No. 99-62

In the
Supreme Court of the United States

October Term, 1999

Santa Fe Independent School District,

Petitioner,

v.

Jane Doe, et al.,

Respondents.

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

BRIEF FOR RESPONDENTS

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STATEMENT OF THE CASE

1. The Litigation. Plaintiffs are two mothers and their children who objected to persistent imposition of sectarian religious practices in the public schools of Santa Fe, Texas. The district court found a history of distinctively Christian prayer at graduation, prayer before every football and baseball game, school selection of the clergyman to conduct a subsidized baccalaureate service, and on-campus distribution of Bibles by the Gideons. The court further found that Santa Fe had encouraged and preferred religion clubs over other clubs and that multiple teachers had promoted their own religious views in the classroom. One teacher, after distributing flyers for a Baptist revival meeting to his class and discovering in the ensuing conversation that one of his students is Mormon, "launched into a diatribe about the non-Christian, cult-like nature of Mormonism, and its general evils." Pet. App. A4.(1)

The district court found that "these incidents occurred amidst the School District's repeated tolerance of similar activities and oftentimes with the awareness and explicit approval of the School District," and that "these incidents therefore reflect the actual policies of the School District at that time, irrespective of any applicable written policies which may have been in place." Pet. App. E2 n.2.(2)

The district court permitted plaintiffs to proceed pseudonymously, and found it necessary to threaten "the harshest possible contempt sanctions" if school employees continued their efforts "to ferret out the identities of the Plaintiffs." JA 35. The court closed the trial for the testimony of the minor plaintiffs, because of "the possibility of social ostracization and violence due to militant religious attitudes." Order at 9 (dkt. 39, July 22, 1996). There was uncontradicted evidence of verbal harassment of students who declined to accept Bibles or objected to prayers and religious observances in school. Tr. 7/25/96 at 98-99, 197, 208-09. One witness -- *not* a plaintiff -- began home-schooling her youngest daughter to avoid persistent verbal harassment, with pushing and shoving, over issues of religion in the public school. *Id.* at 82-83.

2. Prayer At Football Games. The Student Council Chaplain is an officer of the student council, elected by class representatives, whose duties are to "lead the Pledge of Allegiance and say the prayer at all meetings, athletic events and other occasions when the Student Council is asked to do this." Constitution of the Student Council, JA 94. Before this lawsuit was filed, the chaplain delivered a prayer over the public address system before all home football games. Stip. 123 at JA 64.

This lawsuit was filed in April 1995. Santa Fe made no effort to defend its existing policies, but instead immediately began revising its policies to a form it hoped to be able to defend. Santa Fe's lawyer opened the very first hearing by announcing "changes that have been made within the district." Tr. 5/5/95 at 21. On August 18, Stip. 129 at JA 65, the school board issued a new policy governing prayer at football games; that policy is set out at JA 99-101. In October, the board adopted the Football Policy at issue here; that policy is set out at JA 104-05, Pet. App. F1-F2, and Pet. Br. 3. Santa Fe attaches great significance to the following slight differences between these policies (all emphases added):

The August policy was entitled "*Prayer* at Football Games"; the current policy is entitled "*Pre-Game Ceremonies* at Football Games."

The August policy said that "the Board has chosen to permit *invocations*" and provided for student elections to determine if "*invocations*" are to be delivered and if so, who is "to deliver the *invocations*." The current policy says that "the Board has chosen to permit *a brief invocation and/or message*" and provides for student elections to determine whether "*such a statement or invocation*" will be delivered and, if so, who is "to deliver the *statement or invocation*."

The August policy said that the purpose of the invocation is "to solemnize the event and to establish the appropriate environment for the competition." The current policy states the same two purposes and adds an additional purpose to "*promote good sportsmanship and student safety*."

The current policy says that the student volunteer "*may decide what message and/or invocation to deliver, consistent with the goals and purposes of this policy.*" The August policy had no corresponding provision.

Both policies provide that the election is to be conducted once a year, in the spring, so that the student elected serves for the entire football season. Both policies also provide that the election is to be conducted by the student council "upon advice and direction of the high school principal." JA 99, 100, 104, 105. By its constitution, the student council is responsible for "any duty or responsibility assigned to the Student Council by the administration," JA 89, and the student council's advisors have

"the RIGHT TO VETO ANY ACTION of the Student Council which is not standing [sic] with present policy." *Id*. at 88 (emphasis in original).

Finally, both policies set out a backup policy in case Santa Fe's preferred policy is enjoined from operation. The backup policy requires that the "invocations" (August policy), or any "message and/or invocation" (current policy) be "nonsectarian" and "nonproselytizing." *Id*. at 100, 105. In each version, Santa Fe's preferred policy omits the "nonsectarian, nonproselytizing" requirement.[(3)]

The school board adopted both versions of the Football Policy after the first student prayer elections had been held and the outcomes were known. In the spring of 1995, Santa Fe's superintendent "met with the senior class officers to discuss the election regarding prayer at graduation." Stips. 16, 49 at JA 45, 52. In May 1995, the senior class voted for prayer (not yet described as an "invocation and/or message") as part of the graduation program, and then elected two named students to give the prayers. Stips. 51-53 at JA 52. On August 31, 1995, the students voted for prayer (still not described as an "invocation and/or message") as part of the program at football games and, on September 7, they elected a named student to deliver the prayers. Stips. 130-31 at JA 65-66. The August Football Policy was adopted after the graduation prayer elections, and the current Football Policy was adopted after both sets of prayer elections.

The record in this case closed before the 1996 football season. But one of Santa Fe's *amici* has submitted documents, filed as part of the record in related litigation against Santa Fe in the same federal court, that reveal the workings of the Football Policy during the 1999 football season. Brief for Marian Ward, App. C, D, F. In May 1999, the students again voted for a message at football games. *Id.* at C2. School administrators threatened to discipline any student who prayed in defiance of the court of appeals' order in this case. *Id.* at C2-C3. "In response to this threat," the student elected to give the message resigned. *Id.* at 3 n.6. Marian Ward, the runner up, took her place. *Id.* at C3. Ward believes "that a prayer is the best way to solemnize, formalize and dignify almost any event." *Id.* at C5. She sued the school district, asserting that her free speech rights would be violated if she could give a message at the football game but could not pray. Even though this very free speech theory had been squarely rejected in the court of appeals' opinion in this case, Pet. App. A27-A36, a district judge granted a temporary restraining order and then a preliminary injunction forbidding Santa Fe from interfering with Ward's plans to offer prayer as part of the program at football games. Ward Brief at F1-F9.[(4)]

Another of Santa Fe's *amici* has highlighted another important fact, so well known to Texans that it received only passing mention in the record. Texas high school football, especially in small towns, is an event of remarkable importance. *See generally* H.G. Bissinger, Friday Night Lights (1990). Each football game is "a major community-wide social event, complete with the kind of attendance that is reserved for other special or `rite of passage' occurrences." Brief of Texas Ass'n of School Boards Legal Assistance Fund at 6. In that respect, football is indistinguishable from graduation. *Id.* The district court took judicial notice of these facts:

[H]igh school football, which is ten or twelve games at most a season for these kids, is the apex of their social function. It is a very big deal to the community. The entire community turns out for these things. And it really is a big part of these kids' lives. I think, frankly, considering the academic interests of a lot of kids, football is probably a heck of a lot more important than graduation.

Tr. 8/4/95 at 23.

3. Fifth Circuit Law And The Judgments Below. Prior opinions of the court of appeals are of course not binding in this Court. But the case below was litigated under a set of Fifth Circuit rules that must be explained.

The Fifth Circuit rule, established well before the summary judgment on liability in this case, was as follows: Student-led prayer is permitted as part of a school's program at graduation -- but not at any other school event -- if it is approved by vote of the students and if it is nonsectarian and nonproselytizing. The graduation part of this rule emerged in *Jones v. Clear Creek Indep. School Dist.*, 977 F.2d 963 (5th Cir. 1992), *cert. denied*, 508 U.S. 967 (1993), decided on remand in light of *Lee v. Weisman*, 505 U.S. 577 (1992).

Mississippi subsequently enacted a School Prayer Statute, which attempted to codify the *Clear Creek* standard and apply it throughout the public schools. The statute authorized "nonsectarian, nonproselytizing student-initiated voluntary prayer" at all school-related events, whether "compulsory or noncompulsory." Miss. Code ß37-13-4.1(2) (1996). A federal district court entered a preliminary injunction against implementation of the Prayer Statute in all its applications except graduation, *Ingebretsen v. Jackson Public School Dist.*, 864 F.Supp. 1473 (S.D.Miss. 1994), and the Fifth Circuit affirmed, 88 F.3d 274 (5th Cir. 1996), expressly declining to reconsider *Clear Creek*, 88 F.3d at 280.

Even before *Ingebretsen*, the Fifth Circuit had distinguished athletic events from *Clear Creek*'s graduation rule. In *Doe v. Duncanville Indep. School Dist.*, 994 F.2d 160 (5th Cir. 1993), the court affirmed a preliminary injunction against school-encouraged prayer "during curricular or extracurricular activities, including before, during, or after school-related sporting events." *Id.* at 163. In a subsequent appeal, the Duncanville schools relied on *Clear Creek* to attack a provision of the permanent injunction forbidding school employees from supervising or participating in prayer initiated by students. The court rejected Duncanville's argument and affirmed the injunction, emphasizing "that high school graduation is a significant, once-in-a-lifetime event," and that the athletic events principally at issue in *Duncanville* were "a setting that is far less solemn and extraordinary." *Doe v. Duncanville Indep. School Dist.*, 70 F.3d 402, 406-07 (5th Cir. 1995). Although plaintiffs believe that prayer is constitutionally impermissible in both settings, there is no doubt that the Fifth Circuit had confined *Clear Creek* to graduation and applied a different rule to athletic events.

The Fifth Circuit rules dictated the result in the court of appeals. Prayers as part of the graduation program were limited to prayers that are nonsectarian and nonproselytizing, and prayers as part of the pre-game football ceremonies were forbidden without regard to the content of the prayers. Most of the court of appeals' opinion is devoted to Santa Fe's attack on *Clear Creek*'s requirement that prayer be nonsectarian and nonproselytizing if it is permitted at all. Pet. App. A14-A37. The majority below viewed football prayer as an essentially settled issue, devoting only two paragraphs to concluding that this case could not be distinguished from *Duncanville* and *Ingebretsen*. *Id.* at A37-A38.[(5)]

Neither side defends the Fifth Circuit's distinctions. Santa Fe believes that with a student vote it should be able to have student prayer as part of the program at all school events, not just graduation, and that it should be able to have sectarian and proselytizing prayer if that is what a majority of students want. Plaintiffs believe a student vote cannot constitutionally authorize prayer that Santa Fe could not sponsor more forthrightly, that graduation should not be an exception (although that issue is not presented here), and that limiting the content of the prayers does nothing to solve the constitutional problems.

SUMMARY OF ARGUMENT

Both sides agree that if Santa Fe has sponsored or encouraged prayers as part of the program at football games, it has violated the Constitution. Both sides also agree that genuinely private religious speech is constitutionally protected.

The prayers in this case are clearly sponsored and encouraged by the school. Santa Fe has long been committed to prayer at official school events. Football games are such an event; Santa Fe organizes and wholly controls the program. It has conditionally delegated a small portion of that program to a single student, selected by majoritarian political processes. The student's remarks must support the school's event and may address only a narrow range of topics.

Neither the referendum nor the delegation to the chosen student serves any of the purposes of the First Amendment's distinction between government religious speech and private religious speech. Protection for private religious speech protects individual choices. Santa Fe's policy is designed to achieve a single, majoritarian answer to the religious questions of whether and how to pray at football games, and to impose that answer on everyone in the school. If a student vote could privatize prayer, students could vote for prayer in the classroom, and public schools could evade every one of this Court's school prayer cases, beginning with *Engel v. Vitale*, 370 U.S. 421 (1962).

The policy coerces students to attend and participate in a religious exercise. School rules require numerous students to attend, and most other students view the event as a rite of passage that cannot be missed.

The policy was adopted for the actual purpose of perpetuating prayer at football games, and any reasonable observer would understand the policy as an unmistakable endorsement of prayer at school events. The policy gives religious speech preferential access to the public address system. The policy cannot be understood as a free speech policy, because the school subjects all other public speech by students to pervasive prior restraints. The policy is not needed to solemnize the event; the National Anthem and other readily available secular means could do that.

The policy is facially unconstitutional. The school's purpose, the message of endorsement, the preferential access for a single speaker, the narrow restrictions on what that speaker may say, and the submission of religious questions to a referendum all appear on the face of the policy, some within the four corners and all when read in the historical and legal context in which the policy was enacted. None of these constitutional defects depend on whether the elected student eventually delivers a prayer; the school board first violated the Constitution when it endorsed prayer. The policy is also unconstitutional as applied, and there is ample evidence of implementation to support that determination.

ARGUMENT

I. SANTA FE IS FULLY RESPONSIBLE FOR ITS CHOICE TO ENCOURAGE PRAYER AS PART OF THE PROGRAM AT FOOTBALL GAMES AND FOR THE RESULTING PUBLIC PRAYERS

Santa Fe and its *amici* rely, fundamentally and repeatedly, on the "crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." Pet. Br. 12, 19-20, 28, 36, 41 (all quoting or closely paraphrasing the same sentence from *Board of Educ. v. Mergens*, 496 U.S. 226, 250 (1990)(plurality)).(6) That is, Santa Fe concedes that if it has sponsored or encouraged prayers as part of the program at football games, it has violated the Constitution. Its defense is that these prayers and the decision to offer them were private decisions.

Santa Fe had no realistic choice but to concede that the Establishment Clause forbids government-sponsored religious speech in a public school. This Court has repeatedly so held, most recently in *Lee v. Weisman*, 505 U.S. 577, invalidating prayers offered as part of the program at public school graduations. There are similar holdings in *Wallace v. Jaffree*, 472 U.S. 38 (1985); *Treen v. Karen B.*, 455 U.S. 913 (1982); *Stone v. Graham*, 449 U.S. 39 (1980); *Abington School Dist. v. Schempp*, 374 U.S. 203 (1963); and *Engel v. Vitale*, 370 U.S. 421. "No holding by this Court suggests that a school can persuade or compel a student to participate in a religious exercise." *Lee*, 505 U.S. at 599.

The problem is not with the distinction between governmental and private prayer, which is fundamental to the First Amendment and which plaintiffs fully accept.(7) The problem is with Santa Fe's interpretation of the distinction and with its wholly unrealistic view of undisputed facts.

Santa Fe claims that it is not responsible for prayer delivered: (a) over the school's public address system; (b) as part of a ceremony organized and sponsored by the school and wholly subject to the school's control; (c) by a single speaker chosen for an entire season and given exclusive preference over all other possible speakers; (d) to a large crowd assembled at the school's invitation for an official school event of unusual importance in the community; and (e) to numerous students required to be present by the school's command. This is a school district, moreover, where prayers have long been delivered with no pretense of separating the school from the prayer, notwithstanding this Court's repeated admonition that the risks of religious indoctrination are especially high in a public school setting. Santa Fe nonetheless argues that it can and should be absolved of all constitutional responsibility in this case because it delegated a narrow range of decisions about the football game prayer from one majoritarian political process (a vote of the school board) to a different majoritarian political process (a referendum among the students). The school district's theory is untenable, both factually and legally.

Factually, the court of appeals suggested that the claimed delegation is a sham. Pet. App. A20. Plaintiffs agree, but the case does not depend on that. Even if the delegation were not a sham, it would at best be wholly ineffectual to separate the government either from the prayers at football games or from the decision to offer prayers at football games. Neither the delegation nor the referendum serves any of the purposes of the First Amendment's distinction between government religious speech and private religious speech. Santa Fe's policy is designed to achieve a single, majoritarian answer to the religious questions of whether and how to pray at football games, and to impose that answer on everyone in the school. The First Amendment is designed to permit many different answers to religious questions -- as many answers as there are opinions in the population -- and to permit no one to use the instruments of government to impose one of these answers on others who come to a different answer.

There are many independent and mutually reinforcing reasons for holding that both the decision to encourage prayer, and the prayers themselves, are fairly attributable to the state. Most of these reasons would be independently sufficient; cumulatively, they are greater than the sum of the parts.

A. Santa Fe Is Responsible Because Its Football Policy Implements The School's Historic And Continuing Support For Prayer As Part Of The Program At School Events

The current Football Policy grows directly out of the longstanding prior practice in which, without camouflage, the school sponsored public prayers at football games. Football prayers were historically delivered by the chaplain, whose office exists to deliver prayers whenever asked. JA 94. Football prayer was part and parcel of Santa Fe's open support for evangelical Christianity in a variety of school contexts. The district court's findings of fact are replete with examples. Pet. App. D3-D14, E1-E11.

On the eve of the first football season after this litigation was filed, the school board adopted a new policy providing for a student election on whether to offer invocations at football games. Two months later, the board made the cosmetic changes detailed *supra* at 3-4, deleting the word "prayer," and adding to the provision for "invocations" the choice of "invocation and/or message." These changes minimally adjusted Santa Fe's longstanding policy, trying to make it more defensible in

response to this litigation, without risking any change in what would actually happen at football games. Santa Fe's repeated pre-trial amendments to its policy, and its willingness to litigate the issue all the way to this Court, do not reflect an intense desire to be surprised by whatever unexpected message a student might deliver. Rather, these acts reflect an intense commitment to leading the crowd in prayer at football games. As Santa Fe's trial counsel described the board's motives: "they want to push it as far as the Constitution will allow them to push it." Tr. 8/4/95 at 31. That is a legitimate desire, but it is not consistent with the claim that Santa Fe is indifferent to whether its Football Policy ever results in prayer, or that the students decided to pray all on their own.

Santa Fe claims that it is committed only to free speech for students. But this claim is belied by its lack of commitment to student free speech in other contexts. Santa Fe provides for an all-inclusive system of prior restraint over "all publications edited, printed, or distributed in the name of or within the District schools" and of "all written material . . . intended for distribution to students." JA 68-69. Prior to this litigation, all student prayers and speeches at graduation were subject to prior review by the faculty or administration, and the school retained the power to mute the microphone or remove a student speaker. Stips. 40-42, JA 51-52. Since this litigation, the same system of prior restraint continues over all student speeches at graduation except the invocation or message in lieu of an invocation. Stip. 54, 59 at JA 53-54. Santa Fe permits public speech free of prior restraint to only two students per year -- one at football games and one at graduation. And it granted this narrow liberty only after so arranging matters that it could confidently expect the students to deliver Christian prayers.

The juxtaposition of these policies shows a primary purpose not to protect free speech, but to continue public prayer at school events. As further elaborated *infra*, this is an unconstitutional purpose. *Wallace v. Jaffree*, 472 U.S. at 55-56; *Stone v. Graham*, 449 U.S. at 40-41; *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971); *Abington School Dist. v. Schempp*, 374 U.S. at 222. This same juxtaposition of policies would lead any reasonable observer to conclude that Santa Fe is endorsing and encouraging public prayer at official school events. *See County of Allegheny v. ACLU*, 492 U.S. 573, 589-94 (1989); *Wallace v. Jaffree*, 472 U.S. at 56 & n.42, 60-61; *Lynch v. Donnelly*, 465 U.S. 668, 687-94 (1984)(O'Connor, J., concurring)(all prohibiting government conduct that endorses or disapproves of religion). No reasonable observer could believe the school was indifferent to prayer and committed only to free speech. Indeed, a reasonable observer would see that Santa Fe is working desperately to preserve prayer as part of the program at school events.

B. Santa Fe Is Responsible Because It Sponsors And Controls The Program, And Its Conditional Delegation To A Selected Student Does Not Privatize The Delegated Interlude

Football games, and the accompanying pre-game ceremonies, are official school events. Santa Fe schedules the event and attracts the crowd for the school's purposes, which must as a matter of law be secular purposes. Santa Fe controls the program. Santa Fe cannot control the outcome of the game, but it fully controls the pre-game ceremonies and it controls the public address system. No one can speak over the stadium's public address system at an official school event without the permission and cooperation of the school.

Plaintiffs do not rely on the mere fact that Santa Fe *owns* the stadium and public address system. Private groups could be allowed to use school facilities for private purposes, and control could be genuinely relinquished to a range of private voices, as in *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993). But this is far from such a case. In *Lamb's Chapel*, private programs were clearly separated from the school's own programs, and the school's facilities were available to a wide range of private community groups on an equal basis. The religious films in *Lamb's Chapel* were not inserted into the middle of an official school event otherwise wholly controlled by the school, and they were not shown to an audience that had assembled for secular and school-related purposes. In *Lamb's Chapel*, there was a separate and private program -- not an allegedly private interlude in an otherwise wholly governmental program. The private program was controlled by its private sponsors, it was clearly separated in time from the school's own programs, and the religious films were advertised as such and shown to an audience that assembled for the purpose of seeing religious films.

The point is not ownership, but rather that Santa Fe *controls* the program and the public address system. It has delegated a brief portion of the program to a single student, and that student speaks as the school's delegatee. It is not just any student who can seize the microphone, but only one student, selected by a process instituted by the school. This delegatee has no right to speak except as Santa Fe has granted a right to speak. "The board has chosen" to permit an invocation or message, as the Football Policy accurately states. JA 104.

Santa Fe's control over pre-game ceremonies is as complete legally as it is factually. Under this Court's decisions, schools have broad authority over student speech in school-sponsored publications and events. *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988). They have no obligation to promote speech "that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school." *Id.* They may exercise "editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related

to legitimate pedagogical concerns," *id.* at 273, which include preserving the school's appearance of neutrality on controversial matters, *id.* at 272.

Santa Fe relies on this Court's cases holding that religious functions are constitutionally privatized when they result from "the *independent*, intervening choices of individuals." Pet. Br. 19 (emphasis added). But the chosen student speaker is not independent. Santa Fe delegates the right to speak only conditionally, for the school's own purposes. Those purposes are narrowly confined and directly focused on the official school event. The student speaker cannot deliver just any message; she cannot choose a topic or pursue an agenda of her own. Rather, she must address Santa Fe's agenda. Her invocation or message must be "consistent with the goals and purposes of this policy." JA 104. And Santa Fe presumably retains -- it certainly has not disavowed -- the power to punish student speakers who stray outside these boundaries.

Even taking Santa Fe's alleged secular purposes at face value, "the goals and purposes of this policy" are narrow purposes: "to solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition." *Id.* Of course "the event" is Santa Fe's football game; "the competition" is Santa Fe's football game; and "good sportsmanship and student safety" are needed at Santa Fe's football game. The student invocation or message is required to be an integral part of, and to serve the purposes of, the ceremonies introducing Santa Fe's football game.

Of the near infinity of messages that can be composed in the English language, only a tiny percentage would satisfy the conditions of the school's delegation. Neither a parody, nor a math lesson, nor the school's latest gossip, nor a demand to fire the football coach, nor an attack on the school board, nor a political stump speech, nor a discussion of this Court's cases, nor a disquisition on any other controversial issue would serve the stated purposes of the Football Policy. This delegation of a small part of Santa Fe's pre-game ceremony is not about genuine freedom of speech; it is certainly not an opportunity for robust and uninhibited debate. Interpreted most generously to Santa Fe, the delegatee must fit her remarks into the school's official program, and she must support that program. The delegatee is given an opportunity to do for the school what the school cannot legally do for itself. In short, the school has attempted "to contract out its establishment of religion." *Capital Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 792 (1995)(Souter, J., concurring).

Santa Fe does not contend, nor could it, that it has created a public forum at football games. "School officials did not evince either `by policy or practice' any intent to open the [stadium's public address system] to `indiscriminate use'" by the student body or by any subset of the student body. *Hazelwood*, 484 U.S. at 270, quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 47 (1983). "[S]elective access does not turn government property into a public forum." *Perry*, 460 U.S. at 47. The Court has rejected public forum claims even in cases where government had allowed multiple speakers to speak in the alleged forum. *Perry*, *id.*; *Greer v. Spock*, 424 U.S. 828, 831 (1976). One carefully selected speaker per year, confined to a narrowly focused range of topics, does not create a public forum in any sense of the word.

The conditional delegation is not even viewpoint neutral. The student speaker may "promote" good sportsmanship, but she may not denigrate or question the value of good sportsmanship. Anti-religious messages, or dissenting religious messages of any kind, are unauthorized. A message questioning the existence of God, or denying that Jesus is the Messiah, or explaining that plaintiff's teacher was wrong about the Mormons, could not plausibly be connected to the football game or to any of the three authorized purposes of the invocation or message.

But other religious messages are expressly authorized and even encouraged. An "invocation" is the only type of message singled out for express authorization, and Santa Fe concedes that an "invocation" is a religious message. Pet. Br. 25-26. More precisely, an invocation is a prayer.[(8)] Moreover, Santa Fe's preferred policy, read against its backup policy, expressly authorizes and encourages messages that are sectarian and proselytizing.

Santa Fe makes much of the difference between its current Football Policy, providing for an "invocation and/or message," as compared to the previous policy that provided only for an invocation. But this change is the thinnest of disguises, not only because everyone understands what is meant, but more fundamentally because even on the face of the policy, "message" does not carry anything like its general meaning. "Message" is confined to only those few messages that serve the school's narrow purposes.

Including prayers with a narrow range of possible secular messages does not suffice to make the policy neutral. "The Court must survey meticulously the circumstances of governmental categories to eliminate, as it were, religious gerrymanders." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993), quoting *Walz v. Tax Comm'n*, 397 U.S. 664, 696 (Harlan, J., concurring). The "critical question" is whether the state has defined "a class so broad" that religion falls within its "natural perimeter." *Walz*, 397 U.S. at 696 (Harlan, J., concurring). Santa Fe has not authorized a broad class of all messages, which might naturally include religious messages; it has rather authorized a narrow class of messages, gerrymandered around the religious messages that were its focus.

C. Santa Fe Is Responsible Because The School Board's Delegation To A Student Vote Does Not Privatize The Resulting Decisions

The specific content of the invocation or message is conditionally delegated to the selected student, as discussed above. The decision whether to have an invocation or message, and selection of the student to deliver it, is delegated to a vote of the student body. This vote serves none of the purposes of the First Amendment and is itself an unconstitutional feature of Santa Fe's Football Policy.

1. Delegation To Another Majoritarian Political Process Serves None Of The Purposes Of The First Amendment

A core policy of the First Amendment is to prevent imposition of the majority's religious views on the minority. Subjecting these rights to majority vote does not remove government from the process; it merely highlights the constitutional violation. "[F]undamental rights may not be submitted to vote; they depend on the outcome of no elections." *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 638 (1943).

For First Amendment purposes, it makes no difference whether the vote is taken by the elected school board, by the registered voters in the district, or by the students in the school. Each body of potential voters is broadly representative of the same constituency; each will reliably deliver the majoritarian result.

Santa Fe relies on this Court's cases holding that religious functions are constitutionally privatized when they result from "the independent, intervening choices *of individuals*." Pet. Br. 19 (emphasis added). But as shown above, the elected student speaker is not "independent"; she is subject to the restrictive conditions in Santa Fe's delegation of a chance to speak. And the student vote is not the choice "of individuals"; it is the collective choice of the student body as a whole. The student vote serves none of the First Amendment functions that make sense of this Court's cases.

In all the cases on which Santa Fe relies, both in the speech cases and in the funding cases, the intervening private decisions were made by individuals acting separately or in voluntary associations. These individual decisions serve the core First Amendment purpose of protecting a diversity of views and letting each individual decide for himself. In all those cases, different individuals and different voluntary associations could make different choices, and each individual could act on the choice he made. There were multiple clubs meeting in empty classrooms in *Board of Educ. v. Mergens*, 496 U.S. 226; and in *Widmar v. Vincent*, 454 U.S. 263 (1981); multiple community groups using the school facilities in *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384; multiple displays on the capitol grounds in *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753; and multiple student publications and activities in *Rosenberger v. Rector of Univ. of Va.*, 515 U.S. 819 (1995). "The provision of benefits to so broad a spectrum of groups is an important index of secular effect." *Widmar*, 454 U.S. at 274.

Similarly, in the funding cases, each family chose its own school from multiple possibilities in *Agostini v. Felton*, 521 U.S. 203 (1997); *Zobrest v. Catalina Foothills School Dist.*, 509 U.S. 1 (1993); *Witters v. Washington Dep't of Servs. for the Blind*, 474 U.S. 481 (1986); *Mueller v. Allen*, 463 U.S. 388 (1983), and similar cases. There were also multiple grantees, selected on nondiscriminatory criteria, in *Bowen v. Kendrick*, 487 U.S. 589 (1988). To be sure, the funding cases raise the far more difficult issue of direct financial benefit to religious institutions, but no resolution of those cases lends any support to a program with only one beneficiary selected by majority vote. In both the speech cases and the funding cases, none of the programs was skewed in favor of religion; no participant was permitted to proselytize a government-assembled audience; and government did not require or even encourage any individual to participate in a religious program.

This case is entirely different. Here the purpose of the vote is to produce one collective decision which will then be imposed on everybody. Individuals can choose how to vote, but they cannot choose to speak, they cannot choose to hear any speaker different from the one elected by the majority, and they cannot choose to hear any message different from the messages delivered by the speaker elected by the majority. A single speaker, preferred by the majority, is elected for the entire year, and all other speakers are excluded for the entire year -- excluded from what Santa Fe claims is an opportunity for free speech. There is no room for either individual choice or diversity of views.

The Court has long worried about the possibility that "a private religious group may so dominate a public forum that a formal policy of equal access is transformed into a demonstration of [government] approval." *Pinette*, 515 U.S. at 777 (O'Connor, J., concurring); *see also Rosenberger*, 515 U.S. at 850-51 (O'Connor, J., concurring); *Widmar*, 454 U.S. at 275. Here, it does not just happen that one speaker dominates; the whole process is structured from the beginning to ensure that only one speaker gets to speak, that the one selected speaker will reliably represent the majority's views, and that no dissenting views will ever be heard. This is not even a "formal policy of equal access." It is instead a formal policy of exclusive access for one speaker representing the views of the majority.

Nor will there be a diversity of views over time. It is a well-understood feature of majoritarian processes that a reliable majority can win every election. Even a modest majority will get its way 100% of the time if the election is dominated by a single issue on which views are polarized. "[W]here minority and majority voters consistently prefer different candidates [or prayer policies], the majority, by virtue of its numerical superiority, will regularly defeat the choices of minority voters." *Thornburg v. Gingles*, 478 U.S. 30, 48 (1986). These student elections have been conducted in the context of a highly publicized dispute over prayer at football games; few students could understand these elections as anything but a vote on that dispute:

[B]y directing the citizen's attention to the single consideration of race or color [or prayer at football games], the State indicates that a candidate's race or color [or position on prayer at football games] is an important -- perhaps paramount -- consideration in the citizen's choice.

Anderson v. Martin, 375 U.S. 399, 402 (1964).

Addition of the phrase "and/or message" to the policy and the ballot does not change the constitutional significance of the student vote; it remains, in substance and effect, a vote on invocations. A no vote is unambiguously a vote against invocations. A yes vote is a vote for at least the possibility of invocations and, if voters know either the candidates' views or the expectations placed on the candidates, a yes vote may be a vote for the near certainty of invocations. The 1999 voting shows that this information is reliably available. The top two candidates were both so committed to prayer that one resigned, and the other filed a lawsuit, rather than comply with the judgment of the court of appeals. *See supra* 4-5.

Santa Fe's focus on prayer as the central issue increases the polarization of the voting process and thus increases the reliability of the outcome. But these implicit voting instructions are not essential to the fundamental point: a government agency cannot institute a religious exercise on the basis of a majority vote.

2. The Student Election Exercises Government Authority Delegated By The School Board

The students do not vote as a private club making a decision only for its members. These student elections make a decision binding on the whole community. The student election has binding force only because the school board decided to give it binding force. Everyone at the football game listens to the speaker chosen by the student election. Why? Not because the students have any such power acting on their own, but only because the school board decided that everyone at the football game must listen to the speaker chosen by the student election.

Like the delegation to the selected speaker, this delegation to the student body is subject to oversight by the school. The student council exists in part to perform "any duty or responsibility assigned to the Student Council by the administration," JA 89, and football speaker elections have been so assigned. JA 104, 105. Student council actions are subject to veto by the student council's advisors, JA 88, and lest there be any doubt, both versions of the Football Policy repeatedly provide that these elections are conducted "upon advice and direction of the high school principal." JA 99, 100, 104, 105.

A referendum does nothing to insulate unconstitutional decisions from judicial review; a government decision made by the voters is just as much a government decision as one made by their elected representatives. *Hunter v. Erickson*, 393 U.S. 385, 392 (1969); *Lucas v. Forty-Fourth General Assembly*, 377 U.S. 713, 736-37 (1964); *see Romer v. Evans*, 517 U.S. 620, 623 (1996)(striking down the results of a referendum). "A citizen's constitutional rights can hardly be infringed simply because a majority of the people choose that it be." *Lucas*, 377 U.S. at 736-37. "[M]ajority votes do not, as such, defeat First Amendment protections." *Nixon v. Shrink Mo. Gov't PAC*, No. 98-963 (Jan. 24, 2000), slip op. at 14.

It is equally irrelevant that the school board referred this matter to a vote of the student body instead of to the general electorate. This Court has permitted governments to designate a "selected class of voters," *Ball v. James*, 451 U.S. 355, 371 (1981), to elect representatives for a "special limited purpose" whose decisions will have "disproportionate effect" on those made eligible to vote. *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719, 728 (1973). *See also Associated Enterprises, Inc. v. Toltec Watershed Improvement Dist.*, 410 U.S. 743 (1973)(upholding referendum among special classes of voters).

Here, the Santa Fe school board designated a "selected class of voters" to decide, by referendum, one important policy question facing the school and, if necessary, to elect a representative to execute the chosen policy. It is irrelevant that the students are unable to "exercise what might be thought of as `normal governmental' authority"; that was also true in *Salyer*. 410 U.S. at 729. It is equally irrelevant that many of the students would not have been eligible to vote in a general election in Santa Fe; that too was true in *Salyer*, where nonresident and corporate landowners were permitted to vote. *Id.* at 730. As in *Salyer* and its progeny, the students' authority was derived from officials chosen in a general election and subject to

supervision or revocation by those same officials. *Ball*, 451 U.S. at 371 n.20; *Associated Enterprises*, 410 U.S. at 744. This Court held long ago, in *The White Primary Cases*, that government cannot escape its constitutional obligations by deferring to purportedly private voting procedures. *Terry v. Adams*, 345 U.S. 461 (1953); *Smith v. Allwright*, 321 U.S. 649 (1944). A referendum is no less a referendum, and an election is no less an election, when the school board designates a special class of voters.

It may seem odd to think of high school students as exercising governmental power, but that is only because it is odd for them to be delegated such power. The oddity is in Santa Fe's delegation, not in the constitutional analysis of that delegation. If the students voted to segregate seating at the football stadium, confining blacks to the end zone, and if the school board authorized elected student marshals to implement that decision, surely we would not be debating the school's responsibility for the resulting equal protection violation. Similarly, if the students voted to exclude Catholics and Mormons from the stadium, and the school board empowered students to implement that decision, the school would be responsible for the resulting free exercise violation.

Of course, not all student elections exercise power delegated by the school board, and most things students get to vote on pose few or no constitutional issues. Sometimes students vote on matters that are wholly up to them. Sometimes they vote in voluntary groups within the school; these votes are typically the actions of a single club and not the actions of the school. But when the school delegates to a student referendum the power to control part of an official school program, the constitutional obligations that bind the school must accompany the delegation.

D. If Santa Fe's Theory Were Accepted, It Would Logically Extend To All School Activities And All Forms Of Prayer, Including In The Classroom

The logic of Santa Fe's position has nothing to do with football. If a student vote and an elected student speaker make these prayers private free speech, then a student vote and an elected student speaker could have the same privatizing effect at any other school event. The school controls the public address system in its stadium as fully as it controls the public address system in its gymnasium, its auditorium, and its classrooms. If students can vote for prayer over the school public address system at football games, they can vote for prayer over the intercom in their classrooms. On Santa Fe's reasoning, a student vote can effectively overrule or evade every one of this Court's school prayer cases, from *Engel v. Vitale*, 370 U.S. 421, to *Lee v. Weisman*, 505 U.S. 577.

If the Football Policy were applied to the classroom, then according to Santa Fe's argument:

[T]he students in attendance [would] know to a moral certainty that the speech they [were] about to hear is private student speech, rather than speech directed and endorsed by the school. The students [would] know this because they [would] have participated in both the process of deciding whether to have a speaker and the separate process of selecting a speaker . . . . Any decision by a student speaker to offer an invocation [would] stand[] several intervening, student-made decisions removed from the school. Having participated in the decisionmaking process themselves, the students [could] not possibly view the school as endorsing the resulting student speech.

Pet. Br. 37-38.

That paragraph is the essence of Santa Fe's argument, elaborated throughout its brief. Nothing in that argument has anything to do with the venue of the prayer; it is equally applicable at graduation, at student assemblies, and in the classroom. Santa Fe eventually suggests in passing that there is less coercion or endorsement at a football game than in the classroom, Pet. Br. 34, or at graduation, *id.* at 41-42. But only *government* coercion and endorsement are at issue here; the relevant coercion and endorsement arise only if the speech is first attributed to the school. The asserted locational distinctions are not rooted in Santa Fe's primary argument, nor necessary to it, nor even consistent with it. If the student vote and the elected student speaker really leaves the students "morally certain" that the school is not sponsoring or endorsing the prayer, there is no reason for students to become confused or reach the opposite conclusion when they hear the elected student speaker pray over a different public address system. If the message is so clearly student free speech, it is student free speech wherever it appears.

The dissenter below, who accepted Santa Fe's arguments with respect to both graduation and football, explained it this way:

[T]he reason a *Clear Creek II* policy works is that it neutrally accommodates both religious and nonreligious speech in a limited public forum. Constitutionally speaking, *there are no location or other restrictions* on where the state may elect to create its designated or limited public fora.

Pet. App. B27-B28 (Jolly, J., dissenting)(emphasis added).

This is also how a Mississippi high school and the Mississippi legislature read *Jones v. Clear Creek Indep. School Dist.*, 977 F.2d 963. After *Clear Creek*, and following a student vote to authorize the practice, Wingfield High School in Jackson began opening each day with prayer "over the school intercom system to all students who, during which, were required to remain at their desks." *Ingebretsen v. Jackson Public School Dist.*, 864 F.Supp. 1473, 1478 (S.D.Miss. 1994), *aff'd*, 88 F.3d 274 (5th Cir. 1996). Straightforwardly applying the logic of *Clear Creek* and of Santa Fe's argument here, the high school principal concluded that the student vote had privatized the prayer.

Under *Clear Creek*, Wingfield High had regressed to a point worse than the practice in this Court's original school prayer cases. At least in those cases, objecting students had been permitted to leave the room. *Abington School Dist. v. Schempp*, 374 U.S. at 224-25; *Engel v. Vitale*, 370 U.S. at 430. Of course this Court held that remedy inadequate, but nothing in the logic of *Clear Creek* and Santa Fe's argument appears to require even that inadequate remedy.

Higher ranking school officials stopped the classroom prayers at Wingfield High, and the Mississippi legislature responded to the ensuing controversy with its School Prayer Statute, authorizing "nonsectarian, nonproselytizing student-initiated voluntary prayer" at all school-related events, whether "compulsory or noncompulsory." Miss. Code ß37-13-4.1(2) (1996). The School Prayer Statute assumed that if "student-initiation" works to privatize prayer at one official school event, it should work at any other school event. The Fifth Circuit, seeing what *Clear Creek* had unleashed, confined that case to graduation. *Ingebretsen v. Jackson Public School Dist.*, 88 F.3d 274.

The issue is not location *per se*, but whether the school controls the program. Prayer in the classroom is where this Court first recognized the dangers of government-sponsored prayer. But when a voluntary student club uses the very same classroom a few hours later, this Court has held that prayer is unobjectionable. *Board of Educ. v. Mergens*, 496 U.S. 226. The location is the same, but the program is different, and control has shifted from the school to the club. The distinction between graduation and football seems arbitrary precisely because the school sponsors both events and controls the program at both events. The school also controls the public address system that reaches classrooms. Inside each individual classroom, the school actually has less control than it has of the football public address system. Classroom teachers ask questions and lead discussions; students can respond; some will express alternative views. No one can respond to or argue with a public address system that only one person can use. If Santa Fe's position were adopted for football games, only the most arbitrary distinctions would prevent its being adopted for every other school event, including the classroom.

Santa Fe's shifting positions in this litigation also show the arbitrariness of distinctions among locations or events. In the Fifth Circuit, where *Clear Creek* protected public prayer at graduation, Santa Fe treated graduation and football as indistinguishable. *See* Pet. Br. 27 n.11, treating *Clear Creek* as dispositive below. In this Court, where *Clear Creek* is no authority and *Lee v. Weisman* holds that schools cannot sponsor prayer as part of their graduation programs, Santa Fe suggests that graduation and football are distinguishable. Pet. Br. at 41-42. If the Court were to announce different rules for different official school events, courts would face an endless series of such arbitrary arguments. Every school event would have to be separately adjudicated and, because all the arguments would be essentially arbitrary, there would be no standards for adjudication. The true rule is that there can be no majoritarian decision to lead the entire audience in prayer at a school-sponsored event.

Santa Fe's position also has implications for the content of prayers in public schools. Santa Fe says that, because the invocation or message is merely private speech, there can be no substantive limitation on what the student says. Pet. Br. 44-48 (arguing that exclusion of religious speech is unconstitutional); *id.* at n.18 (arguing that limitation to nonsectarian, nonproselytizing speech is unconstitutional); Cert. Pet. 22-27 (arguing that limitation to nonsectarian, nonproselytizing speech is viewpoint discrimination).

The Fifth Circuit's limitation to nonsectarian, nonproselytizing prayer at graduation is more sensitive to religious minorities but, constitutionally, it makes no sense. If the prayer is private, government has no authority to censor it; if the prayer is governmental, government has no authority to sponsor it. Neither conclusion depends on whether the prayer is sectarian or proselytizing. Government has no authority to sponsor sectarian prayers, "so-called nonsectarian" prayers, *Lee*, 505 U.S. at 585, or any other kinds of prayers, or to express any preference among the possibilities. As this Court has said, "the suggestion that government may establish an official or civic religion as a means of avoiding the establishment of a religion with more specific creeds [is] a contradiction that cannot be accepted." *Id.* at 590. *Accord Engel v. Vitale*, 370 U.S. at 430 ("fact that the prayer may be denominationally neutral" does not authorize state to sponsor it).

II. SANTA FE'S FOOTBALL POLICY VIOLATES EVERY EXTANT TEST UNDER THE ESTABLISHMENT CLAUSE

This argument began with the one point of agreement between the parties: if the football prayers are attributable to the school, Santa Fe has violated the Constitution. We have carefully explored the many reasons why the prayers, and the decision to encourage prayer, are attributable to the school. It remains to connect these premises to the Court's doctrinal structure.

A. Coercion

By including prayer as part of the official pre-game ceremonies, Santa Fe has coerced all those in attendance at football games to attend and participate in a religious exercise. This was the holding in *Lee v. Weisman*, 505 U.S. 577, and it is equally applicable here:

Even for those students who object to the religious exercise, their attendance and participation in the state-sponsored religious activity are in a fair and real sense obligatory.

Id. at 586.

Here, the compulsion is in some ways greater than in *Lee.* Significant numbers of students are compelled to attend by official school policy. The parties stipulated that cheerleaders and band members are required to attend the pre-game ceremonies, including the prayer, and that band is a course for which some students receive academic credit. Stips. 126-28 at JA 65. It is obvious that the members of the football team are required to attend, as are the members of the opposing football team and its cheerleaders, and possibly its band. For all these students, who could easily total to more than a hundred, attendance is obligatory not just "in every practical sense," *Lee*, 505 U.S. at 598, but in the more stringent sense that school rules, backed by sanctions, mandate their attendance. On this basis, the district court found that prayers at football games are coercive. Pet. App. E8.

For the remaining students, attendance is "in a fair and real sense obligatory." 505 U.S. at 586. The state's school boards accurately assure the Court that attendance is a "rite of passage"; the district court noted that in Texas, "football is probably a heck of a lot more important than graduation." *See supra* at 6. Students cannot reasonably be expected to skip their graduation to avoid attendance at a religious exercise; even less can they be expected to skip four years of high school football, missing many events instead of one, to avoid attendance at a long series of religious exercises. "[T]o say a teenage student has a real choice not to attend" four years of high school football, at least in Texas, "is formalistic in the extreme." *Id*. at 595.

Lee also found another source of coercion. It is not just that graduation is important to most students, but also, and perhaps more fundamentally, it is a school event that students are entitled to attend. "[T]he State cannot require one of its citizens to forfeit his or her rights and benefits as the price of resisting conformance to state-sponsored religious practice." *Id.* at 596. The importance of football and of graduation makes the coercion greater, but even if the event were not so important, the coercion would inhere in requiring students to forfeit their right to attend an official school event.

A student who is not a football player, a cheerleader, or a band member could in theory avoid the prayer by arriving late to the game. But this option also requires forfeiture of rights, and important ones to students: the chance to get a good seat; the chance to attend with friends, with a date, or as part of a social group; and the chance to see, hear, and participate in the rest of the opening ceremonies and rituals -- the band, the teams running on to the field, the National Anthem, the kickoff, etc.

Respondents believe the Constitution is violated when students are "*subjected* to state-sponsored religious exercises." *Id.* at 592 (emphasis added). That is, the Constitution is violated when students are coerced to *attend* a religious exercise, whether or not they are coerced to *participate* or to appear to participate. Coerced attendance at a religious exercise necessarily entails that the victim is "compelled to listen to the prayers or thoughts of others." *Wallace v. Jaffree*, 472 U.S. at 72 (O'Connor, J., concurring).

Coerced attendance at religious services is at the very core of the Establishment Clause. Mandatory church attendance in colonial Massachusetts, or in Stuart and Tudor England, are classic examples of establishment; no Justice has ever suggested that coerced church attendance would become constitutionally permissible if the state agreed that attendees need only go through the motions, without being expected to actually believe or actually pray. State-coerced attendance at a religious exercise violates the Establishment Clause whether or not there is state-coerced participation.

When the state does coerce participation, the constitutional violation goes even deeper. That was the situation in *Lee*, 505 U.S. at 593-94, and that is the situation here. Students in the football crowd face the same "dilemma of participating, with all that implies, or protesting." *Id.* at 593. When all around them stand and attend to the prayer, it is perfectly obvious if one or a

few do not. A dissenting student has "no real alternative which would have allowed her to avoid the fact or appearance of participation." *Id.* at 588.

A student in a football crowd may be subject to less regimentation from school authorities concerned about how the senior class appears to an audience, but he also receives less protection by school authorities from the reactions of those around him. The dispute over school-sponsored prayer has aroused intense feelings; these feelings may be combined with a crowd mentality, with excitement and rowdiness, and with frustration if the game goes badly. And unlike a graduating senior, who may conceivably leave at the end of the ceremony and never come back, one who visibly fails to pray at a football game has to keep going to school with those around him -- the next week, the next month, the next semester, possibly for as long as four more years. A student who visibly refused to participate in the prayer at a Santa Fe football game would risk "social ostracization and violence." *See supra* at 2. At least one student has been driven out of the Santa Fe schools by such harassment. Tr. 7/25/96 at 82-83. *Cf. Walter v. West Va. Bd. of Educ.*, 610 F.Supp. 1169, 1172 (S.D.W.Va. 1985)(student who was perceived not to have prayed during a classroom moment of silence harassed with anti-Semitic epithets).

B. Endorsement

The endorsement test, first elaborated in Justice O'Connor's concurring opinion in *Lynch v. Donnelly*, 465 U.S. 668, 687-94 (1984), was soon adopted in opinions of the Court. *County of Allegheny v. ACLU*, 492 U.S. 573, 589-94 (1989); *Wallace v. Jaffree*, 472 U.S. at 56 & n.42, 60-61; *see also Engel v. Vitale*, 370 U.S. at 436 (invalidating "governmental endorsement" of the New York Regents' prayer). Santa Fe violates the Establishment Clause if its "actual purpose is to endorse or disapprove of religion," or if, "irrespective of [its] actual purpose, [it] in fact conveys a message of endorsement or disapproval." *Wallace*, 472 U.S. at 56 n.42, quoting *Lynch*, 465 U.S. at 690 (O'Connor, J., concurring).

Santa Fe has endorsed the religious practice of prayer at school events under either standard. That is, Santa Fe's actual purpose was to endorse public prayer, and it actually conveyed a message that endorsed public prayer.

1. Purposeful Endorsement. Santa Fe adopted its Football Policy for the actual purpose of perpetuating prayer as part of the program at football games. No other purpose makes any sense of its actions. The school had long sponsored prayer at football and baseball games, and it had long supported sectarian religion within the school in other ways. There is no evidence of any change in Santa Fe's purpose, but only in its tactics. The historic purpose is presumed to continue forward absent clear evidence of a new purpose.[(9)]

No other claimed purpose plausibly fits the facts. Santa Fe's claimed purpose to solemnize football games could easily be achieved, without religious exercises, without controversy, and without litigation, by playing or singing the National Anthem -- an extraordinarily widespread custom at athletic events, deeply rooted in the culture -- or by any other patriotic observance, or by a secular message about good sportsmanship and fair competition. Santa Fe's insistence on creating an opportunity to solemnize the game with public prayer can only be understood in terms of a purpose to perpetuate public prayer at football games; it is wholly unnecessary to solemnization.

Santa Fe's claimed purpose to support student free speech is belied by the pervasive prior restraint it applies to student speech in every context except football games and graduations -- that is, in every context except those in which it is most determined to perpetuate public prayer as part of its official program. Its claimed purpose to support student free speech is also belied by its control over the entire event, its narrow limits on what the student speaker may say, and its rule that only one student per year will be permitted to speak.

The creator of the endorsement test has expressed confidence "that our courts are capable of distinguishing a sham secular purpose from a sincere one." *Wallace v. Jaffree*, 472 U.S. at 75 (O'Connor, J., concurring). This is an appropriate case for the Court to exercise that ability. The court of appeals concluded that the claimed secular purpose is a sham. Pet. App. A20. This conclusion was based on the "evolutionary history" of the school's prayer policies, *id.* at A21, together with the policies' express preference for sectarian and proselytizing prayer. The inference that the claimed secular purpose is a sham is fully justified by the evidence, and by the duty of the courts of appeals and of this Court in First Amendment cases "to make a fresh examination of crucial facts" and decide for themselves "whether a given course of conduct falls on the near or far side of the line of constitutional protection." *Hurley v. Irish-American Gay, Lesbian and Bisexual Group*, 515 U.S. 557, 567 (1995).[(10)]

2. Actual Message Of Endorsement. Whatever Santa Fe's actual purpose, it has unconstitutionally endorsed prayer at school events if it has conveyed a message of endorsement to a reasonable observer. "[T]he endorsement test necessarily focuses upon the perception of a reasonable, informed observer." *Capitol Square Review and Advisory Bd. v. Pinette*, 515

U.S. at 773 (O'Connor, J., concurring). This observer "must be deemed aware of the history and context of the community and forum in which the religious display appears." *Id.* at 780.

Such an observer would thus know the history of the Santa Fe schools on football prayer in particular and on religion in the schools in general. He would know the polarization in the community and the outcome of past majority votes. He would know the school's limits on student free speech in all other contexts. He would know that there are readily available means to solemnize football games without making prayer part of the program.

Here, as in *Lee v. Weisman*, religious students are free to pray or otherwise express their religious feelings before the game, after the game, or even during the game, provided only that they act individually or in voluntary groups. To exercise their freedom of speech and freedom of religion, individual students and voluntary groups do not need the school's public address system. They do not need the school board to call for elections, or the student council to conduct them. They do not need to hold the entire crowd as a captive audience for their prayer. Freedom of speech and free exercise of religion require none of these collective processes:

Religious students cannot complain that omitting prayers from their [football games] would, in any realistic sense, "burden" their spiritual callings . . . . Because they accordingly have no need for the machinery of the State to affirm their beliefs, the government's sponsorship of prayer at the [football games] is most reasonably understood as an official endorsement of religion.

Lee v. Weisman, 505 U.S. at 629-30 (Souter, J., concurring).

In short, all the reasons that lead plaintiffs to argue that Santa Fe's actual purpose was to endorse Christian prayer would also lead the reasonable observer to perceive an actual endorsement. The difference between the purpose inquiry and the actual-message inquiry is that the purpose inquiry focuses on the state of mind of the state actors; the actual-message inquiry focuses on the state of mind of the hypothetical reasonable observer. Finding an actual purpose to endorse religion requires the Court to discredit the ostensible purpose; finding an actual message of endorsement requires no such thing. Where the government's conduct

has the effect of endorsing religion, even if the governmental actor neither intends nor actively encourages that result, the Establishment Clause is violated. This is so not because of "transferred endorsement," or mistaken attribution of private speech to the State, but because the State's own actions . . . and their relationship to the private speech at issue, *actually convey* a message of endorsement.

Pinette, 515 U.S. at 777 (O'Connor, J., concurring)(emphasis in original).

Here the message of endorsement is actually conveyed. No reasonable observer, not blinded by commitment to the cause of perpetuating school prayer, could possibly conclude otherwise.

C. Preferential Access

Justice Scalia's opinion in *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, partly for the Court and partly for a plurality, offered a third standard. This standard focused neither on the state of mind of the government actors, nor on the state of mind of the reasonable observer, but on the government's actual conduct. The plurality feared that even a reasonable observer might make a mistake, and it was unwilling to find a constitutional violation on the basis of a mistaken perception of endorsement, "at least where, as [in *Pinette*], the government has not fostered or encouraged the mistake." *Id.* at 766 (plurality). Nor did the plurality focus on the government's purpose.

Instead, both the Court and the plurality focused on whether the government had actually created an equal and open forum, or whether it had in fact preferred or assisted religious views. The religious display on the capitol grounds was protected private speech because:

The State did not sponsor respondents' expression, the expression was made on government property that had been opened to the public for speech, and permission was requested through the same application process and on the same terms required of other private groups.

Id. at 763 (opinion of the Court). None of those things are true here. Santa Fe sponsored the elected student's expression by creating the election process and delegating to the elected student a part of the program at an official school event, an event sponsored solely by the school and wholly subject to the school's control. The public address system at football games had *not* "been opened to the public for speech." And the elected student speaker did *not* request permission "through the same

application process and on the same terms" as other groups; the elected student speaker used a unique process created solely for official school events and accessible to no other group.

The *Pinette* plurality elaborated additional objective evidence that religious speakers had received no preference: "Capitol Square is a genuinely public forum, is known to be a public forum, and has been widely used as a public forum for many, many years." *Id.* at 766. None of *these* facts exist in this case either. The public address system at football games, during pre-game ceremonies, is not a public forum, has never been known to be a public forum, and has never been used as a public forum. Moreover, the Court in *Pinette* took for granted that the multiple private groups with access to the forum were free to address their own agendas. But that is not true here either. The one speaker granted access is required to address the school's agenda.

Preferential access is unconstitutional not because of anyone's state of mind, but because it objectively prefers religious speech:

Of course, giving sectarian religious speech preferential access to a forum . . . would violate the Establishment Clause (as well as the Free Speech Clause, since it would involve content discrimination). And one can conceive of a case in which a governmental entity manipulates its administration of a public forum . . . in such a manner that only certain religious groups take advantage of it, creating an impression of endorsement *that is in fact accurate.* But those situations, which involve governmental *favoritism*, do not exist [in *Pinette*.]

Id. (emphasis in original).

In Santa Fe "those situations" do exist. There is favoritism, there is preferential access, the school did manipulate control of the microphone with an elaborate process to ensure that only one student would ever be permitted to speak, and that she would represent the views of the majority. In this case, the impression of endorsement is "in fact accurate."(11)

D. The Lemon Test

Of course the Court's classic formulation of an Establishment Clause standard is the three-part test of *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971). In the context of government speech and government-sponsored speech, *Lemon*'s purpose prong has largely evolved into the question of "whether the government's actual purpose was to endorse or disapprove of religion," and *Lemon*'s effects prong has largely evolved into the question of "whether, irrespective of government's actual purpose, the practice under review in fact conveys a message of endorsement or disapproval." *See Lynch v. Donnelly*, 465 U.S. at 690 (O'Connor, J., concurring). Because we have already analyzed the issue under those labels, this section will be brief.

1. Lack Of Secular Purpose. Because the Football Policy has no secular purpose, it is unconstitutional under *Lemon v. Kurtzman*, 403 U.S. at 612. The one context in which this Court has repeatedly found no secular purpose is in attempts to teach or impose religion in the public schools. *See Edwards v. Aguillard*, 482 U.S. 578, 585-94 (1987); *Wallace v. Jaffree*, 472 U.S. at 56-61; *Stone v. Graham*, 449 U.S. at 40-41; *Epperson v. Arkansas*, 393 U.S. 97, 107-09 (1969).

2. Primary Effect. School-sponsored religious observances have the primary effect of advancing religion. A large audience, assembled by the state for other purposes, is required to listen to, and in every practical sense participate in, a state-sponsored religious exercise. Prayer is a quintessentially religious activity. Unless we are to assume that the prayers are a mere charade, or that they are wholly ineffectual, their primary effect cannot be other than religious. The Court has had few occasions to so hold only because it has so regularly struck down school-sponsored prayer because of its religious purpose, making it unnecessary to reach the question of effects, and because recent cases have made the point in terms of perceived endorsement rather than primary religious effect. *See Abington School Dist. v. Schempp*, 374 U.S. at 222-27 (stating the standard in terms of purpose and primary effect, and striking down school-sponsored prayer without distinguishing the two prongs of the standard).

III. LIMITS ON FACIAL CHALLENGES CANNOT SAVE SANTA FE'S FOOTBALL POLICY

Santa Fe's ultimate position, on which it relies at every turn, is that its Football Policy must be upheld because this case presents only a facial challenge to a policy that has never been implemented. Pet. Br. 11-12, 16-17, 21-26, 29, 31-35 & nn.12-13, 38-39, 42 n.16. Santa Fe asks this Court to ignore every fact known about this case, to consider only the bare words of the Football Policy, to rip those words from context, and to spin rosy scenarios about how the students might never vote for prayer.

This argument is wrong at multiple levels. The Football Policy is indeed facially unconstitutional. Moreover, this is not a pre-implementation challenge; there is enough evidence of initial implementation to support both facial and as-applied challenges. Finally, if Santa Fe's facial challenge argument were valid, school prayer policies could be effectively insulated from appellate review.

A. Santa Fe's Football Policy Is Unconstitutional On Its Face

The Football Policy was unconstitutional when the school board promulgated it, whether or not any student ever delivered a prayer pursuant to the policy. The Football Policy is facially unconstitutional because it requires a public vote on the religious question of whether to pray at football games, and because it attempts to impose on the whole community a majoritarian resolution of that religious question. It is facially unconstitutional because it authorizes only a narrow range of possible messages, and singles out sectarian and proselytizing invocations for special mention within that narrow range. It is facially unconstitutional because its purpose was to encourage public prayer at official school events. It is facially unconstitutional because the policy itself, as originally promulgated and before any implementation, conveyed to a reasonable observer a message of endorsement of religion and of public prayer at official school events.

The restriction of the authorized messages, from the full English meaning of the word "message" to only those messages that are "consistent with the goals and purposes of this policy," appears on the face of the policy. The provision for only one annual election, so that only one student per year will be permitted to speak, appears on the face of the policy. That the election is to be conducted "upon advice and direction of the high school principal" appears on the face of the policy. That the policy applies only to "pre-game ceremonies of home varsity football games" appears on the face of the policy; no implementation is required for the Court to know that these are official school events subject to the school's control except insofar as that control may have been delegated on the face of this policy. Santa Fe's desire to include "sectarian" and "proselytizing" messages appears on the face of the policy.

Moreover, a facial challenge is not an acontextual challenge. The reasonable observer in the endorsement test "must be deemed aware of the history and context of the community and forum." *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. at 780 (O'Connor, J., concurring). This Court cannot pretend to be less informed than the hypothetical reasonable observer. A reasonable observer, or a reasonable judge, knowing the history of widespread support for religious observance in the Santa Fe schools, knowing that the Football Policy is inconsistent with the school's general policy on free speech, knowing that invocations are wholly unnecessary to solemnize a football game, would not have to await the outcome of student votes to understand the purpose of the policy or the message conveyed by the policy.

A reasonable observer informed about the community would also know the likely outcome of the student votes before they were ever taken, and would know that the school board also knew, and would know that the school board relied on that knowledge. This knowledge would reinforce the observer's already confident judgment about the policy's purpose and the message it conveyed.

The constitutional violation is complete when the school board acts with the forbidden religious purpose, or when it conveys the forbidden message of endorsement or disapproval of a religious practice. If the school board endorses prayer at football games, it has violated the Constitution even if the student body fails to act on the board's advice. It is irrelevant if Santa Fe turns out to be an incompetent endorser.(12)

Moreover, this is not a case in which the likelihood of continuing constitutional violations depends on any speculation about future bad-faith administration. The school board has set up a structure calculated to achieve the results it wants and then turned execution over to the students. The school need do nothing more, and the students need not act in bad faith; they have been told that in complete good faith they can vote for a message and for candidates who promise sectarian and proselytizing prayer.

In *Wallace v. Jaffree*, 472 U.S. 38 (1985), this Court struck down Alabama's moment of silence statute on its face, without evidence of how the law had been implemented.(13) The Court relied on the history of the provision, on the implausibility of possible secular purposes, and on its knowledge of the public schools. *Id.* at 56-61 & nn.42-51. Students would have been free to think whatever thoughts they chose during the moment of silence; there, as here, it was possible that no student would ever pray pursuant to the moment-of-silence statute. But the Court did not await proof of what the students had actually thought. The violation was complete when the legislature encouraged the students to pray, whatever the students actually did. Where government intends to convey a message of endorsement, it is "unnecessary" to inquire further. *Id.* at 61.

Similarly in *Karen B. v. Treen*, 653 F.2d 897 (5th Cir. 1981), *aff'd mem.*, 455 U.S. 913 (1982), involving a Louisiana statute that authorized prayer but did not require it, the Court struck the statute down prior to implementation. 653 F.2d at 902 ("The

Jefferson Parish program has yet to be put into effect"). There too it might have happened that no student or teacher would choose to pray, in which case the program would default to a moment of silence that plaintiffs did not challenge. *Id.* at 899. The Court did not await proof of what actually happened, but struck the policy down because its purpose and primary effect could be determined before any implementation.

On the free exercise side, the Court struck down Hialeah's animal sacrifice laws before any prosecutions had been brought, in an opinion that carefully dealt with context, enactment history, and application of the city's alleged policies to analogous activities. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520. There is ample precedent, and ample evidentiary basis, to hold Santa Fe's Football Policy unconstitutional on its face.

B. Santa Fe's Football Policy Is Unconstitutional As Applied

Plaintiffs also challenge the Football Policy as applied to the extent that evidence of the policy's implementation is available. The available evidence is substantial.

The record in this case shows that in May 1995, the students voted for prayer at graduation. In August 1995, the students voted for prayer at football games. These votes were the initial implementation of Santa Fe's new policy of letting students vote on prayer at school events. The cosmetic changes made to the policy in October, authorizing a vote on an "invocation and/or message" instead of a vote on an invocation, do not reduce the evidentiary force of these initial votes. The August version of the Football Policy produced prayer at football games, as the board had no doubt confidently expected, and those early votes increased the board's confidence that the amended version now in effect would work as expected in the future.

Moreover, we know that in 1999 the students again voted for a message at football games, and that they elected a student so determined to pray at football games that she filed her own lawsuit. She filed this lawsuit in the face of a squarely adverse prior decision from the court of appeals, and she somehow secured a temporary restraining order and preliminary injunction insuring her right to pray throughout the 1999 football season. These facts are of record in related litigation against Santa Fe in the Southern District of Texas, and they are known to the whole community. They have been furnished to this Court by the student elected to give the prayers, filing as *amicus curiae* in support of Santa Fe. Brief for Marian Ward, App. C, D, F. In that brief, she insists on her constitutional right to deliver sectarian, proselytizing prayers over the public address system at Santa Fe football games. *Id.* at 28-29.

The judicial record does not document how the policy was implemented in 1996, 1997, or 1998. But that information is not essential. There is ample evidence that the policy worked from the beginning and works today exactly as Santa Fe intended. The school board's message did not fall on deaf ears; it was passed to willing hands.

C. Santa Fe's Argument Seeks To Insulate School Prayer Polices From Appellate Review

The full scope of Santa Fe's facial-challenge argument is breathtaking. When this lawsuit was filed, Santa Fe's practices with respect to religion in school were utterly indefensible. Santa Fe's lawyers immediately announced that the school was revising its policies. Tr. 5/5/95 at 21. They announced a new policy in August and implemented it for the 1995 season, requiring a student vote. They revised it again in October, requiring a vote on "invocation and/or message" instead of just an invocation.

It is apparently Santa Fe's position that the August policy and its implementation are irrelevant to the current policy, lacking even evidentiary value. Only this assumption makes any sense of its claim that this is "a pre-implementation facial challenge." Pet. Br. 22.

On that assumption, school boards can endlessly avoid appellate review by simply tinkering with their policies. Write a new policy and make the past go away. Implement the new policy, change a few more words, and make the implementation go away. Change a few words after the evidentiary record is compiled and make the record go away. Appellate litigation cannot function on such a basis, and this Court's cases on facial challenges authorize no such thing.

Substantial changes to substantive policy undoubtedly change the question presented, although even then the earlier policy may remain relevant to questions of purpose and of the messages conveyed. But here, Santa Fe's changes are neither substantive nor substantial. The difference between the August 1995 policy and the current policy is little more than wordplay, yet Santa Fe claims that this change eliminates even the evidentiary value of the students' votes for prayer in 1995. Santa Fe cannot derive "such a variation in the result from so slight a change in form." *Smith v. Allwright*, 321 U.S. at 661.

Even if the Football Policy were thought to be in some sense facially neutral, that would not suffice. The Court's inquiry cannot "end with the text of the laws at issue . . . . The Free Exercise Clause, like the Establishment Clause, extends beyond facial discrimination." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. at 534. "[T]he Establishment Clause forbids a State to hide behind the application of formally neutral criteria and remain studiously oblivious to the effects of its actions." *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. at 777 (O'Connor, J., concurring). Yet Santa Fe wants to hide behind a veneer of allegedly neutral words, which on close textual analysis are not really neutral, combined with its extraordinary theory of facial challenges. Santa Fe has had one continuous policy of perpetuating prayer as part of its official program at football games, assiduously pursued through increasingly refined means, but never departing from the original goal.

CONCLUSION

"The constitutional design is that preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere." *Lee v. Weisman*, 505 U.S. at 589. A policy that requires an annual majority vote on a religious exercise plainly violates the design of the Constitution. That the invocation will be delivered in a public school, as part of the program at an official school event, compounds the violation. The portion of the judgment presented in the limited grant of *certiorari* should be affirmed.

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1. These findings are set out in the district court's Findings of Fact, Pet. App. D3-D14, and in its Order of Summary Judgment on Liability Issues, *id.* at E1-E11, which is incorporated into the Findings of Fact and Conclusions of Law, *id.* at D2. The quotation is from the opinion of the court of appeals. Many of these facts are set out in greater detail in the parties' Stipulations, JA 43-67. Respondents will use the abbreviations set out in note 1 of Petitioner's Brief (Pet. Br.), and follow that brief's convention of referring to the Santa Fe Independent School District as Santa Fe.

2. Later, when the issue had shifted from correction of unconstitutional practices to damages for the past, the district court gave greater weight to Santa Fe's written policy prohibiting prayer or religious instruction in the classroom, and to its after-the-fact responses to complaints about classroom incidents, concluding that no school policy had proximately caused any damage to plaintiffs. Findings 15, 23, 30 at Pet. App. D6-D10. This opinion also incorporated and reaffirmed the findings in the summary judgment order, *id.* at D2, including the findings quoted in text. Plaintiffs appealed the denial of damages only with respect to the in-class Mormon diatribe; the court of appeals affirmed without deciding whether that episode stemmed from school policy. Pet. App. A40-A41. There is no dispute that the Football Policy and the similar policy for graduation are official school policies.

3. The summary of the current policy at Pet. Br. 10-11 is inaccurate. Paragraphs cited to JA 104 are part of the policy; paragraphs cited to JA 31 or JA 32 are *not* part of the policy. Citations to JA 31-32 are to an Interim Order "intended to resolve only immediately pending problems." JA31. This order was superseded by the ultimate denial of injunctive relief, Pet. App. D19, E13, and certainly by the judgment of the court of appeals reversing the district court with respect to football prayers. *Id.* at A41.

4. Ward's father is the pastor at the Santa Fe Baptist Church. She prayed in Jesus' name and received a standing ovation. "Teen Says Pre-Game Prayer After Court Order Clears Away," Dallas Morning News, Sept. 4, 1999.

5. Because football prayer was a settled issue in the Fifth Circuit, the details of the Football Policy were largely irrelevant in the courts below, and the record is sketchy with respect to football prayer. Fortunately, football games "are such an integral part of American cultural life that [this Court] can with confidence describe their customary features." *Lee v. Weisman*, 505 U.S. at 583.

Although Santa Fe now claims that *Clear Creek* authorized at least its backup football policy, Pet. Br. 3-4, 27 n.11, Santa Fe's trial counsel more candidly conceded that "the *Jones v. Clear Creek* language for football games has not been approved by the Fifth Circuit at this point." Tr. 8/4/95 at 12. "This point" was even before *Ingebretsen* and *Duncanville II* expressly held *Clear Creek* inapplicable to athletic events.

6. This sentence is quoted with approval in *Rosenberger v. Rector of Univ. of Va.*, 515 U.S. 819, 841 (1995), and in *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 766 (1995)(plurality opinion).

7. *See generally* Douglas Laycock, "Freedom of Speech That Is Both Religious and Political," 29 U.C. Davis L.Rev. 793 (1996); Douglas Laycock, "Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers," 81 Nw. U.L. Rev. 1 (1986).

8. **invocation 1a:** the action or an act of petitioning for help or support; *specif, often cap:* a prayer of entreaty that is usu. a call for the divine presence and is offered at the beginning of a meeting or service of worship.

Webster's Third New International Dictionary of the English Language Unabridged (1961, 1981).

invocation *n.* 1. the act of invoking or calling upon a deity, spirit, etc., for aid, protection, inspiration, or the like; supplication . . . . 3. a form of prayer invoking God's presence, esp. one said at the beginning of a religious service or public ceremony.

Random House Dictionary of the English Language Unabridged (2d ed. 1987).

9. This common-sense proposition is implicit in the Court's cases holding that where a defendant has abandoned unlawful conduct in the face of litigation, that defendant bears a "heavy burden" of showing that defendant will not resume the illegal conduct. *Friends of the Earth, Inc. v. Laidlaw Environmental Servs. (TOC), Inc.*, No. 98-822 (Jan. 12, 2000), slip op. at 18, and cases cited. The presumption that defendant might resume the illegal conduct necessarily entails a presumption of continuing purpose to do so, and that continuing purpose may of course be manifested in slightly altered and allegedly lawful conduct.

10. The district court held that the prayers were coercive, Pet. App. E8, and thus had no occasion to make a finding with respect to secular purpose or endorsement.

11. The *Pinette* plurality said only that such preferential access is unconstitutional for "*sectarian* religious speech." *Id.* (emphasis added). This limitation apparently preserved the position of the dissenters in *Lee*, three of whom were part of the plurality in *Pinette*, that government is free to open and close public ceremonies with "officially sponsored nondenominational" prayer. *Lee v. Weisman*, 505 U.S. at 641 (Scalia, J., dissenting).

We respectfully disagree. More important, this Court has consistently struck down religious observances in public schools even when they were nonsectarian in the sense specified by the *Lee* dissent. *Lee*, 505 U.S. at 590; *Wallace v. Jaffree*, 472 U.S. 38 (moment of silence with generic encouragement to prayer); *Engel v. Vitale*, 370 U.S. at 430 ("non-denominational" prayer). Note too that the prayers delivered at school events in Santa Fe, except when constrained by court order, have been sectarian in the sense described by the *Lee* dissent. *See* Stips. 37-39 at JA 39-40. The Football Policy states an express preference to permit prayer that is sectarian and proselytizing.

Moreover, the Fifth Circuit has tried the experiment of permitting nonsectarian prayer while forbidding sectarian prayer, and the experiment has failed. That experiment requires censorship of those invited to offer prayers. It requires courts, as Justice Souter predicted, to draw difficult lines and to engage in "comparative theology," *Lee*, 505 U.S. at 616 (Souter, J., concurring); *see* Pet. App. A36-A37; *id*. at B30-B31 (Jolly, J., dissenting). Thus, all parties to this case reject the distinction between sectarian and nonsectarian prayer.

12. *Cf. Reno v. Bossier Parish School Bd*., No. 98-405 (Jan. 24, 2000), slip op. at 11 (noting that purpose test covers the "unlikely" possibility of the "incompetent retrogressor"); *id.* at slip op. 19 n.10 (Souter, J., dissenting in part)(describing the possibility as "rather paltry").

13. There was evidence that plaintiffs' teachers had led the class in prayer after enactment of the statute, 472 U.S. at 44, but these prayers did not implement the moment-of-silence statute.