

**United States Supreme Court**

**Santa Fe Independent School District**

**v.**

**Jane Doe**

**Decided June 19, 2000**

Justice Stevens delivered the opinion of the Court, in which O'Connor, Kennedy, Souter, Ginsburg, and Breyer, JJ., joined. Rehnquist, C. J., filed a dissenting opinion, in which Scalia and Thomas, JJ., joined.

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Prior to 1995, the Santa Fe High School student who occupied the school's elective office of student council chaplain delivered a prayer over the public address system before each varsity football game for the entire season. This practice, along with others, was challenged in District Court as a violation of the Establishment Clause of the First Amendment. While these proceedings were pending in the District Court, the school district adopted a different policy that permits, but does not require, prayer initiated and led by a student at all home games. The District Court entered an order modifying that policy to permit only nonsectarian, nonproselytizing prayer. The Court of Appeals held that, even as modified by the District Court, the football prayer policy was invalid. We granted the school district's petition for certiorari to review that holding.

**I**

The Santa Fe Independent School District (District) is a political subdivision of the State of Texas, responsible for the education of more than 4,000 students in a small community in the southern part of the

State. The District includes the Santa Fe High School, two primary schools, an intermediate school and the junior high school. Respondents are two sets of current or former students and their respective mothers. One family is Mormon and the other is Catholic. The District Court permitted respondents (Does) to litigate anonymously to protect them from intimidation or harassment.

Respondents commenced this action in April 1995 and moved for a temporary restraining order to prevent the District from violating the Establishment Clause at the imminent graduation exercises. In their complaint the Does alleged that the District had engaged in several proselytizing practices, such as promoting attendance at a Baptist revival meeting, encouraging membership in religious clubs, chastising children who held minority religious beliefs, and distributing Gideon Bibles on school premises. They also alleged that the District allowed students to read Christian invocations and benedictions from the stage at graduation ceremonies, and to deliver overtly Christian prayers over the public address system at home football games.

On May 10, 1995, the District Court entered an interim order addressing a number of different issues. With respect to the impending graduation, the order provided that "non-denominational prayer" consisting of "an invocation and/or benediction" could be presented by a senior student or students selected by members of the graduating class. The text of the prayer was to be determined by the students, without scrutiny or preapproval by school officials. References to particular religious figures "such as Mohammed, Jesus, Buddha, or the like" would be permitted "as long as the general thrust of the prayer is non-proselytizing."

In response to that portion of the order, the District adopted a series of policies over

several months dealing with prayer at school functions. The policies enacted in May and July for graduation ceremonies provided the format for the August and October policies for football games. The May policy provided:

"The board has chosen to permit the graduating senior class, with the advice and counsel of the senior class principal or designee, to elect by secret ballot to choose whether an invocation and benediction shall be part of the graduation exercise. If so chosen the class shall elect by secret ballot, from a list of student volunteers, students to deliver nonsectarian, nonproselytizing invocations and benedictions for the purpose of solemnizing their graduation ceremonies."

The parties stipulated that after this policy was adopted, "the senior class held an election to determine whether to have an invocation and benediction at the commencement [and that the] class voted, by secret ballot, to include prayer at the high school graduation." In a second vote the class elected two seniors to deliver the invocation and benediction. The student giving the invocation thanked the Lord for keeping the class safe through 12 years of school and for gracing their lives with two special people and closed: "Lord, we ask that You keep Your hand upon us during this ceremony and to help us keep You in our hearts through the rest of our lives. In God's name we pray. Amen." The student benediction was similar in content and closed: "Lord, we ask for Your protection as we depart to our next destination and watch over us as we go our separate ways.

Grant each of us a safe trip and keep us secure throughout the night. In Your name we pray. Amen."

In July, the District enacted another policy eliminating the requirement that invocations and benedictions be "nonsectarian and nonproselytizing," but also providing that if the District were to be enjoined from enforcing that policy, the May policy would automatically become effective.

The August policy, which was titled "Prayer at Football Games," was similar to the July policy for graduations. It also authorized two student elections, the first to determine whether "invocations" should be delivered, and the second to select the spokesperson to deliver them. Like the July policy, it contained two parts, an initial statement that omitted any requirement that the content of the invocation be "nonsectarian and nonproselytizing," and a fallback provision that automatically added that limitation if the preferred policy should be enjoined. On August 31, 1995, according to the parties' stipulation, "the district's high school students voted to determine whether a student would deliver prayer at varsity football games . . . . The students chose to allow a student to say a prayer at football games." A week later, in a separate election, they selected a student "to deliver the prayer at varsity football games."

The final policy (October policy) is essentially the same as the August policy, though it omits the word "prayer" from its title, and refers to "messages" and "statements" as well as "invocations." It is the validity of that policy that is before us. It provides:

"STUDENT ACTIVITIES:  
"PRE-GAME CEREMONIES AT

### FOOTBALL GAMES

"The board has chosen to permit students to deliver a brief invocation and/or message to be delivered during the pre-game ceremonies of home varsity football games to solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition.

"Upon advice and direction of the high school principal, each spring, the high school student council shall conduct an election, by the high school student body, by secret ballot, to determine whether such a statement or invocation will be a part of the pre-game ceremonies and if so, shall elect a student, from a list of student volunteers, to deliver the statement or invocation. The student volunteer who is selected by his or her classmates may decide what message and/or invocation to deliver, consistent with the goals and purposes of this policy.

"If the District is enjoined by a court order from the enforcement of this policy, then and only then will the following policy automatically become the applicable policy of the school district.

"The board has chosen to permit students to deliver a brief invocation and/or message to be delivered during the pre-game ceremonies of home varsity football games to solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition.

"Upon advice and direction of the high school principal, each spring, the high school student council shall conduct an election, by the high school student body, by secret ballot, to determine whether such a message or invocation will be a part of the pre-game ceremonies and if so, shall elect a student, from a list of student volunteers, to deliver the statement or invocation. The student volunteer who is selected by his or her classmates may decide what statement or invocation to deliver, consistent with the goals and purposes of this policy. Any message and/or invocation delivered by a student must be nonsectarian and nonproselytizing."

### II

The first Clause in the First Amendment to the Federal Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The

Fourteenth Amendment imposes those substantive limitations on the legislative power of the States and their political subdivisions. In *Lee v. Weisman*, 505 U.S. 577(1992), we held that a prayer delivered by a rabbi at a middle school graduation ceremony violated that Clause. Although this case involves student prayer at a different type of school function, our analysis is properly guided by the principles that we endorsed in *Lee*.

As we held in that case:

"The principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause. It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which 'establishes a [state] religion or religious faith, or tends to do so.'" In this case the District first argues that this principle is inapplicable to its October policy because the messages are private student speech, not public speech. It reminds us that "there is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise

Clauses protect." We certainly agree with that distinction, but we are not persuaded that the pregame invocations should be regarded as "private speech."

These invocations are authorized by a government policy and take place on government property at government-sponsored school-related events. Of course, not every message delivered under such circumstances is the government's own. We have held, for example, that an individual's contribution to a government-created forum was not government speech. See *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1995). Although the District relies heavily on *Rosenberger* and similar cases involving such forums, it is clear that the pregame ceremony is not the type of forum discussed in those cases. The Santa Fe school officials simply do not "evinced either 'by policy or by practice,' any intent to open the [pregame ceremony] to 'indiscriminate use,' . . . by the student body generally." Rather, the school allows only one student, the same student for the entire season, to give the invocation. The statement or invocation, moreover, is subject to particular regulations that confine the content and topic of the student's message.

Granting only one student access to the stage at a time does not, of course, necessarily preclude a finding that a school has created a limited public forum. Here, however, Santa Fe's student election system ensures that only those messages deemed "appropriate" under the District's policy may be delivered. That is, the majoritarian process implemented by the District guarantees, by definition, that minority candidates will never prevail and that their views will be effectively

silenced.

Recently, in *Board of Regents of Univ. of Wis. System v. Southworth*, 529 U.S. \_\_\_\_ (2000), we explained why student elections that determine, by majority vote, which expressive activities shall receive or not receive school benefits are constitutionally problematic:

"To the extent the referendum substitutes majority determinations for viewpoint neutrality it would undermine the constitutional protection the program requires. The whole theory of viewpoint neutrality is that minority views are treated with the same respect as are majority views. Access to a public forum, for instance, does not depend upon majoritarian consent. That principle is controlling here."

Like the student referendum for funding in *Southworth*, this student election does nothing to protect minority views but rather places the students who hold such views at the mercy of the majority. Because "fundamental rights may not be submitted to vote; they depend on the outcome of no elections," the District's elections are insufficient safeguards of diverse student speech. (If instead of a choice between an invocation and no pregame message, the first election determined whether a political speech should be made, and the second election determined whether the speaker should be a Democrat or a Republican, it would be rather clear that the public address system was being used to deliver a partisan message reflecting the viewpoint of the majority rather than a

random statement by a private individual.)

In *Lee*, the school district made the related argument that its policy of endorsing only "civic or nonsectarian" prayer was acceptable because it minimized the intrusion on the audience as a whole. We rejected that claim by explaining that such a majoritarian policy "does not lessen the offense or isolation to the objectors. At best it narrows their number, at worst increases their sense of isolation and affront." Similarly, while *Santa Fe*'s majoritarian election might ensure that most of the students are represented, it does nothing to protect the minority; indeed, it likely serves to intensify their offense.

Moreover, the District has failed to divorce itself from the religious content in the invocations. It has not succeeded in doing so, either by claiming that its policy is "one of neutrality rather than endorsement" or by characterizing the individual student as the "circuit-breaker" in the process. Contrary to the District's repeated assertions that it has adopted a "hands-off" approach to the pregame invocation, the realities of the situation plainly reveal that its policy involves both perceived and actual endorsement of religion. In this case, as we found in *Lee*, the "degree of school involvement" makes it clear that the pregame prayers bear "the imprint of the State and thus put school-age children who objected in an untenable position."

The District has attempted to disentangle itself from the religious messages by developing the two-step student election process. The text of the October policy, however, exposes the extent of the school's entanglement. The elections take place at all only because the school "board has chosen to permit students to deliver a brief invocation and/or message." The elections thus "shall"

be conducted "by the high school student council" and "upon advice and direction of the high school principal." The decision whether to deliver a message is first made by majority vote of the entire student body, followed by a choice of the speaker in a separate, similar majority election. Even though the particular words used by the speaker are not determined by those votes, the policy mandates that the "statement or invocation" be "consistent with the goals and purposes of this policy," which are "to solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition."

In addition to involving the school in the selection of the speaker, the policy, by its terms, invites and encourages religious messages. The policy itself states that the purpose of the message is "to solemnize the event." A religious message is the most obvious method of solemnizing an event. Moreover, the requirements that the message "promote good citizenship" and "establish the appropriate environment for competition" further narrow the types of message deemed appropriate, suggesting that a solemn, yet nonreligious, message, such as commentary on United States foreign policy, would be prohibited. Indeed, the only type of message that is expressly endorsed in the text is an "invocation" -- a term that primarily describes an appeal for divine assistance. In fact, as used in the past at Santa Fe High School, an "invocation" has always entailed a focused religious message. Thus, the expressed purposes of the policy encourage the selection of a religious message, and that is precisely how the students understand the policy.

The actual or perceived endorsement of the message, moreover, is established by factors beyond just the text of the policy.

Once the student speaker is selected and the message composed, the invocation is then delivered to a large audience assembled as part of a regularly scheduled, school-sponsored function conducted on school property. The message is broadcast over the school's public address system, which remains subject to the control of school officials. It is fair to assume that the pregame ceremony is clothed in the traditional indicia of school sporting events, which generally include not just the team, but also cheerleaders and band members dressed in uniforms sporting the school name and mascot. The school's name is likely written in large print across the field and on banners and flags. The crowd will certainly include many who display the school colors and insignia on their school T-shirts, jackets, or hats and who may also be waving signs displaying the school name. It is in a setting such as this that "the board has chosen to permit" the elected student to rise and give the "statement or invocation."

In this context the members of the listening audience must perceive the pregame message as a public expression of the views of the majority of the student body delivered with the approval of the school administration. In cases involving state participation in a religious activity, one of the relevant questions is "whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement of prayer in public schools." Regardless of the listener's support for, or objection to, the message, an objective Santa Fe High School student will unquestionably perceive the inevitable pregame prayer as stamped with her school's seal of approval.

School sponsorship of a religious

message is impermissible because it sends the ancillary message to members of the audience who are nonadherents "that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.". The delivery of such a message -- over the school's public address system, by a speaker representing the student body, under the supervision of school faculty, and pursuant to a school policy that explicitly and implicitly encourages public prayer -- is not properly characterized as "private" speech.

### III

The District next argues that its football policy is distinguishable from the graduation prayer in Lee because it does not coerce students to participate in religious observances. Its argument has two parts: first, that there is no impermissible government coercion because the pregame messages are the product of student choices; and second, that there is really no coercion at all because attendance at an extracurricular event, unlike a graduation ceremony, is voluntary.

The reasons just discussed explaining why the alleged "circuit-breaker" mechanism of the dual elections and student speaker do not turn public speech into private speech also demonstrate why these mechanisms do not insulate the school from the coercive element of the final message. In fact, this aspect of the District's argument exposes anew the concerns that are created by the majoritarian election system. The parties' stipulation clearly states that the issue resolved in the first election was "whether a student would deliver prayer at varsity football games," and the controversy in this case demonstrates that the views of the students are not unanimous on that issue.

One of the purposes served by the Establishment Clause is to remove debate over this kind of issue from governmental supervision or control. We explained in Lee that the "preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere."

As we noted in Lee, "law reaches past formalism." To assert that high school students do not feel immense social pressure, or have a truly genuine desire, to be involved in the extracurricular event that is American high school football is "formalistic in the extreme." Ibid. We stressed in Lee the obvious observation that "adolescents are often susceptible to pressure from their peers towards conformity, and that the influence is strongest in matters of social convention." High school home football games are traditional gatherings of a school community; they bring together students and faculty as well as friends and family from years present and past to root for a common cause. Undoubtedly, the games are not important to some students, and they voluntarily choose not to attend. For many others, however, the choice between whether to attend these games or to risk facing a personally offensive religious ritual is in no practical sense an easy one. The Constitution, moreover, demands that the school may not force this difficult choice upon these students for "it is a tenet of the First Amendment that the 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."

Even if we regard every high school student's decision to attend a home football game as purely voluntary, we are nevertheless persuaded that the delivery of a pregame

prayer has the improper effect of coercing those present to participate in an act of religious worship. For "the government may no more use social pressure to enforce orthodoxy than it may use more direct means...."

Chief Justice Rehnquist, with whom Justice Scalia and Justice Thomas join, dissenting.

The Court distorts existing precedent to conclude that the school district's student-message program is invalid on its face under the Establishment Clause. But even more disturbing than its holding is the tone of the Court's opinion; it bristles with hostility to all things religious in public life. Neither the holding nor the tone of the opinion is faithful to the meaning of the Establishment Clause, when it is recalled that George Washington himself, at the request of the very Congress which passed the Bill of Rights, proclaimed a day of "public thanksgiving and prayer, to be observed by acknowledging with grateful hearts the many and signal favors of Almighty God...."

Even if it were appropriate to apply the Lemon test here, the district's student-message policy should not be invalidated on its face. The Court applies Lemon and holds that the "policy is invalid on its face because it establishes an improper majoritarian election on religion, and unquestionably has the purpose and creates the perception of encouraging the delivery of prayer at a series of important school events." The Court's reliance on each of these conclusions misses the mark.

First, the Court misconstrues the nature of the "majoritarian election" permitted by the policy as being an election on "prayer" and "religion." . To the contrary, the election

permitted by the policy is a two-fold process whereby students vote first on whether to have a student speaker before football games at all, and second, if the students vote to have such a speaker, on who that speaker will be. It is conceivable that the election could become one in which student candidates campaign on platforms that focus on whether or not they will pray if elected. It is also conceivable that the election could lead to a Christian prayer before 90 percent of the football games. If, upon implementation, the policy operated in this fashion, we would have a record before us to review whether the policy, as applied, violated the Establishment Clause or unduly suppressed minority viewpoints. But it is possible that the students might vote not to have a pregame speaker, in which case there would be no threat of a constitutional violation. It is also possible that the election would not focus on prayer, but on public speaking ability or social popularity. And if student campaigning did begin to focus on prayer, the school might decide to implement reasonable campaign restrictions.

But the Court ignores these possibilities by holding that merely granting the student body the power to elect a speaker that may choose to pray, "regardless of the students' ultimate use of it, is not acceptable." The Court so holds despite that any speech that may occur as a result of the election process here would be private, not government, speech. The elected student, not the government, would choose what to say. Support for the Court's holding cannot be found in any of our cases. And it essentially invalidates all student elections. A newly elected student body president, or even a newly elected prom king or queen, could use opportunities for public speaking to say prayers. Under the Court's view, the mere grant of power to the students to vote for such

offices, in light of the fear that those elected might publicly pray, violates the Establishment Clause.

Second, with respect to the policy's purpose, the Court holds that "the simple enactment of this policy, with the purpose and perception of school endorsement of student prayer, was a constitutional violation." . But the policy itself has plausible secular purposes: "To solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition." Where a governmental body "expresses a plausible secular purpose" for an enactment, "courts should generally defer to that stated intent."

Finally, the Court seems to demand that a government policy be completely neutral as to content or be considered one that endorses religion. This is undoubtedly a new requirement, as our Establishment Clause jurisprudence simply does not mandate "content neutrality." That concept is found in our First Amendment speech cases and is used as a guide for determining when we apply strict scrutiny.