

The amicus brief, Doe v. Madison School District No. 321, was joined by Clifton Kirkpatrick, as Stated Clerk of the General Assembly of the Presbyterian Church (U.S.A.). The brief was filed in the United States Court of Appeals for the Ninth Circuit on September 22, 1997.

No. 97- 35642

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JANE DOE, ON HER OWN BEHALF)	
and on behalf of her two)	
children, X. DOE and Y. DOE,)	
Plaintiffs,)	Appeal for the United States
)	District Court for the
v.)	District of Idaho
)	
MADISON SCHOOL DISTRICT NO.)	Case No. CV 90-518-E-EJL
321; BOARD OF TRUSTEES OF)	Hon. Edward J. Lodge
DISTRICT NO. 321; JIM TERRY,)	
ANN HANCOCK, JOHN BAGLEY,)	
NORMAN ERICKSON and GARY)	
SUMMERS, members of said)	
Board, and DR. T. C. MATTOCKS,)	
Superintendent,)	
Defendants.)	

BRIEF *AMICI CURIAE* OF
CHRISTIAN LEGAL SOCIETY, NATIONAL ASSOCIATION OF
EVANGELICALS, ETHICS AND RELIGIOUS LIBERTY COMMISSION OF THE SOUTHERN
BAPTIST CONVENTION, FAMILY RESEARCH COUNCIL, AND PRESBYTERIAN
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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, amici curiae Christian Legal Society, National Association of Evangelicals, Ethics and Religious Liberty Commission of the Southern Baptist Convention, Family Research Council, and the Presbyterian Church (USA) declare, through counsel, that they have no parent company, subsidiary, or affiliate that has issued shares to the public.

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Statement of Jurisdiction

Amici adopt the statement of jurisdiction of the Appellees (hereinafter "Madison School District" or "Madison").

Statement of Issue Presented for Review

Does the failure of public school authorities to censor high school student graduation speeches so as to cleanse them of any religious viewpoint or expression violate the Establishment Clause, where the student speakers are chosen on a neutral, secular basis, where the student speakers are permitted to express themselves freely on any topic and in any manner, and where the printed graduation program makes clear (1) that the speeches are the private speech of the students, (2) that any religious expression contained in the speeches is not endorsed by the school authorities, and (3) that the school authorities consider the essence of education to be the recognition of the right of individuals to express their individual political, social or religious views?

Statement of the Case

Amici adopt Appellees' Statement of the Case with the following clarification: It appears that Mr. Wakefield (the graduation advisor) gives the student speakers time limits for their presentations based on whether they are the valedictorian or one of the salutatorians. The time limits appear to be content-neutral time, place, and manner regulations. Aff. Lyle Wakefield, p.5, ¶¶7-9.

Standard of Review

"A grant of summary judgment is reviewed de novo. An appellate court's review is governed by the same standard used by trial courts under Federal Rule of Civil Procedure 56(c). An appellate court must determine, viewing the evidence in the light most favorable to the nonmoving party, whether

there are any genuine issues of material fact, and whether the district court correctly applied the relevant substantive law." Jesinger v. Nevada Federal Credit Union, 24 F.3d 1127, 1130 (9th Cir. 1994) (citations omitted).

It appears that appellants do not assert that conflicting evidence requires a trial to determine disputed factual issues but rather that the district court simply drew the wrong legal conclusions from the facts. Thus it appears that the Court need only decide whether the district court "correctly applied the relevant substantive law." Id.

Summary of Argument

The key question in this case is whether the Establishment Clause requires that public school graduations be cleansed of all private expression of religious viewpoints and religious speech--including but not limited to prayer--leaving only secular viewpoints and secular speech. The answer to that question must be a firm "no."

Such cleansing would violate the First Amendment. Four recent Supreme Court decisions prohibited discrimination against nongovernmental religious expression and held that the Establishment Clause does not require such discrimination. See Rosenberger v. Rector and Visitors of the University of Virginia, 515 U.S. 819 (1995); Capitol Square Advisory & Review Board v. Pinette, 515 U.S. 753 (1995); Lamb's Chapel v. Center Moriches Union Free School Dist., 508 U.S. 384 (1993); Widmar v. Vincent, 454 U.S. 263 (1981). A fifth recent Supreme Court decision, Board of Education of Westside Community Schools v. Mergens, 496 U.S. 226 (1990), held that the Establishment Clause does not require discrimination against student religious expression in the public schools. In its recent decision in Ceniceros v. Board of Trustees of the San Diego Unified School District, 106 F.3d 878,

882-83 (9th Cir. 1997), this Court followed these Supreme Court precedents and struck down a school district's discrimination against nongovernmental religious speech in the public schools. See also, Garnett v. Renton Sch. Dist. No. 403, 987 F.2d 641 (9th Cir.), cert. denied, 510 U.S. 819 (1993)(school district must allow student group to meet for religious speech on public secondary school campus).

Here the issue is not whether Madison School District may censor speakers so as to cleanse a graduation of religious speech. Rather, the issue is whether Madison School District must engage in such censorship to avoid a violation of the Establishment Clause. Of course, the principle that school districts may not constitutionally engage in such censorship leads directly to the conclusion that they cannot be required to engage in such censorship. Implicit in the Constitution's prohibition of discrimination against religious expression is the clear message that school authorities do not violate the Establishment Clause by permitting nongovernmental religious expression on an equal basis with secular expression.

The Establishment Clause prohibition is triggered when the government engages in religious speech, not when private individuals express their religious values. As the Supreme Court has explained:

[T]here is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.

Mergens, 496 U.S. at 250 (emphasis in original).

This "crucial difference" between government speech endorsing religion and private speech endorsing religion distinguishes this case from the Supreme Court's decision in Lee v. Weisman, 505

U.S. 577 (1992). In Lee, the Court painstakingly sifted the facts of the case to determine whether the religious expression at a graduation ceremony was governmental religious expression and concluded that it was. The Court relied on three facts in finding an Establishment Clause violation in Lee: 1) the school officials decided a prayer would be included in the graduation ceremony; 2) the school officials chose the clergyperson who would deliver the prayer; and 3) the school officials gave the clergyperson guidelines for the content of the prayer. 505 U.S. at 586. None of these facts are present in this case. The school officials do not decide whether religious expression will occur in the graduation, do not choose a person specifically to deliver a prayer, and do not give guidelines for the content of any religious expression. Instead the students who speak during the graduation are chosen on the basis of neutral, secular criteria as the highest academic achievers among the graduates. Each student decides whether to speak and determines the content of his or her speech, including whether it will include any religious expression at all.

Indeed, Justice Souter's concurring opinion in Lee anticipated and distinguished a case like this one in which the religious expression resulted from the private choices of appropriately chosen speakers. In an opinion joined by Justices O'Connor and Stevens, he wrote:

If the State had chosen its graduation day speakers according to wholly secular criteria, and if one of those speakers (not a state actor) had individually chosen to deliver a religious message, it would have been harder to attribute an endorsement of religion to the State. Cf. Witters v. Washington Dept. of Services for Blind, 474 U.S. 481 (1986). But that is not our case.

505 U.S. at 630 n.8 (Souter, J., concurring).

The federal appellate decisions applying Lee to the graduation context have not assumed that Lee required a blanket prohibition on all religious expression at a graduation, but instead have engaged

in a fact-specific analysis of the particular graduation practices being challenged. ACLU v. Black Horse Pike Regional Board of Education, 84 F.3d 1471 (3d Cir. 1996); Jones v. Clear Creek Independent School District, 977 F.2d 963 (5th Cir. 1992), cert. denied, 508 U.S. 967 (1993). These courts split on the issue of whether allowing a graduating class to vote to have prayer violated the Establishment Clause, an issue much more difficult than the issue in this case, which does not involve a group decision about whether to include prayer in the ceremony but merely allows individual students to express their religious and secular viewpoints in their individual speeches.

Madison School District acts well within its discretion by permitting the highest achieving graduates the well-deserved opportunity to express themselves freely at graduation. A key goal of education is to prepare students to think for themselves and to be able to appreciate the right of free expression that is fundamental to a free society. By providing this opportunity for free expression to graduates chosen on neutral, secular criteria, Madison School District reinforces the value of free expression and provides a final capstone experience to the graduates with the highest academic honors.

Of course, absent a specific violation of the law, school districts have broad discretion to run their schools and their programs as they determine to be best. The district court below correctly concluded that the Madison School District Graduation Policy did not violate the law and refused to second-guess the school district's judgment regarding the pedagogical value of allowing the highest achieving graduates to express themselves at graduation.

Argument

I. Under The Analysis Used By The Supreme Court In Lee v. Weisman, The Madison

Graduation Policy Does Not Violate The Establishment Clause.

The Does argue that the Establishment Clause requires school authorities to cleanse public high school graduations of religious expression even when that expression results from the private decision of individuals chosen to speak on a neutral, secular basis. The Does argue that Lee v. Weisman, 505 U.S. 577 (1992), requires this result, but it does not. In fact, the Supreme Court's analysis in Lee shows that the Madison Graduation Policy does not violate the Establishment Clause.

A. The Graduation Policy Does Not Violate the Establishment Clause in Lee Because the Graduation Policy Does Not Result in State-Sponsored Religious Activity.

In its closely divided (5-4) decision in Lee, the Supreme Court majority relied heavily on the particular facts of Lee. The Court especially emphasized three salient facts: 1) the school authorities decided to include prayer in the graduation; 2) the school officials chose the person who was to pray; and 3) the school officials attempted to control the content of the prayer. On those facts, the Court held that the prayer was attributable to the government rather than to private speakers. Those facts made the prayer state-sponsored religious activity rather than private religious expression. That conclusion, plus the Court's view that attendance at graduation was compelled, led the Court to find that the state had coerced students into participating in a state-sponsored religious activity and, thus, had violated the Establishment Clause. The Court emphasized:

These dominant facts mark and control the confines of our decision: State officials direct the performance of a formal religious exercise at promotional and graduation ceremonies for secondary schools. 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, though the school district does not require attendance as a condition for receipt of the diploma....A school official, the principal, decided that an invocation and a benediction should be given;

this is a choice attributable to the State, and from a constitutional perspective it is as if a state statute decreed that the prayers must occur. The principal chose the religious participant, here a rabbi, and that choice is also attributable to the State....The State's role did not end with the decision to include a prayer and with the choice of a clergyman. Principal Lee provided Rabbi Gutterman with a copy of the "Guidelines for Civic Occasions," and advised him that his prayers should be nonsectarian. Through these means the principal directed and controlled the content of the prayers. Even if the only sanction for ignoring the instructions were that the rabbi would not be invited back, we think no religious representative who valued his or her continued reputation and effectiveness in the community would incur the State's displeasure in this regard. It is a cornerstone principle of our Establishment Clause jurisprudence that "it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government," Engel v. Vitale, 370 U.S. 421, 425 (1962), and that is what the school officials attempted to do.

505 U.S. at 586-588.

The Madison Graduation Policy does not suffer from the constitutional defects identified by the Supreme Court in Lee. Under Madison's Graduation Policy, state officials do not direct the performance of any religious exercise. The school officials merely allow the highest achieving students to express their views on any topic. Any prayer or other religious expression that occurs is due to the private choices of student speakers selected under neutral, secular criteria. Nor do state officials choose a person to give a prayer. Each student is selected to speak based on neutral, secular criteria, and each student decides for himself or herself whether to engage in religious expression. The state exercises no control over whether any of the student speakers will do so.

Nor do state officials compose any prayer or other religious expression that may be delivered. The Graduation Policy explicitly states that "The school administration shall not censor any presentation or require any content." Although school officials "may advise the participants about appropriate language," they cannot require changes. In Lee, the school officials attempted to control the content of

the prayer. In this facial challenge to the Madison Graduation Policy, there is absolutely no evidence that any Madison school official ever tried to influence the content of any student's religious expression.

Thus, none of the facts are present here that led the Court in Lee to attribute the prayer to the government. There is not a state-sponsored religious activity, but rather a free choice of expression by a nongovernmental speaker selected on neutral, secular grounds to speak. Under the fact-specific test applied in Lee, the Madison Graduation Policy does not violate the Establishment Clause.

B. No Justice Who Participated In *Lee* Would Necessarily Find The Madison Graduation Policy To Violate The Establishment Clause.

Joined by Justices O'Connor and Stevens, Justice Blackmun's concurrence in Lee stressed the facts which showed that the prayer was government speech, not private speech:

The question then is whether the government has placed its official stamp of approval on the prayer. As the Court ably demonstrates, when the government composes official prayers, selects the member of the clergy to deliver the prayer, has the prayer delivered at a public school event that is planned, supervised and given by school officials, and pressures students to attend and participate in the prayer, there can be no doubt that the government is advancing and promoting religion. As our prior decisions teach us, it is this that the Constitution prohibits.

505 U.S. at 603-04 (Blackmun, J., concurring)(citations, quotation marks and footnote omitted).

Joined by Justices O'Connor and Stevens, Justice Souter's concurring opinion also relied heavily on the facts in Lee that showed state involvement with the prayer and explicitly distinguished those facts from a case like the present case. Justice Souter's opinion indicates the holding in Lee would not control if the religious expression resulted from the private choices of appropriately chosen speakers:

If the State had chosen its graduation day speakers according to wholly secular criteria, and if one of those speakers (not a state actor) had individually chosen to deliver a

religious message, it would have been harder to attribute an endorsement of religion to the State. Cf. Witters v. Washington Dept. of Services for the Blind, 474 U.S. 481 (1986). But that is not our case.

505 U.S. 577, 630 n.8.

Thus, at least three of the five justices who voted to prohibit the prayer in Lee indicated they would treat the student speakers in the present case not as state actors but as nongovernmental actors.¹ A fourth Justice, Justice Kennedy, who authored the majority opinion, would find a violation only if the state had coerced students into participating in a government-sponsored religious activity; however, as discussed above, under the Court's approach in Lee the Madison Graduation Policy does not result in government-sponsored religious activity. A fifth Justice, Justice Blackmun, would have asked whether the state had placed its stamp of endorsement on the religious expression; but again, the neutrality of the Graduation Policy and the disclaimer of endorsement in the graduation program would prevent a

¹It is hard to see how speech that is not state action could violate the Establishment Clause, which applies in this case only as incorporated through the Fourteenth Amendment against the State of Idaho. Of course, the Fourteenth Amendment reaches only state action. Perhaps Justices Blackmun, Souter, O'Connor and Stevens--though not Justice Kennedy and the four dissenting Justices--would have been willing to apply the Establishment Clause to nongovernmental religious speech which could reasonably have been mistaken for governmental speech and which therefore might have been thought to be a state endorsement of religion. But in the present case, the selection of speakers on neutral, secular grounds, their known right to speak freely for themselves, and the statement printed in the graduation program very effectively prevent the reasonable attendee from thinking that Madison School District endorses religion. The reasonable attendee will be aware that any religious content in the graduation is the result of private choices by students rather than any choice by the school district. Thus, in this case, there is no endorsement of religion by the school district.

reasonable person from considering any religious expression to have been endorsed by the state. Of course, the four dissenters in Lee would be unlikely to find an Establishment Clause violation on the facts in this case. Thus, it is possible that none of the nine Justices who participated in Lee would find the Madison Graduation Policy violated the Establishment Clause.

C. The Lower Court Decisions Applying Lee In Graduation Prayer Cases Do Not Support Extension Of Lee To The Extreme Position Necessary To Strike Down The Madison Graduation Policy.

No reported case finds an Establishment Clause violation where a neutral school policy allows individual student graduation speakers the freedom to speak without censorship, including the freedom to choose to engage in religious speech. Indeed, as discussed below in Part IIB, infra at pp.27-30, multiple recent Supreme Court decisions preclude any conclusion that the Establishment Clause would require Madison School District to censor the student speakers in order to eliminate religious expression. None of the federal appellate court decisions applying Lee to graduations deals with a policy like Madison's graduation policy. Rather those decision involve policies that allow the graduating seniors as a body to decide whether or not prayer will be included, an issue not presented by this case.

1. The Case Most Like The Present Case On Its Facts, Adler v. Duval County School District, Held That There Was No Establishment Clause Violation.

The case most like the present case on its facts is a district court decision, Adler v. Duval County School District, 851 F. Supp. 446 (M.D. Fla. 1994), aff'd in part and vacated in part, 112

F.3d 1475 (11th Cir. 1997).² In Adler, the seniors voted on whether to include an opening speech and a closing speech at their graduation. If the seniors voted to do so, then student volunteers would be chosen to deliver the opening and closing speeches. Regardless of whether the speeches consisted of religious expression or nonreligious expression, the school district's policy precluded school officials from interfering with the content of the speeches. The district court correctly held that there was insufficient state involvement to attribute any religious expression to the state. Thus, there was no Establishment Clause violation.

The decision in Adler is unclear as to exactly who would decide whether the opening and closing speeches would include prayer, *i.e.*, whether the senior class as a whole would determine the content of the speeches (along with the initial decision to have or not to have opening and closing speeches), or whether the individual student speakers once chosen to give the opening and closing speeches were allowed to determine the content of the speeches. Compare 851 F. Supp. at 450 with

² The Does' brief claims that the district court's decision in *Adler* was vacated on appeal, or at least vacated *in relevant part*. See Appellants' Brief at 35 n. 9. That is not the case. The district court had granted summary judgment on the merits on claims for injunctive relief, declaratory relief, and damages, holding with respect to all three that the graduation policy in *Adler* did not violate the Establishment Clause. By the time the case reached the Eleventh Circuit, the plaintiffs had all graduated, and thus the claims for injunctive and declaratory relief were moot. The Eleventh Circuit, therefore, vacated the district court's judgment as to those claims. But the claim for damages was not moot, and the Eleventh Circuit affirmed the district court's grant of summary judgment on that claim. It is true that the Eleventh Circuit did not have to reach the merits to affirm the grant of summary judgment, because the plaintiffs did not take appropriate steps to preserve their right to appeal the grant of summary judgment on the damages claim. That did not, however, result in the grant of summary judgment on the damages claim being vacated but rather affirmed.

id. at 453. If the individual speakers determine the content, then Adler is much like the present case, with any prayer or religious expression resulting from the individual, free choices of the speakers. Note, however, that in Adler someone had to decide which volunteers would be chosen to give the opening and closing speeches. If the school officials made that decision, then perhaps in making that decision the school officials could influence whether prayer would be included. By contrast, Madison's Graduation Policy clearly provides neutral, secular criteria to determine the identity of the speakers, making it even less likely than in Adler that the state can influence whether religious expression is included.

2. The Circuit Court Decisions Applying *Lee* To Graduations Do Not Deal With Whether Individual Speakers, Who Are Chosen By Neutral, Secular Criteria, May Choose To Engage In Religious Expression.

The circuits are evenly split on the different question of whether a public school may permit the graduating seniors as a body to decide whether to include prayer at their graduation. In Jones v. Clear Creek Independent School District, 977 F.2d 963 (5th Cir.1992)(Jones II), cert. denied, 508 U.S. 967 (1993), the Fifth Circuit held that such a decision would not be attributable to the state and thus would not violate the Establishment Clause. In ACLU v. Black Horse Pike Regional Board of Education, 84 F.3d 1471 (3d Cir. 1996), the Third Circuit held to the contrary where prayer was selected by a plurality of the seniors, where the school board singled out prayer as a matter for decision by the seniors, and where the prayer was given a favored status by being the only expression not subjected to the control of the school officials.

A panel of this circuit also refused (2-1) to follow Jones II, but the Supreme Court granted certiorari and ordered that the decision be vacated as moot. See Harris v. Joint School District No.

241, 41 F.3d 447 (9th Cir. 1994), cert. granted, vacated and remanded, 115 S.Ct. 2604 (1995), on remand 62 F.3d 1233 (1995). As a result, the panel's decision in Harris was deprived of precedential effect. County of Los Angeles v. Davis, 440 U.S. 625, 634 n. 6 (1979)(vacating circuit court decision for mootness) ("Of necessity our decision 'vacating the judgment of the Court of Appeals deprives that court's opinion of precedential effect").

In contrast, the present case does not involve any group decision to pray or any vote of students to pray. It is simply a case in which individual seniors, selected by application of neutral, secular criteria, are afforded the opportunity to express themselves freely. The Court in this case need not address the issue whether a group decision or a vote of students to include prayer would violate the Establishment Clause.

3. The Circuit Court Decisions Do Not Interpret Lee As Imposing a Blanket Ban on Prayer at Graduations And Recognize That Lee Prohibits Graduation Prayer Only Where The Prayer Is Attributable To The Government.

The circuit court decisions applying Lee to graduation settings recognize that Lee prohibits graduation prayer only where that prayer is attributable to the government. The decisions do not purport to interpret Lee as imposing a blanket ban on graduation prayer.

In Jones II, the Fifth Circuit held that a prayer was not attributable to the government where the senior class, rather than the school officials, made the decision to include the prayer. 977 F.2d 963.

The Third Circuit in Black Horse Pike also recognized that Lee prohibits graduation prayer only where the specific facts show that the prayer is attributable to the government. Rather than simply state that prayer was always impermissible at a graduation, the Third Circuit instead examined the facts of the case to determine the extent to which the prayer might be attributable to the government. The court

stated that it was required to consider the control which the school administration retained over the graduation in order to determine whether, as in Lee, the government had directed the performance of a religious exercise. 84 F.3d at 1479. The court then catalogued the specific facts (none of which exist in the present case) that justified a conclusion that the prayer was attributable to the state, including: (1) the school administration retained a great deal of control over the students' speeches; (2) the school's policy "was not intended to broaden the rights of students to speak at graduation" and thus seemed to be designed simply to permit prayer; and (3) the principal would have speakers arrested rather than permit forms of free expression other than prayer at the graduation. Id. The court thus concluded that "the school officials' involvement and control is not as limited, unintrusive, or neutral as the School Board suggests." Id.

In contrast to the Madison Graduation Policy, the policy in Black Horse Pike did not contemplate making the graduation a forum for graduates' freedom of expression; according to the principal, the policy in Black Horse Pike retained school control over expression at graduation on penalty of arrest, except for the prayer which was given the preferred status of not being subject to school review. Id. at 1484. The court concluded that under these circumstances the reasonable observer would perceive that the school board was endorsing the prayers. Id. at 1487. Of course, it is governmental endorsement of religion which is prohibited; endorsement of religion by nongovernmental actors is constitutionally protected.

Thus, the Third Circuit in Black Horse Pike focused a great deal of attention--as required by Lee--on the question whether the prayers were attributable to the government under the specific facts of the case. The analysis could have been much shorter if the court had understood Lee to impose a

blanket ban on all prayer at public school graduations, just as the analysis in Lee itself could have been much shorter if the Establishment Clause required such a ban. In fact, the Third Circuit refused to approve a blanket ban on graduation prayer:

We need not now address the parameters of these [First Amendment] prohibitions beyond the precise questions raised by the specific policy before us. The district court's order enjoined the School Board from conducting a school-sponsored graduation ceremony that includes a prayer, whether it be an invocation, a benediction or a prayer in any other form. In context, we understand the district court's order to foreclose a school-sponsored graduation service involving an invocation, benediction or prayer pursuant to Policy IKFD Version D. As so read, we affirm the judgment of the district court.

84 F.3d at 1488 (quotation marks and citation omitted). Obviously, the court did not believe that Lee required a blanket ban; each policy that might result in religious expression at a graduation would need to be considered on its own merits and on its own specific facts.

The facts in the present case are diametrically opposed at each point to the facts relied upon by the court in Black Horse Pike to conclude that the prayer was attributable to the state. The Madison school officials do not retain control over the students' speeches. The Madison Graduation Policy protects the free expression of the student speakers whether they choose to engage in religious or secular expression. It does not single out religious expression for preferred treatment as did the policy in Black Horse Pike. As the district court below found, the Madison Graduation Policy is a genuinely neutral policy under which the state neither encourages nor discourages religious expression. Its characteristics are the characteristics against which the court in Black Horse Pike measured the policy at issue in that case, and against which the court found that non-neutral policy to be wanting. Under the Madison Graduation Policy, any religious expression presented by students as a result of the students'

own choices are not attributable to the Madison School District. Even under the analysis in Black Horse Pike, the Madison Graduation Policy passes muster.

The vacated majority decision of the panel in Harris also recognized as a formal matter that Lee prohibits graduation prayers only where there is a combination of "(1) state involvement and (2) the obligatory nature of the students' participation in the religious activity taking place at graduation." 41 F.3d at 453. But the opinion then proceeded to eliminate the "state involvement" requirement by finding that two features common to nearly all public school graduations show sufficient state involvement with any prayers given at a graduation to cause the Establishment Clause to be violated: "First, the school ultimately controls the event.... Second, the school underwrites the event." Id. at 454. The dissent zeroed in on this fatal flaw in the majority's reasoning and wrote:

The majority finds the necessary degree of control because School District No. 241 retains ultimate authority over commencement, and sponsors the event by underwriting the costs. It reasons that school officials cannot divest themselves of constitutional responsibility by allowing the students to make crucial decisions....This analysis, however, does not answer the underlying question examined in Lee: Does the School District's involvement in the decision to have and the presentation of an invocation and a benediction make it clear that the prayer bears the imprint of the state? 505 U.S. at 590.

Id. at 460 (quotation marks, citation and footnotes omitted).

II. The Supreme Court Has Repeatedly Held That Neutrality--Not Hostility--Toward Religious Expression Is Required, And, Thus, Madison School District Cannot Be Required To Discriminate Against Religious Expression.

A. Religious Expression By Student Speakers Under The Madison Graduation Policy Is Nongovernmental Speech And Is Not State Action.

The Does do not argue that any student's religious expression will be mistakenly attributed to the school district and, thus, be misunderstood to be state endorsement of the student's religion.

Rather, the Does argue simply that students' religious speech is state action, an argument which must fail. The Does principally rely on Collins v. Chandler Unified School District, 644 F.2d 759 (9th Cir. 1981), cert. denied, 454 U.S. 863 (1981), a pre-Mergens case which held that public school officials may not authorize student councils to open school assemblies with prayer. But the facts in Collins differ from the facts in the present case to such an extent that Collins simply does not apply here. Moreover, the rationale relied upon in Collins has been undermined so seriously by recent Supreme Court cases that it should not control here even were it on point.

1. Collins v. Chandler Unified School District Is Inapposite And Has Been Undermined So Seriously That It Should Not Control The Present Case Even If It Were On Point.

The facts in Collins differ sufficiently from the facts in the present case that its holding is simply inapposite. Collins simply did not deal with the issue whether the Establishment Clause prohibits an individual student who is otherwise permitted to speak freely from choosing to engage in religious expression. The student in Collins was allowed to speak only if he or she would pray. 644 F.2d at 760. Furthermore, in Collins, the students were justified in believing that the school endorsed the prayers at the assemblies, id.; in the present case, such a perception is not justified, as the graduation program makes clear.

The rationale upon which Collins relied has been so undermined that it should not be binding authority in the present case. Collins relies very heavily on the erroneous Establishment Clause analysis set forth in Brandon v. Board of Education, 635 F.2d 971 (2d Cir. 1980), cert. denied, 454 U.S. 1123 (1981). Collins, 644 F.2d at 762-763. In Brandon, the Second Circuit held that the Establishment Clause prohibited public schools from allowing student religious groups to meet on school premises for

prayer. That extreme premise was rejected decisively in Board of Education of Westside Community Schools v. Mergens, 496 U.S. 226 (1990), which held that student religious meetings on public secondary school campuses did not violate the Establishment Clause. The Supreme Court recognized that Congress had passed the Equal Access Act, 20 U.S.C. 4071, et seq., specifically in response to the Brandon decision. 496 U.S. at 239. See also, Doe v. Duncanville Independent School Dist., 994 F.2d 160, 165 (5th Cir. 1993)(Brandon's holding abrogated by enactment of the Equal Access Act). In Mergens, the Supreme Court rejected the rationale of Brandon, which Collins adopted, that the Establishment Clause imposed a blanket prohibition on students' religious expression, including prayer, in the public school context.

Both Brandon and Collins adopt the fatally flawed assumption that students' religious speech is unprotected on public schools campuses. Both Brandon and Collins adopt a fatally flawed Establishment Clause analysis that has been repudiated by the Supreme Court in Mergens and the Congress in the Equal Access Act. Mergens, 496 U.S. at 239, 247-253.³

³ Another Ninth Circuit opinion that relied on the Brandon rationale was vacated and remanded by the Supreme Court in light of its decision in Mergens. See Garnett v. Renton School District No. 403, 874 F.2d 608 (9th Cir. 1989) (relying on Brandon and holding that the Establishment Clause prohibited meetings of student religious groups on public school grounds before school), cert. granted and judgment vacated, 496 U.S. 914 (1990), on remand 772 F.Supp. 531 (W.D.Wash. 1991) (holding that Washington State Constitution prohibited religious group from meeting on school grounds), rev'd, 987 F.2d 641 (9th Cir.) (holding that federal Equal Access Act preempted any conflicting state constitutional provision and required that schools permit student religious group to meet at school), cert. denied, 510 U.S. 819 (1993).

2. Nongovernmental Religious Expression At Graduation Is Not Endorsed By Or Attributable To Madison School District Simply Because The District Refuses To Censor Such Speech.

The mere presence of prayer at a graduation does not mean that the state has engaged in prohibited religious activity. None of the cases cited by the Does holds that prayer at a public school graduation is a per se violation of the Establishment Clause. The only case cited by the Does which purports to so hold is Gearon v. Loudon County School Board, 844 F.Supp. 1097 (E.D. Va. 1993). But even the court in Gearon relied ultimately on official involvement with initiation of the prayer rather than on a per se rule. The court argued that official involvement created an unlawful entanglement with religion, and then noted that this alternative ground of official involvement was "the more realistic ground for its decision given that no court has declared that prayer at a high school graduation is per se unconstitutional." Id. at 1097 n.4.

In Mergens, eight Justices concluded that the Establishment Clause does not prohibit nongovernmental religious expression in the public schools. Justice O'Connor's plurality opinion clearly explains the principles that should lead to affirmance of the judgment in this case in favor of Madison School District:

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

496 U.S. at 250 (emphasis in original)(citations omitted).

This Court recently followed Mergens to prohibit discrimination against religious expression in public secondary schools, when it required school authorities to permit student religious groups to meet not only after school but during the lunch hour, when other clubs could meet. This Court reasoned:

The [School] District, and the district court, attempt to distinguish Mergens by suggesting that, in contrast with after school meetings, "many students remain on campus" during lunchtime. The record does not reflect how many students are on campus after school as compared to the number during lunchtime. Even if there were a significant difference, however, the number of students who may observe speech does not affect their ability to distinguish between government-sponsored speech and student-sponsored speech, which is the "crucial difference." Id. [496 U.S.] at 250....The emphasis of the Court's decision in Mergens was that student-sponsored religious speech is very different from government-sponsored religious speech and that secondary school students are mature enough to understand the difference between neutrality toward and endorsement of religion.

Ceniceros v. Board of Trustees of the San Diego Unified School District, 106 F.3d 878, 882-83 (9th Cir. 1997).

Here the students attending the graduation know that the student speakers are permitted to speak freely without censorship. The graduation program explains that each student presentation "is the private expression of the individual participants and does not necessarily reflect any official position;" it specifically notes that the district's commitment to free expression rather than any endorsement of religion accounts for any religious content in any of the presentations. Just as in Ceniceros, Madison's "secondary students are mature enough to understand the difference between neutrality toward and endorsement of religion." Id. Their understanding of that "crucial difference" ensures that the students will accurately perceive that the state is treating religion in a neutral manner.

B. The Supreme Court Has Repeatedly Held That Neutrality--Not Hostility--Toward Religious Expression Is Required, And Thus Madison School District Cannot Be Required To Discriminate Against Religious Expression.

In numerous cases, the Supreme Court has hammered home the point that the Free Speech Clause prohibits discrimination against nongovernmental religious expression, and that the Establishment Clause does not justify or require such discrimination. Madison School District certainly cannot be required by the Establishment Clause to discriminate against student speakers' nongovernmental religious expression.

In Widmar v. Vincent, 454 U.S. 263 (1981), the Court held that a public university had to permit a religious student group to use its facilities for meetings on an equal basis with nonreligious groups. Allowing equal access would not violate the Establishment Clause and, thus, the religious nature of the student group's expression could not justify discrimination against it.

In Board of Education of Westside Community Schools v. Mergens, 496 U.S. 226 (1990), the Court held that Congress did not violate the Establishment Clause when it gave religious student groups a federal statutory right to equal access in public secondary schools. The Court further held that religious student groups were entitled to the same kind of access to bulletin boards and to the public address system that nonreligious groups were given. Id. at 247. Again, equal treatment for religious expression did not violate the Establishment Clause.

In Lamb's Chapel v. Center Moriches Union Free School Dist., 508 U.S. 384 (1993), the Court held that a school district could not discriminate against a community group's religious speech in its policy of permitting community groups to use school buildings after hours. The Court determined that the exclusion of religious expression was a form of viewpoint discrimination prohibited even in a nonpublic forum.

In Capitol Square Advisory & Review Board v. Pinette, 515 U.S. 753, 115 S. Ct. 2440

(1995), the Court held that religious speech, a large cross, could not be excluded from a public square in front of the state capitol. A sign by the cross explained that it was privately owned and privately erected; reasonably knowledgeable residents would know that the square was used for free expression, not just for government speech. As a result, the cross could not be excluded, even though it was a religious symbol placed near the seat of government. Again the Court stressed that religious speech was entitled to equal treatment:

Our precedent establishes that private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression. Lamb's Chapel v. Center Moriches Union Free School Dist., 508 U.S. 384 (1993); Board of Ed. of Westside Community Schools v. Mergens, 496 U.S. 226 (1990); Widmar v. Vincent, 454 U.S. 263 (1981); Heffron v. International Soc. for Krishna Consciousness, Inc., 452 U.S. 640 (1981). Indeed, in Anglo-American history, at least, government suppression of speech has so commonly been directed precisely at religious speech that a free-speech clause without religion would be Hamlet without the prince.

115 S. Ct. at 2446.

Finally, in Rosenberger v. Rector and Visitors of the University of Virginia, 515 U.S. 819, 115 S. Ct. 2510 (1995), the Court prohibited the University of Virginia from discriminating against the religious speech of a student group in the provision of printing services. The Court held that the University's refusal to pay for printing of the religious speech on an equal basis with the nonreligious speech of other groups was impermissible viewpoint discrimination that was neither required nor justified by the Establishment Clause.

The clear message of all these cases is that a government body may not discriminate against nongovernmental religious expression. A fortiori Madison School District is not required to discriminate against students' religious expression.

C. The School District's Equal Treatment Of Religious Expression Is Perfectly Consistent With The Supreme Court's Movement Toward Neutrality And Equality As Touchstones For Analysis Of Free Speech, Free Exercise And Establishment Clause Issues.

The Supreme Court's emphasis on equal treatment for religious expression is part of an overall movement by the Court toward neutrality and equality as touchstones for analysis of Free Speech, Free Exercise and Establishment Clause issues. That movement is seen in several lines of cases.

Neutrality and equality are the watchwords of the Establishment Clause line of cases culminating in Agostini v. Felton, ___ U.S. ___, 117 S. Ct. 1997 (1997), in which the Court overruled Aguilar v. Felton, 473 U.S. 402 (1985), and, in part, Grand Rapids School District v. Ball, 473 U.S. 373 (1985). The Court in Agostini held that New York would not violate the Establishment Clause by sending public school teachers into religious schools to provide remedial instruction. In the portion of its holding relevant here, the Court held that it was permissible for New York to provide this benefit to students in the religious schools as part of a neutral program available to students in religious and nonreligious schools. The Court relied on a line of cases indicating that the Establishment Clause does not prohibit government benefits from flowing to religious enterprises if that occurs under a neutral program and is a result of the free choice of individuals who were to be benefitted by the program. Similarly, in Witters v. Washington Dept. of Services for the Blind, 474 U.S. 481 (1986), the Court held that the Establishment Clause did not preclude a grant of public funds to assist Witters in obtaining

the religious training needed to become a minister. The program was religiously neutral; funds were available for all forms of education and training and would flow to a religious school only because of Witters' choice, not because of any choice by the state to advance religion. See also, Zobrest v. Catalina Foothills School District, 509 U.S. 1 (1993)(public school employee could serve as a translator for a deaf student at a religious private school without violating the Establishment Clause).

Neutrality and equality are also the watchwords of a line of cases interpreting the Free Exercise Clause. For example, in Employment Division, Dept. of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990), the Court held that in many situations governments need not have a compelling interest to justify denial of an exemption from a neutral, generally applicable law that burdens religious exercise. In so holding, the Court emphasized facial neutrality and equal treatment as the standards by which the state could justify its refusal to accommodate the free exercise of religion. See also, Church of the Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520 (1993).

Certainly if the right to free exercise of religion in many cases means little more than the right to be governed by neutral laws, the Establishment Clause should not be interpreted so as to require discrimination against religious expression and other religious activity. Indeed, a policy discriminating against private speakers' religious speech would violate the neutrality requirement of the Free Exercise Clause. Madison School District's neutral policy--permitting students to choose to engage in nonreligious and religious expression on an equal basis--is perfectly consistent with the Supreme Court's theme of neutrality. It does not violate the Establishment Clause.

D. Madison's Neutral Graduation Policy Satisfies The Lemon Test, If That Test Applies.

The opinion for the Court in Lee applied a coercion analysis to the graduation prayers at issue there, rather than the traditional tripartite Establishment Clause test enunciated in Lemon v. Kurtzman, 403 U.S. 602 (1971), which requires the existence of some secular purpose for the state action, a primary secular effect rather than primary effect to advance or hinder religion, and a lack of undue entanglement between government and religion. Thus, it is not at all clear that the tripartite Lemon test applies in graduation prayer cases. Further, the Supreme Court recently held that the entanglement prong should be seen as simply a way of considering whether the primary effect of the state action was to advance or hinder religion. See Agostini v. Felton, ___ U.S. ___, 117 S. Ct. 1997, 2015 (1997). The test seems to have been reduced to a two-part test, *i.e.*, the government action must have some secular purpose and a primary secular effect.

Here there is undoubtedly a secular purpose. The protection or enhancement of students' freedom of expression as part of an educational philosophy that stresses free expression is a secular purpose. See, *e.g.*, Mergens, 496 U.S. at 248; Widmar, 454 U.S. at 271.

The primary effect of the Madison Graduation Policy is also secular: it has the effect of protecting or enhancing freedom of expression evenhandedly, whether that expression is nonreligious, religious, or antireligious. It does not have the primary effect of advancing or inhibiting religion. Any religious effect stems only from the free choices of the student speakers. See, *e.g.*, Rosenberger, 515 U.S. 819; Mergens, 496 U.S. at 249-253; Widmar, 454 U.S. at 273-275; Ceniceros, 106 F.3d 878; *cf.*, Witters v. Washington Dept. of Services for the Blind, 474 U.S. 481 (1986) (holding that primary effect of program aiding blind students was secular even though Witters would use the aid to become a

minister, because the religious effect occurred "only as a result of [Witters'] genuinely independent and private choices").

Finally, the Madison Graduation Policy actually lessens the entanglement that a policy discriminating against religious expression would entail. See, e.g., Rosenberger, 115 S. Ct. at 2524-2525; Mergens, 496 U.S. at 248, 253; Widmar, 454 U.S. at 269 n.6, 272 n.11. School officials would have to review speeches for religious content or for embedded prayers under the policy advocated by the Does. There would be substantial entanglement; school officials would have to decide whether particular expression constitutes prayer. Would the line "I thank God for my parents" in a speech constitute a prayer? What if the speaker says, "I know God listens to all of us all the time; He is a part of the audience here, and I will keep that in mind as I speak"? All of this activity would, of course, be directed toward censoring religious expression; thus the entanglement would send the message that religion is disfavored. The primary effect of a policy disfavoring religious expression would be to inhibit religion. See Mergens, 496 U.S. at 248. By contrast, the lack of entanglement under the Madison Graduation Policy shows neutrality toward religion and nonreligion, and helps to ensure that the primary effect of the Policy is secular.

III. The Exclusion of Religious Expression From Student Graduation Speeches Would Be Viewpoint Discrimination And Prohibited Even If A Graduation Is A Nonpublic Forum.

The Does argue that a graduation is not a public forum and, therefore, student graduation speakers do not have a right to engage in religious expression. Appellants' Brief at 38-39. However, the state is prohibited from engaging in viewpoint-based discrimination against religious expression even

in a nonpublic forum. Rosenberger v. University of Virginia, 515 U.S. 819, 115 S. Ct. 2510 (1995); Lamb's Chapel v. Center Moriches Union Free School District, 508 U.S. 384 (1993).

By engaging in religious expression, a student takes a viewpoint on the subjects ordinarily dealt with at graduation. Among other matters, students' graduation speeches often (1) express gratitude toward parents, teachers, and others for the guidance and assistance given to the students during the school experience, (2) ask parents and others to continue to assist the students as they enter a new phase of life, (3) reflect on the meaning of the school experience, (4) review the progress toward maturity made by the students during the school experience, (5) suggest ways in which the students may stay on track toward their life goals as they leave the school, and (6) advocate particular goals for the students to embrace, including ways in which the students may seek to improve themselves and to benefit their community.

Religious expression, including prayer, can provide a viewpoint on each of these matters. Different religious traditions will suggest different viewpoints, but consider the following examples of religious viewpoints that might be expressed on these matters. (1) Perhaps the speaker's view is that God or a religious community deserves to be thanked for assistance and guidance. (Note that thanking God would be a form of prayer.) (2) Perhaps the speaker's view is that God's continued assistance and guidance is needed and should be sought. (Note again that seeking God's assistance would be a form of prayer.) (3) Perhaps the speaker's view is that her religious community or relationship with God has given special meaning to the school experience. (4) Perhaps the speaker's view is that spiritual growth has been part of his or her progress toward maturity. (5) Perhaps the speaker's view is that religion will help the graduates to stay on track toward their goals. (6) Perhaps the speaker's view is

that religion will help the students to improve themselves and to benefit their community. (Of course, a speaker might have the opposite views, and, under the Madison Graduation Policy, he or she would be entitled to express them.)

Religious expression thus can provide different viewpoints. Exclusion of religious expression is viewpoint-based discrimination, the most pernicious and least justifiable form of discrimination against free speech. In Lamb's Chapel and Rosenberger, the Supreme Court held that even in a nonpublic forum such viewpoint discrimination is prohibited.⁴

For example, in Lamb's Chapel v. Center Moriches Union Free School District, 508 U.S. 384 (1993), a school district refused to allow a church to use school buildings after hours to show religiously based films on family issues; the school district's policy prohibited religious uses of school buildings. The lower courts upheld the school district's refusal, finding that the school district had not created a public forum or a limited public forum even though it had opened up the school buildings for after-hours use by many community groups under a policy allowing use for social or civic purposes. The Supreme Court stated that it was unnecessary to determine whether the school district had created a public

⁴ School officials may have power to regulate graduation speeches to a greater degree than government officials may regulate speeches in other contexts. Compare Bethel School District No. 403 v. Fraser, 478 U.S. 675 (1986), with Tinker v. Des Moines Indep. School District, 393 U.S. 503 (1969). However, religious expression is no more likely to be disruptive than the kind of controversial political speech protected in Tinker and no more likely to contain the kind of sexually suggestive language that the Court in Bethel allowed to be regulated. The Establishment Clause itself prohibits the government--including school districts and courts--from declaring that nongovernmental religious expression is inherently harmful.

forum of any kind because the policy's viewpoint-based exclusion of religious speech was impermissible even under the standards applicable to a nonpublic forum. As the Court explained:

With respect to public property that is not a designated public forum open for indiscriminate public use for communicative purposes, we have said that control over access to a nonpublic forum can be based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral....

The Court of Appeals thought that the application of [the policy] in this case was viewpoint neutral because it had been, and would be, applied in the same way to all uses of school property for religious purposes. That all religions and all uses for religious purposes are treated alike under [the policy], however, does not answer the critical question whether it discriminates on the basis of viewpoint to permit school property to be used for the presentation of all views about family issues and child rearing except those dealing with the subject matter from a religious standpoint.

There is no suggestion from the courts below or from the District or the State that a lecture or film about child rearing and family values would not be a use for social or civic purposes otherwise permitted by [the policy]. That subject matter is not one that the District has placed off limits to any and all speakers. Nor is there any indication in the record before us that the application to exhibit the particular film series involved here was, or would have been, denied for any reason other than the fact that the presentation would have been from a religious perspective. In our view, denial on that basis was plainly invalid....Although a speaker may be excluded from a non-public forum if he wishes to address a topic not encompassed within the purpose of the forum...or if he is not a member of the class of speakers for whose especial benefit the forum was created..., the government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject. The film series involved here no doubt dealt with a subject otherwise permissible under [the policy], and its exhibition was denied solely because the series dealt with the subject from a religious standpoint.

Id. at 392-94 (citations and quotation marks omitted).

Religious expression offers a viewpoint on subjects otherwise open for discussion by graduation speakers at the typical graduation. Thus exclusion of that viewpoint would violate the student speakers' free speech rights. Here the Does must argue not only that Madison is entitled to exclude religious viewpoints from graduation, but that it is required to do so. But the Establishment Clause does not

require such exclusion. Thus, under Lamb's Chapel and Rosenberger, Madison has no right to exclude religious viewpoints.⁵

IV. A "Captive Audience" Theory Neither Requires Nor Justifies Discrimination Against The Nongovernmental Religious Expression Permitted Under The Graduation Policy.

None of the “captive audience” cases cited by amici in support of the Does’ position supports the discriminatory suppression of students’ religious speech. Indeed, the first case cited in that brief for the “captive audience” principle illustrates the weakness of that position. In Carey v. Brown, 447 U.S. 455 (1986), the Supreme Court struck down a state statute that banned residential picketing, even though the statute helped to protect a “captive audience” from substantial disruption of their privacy at home. The statute was unconstitutional because it was not content neutral; it banned all picketing except labor picketing. The government was not permitted to engage in content-based protection of a captive audience. Carey actually refutes the amici’s argument that content-based (indeed, viewpoint-based) suppression of religious speech is not only permitted, but required by the Constitution.

⁵While the government may not engage in viewpoint discrimination in any forum, including a nonpublic forum, it should be noted that the Madison Graduation Policy seems to have created a designated public forum for the student speakers. Therefore, a strict scrutiny test would apply if school officials attempted to exclude student speakers' religious speech. See, Widmar, 454 U.S. at 267-268.

Madison School District intentionally has set aside a time and place for certain students to speak freely at the graduation. Such an intent is a hallmark of a public or limited public forum. See, e.g., Tucker v. Calif. Dept. of Educ., 97 F.3d 1204, 1209 (9th Cir. 1996). The limitation to those high achieving students who have earned the right to speak under neutral, secular criteria is not inconsistent with the existence of a limited public forum. In such a limited public forum, not only is viewpoint discrimination prohibited, but so are other kinds of content-based regulation. See, e.g., Widmar, 454 U.S. at 267-268.

None of the “captive audience” cases cited in the amici's brief purport to permit discriminatory suppression of students’ religious speech. One of those cases, in fact, points out that such discrimination would violate the First Amendment. In Muller v. Jefferson Lighthouse School District, 98 F.3d 1530 (7th Cir. 1996), the court upheld the school district’s “code” regulating student distribution of written materials at an elementary school. But the code did not treat religious materials differently from other materials. If it had, the court would have struck it down, as it indicated:

Finally, the Mullers challenge the Code on Establishment Clause grounds. Their argument (a preemptive one) is that defendants cannot justify the Code by claiming it is necessary to prevent entanglement with religion. The Mullers are correct that speech cannot be suppressed or discriminated against solely because it is religious. See Hedges [v. Wauconda], 9 F.3d [1295,] 1297-98 [(7th Cir. 1993)], and cases cited therein. Banning religious expression, which the Free Exercise Clause of the First Amendment singles out for protection, solely because it is religious is per se unreasonable. The Supreme Court has also rejected the view that, in order to avoid the perception of sponsorship, a school may suppress religious speech. Widmar v. Vincent, 454 U.S. 263, 271-73 (1981); Bd. of Education v. Mergens, 496 U.S. 226, 247-52 (1990) (plurality opinion); Lamb's Chapel v. Center Moriches Union Free School District, 508 U.S. 384, 394 (1993). On appeal, defendants do not suggest otherwise and do not attempt to justify any part of the Code by arguing it is necessary to avoid offending the Establishment Clause. The regulations in this case, which apply to religious and nonreligious distributions alike, do not implicate the Establishment Clause. Hedges, 9 F.3d at 1299.

98 F.3d at 1543-44.

Indeed, the “captive audience” theory put forward by amici is inconsistent with Lee v. Weisman, 505 U.S. 577 (1992). Concluding that students do not have a reasonable alternative to attending their high school graduation, the Court accepted that, in a sense, attendance at a high school graduation is compelled. But Lee did not then conclude that any prayer at a such a graduation automatically violates the Establishment Clause. Rather, the Court carefully considered the particular

facts of the case to determine whether the prayers were attributable to the state. The Court in Lee found the compulsory nature of graduation attendance to be relevant (along with other factors) in determining whether state-sponsored graduation prayer was insulated from Establishment Clause attack because of its long tradition.

The compulsory attendance found in Lee is thus relevant to whether the state may sponsor prayer, but it is not relevant to whether individuals who are given the right to freely express themselves may pray or otherwise engage in religious expression at a graduation. If compulsory attendance were sufficient by itself to require that a school event be cleansed of students' nongovernmental religious expression, high school students would be banned from expressing their religious points of view in class discussions of history, philosophy, and other subjects. That is not the law. Fortunately, the Constitution neither requires nor tolerates a cleansing of nongovernmental religious expression from the public square.

Conclusion

For the reasons stated above, amici respectfully request the Court to affirm the judgment in favor of appellees.

Respectfully submitted,

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APPENDIX

STATEMENT OF INTEREST OF *AMICI CURIAE*

Amicus the **Christian Legal Society** ("CLS"), through the **Center for Law and Religious Freedom** (the "Center"), its legal advocacy and information arm, has since 1975 argued in state and federal courts throughout the nation for the protection of religious speech, association and exercise. Founded in 1961, CLS is an ecumenical professional association of 4,500 Christian attorneys, judges, law students, and law professors, with chapters in every state and at 85 law schools.

Using a network of volunteer attorneys and law professors, the Center provides accurate information to the general public and the political branches regarding the law pertaining to religious exercise and the autonomy of religious institutions. In addition, the CLS Center has filed briefs *amici curiae* on behalf of many religious denominations and civil liberties groups in virtually every case before the U.S. Supreme Court involving church-state relations since 1980.

The Society is committed to religious liberty because the founding instrument of this Nation acknowledges as a "self-evident truth" that all persons are divinely endowed with rights that no government may abridge nor any citizen waive, Declaration of Independence (1776). Among such inalienable rights are those enumerated in (but not conferred by) the First Amendment, the first and foremost of which is religious liberty. The right sought to be upheld here inheres in all persons by virtue of its endowment by the Creator, Who is acknowledged in the Declaration. It is also a "constitutional

right," but only in the sense that it is recognized in and protected by the U.S. Constitution. Because the source of religious liberty, according to our Nation's charter, is the Creator, not a constitutional amendment, statute or executive order, it is not merely one of many policy interests to be weighed against others by any of the several branches of state or federal government. Rather, it is foundational to the framers' notion of human freedom. The State has no higher duty than to protect inviolate its full and free exercise. Hence, the unequivocal and non-negotiable prohibition attached to this, our First Freedom, is "Congress shall make no law. . . ."

The CLS Center's national membership, two decades of experience, and professional resources enable it to speak with authority upon religious liberty.

The National Association of Evangelicals is a non-profit association of evangelical Christian denominations, churches, organizations, institutions and individuals. It includes some 43,500 churches from 74 denominations and serves a constituency of approximately 27 million people. NAE is committed to defending religious freedom as a precious gift of God and a vital component of the American heritage.

The **Southern Baptist Convention** is the nation's largest Protestant denomination, with over 15.7 million members in over 40,600 local churches. **The Ethics and Religious Liberty Commission** is the public policy agency of the Convention and is assigned to address religious liberty

and other public policy issues. *Amicus* produces publications and seminars to educate Southern Baptists about ethical and moral issues in daily Christian life, and to advocate responsible Christian citizenship as part of biblical decision-making. *Amicus* also seeks to bring biblical principles and Southern Baptist convictions to bear upon public policy debates before courts, legislatures and policy-making bodies. *Amicus* frequently files briefs as *amicus curiae* in important religious liberty litigation, such as this case.

Family Research Council, Inc. (FRC), is a non-profit research and educational organization dedicated to preserve and support traditional Judeo-Christian values in American society. Through its publications and lobbying efforts, and through its close collaboration with such organizations as Dr. James Dobson's Focus on the Family, FRC seeks to vindicate the rights of Christians to participate as full and equal citizens in the public life of the nation.

Clifton Kirkpatrick, as Stated Clerk of the General Assembly, is senior continuing officer of the highest governing body of the **Presbyterian Church (U.S.A.)**. The Presbyterian Church (U.S.A.) is the largest Presbyterian denomination in the United States, with approximately 2,750,000 active members in 11,500 congregations organized into 171 presbyteries under the jurisdiction of 16 synods.

The General Assembly does not claim to speak for all Presbyterians, nor are its deliverances and policy statements binding on the membership of the Presbyterian Church. The General Assembly is the highest legislative and interpretive body of the denomination, and the final point of decision in all

disputes. As such, its statements are considered worthy of the respect and prayerful consideration of all the denomination's members.

The General Assembly of the Presbyterian Church (U.S.A.) has long supported religious speech for all persons, especially those expressing new and unpopular minority faiths. While the General Assembly has been most uncomfortable with government engaging in or lending its authority to religious expression, the General Assembly's policy seeks to protect and be sensitive to the faith and feelings of others in their own public expressions of faith. Therefore we urge this court to affirm the district court's decision.

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