cross-petition for review in this Court.

the ceremonies. The District Court also specified that the students would have exclusive responsibility for the "mechanics of the election," and no campaigning would be allowed on school property. Next, the Court ordered that Santa Fe would have no "substantive input into this process whatsoever" and limited the school's involvement to "maintain[ing] order, and to provid[ing] for the reasonable safety and security of the proceedings." Finally, the District Court ordered that the selected students would prepare the text themselves and the school district would have no power of scrutiny or pre-approval over the texts. JA 31-32.

The District Court further ordered Santa Fe to

> establish or clarify existing policies to deal with either banning all prayer, or firmly establishing reasonable guidelines to allow nonsectarian and non-proselytizing prayer at all relevant school functions.

JA 32.[4]

At that time, Santa Fe had no formal policy specifically addressing prayers at football games. The practice had been for a "student council chaplain" to say a prayer over the public address system before varsity home football games. JA 64.

[4]The District Court repeatedly expressed its discomfort with the content limitations on student speech entailed in the "nonsectarian, non-proselytizing" requirement, but declared itself bound by Fifth Circuit precedent, namely, *Jones v. Clear Creek*. *See* Tr. 8/4/95 at 3-5; Tr. 11/3/95 at 11-12.

At a subsequent hearing on August 4, 1995, the District Court addressed the particular question of prayers at football games. Tr. 8/4/95. The District Court directed the parties to

> submit to me a joint proposed order to allow a *Jones* sanctioned type order before football games. . . . I want an order that will allow a *Jones* type -- in other words, non-proselytizing/nonsectarian prayer to solemnize and dignify the football game. And let me have that within ten days.

Id. at 48.[5]

On August 17, 1995, the District Court accordingly entered an Interim Order Pertaining to Prayer at Football Games. JA 42. This order incorporated the key elements of the District Court's previous order regarding commencement exercises. The order provided in pertinent part as follows:

> It is hereby ORDERED:
>
> The District's school board may permit the students at the District's high school to vote to include a pre-game prayer at varsity home football games and to select a student volunteer to deliver the prayer. All high school students may participate in the selection process if they so choose; however, the selection procedures previously outlined by the Court in its May 10, 1995 order concerning prayer at graduation must be followed. The pre-game

[5]The District Court further directed that "by October the 13th, the defendant [Santa Fe] will finalize a unified First Amendment religion expression policy addressing all issues . . . set out in this case." Tr. 8/4/95 at 56.

> prayer delivered by the volunteer student must be nonsectarian and nonproselytizing. *See Jones v. Clear Creek Indep. School Dist.*, 97[7] F.2d 963 (5th Cir. 1992), *cert. denied*, 113 S.Ct. 2950 (1993).

JA 42.

In response to this order, Santa Fe initially adopted a *Jones v. Clear Creek*-type policy governing "Prayer at Football Games." JA 99-101. Santa Fe's interim policy - allowing student-led, student-initiated prayer, but specifying that the selected student deliver an invocation - complied with the District Court's direction (at least in its "back-up" form).[6]

Nonetheless, Santa Fe was not satisfied with a football policy that limited student speech to an "invocation." As a result, Santa Fe adopted a new policy, entitled "Pre-Game Ceremonies at Football Games," to permit students to deliver speeches that need not be in any way religious. JA 104 ("brief invocation and/or message," "statement or invocation"). This policy was adopted in October of 1995. *See Doe v. Santa Fe Indep. Sch. Dist.*, 168 F.3d 806, 812 (5th Cir. 1999); dkt. 20 at 14 n.5; Tr. 11/3/95 at 11. This is the current Football Policy, *see* Pet. App. at F1-F2, which is at issue before this Court.

[6]Employing the model used in its new graduation policy, Tr. 8/4/95 at 5-6, Santa Fe adopted a "back-up policy" approach. Under this approach, the policy was set forth without the problematic "nonsectarian, nonproselytizing" restrictions on student speech; however, in the event a court invalidated that policy, a back-up policy containing the "nonsectarian, nonproselytizing" requirement would automatically take effect. JA 100-01.

Under the current Football Policy, Santa Fe students have sole authority over pre-game messages. Each spring, Santa Fe students vote, first, "whether such a statement or invocation will be part of the pre-game ceremonies." Pet. App. at F1. If the vote is affirmative, any student can volunteer to deliver the "statement or invocation." *Id.* Students then vote, in a second election, to select which student, from the list of volunteers, will give the "statement or invocation." *Id.* At that point,

> [t]he 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.

Id. As with the predecessor policy, the new Football Policy included a back-up provision. *Id.* at F1-F2.

There is no record evidence concerning the actual operation of the policy, the results of any student votes, or the content of any messages or invocations given at football games under the current Football Policy at issue here. *See* 168 F.3d at 810 n.3.[7] Nonetheless, the Football Policy, on its face, makes clear that decisions whether to have a student speaker and the content of any student messages or invocations rest with the students.[8] In addition, further insights about the operation of

[7]The stipulations contained in the Joint Appendix, JA 65-66 (Stipulations 129-31), refer to events predating the October 1995 Football Policy and relate instead to the *Jones v. Clear Creek*-type pre-game football policy that was only in effect from August to October 1995.

[8]The school district has no control over the content of the student speaker's "message and/or invocation." *See* JA 32 (Interim Order of May

(continued...)

the current policy come from the District Court's orders, with which the policy was designed to comply.

When the policy is read in conjunction with the District Court's orders, the following aspects of its operation become clear, JA 31-32, 42, 104-05:

- students first determine, by secret ballot held outside business hours, whether or not to include a student speaker as part of the ceremonies, JA 31;

- if the vote is in favor of having a student speaker, the students vote again, by secret ballot held outside business hours, to select who will speak at the ceremonies, JA 104;

- students have exclusive responsibility for the "mechanics of the election," with Santa Fe providing

[8](...continued)
10, 1995); JA 42 (order of August 17, 1995 incorporating Interim Order of May 10, 1995); Tr. 5/10/96 at 9 (District Court: "the kids can use anybody they want, to say anything they want"). Indeed, Santa Fe has consistently maintained that it has ceded all content control to the student speaker. *See, e.g.*, Defendants' Motion for Summary Judgment (dkt. 20) at 14 ("the policy prevents school officials from dictating the content of any student statement or prayer"); Brief of Appellant at 21 (policy "allows *any* statement, message, or prayer that achieves the goal of the policy"); Reply Brief of Appellant/Cross-Appellee Santa Fe Independent School District at 8 ("The pre-game ceremony policy removes any school officials from the decisions of whether a message will be given, whether that message will be secular or prayerful, or what the actual content of the message or invocation will be"); Pet. at 18 (the pre-game policy "prohibits school officials from controlling the content of student speech if the students choose to take advantage of the opportunity offered").

no "substantive input into this process whatsoever," JA 31;

- school officials' involvement is limited to "maintain[ing] order, and to provid[ing] for the reasonable safety and security of the proceedings," JA 31-32;

- no campaigning is allowed on school property, JA 31;

- any 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, JA 104;

- the school district has no power of scrutiny or pre-approval of the student speakers' texts, JA 32.

With no record evidence of the current policy's application, the District Court addressed the facial constitutionality of the current Football Policy in its ruling on summary judgment. Pet. App. at E5. *See also id.* at E13 n.13 (recognizing that respondents retain the right to challenge the policy, as applied, in a separate lawsuit). The court held that the Football Policy as written was unconstitutional, but that the "back-up" policy containing the "nonsectarian, non-proselytizing" requirement passed constitutional muster under the Establishment Clause. Pet. App. at E11-12. The District Court subsequently "adopted" its summary judgment ruling into its final order and entered final judgment. Pet. App. at D2, D19.

The parties filed cross-appeals. JA 11. A divided panel of the Fifth Circuit held the Football Policy unconstitutional both as written and in its "back-up" version. 168 F.3d at 822-23. The Fifth Circuit denied rehearing and, over seven dissenting votes, denied rehearing en banc. Pet. App. at C1. This Court then granted certiorari limited to the following question: "Whether petitioner's policy permitting student-led, student-initiated prayer at football games violates the Establishment Clause."

SUMMARY OF ARGUMENT

"[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 Educ. v. Mergens*, 496 U.S. 226, 250 (1990) (plurality) (emphasis in original). Santa Fe's Football Policy simply permits private speech by students.

Respondents bring a facial challenge to the Football Policy. That challenge cannot succeed absent a showing that under "no set of circumstances" the policy would pass constitutional muster. *United States v. Salerno*, 481 U.S. 739, 745 (1987). Respondents cannot make such a showing.

As a neutral policy that permits secular or religious speech only as a consequence of the independent, intervening decisions of individual students, the Football Policy clearly satisfies Establishment Clause analysis. This Court has repeatedly held that neutrality and deference to private decisionmakers are key elements of a constitutionally permissible program. Neutrality

ensures that the government neither favors nor disfavors religion, while deference to private choice ensures that government neither establishes a religious view itself nor suppresses the religious freedom of private citizens.

Pursuit of this middle course - fostering private liberty while maintaining governmental neutrality - characterizes numerous decisions of this Court. *E.g.*, *Widmar v. Vincent*, 454 U.S. 263 (1981) (neutral accommodation of college student speech); *Mueller v. Allen*, 463 U.S. 388 (1983) (neutral tax deduction for education expenses); *Witters v. Washington Dep't. of Servs. for the Blind*, 474 U.S. 481 (1986) (neutral provision of educational grants); *Board of Educ. v. Mergens*, 496 U.S. 226 (1990) (neutral protection for high school student clubs); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) (neutral access to school facilities); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993) (neutral provision of services to disabled students); *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819 (1995) (neutral access to student fees); *Agostini v. Felton*, 521 U.S. 203 (1997) (neutral provision of remedial education).

This "middle course" properly respects the twin guarantees of the Establishment and Free Exercise Clauses of the First Amendment. The Football Policy embraces this "middle course" and easily satisfies the various tests this Court has employed in its Establishment Clause analysis.

The Football Policy satisfies the purpose, effect, and entanglement inquiries of *Lemon v. Kurtzman*, 403 U.S. 602 (1971). The Football Policy reflects a number of legitimate secular purposes. It was adopted in response to a court order.

It fosters the free expression of private persons, a purpose this Court approved in *Widmar*. And it serves a number of other explicitly stated secular purposes as well - solemnizing sporting events, promoting good sportsmanship and student safety, and establishing an appropriate environment for competition. Pet. App. at F1.

The primary effect of the Football Policy is to achieve the secular purposes identified above. Any religious speech that takes place under the policy will result only from the independent, intervening choices of students and ultimately the individual student speaker. Had the school district desired that students offer only invocations, it simply could have followed the District Court's direction to that effect under governing Fifth Circuit precedent. Instead, the school district chose a broader, neutral course in which students could present a message or invocation.

Santa Fe's Football Policy is the antithesis of excessive entanglement. By embracing a "hands-off" approach, the school district avoided any role as censor or monitor of religious or secular student speech.

Under the "endorsement" test, it is clear that the reasonable, informed observer would perceive no improper endorsement of religion. Any religious speech a student utters at a pre-game ceremony will result from that student's private choice, not from governmental intervention. Indeed, the students will have been involved in the very process of deciding, first, whether there would be a pre-game speech at all, and second, which volunteer speaker would be chosen to compose and deliver a message or invocation. These students

therefore will be personally aware of the neutrality of the policy and the student-initiated, student-composed nature of any speech delivered.

Finally, there is no unconstitutional government "coercion" here. Unlike *Lee v. Weisman*, 505 U.S. 577 (1992), where school officials decided that there would be a prayer, who would give the prayer, and what its contents would be, *id.* at 587-88, Santa Fe exercises no control over whether there would be a message or invocation, who would deliver it, and what its contents would be. Pet. App. at F1. These key features of student choice and neutrality preclude any state coercion. While some students may object to hearing a secular or religious message they disagree with, the Establishment Clause creates no affirmative right to silence student speech. Indeed, cases like *Rosenberger, Mergens*, and *Tinker v. Des Moines Indep. Comm. Sch. Dist.*, 393 U.S. 503 (1969), presuppose that students will encounter speech from classmates with which they may not agree.

Respondents' contrary position - that allowing student speech violates the Establishment Clause because that speech might be religious - is meritless. Furthermore, adoption of respondents' contention would impose an affirmative duty on school officials to censor student *religious* speech in contexts where student *secular* speech is allowed. Such censorship would raise a host of constitutional difficulties under the Free Speech, Free Exercise, and Establishment Clauses of the First Amendment.

ARGUMENT

I. THIS CASE PRESENTS A FACIAL CHALLENGE TO SANTA FE'S POLICY PERMITTING STUDENT SPEECH AT FOOTBALL GAMES.

The Football Policy at issue here was enacted during the pendency of the litigation and in response to court orders mandating the parameters of that policy. Respondents presented no evidence concerning the actual operation of the Football Policy. *Doe v. Santa Fe Indep. Sch. Dist.*, 168 F.3d 806, 810 n.3 (5th Cir. 1999) ("the record contains no examples of the football game prayers"). Therefore, this case presents only a facial challenge to the Football Policy. *See Bowen v. Kendrick*, 487 U.S. 589, 600 (1988) (explaining that in *Edwards v. Aguillard*, 482 U.S. 578, 581 n.1 (1987), "it was clear that only a facial challenge could have been considered, as the Act had not yet been implemented"). *See also* Pet. App. at E13 n.13 (District Court noted in its final order that respondents remain free to challenge the school district's policies, as applied, in a separate lawsuit).

"A facial challenge" to a statute, ordinance, or policy "is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act [or policy] would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). "It has not been the Court's practice, in considering facial challenges to statutes . . . , to strike them down in anticipation that particular applications may result in unconstitutional [government actions]." *Bowen v. Kendrick*, 487 U.S. at 612 (quoting *Roemer v. Board of Public Works*, 426 U.S. 736, 761 (1976) (plurality)).

For respondents to prevail on their facial challenge, they would have to show that Santa Fe's Football Policy allowing "a statement or invocation" would be unconstitutional even if, for example, the student body always voted *not* to have any student message, or even if on each occasion the student speaker simply chose to deliver a secular message, such as a tribute to Walter Payton. Santa Fe's Football Policy cannot be invalidated on the basis of some "possibility or even likelihood" of an unconstitutional application. *Bowen*, 487 U.S. at 613. *Accord id.* at 623 (O'Connor, J., concurring) (facial challenge must be rejected where statute "need not result in constitutional violations, despite an undeniably greater risk than is present in [other contexts]"). "The fact that the [policy] might operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid." *Salerno*, 481 U.S. at 745.

As established herein, respondents "have failed to shoulder their heavy burden to demonstrate that the [policy] is 'facially' unconstitutional." *Id.* On the contrary, the Santa Fe Football Policy easily passes facial constitutional muster.

II. THE SANTA FE FOOTBALL POLICY DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE.

A. As a Neutral Policy that Permits Secular or Religious Speech Only as a Consequence of the Independent, Intervening Choices of Individual Students, the Santa Fe Football Policy Does Not Violate the Establishment Clause.

The Santa Fe Football Policy combines two features which together ensure that the program does not run afoul of the Establishment Clause. First, the Football Policy is neutral as between secular and religious speech. By its express terms, the Football Policy "permit[s] students to deliver a brief invocation and/or message." The Football Policy does not favor invocations over messages or vice-versa. The choice is left to the student.

Second, and equally important, the Football Policy does not permit any religious speech to take place absent the independent, intervening choices of individual students. Indeed, the Football Policy permits student-led, student-initiated, secular or religious speech only after a series of independent student choices. Initially, students must choose whether to have a speaker. (Students do *not* vote whether to have a prayer.) If the students vote to have such a speaker, individual students must then choose to volunteer to deliver the pre-game speech. Next, the student body must choose by vote which student volunteer will speak. Finally, that individual student speaker must choose what message to give. Religious speech will occur, if at all, only as a result of multiple independent, intervening decisions of students.

This Court's religion cases uniformly have stressed the importance of government neutrality toward religion. The neutrality principle has played a role in almost every effort to interpret the Establishment Clause and to reconcile it with the Free Exercise and Free Speech Clauses of the First Amendment. *See, e.g., Everson v. Board of Educ.*, 330 U.S. 1 (1947); *Agostini v. Felton*, 521 U.S. 203 (1997).

More recently, in the context of student speech, this Court has emphasized that a policy of "neutrality" in no way requires or justifies the exclusion of religious speakers or religious topics. A neutral policy that puts religious speech on an equal footing with other speech does not violate the Establishment Clause. Indeed, this Court repeatedly has held that a public school that opens its facilities to secular groups and speakers, not only may, but must, offer those facilities to religious groups and speakers on an equal basis. *See, e.g., Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Board of Educ. v. Mergens*, 496 U.S. 226 (1990); *Widmar v. Vincent*, 454 U.S. 263 (1981). By treating secular and religious speech equally, the government ensures that "the message is one of neutrality rather than endorsement." *Mergens*, 496 U.S. at 248 (plurality).

In addition to neutrality, this Court consistently has emphasized the distinction between direct government involvement in religious speech and government toleration of religious expression that results from the independent, intervening choices of individuals. Speech that is student-led and student-initiated results from the individual speaker's choices. The message does not flow from the government. As *Mergens* recognized, "there is a crucial 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." 496 U.S. at 250 (plurality) (emphasis in original).

This Court also has recognized the importance of independent, intervening choices in other Establishment Clause contexts. In *Mueller v. Allen*, 463 U.S. 388 (1983), for example, this Court upheld Minnesota's tax deduction for educational expenses, including those incurred at sectarian schools, with the observation that "public funds become available only as a result of numerous, private choices of individual parents of school-age children." *Id.* at 463. Likewise, Justice Marshall, writing for a unanimous Court in *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481 (1986), emphasized that "[a]ny 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 of aid recipients." *Id.* at 488; *see also id.* at 490-91 (Powell, J., concurring) (underscoring this point); *id.* at 493 (O'Connor, J., concurring in part and concurring in judgment) (same); *see also Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 12 (1993).

This Court returned to both these themes - neutrality and the importance of intervening, individual choice - in *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819 (1995). First, the Court observed that "a significant factor in upholding governmental programs in the face of an Establishment Clause attack is their neutrality towards religion." *Id.* at 839. In addition, the Court highlighted the critical "distinction between the University's own favored

message and the private speech of students." *Id.* at 834. The majority then applied these principles to conclude that a neutral policy of reimbursing the printing costs of student magazines, whose content was entirely the product of student decisions, did not violate the Establishment Clause.

Although the dissent disagreed with the application of these principles in a context that arguably involved direct aid to religious institutions, no member of the Court quarreled with the importance of these two principles. The dissent recognized the importance of neutrality or "evenhandedness." *Id.* at 877-79 (Souter, J., dissenting). Likewise, the dissent recognized the emphasis prior cases had placed on the fact that any attenuated religious effect was "'the result of the genuinely independent and private choices of aid recipients.'" *Id.* at 880 (Souter, J., dissenting) (quoting *Witters*, 474 U.S. at 487). The dissent also emphasized that there must be a "third party standing between the government and the ultimate religious beneficiary to break the circuit by its independent discretion." 515 U.S. at 886 (Souter, J., dissenting).

The Santa Fe Football Policy satisfies these key principles. The Football Policy, of course, involves no direct aid and so presents a much easier case than *Rosenberger*. This is a case of speech without aid. Nonetheless, even applying the standard of the dissent in *Rosenberger*, the "independent discretion" of the student speaker in deciding whether to give a message or invocation clearly suffices to "break the circuit" between the government and any religious content of the student speech. In addition, the Football Policy's facial neutrality underscores that the individual student's speech is the result of student choice, not school direction. Pet. App. at F1.

Under these circumstances, especially in the context of a pre-implementation facial challenge, the Santa Fe Football Policy does not run afoul of the Establishment Clause. What is more, the neutrality and important role of individual choice that characterize the Football Policy make clear that the policy passes muster under the various tests this Court has employed to guide its Establishment Clause jurisprudence.

B. As a Neutral Policy that Permits Secular or Religious Speech Only as a Consequence of the Independent, Intervening Choices of Individual Students, the Santa Fe Football Policy Passes the *Lemon* Test.

The neutrality and the important role of independent, intervening choices that characterize Santa Fe's Football Policy ensure that it passes all three prongs of the test announced in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). The familiar *Lemon* test imposes three requirements:

> First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . ; finally, the statute must not foster "an excessive government entanglement with religion."

Id. at 612-13 (citation omitted). This Court has not applied *Lemon* with regularity and has most recently suggested that the entanglement test is best understood "as an aspect of the inquiry

into the statute's effect." *Agostini*, 521 U.S. at 233.[9] In any event, the *Lemon* test poses no obstacle to Santa Fe's Football Policy.

1. The Santa Fe Football Policy Has an Explicit Secular Purpose.

The Football Policy serves the secular purpose of encouraging and accommodating student speech. The desire of an educational institution to permit student speech itself reflects a constitutionally sufficient secular purpose. *Widmar v. Vincent*, 454 U.S. 263, 271 & n.10 (1981). Formulation of the policy also served the pressing secular need to comply with court orders directing the adoption of such a policy. Here, Santa Fe went beyond the requirements of the District Court order permitting a prayer-only policy by ultimately adopting the policy at issue here, which allows students to deliver a "message and/or invocation." By going beyond the demands of the District Court order and Fifth Circuit precedent and expressly including secular speech, Santa Fe furthered indisputably legitimate secular purposes.

The policy's facial neutrality, permitting both religious invocations and secular messages, further guarantees a secular purpose. As this Court has noted, "*Lemon*'s 'purpose'

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[9]At times, this Court has referred to the factors enumerated in *Lemon* as "no more than helpful signposts." *Hunt v. McNair*, 413 U.S. 734, 741 (1973). In other cases, this Court's analysis has ignored *Lemon* and its three-prong test entirely. *See, e.g., Rosenberger*; *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753 (1995); *but see Lamb's Chapel*, 508 U.S. at 395 n.7 ("there is a proper way to inter an established decision and *Lemon*, however frightening it might be to some, has not been overruled").

requirement aims at preventing the relevant government decisionmaker . . . from abandoning neutrality." *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 335 (1987).

The Football Policy also serves the more specific "legitimate secular purposes of solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society," as well as fostering an atmosphere of sportsmanship at football games. *Lynch v. Donnelly*, 465 U.S. 668, 693 (1984) (O'Connor, J., concurring). On its face, the Football Policy articulates the secular purpose for student speech and, by extension, for the policy as a whole: "to solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition." Pet. App. at F1.

Santa Fe's stated secular purposes ensure that it does not run afoul of the first prong of *Lemon*. This Court has stressed its "reluctance to attribute unconstitutional motives to states, particularly when a plausible secular purpose for the state's program may be discerned from the face of the statute." *Mueller v. Allen*, 463 U.S. 388, 394-95 (1983). What is more, a challenged provision violates the "purpose" prong of *Lemon* "only if it is motivated wholly by an impermissible purpose." *Bowen v. Kendrick*, 487 U.S. at 602 (and cases cited). Indeed, the Court repeatedly has found a secular purpose even for programs that failed to comply with another aspect of *Lemon*. *See, e.g.*, *Wolman v. Walter*, 433 U.S. 229, 236 (1977); *Lemon*, 403 U.S. at 613.

The Football Policy does not direct any student to offer an invocation. Any religious speech, if it occurs at all, will take place only as a result of the multiple independent, intervening choices of individual students. *Supra* pp. 8-11. This crucial fact underscores the secular purpose of the policy. The best proof of these abiding secular purposes is that the Football Policy's goals would be satisfied even if not a single student chooses to deliver a religious invocation. If every student message is secular, the policy can still achieve its stated goals "to solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition." Pet. App. at F1.

Certainly, the express inclusion of invocations among the permissible forms of student speech does not cast any doubt on the Football Policy's secular purposes. To the contrary, the Football Policy's express neutrality ensures a secular purpose. No rule of construction can convert the policy's express neutrality into express favoritism.

The Football Policy's inclusion of invocations among the permissible forms of student speech reflects the same secular purpose as the express inclusion of "religious" content among the forbidden grounds for discriminating against student speech in the Equal Access Act. *See* 20 U.S.C. § 4071(a) (forbidding the denial of equal access "on the basis of the religious, political, philosophical, or other content of the speech"). The express inclusion of religious speech in the statute did not trouble the Court in *Mergens*. Moreover, the conclusion in *Mergens* applies with full force to the Santa Fe Football Policy: "Because the Act on its face grants equal access to both secular and religious speech, we think it clear that the Act's purpose

was not to '"endorse or disapprove of religion."'" *Mergens*, 496 U.S. at 249 (quoting *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985), quoting *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring)). Likewise, this Court upheld the Adolescent Family Life Act against a facial challenge in *Bowen v. Kendrick*, 487 U.S. 589 (1988), despite four separate express references in the statute to the role of religious organizations in addressing the problems associated with adolescent sexuality. *See id.* at 606-07.

Nothing in *Wallace v. Jaffree*, 472 U.S. 38 (1985), undermines the Football Policy's secular purpose. Indeed, the Football Policy is in many ways the converse of *Wallace*. In *Wallace*, this Court struck down an Alabama statute that layered a moment of silence "for meditation or voluntary prayer" on top of an existing statute providing for a moment of silence "for meditation." 472 U.S. at 59. Although the order of the two statutes was not dispositive,[10] the Court concluded that the addition of voluntary prayer to an existing baseline of meditation reflected a "legislative intent to return prayer to the

[10] *Wallace* involved the unusual situation in which the "unrebutted evidence" pointed to a wholly religious purpose, 472 U.S. at 58, and in defending the statute, Alabama "conceded in the courts below that the purpose of the statute was to make prayer part of daily classroom activity," *id.* at 77-78 (O'Connor, J., concurring in judgment). The addition of an express reference to prayer when an existing statute already permitted a moment of silence for meditation was only one piece of evidence. Indeed, Justice O'Connor specifically noted that the decision in *Wallace* would not invalidate the 1954 congressional amendment expressly adding "under God" to the pre-existing text of the Pledge of Allegiance. *See id.* at 78 n.5 (O'Connor, J., concurring in judgment). "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." *Id.* at 73 (O'Connor, J., concurring in judgment).

public schools," which was "quite different from merely protecting every student's right to engage in voluntary prayer during an appropriate moment of silence during the schoolday." *Id.*

Here, by contrast, the relevant baseline was not a policy that permitted any and all messages at football games, implicitly including invocations. Instead, the relevant baseline was a policy expressly accommodating prayer, and prayer alone, at football games. As explained above, the District Court ordered the school district to formulate a football game policy consistent with Fifth Circuit precedent. That precedent allows a school district to have a policy permitting only prayer.[11] The District Court created a baseline of an explicit prayer-only policy. Despite this clear precedent, and despite the District Court's order to formulate a policy consistent with Fifth Circuit precedent, Santa Fe eventually settled on a policy that expressly gives the student speaker a choice to deliver either an invocation or message. Santa Fe decided to permit not just religious speech, but secular speech - not just invocations,

[11] Governing Fifth Circuit precedent clearly gave Santa Fe the option of adopting an invocation-only policy. In *Jones v. Clear Creek Indep. Sch. Dist.*, 977 F.2d 963 (5th Cir. 1992), on remand for reconsideration in light of this Court's decision in *Lee v. Weisman*, 505 U.S. 577 (1992), the Fifth Circuit upheld an invocation-only policy for commencement ceremonies. Under the *Jones v. Clear Creek* policy, students decided whether or not to have an individual student deliver a nonsectarian, nonproselytizing invocation at the commencement exercise. *Jones v. Clear Creek*, 977 F.2d at 964-65. The Fifth Circuit approved this policy without indicating that the policy created any constitutional difficulties by limiting students to invocations - as opposed to invocations or messages. Accordingly, if Santa Fe had wanted to establish a policy giving students only the option of delivering invocations, Fifth Circuit precedent gave them a green light.

but messages. Under these circumstances, the Football Policy clearly reflects a secular purpose.

2. The Santa Fe Football Policy's Neutrality and the Critical Intervening Roles of Students Ensure that the Policy Does Not Have the Primary Effect of Advancing Religion.

The Santa Fe Football Policy's neutrality and the important role of independent, intervening student decisions prevent the program from having the primary effect of advancing religion. Instead, the program has the primary effect of advancing the neutral, secular goals that are achieved regardless of whether students choose to deliver a message or an invocation - namely, accommodation of student speech, solemnization of public occasions, and promotion of sportsmanship. In *Witters*, for example, empowering handicapped students to choose a suitable education - secular or sectarian - ensured that the policy's primary effect was promoting vocational education for handicapped students. Any benefit to the sectarian or secular institutions chosen by individual students was the secondary result brought about by the independent choices of private persons. As Justice O'Connor explained for a plurality of this Court in *Mergens*,

> there is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect. We think that secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis. . . . The proposition that schools do not endorse everything they fail to censor is not complicated.

496 U.S. at 250 (rejecting "primary effect" challenge) (emphasis in original; citations omitted).

In the present case, as in *Mergens*, any religious or secular message is chosen and delivered by the student speaker, not a government official. The student speaker has unreviewable discretion to compose a message from virtually any religious or secular perspective, and any student can volunteer. Hence, the "broad spectrum" of potential messages, *cf. id.* at 252, supplies an "important index of secular effect," *id.* (quoting *Widmar*, 454 U.S. at 274). In addition, because this is a facial challenge, there is no evidence of any unconstitutional primary effect.

Here, if the school district's primary goal were to promote prayer, it would have been content to direct students to vote only on the question whether to offer prayers, as Fifth Circuit precedent allows. The District Court's invitation to follow this course provided the perfect opportunity for the school district to adopt a "prayer-only" policy. *Supra* note 11. Instead, Santa Fe empowered students to choose whether to have any speech at all, and let the individual student speakers decide whether to deliver a message or invocation. Empowering students in this fashion is entirely consistent with accommodating student speech and promoting sportsmanship, but not with promoting prayer.

The analysis in *Mergens* likewise refutes any notion that the Football Policy has the impermissible primary effect of advancing religion. The same safeguards emphasized in

Mergens are present here. First and foremost, the critical role students play in decisions whether and how to speak ensures that students "understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis." 496 U.S. at 250 (plurality). In addition, like the programs authorized by the Equal Access Act, any student speech that occurs here would take place without the involvement of teachers and during football games, a decidedly non-instructional time. As *Mergens* recognized, "there is little if any risk of official state endorsement or coercion where no formal classroom activities are involved and no school officials actively participate." *Id.* at 251 (plurality). Finally, the program's neutrality plays an important role in maintaining a permissible primary effect. As in *Mergens*, "a school that permits a student-initiated and student-led religious [speech], just as it permits any other student [speech], does not convey a message of state approval or endorsement of the particular religion." *Id.* at 252 (plurality); *accord Rosenberger*, 515 U.S. at 841-42.

This Court's recent analysis of the effects test in *Agostini v. Felton*, 521 U.S. 203 (1997), reinforces the conclusion that the Santa Fe Football Policy does not have the primary effect of advancing religion. In *Agostini*, this Court identified the "three primary criteria we currently use to evaluate whether government aid has the primary effect of advancing religion." *Id.* at 234. The Court upheld the Title I program at issue because "it does not result in government indoctrination; define its recipients by reference to religion; or create an excessive entanglement." *Id.* The Santa Fe Football Policy likewise does not raise any of these concerns. By relinquishing to students the power to decide whether and how to engage in speech,

Santa Fe removes itself from any position to indoctrinate religious beliefs.

Similarly, the policy does not define speakers by reference to religion or create any incentive for the individual speaker to choose a religious theme over a secular one. It is perhaps imaginable that a school could administer such a policy in a manner that would create incentives to choose religious topics. But that is particularly unlikely here in light of the school district's choice of a neutral speech policy over the invocation-only policy permitted under Fifth Circuit precedent and authorized by the District Court.

In any event, the remote possibility that someone could pervert a facially neutral policy to favor religion is not a fit consideration for a pre-implementation facial challenge. *Supra* § I. As this Court has noted on a number of occasions, "public employees will not be presumed to inculcate religion." *Agostini*, 521 U.S. at 225; *accord Zobrest*, 503 U.S. at 13; *Board of Educ. v. Allen*, 392 U.S. 236, 245 (1968) ("Absent evidence, we cannot assume that school authorities . . . will not honestly discharge their duties under the law"). Finally, as demonstrated in the following section, the Football Policy avoids excessive entanglement, the final factor identified in *Agostini*.

3. The Santa Fe Football Policy Avoids, Rather Than Engenders, Excessive Entanglement.

Whether properly analyzed as a stand-alone factor or as part of the effects test, the "entanglement" inquiry poses no constitutional obstacle to the Santa Fe Football Policy. Indeed,

the policy's facial neutrality and its decision to leave the choice of message or invocation up to the individual student is the antithesis of entanglement.

By adopting a "hands-off" approach and leaving it to the student speaker to select the message (and to the student body both to select the speaker and to decide whether even to have a message at football games in the first place), Santa Fe has removed itself several steps from any potential religious message. By deliberate policy design, there is no monitoring of religion or censoring of religious speech that could trigger entanglement concerns. *See Mergens*, 496 U.S. at 253 (plurality) ("school officials may not promote, lead, or participate" in students' religious speech, and "custodial oversight . . . does not impermissibly entangle government in . . . religious activities"). As in *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327 (1987), it "cannot be seriously contended that [the challenged enactment] impermissibly entangles church and state; the [enactment] effectuates a more complete separation of the two and avoids . . . intrusive inquiry into religious belief," *id.* at 339. Indeed, the rule respondents urge - mandatory censorship of student religious messages - would create precisely the entanglement concerns the present policy avoids. *See infra* § III(C).

In this regard, the Santa Fe Football Policy has the same virtues as the program upheld in *Walz v. Tax Comm'n*, 397 U.S. 664 (1970). In that case, a tax exemption for religious organizations along with other charitable organizations avoided entanglement concerns. The contrary policy would have forced tax authorities into innumerable decisions as to whether an organization qualified as "religious" and then obligated them to

monitor organizations to ensure that the resulting classifications were not circumvented. *See id.* at 674. Both are roles for which government authorities are uniquely ill-suited. *See, e.g.*, *Widmar v. Vincent*, 454 U.S. 263, 272 n.11 (1981).

Likewise, in the specific context of student speech, this Court has recognized that neutral policies serve to avoid entanglement problems. *See Rosenberger*, 515 U.S. at 844-45; *Mergens*, 486 U.S. at 253 (plurality); *Widmar*, 454 U.S. at 269-70 n.6, 272 & n.11. As *Mergens* aptly summarized, "a denial of equal access might well create greater entanglement problems in the form of invasive monitoring to prevent religious speech." 486 U.S. at 253 (plurality). Such "official censorship would be far more inconsistent with the Establishment Clause's dictates than would government provision of [an opportunity for student speech] on a religion-blind basis." *Rosenberger*, 515 U.S. at 845; *see also County of Allegheny v. ACLU*, 492 U.S. 573, 677-78 (1989) (Kennedy, J., concurring in part and dissenting in part).[12]

In sum, the Santa Fe Football Policy's facial neutrality between messages and invocations, and the authority of students to make independent decisions, make clear that the policy survives all three prongs of the *Lemon* test. The policy serves secular purposes and has the primary effects of accommodating student speech, solemnizing public occasions,

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[12]Respondents bear a particularly heavy burden in establishing excessive entanglement in a facial challenge. When a program does not involve excessive entanglement "on its face," courts will not assume that bad faith in implementation will necessitate excessive monitoring. *See Committee for Public Educ. & Religious Liberty v. Regan*, 444 U.S. 646, 660-61 (1980).

and fostering sportsmanship. Moreover, far from engendering excessive entanglement between church and state, the policy grants students freedom from government monitoring and censorship.

C. As a Neutral Policy that Permits Secular or Religious Speech Only as a Consequence of the Independent, Intervening Choices of Individual Students, the Santa Fe Football Policy Neither Endorses Religion Nor Coerces Religious Observances.

The neutrality and the role of individual students provide the keys to the Santa Fe Football Policy's compliance with *Lemon*. These same features also ensure that the policy does not run afoul of the other tests this Court has employed in applying the Establishment Clause. The facial neutrality of the program precludes any message of government endorsement of religion, and the choices exercised by students preclude government coercion. With these guarantees of neutrality and student choice, "there is no real likelihood that the speech in question is being either endorsed or coerced by the State." *Rosenberger*, 515 U.S. at 841-42. What is more, the fact that the speech occurs on the football field at night, rather than in the classroom during the school day, avoids coercion or endorsement. As noted above, "there is little if any risk of official state endorsement or coercion where no formal classroom activities are involved and no school officials actively participate." *Mergens*, 496 U.S. at 251.

1. The Santa Fe Football Policy Does Not Endorse Religion.

The question whether the government's actions impermissibly endorse religion is one yardstick this Court has employed in determining whether those actions have the impermissible primary purpose and effect of advancing religion. *See, e.g., Agostini*, 521 U.S. at 235; *Allegheny*, 492 U.S. at 592. Accordingly, Santa Fe's Policy does not endorse religion for the same reasons that it does not have the primary purpose and effect of advancing religion.[13]

In particular, the Football Policy involves student, rather than government, speech and is neutral between religious and secular speech. These factors preclude any government endorsement, or appearance of endorsement, of religion. Any religious speech that occurs under the policy will be "the result of [the student'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 activity." *Witters*, 474 U.S. at 493 (O'Connor, J., concurring); *accord Agostini*, 521 U.S. at 226 (noting that when religious activity occurs only because of independent, individual decisions it cannot be attributed to state decisionmaking); *Rosenberger*, 515 U.S. at 848 (O'Connor, J., concurring) (same); *Mueller v. Allen*, 463 U.S. 388, 399 (1983)

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[13] *See Agostini*, 521 U.S. at 235 (stating at the conclusion of its *Lemon* analysis,"[t]he same considerations . . . require us to conclude that this . . . program also cannot reasonably be viewed as an endorsement of religion"); *Mergens*, 496 U.S. at 252 (plurality) ("students should perceive no message of government endorsement of religion. Thus, we conclude that the Act does not . . . on its face . . . have the primary effect of advancing religion").

("no imprimatur of state approval" of religion where religious choice is made by private individuals).[14]

Although this Court has recognized that intervening, individual choices avoid endorsement problems in other contexts, *see, e.g.*, *Witters*, 474 U.S. at 488-89, this is especially true when student speech is at issue. The "crucial 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," applies with particular force to the question of endorsement. *Mergens*, 496 U.S. at 250 (plurality) (emphasis in original); *see also Lee v. Weisman*, 505 U.S. 577, 630 n.8 (1992) (Souter, J., concurring) ("If the State had chosen its graduation day speaker 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"). Here, Santa Fe employs secular criteria and leaves the choice of whether or not to have a message and decisions concerning its content to the student speaker. Pet. App. at F1. By providing an opportunity for student speech, the school "does not thereby endorse or promote any of the particular ideas aired." *Widmar v. Vincent*, 454 U.S. 263, 272 n.11 (1981).

Moreover, by specifying that a "statement" and "invocation" are both permissible options, "the State has not thereby encouraged prayer over other specified alternatives." *Wallace v. Jaffree*, 472 U.S. 38, 73 (1985) (O'Connor, J.,

[14] "Indeed, we note that Congress specifically rejected the argument that high school students are likely to confuse an equal access policy with state sponsorship of religion." *Mergens*, 496 U.S. at 250 (plurality).

concurring in judgment). As *Mergens* made clear, "secondary school students are mature enough and are likely to understand that a school does not endorse student speech that it merely permits on a nondiscriminatory basis." 486 U.S. at 250 (plurality). "The proposition that schools do not endorse everything they fail to censor is not difficult to understand." *Id.*

Indeed, that straightforward proposition is particularly easy to comprehend in the context of a football game. Unlike *Mergens*, in which most student speech targeted an audience consisting almost entirely of students, a football crowd will include a substantial number of parents, who are even more "likely to understand that a school does not endorse student speech that it permits on a nondiscriminatory basis," and can reinforce that message to their children. The mixed nature of the crowd also underscores how far removed a football game is from the classroom setting. The football field is a physically separate, open-air venue. As a result, "the fortuity of geography" and "the nature of the particular public space" substantially lessen the risks of endorsement. *Pinette*, 515 U.S. at 778 (O'Connor, J., concurring in part and concurring in judgment). Unlike the classroom setting in which students routinely hear speech directed by the school, students do not routinely receive instruction on the football field or in the stands, and have no preconception that the speech they are about to hear will be directed by the school.

To the contrary, the students in attendance will know to a moral certainty that the speech they are about to hear is private student speech, rather than speech directed and endorsed by the school. The students will know this because they will have participated in both the process of deciding whether to have a

speaker and the separate process of selecting a speaker. Participating in those processes will reinforce what is clear from the face of the policy: that the decisions whether to have a speaker, and which speaker to have, rest with students, not the school. Likewise, the decision whether the student speaker will offer an invocation or a secular message rests with that individual student, not the school. Any decision by a student speaker to offer an invocation stands several intervening, student-made decisions removed from the school. Having participated in the decisionmaking process themselves, the students cannot possibly view the school as endorsing the resulting student speech.

This same knowledge should be attributed to others in the crowd who have not participated in the selection process themselves. A program does not become unconstitutional because someone ignorant of its actual operation perceives an endorsement. "Private religious speech cannot be subject to veto by those who see favoritism where there is none." *Pinette*, 515 U.S. at 766 (plurality). "It is for this reason that the reasonable observer in the endorsement inquiry must be deemed aware of the history and context of the community and forum in which the religious [speech] appears." *Id.* at 780 (O'Connor, J., concurring in part and concurring in judgment).[15] A reasonable observer, well-acquainted with the mechanics of the Santa Fe Football Policy and the context of the football game, would perceive student speech, not

[15]For this reason, an observer seeing only one student message of a religious character could not find endorsement in light of the neutrality of the program, the fact that the decision to offer an invocation was the student's, not the school's, and the fact that a student may have offered a secular message in the previous home game.

government endorsement. This is particularly true because speech, unlike the permanent, unattended display in *Pinette*, is uniquely associated with the speaker, as opposed to the forum. *See id.* at 786 (Souter, J., concurring) ("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").

Finally, the facial, pre-implementation nature of respondents' challenge has important implications for the endorsement test. This Court's precedents, new and old, recognize that it will not condemn a policy simply because of the possibility that it could be administered in bad faith to create an endorsement of religion. *See, e.g., Agostini*, 521 U.S. at 225; *Zorach v. Clauson*, 343 U.S. 306, 311 (1952). Accordingly, that possibility cannot provide a basis for striking down a policy on its face in a pre-implementation challenge. In addition, the facial posture of the case provides an opportunity for the Court to give guidance as to how the policy can be implemented to minimize constitutional concerns.

2. The Santa Fe Football Policy Does Not Coerce Participation in Religious Observances.

A neutral program that allows students to choose whether to engage in secular or religious speech does not result in impermissible government coercion. The Santa Fe Football Policy is distinguished by the important role that student choices play. The decisions whether to have a speaker, which speaker to have, and whether to deliver an invocation or speech

lie with students, not with the school. Such student choices are the antithesis of coercion.

In *Lee v. Weisman*, 505 U.S. 577 (1992), this Court concluded that a school-directed commencement prayer was coercive in violation of the Establishment Clause. However, the Santa Fe Football Policy distinguishes itself at every turn from the prayer policy struck down in *Lee*. First, in *Lee*, "[a] school official, the principal, decided that an invocation and a benediction should be given; that is a choice attributable to the State." 505 U.S. at 587. Here, by contrast, students decide, at the outset, whether or not students will speak at the next season's home football games. That choice is clearly attributable to the students. Next, in *Lee*, "[t]he principal chose the religious participant, . . . a rabbi, and that choice is also attributable to the State." *Id.* Here, by contrast, students pick the speaker from among a list of students who choose to volunteer. The school plays no role; the choice is attributable to the students. Moreover, in *Lee*, "[t]he State's role did not end with a decision to include a prayer and with the choice of a clergyman," *id.* at 588; instead, "the principal directed and controlled the content of the prayers," *id.* at 588. Here, by contrast, the individual student speaker decides whether to deliver an invocation or message and controls the content of the speech without regard to whether it is religious or secular. The school exercises no control over content, and so the content is attributable to the student, not the State.

These critical distinctions suffice to avoid the coercive effects of the school-directed prayer invalidated in *Lee*. The coercion in *Lee* resulted from the State directing a religious exercise with one hand, while forcing student attendance with

the other. The Court repeatedly observed that under the challenged program "State officials direct the performance of a formal religious exercise," "creating a state-sponsored and state-directed religious exercise in a public school." *Id.* at 586, 587. The state involvement in the prayer was critical to the Court's conclusion. *See id.; see also id.* at 630 n.8 (Souter, J., concurring). This Court has never found coercion when the State simply provided a neutral opportunity for religious and secular speech. *See, e.g.*, *Rosenberger*, 515 U.S. at 841-42. Indeed, the *Lee* Court recognized that "the First Amendment does not allow the government to stifle [the offering of] prayers," even though the Constitution does not "permit the government to undertake that task for itself." 505 U.S. at 589.

The distinctions between *Lee* and this case do not end with the crucial difference between government prayer and private speech. The context of a home football game differs dramatically from that of a high school commencement in ways that further dissipate any coercion. The Court went out of its way in *Lee* to stress the unique compulsion present in a commencement, for which attendance and participation "are in a fair and real sense obligatory." *Id.* at 586. The Court described commencement as "one of life's most significant occasions" and "an event of singular importance to every student." *Id.* at 595, 598. The same cannot be said for a high school football game. Unlike a commencement that involves every member of the graduating class, football games are of no more than passing interest to many students. Moreover, while commencement is intimately related to - indeed the culmination of - the school's curriculum, football is decidedly extra-curricular.

Football games differ from commencements not only in these broad strokes, but also in the details. For example, during commencement exercises the graduating class generally sits together in a monolith that magnifies peer pressure and exaggerates the failure of a single student to stand. The crowd at football games, by contrast, is a random mix of students, parents, and the community at large. While students at commencement exercises generally must arrive on time and stay in their assigned places for the duration of the ceremony, students at football games remain free to arrive late, move about, and visit the concession stand or other facilities.[16] Collectively, these myriad differences between football games and commencements underscore the absence of any coercion in the Santa Fe Football Policy.

It is of course true that some members of the audience may disagree with the eventual message, if any, given before a football game. Indeed, disagreement will not likely be limited to the religious aspect, if any, of the messages. Fans of the visiting team, for example, may object strenuously to wishes for

[16]To be sure, some students may have to attend football games by virtue of their participation in the band, as a cheerleader, or on the football team. This factor does not change the result here. First, such a fact-based, individualized objection lies outside the scope of this facial challenge and would instead properly belong in an "as applied" challenge, not to the Football Policy, but to the mandatory attendance requirement. *Cf. Wisconsin v. Yoder*, 406 U.S. 205 (1972). Second, and most important, the Establishment Clause does not license one person to silence or censor the speech of another student speaker on the basis of objection to the content or viewpoint of the student's message. *Infra* at p. 43. The key difference between *Lee* and the present case is that in *Lee* the objectionable speech came from the government itself, not from an individual student speaker whose decision to speak is the result of independent, intervening decisions of students.

the success of the home team. But this Court's precedents recognize that

> throughout the course of the educational process, there will be instances when religious values, religious practices, and religious persons will have some interaction with the public schools and their students.

Lee, 505 U.S. at 598-99. "People may take offense at all manner of religious as well as nonreligious messages, but offense alone does not in every case show a violation." *Id.* at 597.

Neither the Establishment Clause nor any other constitutional provision guarantees that one student will never hear another student say something to which the student objects. Indeed, cases like *Tinker v. Des Moines Indep. Comm. Sch. Dist.*, 393 U.S. 503 (1969), *Mergens*, *Pinette*, and *Lee v. ISKCON*, 505 U.S. 830 (1992), allowed freedom of speech despite the inevitable fact that some persons who have to be present may well object to the speaker's message. The possibility that some persons may unavoidably encounter religious speech cannot require affirmative silencing of private speakers without overruling these and countless other precedents.

The student choices and neutrality that characterize the Football Policy distinguish it from the state-directed prayers and coercive atmosphere of *Lee*. Indeed, these same factors ensure that the program complies with all the tests this Court has employed in evaluating claims under the Establishment Clause. What is more, the Santa Fe Football Policy neutrally

accommodates student speech in a way that avoids the myriad problems inherent in direct government involvement with speech and religion. By keeping the school several steps removed from the student speech, the school complies with the Establishment Clause and avoids potential conflicts with the remainder of the First Amendment. Far from violating the First Amendment, the Santa Fe Football Policy accommodates student speech and "follows the best of our traditions." *Zorach v. Clauson*, 343 U.S. 306, 314 (1952).

III. TO INVALIDATE THE MERE ALLOWANCE OF STUDENT SPEECH ON THE BASIS THAT THE STUDENT'S SPEECH COULD BE RELIGIOUS WOULD AFFIRMATIVELY CAUSE CONSTITUTIONAL DIFFICULTIES.

Santa Fe "has chosen to permit" student-initiated, student-delivered speech during pre-game ceremonies of home varsity football games. Pet. App. at F1. To strike that policy down would be to interpret the Establishment Clause as imposing an affirmative obligation on the states to *censor* religious speech where other speech is allowed. Such a rule runs counter to this Court's settled "equal access" jurisprudence. Indeed, such a mandatory censorship rule would raise grave constitutional difficulties under the First Amendment's Free Speech, Free Exercise, and Establishment Clauses. The consistent, bedrock principle derived from these various constitutional provisions is that government may not impose discriminatory burdens on

religious expression.[17] *See generally Rosenberger*, 515 U.S. at 844-45.

A. The Free Speech Clause

Religious speech is constitutionally protected speech. *Widmar v. Vincent*, 454 U.S. 263, 269 n.6 (1981). "[P]rivate religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression." *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995) (plurality) (and cases cited).

> Indeed, in Anglo-American history, at least, government suppression of speech has so commonly been directed *precisely* at religious speech that a free-speech clause without religion would be *Hamlet* without the prince. Accordingly, we have not excluded from free-speech protections religious proselytizing . . . or even acts of worship.

Id. (citations omitted) (emphasis in original). The Free Speech Clause therefore generally precludes discrimination against religious speech. *Id.* at 761 (strict scrutiny applies where expression was rejected "precisely because its content was religious"). Indeed, such discrimination may well constitute

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[17]Petitioner does not contend that a school district is under any constitutional compulsion to allow a student pre-game message in the first place. Once the school extends such an opportunity to speak, however, constitutional considerations determine the legitimacy of any government control over the message. Here, the Establishment Clause and the Free Speech and Free Exercise Clauses all militate in the same direction, namely, noninterference by the government.

viewpoint discrimination, the most egregious form of content-based censorship. *Lamb's Chapel*, 508 U.S. at 394; *Rosenberger*, 515 U.S. at 832 ("discriminating against religious speech was discriminating on the basis of viewpoint").

Thus, as a general matter, for example, if a governmental agency allows a private speaker to offer a secular message of inspiration, it must allow the speaker to take a religious perspective as well.

B. The Free Exercise Clause

The Free Exercise Clause forbids discriminatory restrictions of religious expression. Such restrictions target speech *because it is religious* and thus strike at the very heart of the constitutional protection of religious freedom. *Employment Div. v. Smith*, 494 U.S. 872, 877 (1990) ("The government may not . . . impose special disabilities on the basis of religious views or religious status" or ban acts "only because of the religious belief that they display").

> At a minimum, the protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs or regulates or prohibits conduct because it is undertaken for religious reasons.

Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 532 (1993). *See also McDaniel v. Paty*, 435 U.S. 618 (1978).

Respondents would in effect rewrite the Santa Fe Football Policy explicitly to forbid religious speech and only religious

speech. However, as this Court made clear in *Lukumi*, "the minimum requirement of neutrality is that a law not discriminate on its face." 508 U.S. at 533. The express discrimination envisioned by respondents raises the precise concerns identified in *Lukumi*.

C. The Establishment Clause

The Establishment Clause requires neutrality and forbids hostility toward religion. As this Court explained in *Everson*, the Establishment Clause requires the state to be "neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary." *Everson v. Board of Educ.*, 330 U.S. 1, 18 (1947). The discriminatory suppression of *religious* speech "would demonstrate not neutrality but hostility toward religion." *Mergens*, 496 U.S. at 248. As in *McDaniel*, such a discriminatory "exclusion manifests patent hostility toward, not neutrality respecting religion, and, in sum, has a primary effect which inhibits religion," 435 U.S. at 636 (Brennan, J., concurring in judgment).

Moreover, discriminatory suppression of *religious* speech requires the censor to judge what is and is not religious speech. This creates additional constitutional problems:

> [School officials] would need to determine which words and activities fall within "religious worship and religious teaching." This alone could prove an impossible task in an age where many and various beliefs meet the constitutional definition of religion. . . . There would also be a continuing

need to monitor group meetings to ensure compliance with the rule.

Widmar, 454 U.S. at 272 n.11 (internal quotation marks and citations omitted).[18] Thus, treating religious expression on equal terms with secular expression "would in fact *avoid* entanglement with religion," *Mergens*, 496 U.S. 248 (plurality) (emphasis in original; citation omitted); *see also id.* at 253.

CONCLUSION

In light of the foregoing, the meritlessness of respondents' position becomes clear. Respondents would condemn the Santa Fe Football Policy because it *allows the possibility* of student prayer. But the alternative - selective censorship and suppression of the religious message any student might choose - would create obvious constitutional problems. Fortunately, as demonstrated previously, no such censorship is required. As Justice O'Connor wrote for the plurality in *Mergens*,

> [t]he Establishment Clause does not license government to treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities.

[18]These same entanglement problems plague any attempt to impose a "nonsectarian, nonproselytizing" requirement on private speech. For precisely that reason, the school district adopted a policy that omitted any such requirement unless and until a court ordered that it be imposed. Pet. App. at F1-F2. *See also* Tr. 8/4/95 at 3-7 (District Court and counsel for the school district voicing concern about enforcing a "nonsectarian, nonproselytizing" requirement).

496 U.S. at 248 (internal quotation marks and citation omitted).

This Court should reverse the judgment of the Fifth Circuit.

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