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

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ARGUMENT

The Santa Fe Football Policy is facially constitutional. This policy permits a student, at home football games, to give the message or invocation of that student's choosing. There is no vote on having a prayer. Prayer or other religious speech occurs, if at all, only as a consequence of the student speaker's independent choice. Respondents concede that if the speech of the student is not attributable to the school, there is no constitutional violation. *Infra* § II. Here, the student speaker's intervening, independent choice of what to say suffices alone to break any chain of attribution connecting the student's speech to the school district. Pet. Br. at 19-21, 28-29; *infra* § III. But Santa Fe goes even further to distance itself from the student speaker's speech. The student speaker is selected by a neutral process — first, students vote whether to have any speaker at all; next, if the vote is affirmative, any interested students can volunteer to serve as speaker; and third, students elect a speaker from among the volunteers. Pet. Br. at 9; Pet. App. at F1. Consequently, neither the possibility, nor the actuality, of a student speaker's inclusion of religious content or viewpoint in a pre-game speech, violates the Establishment Clause.

Petitioner Santa Fe has taken the proper constitutional course: selection of student speakers by neutral, secular criteria, and noninterference with the student speaker's decision whether to use secular or religious (or both) elements in a pre-game message. This middle course respects both students' free speech (and free exercise), *and* the non-establishment guarantee. *See* Pet. Br. § III; *infra* § III(D). Respondents' contrary arguments ultimately amount to a constitutional duty of schools to prevent the mere possibility of student-initiated religious speech. No such constitutional duty of censorship exists.

I. RESPONDENTS MAKE ONLY A FACIAL CHALLENGE TO THE SANTA FE FOOTBALL POLICY.

This case presents only a facial challenge to the Santa Fe Football Policy. Pet. Br. § I. As respondents concede, this challenge can succeed only if the Football Policy "was unconstitutional when the school board promulgated it, whether or not any student ever delivered a prayer pursuant to the policy." Resp. Br. at 43-44.

Respondents claim that they "also challenge the Football Policy *as applied to the extent that evidence of the policy's implementation is available*." Resp. Br. at 47 (emphasis added). On the contrary, no such challenge is properly before this Court.

First, respondents did not bring an as applied challenge to the Football Policy below. (Indeed, they could not, as the suit was filed prior to adoption and implementation of the current Football Policy.) Tellingly, respondents do not cite to their lower court briefs to demonstrate that respondents had brought an as applied challenge to the Football Policy. The district court stated that a ruling on the policy (i.e., facial constitutionality) would not preclude respondents from bringing an as applied challenge *in a future, different case*. Tr. 11/3/95 at 10-15; Tr. 5/10/96 at 13. *See* Pet. App. at E13 n.13 ("Should Plaintiffs or other interested parties feel that the *actual* policies of the School District differ from the newly *stated* policies in such a manner as to be violative of the Establishment Clause, a new cause of action may be commenced in a Court of competent jurisdiction") (emphasis added). On appeal, respondents did not contend that the district court erroneously failed to adjudicate the constitutionality of the Football Policy as applied. *See* Plaintiffs-Appellees/Cross-Appellants', Jane Doe, et al's [sic] Brief on Appeal, pp. 20-26.

Second, there is no record to support an "as applied" challenge to the Football Policy. Pet. Br. at 9 & n.7; *id.* at 16; *see also Doe v. Santa Fe Indep. School Dist.*, 168 F.3d 806, 810 n.3 (5th Cir. 1999). Respondents can only point to events predating the October, 1995 Football Policy, Resp. Br. at 47; *see also* Pet. Br. at 9 n.7, or to anecdotal material taken from amicus briefs, Resp. Br. at 5, 47-48.[1] Respondents themselves admit that "[t]he record in this case closed before the 1996 football season," *id.* at 5 — the first season which the (October 1995) Football Policy would govern — and that "[t]he judicial record does not document how the policy was implemented in 1996, 1997, or 1998," *id.* at 48. Nor is the 1999 season representative of the policy. *Supra* note 1.

Third, it would be fundamentally unfair to adjudicate an as applied challenge in such circumstances. Respondents cannot obtain a ruling here on an as applied challenge they neither brought nor preserved below. Petitioner would in any event be entitled to assemble a factual record in opposition to such a fact-based challenge. Reliance upon snippets taken from amicus briefs as evidence cannot substitute for a fully developed record. *Cf. Witters v. Washington Dep't of Servs. for*

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[1]The anecdotal material refers to the Fall 1999 football season. But this season came *after* the Fifth Circuit had issued its ruling of Feb. 26, 1999, invalidating the Football Policy. The 1999 season therefore operated under a policy of *no* religious messages. *See* Brief Amici Curiae for Marian Ward *et al.*, p. D1 (in wake of Fifth Circuit's decision, Santa Fe pre-game message guidelines banned "[p]rayers, blessings, invocations, and references to a deity"). Hence, even this anecdotal material demonstrates, not the operation of the Sante Fe Football Policy as written, but rather the untoward consequences of the Fifth Circuit's ruling requiring the *elimination* of religious speech by student speakers. (Respondents' misguided attempt to use the 1999 season as exemplifying the challenged policy, when in fact the policy had been struck down prior to that season, pointedly illustrates the danger of straying outside the record in this case.)

the Blind, 474 U.S. 481, 486 n.3 (1986) ("this Court must affirm or reverse upon the case as it appears in the record" and should not "consider claims that have not been the subject of factual development in earlier proceedings").[2]

II. RESPONDENTS DO NOT DISPUTE THE CONTROLLING CONSTITUTIONAL PREMISES.

"Both sides . . . agree that genuinely private religious speech is constitutionally protected." Resp. Br. at 9. "Protection for private religious speech protects individual choices." *Id.* Respondents concede 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 10 (quoting Petitioner's Brief, which in turn quotes *Board of Education v. Mergens*, 496 U.S. 226, 250 (1990) (plurality)). Thus, respondents concede that this case turns on "the distinction between governmental and private prayer, which is fundamental to the First Amendment and which plaintiffs fully accept." Resp. Br. at 11 (footnote omitted).

Of course, the Santa Fe Football Policy authorizes, not "prayer," but a "statement or invocation," which may or may not include prayer. This distinction is important. *See infra* § III(B). But the critical point here is that respondents' concessions of constitutional principle reduce their argument to one essential contention: that any potential religious speech by a student speaker at a school event is attributable to Santa Fe and therefore must be prohibited on pain of an Establishment Clause violation. If respondents cannot establish that proposition — and they cannot, *see infra* § III — respondents' challenge fails by its own terms.

[2]The sparse facts respondents identify do not in any event support an as applied challenge. For example, the fact that in 1999 the students "voted for a message at football games," Resp. Br. at 47, is constitutionally unproblematic. Likewise, the fact that the runner-up student, *see* Brief of Amici Curiae Marian Ward *et al.*, p. C2, was so determined to fend off censorship that she filed suit, Resp. Br. at 47, suggests not a school district that "is working desperately to preserve prayer," *id.* at 15, but rather a school district caught in the middle of competing constitutional claims "working desperately" to comply with the latest governing court order.

III. A STUDENT'S SPEECH PURSUANT TO THE SANTA FE FOOTBALL POLICY IS NOT ATTRIBUTABLE TO THE SCHOOL DISTRICT.

The heart of respondents' case is the contention that any student speech under the Football Policy is attributable to the school district. In elaborating this theory, respondents urge three principal arguments for invalidating the Football Policy: first, Santa Fe's real purpose is to perpetuate student prayer at football games; second, the Football Policy permits a religious majority to force prayer on an objecting audience; and third, approving the Football Policy would open the doors to formal, student-led prayers in the classroom. As demonstrated below, these arguments fail.

A. The Santa Fe Football Policy Has a Legitimate Secular Purpose.

The Santa Fe Football Policy serves a legitimate secular purpose — indeed, several such purposes. Pet. Br. at 23-24.

Respondents object that a student speaker is "not needed" because other methods of solemnization are available. Resp. Br. at 10; *see also id.* at 36. The question, however, is not whether the Football Policy is *necessary*, but rather whether it is a *permissible* response to legitimate secular concerns. It is sufficient that a school may legitimately conclude that having a student speaker deliver a pre-game message or invocation will further the stated purposes of the policy. *See* Pet. Br. at 24; *see also Wallace v. Jaffree*, 472 U.S. 38, 74-75 (1985) (O'Connor,

J., concurring) (where a governmental body "expresses a plausible secular purpose" for an enactment, "courts should generally defer to that stated intent").

Respondents would impugn Santa Fe's stated purposes by reference to the constitutional equivalent of "prior bad acts." Resp. Br. at 1-2, 12-13. There are several reasons, both factual and legal, for rejecting this argument.

In fact, Santa Fe was diligent in complying with, not evading, the governing constitutional law.[3] *See* Order Denying Attorney Fees (S.D. Tex. Dec. 13, 1996) (dkt. 65) at 3 (Santa Fe "went to great lengths to abolish unacceptable practices even before suit was filed, and it came, in the Court's view, into voluntary full compliance with applicable Fifth Circuit law *very* early in the case") (emphasis in original). *See also* Pet. Br. at 3-4; *id.* at 5 n.3.

The district court found, after trial, that "no Plaintiff has suffered a compensable injury because of any actions of the [Santa Fe] District." Pet. App. at D14. *See also* 168 F.3d at 824 (affirming denial of damages). The district court further found that the incidents respondents complained of were isolated, not authorized by Santa Fe, and promptly remedied by Santa Fe. *See* Pet. App. at D5-D15; *see, e.g., id.* at D5 (Santa Fe's response to incident "was prompt, sincere, and reasonably calculated to prevent future violations").

The district court found that Santa Fe had promptly enacted new policies to bring the school district into compliance with Establishment Clause precedent. Pet. App. at E4-E5, E11-E13. The district court concluded that "injunctive relief is not needed

[3]Indeed, Santa Fe has faced the accusation that it has been overzealous in deferring to court mandates, as demonstrated by the student lawsuit challenging Santa Fe's efforts to comply with the Fifth Circuit's ruling in this case. *See* Resp. Br. at 5; Brief Amicus Curiae of Marian Ward *et al.*

to ensure the School District's compliance with the Establishment Clause," *id.* at E12 (footnote omitted), and the court of appeals affirmed the denial of injunctive relief, 168 F.2d at 823. In short, Santa Fe has undertaken prompt, good faith compliance with legal directives.

As a legal matter, respondents' approach would make it difficult, if not impossible, to predict the constitutional consequences of action taken in the face of some prior history of violations. How, for example, could school officials predict when such unquantifiable factors as prior practices or the degree of religiosity among students will be regarded as "too much" for an otherwise permissible student speaker policy to pass constitutional muster?[4]

One way to avoid this problem would be to take respondents' approach to its logical conclusion — that is, to conclude simply, "Once a constitutional offender, always a constitutional offender." But that would be to say that a government body that has committed past Establishment Clause violations cannot correct itself. Any action the government body takes that touches on religion would be suspect,[5] no matter how neutral in reality that action is. It would be far

[4]Respondents would further complicate the analysis by asking how much free speech the school district allows to students in other contexts. Resp. Br. at 14. First of all, respondents are incorrect in portraying Santa Fe as hostile to student speech in general. *See, e.g.*, Stipulations Ex. 2 (Policy FMA) ("material that is merely offensive, unpopular, or that stimulates controversy shall not be restricted or forbidden"). Moreover, even leaving aside the complete unworkability of respondents' standard, there is no constitutional rule that says a school may only allow student free speech in one setting if it also allows it in others.

[5]Respondents' invocation of what "everyone" knows, *e.g.*, Resp. Br. at 19, seems little more than an appeal to the kind of stereotyping and regional prejudice that has no proper place in court.

better, and far more consistent with this Court's precedents, to apply the presumption that government actors are faithful to constitutional norms, *e.g.*, *Agostini v. Felton*, 521 U.S. 203, 226-27, 229, 234 (1997).

B. There is No Majoritarian Imposition of Prayer.

Respondents appear to be litigating a policy different from the one before the Court. Repeatedly, respondents attack a policy that authorizes a majority of students to "vote for prayer" at school events. Resp. Br. at 27. *See, e.g., id.* at 8, 24, 50. The district court allowed Santa Fe to adopt such a policy, Pet. Br. at 3-4, 7-8, but Santa Fe ultimately chose a more expansive approach, permitting an "invocation and/or message," Pet. App. at F1; Pet. Br. at 3-4, 8. Thus, the Football Policy *does not entail a vote on whether to have a prayer*. Pet. Br. at 18; Pet. App. at F1. The only one who decides whether the student speaker's message will include a prayer is the individual student speaker. Pet. App. at F1 ("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") (emphasis added). Neither the school district nor the student body makes that decision. This central fact renders irrelevant respondents' insistence that a majority vote cannot abrogate constitutional rights. Resp. Br. at 20-26.[6]

Respondents contend that the student speaker "will reliably represent the majority's views," Resp. Br. at 22. This contention is speculative and implausible. As anyone who has

[6]All that students vote for under the Football Policy is to have a student speaker at a school event. If it were unconstitutional to let a student address a school assembly because the speech the student utters might be religious, the federal courts would need to strike down policies permitting student talent shows, student club fairs, student government speeches, and virtually any other opportunity for students to address their assembled classmates.

been through high school should recall, student votes — such as student government elections — are at least as likely (perhaps more so) to reflect the elected student's admirable character, engaging personality, or sheer popularity, than any particular views.[7] In the present case, moreover, the district court forbade campaigning on school property, JA 31,[8] so it is even less likely than otherwise that the speaker's *views* will decide the election.

This is not a case in which the school district has gerrymandered the election to ensure prayer. On the contrary, Santa Fe explicitly ceded control over the student speaker's message to the elected student speaker. Pet. App. at F1 ("The student volunteer . . . may decide what message and/or invocation to deliver"); *see also* Pet. Br. at 9 & n.8; *Doe v. Santa Fe*, 168 F.3d at 812 (aside from the statement of purposes, terms of the Football Policy "provide no further guidance as to content"). Moreover, while the district court permitted Santa Fe to adopt a "prayer" policy, JA 42, Santa Fe deliberately chose the more expansive, more explicitly neutral course of allowing the student speaker, if any, to deliver an

[7]Furthermore, since any student *may* volunteer to be a speaker but no one *must* volunteer, there is no guarantee that *any* of the volunteer candidates will "reliably represent the majority's views." Nor is it at all clear that it even makes sense to speak of a "majority's views," when viewpoints come in as many distinct varieties as students do.

[8]Respondents point out that the district court's interim orders (e.g., against campaigning) are not, strictly speaking, part of the Football Policy and that, moreover, those orders are no longer in effect. Resp. Br. at 4 n.3. But the Football Policy was adopted to comply with the district court's directives, Pet. Br. at 3, and there is no reason to believe that, once the court orders were no longer in effect, the school district altered its practices. In any event, were that the case (and respondents do not allege that it is), it would be grist for an as applied challenge, not the present facial challenge.

"invocation *and/or message*." Pet. App. at F1. *See generally* Pet. Br. at 3-4, 7-8, 27-28 & n.11.

That the policy explicitly mentions an "invocation" as one possibility does not detract from this conclusion. Pet. Br. at 36-37. An invocation need not be religious, *see* Pet. at 12 n.6, but even if it were religious, merely listing prayer as one option does "not thereby encourage[] prayer over other specified alternatives," *Wallace v. Jaffree*, 472 U.S. at 73 (O'Connor, J., concurring in judgment). Santa Fe does not thereby "effectively favor the child who prays over the child who does not." *Id.*[9] When even the federal government perceives the need to distribute national guidelines assuring school officials that genuinely student-initiated speech may include religious contents or viewpoints, *see* Secretary's Statement on Religious Expression (and accompanying guidelines) (U.S. Dep't of Educ., Dec. 20, 1999) <www.ed.gov/speeches/08-1995/religion.html>, a school district is surely justified in spelling out, for the sake of clarity in an often confused area, that students may also pray when they are otherwise free to select their own message.

Respondents make much of the supposed narrowness of the student speaker's opportunity to speak. Resp. Br. at 17-18.[10] Respondents' premises are erroneous. There is hardly

[9]*Accord* Douglas Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 Nw. U.L. Rev. 1, 58-59 (1986) ("Use of the word 'prayer' should not be fatal in a statute that neutrally accomodates each student's right to private prayer").

[10]Respondents also emphasize that only one speaker has the floor for a given period. Resp. Br. at 11-12. The Football Policy on its face is not incompatible with a system whereby different students rotate as speakers for each of the home games. But even if only one student spoke at all of the (continued...)

anything "narrow" about the range of possible messages which, for example, "establish the appropriate environment for the competition." Pet. App. at F1. It is inaccurate to claim, as respondents do, that a "message questioning the existence of God . . . could not plausibly be connected to . . . any of the three authorized purposes of the invocation or message." Resp. Br. at 18.[11]

Moreover, there is nothing incompatible between topical limits on a speaking opportunity and the private speaker's ultimate personal responsibility for the message. Just because a governmental body imposes germaneness and time restrictions on private speakers does not convert speech from private to governmental. *E.g.*, *City of Madison, Joint School Dist. No. 8 v. Wisconsin Employment Relations Comm'n*, 429 U.S. 167 (1976). *See Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788, 802 (1985) (government may designate forum "for use by certain speakers, or for the discussion of certain subjects"); *id.* at 803 (citing *Madison Joint*

[10](...continued)
games (there are "at least three to six" home games, JA 65 (Stipulation 125)), this would not distinguish the present case from other settings for genuinely free speech, such as a municipal stage featuring one production (or production company) for weeks at a time, *cf. Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975), or a government plaza featuring a single display, *see Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 792-93 (1995) (Souter, J., concurring in part and concurring in judgment). The student speaker selection criteria are secular and content-neutral. It is not a matter of constitutional dimension whether the speaker is chosen by grade point average, first-come/first-serve, majority vote, or a lottery, to mention a few options.

[11]An atheist could compose a message exalting, for example, man's abandonment of the "shackles of religion" in favor of humanistic achievement reflected in the ideals of sportsmanship.

School District as example of designated forum).[12] A school may certainly *permit* a student to speak within the parameters of some germaneness limitations (such as sportsmanship, student safety, and the appropriate environment for competition) without transforming student speech into school district speech. For example, at a club fair, a school could instruct club representatives speaking in turn to confine their remarks to describing and promoting their clubs. The school would be no more responsible for the Fellowship of Christian Athletes' spiritual pitch than for the Young Republicans' political pitch.[13]

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[12]In *Madison Joint School District*, this Court recognized the free speech rights of a speaker from the audience who addressed a topic on the agenda of a school board's public meeting. That the speaker presumably was sharply limited by considerations of germaneness (the meeting agenda) and time (the speaker spoke for about 2½ minutes, 429 U.S. at 172) did not deter this Court from concluding that the private speaker had independent free speech rights.

[13]A limitation on the scope of permissible messages to those that promote sportsmanship is analogous to limitations on the permissible use of funds in cases like *Witters*. If respondents were correct, then the program in *Witters* could not have limited the use of aid to vocational education. But the Court did not find fault with that limitation, nor did it inquire whether too many of the permissible uses were religious. *Mueller v. Allen*, 463 U.S. 388 (1983), provides even stronger support. There, although the restrictions on the tax deductions meant that they primarily benefitted parents of students at religious schools, *see Witters*, 474 U.S. at 491 n.3 (Powell, J., concurring) ("Over 90% of the tax benefits in *Mueller* ultimately flowed to religious institutions"), the Court expressly rejected that as a basis for invalidating the statute, 463 U.S. at 401; *accord Agostini*, 521 U.S. at 229-30. These cases teach that as long as the restrictions on the purpose of the message (or the use of the funds) serve secular ends and do not foreclose the possibility of a secular message (or use), there is no Establishment Clause violation.

Nor does Santa Fe's control of the program as a whole make a difference. *Mergens* expressly rejected the argument that meetings pursuant to the Equal Access Act were unconstitutional because "the student religious meetings are held under school aegis." *Mergens*, 496 U.S. at 249. Respondents emphasize that Santa Fe "schedules the event," Resp. Br. at 15, but schools also set the time (and place) for noncurricular student clubs to meet. This does not make speech at the Bible Club attributable to the school. *See Mergens*. Respondents assert that Santa Fe "fully controls the pre-game ceremonies," Resp. Br. at 15, but this is inaccurate. Santa Fe does *not* control the student pre-game speaker's choice of content, *see* Pet. Br. at 9 & n.8, or even whether there is a student speaker at all, Pet. App. at F1. Respondents charge that Santa Fe "attracts the crowd" and "controls the public address system," Resp. Br. at 15, but the same is true for student government speeches, school talent shows, homecoming, senior proms, club fairs, and so forth. It is unreasonable to contend that all student speech at such events is attributable to the school district. On the contrary, it should be common knowledge that the class president delivers a speech which that student composed; that the student singer at a talent show selected the song (be it "The Impossible Dream" or "Amazing Grace"); that the representative of a student club speaks, not for the school, but for the club.[14] A school's control of the venue does not mean that the school controls the words a student speaks.

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[14]*See also* Laycock, *supra* note 9, at 41 ("That the orator represents the school in an inter-school competition does not make his speech an official school speech; many schools probably would deny endorsing the substantive positions taken by their contestants").

Respondents accuse Santa Fe of adopting an "express preference for sectarian and proselytizing prayer." Resp. Br. at 37; *see also id.* at 41 n.11. This is both wrong and unfair. The policy contains no such preference, express or implied. Respondents presumably extract this contention from Santa Fe's two-tiered approach, whereby Santa Fe included an *express prohibition* on sectarian and proselytizing speech only in its back-up version of the policy. *See* Pet. App. at F1-F2; Pet. Br. at 3, 9. But this two-tiered approach simply represented a prudent response to a legal dilemma. On the one hand, under Fifth Circuit precedent, a nonsectarian, nonproselytizing limitation appeared both permissible and, perhaps, obligatory. Pet. Br. at 3-5; *id.* at 6 n.4; *id.* at 7-8. The district court so concluded. Pet. App. at E11-E12. On the other hand, this Court had clearly condemned the imposition of such nonsectarian content and viewpoint restrictions on a private speaker. *Lee v. Weisman*, 505 U.S. 577, 589-90 (1992). Ironically, respondents agree that a nonsectarian, nonproselytizing restriction on private speakers, constitutionally, "makes no sense," Resp. Br. at 31, and would be unconstitutional, *id.* at 31, 41 n.11. Respondents, then, can hardly fault Santa Fe for choosing the constitutional course — "hands off" on content — while installing a back-up provision to comport with the peculiarities of Fifth Circuit precedent.

Respondents' contention that the Santa Fe Football Policy coerces both band members and students in the stands depends on the premise — refuted above — that any student "football prayers" given pursuant to the Football Policy "are attributable to the school." Resp. Br. at 31. Respondents do not appear to argue that there is any unconstitutional coercion if the prayers or messages given by individual students are attributable to the students, and for good reason. *Lee v. Weisman* expressed

concern over coercing students to participate in "a state-sponsored and state-directed religious exercise in a public school." But there is no unconstitutional coercion when religious speech results from (and is attributable to) the independent decisions of individual students. *See* Pet. Br. at 39-44. That is all that is involved here.

C. Approving the Football Policy Would Not Open the Doors to Classroom Prayer.

Respondents suggest that if this Court upholds the Santa Fe Football Policy then it necessarily must also approve student-led, student-initiated prayer in the classroom during the school day. Resp. Br. at 26-31. But the Football Policy does not apply to the classroom; indeed, other Santa Fe policies already prohibited prayer and other religious activities in the classrooms, *see* Pet. App. at D6, D9; Stipulations Exs. 1 (Policy EMI), 9 (Policy EMI (Local)). Furthermore, respondents' suggestion ignores both this Court's precedents and the unique characteristics of the classroom setting.

First, it is far too late in the day to suggest that context is irrelevant under the Establishment Clause. This Court repeatedly has emphasized the importance of context and the need for nuance in Establishment Clause analysis, especially in applying the endorsement test. *See, e.g., Lee v. Weisman*, 505 U.S. at 598 ("Our jurisprudence in this area is necessarily one of line drawing"); *accord Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 778 (1995) (O'Connor, J., concurring) (recognizing that the endorsement test may turn on "the fortuity of geography, the nature of the particular public space, or the character of the religious speech at issue"); *id.* at 788-90 (Souter, J., concurring); *Rosenberger v. Rector & Visitors of the University of Virginia*, 515 U.S. 819, 847 (1995) (O'Connor, J., concurring) (noting that the Establishment

Clause "requires courts to draw lines, sometimes quite fine, based on the particular facts of each case").

In *County of Allegheny*, for example, the Court stated plainly that "the effect of a crèche display turns on its setting." *County of Allegheny v. ACLU*, 492 U.S. 573, 598 (1989). The Court concluded that a display on the Grand Staircase of the seat of county government raised more troubling questions than a display in a private park in a city's commercial district. *Id.* at 598-600 (distinguishing *Lynch v. Donnelly*, 465 U.S. 668 (1983)); *see also* 492 U.S. at 624-26 (O'Connor, J., concurring) (same). As Justice O'Connor underscored in her concurrence, "'[e]very government practice must be judged in its unique circumstances to determine whether it constitutes an endorsement or disapproval of religion.'" *Id.* at 624-25 (O'Connor, J., concurring) (*quoting Lynch*, 465 U.S. at 694 (O'Connor, J., concurring)).

Second, this Court specifically has noted the unique risks of endorsement and coercion in the classroom setting. More difficult issues arise when the questioned conduct occurs "as part of the curricular activities of students who are required by law to attend school." *School District of Abington Township v. Schempp*, 374 U.S. 203, 223 (1963). In the classroom setting, compulsory attendance laws and small numbers magnify problems of coercion. Moreover, it is in the classroom that students routinely receive instruction from their teachers. *See also Edwards v. Aguillard*, 482 U.S. 578, 584 (1987) (noting the "students' emulation of teachers as role models"). The challenge of segregating out certain speech as purely private and the risk of mistakenly inferring government endorsement are greater in the classroom. Thus, *Mergens* emphasized that the Equal Access Act applied only to meetings held during "noninstructional time." *Mergens*, 496 U.S. at 251 (plurality).

By allowing student religious speech to take place in the same classrooms in which students received secular instruction only during noninstructional time, the Equal Access Act avoided any concerns with coercion or mistaken inferences of endorsement. *See id.*

The Santa Fe Football Policy puts even greater distance between any student religious speech that occurs and the classroom. It allows the possibility of such speech only at football games, which are separated from the classroom by time, space, and subject matter. A football game features large crowds with parents interspersed. Students sit in self-selected groups in the stands, and the event takes place long after the end of the school day. Although it remains a school event, the football game is an extracurricular event in an extracurricular setting during noninstructional time. On the spectrum of school-related events, a football game sits at one extreme, with the classroom at its polar opposite. For all these reasons, the football game poses far less risk of coercion and endorsement than the classroom.[15] As noted in *Mergens*, "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." 496 U.S. at 251.[16]

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[15]In its opening brief, petitioner pointed out the numerous factors that distinguish football games from the classroom. Pet. Br. at 34, 37-38, 41-42. Rather than refute these differences, respondents dismiss them as irrelevant. By failing to differentiate football games from classrooms, respondents demonstrate the breadth and rigidity of their position. By lumping together football games and physics class, Resp. Br. at 26-27, 30, respondents necessarily imply that all school functions pose identical risks of establishment and that all must be free from private religious expression.

[16]Respondents also suggest that the facts of *Ingebretsen v. Jackson Public School Dist.*, 88 F.3d 274 (5th Cir.), *cert. denied*, 519 U.S. 965 (1996), (continued...)

D. Respondents' Theory of the Case is Rife with Constitutional Difficulty.

The unstated premise of respondents' theory — that any speech by a student speaker at a school event is attributable to the school district — not only is meritless, but raises a host of constitutional difficulties.

There is no principled limitation of respondents' theory to pre-game student speeches at high school football games. A football game is just one among many school events at which students may have an opportunity to address, in their own words, their assembled classmates (and others). The class president at a student government assembly, the student competitor at a school talent show, the student athlete at a school awards ceremony — all these, and others, enjoy a "moment in the sun" in which they alone command the podium or microphone and, for that brief moment, can individually express themselves. Respondents would presumably ban all such occasions because, after all, the student *might* voice a *religious* sentiment. The only alternative would be for the school strictly to censor any religious content and viewpoint from the student's speech. Yet respondents cannot reconcile the latter option with this Court's precedents shielding private speech from content and viewpoint censorship.

Imposing upon schools an affirmative duty to gag student religious speech at school events would force upon school

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[16](...continued)
somehow demonstrate the implications of upholding Santa Fe's Football Policy. Resp. Br. at 28-29. However, *Ingebretsen* involved a Mississippi statute that gave a blanket authorization for prayer in school, including prayer by teachers and school officials. The Fifth Circuit had no difficulty concluding that the statute violated the Establishment Clause. *See* 88 F.3d at 279-80. That result will not change if this Court upholds Santa Fe's Football Policy.

districts the intractable task of deciding what is and is not impermissible "religious" speech, a task unsuitable for any branch of government. *Widmar v. Vincent*, 454 U.S. 263, 272 n.11 (1981); *cf. Rosenberger*, 515 U.S. at 835-37. *See* Pet. Br. § III (outlining constitutional difficulties with discriminatory school censorship of student religious speech).

In essence, respondents' approach blurs the very distinction respondents concede is fundamental: between *government* speech and *private* (student) speech. Once that line is blurred, the challenge of complying simultaneously with the Establishment Clause (barring government *establishment* of religion) and the Free Speech and Free Exercise Clauses (barring government *suppression* of religious expression) becomes an administrative nightmare, if not a downright impossibility, for school districts. *See* Brief of Amici Curiae Spearman Independent School District *et al.* at 12-13. The far better approach — the one endorsed by this Court — is to uphold the "crucial difference" between government speech and private speech, *Mergens*, 496 U.S. at 250 (plurality). Adherence to that distinction allows school districts to follow a constitutionally permissible and readily identifiable middle course: neither *prescribing* nor *proscribing* student religious speech, but simply *allowing* such speech on equal terms with secular student speech.

CONCLUSION

This Court should reverse the judgment of the Fifth Circuit.

Respectfully submitted,

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