III. Elian Gonzales

Brett Kavanaugh – Elian Gonzalez

Allegation: Mr. Kavanaugh challenged the Clinton administration's decision to return Elian Gonzalez, a Cuban citizen, to his legal guardian – his father in Cuba.

Facts:

- Mr. Kavanaugh was asked to represent, on a pro bono basis, six-year-old Elian and his American relatives after the Eleventh Circuit had ruled against Elian. Mr. Kavanaugh was involved in filing a petition for rehearing *en banc* by the Eleventh Circuit, as well as an application for a stay and a petition for writ of certiorari from the U.S. Supreme Court.

- The narrow question before the court was not whether or not Elian should be returned to Cuba, but whether it was proper for the INS to make a decision to return Elian without even considering the merits of his case – without a hearing of any kind.

  - ✓ After his mother died at sea while attempting to bring Elian to the United States, Elian filed for political asylum through his "next friend" on several grounds, including that he feared persecution at the hands of the communist-totalitarian Cuban government if he were returned.

  - ✓ Under 8 U.S.C. 1158, "[a]ny alien who is physically present in the United States… may apply for asylum." However, the INS determined that because of Elian's age, the application had no legal effect and it therefore did not have to consider the merits of the application or reach the question of whether Elian's fears of persecution were well founded.

  - ✓ The Lawyers' Committee for Human Rights explained in its amicus brief before the 11th Circuit, "the implications" of the INS's no-hearing, no-interview procedure for minor asylum applicants are "quite serious." Amicus brief of Lawyers' Committee for Human Rights, at 19.

- The Eleventh Circuit recognized the merits of the arguments set forth by Mr. Kavanaugh on behalf of his clients. Nevertheless, the court upheld the INS's authority to interpret the law because of the great deference that it had to grant an executive branch agency. In rendering its opinion, the court expressed serious concerns with the action taken by the agency:

  "We have not the slightest illusion about the INS's choices: the choices—about policy and about application of the policy—that the INS made in this case are choices about which reasonable people can disagree." *Gonzalez v. Reno*, 212 F.3d 1338, 1356 (2000) (emphasis added).

  "The final aspect of the INS policy also worries us some. According to the INS policy, that a parent lives in a communist-totalitarian state is no special circumstance . . . to justify the consideration of a six-year-old child's asylum . . . . We acknowledge, as a widely-accepted truth, that Cuba does violate

human rights and fundamental freedoms and does not guarantee the rule of law to people living in Cuba." *Id.* at 1353.

"But whatever we personally might think about the decisions made by the Government, we cannot properly conclude that the INS acted arbitrarily or abused its discretion here." *Id.* at 1354.

- The representation of Elian Gonzalez and his American relatives was nonpartisan. In fact, lawyers who brought Mr. Kavanaugh into the case included Manny Diaz, currently the Democrat Mayor of Miami, and Kendall Coffey, a prominent Miami Democrat and former U.S. Attorney in the Clinton Justice Department.

No. 99-2079

IN THE

Supreme Court of the United States

OCTOBER TERM, 1999

ELIAN GONZALEZ, A MINOR, BY AND THROUGH LAZARO GONZALEZ, AS NEXT FRIEND, OR ALTERNATIVELY, AS TEMPORARY LEGAL CUSTODIAN,

Petitioner,

v.

JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. The Refugee Act of 1980, as amended and codified at 8 U.S.C. § 1158(a)(1), provides that "any alien" may "apply" for asylum and receive an asylum hearing. In contrast to the Eleventh Circuit's ruling in this case, at least five other courts of appeals – the D.C., Second, Third, Fourth, and Fifth Circuits – have held that this statute creates a liberty or property interest in petitioning for asylum that cannot be deprived without due process. The first question presented is whether an alien has a liberty or property interest in petitioning for asylum that cannot be deprived without due process – namely, a hearing and an opportunity to be heard.

2. The Refugee Act of 1980 provides, with exceptions not applicable here, that "any alien" may "apply" for asylum and receive an asylum hearing. *See* 8 U.S.C. § 1158(a)(1). Elian Gonzalez is an alien and has applied for asylum. The 1998 INS *Guidelines for Children's Asylum Claims* recognize the right of minor aliens to apply for asylum and receive asylum hearings. The second question presented is whether the INS's refusal to grant Elian Gonzalez an asylum hearing violates the plain meaning of 8 U.S.C. § 1158(a)(1).

3. The court of appeals accorded *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984), deference to opinion letters and an informal memorandum of the INS. In *Christensen v. Harris County*, 120 S. Ct. 1655 (2000), this Court held that *Chevron* deference does not extend to informal agency action such as opinion letters. Contrary to the Eleventh Circuit, the D.C. Circuit recently suggested that *Christensen* may preclude courts from extending *Chevron* deference to opinion letters issued in an informal adjudication. The third question presented is whether *Chevron* deference applies to opinion letters issued in an informal adjudication.

4. The fourth question presented is whether the court of appeals otherwise erred in upholding the INS's decision not to hold an asylum hearing for Elian Gonzalez. *See infra* n.11.

LIST OF PARTIES AND RULE 29.6 STATEMENT

The parties to this Petition are as listed in the caption of the case, with the following parties as additional Respondents:

Doris Meissner, Commissioner, United States Immigration and Naturalization Service;

Robert Wallis, District Director, United States Immigration and Naturalization Service;

United States Immigration and Naturalization Service;

United States Department of Justice.

Pursuant to Supreme Court Rule 29.6, Petitioner states that the Petitioner is not a nongovernmental corporation and therefore has nothing to disclose under Supreme Court Rule 29.6.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Regulations and Guidance

International Law

Miscellaneous

INTRODUCTION

This petition raises three primary legal issues that boil down to a single straightforward question: Can the INS deprive an alien child of his statutory and constitutional right to apply for asylum without conducting *any* hearing of *any* kind – or *even interviewing the child himself*? The INS contends that it is not required to conduct any hearing, or even interview an alien child seeking asylum, if the child's parent wants to return the child to his former country. The INS advances this position even though a hearing or interview, if conducted, necessarily could reveal evidence that the child faces a risk of persecution in returning to his former country.

The INS's procedural approach is dramatically inconsistent with the Due Process Clause of the Fifth Amendment (which requires a hearing before a "person," including a child, is deprived of a liberty interest) and with the Refugee Act of 1980 (which expressly provides that "any alien," which on its face includes an alien child, may "apply" for asylum and receive an asylum hearing). *See* 8 U.S.C. § 1158(a).

As the Lawyers' Committee for Human Rights explained in its amicus brief in the court of appeals, moreover, "[t]he implications" of the INS's no-hearing, no-interview procedure for minor asylum applicants are "quite serious." Amicus Brief of Lawyers' Committee for Human Rights, at 19. The Lawyers' Committee pointed out the example of a young Togolese girl who applied for asylum, but whose parents "demand[ed] that the Attorney General dismiss their daughter's asylum claim [so] that she be returned to Togo" – where "she would be forced" to endure severe physical abuse. *Id.* In such a case, as the Lawyers' Committee explained, the INS's position would not require an asylum hearing (or even an interview of the girl).[2]

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[2] The INS may try to discount such examples, but it cannot. Without a hearing or even an interview, the INS cannot plausibly claim

(continued...)

In this case, no one can say for sure what would happen at the asylum hearing – whether INS immigration officials would find that Elian Gonzalez has a risk of persecution if he returns to Cuba. The court of appeals frankly acknowledged that "*we expect that a reasonable adjudicator might find that [Elian's] fears were 'well founded.*'" Pet. App. 30a-31a n.26 (emphasis added). In any event, predictions and debate about the possible *substantive* outcome of the asylum hearing are speculative and misplaced, for the question here concerns the *process* that the INS must employ to make the asylum determination.

In an immigration case decided nearly a half-century ago, Justice Jackson posed the question at the heart of this case: "[D]oes it matter what the procedure is?" *Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 224 (1953) (opinion of Jackson, J., joined by Frankfurter, J.). He responded to his own question that "[o]nly the untaught layman or the charlatan lawyer can answer that procedures matter not. Procedural fairness and regularity are of the indispensable essence of liberty." *Id.*

This case is about "procedural fairness and regularity": the procedures to which alien children seeking asylum are entitled under the Refugee Act of 1980, as amended and codified at 8 U.S.C. § 1158(a), and under the Fifth Amendment to the United States Constitution. Our petition raises three primary questions.

First, the *constitutional* question raised by the petition is whether aliens seeking asylum have due process rights in

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[2] (...continued)
that it will discover the facts that could demonstrate a well founded fear of persecution. That is precisely why a hearing is central to the notion of procedural due process. *See Marshall v. Jerrico, Inc.*, 446 U.S. 238 (1980).

connection with an asylum application. Relying on its 16-year-old precedent in *Jean v. Nelson*, 727 F.2d 957 (11th Cir. 1984), the Eleventh Circuit held that aliens seeking admission to this country (including aliens seeking asylum) have *no due process rights whatsoever*. In the Eleventh Circuit's view, such aliens possess neither an *inherent* liberty interest under the Due Process Clause in seeking asylum, nor an interest created by the Refugee Act of 1980. The D.C., Second, Third, Fourth, and Fifth Circuits have reached the opposite conclusion, holding that the Refugee Act of 1980 gives aliens seeking asylum an interest in petitioning for asylum that thereby triggers at least the basic due process rights. *See, e.g., Selgeka v. Carroll*, 184 F.3d 337, 342 (4th Cir. 1999) ("An asylum applicant is entitled to the minimum due process that these cases [such as *Meachum v. Fano*, 427 U.S. 215 (1976)] envision.").

The circuit split on the due process issue is deep, it is recognized by scholars and commentators, and it is ripe for resolution by this Court. The issue is important to the rights of aliens (including the thousands of alien children in this country) and to the Government's administration of the asylum process. And resolution of the due process question is critical to the outcome of this case: If aliens seeking asylum have due process rights, then alien children seeking asylum are, of course, also entitled to due process in seeking asylum (which, at a minimum, would entail an interview and some kind of hearing for a child asylum applicant). *See, e.g., Parham v. J.R*, 442 U.S. 584 (1979); *cf.* INS *Guidelines for Children's Asylum Claims* 19 (Dec. 10, 1998) (discussing how to interview minor children who apply for asylum and may "lack . . . maturity").

Second, apart from any requirements dictated by the Constitution, the Refugee Act of 1980 grants alien children who apply for asylum the right to an asylum hearing. The plain language of the statute requires an asylum hearing for "any alien" who has "applied" for asylum. The statutory language is clear and unambiguous. An alien child is plainly included in the

broad term "any alien," and Elian Gonzalez has in fact applied for asylum under any plausible definition of the term. The INS's Guidelines themselves recognize, moreover, that even very young children may apply for asylum. The INS's contrary interpretation adopted in this case flouts the statutory text and is therefore not entitled to *Chevron* deference. *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 446-47 (1987); *id.* at 453 (Scalia, J.) ("INS's interpretation is clearly inconsistent with the plain meaning" and thus entitled to no deference).

While the plain language is controlling, it bears emphasis that the plain language is fully consistent with sound policy for resolution of asylum applications submitted by minors. Indeed, before this case, the INS's *Guidelines* and the INS's most closely analogous regulation provided that alien children applying for asylum should receive an asylum hearing. *See* 8 C.F.R. § 236.3(f). In short, "U.S. law, regulations and guidelines clearly recognize that children may apply for asylum independently of their parents. So, too . . . do international law and guidelines." Amicus Brief of Lawyers' Committee for Human Rights, at 16.

Third, the petition raises an important additional question regarding the scope of *Chevron* deference. The court of appeals erroneously extended *Chevron* deference to the INS's interpretation although it was set forth in an internal INS memorandum and three opinion letters. In *Christensen v. Harris County*, 120 S. Ct. 1655 (2000), this Court squarely held that *Chevron* deference does not apply to an agency interpretation of a statute that is "contained in an opinion letter," as opposed to an interpretation "arrived at after, for example, a *formal* adjudication or notice-and-comment rulemaking." *Id.* at 1662 (emphasis added). The Court added – unequivocally – that "[i]nterpretations such as those in opinion letters, . . . policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law – do not warrant *Chevron*-style deference." *Id.* The court of appeals

in this case thus erroneously accorded *Chevron* deference to precisely the kinds of *informal* agency interpretations (opinion letters in an "informal adjudication," *see* Pet. App. 147a-48a) that, under *Christensen*, are not entitled to *Chevron* deference.

Even though *Christensen* was decided less than two months ago, the D.C. Circuit has already suggested (contrary to the Eleventh Circuit's decision) that *Christensen* may prohibit *Chevron* deference to opinion letters issued in informal adjudications. *See Independent Ins. Agents of America v. Hawke*, 211 F.3d 638, 643 n.2 (D.C. Cir. 2000). While the divergence is obviously not as deep as the circuit split on the due process issue, the developing confusion in the court of appeals on such a recurring issue warrants review and clarification. That is particularly true in this case given that the court of appeals' *Chevron* error undeniably affected its resolution of this case. *See, e.g.*, Pet App. 13a-26a, 32a.

In an ordinary case, then, certiorari would be warranted based on (i) the importance of these legal issues, (ii) the deep circuit split on the due process issue, (iii) the court of appeals' clear error in failing to heed the plain language of the statute, (iv) the court's error applying *Christensen*, and (v) the confusion in the lower courts on the *Chevron/Christensen* issue.

This is no ordinary case, to be sure, and that raises the question whether this is an appropriate case for this Court to resolve those important and recurring legal issues. We think so. Indeed, even absent the important legal issues at the heart of this petition, there is plainly a national need that *this individual case* be decided *correctly* and *be decided by this Court*. The extraordinary importance of *this individual case* – to the United States (with its myriad congressional denunciations of Cuba's gross human rights abuses), to the Cuban-American community, to the American citizenry more broadly, and to the Gonzalez family – is too obvious to require extended discussion. That factor alone justifies this Court's review. Only this Court has

the constitutional stature and moral authority to render the final word that will stand the test of time in this divisive, difficult, and nationally momentous matter.

The petition should be granted. The importance of this case – particularly when coupled with the significance of the underlying constitutional and statutory issues, the circuit splits and confusion, and the court of appeals' errors – demonstrates the compelling need for this Court's review.

In order to ensure expedition in this case, we respectfully request that the Court grant certiorari during the summer. If so, counsel for petitioner will work with counsel for respondents to devise and propose an expedited briefing and argument schedule that would result in oral argument, if possible, no later than October 2000.

OPINIONS BELOW

The district court's opinion is reported at 86 F. Supp.2d 1167 and is reprinted at Pet. App. 47a-108a.

The Eleventh Circuit's opinion granting an injunction pending appeal is unreported and is reprinted at Pet. App. 33a-46a. The Eleventh Circuit's opinion on the merits, which is not yet reported, is reprinted at Pet. App. 1a-32a. The Eleventh Circuit's opinion denying the petition for rehearing is unreported and is reprinted at Pet. App. 146a-150a.

JURISDICTION

The district court had jurisdiction under 28 U.S.C. §§ 1331, 1346, 1361, and 2201. The court of appeals had jurisdiction under 28 U.S.C. § 1291. This Court has jurisdiction under 28 U.S.C. § 1254(1).

PROVISIONS INVOLVED

The relevant constitutional, statutory, and regulatory provisions are set forth in an addendum at the end of this brief.

STATEMENT OF THE CASE

A. Background

Petitioner Elian Gonzalez was born in December 1993 to Elizabeth Brotons and Juan Miguel Gonzalez. In the pre-dawn hours of November 22, 1999, when Elian was nearly six years old, his mother and twelve other Cuban nationals boarded a small motorboat and attempted to reach the United States. The next day, the boat capsized in windy conditions and rough seas. Eleven of the passengers died, including Elian's mother. Elian survived by clinging to an inner tube. Pet. App. 3a.

Two days later, two fisherman rescued Elian. Elian later was taken into INS custody and brought to a hospital in Miami to recuperate from his ordeal. Elian's great uncle, Lazaro Gonzalez, contacted the INS and visited the boy in the hospital. Upon Elian's release, the INS paroled Elian into his great uncle's care, and Elian went to live with his great uncle. Pet. App. 3a-4a.

Soon thereafter, Lazaro Gonzalez filed an asylum application on Elian's behalf, which was followed by a similar application signed by Elian himself. Lazaro Gonzalez filed a third application after a Florida state court judge, in a now-dissolved order, granted Lazaro temporary custody of Elian. Each application stated that petitioner Elian Gonzalez "is afraid to return to Cuba" on account of a well-founded fear of persecution. For support, the applications stated that many members of Elian's family have been persecuted by the Castro regime by being imprisoned and harassed. The applications also stated that Elian, if returned to Cuba, would be used as a propaganda tool for the Castro government and would be involuntarily indoctrinated. Pet. App. 4a.

B. The INS's Administrative Process

Through Cuban officials, Juan Miguel Gonzalez eventually expressed his views that he wanted his son returned

to him. In December 1999, INS officials conducted interviews of Juan Miguel Gonzalez and of Lazaro Gonzalez (with Lazaro's daughter Marisleysis). *The INS never interviewed Elian Gonzalez about the asylum applications, whether he had a fear of persecution, or whether there was a possible conflict of interest between him and his father.* Pet. App. 5a.

On January 5, 2000, the Executive Associate Commissioner of the INS for Field Operations sent virtually identical letters to Lazaro Gonzalez and his attorneys. *See* Pet. App. 132a-135a, 136a-139a. The letters stated that INS Commissioner Doris Meissner had concluded that the asylum applications filed by and on behalf of Elian Gonzalez were void and required no further consideration. The letters further stated that "we have determined that Mr. [Juan Miguel] Gonzalez-Quintana has the authority to speak for his son in immigration matters. After carefully considering all relevant factors, we have determined that there is no conflict of interest between Mr. Gonzalez-Quintana and his son, or any other reason, that would warrant our declining to recognize the authority of this father to speak on behalf of his son in immigration matters." *Id.* at 133a, 137a.

One week later, on January 12, 2000, Attorney General Janet Reno sent a letter to Lazaro Gonzalez's attorneys. *See* Pet. App. 140a-145a. The Attorney General stated that she was unaware of "any basis for reversing Commissioner Meissner's decision that Juan Gonzalez – Elian's father – has the sole authority to speak for his son on immigration matters." *Id.* at 141a.

After this litigation commenced, the INS produced a copy of a legal memorandum written by the General Counsel of the INS for Commissioner Meissner (and signed "approved" by the Commissioner). Pet. App. 109a-131a. The memorandum states that "*a child's right to seek asylum independent of his parents is well established* . . . . While Section 208(a)(2) of the

INA describes certain exceptions to this right, those exceptions are not applicable to this case. *There are no age-based restrictions on applying for asylum.* Because the statute does not place any age restrictions on the ability to seek asylum, it must be taken as a given that under some circumstances *even a very young child* may be considered for a grant of asylum." *Id.* at 123a-124a (emphasis added).

Despite this analysis, the memorandum concluded that "[t]he INS may give effect to the father's request for the return of his child by not accepting or adjudicating the application for asylum submitted under Elian's signature." Pet. App. 131a.

C. Litigation in the District Court

On January 19, 2000, petitioner filed a complaint in the United States District Court for the Southern District of Florida for injunctive and mandamus relief to compel the INS to adjudicate his asylum application as required by the Refugee Act of 1980 and the INS's implementing regulations. The complaint contended that the INS's actions in the case had violated Elian's constitutional, statutory, and regulatory rights. Pet. App. 60a-61a.

On January 27, 2000, the INS moved to dismiss, and on March 21, 2000, the district court granted the INS's motion. Citing *Jean v. Nelson*, 727 F.2d 957 (11th Cir. 1984), the district court concluded that petitioner had no due process rights in connection with the asylum process. Pet. App. 90a. The decision in *Jean* had held that, in connection with the asylum process, excludable aliens have no *inherent* due process rights, nor any procedural due process rights created as a result of the statutory entitlement to seek asylum provided by 8 U.S.C. § 1158(a)(1).

As to the statutory claim, the district court acknowledged that 8 U.S.C. § 1158(a)(1) states that "[a]ny alien . . . may apply for asylum." Pet. App. 92a-93a. Although

recognizing that Congress has carved out specific rules for children in other immigration statutes (but not here) and that Congress had created several other exceptions to the asylum application process (none covering applications by children), the court stated that the phrase "any alien" was ambiguous as to whether it covered alien children. *Id.* at 100a-105a. The district court concluded, therefore, that the INS was entitled to *Chevron* deference in refusing to process Elian Gonzalez's asylum application. *Id.* at 105a.

D. Litigation in the Eleventh Circuit

1. On April 19, 2000, the Eleventh Circuit issued an opinion granting an injunction pending appeal. The injunction prevented Elian Gonzalez from departing the United States and required the Government to take steps to prevent his departure while the appeal was pending. Pet. App. 46a.

In granting the injunction, the court of appeals stated that "Plaintiff has made a 'substantial case on the merits' of his appeal." Pet. App. 36a. The court stated:

> The statute in this case seems pretty clear. Section 1158(a)(1) provides that "[a]ny alien . . . irrespective of such alien's status, may apply for asylum." Plaintiff appears to come within the meaning of "[a]ny alien." *See* 8 U.S.C. § 1101(a)(3). And the statute plainly says that such an alien "may apply for asylum." We, therefore, question the proposition that, as a matter of law, Plaintiff (unless his father consents) cannot exercise the statutory right to apply for asylum. . . . Congress's provision for "any alien" is not uncertain in meaning just because it is broad.

Id. at 39a. The court of appeals noted that "the INS cannot properly infringe on the plain language of the statute or the clear congressional purpose underlying it." *Id.* at 40a. The court also pointed out that the "[t]he existing INS regulations do

envision situations where a minor may act on his own behalf in immigration matters . . . [and] under some circumstances, may seek asylum against the express wishes of his parents. Also, the INS *Guidelines for Children's Asylum Claims* . . . envision that young children will be active and independent participants in the asylum adjudication process." *Id.* at 40a-41a (footnotes omitted).

As to Elian's case, the court stated that "[n]ot only does it appear that Plaintiff might be entitled to apply personally for asylum, it appears that he did so. . . . Plaintiff – although a young child – has expressed a wish that he not be returned to Cuba. He personally signed an application for asylum. Plaintiff's cousin, Marisleysis Gonzalez, notified the INS that Plaintiff said he did not want to go back to Cuba. And it appears that never have INS officials attempted to interview Plaintiff about his own wishes." Pet. App. 43a-44a.

2. Although it granted the injunction, on June 1, 2000, addressing the appeal on the merits, the court of appeals affirmed the district court. Pet. App. 1a-32a. First, as to the due process claim, the court ruled that it was constrained by its *en banc* decision in *Jean v. Nelson*, 727 F.2d 957 (11th Cir. 1984), to rule that Elian Gonzalez had no procedural due process rights in connection with his application for asylum, whether through an inherent liberty interest or a liberty interest created by the Refugee Act of 1980. Pet. App. 8a.

On the statutory question, the INS had contended in the court of appeals that a child cannot ordinarily "apply" for asylum over the objection of his parent, that Elian Gonzalez thus had not really "applied" for asylum, and that the asylum applications were void. The court of appeals stated that the statute provides that "any alien" may "apply" for asylum and that the INS is required to adjudicate any such application. Pet. App. 11a-12a. But the court of appeals ultimately concluded that the statutory term "apply" was ambiguous and the court

thus extended *Chevron* deference to the INS's interpretation of the statute. *Id.* at 13a-26a. The court made clear, however, that the INS's interpretation was merely "within the outside border of reasonable choices." *Id.* at 32a; *see also id.* at 23a ("We are not untroubled by the degree of obedience that the INS policy appears to give to the wishes of parents, especially parents who are outside this country's jurisdiction."); *id.* at 24a ("we cannot disturb the INS policy in this case just because it might be imperfect").

3. On June 14, 2000, petitioner filed a petition for rehearing and rehearing *en banc*. On the *Chevron* issue, petitioner emphasized that the panel's decision was inconsistent with this Court's recent decision in *Christensen v. Harris County*, 120 S. Ct. 1655 (2000), handed down on May 1, 2000. Specifically, petitioner pointed out that the Court in *Christensen* held that *Chevron* deference does not extend to "opinion letters, . . . policy statements, agency manuals, and enforcement guidelines," 120 S. Ct. at 1662, and that the INS's interpretations in this case were contained in opinion letters and an internal memorandum – precisely the kinds of *informal* agency actions that *Christensen* said do not warrant deference.

The court of appeals denied the petition for *en banc* review, and the panel issued an opinion. The court distinguished *Christensen* on the ground that the agency decisionmaking in this case was an "*informal* adjudication." Pet. App. 147a. The panel said it would not interpret *Christensen* to apply to opinion letters in informal agency adjudications. *Id.* at 149a.

REASONS FOR GRANTING THE WRIT

I. THE CIRCUITS ARE DEEPLY SPLIT ON THE QUESTION WHETHER ALIENS SEEKING ASYLUM HAVE PROCEDURAL DUE PROCESS RIGHTS, AND THE ELEVENTH CIRCUIT'S DECISION DENYING SUCH RIGHTS IS ERRONEOUS.

The Due Process Clause of the Fifth Amendment provides that "[n]o person shall be . . . deprived of life, liberty, or property without due process of law." U.S. Const. amend. v. "The requirements of procedural due process apply only to the deprivation of interests encompassed by the [Fifth] Amendment's protection of liberty and property." *Board of Regents v. Roth*, 408 U.S. 564, 569-70 (1972). If a person's liberty or property interest is at stake, the "Constitution's command of due process" ordinarily requires "prior notice and a hearing" before a deprivation of that interest. *United States v. James Daniel Good Real Property*, 510 U.S. 43, 53 (1993).

A person's liberty or property interests stem from one of two sources. *First*, federal statutes may create liberty or property interests that cannot be deprived without procedural due process. *See Vitek v. Jones*, 445 U.S. 480, 488-91 (1980); *Goldberg v. Kelly*, 397 U.S. 254, 261-62 (1970). *Second*, individuals have certain "core" liberty or property interests that cannot be deprived without procedural due process. *See Kentucky Dep't of Corrections v. Thompson*, 490 U.S. 454, 460 (1989) (protected liberty interests "may arise from two sources – the Due Process Clause itself and the laws" of the federal government or States).[3]

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[3] The Court has extended "the same procedural protections to statutorily created rights as to 'core' rights." Tribe, *American Constitutional Law* 710 (2d ed. 1988).

In this case, both sources apply. First, as most courts of appeals other than the Eleventh Circuit have held, the Refugee Act of 1980 gives aliens seeking asylum a liberty or property interest in applying for asylum that cannot be deprived without due process. Second, even apart from the statute, aliens seeking asylum possess a core liberty interest in seeking asylum that cannot be deprived without due process.

Resolution of the due process issue would clearly alter the outcome of this case, which makes this case a proper vehicle for addressing the question. Elian Gonzalez never received a hearing (the central requirement of due process); indeed, the INS never even interviewed him in connection with his asylum application.

A. The Circuits Are Divided on the Question Whether the Refugee Act of 1980 Grants Aliens an Entitlement to Seek Asylum That Creates Procedural Due Process Rights.

The Refugee Act of 1980 established a uniform right for aliens to seek asylum:

> Any alien who is physically present in the United States or who arrives in the United States . . . , *irrespective of such alien's status*, may apply for asylum in accordance with this section . . . .

8 U.S.C. § 1158(a)(1) (emphasis added). Except in certain statutorily specified circumstances not applicable here, an alien who applies for asylum must receive a hearing. *See* 8 U.S.C. § 1158(a)(2). INS regulations extensively set forth the procedures governing asylum applications and, consistent with the statute, state that "[t]he Service shall adjudicate the claim of each asylum applicant whose application is complete." 8 C.F.R. § 208.9(a).

By its plain terms, the Refugee Act grants all aliens an entitlement to apply for asylum. This Court's precedents

establish that this entitlement qualifies as a protected interest under the Due Process Clause. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 431 (1982) (statutory "right to use . . . adjudicatory procedures" is a "property" right triggering appropriate procedural protections under Due Process Clause); *see also Meachum v. Fano*, 427 U.S. 215, 226 (1976); *Bishop v. Wood*, 426 U.S. 341, 344 (1976); *Goss v. Lopez*, 419 U.S. 565, 572-73 (1975); *Goldberg v. Kelly*, 397 U.S. 254, 262 (1970). As a result, the Government may not deprive an asylum applicant of his entitlement to seek asylum without providing certain procedural due process protections.

This Court has never directly addressed the question whether the Refugee Act of 1980 creates a liberty or property interest for purposes of the procedural protections of the Due Process Clause. Confusion reigns in the lower courts, however, and the courts of appeals are deeply divided on the issue. "The constitutional standards to be applied to exclusion cases, wherein the government has refused to admit into the country persons from other nations who have arrived at United States borders, are less than clear." 3 Rotunda and Nowak, *Treatise on Constitutional Law* 65 n.102 (1999) (citing cases on split); *see also* Jones, *The Fifth Amendment Due Process Rights of Interdicted Haitian Refugees*, 21 Hastings Const. L.Q. 1071, 1093 (1994) ("a split has developed among lower courts as to the extent to which unadmitted foreigners have due process rights"); Miller, *Aliens' Right to Seek Asylum*, 22 Vand. L. J. Transnational Law 187, 204 (1989) ("the circuits are split as to whether aliens have due process rights").

Since 1980, the D.C., Second, Third, Fourth, and Fifth Circuits (and arguably the Seventh) have properly concluded that the entitlement to seek asylum granted by the Refugee Act triggers corresponding procedural due process rights in connection with asylum-related proceedings. We will briefly chronicle the leading circuit decisions.

In *Selgeka v. Carroll*, 184 F.3d 337, 342 (4th Cir. 1999), the Fourth Circuit held that the statutory right to seek asylum also created a constitutional right to due process in asylum-related proceedings. *See id.* ("An asylum applicant is entitled to the minimum due process that these cases [such as *Meachum*] envision.").[4]

The Third Circuit similarly has held that the Refugee Act creates such a protected liberty interest. *Marincas v. Lewis*, 92 F.3d 195, 204 (3d Cir. 1996).[5] As a result, there are "minimum due process rights required by fairness to which all asylum applicants are entitled." *Id.* (citing *Hewitt v. Helms*, 459 U.S. 460, 472 (1983) and *Meachum*, 427 U.S. 215). The court added that "[p]recisely what minimum procedures are due under a statutory right depends on the circumstances of the particular situation." *Marincas*, 92 F.3d at 203. The court explained, in addition, that other "[c]ourts have recognized that aliens seeking asylum are entitled to some due process protection." *Id.* at 203 n.8 (citing Second Circuit cases).

The D.C. Circuit likewise has squarely concluded that an alien has "a Fifth Amendment procedural due process right to petition the government for political asylum." *Maldonado-Perez v. INS*, 865 F.2d 328, 332 (1989). That due process right requires – at a "minimum" – "some form of meaningful or fair hearing." *Id.*

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[4] The Fourth Circuit rejected any suggestion that an alien seeking asylum has an *inherent* constitutional liberty interest in connection with the asylum process, as opposed to a statutorily created interest that triggers procedural due process protections. *See* 184 F.3d at 342 ("Aliens have no *independent* constitutional rights in an asylum procedure.") (emphasis added).

[5] The Third Circuit, too, stated that aliens have no *inherent* constitutionally protected liberty interest in seeking admission, but do have a *statutorily created* entitlement that triggers procedural due process.

The Second Circuit similarly has held: "In the absence of protected interests which originate in the Constitution itself, constitutionally protected liberty or property interests may have their source in positive rules of law creating a substantive entitlement to a particular government benefit." *Augustin v. Sava*, 735 F.2d 32, 36 (2d Cir. 1984); *see also Yiu Sing Chen v. Sava*, 708 F.2d 869, 877 (2d Cir. 1983) ("refugee who has a 'well-founded fear of persecution' in his homeland has a protectable interest recognized by both treaty and statute, and his interest in not being returned" may enjoy due process protection).[6]

The Fifth Circuit also has reached the same result: "Besides protected interests which originate in the Constitution itself, the Supreme Court has also recognized that constitutionally protected liberty or property interests may have their source in positive rules of law, enacted by the state or federal government and creating a substantive entitlement to a particular governmental benefit. In this case we conclude that Congress and the executive have created, at a minimum, *a constitutionally protected right to petition our government for*

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[6] The question of entitlement is based on the language of the statute, which grants an asylum hearing to "any alien" who is physically present in the United States. Such aliens are indisputably "persons" for purposes of the Due Process Clause. "Aliens . . . have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments." *Plyler v. Doe*, 457 U.S. 202, 210 (1982). There would be no basis, therefore, for trying to draw a line between excludable and deportable aliens in determining whether *the statute* creates an entitlement that triggers procedural due process. *See generally* Klingsberg, *Penetrating the Entry Doctrine: Excludable Aliens' Constitutional Rights in Immigration Processes*, 98 Yale L.J. 639, 658 (1989). Even were such a line drawn, the majority of these cases concern excludable aliens (the category historically held to have fewer *inherent* constitutional rights), yet the courts granted due process rights.

political asylum." *Haitian Refugee Center v. Smith*, 676 F.2d 1023, 1036-38 (5th Cir. Unit B 1982) (emphasis added).

Finally, the Seventh Circuit has indicated that both a minor child applying for asylum and his parents have due process rights in connection with the minor's asylum hearing. *See Polovchak v. Meese*, 774 F.2d 731 (7th Cir. 1985). Although the case concerned the due process rights of parents to be informed of their child's asylum application, the decision was premised on and assumed the due process right of the child to seek asylum over his parent's objection and to receive procedural due process protections. *Accord DeSilva v. DiLeonardi*, 125 F.3d 1110, 1115 (7th Cir. 1997).

In contrast to those decisions, the Eleventh Circuit had previously held (and held again in this case) that the Refugee Act of 1980 does *not* create an entitlement to seek asylum that is thereby protected by the Due Process Clause. In its 8-4 *en banc* decision in *Jean v. Nelson*, the Eleventh Circuit held that the Refugee Act grants aliens no entitlement to seek asylum – and that aliens therefore possess *no due process rights* in connection with asylum proceedings. Judge Kravitch dissented for four judges, stating that "the Refugee Act of 1980 does create at a minimum a *constitutionally protected right* to petition our government for political asylum" – an entitlement that carries with it certain procedural due process rights for aliens seeking asylum. 727 F.2d at 989 (quotation omitted) (emphasis added).

This circuit split is deep, it is ripe, it is recognized by scholars and commentators, and it is obviously of critical importance to aliens who seek asylum and to the Government's immigration policies. The Government takes the view that the Eleventh Circuit's decision in *Jean v. Nelson* is correct and that excludable aliens seeking asylum have no due process rights. It is our submission, by contrast, that the D.C., Second, Third, Fourth, Fifth, and Seventh Circuits have correctly concluded

that the Refugee Act of 1980 creates an interest in seeking asylum that triggers procedural protections under the Due Process Clause. As the lopsided nature of the split would suggest, the Eleventh Circuit – the court that decided *this case* – has decided the issue erroneously. This Court should grant certiorari to resolve the split. As we will explain in Section I.C below, moreover, resolution of this issue would clearly alter the outcome of this case, which makes this case a proper vehicle for addressing the question.

B. Even in the Absence of Any Statutorily Created Interest, Refugees in the United States Who Apply for Asylum Possess an *Inherent* Liberty Interest in Seeking Asylum That Is a Protected Interest Under the Due Process Clause.

In the 1950s, this Court ruled that aliens seeking admission to this country possess no *inherent* liberty interest in admission that would trigger procedural due process rights. *See Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206 (1953); *United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537 (1950); *see also Landon v. Plasencia*, 459 U.S. 21 (1982). That is a different question, of course, from whether there is a statutorily created liberty interest. For that reason, these decisions in no way affect or diminish our argument that the Refugee Act creates a liberty or property interest for purposes of procedural due process.

That said, and even assuming these 1950s-era decisions are correct (which is a dubious proposition[7]), the cases do not

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[7] These decisions have been described as "patently preposterous," Hart, *The Power of Congress to Limit the Jurisdiction of Federal Courts*, 66 Harv. L. Rev. 1362, 1392-96 (1953), and among "the most shocking decisions the Court has ever rendered," 2 Davis, *Administrative Law*

(continued...)

speak directly to the distinct question whether that *subset* of unadmitted aliens who are *seeking asylum* have an inherent liberty interest in seeking asylum that triggers procedural protections under the Due Process Clause. Contrary to the Eleventh Circuit's *other* holding in *Jean*, we submit that aliens seeking asylum do possess such an interest.

Because the existence of the statutorily created liberty interest means that the Court need not reach this alternative ground for finding a liberty interest, we touch upon it only briefly. "Aliens . . . have long been recognized as 'persons' guaranteed due process of law by the Fifth and Fourteenth Amendments." *Plyler*, 457 U.S. at 210. "In a Constitution for a free people, there can be no doubt that the meaning of 'liberty' must be broad indeed." *Board of Regents v. Roth*, 408 U.S. 564, 572 (1972). The Court has long rejected the concept that "constitutional rights turn upon whether a governmental benefit is characterized as a 'right' or as a 'privilege.'" *Id.* "Whether any procedural protections are due depends on the extent to which an individual will be 'condemned to suffer grievous loss.'" *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) (quoting *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring)).

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[7] (...continued)
Treatise 358 (1979). In his separate opinion in *Jean*, Justice Marshall stated that "excludable aliens do, in fact, enjoy Fifth Amendment protections" and "the principle that unadmitted aliens have no constitutionally protected rights defies rationality." 472 U.S. at 873, 874. Indeed, any other conclusion, Justice Marshall pointed out, would mean that courts could not intervene even if the Government were to "invoke legitimate immigration goals to justify a decision to stop feeding all detained aliens." *Id.* at 874. We agree with Justice Marshall that those decisions are wrongly decided and, if necessary, should be overruled. That said, the Court need not come near reaching that question to resolve this case in our favor.

The scope of "liberty" encompassed by the Due Process Clause plainly must include the interest of a "person" in this country to *petition for asylum*. This Court has long held that aliens subject to *deportation* have due process rights. *See Landon v. Plasencia*, 459 U.S. at 32-33. There is no plausible distinction – for purposes of determining whether procedural due process *applies* – between an alien subject to *deportation* and an unadmitted alien *seeking asylum*. Indeed, the alien seeking asylum is seeking to avoid persecution, which on its face is a more weighty interest than merely avoiding deportation. What is more, Congress itself has eliminated the distinction between excludable and deportable aliens in both the Refugee Act, *see* 8 U.S.C. § 1158(a)(1), and in the relevant 1996 amendments now codified at 8 U.S.C. § 1229 *et seq.*

In short, regardless of any *statutorily created* liberty interest, we submit that the right of a "person" within the territory of the United States to seek asylum because of a well founded fear of persecution by returning to his former country is an inherent liberty interest that triggers procedural due process protections.

C. The INS's Procedures in This Case Did Not Satisfy Due Process.

We acknowledge, of course, that this Court generally does not grant certiorari to resolve a circuit split if resolution of the legal issue could not affect the outcome of the case at hand. In this case, however, a ruling that aliens seeking asylum have a liberty interest under the Due Process Clause would alter the outcome of this case – and require the INS to hold a hearing before depriving Elian Gonzalez of his right to seek asylum.

The reason is straightforward: As the Court stated in *United States v. James Daniel Good Real Property*, "[t]he right to prior notice and a hearing is central to the Constitution's command of due process." 510 U.S. 43, 53 (1993). This core

principle of due process applies to children in matters that affect children's rights. *See Parham v. J.R.*, 442 U.S. 584 (1979).

The question here, then, is what process – what kind of hearing – is necessary to satisfy the due process rights of a child who has applied for asylum. Given the child's extraordinarily important interest in an accurate assessment, the proper rule is that a child who seeks to apply for asylum has a due process right to an asylum hearing (an asylum hearing where, to be sure, the parents are entitled to be heard as well). *Cf. Reno v. Flores*, 507 U.S. 292, 309 (1993) ("At least insofar as this facial challenge is concerned, due process is satisfied by giving the detained alien juveniles the right to a hearing before an immigration judge.").[7]

Holding an asylum hearing protects the alien's weighty interest in obtaining asylum, but does not unduly burden any parental interest. *See Mathews v. Eldridge*, 424 U.S. 319 (1976). After all, if the asylum hearing fails to produce sufficient evidence that the minor would suffer persecution from returning to his former country, the question of parental control is moot. If, on the other hand, the hearing produces evidence that the minor would suffer persecution from returning to his former country, there is little rational reason a parent would have for returning the child to such persecution. In other words, the asylum hearing will necessarily produce a result – either way – that will be consistent with the best interests of the child and, presumably, the parent.[8] In short, by following the

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[7] Even if a child is not *automatically* entitled to an asylum hearing when the child seeks asylum over the objection of a parent, the child clearly still possesses a due process right *to a fair hearing* to determine the parent's ability to represent the child's best interests in any asylum proceedings.

[8] If a parent somehow made a convincing case that a child facing persecution should nonetheless be returned to his former country, the (continued...)

statute, the INS not only will comply with due process requirements, it will reach the best result for the child.

The suggestion that a minor's liberty interests evaporate when a parent seeks to exercise control over the minor has been rejected time and again by this Court. To take just one example, in *Parham v. J.R.*, the Court found that a child has a due process interest in avoiding institutional commitment – notwithstanding the desires of the parent – and "that the risk of error inherent in the parental decision to have a child institutionalized for mental health care is sufficiently great that some kind of inquiry should be made by a 'neutral factfinder.'" 442 U.S. at 606. The Court added that the inquiry "*must also include an interview with the child.*" *Id.* at 607[9] (emphasis added).[9]

In this case, whatever the *minimum* elements of due process might be for alien children in asylum proceedings, the INS did not come anywhere close. It did not hold an asylum hearing. In fact, it did not hold *any hearing at all* to determine, for example, whether Elian's father represented Elian's best interests. Indeed, *the INS agents never even interviewed Elian Gonzalez* as part of the INS's supposed "assessment" of the matter. Nor did the INS ask Elian (or even Juan Miguel Gonzalez, for that matter) a single question about possible harm to Elian should he return to Cuba, or provide any opportunity for consideration of objective evidence on that subject. The INS's ad hoc and haphazard procedures fell woefully short of due process.

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[8] (...continued)
Attorney General may have authority to consider the parent's view, subject to constitutional and statutory constraints. *See* 8 U.S.C. §§ 1158(b), 1231(b)(3).

[9] *See Planned Parenthood v. Danforth*, 428 U.S. 52 (1976) (child's exercise of constitutional right cannot be controlled or thwarted by her parent).

The Court should grant certiorari to resolve the split on the due process issue and reverse the judgment of the court of appeals.

II. THE PLAIN LANGUAGE OF THE STATUTE REQUIRES AN ASYLUM HEARING FOR "ANY ALIEN" WHO "APPLIES" FOR ASYLUM, AND ELIAN GONZALEZ IS AN ALIEN WHO HAS APPLIED FOR ASYLUM.

The Refugee Act of 1980 provides for an asylum hearing for "any alien" who has "applied" for asylum. The phrase "any alien" by its terms includes any child, and Elian Gonzalez has in fact "applied" for asylum by any plausible definition of that term. While a parent's views can and should be heard at a child's asylum hearing, the statute leaves no room for the INS simply to refuse outright to hold *a hearing*.

This Court has emphasized repeatedly that statutory analysis "begins with the language of the statute. And where the statute provides a clear answer, it ends there as well." *Harris Trust & Savings Bank v. Salomon Smith Barney, Inc.*, 2000 WL 742912, at *9, No. 99-579 (U.S. June 12, 2000); *see Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) ("We have stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there."); *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989) ("[W]here, as here, the statute's language is plain, the sole function of the courts is to enforce it according to its terms.") (internal quotation omitted).

Because the statutory text is plain, there is no basis for extending *Chevron* deference to the INS's contrary interpretation. *See California Dental Ass'n v. FTC*, 526 U.S. 756, 766 (1999) ("[w]e have no occasion to review the call for deference here, the interpretation urged in respondent's brief

being clearly the better reading of the statute under ordinary principles of construction.").

The INS claims that the term "apply" is undefined and ambiguous. But an undefined term is interpreted in accord "with its ordinary or natural meaning." *FDIC v. Meyer*, 510 U.S. 471, 476 (1994); *see also INS v. Phinpathya*, 464 U.S. 183, 189 (1984) ("assume that the legislative purpose is expressed by the ordinary meaning of the words used") (internal quotation omitted). The term "apply" is ordinarily defined to mean "[t]o request or seek assistance, employment, or admission." American Heritage Dictionary 89 (3d ed. 1996); *see also* Black's Law Dictionary 96 (7th ed. 1999) ("[t]o make a formal request or motion"). Under any remotely plausible definition of the term "apply," Elian Gonzalez has applied for asylum.

The INS's supposed statutory construction of the word "apply" is, in reality, a rather transparent plea for the courts to recognize or create an implicit exception to the statute in cases involving minors who apply for asylum (at least in cases where the parent objects). The INS seeks, in effect, to superimpose a parental consent requirement onto the statute. But the statutory text contains no such exception. The omission of such an exception is significant, particularly given that Section 1158(a)(2) of the statute – entitled "Exceptions" – sets forth three specific exceptions to the right to apply for asylum. *See* 8 U.S.C. § 1158(a)(2). The fact that Congress specified various exceptions (and did so in 1996) to the right to apply for asylum, but did not provide any exception for applications by children, strongly buttresses the natural reading of the text. *See United States v. Johnson*, 120 S.Ct. 1114, 1118 (2000) ("When Congress provides exceptions in a statute, it does not follow that courts have authority to create others. The proper inference, and the one we adopt here, is that Congress considered the issue of exceptions and, in the end, limited the statute to the ones set forth."); *see also Andrus v. Glover*

Constr. Co., 446 U.S. 608, 616-17 (1980) ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of contrary legislative intent.").

Nor can the INS claim that this was some kind of congressional mistake or mere oversight. As the 1998 INS *Guidelines for Children's Asylum Claims* state, "[d]uring the last 10 years, the topic of child asylum seekers has received increasing attention from the international community." INS *Guidelines* at 1.

In addition, Congress specified special rules for children in different provisions of the statute. *See* 8 U.S.C. § 1182(a)(9)(B)(iii). Again, the fact that Congress spoke specifically to children in one portion of the statute, but not in the asylum provision, buttresses the textual interpretation that the term "any alien" includes alien children and that alien children thus may "apply" for asylum. *See Bates v. United States*, 522 U.S. 23, 29-30 (1997) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)); *see also INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 (1987) ("The contrast between the language used in the two standards, and the fact that Congress used a new standard to define the term 'refugee,' [in the 1980 amendments to the Immigration and Naturalization Act] certainly indicate that Congress intended the two standards to differ").

The INS's contrary argument, accepted by the court of appeals under *Chevron*, ultimately seems premised on the notion that it would somehow be "bad policy" or "absurd" to apply the plain language here. *See Cardoza-Fonseca*, 480 U.S. at 452 (Scalia, J., concurring). As to the INS's naked policy arguments, the plain language of the statute controls. *See*

Harris, 2000 WL 742912, at *9 (U.S. June 12, 2000) (party and amici "submit that the policy consequences . . . could be devastating . . . . We decline these suggestions to depart from the text of § 502(a)(3)."); *Central Bank of Denver v. First Interstate Bank*, 511 U.S. 164, 188 (1994) ("Policy considerations cannot override our interpretation of the text and structure of the Act.").

Nor can the INS squeeze this case into the rare case where the effect of implementing the ordinary meaning of the text would cause a "patent absurdity." *Cardoza-Fonseca*, 480 U.S. at 452 (Scalia, J., concurring). In fact, the plain language of the text is entirely consistent with the INS *Guidelines for Children's Asylum Claims*, with the most closely analogous INS regulation, with international law principles, and with common sense.

As the court of appeals recognized, the INS *Guidelines for Children's Asylum Claims* "envision that young children will be active and independent participants in the asylum adjudication process." Pet. App. 41a. In addition, INS regulations actually "contemplate that a minor, under some circumstances, may seek asylum against the express wishes of his parents." *Id.*[10] Not only do "U.S. law, regulations and guidelines clearly recognize that children may apply for asylum independently of their parents, [but] [s]o, too . . . do international law and guidelines." Amicus Brief of Lawyers' Committee for Human Rights, at 16.

In short, all relevant legal sources to which this Court might look to determine whether the plain language of the statute reflects sensible policy strongly confirm application of the plain language in this case. By contrast, the INS has not uncovered any support in the relevant body of legal materials

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[10] *See* 8 C.F.R. § 236.3(f), quoted in full in addendum.

for its decision to flat-out refuse an asylum hearing for a minor alien who has applied for asylum.

The final point in assessing whether the plain language constitutes sensible policy is perhaps the most decisive. Holding an asylum hearing as the statute dictates is plainly the best way to protect the child's rights and preserve the integrity of the Refugee Act, while not unduly burdening the parental or government interests at stake. As we stated above, if the asylum hearing fails to produce sufficient evidence that the minor would suffer persecution from returning to his former country, the question of parental control is moot. If, on the other hand, the hearing produces evidence that the minor would suffer persecution from returning to his former country, there is little rational reason for a parent to return the child to such persecution. To reiterate, the asylum hearing will necessarily produce a result – either way – that will be consistent with the best interests of the child and, presumably, the parent.

In short, the plain language and structure of the statute mandate an asylum hearing for Elian Gonzalez and demonstrate that the INS violated the statute. Because of the unique importance of this particular case, and the need that it be resolved both correctly and by this Court, this statutory issue warrants certiorari.

III. CONTRARY TO THIS COURT'S RECENT DECISION IN *CHRISTENSEN*, THE COURT OF APPEALS ERRONEOUSLY EXTENDED *CHEVRON* DEFERENCE TO THE INS's OPINION LETTERS AND MEMORANDUM.

This Court's recent decision in *Christensen v. Harris County* established a simple and unambiguous prohibition on extending *Chevron* deference to "opinion letters, . . . policy statements, agency manuals, and enforcement guidelines." 120 S. Ct. 1655, 1662 (2000). The Court observed that under *Chevron* "a court must give effect to an agency's regulation

containing a reasonable interpretation of an ambiguous statute." *Id.* But the Court emphasized that it was "confront[ing] an interpretation contained in an opinion letter, not one arrived at after, for example, a formal adjudication or notice-and-comment rulemaking. Interpretations such as those in opinion letters – like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law – do not warrant *Chevron*-style deference." *Id.*

The court of appeals' decision in this case is in conflict with the decision in *Christensen*. The INS internal memorandum and letters are the kinds of agency statements that the *Christensen* Court held are not entitled to *Chevron* deference. And even though *Christensen* was decided less than two months ago, the D.C. Circuit has already suggested (contrary to the Eleventh Circuit's decision) that *Christensen* would prohibit *Chevron* deference to opinion letters issued in informal adjudications. *See Independent Ins. Agents of America v. Hawke*, 211 F.3d 638, 643 n.2 (D.C. Cir. 2000); *cf. Association of Int'l Auto. Mfrs., Inc. v. Commissioner, Mass. Dep't of Envt'l Protection*, 208 F.3d 1, 4-6 (1st Cir. 2000) (refusing to grant *Chevron* deference to an opinion letter issued by the EPA to resolve a matter referred to that agency under the doctrine of primary jurisdiction). While this divergence of interpretation is obviously not as deep as the circuit split on the due process issue, the developing confusion in the court of appeals on such a recurring and important issue warrants review and clarification, particularly given that it altered the result in this case.

The court of appeals made clear that, freed from *Chevron*, it likely would have interpreted the statute differently than did the INS. *See* Pet. App. 23a ("We are not untroubled by the degree of obedience that the INS policy appears to give to the wishes of parents, especially parents who are outside this country's jurisdiction."); *id.* at 24a ("we cannot disturb the INS policy in this case just because it might be imperfect."); *id.*

("The final aspect of the INS policy also worries us some."); *id.* at 32a ("The policy decision that the INS made was within the outside border of reasonable choices.").[11]

The court of appeals also stated that the level of deference it applied in this case "was strengthened" by the "foreign policy implications of the administrative decisions dealing with immigration." Pet. App. 147a. The court's reference to foreign policy implications in an asylum case was plain error. As the Second Circuit has rightly explained, "[C]ongress made it clear that factors such as the government's geopolitical and foreign policy interests were not legitimate concerns of asylum." *Doherty v. INS*, 908 F.2d 1108, 1119 (2d Cir. 1990), *rev'd on other grounds*, 502 U.S. 314 (1992).

CONCLUSION

For the foregoing reasons, the petition should be granted.

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[11] In order to preserve them for review on the merits, we also raise several other issues. First, the INS's ultimate interpretation was the product of an insufficiently explained change in interpretation. The INS's multiple and shifting interpretations – shifts that occurred without sufficient explanation – preclude the courts from granting deference to the INS's final interpretation. *See, e.g., Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Auto. Ins. Co.*, 463 U.S. 29, 57 (1983). Second, the INS's policy was adopted some 20 years after the statute was enacted, which also diminishes any deference owed to it. *See EEOC v. Arabian-American Oil Co.*, 499 U.S. 244 (1991). Third, the INS's ultimate interpretation is equivalent to a litigating position, and it is black-letter law that agency interpretations developed as litigating positions similarly warrant no deference under *Chevron*. *See* Pet. App. 40. Finally, the INS's application of its policy in this case – particularly its failure to interview Elian Gonzalez and to allow presentation of objective evidence about his risk of persecution – was arbitrary and capricious under the Administrative Procedure Act.

Respectfully submitted,

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June 26, 2000

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Briefs and Other Related Documents

United States Court of Appeals,
Eleventh Circuit.

Elian GONZALEZ, a minor, by and through Lazaro Gonzalez, as next friend, or, alternatively, as temporary legal custodian, Plaintiffs-Appellants,
v.
Janet RENO, Attorney General of the United States; Doris Meissner, Commissioner, United States Immigration and Naturalization Service; Robert Wallis, District Director, United States Immigration and Naturalization Service; United States Immigration and Naturalization Service; and United States Department of Justice, Defendants-Appellees, Juan Miguel Gonzalez, Intervenor.

No. 00-11424.

June 1, 2000.

Six-year-old alien, whose mother had died during their trip aboard small boat from Cuba to Florida, brought suit, by and through his great uncle as his next friend, alleging that Immigration and Naturalization Service (INS) and others denied him due process and violated immigration statute by dismissing his asylum applications as legally void, based on INS's conclusion that alien lacked capacity to file personally for asylum against wishes of his Cuban father. The United States District Court for the Southern District of Florida, No. 00-00206-CV-KMM, K. Michael Moore, J., 86 F.Supp.2d 1167, dismissed action. Alien appealed. The Court of Appeals, Edmondson, Circuit Judge, held that: (1) INS did not violate alien's due process rights; (2) District Court was not required to appoint guardian ad litem to represent alien's interests; (3) policies upon which INS relied in determining that alien lacked capacity to file personally for asylum were entitled to some deference; (4) INS policies under which six-year-old aliens necessarily lacked sufficient capacity to assert asylum claims on their own, and under which a six-year-old alien was required to be represented by some adult in applying for asylum, were reasonable interpretations of asylum statute; (5) policy under which ordinarily a parent, even one outside United States, and only a parent, could act for his or her six-year old child who was in this country with respect to asylum was reasonable interpretation of asylum statute; (6) INS policy under which parent's residence in communist-totalitarian state was no special circumstance, sufficient in and of itself, to justify consideration of asylum claim by parent's six-year-old child, presented by child's relative in this country, against wishes of parent, was reasonable interpretation of asylum statute; and (7) INS did not act arbitrarily or abuse its discretion in rejecting alien's applications as void.

Affirmed.

West Headnotes

[1] **Aliens** 54.3(1)
24k54.3(1) Most Cited Cases

Court of Appeals had subject-matter jurisdiction over minor alien's appeal of district court decision dismissing his action alleging that Immigration and Naturalization Service (INS) denied him due process and violated immigration statute by dismissing his asylum applications as legally void, based on its conclusion that alien lacked capacity to file personally for asylum against wishes of his father. U.S.C.A. Const.Amend. 5; Immigration and Nationality Act, § 208, 8 U.S.C.A. § 1158.

[2] **Aliens** 53.10(3)
24k53.10(3) Most Cited Cases

[2] **Constitutional Law** 274.3
92k274.3 Most Cited Cases

Immigration and Naturalization Service (INS) did not violate due process rights of six-year-old alien in dismissing his asylum applications as legally void, based on its conclusion that alien lacked capacity to file personally for asylum against wishes of his Cuban father. U.S.C.A. Const.Amend. 5.

[3] **Infants** 78(1)
211k78(1) Most Cited Cases

District court was not required to appoint guardian ad

litem to represent interests of six-year-old alien in his action alleging that Immigration and Naturalization Service (INS) violated immigration statute by dismissing his asylum applications as legally void, based on INS's conclusion that alien lacked capacity to file for asylum against wishes of his Cuban father, inasmuch as alien was ably represented in district court by his great uncle as next friend. Immigration and Nationality Act, § 208, 8 U.S.C.A. § 1158; Fed.Rules Civ.Proc.Rule 17(c), 28 U.S.C.A.

[4] Infants 82
211k82 Most Cited Cases

Court of Appeals would not remove six-year-old alien's great uncle as alien's next friend to substitute alien's father, in alien's action alleging that Immigration and Naturalization Service (INS) violated immigration statute by dismissing his asylum applications as legally void, based on INS's conclusion that alien lacked capacity to file for asylum against wishes of his Cuban father, inasmuch as great uncle, aided by seasoned lawyers, had completely and steadfastly pressed alien's claimed rights in district court and Court of Appeals. Immigration and Nationality Act, § 208, 8 U.S.C.A. § 1158; Fed.Rules Civ.Proc.Rule 17(c), 28 U.S.C.A.

[5] Aliens 53.10(3)
24k53.10(3) Most Cited Cases

In considering claim that Immigration and Naturalization Service (INS) violated immigration statute by dismissing asylum claim, Court of Appeals was required to begin with examination of scope of statute itself. Immigration and Nationality Act, § 208, 8 U.S.C.A. § 1158.

[6] Statutes 219(2)
361k219(2) Most Cited Cases

In a review of an agency's construction of statute which it administers, first is the question whether Congress has spoken directly to the precise question at issue; if the intent of Congress is clear, that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.

[7] Aliens 53.10(3)
24k53.10(3) Most Cited Cases

Six-year-old alien was eligible to apply for asylum, inasmuch as statute providing that "[a]ny alien . . . may apply for asylum" meant exactly what it said. Immigration and Nationality Act, § 208(a)(1), 8 U.S.C.A. § 1158(a)(1).

[8] Aliens 53.10(3)
24k53.10(3) Most Cited Cases

When an alien applies for asylum within the meaning of the asylum statute, the Immigration and Naturalization Service (INS), under the statute itself and INS regulations, must consider the merits of the alien's asylum claim. Immigration and Nationality Act, § 208(a)(1), 8 U.S.C.A. § 1158(a)(1); 8 C.F.R. § 208.9(a).

[9] Statutes 188
361k188 Most Cited Cases

In reading statutes, the Court of Appeals considers not only the words Congress used, but the spaces between those words.

[10] Constitutional Law 72
92k72 Most Cited Cases

[10] Statutes 219(1)
361k219(1) Most Cited Cases

Where a statute is silent on an issue, Congress has left a gap in the statutory scheme, from which springs executive discretion, and, as a matter of law, it is not for the courts, but for the executive agency charged with enforcing the statute, to choose how to fill such gaps.

[11] Constitutional Law 60
92k60 Most Cited Cases

That Congress has left a gap in a statutory scheme does not mean that Congress has done something wrong; Congress may commit something to the discretion of other branches of government.

[12] Constitutional Law 74
92k74 Most Cited Cases

When a statute is ambiguous or silent on the pertinent issue, it ordinarily is for the judicial branch to construe the statute; however, where Congress has indicated that gaps in the statutory scheme should be filled in by officers of the executive branch, then the gaps should not be filled by federal judges.

[13] Constitutional Law 74

92k74 Most Cited Cases

Where congress has committed the enforcement of a statute to a particular executive agency, Congress has sufficiently indicated its intent that statutory gaps be filled by the executive agency rather than by federal courts.

[14] Aliens 39
24k39 Most Cited Cases

The authority of the executive branch to fill gaps in statutory schemes is especially great in the context of immigration policy.

[15] Aliens 39
24k39 Most Cited Cases

The authority of the executive branch in immigration matters stems from the primacy of the President and other executive officials, such as the Immigration and Naturalization Service (INS), in matters touching upon foreign affairs.

[16] Constitutional Law 72
92k72 Most Cited Cases

Respect for the authority of the executive branch in foreign affairs is a well- established theme in our law, and the judicial respect for executive authority in matters touching upon foreign relations is even greater where the presidential power has been affirmed in an act of Congress.

[17] Statutes 219(1)
361k219(1) Most Cited Cases

The proper review by the Court of Appeals of the exercise by the executive branch of its discretion to fill gaps in statutory schemes must be very limited.

[18] Constitutional Law 72
92k72 Most Cited Cases

That the courts owe some deference to executive policy does not mean that the executive branch has unbridled discretion in creating and in implementing policy.

[19] Administrative Law and Procedure 310
15Ak310 Most Cited Cases

Executive agencies must comply with the procedural requirements imposed by statute.

[20] Administrative Law and Procedure 416.1
15Ak416.1 Most Cited Cases

Agencies must respect their own procedural rules and regulations.

[21] Administrative Law and Procedure 303.1
15Ak303.1 Most Cited Cases

The policy selected by an agency must be a reasonable one in light of the statutory scheme.

[22] Administrative Law and Procedure 760
15Ak760 Most Cited Cases

Although the courts retain the authority to check agency policymaking for procedural compliance and for arbitrariness, the courts cannot properly reexamine the wisdom of an agency-promulgated policy.

[23] Aliens 44
24k44 Most Cited Cases

Because the law, particularly the asylum statute, was silent about validity of six-year-old alien's purported asylum applications, it fell to Immigration and Naturalization Service (INS) to make discretionary policy choice with respect to that issue. Immigration and Nationality Act, § 208, 8 U.S.C.A. § 1158.

[24] Aliens 44
24k44 Most Cited Cases

Policies upon which Immigration and Naturalization Service (INS) relied in determining that six-year-old alien lacked capacity to file personally for asylum against wishes of his Cuban father were entitled to some deference in alien's action alleging that INS violated immigration statute by dismissing his asylum applications as legally void, notwithstanding that such policies were developed in course of administrative proceedings, rather than during rulemaking, and that such policies might not harmonize perfectly with earlier INS interpretative guidelines, inasmuch as policies were not after-the-fact rationalization; policies were not contradicted by any statutory provision, regulatory authority, or prior agency adjudication. Immigration and Nationality Act, § 208(a)(1), 8 U.S.C.A. § 1158(a)(1).

[25] Administrative Law and Procedure 753
15Ak753 Most Cited Cases

An after-the-fact rationalization of agency action, that is, an explanation developed for the sole purpose of defending in court the agency's actions, is usually entitled to no deference from the courts.

[26] Aliens 44
24k44 Most Cited Cases

Interpretative guidelines issued by Immigration and Naturalization Service (INS) do not have the force and effect of law.

[27] Aliens 44
24k44 Most Cited Cases

That an Immigration and Naturalization Service (INS) policy has been developed in the course of an informal adjudication, rather than during formal rulemaking, may affect the degree of deference appropriate but does render the policy altogether unworthy of deference.

[28] Aliens 44
24k44 Most Cited Cases

That an Immigration and Naturalization Service (INS) policy may not be a longstanding one affects only the degree of deference required, and does not render the policy altogether unworthy of deference.

[29] Aliens 53.10(3)
24k53.10(3) Most Cited Cases

Immigration and Naturalization Service (INS) policies under which six-year-old aliens necessarily lacked sufficient capacity to assert asylum claims on their own, and under which a six-year-old alien was required to be represented by some adult in applying for asylum, were reasonable interpretations of asylum statute. Immigration and Nationality Act, § 208(a)(1), 8 U.S.C.A. § 1158(a)(1).

[30] Aliens 53.10(3)
24k53.10(3) Most Cited Cases

The Immigration and Naturalization Service (INS) is not required, as a matter of law, to individually assess each alien minor's mental capacity to determine if they have the capacity to assert asylum claims on their own; rather, absolute line-drawing based on age is an acceptable approach. Immigration and Nationality Act, § 208(a)(1), 8 U.S.C.A. § 1158(a)(1).

[31] Aliens 54(1)
24k54(1) Most Cited Cases

Although the Immigration and Naturalization Service (INS) is not required to let six-year-old children speak for themselves about asylum, neither is the INS required to ignore the expressed statements of young children. Immigration and Nationality Act, § 208(a)(1), 8 U.S.C.A. § 1158(a)(1).

[32] Aliens 53.10(3)
24k53.10(3) Most Cited Cases

Immigration and Naturalization Service (INS) policy under which ordinarily a parent, even one outside United States, and only a parent, could act for his or her six-year old child who was in this country with respect to asylum was reasonable interpretation of asylum statute; although policy gave paramount consideration to primary role of parents in upbringing of their children, it recognized that special circumstances might exist rendering a parent an inappropriate representative for child. Immigration and Nationality Act, § 208(a)(1), 8 U.S.C.A. § 1158(a)(1).

[33] Infants 81
211k81 Most Cited Cases

Although the common practice in courts seems to be that a parent will be appointed to act as next friend for a child, a parent is not usually entitled to be next friend of his or her child as a matter of right.

[34] Parent and Child 2.5
285k2.5 Most Cited Cases
(Formerly 285k2(2))

Because the best interests of a child and the best interests of even a loving parent can clash, parental authority over children, even where the parent is not generally unfit, is not without limits.

[35] Aliens 44
24k44 Most Cited Cases

[35] Aliens 53.10(3)
24k53.10(3) Most Cited Cases

Because Congress has decided that any alien may apply for asylum, Congress has charged the

Immigration and Naturalization Service (INS), when the INS promulgates policy and fills gaps in the statutory scheme, with facilitation, not hindrance, of that legislative goal. Immigration and Nationality Act, § 208(a)(1), 8 U.S.C.A. § 1158(a)(1).

[36] **Aliens** 54.3(1)
24k54.3(1) Most Cited Cases

Considering the principles of judicial deference to executive agencies, Court of Appeals could not disturb policy of Immigration and Naturalization Service (INS) just because it might be imperfect.

[37] **Aliens** 54.3(1)
24k54.3(1) Most Cited Cases

Court of Appeals could not invalidate policy of Immigration and Naturalization Service (INS) merely because Court personally might have chosen another.

[38] **Aliens** 53.10(3)
24k53.10(3) Most Cited Cases

Immigration and Naturalization Service (INS) policy, under which parent's residence in communist-totalitarian state was no special circumstance, sufficient in and of itself, to justify consideration of asylum claim by parent's six-year-old child, presented by child's relative in this country, against wishes of parent, was reasonable interpretation of asylum statute; policy took some account of possibility of government coercion, and policy implicated foreign affairs, requiring special deference. Immigration and Nationality Act, § 208(a)(1), 8 U.S.C.A. § 1158(a)(1).

[39] **Constitutional Law** 72
92k72 Most Cited Cases

In no context is the executive branch entitled to more deference than in the context of foreign affairs.

[40] **Aliens** 54.3(3)
24k54.3(3) Most Cited Cases

Appropriate standard of review of decision of Immigration and Naturalization Service (INS) to treat asylum applications filed by six-year-old alien against wishes of his father as legally void was "arbitrary, capricious, or abuse of discretion" standard, not "facially legitimate and bona fide reason" standard. 5 U.S.C.A. § 706(2)(A); Immigration and Nationality Act, § 208(a)(1), 8 U.S.C.A. § 1158(a)(1).

[41] **Aliens** 53.10(3)
24k53.10(3) Most Cited Cases

Immigration and Naturalization Service (INS) did not act arbitrarily or abuse its discretion in rejecting as void application for asylum signed and submitted by six-year-old alien himself against his Cuban father's wishes, inasmuch as INS's per se rule prohibiting six-year-old children from personally filing asylum applications against their parents' wishes was entitled to deference. 5 U.S.C.A. § 706(2)(A); Immigration and Nationality Act, § 208(a)(1), 8 U.S.C.A. § 1158(a)(1).

[42] **Aliens** 53.10(3)
24k53.10(3) Most Cited Cases

Immigration and Naturalization Service (INS) did not act arbitrarily or abuse its discretion in rejecting as void application for asylum submitted on behalf of six-year-old alien, against wishes of alien's Cuban father, by alien's great uncle as next friend; INS was not clearly wrong in determining that father was not operating under coercion by Cuban government or that, if he was, his interests were aligned with Cuban government, and INS's determination that asylum claim probably lacked merit was not clearly inaccurate, given lack of INS or judicial decisions where person in similar circumstances established well-founded fear of persecution. 5 U.S.C.A. § 706(2)(A); Immigration and Nationality Act, § 208(a)(1), 8 U.S.C.A. § 1158(a)(1).

[43] **Aliens** 53.10(3)
24k53.10(3) Most Cited Cases

Congress largely has left the task of defining with precision the phrase "well- founded fear of persecution," found in statute defining "refugee" for asylum purposes, to the Immigration and Naturalization Service (INS). Immigration and Nationality Act, § 101(a)(42), 8 U.S.C.A. § 1101(a)(42).

[44] **Aliens** 53.10(3)
24k53.10(3) Most Cited Cases

Political conditions which affect the populace as a whole or in large part are generally insufficient to establish persecution of an asylum applicant. Immigration and Nationality Act, § 101(a)(42), 8 U.S.C.A. § 1101(a)(42).

[45] **Aliens 53.10(3)**
24k53.10(3) Most Cited Cases

The Immigration and Naturalization Service is not required to treat education and indoctrination as synonymous with persecution in asylum proceedings. Immigration and Nationality Act, § 101(a)(42), 8 U.S.C.A. § 1101(a)(42).

[46] **Aliens 53.10(3)**
24k53.10(3) Most Cited Cases

Not all exceptional treatment is "persecution" for purposes of an asylum claim. Immigration and Nationality Act, § 101(a)(42), 8 U.S.C.A. § 1101(a)(42).

[47] **Constitutional Law 70.1(1)**
92k70.1(1) Most Cited Cases

[47] **Constitutional Law 72**
92k72 Most Cited Cases

It is the duty of Congress and the executive branch, as policymakers, to exercise political will, and, although courts should not be unquestioning, they should respect the other branches' policymaking powers.

[48] **Federal Courts 1.1**
170Bk1.1 Most Cited Cases

The judicial power is a limited power, and it is the duty of the judicial branch not to exercise political will, but only to render judicial judgment under the law.

***1343** Kendall B. Coffey, Miami, FL, Barbara Lagoa, Judd J. Goldberg, Greenberg, Traurig, PA, for Plaintiffs-Appellants.

David J. Kline, Office of Immig. Litigation, Civil Division, William J. Howard, Department of Justice/OIL, Russell J.E. Verby, Department of Immigration Litigation, Edwin S. Kneedler, Washington, DC, Anne R. Schultz, Miami, FL, for Defendants-Appellees.

Mark D. Beckett, Martin N. Flics, Jeffrey Alan Tochner, Latham & Watkins, New York City, Amicus Curiae for Lawyers Committee for Human Rights, Women's Commission for Refugee Women and Children, Florida Immigrant Advocacy Center, United States Representative from the 18th, Children and Family Justice Center.

Appeal from the United States District Court for the Southern District of Florida.

***1344** Before EDMONDSON, DUBINA and WILSON, Circuit Judges.

EDMONDSON, Circuit Judge:

This case, at first sight, seems to be about little more than a child and his father. But, for this Court, the case is mainly about the separation of powers under our constitutional system of government: a statute enacted by Congress, the permissible scope of executive discretion under that statute, and the limits on judicial review of the exercise of that executive discretion.

Elian Gonzalez ("Plaintiff"), a six-year-old Cuban child, arrived in the United States alone. His father in Cuba demanded that Plaintiff be returned to Cuba. Plaintiff, however, asked to stay in the United States; and asylum applications were submitted on his behalf. The Immigration and Naturalization Service ("INS")--after, among other things, consulting with Plaintiff's father and considering Plaintiff's age--decided that Plaintiff's asylum applications were legally void and refused to consider their merit.

Plaintiff then filed this suit in federal district court, seeking on several grounds to compel the INS to consider and to determine the merit of his asylum applications. The district court dismissed Plaintiff's suit. *Gonzalez ex rel. Gonzalez v. Reno*, 86 F.Supp.2d 1167, 1194 (S.D.Fla.2000). Plaintiff appeals, [FN1] and we affirm.

FN1. Several defendant-appellees are involved in this appeal. All these defendants are part of the executive branch of our government. For the sake of simplicity, we refer to the defendants collectively as the "INS."

I.

In December 1993, Plaintiff was born in Cuba to Juan Miguel Gonzalez and Elizabeth Gonzalez. When Plaintiff was about three years old, Juan

Miguel and Elizabeth separated. Elizabeth retained custody of Plaintiff after the separation. Juan Miguel, however, continued to have regular and significant contact with his son. Plaintiff, in fact, attended school in the district where his father lived and often stayed at Juan Miguel's home.

In November 1999, Elizabeth decided to leave Cuba and to take her son to the United States. In the pre-dawn hours of 22 November, Plaintiff and Elizabeth, along with twelve other Cuban nationals, left Cuba aboard a small boat. The next day, the boat capsized in strong winds and rough seas off the coast of Florida. Eleven of the passengers, including Elizabeth, died. Plaintiff, clinging to an inner tube, endured and survived.

Two days later, Plaintiff was rescued at sea by Florida fishermen and was taken to a hospital in Miami for medical treatment. While Plaintiff was receiving medical treatment, the INS was contacted by Plaintiff's great-uncle: Miami resident Lazaro Gonzalez. INS officials decided, upon Plaintiff's release from the hospital, not to remove Plaintiff immediately to Cuba. Instead, the INS deferred Plaintiff's immigration inspection and paroled Plaintiff into Lazaro's custody and care.

Soon thereafter, Lazaro filed an application for asylum on Plaintiff's behalf with the INS. This application was followed shortly by a second application signed by Plaintiff himself. A third asylum application was filed by Lazaro on Plaintiff's behalf in January 2000, after a state court awarded temporary custody of Plaintiff to Lazaro. [FN2] The applications were prepared by a Miami lawyer.

> FN2. A Florida state court since has dismissed Lazaro's petition for custody of Plaintiff. *See In re the Matter of Lazaro Gonzalez,* No. 00- 00479-FC-28 (Fla. 11th Cir.Ct.2000).

The three applications were substantially identical in content. The applications stated that Plaintiff "is afraid to return to Cuba ." The applications claimed that Plaintiff had a well-founded fear of persecution because many members of Plaintiff's family had been persecuted by the Castro government in Cuba. In particular, ***1345** according to the applications, Plaintiff's stepfather had been imprisoned for several months because of opposition to the Cuban government. Two of Plaintiff's great-uncles also had been imprisoned for their political acts. Plaintiff's mother had also been harassed and intimidated by communist authorities in Cuba. The applications also alleged that, if Plaintiff were returned to Cuba, he would be used as a propaganda tool for the Castro government and would be subjected to involuntary indoctrination in the tenets of communism.

Plaintiff's father, however, apparently did not agree that Plaintiff should remain in the United States. Soon after Plaintiff was rescued at sea, Juan Miguel sent to Cuban officials a letter, asking for Plaintiff's return to Cuba. The Cuban government forwarded this letter to the INS.

Because of the conflicting requests about whether Plaintiff should remain in the United States, INS officials interviewed both Juan Miguel and Lazaro. An INS official, on 13 December, met with Juan Miguel at his home in Cuba. At that meeting, Juan Miguel made this comment:

> [Plaintiff], at the age of six, cannot make a decision on his own .... I'm very grateful that he received immediate medical assistance, but he should be returned to me and my family .... As for him to get asylum, I am not allowing him to stay or claim any type of petition; he should be returned immediately to me.

Juan Miguel denied that Lazaro was authorized to seek asylum for Plaintiff; Juan Miguel also refused to consent to any lawyer representing Plaintiff. Juan Miguel assured the INS official that his desire for Plaintiff's return to Cuba was genuine and was not coerced by the Cuban government.

One week later, INS officials in Miami met with Lazaro, Marisleysis Gonzalez (Plaintiff's cousin), and several lawyers representing Plaintiff. At that meeting, the parties discussed Juan Miguel's request. Lazaro contended that Juan Miguel's request for Plaintiff's return to Cuba was coerced by the Cuban government. [FN3] INS officials also inquired about the legal basis for Plaintiff's asylum applications; Lazaro replied this way: "During the time he's been here, everything he has, if he goes back, it's all changed. His activities here are different from those that he would have over there." Plaintiff's lawyers told the INS again of the persecution of Plaintiff's relatives in Cuba because of their political opposition to the Castro government.

> FN3. As proof of this contention, Lazaro told INS officials that, before Plaintiff was discovered at sea, Juan Miguel telephoned

> Lazaro and asked Lazaro to take care of Plaintiff if Plaintiff made it to the United States. Lazaro stated that, after Plaintiff's rescue, Juan Miguel's demeanor had changed noticeably and that, according to Juan Miguel's neighbors in Cuba, Juan Miguel was "[g]etting extra protection" from Cuban authorities.

On 31 December, an INS official again met with Juan Miguel in Cuba to investigate further Lazaro's claim that Juan Miguel's request had been coerced. [FN4] At that meeting, Juan Miguel repeated that he desired Plaintiff's return to Cuba. Juan Miguel also reasserted that he was under no undue influence from any individual or government. The INS official--taking Juan Miguel's demeanor into account--determined that Juan Miguel, in fact, genuinely desired his son's return to Cuba.

> FN4. To reduce third parties' opportunities to eavesdrop upon the meeting, this interview was held at the residence of a United Nations official near Havana. Also, some of the interview was conducted in writing to prevent eavesdropping.

The INS Commissioner, on 5 January 2000, rejected Plaintiff's asylum applications as legally void. The Commissioner--concluding that six-year-old children lack the capacity to file personally for asylum against the wishes of their parents--determined that Plaintiff could not file his own asylum applications. Instead, according to ***1346** the Commissioner, Plaintiff needed an adult representative to file for asylum on his behalf. The Commissioner--citing the custom that parents generally speak for their children and finding that no circumstance in this case warranted a departure from that custom--concluded that the asylum applications submitted by Plaintiff and Lazaro were legally void and required no further consideration. Plaintiff asked the Attorney General to overrule the Commissioner's decision; the Attorney General declined to do so.

Plaintiff then, by and through Lazaro as his next friend, filed a complaint in federal district court seeking to compel the INS to consider the merits of his asylum applications. In his complaint, Plaintiff alleged, among other things, that the refusal to consider his applications violated 8 U.S.C. § 1158 and the Fifth Amendment Due Process Clause. The district court rejected both claims and dismissed Plaintiff's complaint. Plaintiff appeals. [FN5]

> FN5. During the pendency of this appeal, the INS revoked Plaintiff's parole and removed Plaintiff from Lazaro's custody. The INS then paroled Plaintiff into the custody of Juan Miguel, who had traveled to the United States to reclaim his son. After Juan Miguel came to the United States, we permitted Juan Miguel to intervene in this case.
>
> To ensure that Plaintiff would not be returned to Cuba, depriving Plaintiff of a day in court and depriving this Court of jurisdiction over Plaintiff's appeal, we enjoined Plaintiff's removal from the United States pending appeal. Considering that we affirm the judgment of the district court, the injunction will dissolve (without a further order) when the Court's mandate is issued.

II.

[1][2][3][4] On appeal, Plaintiff argues that the district court erred (1) by dismissing Plaintiff's claim under 8 U.S.C. § 1158, (2) by dismissing Plaintiff's due process claim, and (3) by failing to appoint a guardian ad litem to represent Plaintiff's interests. [FN6] We have reviewed carefully the record and the briefs filed by all parties. We conclude that Plaintiff's due process claim lacks merit and does not warrant extended discussion. *See Jean v. Nelson*, 727 F.2d 957, 968 (11th Cir.1984) (en banc) ("Aliens seeking admission to the United States ... have no constitutional rights with regard to their applications ...."), *aff'd on other grounds*, 472 U.S. 846, 105 S.Ct. 2992, 86 L.Ed.2d 664 (1985). Plaintiff's guardian ad litem claim, because Plaintiff was ably represented in district court by his next friend, also lacks merit and similarly does not warrant extended discussion. *See* Fed.R.Civ.P. 17(c) (providing for appointment of guardian ad litem in discretion of district court); *see also Roberts v. Ohio Cas. Ins. Co.*, 256 F.2d 35, 39 (5th Cir.1958) (noting that guardian ad litem may be unnecessary where child already represented adequately by next friend). We, accordingly, affirm the district court's dismissal of the constitutional claim and the district court's refusal to appoint a guardian ad litem. [FN7] We now turn, however, to a more difficult question: the district court's dismissal of Plaintiff's statutory claim.

FN6. The INS contended in district court that the district court lacked subject-matter jurisdiction over Plaintiff's suit. The district court, however, rejected this argument and concluded that subject-matter jurisdiction did exist. The INS has not renewed its jurisdictional contention on appeal.
We, however, are mindful of our own jurisdictional limits. So, we have considered our subject-matter jurisdiction over this appeal. We conclude that this Court does have subject-matter jurisdiction over Plaintiff's appeal.

FN7. Also before this Court is a recently filed motion of Intervenor, Juan Miguel Gonzalez, to remove Lazaro Gonzalez as Plaintiff's next friend and to substitute Plaintiff's father as next friend. Notwithstanding that much has happened since Lazaro brought this suit as Plaintiff's next friend, Lazaro (aided by a troop of seasoned lawyers) has completely and steadfastly pressed Plaintiff's claimed rights in the district court and in this Court. We see no powerful reason to make a change at this point. We, therefore, deny Intervenor's motion to remove Lazaro and to substitute Intervenor as next friend for the purposes of this litigation.

III.

Plaintiff contends that the district court erred in rejecting his statutory claim ***1347** based on 8 U.S.C. § 1158. Section 1158 provides that "[a]ny alien ... may apply for asylum." 8 U.S.C. § 1158(a)(1). Plaintiff says that, because he is "[a]ny alien," he may apply for asylum. Plaintiff insists that, by the applications signed and submitted by himself and Lazaro, he, in fact, did apply for asylum within the meaning of section 1158. In addition, Plaintiff argues that the summary rejection by the INS of his applications as invalid violated the intent of Congress as set out in the statute.

The INS responds that section 1158 is silent about the validity of asylum applications filed on behalf of a six-year-old child, by the child himself and a non-parental relative, against the wishes of the child's parent. The INS argues that, because the statute does not spell out how a young child files for asylum, the INS was free to adopt a policy requiring, in these circumstances, that any asylum claim on Plaintiff's behalf be filed by Plaintiff's father. As such, the INS urges that the rejection of Plaintiff's purported asylum applications as legally void was lawful. According to the INS, because the applications had no legal effect, Plaintiff never applied at all within the meaning of the statute.

Guided by well-established principles of statutory construction, judicial restraint, and deference to executive agencies, we accept that the rejection by the INS of Plaintiff's applications as invalid did not violate section 1158.

A.

[5][6] Our consideration of Plaintiff's statutory claim must begin with an examination of the scope of the statute itself. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 2781, 81 L.Ed.2d 694 (1984); *see also INS v. Aguirre-Aguirre*, 526 U.S. 415, 119 S.Ct. 1439, 1445, 143 L.Ed.2d 590 (1999) (instructing that analysis set out in *Chevron* is applicable to immigration statutes); *Jaramillo v. INS*, 1 F.3d 1149, 1153 (11th Cir.1993) (en banc) (same). In *Chevron*, the Supreme Court explained: "First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." 104 S.Ct. at 2781. We turn, therefore, to the plain language of the statute.

[7] Section 1158 provides, in pertinent part:

> *Any alien* who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien's status, *may apply for asylum* in accordance with this section or, where applicable, section 1225(b) of this title.

8 U.S.C. § 1158(a)(1) (emphasis added). Section 1158 is neither vague nor ambiguous. The statute means exactly what it says: "[a]ny alien ... may apply for asylum." *See Pennsylvania Dep't of Corrections v. Yeskey*, 524 U.S. 206, 118 S.Ct. 1952, 1956, 141 L.Ed.2d 215 (1998) (observing that statute is not ambiguous just because it is broad and that statute may apply to circumstances not envisioned by Congress). That "[a]ny alien" includes Plaintiff

seems apparent. [FN8] *See* 8 U.S.C. § 1101(a)(3) (defining "alien" as "any person not a citizen or national of the United States"); *see also Merritt v. Dillard Paper Co.*, 120 F.3d 1181, 1186 (11th Cir.1997) (noting that word "any" has "an expansive meaning"). Section 1158, therefore, plainly would permit Plaintiff to apply for asylum.

FN8. The INS concedes that Plaintiff is eligible to apply for asylum pursuant to section 1158.

[8] When an alien does apply for asylum within the meaning of the statute, the INS--according to the statute itself and ***1348** INS regulations--must consider the merits of the alien's asylum claim. *See* 8 U.S.C. § 1158(d)(1) ("The Attorney General *shall* establish a procedure for the consideration of asylum applications filed under subsection (a) of this section.") (emphasis added); 8 C.F.R. § 208.9(a) (requiring INS to "adjudicate the claim of each asylum applicant whose application is complete"). The important legal question in this case, therefore, is not whether Plaintiff *may* apply for asylum; that a six-year-old is eligible to apply for asylum is clear. The ultimate inquiry, instead, is whether a six- year-old child *has* applied for asylum within the meaning of the statute when he, or a non-parental relative on his behalf, signs and submits a purported application against the express wishes of the child's parent.

[9] About this question, more important than what Congress said in section 1158 is what Congress left unsaid. In reading statutes, we consider not only the words Congress used, but the spaces between those words. Section 1158 is silent on the precise question at issue in this case. Although section 1158 gives "[a]ny alien" the right to "apply for asylum," the statute does not command how an alien applies for asylum. The statute includes no definition of the term "apply." The statute does not set out procedures for the proper filing of an asylum application. Furthermore, the statute does not identify the necessary contents of a valid asylum application. In short, although the statute requires the existence of some application procedure so that aliens may apply for asylum, section 1158 says nothing about the particulars of that procedure. *See* 8 U.S.C. § 1158.

B.

[10][11][12][13][14][15][16][17] Because the statute is silent on the issue, Congress has left a gap in the statutory scheme. [FN9] From that gap springs executive discretion. [FN10] As a matter of law, it is not for the courts, but for the executive agency charged with enforcing the statute (here, the INS), to choose how to ***1349** fill such gaps. [FN11] *See Chevron*, 104 S.Ct. at 2793. Moreover, the authority of the executive branch to fill gaps is especially great in the context of immigration policy. [FN12] *See Aguirre-Aguirre*, 119 S.Ct. at 1445. Our proper review of the exercise by the executive branch of its discretion to fill gaps, therefore, must be very limited. *See Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 111 S.Ct. 2524, 2534, 115 L.Ed.2d 604 (1991).

FN9. That Congress left a gap in the statutory scheme does not mean that Congress has done something wrong. Whether Congress could or should legislate with sufficient detail to address every conceivable set of circumstances that might arise is highly debatable. *See generally Loving v. United States*, 517 U.S. 748, 116 S.Ct. 1737, 1744, 135 L.Ed.2d 36 (1996) ("To burden Congress with all federal rulemaking would divert that branch from more pressing issues, and defeat the Framers' design of a workable National Government."). Congress may properly commit something to the discretion of the other branches of government.

FN10. This case is about the *discretion* of the executive branch to make policy, not about ministerial enforcement of the "law" by executive officials. It has been suggested that the precise policy adopted by the INS in this case was required by "law." That characterization of this case, however, is inaccurate. As we have explained, when the INS made its pertinent policy, the preexisting law said nothing about the validity of Plaintiff's asylum applications. Instead, Congress just provided that "[a]ny alien" may apply for asylum and left the details of the application process to the discretion of the INS. *See Mesa Verde Constr. Co. v. Northern Cal. Dist. Council of Laborers*, 861 F.2d 1124, 1140 (9th Cir.1988) (en banc) (Hug, J., dissenting) (explaining that sometimes "Congress enacts quite general provisions, with the specifics to be filled in by the agency"). The INS, in

its discretion, decided to require six-year-old children--who arrive unaccompanied in the United States from Cuba--to act in immigration matters only through (absent special circumstances) their parents in Cuba. The INS could have shaped its policy in a different fashion, perhaps allowing relatives (for example, those within the fourth degree of relationship) in the United States to act for such children. But it did not, and we cannot. That choice was the sole prerogative of the executive branch. According to the principles set out in *Chevron*, we can only disturb that choice if it is unreasonable. *See* *Chevron*, 104 S.Ct. at 2793; *see also* *Mistretta v. United States*, 488 U.S. 361, 109 S.Ct. 647, 678, 102 L.Ed.2d 714 (1989) (Scalia, J., dissenting) (explaining discretionary authority of executive branch in administering statutory scheme).

FN11. When a statute is ambiguous or silent on the pertinent issue, it ordinarily is for the judicial branch to construe the statute. *See generally* *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177, 2 L.Ed. 60 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."). But the ordinary rule does not always apply: where Congress has indicated that gaps in the statutory scheme should be filled in by officers of the executive branch (a political branch accountable to the people and fit for making policy judgments), then the gaps should not be filled in by federal judges. Where Congress has committed the enforcement of a statute to a particular executive agency, Congress has sufficiently indicated its intent that statutory gaps be filled by the executive agency. And the Supreme Court has directed that, for such statutes, if "Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute .... Rather, if the statute is silent ... the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron*, 104 S.Ct. at 2782.

FN12. The authority of the executive branch in immigration matters stems from the primacy of the President and other executive officials (such as the INS) in matters touching upon foreign affairs. *See* *Aguirre-Aguirre*, 119 S.Ct. at 1445. Respect for the authority of the executive branch in foreign affairs is a well-established theme in our law. *See* *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 57 S.Ct. 216, 221, 81 L.Ed. 255 (1936) (recognizing "the very delicate, plenary and exclusive power of the President as the sole organ of the federal government in the field of international relations"). And the judicial respect for executive authority in matters touching upon foreign relations is even greater where the presidential power has been affirmed in an act of Congress. *See* *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 72 S.Ct. 863, 870, 96 L.Ed. 1153 (1952) (Jackson, J., concurring) ("When the President acts pursuant to an express or implied authorization of Congress, his authority is at its maximum, for it includes all that he possesses in his own right plus all that Congress can delegate."); *see also* *United States v. Frade*, 709 F.2d 1387, 1402 (11th Cir.1983) (same).

[18][19][20][21][22] That the courts owe some deference to executive policy does not mean that the executive branch has unbridled discretion in creating and in implementing policy. Executive agencies must comply with the procedural requirements imposed by statute. *See* *Morton v. Ruiz*, 415 U.S. 199, 94 S.Ct. 1055, 1073, 39 L.Ed.2d 270 (1974). Agencies must respect their own procedural rules and regulations. *See* *id.* at 1074; *see also* *Hall v. Schweiker*, 660 F.2d 116, 119 (5th Cir.1981). And the policy selected by the agency must be a reasonable one in the light of the statutory scheme. *Chevron*, 104 S.Ct. at 2782. To this end, the courts retain the authority to check agency policymaking for procedural compliance and for arbitrariness. But the courts cannot properly reexamine the wisdom of an agency-promulgated policy . [FN13] *See* *SEC v. Chenery Corp.*, 332 U.S. 194, 67 S.Ct. 1575, 1582, 91 L.Ed. 1995 (1947) ("The wisdom of the principle adopted is none of our concern.").

FN13. The Supreme Court has instructed us with these words:
[F]ederal judges--who have no constituency-

> -have a duty to respect legitimate policy choices made by those who do. The responsibilities for assessing the wisdom of such policy choices and resolving the struggle between competing views of the public interest are not judicial ones: "Our Constitution vests such responsibilities in the political branches."
> *Chevron*, 104 S.Ct. at 2793 (citation omitted).

[23] In this case, because the law--particularly section 1158--is silent about the validity of Plaintiff's purported asylum applications, it fell to the INS to make a discretionary policy choice. The INS, exercising its gap-filling discretion, determined these things: (1) six-year-old children lack the capacity to sign and to ***1350** submit personally an application for asylum; (2) instead, six-year-old children must be represented by an adult in immigration matters; (3) absent special circumstances, the only proper adult to represent a six-year-old child is the child's parent, even when the parent is not in this country; and, (4) that the parent lives in a communist- totalitarian state (such as Cuba), [FN14] in and of itself, does not constitute a special circumstance requiring the selection of a non-parental representative. Our duty is to decide whether this policy might be a reasonable one in the light of the statutory scheme. *See Chevron*, 104 S.Ct. at 2782.

> FN14. *See* U.S. Dept. of State, 1999 Country Reports on Human Rights Practices: Cuba (2000) (noting that "Cuba is a totalitarian state," where Communist Party "exercises control over all aspects of Cuban life").

[24][25] But we first address Plaintiff's contention that the "policy" relied on by the INS in this case is really no policy at all but is, in reality, just a litigating position. An after-the-fact rationalization of agency action--an explanation developed for the sole purpose of defending in court the agency's acts--is usually entitled to no deference from the courts. *Bradberry v. Director, Office of Workers' Comp. Programs*, 117 F.3d 1361, 1366 (11th Cir.1997). But we are unable to say that the position of the INS here is just an after-the-fact rationalization.

[26][27][28] The INS policy toward Plaintiff's application was not created by INS lawyers during litigation, but instead was developed in the course of administrative proceedings before litigation commenced. [FN15] *Cf. IAL Aircraft Holding, Inc. v. FAA*, 206 F.3d 1042, 1046 & n. 5 (11th Cir.2000). While the policy announced by the INS may not harmonize perfectly with earlier INS interpretative guidelines (which are not law), [FN16] the parties have cited, and we have found, no statutory provision, no regulatory authority, and no prior agency adjudication that "flatly contradicts" the policy. *Cf. General Elec. Co. v. Gilbert*, 429 U.S. 125, 97 S.Ct. 401, 411, 50 L.Ed.2d 343 (1976); *see also Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 103 S.Ct. 2856, 2866, 77 L.Ed.2d 443 (1983) (noting that agencies have latitude to "adapt their rules and policies to the demands of changing circumstances"). That the INS policy was developed in the course of an informal adjudication, rather than during formal rulemaking, may affect the degree of deference appropriate but does not render the policy altogether unworthy of deference. *See Chenery*, 67 S.Ct. at 1580; *see also Cook v. Wiley*, 208 F.3d 1314, 1319-20 (11th Cir.2000) (explaining that executive policies not "subjected to the heightened scrutiny of [formal] rulemaking" are nonetheless entitled to "some deference"); *Bigby v. INS*, 21 F.3d 1059, 1063-64 (11th Cir.1994) (finding *Chevron* deference appropriate even though agency policy had not been adopted as regulation); *U.S. Mosaic Tile Co. v. NLRB*, 935 F.2d 1249, 1255 n. 6 (11th Cir.1991) ("Although the agency action in *Chevron* involved a legislative regulation, the deference standards set forth in that case are now applied to most agency actions, including administrative adjudications ...."). And that the INS policy may not be a longstanding one likewise affects only the degree of deference required. [FN17] ***1351** *See Chenery*, 67 S.Ct. at 1580. The INS policy, therefore, is entitled to, at least, some deference under *Chevron;* and that deference, when we take account of the implications of the policy for foreign affairs, becomes considerable.

> FN15. The INS policy on unaccompanied six-year-old children purporting to file for asylum against their parents' wishes was set out in these writings: (1) a memorandum, dated 3 January 2000, from the INS General Counsel to the INS Commissioner; (2) two letters, dated 5 January, from an INS district director to Plaintiff's lawyers and Lazaro, letters explaining the decision of the INS Commissioner; and (3) a letter, dated 12 January, from the Attorney General to

Plaintiff's lawyers and Lazaro.

FN16. The INS Guidelines "do not have the force and effect of law." *Haitian Refugee Ctr., Inc. v. Baker*, 953 F.2d 1498, 1511 (11th Cir.1992).

FN17. The INS claims that the approach taken in Plaintiff's case is the INS's longstanding position on young, unaccompanied aliens. The INS, however, points to no evidence in the record showing that the INS, in the past, has taken this approach. But, even assuming that Plaintiff's case triggered the making of this policy to fit cases like Plaintiff's peculiar circumstances, deference to the INS policy would still be due if the policy is a reasonable one. *See Chenery*, 67 S.Ct. at 1580 ("[P]roblems may arise in a case which the administrative agency could not reasonably foresee, problems which must be solved despite the absence of a relevant general rule.").

[29][30][31] We accept that the INS policy at issue here comes within the range of reasonable choices. First, we cannot say that the foundation of the policy--the INS determination that six-year-old children necessarily lack sufficient capacity to assert, on their own, an asylum claim-- is unreasonable. [FN18] *See Polovchak v. Meese*, 774 F.2d 731, 736-37 (7th Cir.1985) (presuming that twelve-year-old child was "near the lower end of an age range in which a minor may be mature enough to assert" an asylum claim against the wishes of his parents). Because six-year-old children must have some means of applying for asylum, *see* 8 U.S.C. § 1158(a)(1), and because the INS has decided that the children cannot apply personally, the next element of the INS policy--that a six-year-old child must be represented by some adult in applying for asylum--necessarily is reasonable.

FN18. In other words, we do not think that the INS, as a matter of law, must individually assess each child's mental capacity; we cannot say that looking at capacity instead of age for young children is required. Instead, we recognize that absolute line drawing--although necessarily sacrificing accuracy and flexibility for certainty and efficiency--is an acceptable approach. *See Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 96 S.Ct. 2562, 2567-68, 49 L.Ed.2d 520 (1976). And, as long as the approach taken by the INS is a reasonable one, we need not decide what the best approach would be.

We, however, do not mean to suggest that the course taken by the INS is the only permissible approach. Although the INS is not required to let six- year-old children speak for themselves about asylum, neither is the INS required to ignore the expressed statements of young children. Even young children can be capable of having an accurate impression of the facts about which they might speak. To obtain asylum, we doubt that it is essential for a child to be able to debate the merits of Marxism-Leninism against the merits of Western-style democracy. Some reasonable people could conclude that it should be sufficient for a child to be able to speak about his fears and to recount the facts that support his fears about returning to another country. Not infrequently, the law does permit six-year-old children (and even younger children) to speak and, in fact, does give their words great effect. *See, e.g., Pocatello v. United States*, 394 F.2d 115, 116-17 (9th Cir.1968) (affirming district court's admission of five-year-old's testimony); *Miller v. State*, 391 So.2d 1102, 1106 (Ala.Crim.App.1980) (affirming decision of trial court to permit four-year- old to testify); *Baker v. State*, 674 So.2d 199, 200 (Fla.Dist.Ct.App.1996) (affirming trial court decision admitting testimony and statements of six-year-old victim).

[32][33][34] The INS determination that ordinarily a parent (even one outside of this country) [FN19]--and, more important, *only* a parent--can act for his six-year-old child (who is in this country) in immigration matters also comes within the range of reasonable choices. In making that determination, INS officials seem to have taken account of the relevant, competing policy interests: the interest of a child in asserting ***1352** a non-frivolous asylum claim; the interest of a parent in raising his child as he sees fit; and the interest of the public in the prompt but fair disposition of asylum claims. The INS policy--by presuming that the parent is the sole, appropriate representative for a child--gives

paramount consideration to the primary role of parents in the upbringing of their children. But we cannot conclude that the policy's stress on the parent-child relationship is unreasonable. [FN20] *See Ginsberg v. New York*, 390 U.S. 629, 88 S.Ct. 1274, 1280, 20 L.Ed.2d 195 (1968) ("[T]he parents' claim to authority in their own household to direct the rearing of their children is basic in the structure of our society.").

FN19. We conclude that the approach taken by the INS about out-of- the-country representatives was a reasonable one. Other approaches might have been available. The INS might have selected a policy giving more weight to the fact that the parent of a child in the United States remained outside of this country's jurisdiction. For example, maybe the INS could have required that the adult representative--purporting to act in immigration matters (either by applying for asylum on behalf of the child or in effect vetoing an application for asylum) for a child in this country--be present in this country himself at the pertinent time. *See, e.g., Cozine v. Bonnick*, 245 S.W.2d 935, 937 (Ky.1952) (requiring that next friend, purporting to represent child in court, be resident of state). But what else might have been done is not decisive for us.

FN20. We do not suggest that recognizing the parent-child relationship to the exclusion of other familial relationships is the only reasonable approach. The parent-child relationship is obviously an important one. *See Wisconsin v. Yoder*, 406 U.S. 205, 92 S.Ct. 1526, 1541-42, 32 L.Ed.2d 15 (1972); *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S.Ct. 571, 573, 69 L.Ed. 1070 (1925); *see also In re Custody of Smith*, 137 Wash.2d 1, 969 P.2d 21, 27-28 (Wash.1998), *cert. granted sub nom. Troxel v. Granville*, 527 U.S. 1069, 120 S.Ct. 11, 144 L.Ed.2d 842 (1999). Still, although the common practice in the courts of this country seems to be that a parent will be appointed to act as next friend for a child, a parent is not usually entitled to be the next friend of his child as a matter of absolute right. *See Fong Sik Leung v. Dulles*, 226 F.2d 74, 82 (9th Cir.1955) ("[No] parent [ ] may claim to be a guardian ad litem of his minor child as a matter of right."). Especially because the best interests of a child and the best interests of even a loving parent can clash, parental authority over children--even where the parent is not generally "unfit"--is not without limits in this country. *See, e.g., In the Matter of Sampson*, 37 A.D.2d 668, 323 N.Y.S.2d 253, 255 (N.Y.App.Div.1971) (affirming order requiring disfigured child to undergo risky cosmetic surgery against genuine wishes of child's only parent: the state contended surgery would have "a beneficial effect" upon child); *Crommelin-Monnier v. Monnier*, 638 So.2d 912, 916 (Ala.Civ.App.1994) (requiring appointment of guardian ad litem where custodial parent sought to remove child to foreign country). In addition, the law in the United States frequently treats more distant familial relationships as important. *See, e.g.*, Kan. Stat. Ann. § 38-1541 (permitting any person related within the fourth degree to child to move to intervene in "child in need of care" proceedings); Ala.Code § 12-16- 150(4) (allowing challenge for cause where potential juror is related within ninth degree to party); O.C.G.A. § 15-12-135(a) (disqualifying persons related within the sixth degree to interested parties from jury service).

Critically important, the INS policy does not neglect completely the independent and separate interest that a child may have, apart from his parents, in applying for asylum. *See Polovchak*, 774 F.2d at 736-37. Instead, according to the INS policy, special circumstances may exist that render a parent an inappropriate representative for the child. [FN21] Where such circumstances do exist, the INS policy appears to permit other persons, besides a parent, to speak for the child in immigration matters. So, to some extent, the policy does protect a child's own right to apply for asylum under section 1158 despite the contrary wishes of his parents.

FN21. Under the INS policy, a substantial conflict of interest between the parent and the child may require or allow another adult to speak for the child on immigration matters. In considering whether a substantial conflict of interest exists, the INS considers the potential merits of a child's asylum claim. If the child would have an

> exceedingly strong case for asylum, the parent's unwillingness to seek asylum on that child's behalf may indicate, under the INS policy, that the parent is not representing adequately the child's interests.

[35][36][37] We are not untroubled by the degree of obedience that the INS policy appears to give to the wishes of parents, especially parents who are outside this country's jurisdiction. Because Congress has decided that "[a]ny alien" (including six-year-old children) may apply for asylum, 8 U.S.C. § 1158(a)(1), Congress has charged the INS--when it promulgates policy and fills gaps in the statutory scheme--with facilitation, not hindrance, of that legislative goal. *See Shoemaker v. Bowen*, 853 F.2d 858, 861 (11th Cir.1988) (noting that *Chevron* does not provide agency with license to "frustrate[ ] the underlying congressional policy"). We recognize***1353** that, in some instances, the INS policy of deferring to parents--especially those residing outside of this country--might hinder some six-year-olds with non-frivolous asylum claims and prevent them from invoking their statutory right to seek asylum. But, considering the well-established principles of judicial deference to executive agencies, we cannot disturb the INS policy in this case just because it might be imperfect. *See Industrial Union Dept., AFL-CIO v. American Petroleum Inst.*, 448 U.S. 607, 100 S.Ct. 2844, 2875, 65 L.Ed.2d 1010 (1980) (Burger, C.J., concurring) (noting that agency policy may be valid although policy does not perfectly accomplish legislative goals). And we cannot invalidate the policy--one with international-relations implications--selected by the INS merely because we personally might have chosen another. *See Chevron*, 104 S.Ct. at 2793; *see also Jaramillo*, 1 F.3d at 1152-53. Because we cannot say that this element of the INS policy-- that, ordinarily, a parent, and only a parent, can act for a six-year-old child in immigration matters--is unreasonable, we defer to the INS policy.

[38] The final aspect of the INS policy also worries us some. According to the INS policy, that a parent lives in a communist-totalitarian state is no special circumstance, sufficient in and of itself, to justify the consideration of a six-year-old child's asylum claim (presented by a relative in this country) against the wishes of the non-resident parent. We acknowledge, as a widely-accepted truth, that Cuba does violate human rights and fundamental freedoms and does not guarantee the rule of law to people living in Cuba. [FN22] *See generally* U.S. Dept. of State, 1999 Country Reports on Human Rights Practices: Cuba (2000) ("[The Cuban Government] continue[s] systematically to violate fundamental civil and political rights of its citizens."). Persons living in such a totalitarian state may be unable to assert freely their own legal rights, much less the legal rights of others. Moreover, some reasonable people might say that a child in the United States inherently has a substantial conflict of interest with a parent residing in a totalitarian state when that parent--even when he is not coerced--demands that the child leave this country to return to a country with little respect for human rights and basic freedoms.

> FN22. According to the United States Department of State, the human rights record of the Cuban government is "poor." Cuban citizens who oppose or criticize the government routinely are "harass[ed], threaten[ed], arbitrarily arrest[ed], detain[ed], imprison[ed], and defame[d]." Cuba regularly denies citizens "the freedoms of speech, press, assembly, and association," and restricts the free exercise of religion. The Cuban constitution provides that "legally recognized civil liberties can be denied to anyone who actively opposes the 'decision of the Cuban people to build socialism.' " *See* U.S. Dept. of State, 1999 Country Reports on Human Rights Practices: Cuba (2000); *see also* UNHCHR Res.2000/25, U.N. Comm. on Human Rights, 56th Sess., U.N. Doc. E/CN.4/2000/L.11 (2000) (expressing concern about "the continued violation of human rights and fundamental freedoms in Cuba").

[39] Nonetheless, we cannot properly conclude that the INS policy is totally unreasonable in this respect. The INS policy does take some account of the possibility of government coercion: where special circumstances--such as definite coercion directed at an individual parent--exist, a non-parental representative may be necessary to speak for the child. In addition and more important, in no context is the executive branch entitled to more deference than in the context of foreign affairs. *See generally United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 57 S.Ct. 216, 221, 81 L.Ed. 255 (1936). This aspect of the INS policy seems to implicate the conduct of foreign affairs more than any other. Something even close to a per se rule-- that, for

immigration purposes, no parent living in a totalitarian state has sufficient liberty to represent and to serve the true, best interests of his own child in the United ***1354** States--likely would have significant consequences for the President's conduct of our Nation's international affairs: such a rule would focus not on the qualities of the particular parent, but on the qualities of the government of the parent's country. As we understand the legal precedents, they, in effect, direct that a court of law defer especially to this international-relations aspect of the INS policy.

We are obliged to accept that the INS policy, on its face, does not contradict and does not violate section 1158; although section 1158 does not require the approach that the INS has chosen to take.

C.

[40] We now examine the INS's application of its facially reasonable policy to Plaintiff in this case. Although based on a policy permissible under *Chevron,* if the ultimate decision of the INS--to treat Plaintiff's asylum applications as invalid--was "arbitrary, capricious, [or] an abuse of discretion," the decision is unlawful. [FN23] *See* 5 U.S.C. § 706(2)(A); *see also INS v. Yueh-Shaio-Yang,* 519 U.S. 26, 117 S.Ct. 350, 353, 136 L.Ed.2d 288 (1996); *Citizens to Preserve Overton Park, Inc. v. Volpe,* 401 U.S. 402, 91 S.Ct. 814, 822, 28 L.Ed.2d 136 (1971). But whatever we personally might think about the decisions made by the Government, we cannot properly conclude that the INS acted arbitrarily or abused its discretion here.

FN23. The INS asks us to apply the "facially legitimate and bona fide reason" standard of review set out in *Kleindienst v. Mandel,* 408 U.S. 753, 92 S.Ct. 2576, 2585, 33 L.Ed.2d 683 (1972), instead of the more stringent "arbitrary, capricious, or an abuse of discretion" standard. We think that the *Kleindienst* standard is not the correct standard to apply in this case. But we do note that, even if the *Kleindienst* standard were applied, the result in this case would remain the same.

[41] The application signed and submitted by Plaintiff himself, insofar as the INS has decided that six-year-old children cannot file for asylum themselves, necessarily was a nullity under the INS policy. As we have explained, the INS's per se rule--prohibiting six-year-old children from personally filing asylum applications against their parents' wishes--is entitled to deference under the law. The INS, therefore, did not act arbitrarily or abuse its discretion in rejecting Plaintiff's own purported asylum application as void.

[42] Plaintiff contends that, even if the INS policy is facially reasonable under *Chevron,* the INS decision to reject the applications submitted by Lazaro was arbitrary. Plaintiff asserts that two special circumstances--the alleged coercion of Juan Miguel by the Cuban government and the objective basis of Plaintiff's asylum claim--bear negatively upon Juan Miguel's fitness to represent Plaintiff in immigration matters. The INS, according to Plaintiff, was therefore required to recognize some other adult representative--namely, Lazaro--to act on Plaintiff's behalf. We, however, conclude that the INS adequately considered these circumstances in reaching its ultimate decision.

The INS first determined that Juan Miguel, in fact, was not operating under coercion from the Cuban government or that, even if he was, his honest and sincere desires were aligned with those of the Cuban government. That determination was not clearly wrong and was no abuse of discretion. An INS official, on two occasions, interviewed Juan Miguel in person in Cuba. Aware of the possibility that Juan Miguel might be under some kind of coercion, the INS official took steps to ensure that Juan Miguel could express freely his genuine wishes about Plaintiff's asylum claim. The INS official, after meeting with Juan Miguel face-to-face, concluded--based upon her observations of his demeanor--that Juan Miguel's statement was not the result of duress or coercion. We, therefore, cannot say that the INS's rejection of Plaintiff's contention about coercion was arbitrary.

***1355** The INS also preliminarily assessed the objective basis of Plaintiff's asylum claim and concluded that his claim for asylum probably lacked merit. [FN24] Again, we cannot conclude that the INS's determination was arbitrary or an abuse of discretion. In making this assessment, the INS considered the information contained in the asylum applications and information provided to the INS by Plaintiff's lawyers. In addition, the INS interviewed Lazaro and inquired about the basis for Plaintiff's asylum claim. [FN25]

FN24. We do not decide, as the INS

advocates, that this summary and preliminary assessment of the merits of Plaintiff's asylum claim was a "consideration" of Plaintiff's purported asylum application within the meaning of the statute. But we do accept that this rough look at the potential merits was a legitimate part of deciding whether Plaintiff's father had a substantial conflict of interest with Plaintiff about asylum that would disqualify the father from representing Plaintiff.

FN25. That the INS, in making a preliminary assessment of the strength of Plaintiff's asylum claim, never interviewed Plaintiff has worried us. But the INS did speak with persons representing Plaintiff--Lazaro, Marisleysis, and Plaintiff's lawyers--on more than one occasion about the nature of his asylum claim.

The essence of Plaintiff's asylum claim was that, if he is returned to Cuba: (1) he will not enjoy the freedom that he has in the United States; (2) he might be forced to undergo "re-education" and indoctrination in communist theory; and (3) he might be used by the Cuban government for propaganda purposes. No one should doubt that, if Plaintiff returns to Cuba, he will be without the degree of liberty that people enjoy in the United States. Also, we admit that re-education, communist indoctrination, and political manipulation of Plaintiff for propaganda purposes, upon a return to Cuba, are not beyond the realm of possibility.

[43] Nonetheless, we cannot say that the INS's assessment of Plaintiff's asylum claim--that it probably lacked merit--was arbitrary. To make a meritorious asylum claim, an asylum applicant must show that he has a "well-founded fear of persecution" in his native land. *See* 8 U.S.C. § 1101(a)(42). Congress largely has left the task of defining with precision the phrase "well-founded fear of persecution" to the INS. *See Perlera- Escobar v. Executive Office for Immigration,* 894 F.2d 1292, 1296 (11th Cir.1990) (stating that, where statutory term is ambiguous, agency properly defined term through adjudications); *see also Singh v. INS,* 134 F.3d 962, 967 (9th Cir.1998) (noting that statutes do not define "persecution" or specify acts constituting "persecution").

[44][45][46] Plaintiff points to no earlier INS adjudications or judicial decisions where a person, in circumstances similar to Plaintiff's, was found to have established a "well-founded fear of persecution." Political conditions "which affect the populace as a whole or in large part are generally insufficient to establish [persecution]." *See Mitev v. INS,* 67 F.3d 1325, 1330 (7th Cir.1995). We cannot say that the INS had to treat education and indoctrination as synonymous with "persecution." *See Ghaly v. INS,* 58 F.3d 1425, 1431 (9th Cir.1995) (explaining that "persecution is an extreme concept that does not include every sort of treatment our society regards as offensive"); *see also Mikhailevitch v. INS,* 146 F.3d 384, 390 (6th Cir.1998) (stating that "persecution" "requires more than a few isolated incidents of verbal harassment or intimidation, unaccompanied by any physical punishment, infliction of harm, or significant deprivation of liberty"); *Bradvica v. INS,* 128 F.3d 1009, 1012 (7th Cir.1997) ("[M]ere harassment does not amount to persecution."); Ira J. Kurzban, *Kurzban's Immigration Law Sourcebook,* 254-61 (6th ed.1998) (citing cases discussing meaning of "persecution"). Not all exceptional treatment is persecution. The INS's estimate of the purported applications--as applications ***1356** that were not strong on their merits--is not clearly inaccurate. [FN26]

FN26. We do not know for certain that, if Plaintiff's asylum applications were accepted and fully adjudicated, Plaintiff necessarily would fail to establish his eligibility for asylum. Depending on how the record was developed, we expect that a reasonable adjudicator might find that Plaintiff's fears were "well-founded." We also think that some reasonable adjudicator might regard things like involuntary and forcible "re-education" as persecution. But these issues are not questions that we, in the first instance, are to answer. The ultimate merits of an asylum petition are not before this Court at all. Instead, they are matters that would be committed to the discretion of the INS. The INS (and the courts) never have suggested that an asylum applicant in like circumstances was eligible for asylum. We cannot say that the INS's assessment of the likelihood of success of the applications in this case was arbitrary.

We have not the slightest illusion about the INS's

choices: the choices-- about policy and about application of the policy--that the INS made in this case are choices about which reasonable people can disagree. Still, the choices were not unreasonable, not capricious and not arbitrary, but were reasoned and reasonable. The INS's considerable discretion was not abused.

CONCLUSION

[47][48] As policymakers, it is the duty of the Congress and of the executive branch to exercise political will. Although courts should not be unquestioning, we should respect the other branches' policymaking powers. The judicial power is a limited power. It is the duty of the judicial branch not to exercise political will, but only to render judicial judgment under the law.

When the INS was confronted with Plaintiff's purported asylum applications, the immigration law of the United States provided the INS with no clear answer. The INS accordingly developed a policy to deal with the extraordinary circumstances of asylum applications filed on behalf of a six-year-old child, by the child himself and a non-parental relative, against the express wishes of the child's parents (or sole parent). The INS then applied this new policy to Plaintiff's purported asylum applications and rejected them as nullities.

Because the preexisting law compelled no particular policy, the INS was entitled to make a policy decision. The policy decision that the INS made was within the outside border of reasonable choices. And the INS did not abuse its discretion or act arbitrarily in applying the policy and rejecting Plaintiff's purported asylum applications. The Court neither approves nor disapproves the INS's decision to reject the asylum applications filed on Plaintiff's behalf, but the INS decision did not contradict 8 U.S.C. § 1158.

The judgment of the district court is AFFIRMED [FN27].

FN27. NOTICE OF SHORTENED TIME: We order that, if petitions for rehearing or suggestions for rehearing en banc are to be filed, they must be filed within 14 days of this date. Expect no extensions.

212 F.3d 1338, 2000 Daily Journal D.A.R. 5737, 13 Fla. L. Weekly Fed. C 713

Briefs and Other Related Documents (Back to top)

- 2000 WL 33978813 (Appellate Brief) Brief of the Lawyers Committee for Human Rights, the Women's Commission for Refugee Women and Children, and the Florida Immigrant Advocacy Center as Amici Curiae, in Support of Neither Party (May. 04, 2000)

- 2000 WL 33978814 (Appellate Brief) Amicus Curae Brief on behalf of Appellant (May. 04, 2000)

- 2000 WL 33978812 (Appellate Brief) Reply Brief of Plaintiff-Appellant Elian Gonzalez (May. 01, 2000)

- 2000 WL 33980154 (Appellate Brief) Brief of Intervenor Juan Miguel Gonzalez (May. 01, 2000)

- 2000 WL 33978811 (Appellate Brief) Initial Brief of Plaintiff-Appellant Elian Gonzalez (Apr. 10, 2000)

END OF DOCUMENT

IV. Separation of Church & State

Brett Kavanaugh – *Good News Club v. Milford Central School*

Allegation: In *Good News Club v. Milford Central School*, 533 U.S. 98 (2001), Brett Kavanaugh demonstrated his hostility to the separation of church and state and religious freedom when he argued that the U.S. Constitution required a New York public school district to allow a Christian organization to hold an evangelical worship service after school hours in an elementary school's cafeteria.

Facts:

- **The U.S. Supreme Court, including Clinton appointee Justice Stephen Breyer, agreed with the position taken by Mr. Kavanaugh on behalf of his client.**

- **In *Good News Club*, Mr. Kavanaugh filed an amicus brief on behalf of his client with the U.S. Supreme Court and argued for the principle that religious perspectives should be given equal, but not favored, treatment in the public sphere.**

  - ✓ Although the school district allowed members of the public to use school facilities for artistic, social, civil, recreational, and educational purposes as well as "other uses pertaining to the welfare of the community," **it specifically forbade school premises from being used for "religious purposes."**

  - ✓ Mr. Kavanaugh's brief argued that the school district's policy was unconstitutional because it targeted "religious speech for a distinctive burden."

- **Looking to past U.S. Supreme Court precedent, Mr. Kavanaugh's brief merely argued for the equal treatment of religious organizations.** It pointed out that the school district "would not be favoring (and thereby endorsing) religion over non-religion simply by opening its doors on a neutral basis and allowing the Good News Club, among many others, to enter."

  - ✓ The U.S. Supreme Court concluded that the New York School District's "exclusion of the [Good News] Club from use of the school . . . constitute[d] impermissible viewpoint discrimination." *Good News Club*, 533 U.S. at 112.

  - ✓ The U.S. Supreme Court also held that permitting the Good News Club to meet on school premises, just as a variety of other clubs were allowed to use school facilities after school hours, would not violate the Establishment Clause. See *Good News Club*, 533 U.S. at 119.

- **Five Democratic State Attorneys General joined an amicus brief in *Good News Club* taking the same position that Mr. Kavanaugh took on behalf of his client.**

  - ✓ Democratic Attorneys General Tom Miller of Iowa, Richard Ieyoub of Louisiana, Mike Moore of Mississippi, Paul Summers of Tennessee, and Jan Graham of Utah joined a brief on behalf of their respective states arguing that the New York school district's discrimination against religious speech was unconstitutional.

- **A diverse range of religious organizations advocated the same position in their amicus briefs as Mr. Kavanaugh did on behalf of his client.**

  - ✓ The National Council of Churches, Baptist Joint Committee on Public Affairs, American Muslim Council, General Conference of Seventh-Day Adventists, Reorganized Church of Jesus Christ of Latter Day Saints, First Church of Christ, Scientist, General Assembly of the Presbyterian Church (U.S.A.), General Board of Church & Society of the United Methodist Church, Union of Orthodox Jewish Congregations of America, and A.M.E. Zion Church all agreed that the New York school district's decision to discriminate against religious organizations violated the First Amendment.

- Mr. Kavanaugh submitted an amicus brief on behalf of his client Sally Campbell in *Good News Club*. As Ms. Campbell's attorney, Mr. Kavanaugh had a duty to zealously represent his client's position and make the best argument on her behalf. Such arguments do not necessarily reflect the personal views of Mr. Kavanaugh.

  - ✓ Lawyers have an ethical obligation to make all reasonable arguments that will advance their clients' interests. According to Rule 3.1 of the ABA's Model Rules of Professional Conduct, a lawyer may make any argument if "there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law." Lawyers would violate their ethical duties to their client if they made only arguments with which they would agree were they a judge.

For opinion see 121 S.Ct. 2093, 121 S.Ct. 296

Briefs and Other Related Documents

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United States Supreme Court Amicus Brief.
GOOD NEWS CLUB, et al., Petitioners,
v.
MILFORD CENTRAL SCHOOL, Respondent.
No. 99-2036.
October Term, 2000.
November 30, 2000.
On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF AMICUS CURIAE SALLY CAMPBELL IN SUPPORT OF PETITIONERS

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*i QUESTIONS PRESENTED

1. Whether the Establishment Clause requires the government to exclude a private religious group, because of its religious perspective, from use of an open and neutrally available public facility.

2. Whether the Free Speech, Free Exercise, and Equal Protection Clauses permit the government to exclude a private religious group, because of its religious perspective, from use of an open and neutrally available public facility.

*iii TABLE OF CONTENTS

***iv** TABLE OF AUTHORITIES

CASES

***1** INTEREST OF AMICUS CURIAE [FN1]

FN1. The parties have consented in writing to the filing of this brief in letters that have been submitted to the clerk. See S. Ct. R. 37.3(a). Counsel for a party did not author this brief in whole or in part. See S. Ct. R. 37.6. No person or entity other than the amicus curiae and counsel for amicus curiae made a monetary contribution to the preparation or submission of this brief. See id.

Amicus Curiae Sally Campbell has challenged a local policy in St. Tammany Parish, Louisiana, that is similar to the Milford policy at issue in this case. The school board of St. Tammany Parish allows after-hours use of its buildings for civic, recreational, and entertainment uses, and for other uses that pertain to the "welfare of the public." Campbell v. St. Tammany School Bd., 206 F.3d 482, 484 (5th Cir. 2000). The St. Tammany policy expressly excludes partisan political activity, for-profit fundraising, and "religious services or religious instruction." Id. Ms. Campbell asked to use school facilities in St. Tammany School District for religious purposes. Relying on its policy, the School Board denied her request.

Ms. Campbell brought suit, alleging a violation of her First and Fourteenth Amendment rights. A panel of the United States Court of Appeals for the Fifth Circuit ruled that the Constitution does not require St. Tammany to allow religious speech in its facilities. Id. On October 26, 2000, over the dissent of Judges Jones, Smith, Barksdale, Garza, and DeMoss, the Court denied rehearing en banc. 2000 WL 1597749 (5th Cir.). Ms. Campbell intends soon to file a petition for writ of certiorari in this Court.

In their dissent from denial of rehearing en banc, Judges Jones, Smith, Barksdale, Garza, and DeMoss correctly contended that St. Tammany has created a public forum and that the content-based exclusion of religious speech from that forum is unconstitutional. For a forum to be considered a public forum, "[a]ll that is required is that the forum be 'generally open' to the public." Id. at *6 (Jones,

J.). The St. Tammany facilities are "open 'indifferently' for use by private *2 groups. The content-based exclusion of religious speakers from access to the facilities is censorship pure and simple." Id. at *8.

These five Judges also correctly explained that St. Tammany's exclusion of religious speech is, in any event, unconstitutional even under the test applicable to limited public fora. See Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819 (1995). Exclusions of speech from such fora must be both reasonable and viewpoint-neutral. The St. Tammany policy is unreasonable because it bears no relationship to the purposes of the forum: "To describe the exclusion as covering 'religious activity' somehow outside the pale of the community's welfare makes no sense." 2000 WL 1597749 at *9 (Jones, J.). In addition, the St. Tammany policy discriminates on the basis of viewpoint, as is inherent in the exclusion of religious speech: "The crux of the issue is this: when measured against the 'welfare of the public standard,' how can the prohibition of religious worship or instruction be anything other than viewpoint discrimination?" Id.

In summary, these five Judges stated: "It is unfortunate for the citizens of the Fifth Circuit that this court has seen fit to retreat from equal treatment of religious speech and to deviate from fifteen years of consistent Supreme Court jurisprudence on the subject. The St. Tammany school board was not required to open its facilities for the 'welfare of the public.' Once it did so, however, it could not arbitrarily discriminate against religious speakers." Id. at *10.

As this description reveals, the Milford case currently before the Court is not unique, but rather exemplifies a broader national problem of unjustified discrimination against religious speech in public facilities (as in St. Tammany). For that reason, and because the Court's resolution of this case is likely to affect the resolution of Ms. Campbell's case, Ms. Campbell respectfully submits this amicus curiae brief.

*3 SCHOOL POLICY INVOLVED

The relevant portions of the Milford Community Use of School Facilities policy are as follows:

> The Board of Education will permit the use of school facilities and school grounds, when not in use for school purposes if, in the opinion of the District, use will not be disruptive of normal school operations, consistent with State law, for any of the following purposes;
>
> 1. For the purpose of instruction in any branch of education, learning or the arts.
>
> ***
>
> 3. For holding social, civic and recreational meetings and entertainment events and other uses pertaining to the welfare of the community, provided that such uses shall be nonexclusive and shall be open to the general public. ***
>
> Use for Nonreligious Purposes. School premises shall not be used by any individual or organization for religious purposes.

INTRODUCTION AND SUMMARY OF ARGUMENT

Under the Community Use policy for the Milford Central School District, members of the public may use public school facilities for (i) "instruction in any branch of education, learning or the arts," (ii) "holding social, civic and recreational meetings and entertainment events," or (iii) "other uses pertaining to the welfare of the community." Milford's expansive public access policy contains one -- and only one -- express exception: "School premises shall not be used by any individual or organization for religious purposes." Pursuant to this policy, the Milford Board

of Education denied the request of the Good News Club (a community-based youth organization that provides moral instruction from a Christian perspective) to use its facilities. See 202 F.3d 502 (2d Cir. 2000).

*4 The discriminatory policy enacted by Milford Central School District targets religious speech for a distinctive burden. Milford's discrimination against private religious speech in general, and against the Good News Club in particular, is unconstitutional. As the Court has concluded in several virtually identical cases, the Constitution demands that private religious speech, religious people, and religious organizations receive at least the same treatment as their secular counterparts in gaining access to public facilities and public property. See Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819 (1995); Lamb's Chapel v. Center Moriches Union Free School Dist., 508 U.S. 384 (1993); Widmar v. Vincent, 454 U.S. 263 (1981). Indeed, with respect to the precise issue of access to public school facilities that is raised in this case, the Court has repeatedly (and often unanimously) held that "schools may not discriminate against religious groups by denying them equal access to facilities that the schools make available to all." Rosenberger, 515 U.S. at 846 (O'Connor, J., concurring). In so ruling, the Court has emphasized time and again that the Free Speech and Free Exercise Clauses protect "private speech endorsing religion." Id. at 841 (majority opinion).

Because the Court has already ruled decisively on the two central issues raised here, this case requires the Court to break no new ground, but merely to reaffirm its prior holdings. First, the Establishment Clause does not require the government to exclude private religious speech, because it is religious, from an open and neutrally available public facility. Second, the Free Speech, Free Exercise, and Equal Protection Clauses do not permit the government to exclude private religious speech, because it is religious, from an open and neutrally available public facility.

*5 ARGUMENT

I. THE CONSTITUTION DOES NOT REQUIRE THE GOVERNMENT TO EXCLUDE PRIVATE RELIGIOUS SPEECH, BECAUSE IT IS RELIGIOUS, FROM AN OPEN AND NEUTRALLY AVAILABLE PUBLIC FACILITY.

One fundamental question in this case is whether the Establishment Clause requires the government to exclude private religious groups such as the Good News Club from open and neutrally available public facilities. The answer is plainly no. The government may open public facilities on a neutral basis -- for use by religious and secular groups alike -- without violating the Establishment Clause.

To be sure, the Court has held that the Establishment Clause prohibits government-led or government-encouraged prayer to student audiences at certain public school events. See, e.g., Santa Fe Indep. School District v. Doe, 120 S. Ct. 2266 (2000); Lee v. Weisman, 505 U.S. 577 (1992); Engel v. Vitale, 370 U.S. 421 (1962). But the Court has flatly rejected the broader and more extreme proposition that the Establishment Clause requires the government to eradicate all religious expression, public and private, from public schools and other public facilities. The Establishment Clause "was never meant, and has never been read by this Court, to serve as an impediment to purely private religious speech connected to the State only through its occurrence in a public forum." Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 767 (1995) (plurality opinion of Scalia, J., joined by Rehnquist, C.J., Kennedy and Thomas, JJ.); see also id. at 775 (O'Connor, J., joined by Souter and Breyer, JJ., concurring) (Establishment Clause not contravened "where truly private speech is allowed on equal terms in a vigorous public forum" so long as there is no "government manipulation of the forum"). The Court thus has

emphasized time and again the critical distinction "between government speech endorsing religion, which the Establishment *6 Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." Rosenberger, 515 U.S. at 841 (quotation omitted).

Therefore, it is by now clear that the government does not violate the Establishment Clause when it allows religious individuals or groups to use public facilities or take public assistance that is available on a neutral basis to secular and religious alike. See Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819 (1995); Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753 (1995); 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); see also Mitchell v. Helms, 120 S. Ct. 2530 (2000); Agostini v. Felton, 521 U.S. 203 (1997); Zobrest v. Catalina Foothills School Dist., 509 U.S. 1 (1993); Witters v. Washington Dept. of Services for the Blind, 474 U.S. 481 (1986); Mueller v. Allen, 463 U.S. 388 (1983). When the government provides facilities or aid on a neutral basis to religious and secular alike, there is no danger that the government has favored (and thereby endorsed) the religious over the secular -- and thus no Establishment Clause violation. Lamb's Chapel, 508 U.S. at 395 ("Under these circumstances ..., there would have been no realistic danger that the community would think that the District was endorsing religion or any particular creed .... "). A public facility open for use by private groups is "in a sense, surplus land" such that the government "conveys no message of endorsement" when it permits "privately organized and privately led groups of students (or others)" to use the facility. Laurence Tribe, American Constitutional Law § 14-5, at 1175 (2d ed. 1988).

If the rule were otherwise -- that is, if the Establishment Clause barred the neutral extension of general facilities or benefits to religious groups -- "a church could not be protected by the police and fire departments, or have its public sidewalk kept in repair." *7Widmar, 454 U.S. at 274-75 (quotation omitted). The Constitution requires no such discrimination against religious people and groups.

In assessing neutrality for purposes of the Establishment Clause, moreover, a government forum or benefit readily qualifies as neutral when (as here) the government makes the forum or benefit available to "a wide variety of private organizations." Lamb's Chapel, 508 U.S. at 395. See also Rosenberger, 515 U.S. at 842 ("It does not violate the Establishment Clause for a public university to grant access to its facilities on a religion-neutral basis to a wide spectrum of student groups, including groups that use meeting rooms for sectarian activities, accompanied by some devotional exercises."); Mergens, 496 U.S. at 252 (neutrality requirement met given that "broad spectrum" of secular groups could use the facilities); Widmar, 454 U.S. at 277 ("provision of benefits to so broad a spectrum of groups is an important index of secular effect"). In other words, the fact that numerous secular groups enjoy the same rights as religious groups more than suffices to demonstrate that the government has not impermissibly favored religion.

The fact that younger (and at least potentially more impressionable) children may attend school or play at a particular public building or park does not alter the Establishment Clause analysis, or the significance of neutrality as the government's essential safe harbor in complying with the Establishment Clause. On the contrary, with younger and more impressionable children, it is doubly important for the government to be scrupulously neutral so as not to convey a message that religion is disfavored. Otherwise, "[w]ithholding access" to religious groups, because they are religious, "would leave an impermissible perception that religious activities are disfavored." Rosenberger, 515 U.S. at 846 (O'Connor, J.,

concurring). Justice O'Connor's assessment applies to young as well as old. After all, if a young student cannot "understand toleration of [private] religion in the schools" -- which is the necessary premise of the impressionability argument -- he or she *8 would be just as "incapable of understanding exclusion of [private] religion from the schools." Douglas Laycock, Equal Access and Moments of Silence: The Equal Access Status of Religious Speech by Private Speakers, 81 Nw. U. L. Rev. 1, 19 (1987). [FN2]

FN2. If the Court were to accept the mistaken- attribution/impressionability argument, the appropriate remedy, as Justice Marshall stated in Mergens, would not be an outright ban on private religious speech, but merely a disclaimer making clear that the school does not endorse the groups or clubs that use its facilities. See Mergens, 496 U.S. at 270 (Marshall, J., concurring) (voting to uphold access program at issue in Mergens because school could allow private "religious speech" and affirmatively "disclaim[] any endorsement" of the private speech when necessary); see also Pinette, 515 U.S. at 794 n.2 (Souter, J., concurring) (if there is a danger of confusion, "no reason to presume that an adequate disclaimer could not have been drafted"); id. at 769 (plurality) ("If Ohio is concerned about misperceptions, nothing prevents it from requiring all private displays in the Square to be identified as such.").
As to any possibility of student peer pressure, as was stated in Mergens, "there is little if any risk of official state endorsement or coercion where no formal classroom activities are involved and no school officials actively participate." Mergens, 496 U.S. at 251. Again the appropriate remedy for the possibility of such pressure would not be an overbroad ban on religious speech, but a neutral mechanism for ensuring, for example, that only students with parental permission were allowed into meetings of private groups occurring in public school facilities. Of course, parental permission is already necessary to attend meetings of the Good News Club, which eliminates any such issue in this case.

In this case, the Establishment Clause does not require the exclusion of religious speech in general -- or the Good News Club in particular -- from Milford's open and neutrally available public facility. It is undisputed that the Good News Club is a private group, not a government organization, and it is undisputed that the Milford school is available to a broad class of secular educational events, "social, civic and recreational meetings and entertainment events," and other uses pertaining to the welfare of the community. The School District therefore would not be favoring (and thereby endorsing) religion over *9 non-religion simply by opening its doors on a neutral basis and allowing the Good News Club, among many others, to enter. When, as here, the government ensures neutrality by making its facilities available to religious and secular groups alike, "the message is one of neutrality rather than endorsement" and the Establishment Clause is not violated. Mergens, 496 U.S. at 248.

II. THE CONSTITUTION DOES NOT PERMIT THE GOVERNMENT TO EXCLUDE PRIVATE RELIGIOUS SPEECH, BECAUSE IT IS RELIGIOUS, FROM AN OPEN AND NEUTRALLY AVAILABLE PUBLIC FACILITY.

Because the Establishment Clause raises no barrier to religious speech in an open and neutrally available public facility, the remaining question is whether the Constitution permits the Milford School District to exclude religious groups such as the Good News Club from school facilities. Stated more directly, can the government unapologetically and unabashedly discriminate against private religious

speech in a public facility? The answer to that question as well is no.

The basic principles that guide the free speech analysis are settled. "[P]rivate religious speech ... is as fully protected under the Free Speech Clause as secular private expression." Pinette, 515 U.S. at 760. A "free- speech clause without religion" would be, in the words of the Court, "Hamlet without the prince." Id. (opinion of Court for 7 Justices). The Constitution's protection for religious speech applies not just to speech from a religious perspective, but also to religious "proselytizing," Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640, 647 (1981), and religious "worship," Pinette, 515 U.S. at 760; Widmar, 454 U.S. at 269 n.6.

It is "axiomatic" that the government "may not regulate speech based on its substantive content or the message it conveys." Rosenberger, 515 U.S. at 828. When the ***10** government targets not just subject matter, "but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. Viewpoint discrimination is thus an egregious form of content discrimination." Id. (internal citation omitted).

It is true that "speech which is constitutionally protected against state suppression is not thereby accorded a guaranteed forum on all property owned by the State." Pinette, 515 U.S. at 761. But when the government maintains a forum open to at least some speakers and subject matters, the government's "right to limit protected expressive activity is sharply circumscribed." Id.

In a public forum (whether a traditional public forum such as a park or a public forum designated by the government such as an open bandstand), the government may impose reasonable content-neutral time, place, and manner restrictions. But content-based exclusions from a traditional or designated public forum are subject to strict scrutiny and presumptively unconstitutional. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983). When the government operates not a traditional or designated public forum, but what is referred to as a "limited public forum" or a "non-public forum," the government's ability to impose content-based exclusions may be more expansive. But the government still "may not exclude speech where its distinction is not reasonable in light of the purpose served by the forum, nor may it discriminate against speech on the basis of its viewpoint." Rosenberger, 515 U.S. at 829 (internal quotations omitted); Cornelius v. NAACP Legal Defense & Educ. Fund, 473 U.S. 788, 806 (1985); Perry, 460 U.S. at 46. [FN3]

FN3. There is substantial confusion regarding the appropriate terms to describe these three categories. Some cases use the term "non-public forum" to describe what we refer to as a "limited public forum." See, e.g., Cornelius, 473 U.S. at 800. That, of course, creates no real confusion, but reveals that there are two terms that may describe the same kind of forum. Some cases (including many in the Second Circuit) use the term "limited public forum" to describe what we refer to as a "designated public forum." See Bronx Household of Faith v. Community School Dist. No. 10, 127 F.3d 207, 211 (2d Cir. 1997) ("designated public forum, sometimes called the 'limited public forum' "); see also Good News Club, 202 F.3d at 508 (referring to "designated or limited public forums" as a single category). That can generate substantial confusion because the standards governing those two kinds of forums otherwise would be different. In any event, the terminology we use in this case -- traditional public forum, designated public forum, and limited public forum -- is consistent with Rosenberger, but we nonetheless caution that the use of terminology is not entirely consistent among courts, advocates, and commentators.

***11** In this case, Milford's exclusion of Good News Club from its facilities is unconstitutional for any of four independent reasons.

• First, Milford has created a designated public forum, and Milford's exclusion of religious speech (the Good News Club) from that forum is content- based and viewpoint-based, is not justified by a compelling state interest, and thus is unconstitutional under the Free Speech Clause.

• Second, even if Milford has not created a designated public forum, it maintains a limited or non-public forum, and the exclusion of religious speech in general (and instruction about morals from a religious perspective in particular) is viewpoint-based and thus unconstitutional under the Free Speech Clause.

• Third, in order to exclude speech from a limited or non-public forum, the government's exclusion must also be reasonable in light of the purpose of the forum. The blanket exclusion of religious speech, because it is religious, from a forum is facially unreasonable where, as here, it bears no relationship to the purpose for which the forum was created. Milford's policy is thus unconstitutional under the Free Speech Clause for that reason as well.

***12** • Fourth, putting aside the intricacies of free speech doctrine (whether a forum is a designated public forum or merely a limited public forum, whether an exclusion is viewpoint-based or merely content-based), the Milford policy contains a more basic constitutional flaw. The government's exclusion of religious speech, because it is religious, from a public facility violates the Free Exercise and Equal Protection Clauses, both of which bar governmental discrimination against religious people, religious organizations, and religious speech.

1. The policy adopted by the Milford Central School District has created a designated public forum with respect to Milford's school facilities. As a result, the content-based exclusion of religious speech (including the Good News Club) from those facilities is unconstitutional.

A government entity's traditional public fora are those places such as streets and parks that have "immemorially been held in trust for the use of the public." Hague v. CIO, 307 U.S. 496, 515 (1939). In addition, the government can create a public forum for free speech (create the legal equivalent of, for example, a park) by opening public facilities to general use. Perry, 460 U.S. at 45. Public school facilities, in particular, become public fora when school authorities "by policy or practice opened those facilities for indiscriminate use by the general public, or by some segment of the public, such as student organizations." Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260, 267 (1988) (internal quotations omitted).

The Court's decision in Widmar is instructive on the forum definition issue. There, the University of Missouri at Kansas City made its facilities "generally available for the activities of registered student groups." 454 U.S. at 264-65. The school policy also stated: "No University buildings or grounds ... may be used for purposes of religious worship or religious teaching." Id. at 265 n.3. Because the university had created a public forum, the Court subjected the content-based exclusion of religious speech from the forum to strict scrutiny: "[T]he ***13** UMKC has discriminated against student groups and speakers based on their desire to use a generally open forum to engage in religious worship and discussion. ... In order to justify discriminatory exclusion from a public forum based on the religious content of a group's intended speech, the University must therefore satisfy the standard of review appropriate to content-based exclusions" -- namely, strict

scrutiny. Id. at 269-70 (emphasis added).

In Lamb's Chapel, the Court similarly considered whether the government policy at issue there -- providing that school facilities were available to the public for educational, social, civic, and recreational purposes, and for other uses pertaining to the welfare of the community -- created a public forum, or rather a limited public forum. The Court stated that the argument that the school district had created a public forum carried "considerable force," but the Court ultimately decided not to "rule on this issue" because the exclusion of religious groups was plainly viewpoint-based and unconstitutional regardless of the nature of the forum. 508 U.S. at 392-93.

The Court's "strong suggestion" in Lamb's Chapel that open school facilities may well be a public forum is a useful starting point, however, for considering the nature of the forum in this case. See Bronx Household of Faith v. Community School Dist. No. 10, 127 F.3d 207, 218 (2d Cir. 1997) (Cabranes, J., concurring). The Milford policy, in our view, plainly creates "a forum generally open to the public." Perry, 460 U.S. at 45. Indeed, it is hard to conjure up a more expansive access policy than one in which a public facility is open for any "social, civic, or recreational use," for uses pertaining to the welfare of the community, and for "instruction in any branch of education." [FN4] For that reason, numerous courts ***14** of appeals analyzing similarly expansive policies where school facilities were open for social, civic, and recreational use by outside groups have held that the schools created public fora. See, e.g., Grace Bible Fellowship, Inc. v. Maine School Admin. Dist. No. 5, 941 F.2d 45, 48 (1st Cir. 1991); Gregoire v. Centennial School Dist., 907 F.2d 1366, 1378 (3rd Cir. 1990); National Socialist White People's Party v. Ringers, 473 F.2d 1010 (4th Cir. 1973) (en banc).

FN4. To be sure, Milford requires that groups using its facilities also make its events "open to the general public." That is a "manner" restriction imposed on groups seeking to use the school facilities. That is not a content-based restriction and thus does not in any way call into question the conclusion that Milford operates a public forum. Indeed, if anything, the non-exclusivity requirement buttresses the notion that this is a designated public forum.

For example, in the Grace Bible case, the First Circuit panel (including then-Chief Judge Breyer) assessed a policy that, as the Court characterized it, provided access for groups that were "good for the community unless, in the judgment of the school board, it is injurious to the school." 941 F.2d at 48. The school district excluded a group that wished to engage in religious speech. The First Circuit stressed that a school district opening its facilities for public use under such a policy "has no greater right to pick and choose among users on account of their views than does the government in general when it provides a park, or a hall, or an auditorium, for public use." Id. The Court concluded: "The bare fact is, [the school district] has volunteered expressive opportunity to the community at large, excluding some because of the content of their speech. This is elementary violation." Id.

This Court has looked not just to the policy, but also to the "practice of the government to ascertain whether it intended to designate a place not traditionally open to assembly and debate as a public forum." Cornelius, 473 U.S. at 802. In this case, the factual record buttresses what the plain terms of the policy reveal. In particular, Milford has granted access to numerous groups such as the Boy Scouts, Girl Scouts, and 4-H Club. ***15** This practice is persuasive evidence regarding the

open nature of the forum. [FN5]

FN5. The government cannot rely on a vague definition of the forum to escape the conclusion that it has created a public forum. "If the concept of a designated open forum is to retain any vitality whatever, the definition of the standards for inclusion and exclusion must be unambiguous and definite." Gregoire, 907 F.2d at 1375. Were the rule contrary, "[a] school's administration could simply declare that it maintains a closed forum and choose which student clubs it wanted to allow by tying the purposes of those student clubs to some broadly defined educational goal." Mergens, 496 U.S. at 244.

In sum, the policy and the record show that Milford Central School has created a public forum. Thus, Milford's indisputably content-based exclusion of religious speech in general (and the Good News Club in particular) from that forum is unconstitutional. See Widmar, 454 U.S. at 269; see also Campbell, 2000 WL 1597749 at *8 (Jones, J.) ("The St. Tammany facilities are "open 'indifferently' for use by private groups. The content-based exclusion of religious speakers from access to the facilities is censorship pure and simple."). [FN6]

FN6. The court of appeals suggested that the parties had agreed that Milford created only a limited public forum. 202 F.3d at 509. But as explained above, Second Circuit precedent conflates the categories of designated public fora and limited public fora by suggesting that the categories are governed by the same rules. See Bronx Household of Faith, 127 F.3d at 211 ("designated public forum, sometimes called the 'limited public forum' "); see also Good News Club, 202 F.3d at 508 (referring to "designated or limited public forums" as a single category). Any concession that a "limited public forum" was involved in this case is, therefore, not a concession at all given Second Circuit precedent that equates a designated public forum and a limited public forum. For that reason, the Court should independently assess the nature of the forum in this case, unconstrained by the parties' prior Second-Circuit-induced characterizations.

2. If Milford's forum is not a designated public forum, it is a limited public forum from which viewpoint-based exclusions are unconstitutional. The decisions in Lamb's Chapel and *16 Rosenberger demonstrate, moreover, that Milford's exclusion of religious speech in general (and of the Good News Club in particular) from its school facilities is viewpoint-based and thus unconstitutional.

In Lamb's Chapel, the Court considered a school policy like the one at issue in this case that provided: "[S]chool premises shall not be used by any group for religious purposes." 508 U.S. at 387. Pursuant to that policy, the school denied a church's request to use school premises "to exhibit for public viewing and for assertedly religious purposes, a film series dealing with family and child-rearing issues faced by parents today." Id. The record did not indicate "that the application to exhibit the particular film series ... was, or would have been, denied for any reason other than the fact that the presentation would have been from a religious perspective." Id. at 393-94. The Court held that this exclusion of religious perspectives was viewpoint- based and "plainly invalid." Id. at 394. The Court concluded that "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 viewpoint."

Id. at 393.

The Court reached the same result in Rosenberger. The University of Virginia authorized the payment of printing costs for a variety of student organization publications, but withheld payment for a religious student group. The Court held that the University had engaged in impermissible viewpoint discrimination by excluding those "student journalistic efforts with religious editorial viewpoints." 515 U.S. at 831. Relying on Lamb's Chapel, the Court stressed that "discriminating against religious speech [is] discriminating on the basis of viewpoint." Id. at 832 (emphasis added). In particular, "[r]eligion may be a vast area of inquiry, but it also provides ... a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered." Id. at 831. As that language demonstrates, the Rosenberger Court concluded that the exclusion of religious speech, ideas, ***17** thought, and uses from a forum is inherently and by definition viewpoint-based.

In this case, Lamb's Chapel and Rosenberger make clear that Milford's policy and exclusion of the Good News Club is patently unconstitutional. The Milford School District allows instruction about morals provided from a secular perspective, but disallows instruction about morals from a religious perspective. As Judge Cabranes observed in a factually similar case, "the District's policy banning religious instruction, while at the same time allowing instruction on any subject of learning from a secular viewpoint, is an impermissible form of viewpoint discrimination." Bronx Household of Faith, 127 F.3d at 220 (concurring and dissenting). Similarly, in Campbell, Judge Jones correctly analyzed a vague "welfare" standard similar to that in Milford: "when measured against the 'welfare of the public' standard, how can the prohibition of religious worship or instruction be anything other than viewpoint discrimination?" St. Tammany, 2000 WL 1597749 at *9. [FN7]

FN7. Bound by Second Circuit precedent, Judge Cabranes' opinion in that case did not take issue with the circuit's distinction between religious speech and religious worship. Such a distinction is, however, flawed for the reasons discussed below.

Of course, under Rosenberger, the express exclusion of religious uses is, in any event, inherently viewpoint-based, and thus unconstitutional regardless of the nature of the forum. As the Court said, "[r]eligion may be a vast area of inquiry, but it also provides ... a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered." Id. at 831. [FN8]

FN8. The four dissenters in Rosenberger likewise recognized that discrimination against religious speech was unacceptable. "The common factual thread running through Widmar, Mergens, and Lamb's Chapel, is that a governmental institution created a limited forum for the use of students in a school or college, or for the public at large, but sought to exclude speakers with religious messages. In each case the restriction was struck down either as an impermissible attempt to regulate the content of speech in an open forum (as in Widmar and Mergens) or to suppress a particular religious viewpoint (as in Lamb's Chapel). ... Each case ... drew ultimately on the unexceptionable Speech Clause doctrine treating the evangelist, the Salvation Army, the millennialist, or the Hare Krishna like any other speaker in a public forum." 515 U.S. at 888 (Souter, J., dissenting) (internal citations omitted).

***18** Milford's exclusion of certain religious speech cannot be saved or cabined by positing a distinction between (i) speech from a religious perspective and (ii) religious prayer or worship. The court of appeals attempted to split the atom and to draw such a line, but that is impossible: Religious worship is religious speech and religious thought. As Judge Jacobs persuasively explained, moreover, "[d]iscussion of morals and character from purely secular viewpoints of idealism, culture or general uplift will often appear secular, while discussion of the same issues from a religious viewpoint will often appear essentially -- quintessentially -- religious." 202 F.3d at 515 (dissent).

So, too, the Court in Widmar flatly dismissed the idea that religious worship could be segregated from religious speech for purposes of free speech doctrine. The Court said that it is impossible to draw the line where singing, reading, and teaching transforms into "worship." 454 U.S. at 269 n.6 The Widmar analysis is surely correct, as there is no basis in precedent or logic for placing religious speech in one First Amendment category and religious worship in another First Amendment category.

In sum, even assuming that the Milford policy does not create a designated public forum, but only a limited or nonpublic forum, the exclusion of the Good News Club is viewpoint-based and thus unconstitutional.

3. A third independent reason why the exclusion of Good News Club violates the Free Speech Clause is the utter unreasonableness of the exclusion in light of the forum's ***19** purposes. In a limited public forum, the government's exclusion of particular speech not only must be viewpoint-neutral, but also must be "reasonable in light of the purpose served by the forum." Cornelius, 473 U.S. at 806; see also Rosenberger, 515 U.S. at 829 (same); Perry, 460 U.S. at 49 (same; government may limit activities in forum, but cannot exclude "activities compatible with the intended purpose of the property"). In this case, Milford's express exclusion of religious speech does not serve any legitimate purpose of the forum.

In Lamb's Chapel, having found that the exclusion was viewpoint-based and thus unconstitutional, the Court did not reach the additional question whether the exclusion was "unreasonable in light of the purposes of the forum." But the Court did pointedly note that the Second Circuit had "uttered not a word in support of its reasonableness holding" and that if the rule were unreasonable, "it could be held facially invalid." 508 U.S. at 393 n.6. As suggested by the Court in Lamb's Chapel, therefore, the reasonableness analysis is a separate and vitally important aspect of the inquiry in limited public forum cases. And it provides an independent basis for striking down Milford's action in this case.

The "reasonableness" inquiry necessarily focuses, first, on the purpose of the Community Use policy and, second, on how that purpose is allegedly thwarted by allowing the forum to be used for religious purposes. The Milford policy allows the forum to be used for instruction in any branch of education, for uses pertaining to the welfare of the community, and for holding social, civic, and recreational meetings and entertainment events. The clear purpose of the Milford policy on its face is to provide the community with a place to meet and to speak as individuals and groups -- a public service provided by the government in the same way that parks are a public service to the people. It is inconceivable, however, that allowing religious speech in that public building would somehow undermine or thwart those purposes. That is especially so given that the policy allows uses pertaining to the "welfare of the community." ***20** As Judge Jones said in analyzing a similar policy in Campbell, "[t]o describe the exclusion as covering 'religious activity' somehow outside the pale of the community's welfare makes no sense." 2000 WL

1597749 at *9.

Indeed, the only possible bases for excluding religious speech would be (i) a blatant desire to disfavor religious speech or (ii) a claim that the Establishment Clause required exclusion. The former argument is unreasonable as a matter of law (and unconstitutional, as discussed below), and the latter is unavailing under this Court's precedents. In short, then, the Community Use policy's exclusion of use for "religious purposes" is unreasonable in light of the purposes served by the forum. See St. Tammany, 2000 WL 1597749, at *8 (Jones, J.) (policy excluding religious speech is "unreasonable" and "doomed"); see also Br. of Amicus Curiae American Center for Law and Justice at 17-29.

4. Aside from the intricacies of free speech doctrine, a more fundamental point demonstrates that Milford's exclusion of the Good News Club is unconstitutional. Under the Free Exercise and Equal Protection Clauses (as well as the Establishment Clause), the government may not discriminate against religion, just as the government may not discriminate on the basis of race. The government thus may not impose a burden or deny a benefit because of the religious nature of a group, person, writing, speech, or idea. To use the words of Justice Brennan, the government "may not use religion as a basis of classification for the imposition of duties [and] penalties ..." McDaniel v. Paty, 435 U.S. 618, 639 (1978) (Brennan, J., concurring). Of course, the non- discrimination principle articulated by Justice Brennan is by now firmly entrenched in this Court's jurisprudence. See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 US 520, 532 (1993) (government may not "discriminate[] against some or all religious beliefs or regulate[] or prohibit [] conduct because it is undertaken for religious reasons"); Employment Division v. Smith, 494 U.S. 872, 877 (1990) ("The government "may not ***21** impose special disabilities on the basis of religious views or religious status.").

Except in the context of a permissible accommodation of religion, the government must act on a religion-neutral basis, based on objective and discernible criteria that do not refer to or target religion. For example, if the government bars certain categories of speech or activities from a public facility (say, events with more than 50 people in attendance) and defines the limitation without reference to religion, the Constitution is not violated even though a religious meeting with more than 50 people in attendance would be excluded from the facility. In such a case, the government has not discriminated against religion (putting aside, of course, any issue of required accommodation under the Free Exercise Clause).

On the other hand, where the government excludes religious speech -- because it is religious -- from a public facility, the government has plainly discriminated against religion and just as plainly violated the Constitution. And that is precisely what Milford has done in this case by targeting religion for a distinctive burden.

III. RESPONDENT'S POSITION WOULD REQUIRE THE GOVERNMENT TO INQUIRE INTO THE RELIGIOSITY OF SPEECH AND WOULD FORCE RELIGIOUS PEOPLE TO HIDE OR DISGUISE THEIR RELIGIOUS BELIEFS.

In closing, it bears mention that the Milford policy poses two additional and important threats to religious liberty and freedom -- threats that this Court has emphasized before and that should inform the analysis in this case.

First, Milford's policy creates grave dangers of excessive entanglement -- namely, of the government seeking to monitor and inquire into the content of speech to determine whether it is sufficiently "religious" to require exclusion. This Court

on many occasions has emphasized the constitutional dangers implicated when the government intrudes in this way into the *22 nature of speech. See Mergens, 496 U.S. at 253 (plurality) (denial of the forum to religious groups "might well create greater entanglement problems in the form of invasive monitoring to prevent religious speech at meetings at which such speech might occur"); cf. Lee v. Weisman, 505 U.S. at 616-17 (Souter, J., concurring) (regarding judicial review of speech for sectarian influences: "I can hardly imagine a subject less amenable to the competence of the federal judiciary, or more deliberately to be avoided where possible").

The Court in Rosenberger elaborated on the problem, stating that the "first danger to liberty lies in granting the State the power to examine publications to determine whether or not they are based on some ultimate idea and, if so, for the State to classify them." 515 U.S. at 835. The Court continued: "The viewpoint discrimination inherent in the University's regulation required public officials to scan and interpret student publications to discern their underlying philosophic assumptions respecting religious theory and belief. That course of action was a denial of the right of free speech and would risk fostering a pervasive bias or hostility to religion...."Id. at 845-46 (emphasis added).

Second, the School District's policy necessarily induces people seeking to use public facilities to water down their speech and to hide the religiosity of their message in order to satisfy a government administrator that a proposed meeting is not really for "religious purposes." That demeaning and disturbing exercise is neither mandated nor permitted by the Constitution. The Constitution is not "some sort of homogenizing solvent" that forces religious groups "to choose between assimilating to mainstream American culture or losing their political rights." Board of Educ. of Kiryas Joel Village School Dist. v. Grumet, 512 U.S. 687, 730 (1994) (Kennedy, J., concurring). The Constitution in no way licenses the government to operate a checkpoint where religious people who hide their beliefs and intentions are allowed through, but those who express their true beliefs and intentions are turned away.

*23 In short, these two factors underscore the sound prudential and historical reasons why the Constitution neither requires nor permits discrimination against religious people and religious speech.

CONCLUSION

For the foregoing reasons, as well as those set forth in petitioners' brief, the decision of the court of appeals should be reversed.

U.S.Amicus.Brief,2000.
Good News Club v. Milford Central School
2000 WL 1784193

Briefs and Other Related Documents (Back to top)

- 2001 WL 196997, 69 USLW 3416 (Oral Argument) Oral Argument (Feb. 28, 2001)
- 2001 WL 173531 (Appellate Brief) Reply Brief for Petitioners (Feb. 15, 2001)
- 2001 WL 43335 (Appellate Brief) BRIEF AMICUS CURIAE OF THE AMERICAN JEWISH CONGRESS IN SUPPORT OF RESPONDENT (Jan. 12, 2001)
- 2001 WL 43353 (Appellate Brief) BRIEF OF AMERICANS UNITED FOR SEPARATION OF

CHURCH AND STATE, THE AMERICAN CIVIL LIBERTIES UNION, THE AMERICAN JEWISH COMMITTEE, THE NEW YORK CIVIL LIBERTIES UNION, AND PEOPLE FOR THE AMERICAN WAY FOUNDATION IN SUPPORT OF THE RESPONDENT (Jan. 12, 2001)

• 2001 WL 43374 (Appellate Brief) BRIEF OF AMICI CURIAE NATIONAL SCHOOL BOARDS ASSOCIATION, AMERICAN ASSOCIATION OF SCHOOL ADMINISTRATORS, HORACE MANN LEAGUE IN SUPPORT OF RESPONDENTS (Jan. 12, 2001)

• 2001 WL 43386 (Appellate Brief) BRIEF FOR RESPONDENT (Jan. 12, 2001)

• 2001 WL 43367 (Appellate Brief) BRIEF OF AMICI CURIAE ANTI-DEFAMATION LEAGUE; HADASSAH, THE WOMEN'S ZIONIST ORGANIZATION OF AMERICA, INC.; NATIONAL COALITION FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY; AND NATIONAL COUNCIL OF JEWISH WOMEN, IN SUPPORT OF RESPONDENT (Jan. 11, 2001)

• 2001 WL 43380 (Appellate Brief) BRIEF OF THE NEW YORK STATE SCHOOL BOARDS ASSOCIATION, INC. AS AMICUS CURIAE IN SUPPORT OF RESPONDENT (Jan. 11, 2001)

• 2000 WL 1803627 (Appellate Brief) BRIEF AMICUS CURIAE FOR 20 THEOLOGIANS AND SCHOLARS OF RELIGION IN SUPPORT OF PETITIONERS (Dec. 05, 2000)

• 2000 WL 1784135 (Appellate Brief) BRIEF OF AMICI CURIAE THE AMERICAN CENTER FOR LAW & JUSTICE, FOCUS ON THE FAMILY, AND THE ETHICS & RELIGIOUS LIBERTY COMMISSION OF THE SOUTHERN BAPTIST CONVENTION IN SUPPORT OF PETITIONERS (Nov. 30, 2000)

• 2000 WL 1784136 (Appellate Brief) BRIEF AMICUS CURIAE OF CAROL HOOD (PETITIONER IN NO. 00-845) IN SUPPORT OF PETITIONERS (Nov. 30, 2000)

• 2000 WL 1784137 (Appellate Brief) BRIEF AMICI CURIAE OF CHILD EVANGELISM FELLOWSHIP, INC., MAE CULBERTSON, LADETTE ARMSTRONG, MARSHA HALL, MARY TOMMILA, FAMILY RESEARCH COUNCIL, FELLOWSHIP OF CHRISTIAN ATHLETES, AND CAMPUS CRUSADE FOR CHRIST IN SUPPORT OF PETITIONERS (Nov. 30, 2000)

• 2000 WL 1784139 (Appellate Brief) BRIEF AMICI CURIAE OF CHRISTIAN LEGAL SOCIETY AND UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA IN SUPPORT OF PETITIONERS (Nov. 30, 2000)

• 2000 WL 1784144 (Appellate Brief) BRIEF OF LIBERTY COUNSEL AS AMICUS CURIAE IN SUPPORT OF PETITIONERS (Nov. 30, 2000)

• 2000 WL 1784146 (Appellate Brief) BRIEF OF THE LIBERTY LEGAL INSTITUTE AS AMICUS CURIAE IN SUPPORT OF PETITIONERS (Nov. 30, 2000)

• 2000 WL 1784148 (Appellate Brief) BRIEF OF DOUGLAS LAYCOCK AS AMICUS CURIAE IN SUPPORT OF PETITIONERS (Nov. 30, 2000)

• 2000 WL 1784159 (Appellate Brief) BRIEF OF THE NATIONAL COUNCIL OF CHURCHES, THE BAPTIST JOINT COMMITTEE ON PUBLIC AFFAIRS, THE GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS, THE REORGANIZED CHURCH OF JESUS CHRIST OF LATTER DAY SAINTS, THE AMERICAN MUSLIM COUNCIL, THE FIRST CHURCH OF CHRIST, SCIENTIST, THE GENERAL ASSEMBLY OF THE PRESBYTERIAN CHURCH (U.S.A.), THE GENERAL BOARD OF CHURCH & SOCIETY OF THE UNITED METHODIST CHURCH, AND THE A.M.E. ZION CHURCH AS AMICI CURIAE IN SUPPORT OF PETITIONERS (Nov. 30, 2000)

• 2000 WL 1784164 (Appellate Brief) BRIEF OF THE NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS (''COLPA'') AS AMICUS CURIAE IN SUPPORT OF PETITIONERS (Nov. 30, 2000)

• 2000 WL 1784166 (Appellate Brief) BRIEF OF THE AMICI CURIAE THE NORTHSTAR LEGAL CENTER AND BRONX HOUSEHOLD OF FAITH IN SUPPORT OF PETITIONERS (Nov. 30, 2000)

• 2000 WL 1784206 (Appellate Brief) BRIEF OF THE SOLIDARITY CENTER FOR LAW AND JUSTICE, P.C. AS AMICUS CURIAE IN SUPPORT OF PETITIONERS (Nov. 30, 2000)

• 2000 WL 1784209 (Appellate Brief) BRIEF FOR THE STATES OF ALABAMA, IOWA, LOUISIANA, MISSISSIPPI, NEBRASKA, OHIO, SOUTH CAROLINA, TENNESSEE, TEXAS, UTAH, AND VIRGINIA, AS AMICI CURIAE, IN SUPPORT OF PETITIONERS (Nov. 30, 2000)

• 2000 WL 1784212 (Appellate Brief) BRIEF AMICUS CURIAE OF WALLBUILDERS, INC. in support of the Petitioner (Nov. 30, 2000)

• 2000 WL 1793046 (Appellate Brief) Brief on the Merits for Petitioners (Nov. 30, 2000)

• 2000 WL 33979594 (Appellate Filing) Reply Brief (Aug. 03, 2000)

• 2000 WL 33979705 (Appellate Filing) Brief in Opposition (Jul. 20, 2000)

• 2000 WL 33979674 (Appellate Filing) Brief for Amici Curiae, the States of Alabama, Iowa, Louisiana, Mississippi, Nebraska, Ohio, South Carolina, Texas, and Virginia in Support of Petition for Writ of Certiorari (Jul. 19, 2000)

END OF DOCUMENT

Briefs and Other Related Documents

Supreme Court of the United States

GOOD NEWS CLUB, et al., Petitioners,
v.
MILFORD CENTRAL SCHOOL.

No. 99-2036.

Argued Feb. 28, 2001.
Decided June 11, 2001.

Christian club for children, a sponsor, and a member brought § 1983 action against public school, alleging that school's refusal to allow club to use school facilities violated, inter alia, their free speech rights. The United States District Court for the Northern District of New York, McAvoy, Chief Judge, 21 F.Supp.2d 147, granted school summary judgment, and club appealed. The United States Court of Appeals for the Second Circuit, 202 F.3d 502, affirmed, and certiorari was granted. The Supreme Court, Justice Thomas, J., held that: (1) school's exclusion of Christian children's club from meeting after hours at school based on its religious nature was unconstitutional viewpoint discrimination, and (2) school's viewpoint discrimination was not required to avoid violating the Establishment Clause.

Reversed and remanded.

Justice Scalia filed a concurring opinion.

Justice Breyer filed an opinion concurring in part.

Justice Stevens filed a dissenting opinion.

Justice Souter filed a dissenting opinion, in which Justice Ginsburg joined.

West Headnotes

[1] Constitutional Law ⚿90.1(4)
92k90.1(4)

If a forum is a traditional or open public forum, the State's restrictions on speech are subject to stricter scrutiny than are restrictions in a limited public forum. U.S.C.A. Const.Amend. 1.

[2] Constitutional Law ⚿90.1(4)
92k90.1(4)

When the State establishes a limited public forum, the State is not required to and does not allow persons to engage in every type of speech, and may be justified in reserving its forum for certain groups or for the discussion of certain topics, but the restriction must not discriminate against speech on the basis of viewpoint, and must be reasonable in light of the purpose served by the forum. U.S.C.A. Const.Amend. 1.

[3] Constitutional Law ⚿90.1(1.4)
92k90.1(1.4)

[3] Schools ⚿72
345k72

Public school's exclusion of Christian children's club from meeting after hours at school based on its religious nature was unconstitutional viewpoint discrimination, where school had opened its limited public forum to activities that served a variety of purposes, including events "pertaining to the welfare of the community," and had interpreted its policy to permit discussions of subjects such as "the development of character and morals from a religious perspective," but excluded club on ground that its activities, which included learning Bible verses, relation of Bible stories to members' lives, and prayer, were "the equivalent of religious instruction itself;" fact that club's activities were "decidedly religious in nature" did not mean that they could not also be characterized properly as the teaching of morals and character development from a particular viewpoint; abrogating *Campbell v. St. Tammany's School Bd.*, 206 F.3d 482. U.S.C.A. Const.Amend. 1.

[4] Constitutional Law ⚿90.1(1.4)
92k90.1(1.4)

[4] Schools ⚿72
345k72

Because the exclusion of Christian club from use of public school premises on the basis of its religious perspective constituted unconstitutional viewpoint discrimination, it was no defense for school that purely religious purposes could be excluded under state law enumerating several purposes for which

local boards may open their schools to public use. U.S.C.A. Const.Amend. 1; N.Y.McKinney's Education Law § 414.

[5] Constitutional Law ⚷90.1(4)
92k90.1(4)

Speech discussing otherwise permissible subjects cannot be excluded from a limited public forum on the ground that the subject is discussed from a religious viewpoint. U.S.C.A. Const.Amend. 1.

[6] Constitutional Law ⚷84.5(3)
92k84.5(3)

[6] Schools ⚷72
345k72

Public school's viewpoint discrimination, in exclusion of Christian children's club from meeting at school based on its religious nature, was not required to avoid violating the Establishment Clause, where the club's meetings were held after school hours, not sponsored by the school, and open to any student who obtained parental consent, and the school made its forum available to other organizations, despite contention that elementary school children would perceive that the school was endorsing the club and would feel coercive pressure to participate, because the club's activities took place on school grounds. U.S.C.A. Const.Amend. 1.

[7] Constitutional Law ⚷84.1
92k84.1

A significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion, and the guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse. U.S.C.A. Const.Amend. 1.

[8] Constitutional Law ⚷84.5(3)
92k84.5(3)

[8] Schools ⚷72
345k72

To the extent Supreme Court considered whether the community would feel coercive pressure to engage in the activities of Christian children's club, conducted after hours on public school premises, the relevant community would be the parents, not the elementary school children, where it was the parents who chose whether their children would attend the club meetings and the children could not attend without their parents' permission, and an argument that the parents would be confused about whether the school was endorsing religion could not be reasonably advanced. U.S.C.A. Const.Amend. 1.

[9] Constitutional Law ⚷84.5(3)
92k84.5(3)

Whatever significance Supreme Court may have assigned in the Establishment Clause context to the suggestion that elementary school children are more impressionable than adults, it has never extended its Establishment Clause jurisprudence to foreclose private religious conduct during nonschool hours merely because it takes place on school premises where elementary school children may be present. U.S.C.A. Const.Amend. 1.

[10] Constitutional Law ⚷84.5(3)
92k84.5(3)

[10] Schools ⚷72
345k72

Even if Supreme Court were to consider the possible misperceptions by schoolchildren in deciding whether public school's permitting Christian children's club's after hours activities on school premises would violate the Establishment Clause, the facts of the case did not support school's conclusion, where there was no evidence that young children were permitted to loiter outside classrooms after the school day had ended, parents had to sign permission forms for attendance at club meetings, the meetings were held in a combined high school resource room and middle school special education room, not in an elementary school classroom, the instructors were not schoolteachers, and the children in the group were not all the same age as in the normal classroom setting. U.S.C.A. Const.Amend. 1.

[11] Constitutional Law ⚷84.5(3)
92k84.5(3)

[11] Schools ⚷72
345k72

Even if Supreme Court were to inquire into the minds of schoolchildren with respect to the Establishment

Clause implications of permitting Christian children's club to hold meetings after hours on school premises, the danger that children would misperceive the endorsement of religion was no greater than the danger that they would perceive a hostility toward the religious viewpoint if the club were excluded from the public forum. U.S.C.A. Const.Amend. 1.

[12] Constitutional Law ⚿84.5(3)
92k84.5(3)

[12] Schools ⚿72
345k72

Any risk that small children would perceive endorsement of religion did not counsel in favor of excluding a Christian children's club's religious activity after hours on school premises, as there were countervailing constitutional concerns related to rights of other individuals in the community, consisting of the free speech rights of the club and its members. U.S.C.A. Const.Amend. 1.

[13] Constitutional Law ⚿84.5(11)
92k84.5(11)

When a limited public forum is available for use by groups presenting any viewpoint, Supreme Court would not find an Establishment Clause violation simply because only groups presenting a religious viewpoint have opted to take advantage of the forum at a particular time. U.S.C.A. Const.Amend. 1.

****2095** *Syllabus* [FN*]

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

***98** Under New York law, respondent Milford Central School (Milford) enacted a policy authorizing district residents to use its building after school for, among other things, (1) instruction in education, learning, or the arts and (2) social, civic, recreational, and entertainment uses pertaining to the community welfare. Stephen and Darleen Fournier, district residents eligible to use the school's facilities upon approval of their proposed use, are sponsors of the **Good News Club**, a private Christian organization for children ages 6 to 12. Pursuant to Milford's policy, they submitted a request to hold the Club's weekly afterschool meetings in the school. Milford denied the request on the ground that the proposed use--to sing songs, hear Bible lessons, memorize scripture, and pray--was the equivalent of religious worship prohibited by the community use policy. Petitioners (collectively, the Club), filed suit under 42 U.S.C. § 1983, alleging, *inter alia,* that the denial of the Club's application violated its free speech rights under the First and Fourteenth Amendments. The District Court ultimately granted Milford summary judgment, finding the Club's subject matter to be religious in nature, not merely a discussion of secular matters from a religious perspective that Milford otherwise permits. Because the school had not allowed other groups providing religious instruction to use its limited public forum, the court held that it could deny the Club access without engaging in unconstitutional viewpoint discrimination. In affirming, the Second Circuit rejected the Club's contention that Milford's restriction was unreasonable, and held that, because the Club's subject matter was quintessentially religious and its activities fell outside the bounds of pure moral and character development, Milford's policy was constitutional subject discrimination, not unconstitutional viewpoint discrimination.

Held:

****2096** 1. Milford violated the Club's free speech rights when it excluded the Club from meeting after hours at the school. Pp. 2099-2102.

(a) Because the parties so agree, this Court assumes that Milford operates a limited public forum. A State establishing such a forum is not required to and does not allow persons to engage in every type of ***99** speech. It may be justified in reserving its forum for certain groups or the discussion of certain topics. *E.g., Rosenberger v. Rector and Visitors of Univ. of Va.,* 515 U.S. 819, 829, 115 S.Ct. 2510, 132 L.Ed.2d 700. The power to so restrict speech, however, is not without limits. The restriction must not discriminate against speech based on viewpoint, *ibid.,* and must be reasonable in light of the forum's purpose, *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.,* 473 U.S. 788, 806, 105 S.Ct. 3439, 87 L.Ed.2d 567. Pp. 2099-2100.

(b) By denying the Club access to the school's limited public forum on the ground that the Club was religious in nature, Milford discriminated against the Club because of its religious viewpoint in violation of the Free Speech Clause. That exclusion is indistinguishable from the exclusions held violative of the Clause in *Lamb's Chapel v. Center Moriches*

Union Free School Dist., 508 U.S. 384, 113 S.Ct. 2141, 124 L.Ed.2d 352, where a school district precluded a private group from presenting films at the school based solely on the religious perspective of the films, and in *Rosenberger,* where a university refused to fund a student publication because it addressed issues from a religious perspective. The only apparent difference between the activities of Lamb's Chapel and the Club is the inconsequential distinction that the Club teaches moral lessons from a Christian perspective through live storytelling and prayer, whereas Lamb's Chapel taught lessons through films. *Rosenberger* also is dispositive: Given the obvious religious content of the publication there at issue, it cannot be said that the Club's activities are any more "religious" or deserve any less Free Speech Clause protection. This Court disagrees with the Second Circuit's view that something that is quintessentially religious or decidedly religious in nature cannot also be characterized properly as the teaching of morals and character development from a particular viewpoint. What matters for Free Speech Clause purposes is that there is no logical difference in kind between the invocation of Christianity by the Club and the invocation of teamwork, loyalty, or patriotism by other associations to provide a foundation for their lessons. Because Milford's restriction is viewpoint discriminatory, the Court need not decide whether it is unreasonable in light of the forum's purposes. Pp. 2100-2102.

2. Permitting the Club to meet on the school's premises would not have violated the Establishment Clause. Establishment Clause defenses similar to Milford's were rejected in *Lamb's Chapel, supra,* at 395, 113 S.Ct. 2141-- where the Court found that, because the films would not have been shown during school hours, would not have been sponsored by the school, and would have been open to the public, not just to church members, there was no realistic danger that the community would think that the district was endorsing religion--and in *Widmar v. Vincent,* 454 U.S. 263, 272-273, and n. 13, 102 S.Ct. 269, 70 L.Ed.2d 440--where a university's forum was ***100** already available to other groups. Because the Club's activities are materially indistinguishable from those in *Lamb's Chapel* and *Widmar,* Milford's reliance on the Establishment Clause is unavailing. As in *Lamb's Chapel,* the Club's meetings were to be held after school hours, not sponsored by the school, and open to any student who obtained parental consent, not just to Club members. As in *Widmar,* Milford made its forum available to other organizations. The Court rejects Milford's attempt to distinguish those cases by emphasizing that its policy involves elementary school children ****2097** who will perceive that the school is endorsing the Club and will feel coerced to participate because the Club's activities take place on school grounds, even though they occur during nonschool hours. That argument is unpersuasive for a number of reasons. (1) Allowing the Club to speak on school grounds would ensure, not threaten, neutrality toward religion. Accordingly, Milford faces an uphill battle in arguing that the Establishment Clause compels it to exclude the Club. See, *e.g., Rosenberger, supra,* at 839, 115 S.Ct. 2510. (2) To the extent the Court considers whether the community would feel coercive pressure to engage in the Club's activities, cf. *Lee v. Weisman,* 505 U.S. 577, 592-593, 112 S.Ct. 2649, 120 L.Ed.2d 467, the relevant community is the parents who choose whether their children will attend Club meetings, not the children themselves. (3) Whatever significance it may have assigned in the Establishment Clause context to the suggestion that elementary school children are more impressionable than adults, cf., *e.g., id.,* at 592, 112 S.Ct. 2649, the Court has never foreclosed private religious conduct during nonschool hours merely because it takes place on school premises where elementary school children may be present. *Lee, supra,* at 592, 112 S.Ct. 2649, and *Edwards v. Aguillard,* 482 U.S. 578, 584, 107 S.Ct. 2573, 96 L.Ed.2d 510, distinguished. (4) Even if the Court were to consider the possible misperceptions by schoolchildren in deciding whether there is an Establishment Clause violation, the facts of this case simply do not support Milford's conclusion. Finally, it cannot be said that the danger that children would misperceive the endorsement of religion is any greater than the danger that they would perceive a hostility toward the religious viewpoint if the Club were excluded from the public forum. Because it is not convinced that there is any significance to the possibility that elementary school children may witness the Club's activities on school premises, the Court can find no reason to depart from *Lamb's Chapel* and *Widmar.* Pp. 2103-2107.

3. Because Milford has not raised a valid Establishment Clause claim, this Court does not address whether such a claim could excuse Milford's viewpoint discrimination. Pp. 2103, 2107.

202 F.3d 502, reversed and remanded.

***101** THOMAS, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, SCALIA, and KENNEDY, JJ., joined,

and in which BREYER, JJ., joined in part. SCALIA, J., filed a concurring opinion, *post,* p. 2107. BREYER, J., filed an opinion concurring in part, *post,* p. 2111. STEVENS, J., filed a dissenting opinion, *post,* p. 2112. SOUTER, J., filed a dissenting opinion, in which GINSBURG, J., joined, *post,* p. 2115.

Thomas Marcelle, Slingerlands, NY, for petitioners.

Frank W. Miller, East Syracuse, NY, for Respondents.

***102** Justice THOMAS delivered the opinion of the Court.

This case presents two questions. The first question is whether Milford Central School violated the free speech rights of the **Good News Club** when it excluded the Club from meeting after hours at the school. The second question is whether any such violation is justified by Milford's concern that permitting the Club's activities would violate the Establishment Clause. We conclude that Milford's restriction violates the Club's free speech rights and that no Establishment Clause concern justifies that violation.

I

The State of New York authorizes local school boards to adopt regulations governing ****2098** the use of their school facilities. In particular, N.Y. Educ. Law § 414 (McKinney 2000) enumerates several purposes for which local boards may open their schools to public use. In 1992, respondent Milford Central School (Milford) enacted a community use policy adopting seven of § 414's purposes for which its building could be used after school. App. to Pet. for Cert. D1-D3. Two of the stated purposes are relevant here. First, district residents may use the school for "instruction in any branch of education, learning or the arts." *Id.,* at D1. Second, the school is available for "social, civic and recreational meetings and entertainment events, and other uses pertaining to the welfare of the community, provided that such uses shall be nonexclusive and shall be opened to the general public." *Ibid.*

***103** Stephen and Darleen Fournier reside within Milford's district and therefore are eligible to use the school's facilities as long as their proposed use is approved by the school. Together they are sponsors of the local **Good News Club**, a private Christian organization for children ages 6 to 12. Pursuant to Milford's policy, in September 1996 the Fourniers submitted a request to Dr. Robert McGruder, interim superintendent of the district, in which they sought permission to hold the Club's weekly afterschool meetings in the school cafeteria. App. in No. 98-9494(CA2), p. A-81. The next month, McGruder formally denied the Fourniers' request on the ground that the proposed use--to have "a fun time of singing songs, hearing a Bible lesson and memorizing scripture," *ibid.*--was "the equivalent of religious worship." App. H1-H2. According to McGruder, the community use policy, which prohibits use "by any individual or organization for religious purposes," foreclosed the Club's activities. App. to Pet. for Cert. D2.

In response to a letter submitted by the Club's counsel, Milford's attorney requested information to clarify the nature of the Club's activities. The Club sent a set of materials used or distributed at the meetings and the following description of its meeting:

> "The Club opens its session with Ms. Fournier taking attendance. As she calls a child's name, if the child recites a Bible verse the child receives a treat. After attendance, the Club sings songs. Next Club members engage in games that involve, *inter alia,* learning Bible verses. Ms. Fournier then relates a Bible story and explains how it applies to Club members' lives. The Club closes with prayer. Finally, Ms. Fournier distributes treats and the Bible verses for memorization." App. in No. 98-9494(CA2), at A30.

McGruder and Milford's attorney reviewed the materials and concluded that "the kinds of activities proposed to be ***104** engaged in by the **Good News Club** were not a discussion of secular subjects such as child rearing, development of character and development of morals from a religious perspective, but were in fact the equivalent of religious instruction itself." *Id.,* at A25. In February 1997, the Milford Board of Education adopted a resolution rejecting the Club's request to use Milford's facilities "for the purpose of conducting religious instruction and Bible study." *Id.,* at A56.

In March 1997, petitioners, the **Good News Club**, Ms. Fournier, and her daughter Andrea Fournier (collectively, the Club), filed an action under Rev.Stat. § 1979, 42 U.S.C. § 1983, against Milford in the United States District Court for the Northern District of New York. The Club alleged that Milford's denial of its application violated its free speech rights under the First and Fourteenth Amendments, its right

to equal protection under the Fourteenth Amendment, and its right to religious freedom under the Religious Freedom Restoration Act of 1993, 107 Stat. 1488, 42 U.S.C. § 2000bb *et seq.* [FN1]

FN1. The District Court dismissed the Club's claim under the Religious Freedom Restoration Act because we held the Act to be unconstitutional in *City of Boerne v. Flores,* 521 U.S. 507, 117 S.Ct. 2157, 138 L.Ed.2d 624 (1997). See 21 F.Supp.2d 147, 150, n. 4 (N.D.N.Y.1998).

**2099 The Club moved for a preliminary injunction to prevent the school from enforcing its religious exclusion policy against the Club and thereby to permit the Club's use of the school facilities. On April 14, 1997, the District Court granted the injunction. The Club then held its weekly afterschool meetings from April 1997 until June 1998 in a high school resource and middle school special education room. App. N12.

In August 1998, the District Court vacated the preliminary injunction and granted Milford's motion for summary judgment. 21 F.Supp.2d 147 (N.D.N.Y.1998). The court found that the Club's "subject matter is decidedly religious in nature, and not merely a discussion of secular matters *105 from a religious perspective that is otherwise permitted under [Milford's] use policies." *Id.,* at 154. Because the school had not permitted other groups that provided religious instruction to use its limited public forum, the court held that the school could deny access to the Club without engaging in unconstitutional viewpoint discrimination. The court also rejected the Club's equal protection claim.

The Club appealed, and a divided panel of the United States Court of Appeals for the Second Circuit affirmed. 202 F.3d 502 (2000). First, the court rejected the Club's contention that Milford's restriction against allowing religious instruction in its facilities is unreasonable. Second, it held that, because the subject matter of the Club's activities is "quintessentially religious," *id.,* at 510, and the activities "fall outside the bounds of pure 'moral and character development,' " *id.,* at 511, Milford's policy of excluding the Club's meetings was constitutional subject discrimination, not unconstitutional viewpoint discrimination. Judge Jacobs filed a dissenting opinion in which he concluded that the school's restriction did constitute viewpoint discrimination under *Lamb's Chapel v. Center Moriches Union Free School Dist.,* 508 U.S. 384, 113 S.Ct. 2141, 124 L.Ed.2d 352 (1993).

There is a conflict among the Courts of Appeals on the question whether speech can be excluded from a limited public forum on the basis of the religious nature of the speech. Compare *Gentala v. Tucson,* 244 F.3d 1065 (C.A.9 2001) (en banc) (holding that a city properly refused National Day of Prayer organizers' application to the city's civic events fund for coverage of costs for city services); *Campbell v. St. Tammany's School Bd.,* 206 F.3d 482 (C.A.5 2000) (holding that a school's policy against permitting religious instruction in its limited public forum did not constitute viewpoint discrimination), cert. pending, No. 00-1194; [FN*] *Bronx Household of Faith v. Community School Dist. No. 10,* 127 F.3d 207 (C.A.2 1997) (concluding that a ban on religious services and *106 instruction in the limited public forum was constitutional), with *Church on the Rock v. Albuquerque,* 84 F.3d 1273 (C.A.10 1996) (holding that a city's denial of permission to show the film Jesus in a senior center was unconstitutional viewpoint discrimination); and *Good News/Good Sports Club v. School Dist. of Ladue,* 28 F.3d 1501 (C.A.8 1994) (holding unconstitutional a school use policy that prohibited **Good News Club** from meeting during times when the Boy Scouts could meet). We granted certiorari to resolve this conflict. 531 U.S. 923, 121 S.Ct. 296, 148 L.Ed.2d 238 (2000)

FN* [Reporter's Note: See *post,* 533 U.S. 913, 121 S.Ct. 2518.]

II

[1] The standards that we apply to determine whether a State has unconstitutionally excluded a private speaker from use of a public forum depend on the nature of the forum. See *Perry Ed. Assn. v. Perry Local Educators' Assn.,* 460 U.S. 37, 44, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983). **2100 If the forum is a traditional or open public forum, the State's restrictions on speech are subject to stricter scrutiny than are restrictions in a limited public forum. *Id.,* at 45-46, 103 S.Ct. 948. We have previously declined to decide whether a school district's opening of its facilities pursuant to N.Y. Educ. Law § 414 creates a limited or a traditional public forum. See *Lamb's Chapel, supra,* at 391-392, 113 S.Ct. 2141. Because the parties have agreed that Milford created a limited public forum when it opened its facilities in 1992, see Brief for Petitioners 15-17; Brief for Respondent 26, we need not resolve the issue here. Instead, we simply will assume that Milford operates a limited

public forum.

[2] When the State establishes a limited public forum, the State is not required to and does not allow persons to engage in every type of speech. The State may be justified "in reserving [its forum] for certain groups or for the discussion of certain topics." *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 829, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995); see also *Lamb's Chapel, supra,* at 392-393, 113 S.Ct. 2141. The State's power to restrict speech, however, is not without limits. The restriction must not discriminate against speech on the basis of viewpoint, ***107** *Rosenberger, supra,* at 829, 115 S.Ct. 2510, and the restriction must be "reasonable in light of the purpose served by the forum," *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.*, 473 U.S. 788, 806, 105 S.Ct. 3439, 87 L.Ed.2d 567 (1985).

III

[3][4] Applying this test, we first address whether the exclusion constituted viewpoint discrimination. We are guided in our analysis by two of our prior opinions, *Lamb's Chapel* and *Rosenberger.* In *Lamb's Chapel,* we held that a school district violated the Free Speech Clause of the First Amendment when it excluded a private group from presenting films at the school based solely on the films' discussions of family values from a religious perspective. Likewise, in *Rosenberger,* we held that a university's refusal to fund a student publication because the publication addressed issues from a religious perspective violated the Free Speech Clause. Concluding that Milford's exclusion of the **Good News Club** based on its religious nature is indistinguishable from the exclusions in these cases, we hold that the exclusion constitutes viewpoint discrimination. Because the restriction is viewpoint discriminatory, we need not decide whether it is unreasonable in light of the purposes served by the forum. [FN2]

FN2. Although Milford argued below that, under § 414, it could not permit its property to be used for the purpose of religious activity, see Brief for Appellee in No. 98-9494(CA2), p. 12, here it merely asserts in one sentence that it has, "in accordance with state law, closed [its] limited open forum to purely religious instruction and services," Brief for Respondent 27. Because Milford does not elaborate, it is difficult to discern whether it is arguing that it is required by state law to exclude the Club's activities.

Before the Court of Appeals, Milford cited *Trietley v. Board of Ed. of Buffalo,* 65 A.D.2d 1, 409 N.Y.S.2d 912 (1978), in which a New York court held that a local school district could not permit a student Bible club to meet on school property because "[r]eligious purposes are not included in the enumerated purposes for which a school may be used under section 414 of the Education Law." *Id.,* at 5-6, 409 N.Y.S.2d, at 915. Although the court conceded that the Bible clubs might provide incidental secular benefits, it nonetheless concluded that the school would have violated the Establishment Clause had it permitted the club's activities on campus. Because we hold that the exclusion of the Club on the basis of its religious perspective constitutes unconstitutional viewpoint discrimination, it is no defense for Milford that purely religious purposes can be excluded under state law.

***108** Milford has opened its limited public forum to activities that serve a variety of purposes, including events "pertaining to the welfare of the community." App. to Pet. for Cert. D1. Milford interprets its policy to permit discussions of subjects such as child rearing, and of "the development **2101** of character and morals from a religious perspective." Brief for Appellee in No. 98-9494(CA2), p. 6. For example, this policy would allow someone to use Aesop's Fables to teach children moral values. App. N11. Additionally, a group could sponsor a debate on whether there should be a constitutional amendment to permit prayer in public schools, *id.,* at N6, and the Boy Scouts could meet "to influence a boy's character, development and spiritual growth," *id.,* at N10-N11. In short, any group that "promote[s] the moral and character development of children" is eligible to use the school building. Brief for Appellee in No. 98-9494(CA2), at 9.

Just as there is no question that teaching morals and character development to children is a permissible purpose under Milford's policy, it is clear that the Club teaches morals and character development to children. For example, no one disputes that the Club instructs children to overcome feelings of jealousy, to treat others well regardless of how they treat the children, and to be obedient, even if it does so in a nonsecular way. Nonetheless, because Milford found the Club's activities to be religious in nature--"the equivalent of religious instruction itself," 202 F.3d, at 507--it excluded the Club from use of its facilities.

***109** Applying Lamb's Chapel, [FN3] we find it quite clear that Milford engaged in viewpoint discrimination when it excluded the Club from the afterschool forum. In *Lamb's Chapel,* the local New

York school district similarly had adopted § 414's "social, civic or recreational use" category as a permitted use in its limited public forum. The district also prohibited use "by any group for religious purposes." 508 U.S., at 387, 113 S.Ct. 2141. Citing this prohibition, the school district excluded a church that wanted to present films teaching family values from a Christian perspective. We held that, because the films "no doubt dealt with a subject otherwise permissible" under the rule, the teaching of family values, the district's exclusion of the church was unconstitutional viewpoint discrimination. *Id.,* at 394, 113 S.Ct. 2141.

> FN3. We find it remarkable that the Court of Appeals majority did not cite *Lamb's Chapel,* despite its obvious relevance to the case. We do not necessarily expect a court of appeals to catalog every opinion that reverses one of its precedents. Nonetheless, this oversight is particularly incredible because the majority's attention was directed to it at every turn. See, *e.g.,* 202 F.3d 502, 513 (C.A.2 2000) (Jacobs, J., dissenting) ("I cannot square the majority's analysis in this case with *Lamb's Chapel* "); 21 F.Supp.2d, at 150; App. O9-O11 (District Court stating "that *Lamb's Chapel* and *Rosenberger* pinpoint the critical issue in this case"); Brief for Appellee in No. 98-9494(CA2), at 36-39; Brief for Appellants in No. 98-9494(CA2), pp. 15, 36.

Like the church in *Lamb's Chapel,* the Club seeks to address a subject otherwise permitted under the rule, the teaching of morals and character, from a religious standpoint. Certainly, one could have characterized the film presentations in *Lamb's Chapel* as a religious use, as the Court of Appeals did, *Lamb's Chapel v. Center Moriches Union Free School Dist.,* 959 F.2d 381, 388-389 (C.A.2 1992). And one easily could conclude that the films' purpose to instruct that " 'society's slide toward humanism ... can only be counterbalanced by a loving home where Christian values are instilled from an early age,' " *id.,* at 384, was "quintessentially religious," 202 F.3d, at 510. The only apparent difference ***110** between the activity of Lamb's Chapel and the activities of the **Good News Club** is that the Club chooses to teach moral lessons from a Christian perspective through live storytelling and prayer, whereas Lamb's Chapel taught lessons through films. This distinction is inconsequential. Both modes of speech use a religious viewpoint. Thus, the exclusion of the **Good News Club's** activities, like the exclusion of Lamb's Chapel's films, constitutes unconstitutional viewpoint discrimination.

Our opinion in *Rosenberger* also is dispositive. In *Rosenberger,* a student organization ****2102** at the University of Virginia was denied funding for printing expenses because its publication, Wide Awake, offered a Christian viewpoint. Just as the Club emphasizes the role of Christianity in students' morals and character, Wide Awake " 'challenge[d] Christians to live, in word and deed, according to the faith they proclaim and ... encourage[d] students to consider what a personal relationship with Jesus Christ means.' " 515 U.S., at 826, 115 S.Ct. 2510. Because the university "select[ed] for disfavored treatment those student journalistic efforts with religious editorial viewpoints," we held that the denial of funding was unconstitutional. *Id.,* at 831, 115 S.Ct. 2510. Although in *Rosenberger* there was no prohibition on religion as a subject matter, our holding did not rely on this factor. Instead, we concluded simply that the university's denial of funding to print Wide Awake was viewpoint discrimination, just as the school district's refusal to allow Lamb's Chapel to show its films was viewpoint discrimination. *Ibid.* Given the obvious religious content of Wide Awake, we cannot say that the Club's activities are any more "religious" or deserve any less First Amendment protection than did the publication of Wide Awake in *Rosenberger.*

Despite our holdings in *Lamb's Chapel* and *Rosenberger,* the Court of Appeals, like Milford, believed that its characterization of the Club's activities as religious in nature ***111** warranted treating the Club's activities as different in kind from the other activities permitted by the school. See 202 F.3d, at 510 (the Club "is doing something other than simply teaching moral values"). The "Christian viewpoint" is unique, according to the court, because it contains an "additional layer" that other kinds of viewpoints do not. *Id.,* at 509. That is, the Club "is focused on teaching children how to cultivate their relationship with God through Jesus Christ," which it characterized as "quintessentially religious." *Id.,* at 510. With these observations, the court concluded that, because the Club's activities "fall outside the bounds of pure 'moral and character development,' " the exclusion did not constitute viewpoint discrimination. *Id.,* at 511.

[5] We disagree that something that is "quintessentially religious" or "decidedly religious in nature" cannot also be characterized properly as the teaching of morals and character development from a particular viewpoint. See 202 F.3d, at 512 (Jacobs, J., dissenting) ("[W]hen the subject matter is morals

and character, it is quixotic to attempt a distinction between religious viewpoints and religious subject matters"). What matters for purposes of the Free Speech Clause is that we can see no logical difference in kind between the invocation of Christianity by the Club and the invocation of teamwork, loyalty, or patriotism by other associations to provide a foundation for their lessons. It is apparent that the unstated principle of the Court of Appeals' reasoning is its conclusion that any time religious instruction and prayer are used to discuss morals and character, the discussion is simply not a "pure" discussion of those issues. According to the Court of Appeals, reliance on Christian principles taints moral and character instruction in a way that other foundations for thought or viewpoints do not. We, however, have never reached such a conclusion. Instead, we reaffirm our holdings in *Lamb's Chapel* and *Rosenberger* ***112** *that speech discussing otherwise permissible subjects cannot be excluded from a limited public forum on the ground that the subject is discussed from a religious viewpoint. Thus, we conclude that Milford's exclusion of the Club from use of the school, pursuant to its community use policy, constitutes impermissible viewpoint discrimination. [FN4]*

FN4. Despite Milford's insistence that the Club's activities constitute "religious worship," the Court of Appeals made no such determination. It did compare the Club's activities to "religious worship," 202 F.3d, at 510, but ultimately it concluded merely that the Club's activities "fall outside the bounds of pure 'moral and character development,' " *id.*, at 511. In any event, we conclude that the Club's activities do not constitute mere religious worship, divorced from any teaching of moral values.

Justice SOUTER's recitation of the Club's activities is accurate. See *post,* at 2116-2117 (dissenting opinion). But in our view, religion is used by the Club in the same fashion that it was used by Lamb's Chapel and by the students in *Rosenberger:* Religion is the viewpoint from which ideas are conveyed. We did not find the *Rosenberger* students' attempt to cultivate a personal relationship with Christ to bar their claim that religion was a viewpoint. And we see no reason to treat the Club's use of religion as something other than a viewpoint merely because of any evangelical message it conveys. According to Justice SOUTER, the Club's activities constitute "an evangelical service of worship." *Post,* at 2117. Regardless of the label Justice SOUTER wishes to use, what matters is the substance of the Club's activities, which we conclude are materially indistinguishable from the activities in *Lamb's Chapel* and *Rosenberger.*

****2103** IV

[6] Milford argues that, even if its restriction constitutes viewpoint discrimination, its interest in not violating the Establishment Clause outweighs the Club's interest in gaining equal access to the school's facilities. In other words, according to Milford, its restriction was required to avoid violating the Establishment Clause. We disagree.

We have said that a state interest in avoiding an Establishment Clause violation "may be characterized as compelling," and therefore may justify content-based discrimination. ***113** *Widmar v. Vincent,* 454 U.S. 263, 271, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981). However, it is not clear whether a State's interest in avoiding an Establishment Clause violation would justify viewpoint discrimination. See *Lamb's Chapel,* 508 U.S., at 394-395, 113 S.Ct. 2141 (noting the suggestion in *Widmar* but ultimately not finding an Establishment Clause problem). We need not, however, confront the issue in this case, because we conclude that the school has no valid Establishment Clause interest.

We rejected Establishment Clause defenses similar to Milford's in two previous free speech cases, *Lamb's Chapel* and *Widmar.* In particular, in *Lamb's Chapel,* we explained that "[t]he showing of th[e] film series would not have been during school hours, would not have been sponsored by the school, and would have been open to the public, not just to church members." 508 U.S., at 395, 113 S.Ct. 2141. Accordingly, we found that "there would have been no realistic danger that the community would think that the District was endorsing religion or any particular creed." *Ibid.* Likewise, in *Widmar,* where the university's forum was already available to other groups, this Court concluded that there was no Establishment Clause problem. 454 U.S., at 272-273, and n. 13, 102 S.Ct. 269.

The Establishment Clause defense fares no better in this case. As in *Lamb's Chapel,* the Club's meetings were held after school hours, not sponsored by the school, and open to any student who obtained parental consent, not just to Club members. As in *Widmar,* Milford made its forum available to other organizations. The Club's activities are materially indistinguishable from those in *Lamb's Chapel* and *Widmar.* Thus, Milford's reliance on the Establishment Clause is unavailing.

Milford attempts to distinguish *Lamb's Chapel* and

Widmar by emphasizing that Milford's policy involves elementary school children. According to Milford, children will perceive that the school is endorsing the Club and will feel coercive pressure to participate, because the Club's activities ***114** take place on school grounds, even though they occur during nonschool hours. [FN5] This argument is unpersuasive.

> FN5. It is worth noting that, although Milford repeatedly has argued that the Club's meeting time directly after the schoolday is relevant to its Establishment Clause concerns, the record does not reflect any offer by the school district to permit the Club to use the facilities at a different time of day. The superintendent's stated reason for denying the applications was simply that the Club's activities were "religious instruction." 202 F.3d, at 507. In any event, consistent with *Lamb's Chapel* and *Widmar,* the school could not deny equal access to the Club for any time that is generally available for public use.

****2104** [7] First, we have held that "a significant factor in upholding governmental programs in the face of Establishment Clause attack is their *neutrality* towards religion." *Rosenberger,* 515 U.S., at 839, 115 S.Ct. 2510 (emphasis added). See also *Mitchell v. Helms,* 530 U.S. 793, 809, 120 S.Ct. 2530, 147 L.Ed.2d 660, (2000) (plurality opinion) ("In distinguishing between indoctrination that is attributable to the State and indoctrination that is not, [the Court has] consistently turned to the principle of *neutrality,* upholding aid that is offered to a broad range of groups or persons without regard to their religion" (emphasis added)); *id.,* at 838, 120 S.Ct. 2530 (O'CONNOR, J., concurring in judgment) ("[N]eutrality is an important reason for upholding government-aid programs against Establishment Clause challenges"). Milford's implication that granting access to the Club would do damage to the neutrality principle defies logic. For the "guarantee of neutrality is respected, not offended, when the government, following neutral criteria and evenhanded policies, extends benefits to recipients whose ideologies and viewpoints, including religious ones, are broad and diverse." *Rosenberger, supra,* at 839, 115 S.Ct. 2510. The **Good News Club** seeks nothing more than to be treated neutrally and given access to speak about the same topics as are other groups. Because allowing the Club to speak on school grounds would ensure neutrality, not threaten it, Milford faces an uphill battle in arguing that the Establishment Clause compels it to exclude the **Good News Club**.

[8] ***115** Second, to the extent we consider whether the community would feel coercive pressure to engage in the Club's activities, cf. *Lee v. Weisman,* 505 U.S. 577, 592-593, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992), the relevant community would be the parents, not the elementary school children. It is the parents who choose whether their children will attend the **Good News Club** meetings. Because the children cannot attend without their parents' permission, they cannot be coerced into engaging in the **Good News Club's** religious activities. Milford does not suggest that the parents of elementary school children would be confused about whether the school was endorsing religion. Nor do we believe that such an argument could be reasonably advanced.

[9] Third, whatever significance we may have assigned in the Establishment Clause context to the suggestion that elementary school children are more impressionable than adults, cf., *e.g., id.,* at 592, 112 S.Ct. 2649; *School Dist. of Grand Rapids v. Ball,* 473 U.S. 373, 390, 105 S.Ct. 3216, 87 L.Ed.2d 267 (1985) (stating that "symbolism of a union between church and state is most likely to influence children of tender years, whose experience is limited and whose beliefs consequently are the function of environment as much as of free and voluntary choice"), we have never extended our Establishment Clause jurisprudence to foreclose private religious conduct during nonschool hours merely because it takes place on school premises where elementary school children may be present.

None of the cases discussed by Milford persuades us that our Establishment Clause jurisprudence has gone this far. For example, Milford cites *Lee v. Weisman* for the proposition that "there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools," 505 U.S., at 592, 112 S.Ct. 2649. In *Lee,* however, we concluded that attendance at the graduation exercise was obligatory. *Id.,* at 586, 112 S.Ct. 2649. See also *Santa Fe Independent School* *****2105*** *Dist. v. Doe,* 530 U.S. 290, 120 S.Ct. 2266, 147 L.Ed.2d 295 (2000) (holding the school's policy of permitting prayer at ***116** football games unconstitutional where the activity took place during a school-sponsored event and not in a public forum). We did not place independent significance on the fact that the graduation exercise might take place on school premises, *Lee, supra,* at 583, 112 S.Ct. 2649. Here, where the school facilities are being used for a

nonschool function and there is no government sponsorship of the Club's activities, *Lee* is inapposite.

Equally unsupportive is *Edwards v. Aguillard,* 482 U.S. 578, 107 S.Ct. 2573, 96 L.Ed.2d 510 (1987), in which we held that a Louisiana law that proscribed the teaching of evolution as part of the public school curriculum, unless accompanied by a lesson on creationism, violated the Establishment Clause. In *Edwards,* we mentioned that students are susceptible to pressure in the classroom, particularly given their possible reliance on teachers as role models. See *id.,* at 584, 107 S.Ct. 2573. But we did not discuss this concern in our application of the law to the facts. Moreover, we did note that mandatory attendance requirements meant that state advancement of religion in a school would be particularly harshly felt by impressionable students. [FN6] But we did not suggest that, when the school was not actually advancing religion, the impressionability of students would be relevant to the Establishment Clause issue. Even if *Edwards* had articulated the principle Milford believes it did, the facts in *Edwards* are simply too remote from those here ***117** to give the principle any weight. *Edwards* involved the content of the curriculum taught by state teachers *during the schoolday* to children required to attend. Obviously, when individuals who are not schoolteachers are giving lessons after school to children permitted to attend only with parental consent, the concerns expressed in *Edwards* are not present. [FN7]

FN6. Milford also cites *Illinois ex rel. McCollum v. Board of Ed. of School Dist. No. 71, Champaign Cty.,* 333 U.S. 203, 68 S.Ct. 461, 92 L.Ed. 649 (1948), for its position that the Club's religious element would be advanced by the State through compulsory attendance laws. In *McCollum,* the school district excused students from their normal classroom study during the regular schoolday to attend classes taught by sectarian religious teachers, who were subject to approval by the school superintendent. Under these circumstances, this Court found it relevant that "[t]he operation of the State's compulsory education system ... assist [ed] and [wa]s integrated with the program of religious instruction carried on by separate religious sects." *Id.,* at 209, 68 S.Ct. 461. In the present case, there is simply no integration and cooperation between the school district and the Club. The Club's activities take place *after* the time when the children are compelled by state law to be at the school.

FN7. Milford also refers to *Board of Ed. of Westside Community Schools (Dist. 66) v. Mergens,* 496 U.S. 226, 110 S.Ct. 2356, 110 L.Ed.2d 191 (1990), to support its view that "assumptions about the ability of students to make ... subtle distinctions [between schoolteachers during the schoolday and Reverend Fournier after school] are less valid for elementary age children who tend to be less informed, more impressionable, and more subject to peer pressure than average adults." Brief for Respondent 19. Four Justices in *Mergens* believed that high school students likely are capable of distinguishing between government and private endorsement of religion. See 496 U.S., at 250-251, 110 S.Ct. 2356 (opinion of O'CONNOR, J.). The opinion, however, made no statement about how capable of discerning endorsement elementary school children would have been in the context of *Mergens,* where the activity at issue was *after school.* In any event, even to the extent elementary school children are more prone to peer pressure than are older children, it simply is not clear what, in this case, they could be pressured to do.

In further support of the argument that the impressionability of elementary school children even after school is significant, Milford points to several cases in which we have found Establishment Clause violations in public schools. For example, Milford relies heavily on *School Dist. of Abington Township v. Schempp,* 374 U.S. 203, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963), in which we found unconstitutional Pennsylvania's practice of permitting public schools to read Bible verses at the opening of each schoolday. *Schempp,* however, is inapposite because this case does not involve activity by the school during the schoolday.

****2106** [10] Fourth, even if we were to consider the possible misperceptions by schoolchildren in deciding whether Milford's permitting the Club's activities would violate the Establishment Clause, the facts of this case simply do not support Milford's conclusion. There is no evidence that young children are permitted to loiter outside classrooms after the schoolday has ended. Surely even young children are aware of events for which their parents must sign permission ***118** forms. The meetings were held in a combined high school resource room and middle school special education room, not in an elementary school classroom. The instructors are not schoolteachers. And the children in the group are not all the same age as in the normal classroom setting; their ages range from 6 to 12. [FN8] In sum, these circumstances simply do not support the theory that small children would perceive endorsement here.

FN8. Milford also relies on the Equal Access Act, 98 Stat. 1302, 20 U.S.C. §§ 4071-4074, as evidence that Congress has recognized the vulnerability of elementary school children to misperceiving endorsement of religion. The Act, however, makes

no express recognition of the impressionability of elementary school children. It applies only to public secondary schools and makes no mention of elementary schools. § 4071(a). We can derive no meaning from the choice by Congress not to address elementary schools. .

[11] Finally, even if we were to inquire into the minds of schoolchildren in this case, we cannot say the danger that children would misperceive the endorsement of religion is any greater than the danger that they would perceive a hostility toward the religious viewpoint if the Club were excluded from the public forum. This concern is particularly acute given the reality that Milford's building is not used only for elementary school children. Students, from kindergarten through the 12th grade, all attend school in the same building. There may be as many, if not more, upperclassmen as elementary school children who occupy the school after hours. For that matter, members of the public writ large are permitted in the school after hours pursuant to the community use policy. Any bystander could conceivably be aware of the school's use policy and its exclusion of the **Good News Club**, and could suffer as much from viewpoint discrimination as elementary school children could suffer from perceived endorsement. Cf. *Rosenberger,* 515 U.S., at 835-836, 115 S.Ct. 2510 (expressing the concern that viewpoint discrimination can chill individual thought and expression).

[12] ***119** We cannot operate, as Milford would have us do, under the assumption that any risk that small children would perceive endorsement should counsel in favor of excluding the Club's religious activity. We decline to employ Establishment Clause jurisprudence using a modified heckler's veto, in which a group's religious activity can be proscribed on the basis of what the youngest members of the audience might misperceive. Cf. *Capitol Square Review and Advisory Bd. v. Pinette,* 515 U.S. 753, 779-780, 115 S.Ct. 2440, 132 L.Ed.2d 650 (1995) (O'CONNOR, J., concurring in part and concurring in judgment) ("[B]ecause our concern is with the political community writ large, the endorsement inquiry is *not about the perceptions of particular individuals* or saving isolated nonadherents from ... discomfort .... It is for this reason that the reasonable observer in the endorsement inquiry must be deemed aware of the history and context of the community and forum in which the religious [speech takes place]" (emphasis added)). There are countervailing constitutional concerns related to rights of other individuals in the community. In this case, those countervailing concerns are the free speech rights of the Club and its members. Cf. *Rosenberger, supra,* at 835, 115 S.Ct. 2510 ("Vital First Amendment speech principles are at stake here"). ****2107** And, we have already found that those rights have been violated, not merely perceived to have been violated, by the school's actions toward the Club.

[13] We are not convinced that there is any significance in this case to the possibility that elementary school children may witness the **Good News Club's** activities on school premises, and therefore we can find no reason to depart from our holdings in *Lamb's Chapel* and *Widmar.* Accordingly, we conclude that permitting the Club to meet on the school's premises would not have violated the Establishment Clause. [FN9]

FN9. Both parties have briefed the Establishment Clause issue extensively, and neither suggests that a remand would be of assistance on this issue. Although Justice SOUTER would prefer that a record be developed on several facts, see *post,* at 2118, and Justice BREYER believes that development of those facts could yet be dispositive in this case, see *post,* at 2111 (opinion concurring in part), none of these facts is relevant to the Establishment Clause inquiry. For example, Justice SOUTER suggests that we cannot determine whether there would be an Establishment Clause violation unless we know when, and to what extent, other groups use the facilities. When a limited public forum is available for use by groups presenting any viewpoint, however, we would not find an Establishment Clause violation simply because only groups presenting a religious viewpoint have opted to take advantage of the forum at a particular time.

***120** V

When Milford denied the **Good News Club** access to the school's limited public forum on the ground that the Club was religious in nature, it discriminated against the Club because of its religious viewpoint in violation of the Free Speech Clause of the First Amendment. Because Milford has not raised a valid Establishment Clause claim, we do not address the question whether such a claim could excuse Milford's viewpoint discrimination.

* * *

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice SCALIA, concurring.

I join the Court's opinion but write separately to explain further my views on two issues.

I

First, I join Part IV of the Court's opinion, regarding the Establishment Clause issue, with the understanding that its consideration of coercive pressure, see *ante,* at 2104, and perceptions of endorsement, see *ante,* at 2104, 2106, "to the extent" that the law makes such factors relevant, ***121** is consistent with the belief (which I hold) that in this case that extent is zero. As to coercive pressure: Physical coercion is not at issue here; and so-called "peer pressure," if it can even be considered coercion, is, when it arises from private activities, one of the attendant consequences of a freedom of association that is constitutionally protected, see, *e.g., Roberts v. United States Jaycees,* 468 U.S. 609, 622, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984); *NAACP v. Alabama ex rel. Patterson,* 357 U.S. 449, 460-461, 78 S.Ct. 1163, 2 L.Ed.2d 1488 (1958). What is at play here is not coercion, but the compulsion of ideas--and the private right to exert and receive that compulsion (or to have one's children receive it) is *protected* by the Free Speech and Free Exercise Clauses, see, *e.g., Heffron v. International Soc. for Krishna Consciousness, Inc.,* 452 U.S. 640, 647, 101 S.Ct. 2559, 69 L.Ed.2d 298 (1981); *Murdock v. Pennsylvania,* 319 U.S. 105, 108-109, 63 S.Ct. 870, 87 L.Ed. 1292 (1943); *Cantwell v. Connecticut,* 310 U.S. 296, 307-310, 60 S.Ct. 900, 84 L.Ed. 1213 (1940), not banned by the Establishment Clause. A priest has as much liberty to proselytize as a patriot.

As to endorsement, I have previously written that "[r]eligious expression cannot ****2108** violate the Establishment Clause where it (1) is purely private and (2) occurs in a traditional or designated public forum, publicly announced and open to all on equal terms." *Capitol Square Review and Advisory Bd. v. Pinette,* 515 U.S. 753, 770, 115 S.Ct. 2440, 132 L.Ed.2d 650 (1995). The same is true of private speech that occurs in a limited public forum, publicly announced, whose boundaries are not drawn to favor religious groups but instead permit a cross-section of uses. In that context, which is this case, "erroneous conclusions [about endorsement] do not count." *Id.,* at 765, 115 S.Ct. 2440. See also *Lamb's Chapel v. Center Moriches Union Free School Dist.,* 508 U.S. 384, 401, 113 S.Ct. 2141, 124 L.Ed.2d 352 (1993) (SCALIA, J., concurring in judgment) ("I would hold, simply and clearly, that giving [a private religious group] nondiscriminatory access to school facilities cannot violate [the Establishment Clause] because it does not signify state or local embrace of a particular religious sect").

***122** II

Second, since we have rejected the only reason that respondent gave for excluding the Club's speech from a forum that clearly included it (the forum was opened to any "us[e] pertaining to the welfare of the community," App. to Pet. for Cert. D1), I do not suppose it matters whether the exclusion is characterized as viewpoint or subject-matter discrimination. Lacking *any* legitimate reason for excluding the Club's speech from its forum--"because it's religious" will not do, see, *e.g., Church of Lukumi Babalu Aye, Inc. v. Hialeah,* 508 U.S. 520, 532-533, 546, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993); *Employment Div., Dept. of Human Resources of Ore. v. Smith,* 494 U.S. 872, 877-878, 110 S.Ct. 1595, 108 L.Ed.2d 876 (1990)--respondent would seem to fail First Amendment scrutiny regardless of how its action is characterized. Even subject-matter limits must at least be "reasonable in light of the purpose served by the forum," *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.,* 473 U.S. 788, 806, 105 S.Ct. 3439, 87 L.Ed.2d 567 (1985). [FN1] But I agree, in any event, that respondent did discriminate on the basis of viewpoint.

FN1. In this regard, I should note the inaccuracy of Justice SOUTER'S claim that the reasonableness of the forum limitation is not properly before us, see *post,* at 2115-2116, and n. 1 (dissenting opinion). Petitioners argued, both in their papers filed in the District Court, Memorandum of Law in Support of Cross-Motion for Summary Judgment in No. 97-CV-0302 (NDNY), pp. 20-22, and in their brief filed on appeal, Brief for Appellants in No. 98-9494(CA2), pp. 33-35, that respondent's exclusion of them from the forum was unreasonable in light of the purposes served by the forum. Although the District Court did say in passing that the reasonableness of respondent's general restriction on use of its facilities for religious purposes was not challenged, see 21 F.Supp.2d 147, 154 (N.D.N.Y.1998), the Court of Appeals apparently decided that the particular reasonableness challenge brought by petitioners had been preserved, because it addressed the argument on the merits, see 202 F.3d 502, 509 (C.A.2 2000) ("Taking first the reasonableness criterion, the Club argues that the

> restriction is unreasonable .... This argument is foreclosed by precedent").

As I understand it, the point of disagreement between the Court and the dissenters (and the Court of Appeals) ***123** with regard to petitioner's Free Speech Clause claim is not whether the **Good News Club** must be permitted to present religious viewpoints on morals and character in respondent's forum, which has been opened to secular discussions of that subject, see *ante,* at 2100-2101. [FN2] The answer to that is established by our decision in *Lamb's Chapel, supra.* The point of disagreement is not even whether *some* of the Club's religious speech fell within the protection ****2109** of *Lamb's Chapel.* It certainly did. See *ante,* at 2101; 202 F.3d 502, 509 (C.A.2 2000) (the Club's "teachings may involve secular values such as obedience or resisting jealousy").

> FN2. Neither does the disagreement center on the mode of the Club's speech--the fact that it sings songs and plays games. Although a forum could perhaps be opened to lectures but not plays, debates but not concerts, respondent has placed no such restrictions on the use of its facilities. See App. N8, N14, N19 (allowing seminars, concerts, and plays).

The disagreement, rather, regards the portions of the Club's meetings that are not "purely" "discussions" of morality and character from a religious viewpoint. The Club, for example, urges children "who already believe in the Lord Jesus as their Savior" to "[s]top and ask God for the strength and the 'want' ... to obey Him," 21 F.Supp.2d 147, 156 (N.D.N.Y.1998) (internal quotation marks omitted), and it invites children who "don't know Jesus as Savior" to "trust the Lord Jesus to be [their] Savior from sin," *ibid.* The dissenters and the Second Circuit say that the presence of such additional speech, because it is purely religious, transforms the Club's meetings into something different in kind from other, nonreligious activities that teach moral and character development. See *post,* at 2113-2114 (STEVENS, J., dissenting); *post,* at 2116-2117 (SOUTER, J., dissenting); 202 F.3d, at 509-511. Therefore, the argument goes, excluding the Club is not viewpoint discrimination. I disagree.

Respondent has opened its facilities to any "us[e] pertaining to the welfare of the community, provided that such us[e] shall be nonexclusive and shall be opened to the general ***124** public." App. to Pet. for Cert. D1. Shaping the moral and character development of children certainly "pertain[s] to the welfare of the community." Thus, respondent has agreed that groups engaged in the endeavor of developing character may use its forum. The Boy Scouts, for example, may seek "to influence a boy's character, development and spiritual growth," App. N10-N11; cf. *Boy Scouts of America v. Dale,* 530 U.S. 640, 649, 120 S.Ct. 2446, 147 L.Ed.2d 554 (2000) ("[T]he general mission of the Boy Scouts is clear: '[t]o instill values in young people' " (quoting the Scouts' mission statement)), and a group may use Aesop's Fables to teach moral values, App. N11. When the Club attempted to teach Biblical-based moral values, however, it was excluded because its activities "d[id] not involve merely a religious perspective on the secular subject of morality" and because "it [was] clear from the conduct of the meetings that the **Good News Club** goes far beyond merely stating its viewpoint." 202 F.3d, at 510.

From no other group does respondent require the sterility of speech that it demands of petitioners. The Boy Scouts could undoubtedly buttress their exhortations to keep "morally straight" and live "clean" lives, see *Boy Scouts of America v. Dale, supra,* at 649, 120 S.Ct. 2446, by giving *reasons* why that is a good idea--because parents want and expect it, because it will make the scouts "better" and "more successful" people, because it will emulate such admired past Scouts as former President Gerald Ford. The Club, however, may only discuss morals and character, and cannot give *its* reasons why they should be fostered--because God wants and expects it, because it will make the Club members "saintly" people, and because it emulates Jesus Christ. The Club may not, in other words, independently discuss the religious premise on which its views are based--that God exists and His assistance is necessary to morality. It may not defend the premise, and it absolutely must not seek to persuade the children that the premise is true. The children must, so to say, take it on faith. This is blatant viewpoint discrimination. ***125** Just as calls to character based on patriotism will go unanswered if the listeners do not believe their country is good and just, calls to moral behavior based on God's will are useless if the listeners do not believe that God exists. Effectiveness in presenting a viewpoint rests on the persuasiveness with which the speaker defends his premise--and in respondent's facilities every premise but a religious one may be defended.

****2110** In *Rosenberger v. Rector and Visitors of Univ. of Va.,* 515 U.S. 819, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995), we struck down a similar

viewpoint restriction. There, a private student newspaper sought funding from a student-activity fund on the same basis as its secular counterparts. And though the paper printed such directly religious material as exhortations to belief, see *id.,* at 826, 115 S.Ct. 2510 (quoting the paper's self-described mission " 'to encourage students to consider what a personal relationship with Jesus Christ means' "); *id.,* at 865, 115 S.Ct. 2510 (SOUTER, J., dissenting) (" 'The only way to salvation through Him is by confessing and repenting of sin. It is the Christian's duty to make sinners aware of their need for salvation' " (quoting the paper)); see also *id.,* at 865-867, 115 S.Ct. 2510 (quoting other examples), we held that refusing to provide the funds discriminated on the basis of viewpoint, because the religious speech had been used to "provid[e] ... a specific premise ... from which a variety of subjects may be discussed and considered," *id.,* at 831, 115 S.Ct. 2510 (opinion of the Court). The right to present a viewpoint based on a religion premise carried with it the right to defend the premise.

The dissenters emphasize that the religious speech used by the Club as the foundation for its views on morals and character is not just any type of religious speech--although they cannot agree exactly what type of religious speech it is. In Justice STEVENS's view, it is speech "aimed principally at proselytizing or inculcating belief in a particular religious faith," *post,* at 2112; see also *post,* at 2114, n. 3. This does not, to begin with, distinguish *Rosenberger,* which ***126** also involved proselytizing speech, as the above quotations show. See also *Rosenberger, supra,* at 844, 115 S.Ct. 2510 (referring approvingly to the dissent's description of the paper as a "wor[k] characterized by ... evangelism"). But in addition, it does not distinguish the Club's activities from those of the other groups using respondent's forum--which have not, as Justice STEVENS suggests, see *post,* at 2113, been restricted to roundtable "discussions" of moral issues. Those groups may seek to inculcate children with their beliefs, and they may furthermore "recruit others to join their respective groups," *post,* at 2113. The Club must therefore have liberty to do the same, even if, as Justice STEVENS fears without support in the record, see *ibid.,* its actions may prove (shudder!) divisive. See *Lamb's Chapel,* 508 U.S., at 395, 113 S.Ct. 2141 (remarking that worries about "public unrest" caused by "proselytizing" are "difficult to defend as a reason to deny the presentation of a religious point of view"); cf. *Lynch v. Donnelly,* 465 U.S. 668, 684-685, 104 S.Ct. 1355, 79 L.Ed.2d 604 (1984) (holding that "political divisiveness" could not invalidate inclusion of creche in municipal Christmas display); *Cantwell v. Connecticut,* 310 U.S., at 310-311, 60 S.Ct. 900.

Justice SOUTER, while agreeing that the Club's religious speech "may be characterized as proselytizing," *post,* at 2117, n. 3, thinks that it is even more clearly excludable from respondent's forum because it is essentially "an evangelical service of worship," *post,* at 2117. But we have previously rejected the attempt to distinguish worship from other religious speech, saying that "the distinction has [no] intelligible content," and further, no "*relevance* " to the constitutional issue. *Widmar v. Vincent,* 454 U.S. 263, 269, n. 6, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981); see also *Murdock v. Pennsylvania,* 319 U.S., at 109, 63 S.Ct. 870 (refusing to distinguish evangelism from worship). [FN3] Those holdings ***127** are ****2111** surely proved correct today by the dissenters' inability to agree, even between themselves, into which subcategory of religious speech the Club's activities fell. If the distinction did have content, it would be beyond the courts' competence to administer. *Widmar v. Vincent, supra,* at 269, n. 6, 102 S.Ct. 269; cf. *Lee v. Weisman,* 505 U.S. 577, 616-617, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992) (SOUTER, J., concurring) ("I can hardly imagine a subject less amenable to the competence of the federal judiciary, or more deliberately to be avoided where possible," than "comparative theology"). And if courts (and other government officials) were competent, applying the distinction would require state monitoring of private, religious speech with a degree of pervasiveness that we have previously found unacceptable. See, *e.g., Rosenberger v. Rector and Visitors of Univ. of Va., supra,* at 844-845, 115 S.Ct. 2510; *Widmar v. Vincent, supra,* at 269, n. 6, 102 S.Ct. 269. I will not endorse an approach that suffers such a wondrous diversity of flaws.

FN3. We *have* drawn a different distinction--between religious speech generally and speech about religion--but only with regard to restrictions the State must place on its own speech, where pervasive state monitoring is unproblematic. See *School Dist. of Abington Township v. Schempp,* 374 U.S. 203, 225, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963) (State schools in their official capacity may not teach religion but may teach about religion). Whatever the rule there, licensing and monitoring private religious speech is an entirely different matter, see, *e.g., Kunz v. New York,* 340 U.S. 290, 293-294, 71 S.Ct. 312, 95 L.Ed. 280 (1951), even in a limited public forum where the State has some authority to draw subject-matter distinctions.

* * *

With these words of explanation, I join the opinion of the Court.

Justice BREYER, concurring in part.

I agree with the Court's conclusion and join its opinion to the extent that they are consistent with the following three observations. First, the government's "neutrality" in respect to religion is one, but only one, of the considerations relevant to deciding whether a public school's policy violates the Establishment Clause. See, *e.g., Mitchell v. Helms,* 530 U.S. 793, 839, 120 S.Ct. 2530, 147 L.Ed.2d 660 (2000) (O'CONNOR, J., concurring in judgment); ***128** *Capitol Square Review and Advisory Bd. v. Pinette,* 515 U.S. 753, 774, 777, 115 S.Ct. 2440, 132 L.Ed.2d 650 (1995) (O'CONNOR, J., concurring in part and concurring in judgment). As this Court previously has indicated, a child's perception that the school has endorsed a particular religion or religion in general may also prove critically important. See *School Dist. of Grand Rapids v. Ball,* 473 U.S. 373, 389-390, 105 S.Ct. 3216, 87 L.Ed.2d 267 (1985); see also *Lamb's Chapel v. Center Moriches Union Free School Dist.,* 508 U.S. 384, 395, 113 S.Ct. 2141, 124 L.Ed.2d 352 (1993); *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter,* 492 U.S. 573, 592-594, 109 S.Ct. 3086, 106 L.Ed.2d 472 (1989). Today's opinion does not purport to change that legal principle.

Second, the critical Establishment Clause question here may well prove to be whether a child, participating in the **Good News Club's** activities, could reasonably perceive the school's permission for the Club to use its facilities as an endorsement of religion. See *Ball, supra,* at 390, 105 S.Ct. 3216 ("[A]n important concern of the effects test is whether ... the challenged government action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices"). The time of day, the age of the children, the nature of the meetings, and other specific circumstances are relevant in helping to determine whether, in fact, the Club "so dominate [s]" the "forum" that, in the children's minds, "a formal policy of equal access is transformed into a demonstration of approval." *Capitol Square Review and Advisory Bd., supra,* at 777, 115 S.Ct. 2440 (O'CONNOR, J., concurring in part and concurring in judgment).

Third, the Court cannot fully answer the Establishment Clause question this case raises, given its procedural posture. The specific legal action that brought this case **2112 to the Court of Appeals was the District Court's decision to grant Milford Central School's motion for summary judgment. The Court of Appeals affirmed the grant of summary judgment. We now hold that the school was not entitled to *129 summary judgment, either in respect to the Free Speech or the Establishment Clause issue. Our holding must mean that, *viewing the disputed facts* (including facts about the children's perceptions) *favorably to the Club* (the nonmoving party), the school has not shown an Establishment Clause violation.

To deny one party's motion for summary judgment, however, is not to grant summary judgment for the other side. There may be disputed "genuine issue[s]" of "material fact," Fed. Rule Civ. Proc. 56(c), particularly about how a reasonable child participant would understand the school's role, cf. *post,* at 2118 (SOUTER, J., dissenting). Indeed, the Court itself points to facts not in evidence, *ante,* at 2106 ("There is no evidence that young children are permitted to loiter outside classrooms after the schoolday has ended"), *ante,* at 2106 ("There may be as many, if not more, upperclassmen as elementary school children who occupy the school after hours"), identifies facts in evidence which may, depending on other facts not in evidence, be of legal significance, *ibid.* (discussing the type of room in which the meetings were held and noting that the Club's participants "are not all the same age as in the normal classroom setting"), and makes assumptions about other facts, *ibid.* ("Surely even young children are aware of events for which their parents must sign permission forms"), *ibid.* ("Any bystander could conceivably be aware of the school's use policy and its exclusion of the **Good News Club**, and could suffer as much from viewpoint discrimination as elementary school children could suffer from perceived endorsement"). The Court's invocation of what is missing from the record and its assumptions about what is present in the record only confirm that both parties, if they so desire, should have a fair opportunity to fill the evidentiary gap in light of today's opinion. Cf. Fed. Rules Civ. Proc. 56(c) (summary judgment appropriate only where there is "no genuine issue as to any material fact" and movant "is entitled to a judgment as a *130 matter of law"), 56(f) (permitting supplementation of record for summary judgment purposes where appropriate).

Justice STEVENS, dissenting.

The Milford Central School has invited the public to use its facilities for educational and recreational purposes, but not for "religious purposes." Speech for "religious purposes" may reasonably be understood to encompass three different categories. First, there is religious speech that is simply speech about a particular topic from a religious point of view. The film in *Lamb's Chapel v. Center Moriches Union Free School Dist.,* 508 U.S. 384, 113 S.Ct. 2141, 124 L.Ed.2d 352 (1993), illustrates this category. See *id.,* at 388, 113 S.Ct. 2141 (observing that the film series at issue in that case "would discuss Dr. [James] Dobson's views on the undermining influences of the media that could only be counterbalanced by returning to traditional, Christian family values instilled at an early stage"). Second, there is religious speech that amounts to worship, or its equivalent. Our decision in *Widmar v. Vincent,* 454 U.S. 263, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981), concerned such speech. See *id.,* at 264-265, 102 S.Ct. 269 (describing the speech in question as involving "religious worship"). Third, there is an intermediate category that is aimed principally at proselytizing or inculcating belief in a particular religious faith.

A public entity may not generally exclude even religious worship from an open public forum. *Id.,* at 276, 102 S.Ct. 269. Similarly, a public entity that creates a limited public forum for the discussion of certain specified topics may not exclude a speaker simply because she approaches **2113 those topics from a religious point of view. Thus, in *Lamb's Chapel* we held that a public school that permitted its facilities to be used for the discussion of family issues and child rearing could not deny access to speakers presenting a religious point of view on those issues. See 508 U.S., at 393-394, 113 S.Ct. 2141.

But, while a public entity may not censor speech about an authorized topic based on the point of view expressed *131 by the speaker, it has broad discretion to "preserve the property under its control for the use to which it is lawfully dedicated." *Greer v. Spock,* 424 U.S. 828, 836, 96 S.Ct. 1211, 47 L.Ed.2d 505 (1976); see also *Board of Ed. of Westside Community Schools (Dist.66) v. Mergens,* 496 U.S. 226, 275, n. 6, 110 S.Ct. 2356, 110 L.Ed.2d 191 (1990) (STEVENS, J., dissenting) "A school's extracurricular activities constitute a part of the school's teaching mission, and the school accordingly must make 'decisions concerning the content of those activities' " (quoting *Widmar,* 454 U.S., at 278, 102 S.Ct. 269 (STEVENS, J., concurring in judgment)). Accordingly, "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." *Cornelius v. NAACP Legal Defense & Ed. Fund, Inc.,* 473 U.S. 788, 806, 105 S.Ct. 3439, 87 L.Ed.2d 567 (1985). The novel question that this case presents concerns the constitutionality of a public school's attempt to limit the scope of a public forum it has created. More specifically, the question is whether a school can, consistently with the First Amendment, create a limited public forum that admits the first type of religious speech without allowing the other two.

Distinguishing speech from a religious viewpoint, on the one hand, from religious proselytizing, on the other, is comparable to distinguishing meetings to discuss political issues from meetings whose principal purpose is to recruit new members to join a political organization. If a school decides to authorize afterschool discussions of current events in its classrooms, it may not exclude people from expressing their views simply because it dislikes their particular political opinions. But must it therefore allow organized political groups--for example, the Democratic Party, the Libertarian Party, or the Ku Klux Klan--to hold meetings, the principal purpose of which is not to discuss the current-events topic from their own unique point of view but rather to recruit others to join their respective groups? I think not. Such recruiting meetings may introduce divisiveness and *132 tend to separate young children into cliques that undermine the school's educational mission. Cf. *Lehman v. Shaker Heights,* 418 U.S. 298, 94 S.Ct. 2714, 41 L.Ed.2d 770 (1974) (upholding a city's refusal to allow "political advertising" on public transportation).

School officials may reasonably believe that evangelical meetings designed to convert children to a particular religious faith pose the same risk. And, just as a school may allow meetings to discuss current events from a political perspective without also allowing organized political recruitment, so too can a school allow discussion of topics such as moral development from a religious (or nonreligious) perspective without thereby opening its forum to religious proselytizing or worship. See, *e.g., Campbell v. St. Tammany Parish School Board,* 231 F.3d 937, 942 (C.A.5 2000) ("Under the Supreme Court's jurisprudence, a government entity such as a school board has the opportunity to open its facilities to activity protected by the First Amendment, without

inviting political or religious activities presented in a form that would disserve its efforts to maintain neutrality"). Moreover, any doubt on a question such as this should be resolved in a way that minimizes "intrusion by the Federal Government into the operation of our public schools," *Mergens,* 496 U.S., at 290, 110 S.Ct. 2356 (STEVENS, J., dissenting); see also *Epperson v. Arkansas,* **2114 393 U.S. 97, 104, 89 S.Ct. 266, 21 L.Ed.2d 228 (1968) ("Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint .... By and large, public education in our Nation is committed to the control of state and local authorities").

The particular limitation of the forum at issue in this case is one that prohibits the use of the school's facilities for "religious purposes." It is clear that, by "religious purposes," the school district did not intend to exclude all speech from a religious point of view. See App. N13-N15 (testimony of the superintendent for Milford schools indicating that the policy would permit people to teach "that man was created by God as described in the Book of Genesis" and that crime *133 was caused by society's "lack of faith in God"). Instead, it sought only to exclude religious speech whose principal goal is to "promote the gospel." *Id.,* at N18. In other words, the school sought to allow the first type of religious speech while excluding the second and third types. As long as this is done in an evenhanded manner, I see no constitutional violation in such an effort. [FN1] The line between the various categories of religious speech may be difficult to draw, but I think that the distinctions are valid, and that a school, particularly an elementary school, must be permitted to draw them. [FN2] Cf. *Illinois ex rel. McCollum v. Board of Ed. of School Dist. No. 71, Champaign Cty.,* 333 U.S. 203, 231, 68 S.Ct. 461, 92 L.Ed. 649 (1948) (Frankfurter, J., concurring) ("In no activity of the State is it more vital to keep out divisive forces than in its schools ...").

FN1. The school district, for example, could not, consistently with its present policy, allow school facilities to be used by a group that affirmatively attempted to inculcate nonbelief in God or in the view that morality is wholly unrelated to belief in God. Nothing in the record, however, indicates that any such group was allowed to use school facilities.

FN2. "A perceptive observer sees a material difference between the light of day and the dark of night, and knows that difference to be a reality even though the two are separated not by a bright line but by a zone of twilight." *Buirkle v. Hanover Ins. Cos.,* 832 F.Supp. 469, 483 (D.Mass.1993).

This case is undoubtedly close. Nonetheless, regardless of whether the **Good News Club's** activities amount to "worship," it does seem clear, based on the facts in the record, that the school district correctly classified those activities as falling within the third category of religious speech and therefore beyond the scope of the school's limited public forum. [FN3] In short, I am persuaded that the school district *134 could (and did) permissibly exclude from its limited public forum proselytizing religious speech that does not rise to the level of actual worship. I would therefore affirm the judgment of the Court of Appeals.

FN3. The majority elides the distinction between religious speech on a particular topic and religious speech that seeks primarily to inculcate belief. Thus, it relies on *Rosenberger v. Rector and Visitors of Univ. of Va.,* 515 U.S. 819, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995), as if that case involved precisely the same type of speech that is at issue here. But, while both Wide Awake, the organization in *Rosenberger,* and the **Good News Club** engage in a mixture of different types of religious speech, the *Rosenberger* Court clearly believed that the first type of religious speech predominated in Wide Awake. It described that group's publications as follows:
"The first issue had articles about racism, crisis pregnancy, stress, prayer, C.S. Lewis' ideas about evil and free will, and reviews of religious music. In the next two issues, Wide Awake featured stories about homosexuality, Christian missionary work, and eating disorders, as well as music reviews and interviews with University professors." *Id.,* at 826, 115 S.Ct. 2510.
In contrast to Wide Awake's emphasis on providing Christian commentary on such a diverse array of topics, **Good News Club** meetings are dominated by religious exhortation, see *post,* at 2116 (SOUTER, J., dissenting). My position is therefore consistent with the Court's decision in *Rosenberger.*

Even if I agreed with Part II of the majority opinion, however, I would not **2115 reach out, as it does in Part IV, to decide a constitutional question that was not addressed by either the District Court or the Court of Appeals.

Accordingly, I respectfully dissent.

Justice SOUTER, with whom Justice GINSBURG joins, dissenting.

The majority rules on two issues. First, it decides that the Court of Appeals failed to apply the rule in

Lamb's Chapel v. Center Moriches Union Free School Dist., 508 U.S. 384, 113 S.Ct. 2141, 124 L.Ed.2d 352 (1993), which held that the government may not discriminate on the basis of viewpoint in operating a limited public forum. The majority applies that rule and concludes that Milford violated *Lamb's Chapel* in denying Good News the use of the school. The majority then goes on to determine that it would not violate the Establishment Clause of the First Amendment for the Milford School District to allow the **Good News Club** to hold its intended gatherings of public school children in Milford's elementary school. ***135** The majority is mistaken on both points. The Court of Appeals unmistakably distinguished this case from *Lamb's Chapel,* though not by name, and accordingly affirmed the application of a policy, unchallenged in the District Court, that Milford's public schools may not be used for religious purposes. As for the applicability of the Establishment Clause to the **Good News Club's** intended use of Milford's school, the majority commits error even in reaching the issue, which was addressed neither by the Court of Appeals nor by the District Court. I respectfully dissent.

I

Lamb's Chapel, a case that arose (as this one does) from application of N.Y. Educ. Law § 414 (McKinney 2000) and local policy implementing it, built on the accepted rule that a government body may designate a public forum subject to a reasonable limitation on the scope of permitted subject matter and activity, so long as the government does not use the forum-defining restrictions to deny expression to a particular viewpoint on subjects open to discussion. Specifically, *Lamb's Chapel* held that the government could not "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." 508 U.S., at 393-394, 113 S.Ct. 2141.

This case, like *Lamb's Chapel,* properly raises no issue about the reasonableness of Milford's criteria for restricting the scope of its designated public forum. Milford has opened school property for, among other things, "instruction in any branch of education, learning or the arts" and for "social, civic and recreational meetings and entertainment events and other uses pertaining to the welfare of the community, provided that such uses shall be nonexclusive and shall be opened to the general public." App. to Pet. for Cert. D1-D3. But Milford has done this subject to the restriction that "[s]chool premises shall not be used ... for ***136** religious purposes." *Id.,* at D2. As the District Court stated, Good News did "not object to the reasonableness of [Milford]'s policy that prohibits the use of [its] facilities for religious purposes." *Id.,* at C14.

The sole question before the District Court was, therefore, whether, in refusing to allow Good News's intended use, Milford was misapplying its unchallenged restriction in a way that amounted to imposing a viewpoint-based restriction on what could be said or done by a group entitled to use the forum for an educational, civic, or other permitted purpose. The question was whether Good News was being disqualified when it merely sought to use the school property the same way that the Milford Boy and Girl Scouts and the 4-H Club did. The District Court held on the basis of undisputed facts that Good News's activity was essentially unlike the presentation of views on secular issues from a ****2116** religious standpoint held to be protected in *Lamb's Chapel,* see App. to Pet. for Cert. C29-C31, and was instead activity precluded by Milford's unchallenged policy against religious use, even under the narrowest definition of that term.

The Court of Appeals understood the issue the same way. See 202 F.3d 502, 508 (C.A.2 2000) (Good News argues that "to exclude the Club because it teaches morals and values from a Christian perspective constitutes unconstitutional viewpoint discrimination"); *id.,* at 509 ("The crux of the **Good News Club's** argument is that the Milford school's application of the Community Use Policy to exclude the Club from its facilities is not viewpoint neutral"). [FN1] The Court of Appeals ***137** also realized that the *Lamb's Chapel* criterion was the appropriate measure: "The activities of the **Good News Club** do not involve merely a religious perspective on the secular subject of morality." 202 F.3d, at 510. Cf. *Lamb's Chapel, supra,* at 393, 113 S.Ct. 2141 (district could not exclude "religious standpoint" in discussion on child rearing and family values, an undisputed "use for social or civic purposes otherwise permitted" under the use policy). [FN2] The appeals court agreed with the District Court that the undisputed facts in this case differ from those in *Lamb's Chapel,* as night from day. A sampling of those facts shows why both courts were correct.

FN1. The Court of Appeals held that any challenge to the policy's reasonableness was foreclosed by its own precedent, 202 F.3d, at 502, 509, a holding the majority leaves untouched, see *ante,* at 2100 ("[W]e need not decide whether it is unreasonable in light of

the purposes served by the forum"); cf. *ante,* at 2100, n. 2 ("Because we hold that the exclusion of the Club on the basis of its religious perspective constitutes unconstitutional viewpoint discrimination, it is no defense for Milford that purely religious purposes can be excluded under state law"). In any event, the reasonableness of the forum limitation was beyond the scope of the appeal from summary judgment since the District Court had said explicitly that the religious use limitation was not challenged.

FN2. It is true, as the majority notes, *ante,* at 2101, n. 3, that the Court of Appeals did not cite *Lamb's Chapel* by name. But it followed it in substance, and it did cite an earlier opinion written by the author of the panel opinion here, *Bronx Household of Faith v. Community School Dist. No. 10,* 127 F.3d 207 (C.A.2 1997), which discussed *Lamb's Chapel* at length.

Good News's classes open and close with prayer. In a sample lesson considered by the District Court, children are instructed that "[t]he Bible tells us how we can have our sins forgiven by receiving the Lord Jesus Christ. It tells us how to live to please Him.... If you have received the Lord Jesus as your Saviour from sin, you belong to God's special group--His family." App. to Pet. for Cert. C17-C18 (ellipsis in original). The lesson plan instructs the teacher to "lead a child to Christ," and, when reading a Bible verse, to "[e]mphasize that this verse is from the Bible, God's Word," and is "important--and true--because God said it." The lesson further exhorts the teacher to "[b]e sure to give an opportunity for the 'unsaved' children in your class to respond to the Gospel" and cautions against "neglect[ing] this responsibility." *Id.,* at C20.

While Good News's program utilizes songs and games, the heart of the meeting is the "challenge" and "invitation," which are repeated at various times throughout the lesson. ***138** During the challenge, "saved" children who "already believe in the Lord Jesus as their Savior" are challenged to " 'stop and ask God for the strength and the "want" ... to obey Him.' " *Ibid.* They are instructed that

"[i]f you know Jesus as your Savior, you need to place God first in your life. And if you don't know Jesus as Savior and if you would like to, then we will--we will pray with you separately, individually .... And the challenge would be, those of you who know Jesus as Savior, you can rely on God's strength to obey Him." *Ibid.*

****2117** During the invitation, the teacher "invites" the "unsaved" children " 'to trust the Lord Jesus to be your Savior from sin,' " and " 'receiv[e][him] as your Savior from sin.' " *Id.,* at C21. The children are then instructed that

"[i]f you believe what God's Word says about your sin and how Jesus died and rose again for you, you can have His forever life today. Please bow your heads and close your eyes. If you have never believed on the Lord Jesus as your Savior and would like to do that, please show me by raising your hand. If you raised your hand to show me you want to believe on the Lord Jesus, please meet me so I can show you from God's Word how you can receive His everlasting life." *Ibid.*

It is beyond question that Good News intends to use the public school premises not for the mere discussion of a subject from a particular, Christian point of view, but for an evangelical service of worship calling children to commit themselves in an act of Christian conversion. [FN3] The majority ***139** avoids this reality only by resorting to the bland and general characterization of Good News's activity as "teaching of morals and character, from a religious standpoint." *Ante,* at 2101. If the majority's statement ignores reality, as it surely does, then today's holding may be understood only in equally generic terms. Otherwise, indeed, this case would stand for the remarkable proposition that any public school opened for civic meetings must be opened for use as a church, synagogue, or mosque.

FN3. The majority rejects Milford's contention that Good News's activities fall outside the purview of the limited forum because they constitute "religious worship" on the ground that the Court of Appeals made no such determination regarding the character of the club's program, see *ante,* at 2102-2103, n. 4. This distinction is merely semantic, in light of the Court of Appeals's conclusion that "[i]t is difficult to see how the Club's activities differ materially from the 'religious worship' described" in other case law, 202 F.3d 502, 510 (C.A.2 2000), and the record below.

Justice STEVENS distinguishes between proselytizing and worship, *ante,* at 2112 (dissenting opinion), and distinguishes each from discussion reflecting a religious point of view. I agree with Justice STEVENS that Good News's activities may be characterized as proselytizing and therefore as outside the purpose of Milford's limited forum, *ante,* at 2114. Like the Court of Appeals, I also believe Good News's meetings have elements of worship that put the club's activities further afield of Milford's limited forum policy, the legitimacy of which was unchallenged in the summary judgment proceeding.

II

I also respectfully dissent from the majority's refusal to remand on all other issues, insisting instead on acting as a court of first instance in reviewing Milford's claim that it would violate the Establishment Clause to grant Good News's application. Milford raised this claim to demonstrate a compelling interest for saying no to Good News, even on the erroneous assumption that *Lamb's Chapel's* public forum analysis would otherwise require Milford to say yes. Whereas the District Court and Court of Appeals resolved this case entirely on the ground that Milford's actions did not offend the First Amendment's Speech Clause, the majority now sees fit to rule on the application of the Establishment Clause, in derogation of this Court's proper role as a court of review. *E.g., National Collegiate Athletic* ***140** *Assn. v. Smith,* 525 U.S. 459, 470, 119 S.Ct. 924, 142 L.Ed.2d 929 (1999) ("[W]e do not decide in the first instance issues not decided below").

The Court's usual insistence on resisting temptations to convert itself into a trial court and on remaining a court of review is not any mere procedural nicety, and my objection to turning us into a district court here does not hinge on a preference for immutable procedural rules. Respect for our role as a reviewing court rests, rather, on recognizing that this Court can often learn a good deal from considering how a **2118 district court and a court of appeals have worked their way through a difficult issue. It rests on recognizing that an issue as first conceived may come to be seen differently as a case moves through trial and appeal; we are most likely to contribute something of value if we act with the benefit of whatever refinement may come in the course of litigation. And our customary refusal to become a trial court reflects the simple fact that this Court cannot develop a record as well as a trial court can. If I were a trial judge, for example, I would balk at deciding on summary judgment whether an Establishment Clause violation would occur here without having statements of undisputed facts or uncontradicted affidavits showing, for example, whether Good News conducts its instruction at the same time as school-sponsored extracurricular and athletic activities conducted by school staff and volunteers, see Brief for Respondent 6; whether any other community groups use school facilities immediately after classes end and how many students participate in those groups; and the extent to which Good News, with 28 students in its membership, may "dominate the forum" in a way that heightens the perception of official endorsement, *Rosenberger v. Rector and Visitors of Univ. of Va.,* 515 U.S. 819, 851, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995) (O'CONNOR, J., concurring); see also *Widmar v. Vincent,* 454 U.S. 263, 274, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981). We will never know these facts.

Of course, I am in no better position than the majority to perform an Establishment Clause analysis in the first *141 instance. Like the majority, I lack the benefit that development in the District Court and Court of Appeals might provide, and like the majority I cannot say for sure how complete the record may be. I can, however, speak to the doubtful underpinnings of the majority's conclusion.

This Court has accepted the independent obligation to obey the Establishment Clause as sufficiently compelling to satisfy strict scrutiny under the First Amendment. See *id.,* at 271, 102 S.Ct. 269 ("[T]he interest of the [government] in complying with its constitutional obligations may be characterized as compelling"); *Lamb's Chapel,* 508 U.S., at 394, 113 S.Ct. 2141. Milford's actions would offend the Establishment Clause if they carried the message of endorsing religion under the circumstances, as viewed by a reasonable observer. See *Capitol Square Review and Advisory Bd. v. Pinette,* 515 U.S. 753, 777, 115 S.Ct. 2440, 132 L.Ed.2d 650 (1995) (O'CONNOR, J., concurring). The majority concludes that such an endorsement effect is out of the question in Milford's case, because the context here is "materially indistinguishable" from the facts in *Lamb's Chapel* and *Widmar. Ante,* at 2103. In fact, the majority is in no position to say that, for the principal grounds on which we based our Establishment Clause holdings in those cases are clearly absent here.

In *Widmar,* we held that the Establishment Clause did not bar a religious student group from using a public university's meeting space for worship as well as discussion. As for the reasonable observers who might perceive government endorsement of religion, we pointed out that the forum was used by university students, who "are, of course, young adults," and, as such, "are less impressionable than younger students and should be able to appreciate that the University's policy is one of neutrality toward religion." 454 U.S., at 274, n. 14, 102 S.Ct. 269. To the same effect, we remarked that the "large number of groups meeting on campus" negated "any reasonable inference of

University support from the mere fact of a campus meeting place." *Ibid.* Not only was the forum "available to a broad class of nonreligious as ***142** well as religious speakers," but there were, in fact, over 100 recognized student groups at the University, and an "absence of empirical evidence that religious groups [would] dominate [the University's] open forum." *Id.,* at 274- ****2119** 275, 102 S.Ct. 269; see also *id.,* at 274, 102 S.Ct. 269 ("The provision of benefits to so broad a spectrum of groups is an important index of secular effect"). And if all that had not been enough to show that the university-student use would probably create no impression of religious endorsement, we pointed out that the university in that case had issued a student handbook with the explicit disclaimer that "the University's name will not 'be identified in any way with the aims, policies, programs, products, or opinions of any organization or its members.' " *Id.,* at 274, n. 14, 102 S.Ct. 269.

Lamb's Chapel involved an evening film series on child rearing open to the general public (and, given the subject matter, directed at an adult audience). See 508 U.S., at 387, 395, 113 S.Ct. 2141. There, school property "had repeatedly been used by a wide variety of private organizations," and we could say with some assurance that "[u]nder these circumstances ... there would have been no realistic danger that the community would think that the District was endorsing religion or any particular creed ...." *Id.,* at 395, 113 S.Ct. 2141.

What we know about this case looks very little like *Widmar* or *Lamb's Chapel.* The cohort addressed by Good News is not university students with relative maturity, or even high school pupils, but elementary school children as young as six. [FN4] The Establishment Clause cases have ***143** consistently recognized the particular impressionability of schoolchildren, see *Edwards v. Aguillard,* 482 U.S. 578, 583-584, 107 S.Ct. 2573, 96 L.Ed.2d 510 (1987) , and the special protection required for those in the elementary grades in the school forum, see *County of Allegheny v. American Civil Liberties Union, Greater Pittsburgh Chapter,* 492 U.S. 573, 620, n. 69, 109 S.Ct. 3086, 106 L.Ed.2d 472 (1989). We have held the difference between college students and grade school pupils to be a "distinction [that] warrants a difference in constitutional results," *Edwards v. Aguillard, supra,* at 584, n. 5, 107 S.Ct. 2573 (internal quotation marks and citation omitted).

FN4. It is certainly correct that parents are required to give permission for their children to attend Good News's classes, see *ante,* at 2104 (as parents are often required to do for a host of official school extracurricular activities), and correct that those parents would likely not be confused as to the sponsorship of Good News's classes. But the proper focus of concern in assessing effects includes the elementary school pupils who are invited to meetings, Lodging, Exh. X2, who see peers heading into classrooms for religious instruction as other classes end, and who are addressed by the "challenge" and "invitation."
The fact that there may be no evidence in the record that individual students were confused during the time the **Good News Club** met on school premises pursuant to the District Court's preliminary injunction is immaterial, cf. Brief for Petitioners 38. As Justice O'CONNOR explained in *Capitol Square Review and Advisory Bd. v. Pinette,* 515 U.S. 753, 115 S.Ct. 2440, 132 L.Ed.2d 650 (1995), the endorsement test does not focus "on the actual perception of individual observers, who naturally have differing degrees of knowledge," but on "the perspective of a hypothetical observer." *Id.,* at 779-780, 115 S.Ct. 2440 (opinion concurring in part and concurring in judgment).

Nor is Milford's limited forum anything like the sites for wide-ranging intellectual exchange that were home to the challenged activities in *Widmar* and *Lamb's Chapel.* See also *Rosenberger,* 515 U.S., at 850, 836-837, 115 S.Ct. 2510. In *Widmar,* the nature of the university campus and the sheer number of activities offered precluded the reasonable college observer from seeing government endorsement in any one of them, and so did the time and variety of community use in the *Lamb's Chapel* case. See also *Rosenberger,* 515 U.S., at 850, 115 S.Ct. 2510 ("Given this wide array of nonreligious, antireligious and competing religious viewpoints in the forum supported by the University, any perception that the University endorses one particular viewpoint would be illogical"); *id.,* at 836-837, 850, 115 S.Ct. 2510 (emphasizing the array of university-funded magazines containing "widely divergent ****2120** viewpoints" and the fact that believers in Christian evangelism competed on equal footing in the University forum with aficionados of "Plato, Spinoza, and Descartes," as well as "Karl Marx, Bertrand Russell, and Jean-Paul Sartre"); *Board of Ed. of Westside Community Schools (Dist.66) v. Mergens,* 496 ***144** U.S. 226, 252, 110 S.Ct. 2356, 110 L.Ed.2d 191 (1990) (plurality opinion) ("To the extent that a religious club is merely one of many different student-initiated voluntary clubs, students should perceive no message of government endorsement of religion").

The timing and format of Good News's gatherings, on the other hand, may well affirmatively suggest the *imprimatur* of officialdom in the minds of the young children. The club is open solely to elementary students (not the entire community, as in *Lamb's Chapel*), only four outside groups have been identified as meeting in the school, and Good News is, seemingly, the only one whose instruction follows immediately on the conclusion of the official schoolday. See Brief for National School Boards Association et al. as *Amici Curiae* 6. Although school is out at 2:56 p.m., Good News apparently requested use of the school beginning at 2:30 on Tuesdays "during the school year," so that instruction could begin promptly at 3:00, see Lodging, Exh. W-1, at which time children who are compelled by law to attend school surely remain in the building. Good News's religious meeting follows regular school activities so closely that the Good News instructor must wait to begin until "the room is clear," and "people are out of the room," App. P29, before starting proceedings in the classroom located next to the regular third- and fourth-grade rooms, *id.*, at N12. In fact, the temporal and physical continuity of Good News's meetings with the regular school routine seems to be the whole point of using the school. When meetings were held in a community church, 8 or 10 children attended; after the school became the site, the number went up three-fold. *Id.*, at P12; Lodging, Exh. AA2.

Even on the summary judgment record, then, a record lacking whatever supplementation the trial process might have led to, and devoid of such insight as the trial and appellate judges might have contributed in addressing the Establishment Clause, we can say this: there is a good case that Good News's exercises blur the line between public ***145** classroom instruction and private religious indoctrination, leaving a reasonable elementary school pupil unable to appreciate that the former instruction is the business of the school while the latter evangelism is not. Thus, the facts we know (or think we know) point away from the majority's conclusion, and while the consolation may be that nothing really gets resolved when the judicial process is so truncated, that is not much to recommend today's result.

121 S.Ct. 2093, 533 U.S. 98, 150 L.Ed.2d 151, 154 Ed. Law Rep. 45, 1 Cal. Daily Op. Serv. 4737, 2001 Daily Journal D.A.R. 5858, 14 Fla. L. Weekly Fed. S 337, 2001 DJCAR 2934

Briefs and Other Related Documents (Back to top)

. 2001 WL 196997, 69 USLW 3416 (Oral Argument) Oral Argument (Feb. 28, 2001)

. 2001 WL 173531 (Appellate Brief) Reply Brief for Petitioners (Feb. 15, 2001)

. 2001 WL 43335 (Appellate Brief) BRIEF AMICUS CURIAE OF THE AMERICAN JEWISH CONGRESS IN SUPPORT OF RESPONDENT (Jan. 12, 2001)

. 2001 WL 43353 (Appellate Brief) BRIEF OF AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, THE AMERICAN CIVIL LIBERTIES UNION, THE AMERICAN JEWISH COMMITTEE, THE NEW YORK CIVIL LIBERTIES UNION, AND PEOPLE FOR THE AMERICAN WAY FOUNDATION IN SUPPORT OF THE RESPONDENT (Jan. 12, 2001)

. 2001 WL 43374 (Appellate Brief) BRIEF OF AMICI CURIAE NATIONAL SCHOOL BOARDS ASSOCIATION, AMERICAN ASSOCIATION OF SCHOOL ADMINISTRATORS, HORACE MANN LEAGUE IN SUPPORT OF RESPONDENTS (Jan. 12, 2001)

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. 2001 WL 43367 (Appellate Brief) BRIEF OF AMICI CURIAE ANTI-DEFAMATION LEAGUE; HADASSAH, THE WOMEN'S ZIONIST ORGANIZATION OF AMERICA, INC.; NATIONAL COALITION FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY; AND NATIONAL COUNCIL OF JEWISH WOMEN, IN SUPPORT OF RESPONDENT (Jan. 11, 2001)

. 2001 WL 43380 (Appellate Brief) BRIEF OF THE NEW YORK STATE SCHOOL BOARDS ASSOCIATION, INC. AS AMICUS CURIAE IN SUPPORT OF RESPONDENT (Jan. 11, 2001)

. 2000 WL 1803627 (Appellate Brief) BRIEF AMICUS CURIAE FOR 20 THEOLOGIANS AND SCHOLARS OF RELIGION IN SUPPORT OF PETITIONERS (Dec. 05, 2000)

. 2000 WL 1784135 (Appellate Brief) BRIEF OF AMICI CURIAE THE AMERICAN CENTER FOR LAW & JUSTICE, FOCUS ON THE FAMILY,

AND THE ETHICS & RELIGIOUS LIBERTY COMMISSION OF THE SOUTHERN BAPTIST CONVENTION IN SUPPORT OF PETITIONERS (Nov. 30, 2000)

. 2000 WL 1784136 (Appellate Brief) BRIEF AMICUS CURIAE OF CAROL HOOD (PETITIONER IN NO. 00-845) IN SUPPORT OF PETITIONERS (Nov. 30, 2000)

. 2000 WL 1784137 (Appellate Brief) BRIEF AMICI CURIAE OF CHILD EVANGELISM FELLOWSHIP, INC., MAE CULBERTSON, LADETTE ARMSTRONG, MARSHA HALL, MARY TOMMILA, FAMILY RESEARCH COUNCIL, FELLOWSHIP OF CHRISTIAN ATHLETES, AND CAMPUS CRUSADE FOR CHRIST IN SUPPORT OF PETITIONERS (Nov. 30, 2000)

. 2000 WL 1784139 (Appellate Brief) BRIEF AMICI CURIAE OF CHRISTIAN LEGAL SOCIETY AND UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA IN SUPPORT OF PETITIONERS (Nov. 30, 2000)

. 2000 WL 1784144 (Appellate Brief) BRIEF OF LIBERTY COUNSEL AS AMICUS CURIAE IN SUPPORT OF PETITIONERS (Nov. 30, 2000)

. 2000 WL 1784146 (Appellate Brief) BRIEF OF THE LIBERTY LEGAL INSTITUTE AS AMICUS CURIAE IN SUPPORT OF PETITIONERS (Nov. 30, 2000)

. 2000 WL 1784148 (Appellate Brief) BRIEF OF DOUGLAS LAYCOCK AS AMICUS CURIAE IN SUPPORT OF PETITIONERS (Nov. 30, 2000)

. 2000 WL 1784159 (Appellate Brief) BRIEF OF THE NATIONAL COUNCIL OF CHURCHES, THE BAPTIST JOINT COMMITTEE ON PUBLIC AFFAIRS, THE GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS, THE REORGANIZED CHURCH OF JESUS CHRIST OF LATTER DAY SAINTS, THE AMERICAN MUSLIM COUNCIL, THE FIRST CHURCH OF CHRIST, SCIENTIST, THE GENERAL ASSEMBLY OF THE PRESBYTERIAN CHURCH (U.S.A.), THE GENERAL BOARD OF CHURCH & SOCIETY OF THE UNITED METHODIST CHURCH, AND THE A.M.E. ZION CHURCH AS AMICI CURIAE IN SUPPORT OF PETITIONERS (Nov. 30, 2000)

. 2000 WL 1784164 (Appellate Brief) BRIEF OF THE NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC AFFAIRS ("COLPA") AS AMICUS CURIAE IN SUPPORT OF PETITIONERS (Nov. 30, 2000)

. 2000 WL 1784166 (Appellate Brief) BRIEF OF THE AMICI CURIAE THE NORTHSTAR LEGAL CENTER AND BRONX HOUSEHOLD OF FAITH IN SUPPORT OF PETITIONERS (Nov. 30, 2000)

. 2000 WL 1784193 (Appellate Brief) BRIEF OF AMICUS CURIAE SALLY CAMPBELL IN SUPPORT OF PETITIONERS (Nov. 30, 2000)

. 2000 WL 1784206 (Appellate Brief) BRIEF OF THE SOLIDARITY CENTER FOR LAW AND JUSTICE, P.C. AS AMICUS CURIAE IN SUPPORT OF PETITIONERS (Nov. 30, 2000)

. 2000 WL 1784209 (Appellate Brief) BRIEF FOR THE STATES OF ALABAMA, IOWA, LOUISIANA, MISSISSIPPI, NEBRASKA, OHIO, SOUTH CAROLINA, TENNESSEE, TEXAS, UTAH, AND VIRGINIA, AS AMICI CURIAE, IN SUPPORT OF PETITIONERS (Nov. 30, 2000)

. 2000 WL 1784212 (Appellate Brief) BRIEF AMICUS CURIAE OF WALLBUILDERS, INC. in support of the Petitioner (Nov. 30, 2000)

. 2000 WL 1793046 (Appellate Brief) Brief on the Merits for Petitioners (Nov. 30, 2000)

. 2000 WL 33979594 (Appellate Filing) Reply Brief (Aug. 03, 2000)

. 2000 WL 33979705 (Appellate Filing) Brief in Opposition (Jul. 20, 2000)

. 2000 WL 33979674 (Appellate Filing) Brief for Amici Curiae, the States of Alabama, Iowa, Louisiana, Mississippi, Nebraska, Ohio, South Carolina, Texas, and Virginia in Support of Petition for Writ of Certiorari (Jul. 19, 2000)

END OF DOCUMENT

Brett Kavanaugh – *Santa Fe Independent School District v. Doe*

Allegation: In *Santa Fe Independent School District v. Doe,* 530 U.S. 290 (2000), Brett Kavanaugh once again demonstrated his hostility to the separation of church and state by defending a high school's broadcasting of prayers over its public address system before football games. The U.S. Supreme Court decisively rejected Mr. Kavanaugh's radical argument, holding that the pre-game prayers in question violated the First Amendment's Establishment Clause.

Facts:

- **In *Santa Fe Independent School District*, Mr. Kavanaugh filed an amicus brief on behalf of his clients with the U.S. Supreme Court and argued for the principle that a public school is not required to discriminate against a student's religious speech.**
  - ✓ The school district permitted high school students to choose whether a statement would be delivered before football games and, if so, who would deliver that message.
  - ✓ A speaker chosen to deliver a pre-game message **was allowed to choose the content of his or her statement.**
  - ✓ As Mr. Kavanaugh's brief pointed out, **the school district's policy did "not *require* or even *encourage* the student speaker to invoke God's name, to utter religious words, or to say a 'prayer' of any kind. Nor, on the other hand [did] the school policy *prevent* the student from doing so.** The policy [was] thus entirely neutral toward religion and religious speech."
  - ✓ Mr. Kavanaugh therefore argued on behalf of his clients that the school district's policy did not run afoul of the First Amendment simply because a student speaker might choose to invoke God's name or say a "prayer" in his or her pre-game statement. **His brief pointed out: "The Constitution protects the . . . student speaker who chooses to mention God just as much as it protects the . . . student speaker who chooses not to mention God."**
- **Mr. Kavanaugh's arguments were based upon well-established Supreme Court precedent** holding that the government does not violate the Establishment Clause when private speakers avail themselves of a neutrally available school forum to engage in religious speech. *See* Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819 (1995); 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).
- **In the amicus brief that Mr. Kavanaugh filed on behalf of his clients, he carefully distinguished between individual religious speech in schools, which is protected by the Constitution, and government-required religious speech in schools, which is prohibited by the Constitution.**

- ✓ **Mr. Kavanaugh's brief acknowledged that the Establishment Clause prohibits government-composed, government-delivered, or government-required prayers in classes or at school events.**

➢ **Three Democratic State Attorneys General joined an amicus brief in *Santa Fe Independent School District* taking the same position that Mr. Kavanaugh took on behalf of his clients.**

- ✓ Democratic Attorneys General Richard Ieyoub of Louisiana, Mike Moore of Mississippi, and Paul Summers of Tennessee joined an amicus brief on behalf of their respective states urging the U.S. Supreme Court to uphold the constitutionality of the school district's policy regarding pre-game messages.

➢ **Mr. Kavanaugh submitted an amicus brief on behalf of his clients, Congressman Steve Largent and Congressman J.C. Watts in *Santa Fe Independent School District.* As their attorney, Mr. Kavanaugh had a duty to zealously represent his clients' position and make the best argument on their behalf. Such arguments do not necessarily reflect the personal views of Mr. Kavanaugh.**

- ✓ Lawyers have an ethical obligation to make all reasonable arguments that will advance their clients' interests. According to Rule 3.1 of the ABA's Model Rules of Professional Conduct, a lawyer may make any argument if "there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law." Lawyers would violate their ethical duties to their client if they made only arguments with which they would agree were they a judge.

For opinion see 120 S.Ct. 2266, 120 S.Ct. 494

Briefs and Other Related Documents

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United States Supreme Court Amicus Brief.
SANTA FE INDEPENDENT SCHOOL DISTRICT, Petitioner,
v.
Jane DOE, et al., Respondents.
No. 99-62.
December 30, 1999.
On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF AMICI CURIAE CONGRESSMAN STEVE LARGENT AND CONGRESSMAN J.C. WATTS IN SUPPORT OF PETITIONER

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*i QUESTION PRESENTED

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

*iii TABLE OF CONTENTS

*v TABLE OF AUTHORITIES

CASES

*1 INTEREST OF AMICI CURIAE [FN1]

FN1. The parties have consented in writing to the filing of this brief in letters that have been submitted to the Clerk. See S. Ct. R. 37.3(a). Counsel for a party did not author this brief in whole or in part. See S. Ct. R. 37.6. No person or entity other than the amici curiae and counsel made a monetary contribution to the preparation or submission of this brief. See id.

Congressman Steve Largent represents the First District of Oklahoma in the United States House of Representatives. Congressman J.C. Watts represents the Fourth District of Oklahoma in the United States House of Representatives. Both Mr. Largent and Mr. Watts played professional football; Mr. Largent is a member of the Hall of Fame.

Congress has substantial authority to enact legislation and vote on constitutional amendments regarding student religious speech, particularly in the Nation's public schools. See generally Board of Ed. of Westside Community Schools v. Mergens, 496 U.S. 226 (1990). As citizens and Members of Congress, Mr. Largent and Mr. Watts have a deep interest in ensuring appropriate protection for student religious speech in our public schools and in preventing discrimination against religious organizations, religious persons, and religious speech. Mr. Largent and Mr. Watts thus have a strong interest in this case and submit that Santa Fe High School's religion-neutral policy for a brief student statement before varsity football games is entirely appropriate and consistent with the Constitution.

SCHOOL POLICY INVOLVED

The Santa Fe Independent School District in Galveston County, Texas, maintains the following policy for Santa Fe High School:

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 *2 student safety, and to establish the appropriate environment for the competition.

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

Pet. App. F1 (emphases added).

SUMMARY OF ARGUMENT

Santa Fe High School allows a student to make a brief statement to the crowd before home varsity football games "to solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition." Santa Fe High School's policy does not require or even encourage the student speaker to invoke God's name, to utter religious words, or to say a "prayer" of any kind. Nor, on the other hand, does the school policy prevent the student from doing so. The policy is thus entirely neutral toward religion and religious speech.

Respondents nonetheless claim that the school policy on its face violates the Establishment Clause because an individual student (not a school or government official) might invoke God's name, utter religious words, or say a prayer in his or her pre-game statement. Respondents' Establishment Clause theory directly conflicts with this Court's settled jurisprudence. The Court has held that the Establishment Clause permits a neutral school speech policy in which individuals may engage in religious or other speech as they see fit in a school forum. See *3Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819 (1995); 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). In these cases, the Court has stressed the critical distinction "between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." Rosenberger, 515 U.S. at 841 (quoting Mergens, 496 U.S. at 250).

Similarly, in Lee v. Weisman, 505 U.S. 577 (1992), a case striking down government-led and government-composed prayer at school graduations, the Court repeatedly distinguished government religious speech from private religious speech. Indeed, in concurrence, Justice Souter, joined by Justices Stevens and O'Connor, foreshadowed and effectively answered in advance the question presented in this case: "If the State had chosen its ... 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." Id. at 630 n.8 (Souter, J., concurring) (emphasis added) (citing Witters v. Washington Dept. of Services for the Blind, 474 U.S. 481 (1986)).

The Court's cases show, moreover, that respondents' theory of the Constitution is exactly backwards. If Santa Fe High School took steps to prevent the student speaker from invoking God's name or uttering religious words or saying a prayer in his or her pre-game statement, then the school would violate the Constitution --

the Free Speech and Free Exercise Clauses of the First Amendment. The Constitution protects the Santa Fe student speaker who chooses to mention God just as much as it protects the Santa Fe student speaker who chooses not to mention God. The school cannot force the student to "say a prayer," nor can the school prohibit the student from "saying a prayer." By adhering scrupulously to this principle *4 of neutrality, the Santa Fe High School policy for pre-game student statements satisfies the Constitution.

As seven Justices indicated in Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753 (1995), the school need not issue any sort of "disclaimer" because this case involves an individual's verbal speech (in contrast to a case such as Pinette involving a fixed visual display in a public area). That said, we understand that a disclaimer is currently read over the public address system at Santa Fe High School football games. Given that fact and, in any event, given that this case involves a facial challenge, the Court can uphold the Santa Fe policy without considering whether and/or under what circumstances a school disclaimer ever might be necessary.

The forum's scarcity (namely, the fact that only one student per game speaks) does not alter the constitutional analysis. The Court explained in Rosenberger that "nothing" in the Court's decisions suggests that "scarcity would give the State the right to exercise viewpoint discrimination that is otherwise impermissible." 515 U.S. at 835.

Finally, respondents' theory would cause severe practical harm. Schools would have to monitor and censor religious words by all non-governmental speakers (a high school football player in a pre-game pep rally, a student newspaper writer, the guest speaker at a school speakers' series, the valedictorian at graduation). This Court, however, has never forced or even allowed the public schools of this country to censor students and speakers who happen to be religious or wish to speak religious words at a school event. On the contrary, as the Court has said, the absolutist legal theory of those who seek to cleanse public school events of all private religious expression evinces a pervasive "hostility to religion" that is neither required nor permitted under the Religion Clauses. Rosenberger, 515 U.S. at 846.

*5 ARGUMENT

I. A PUBLIC HIGH SCHOOL CONSTITUTIONALLY NEED NOT -- INDEED, CONSTITUTIONALLY CANNOT -- BAN A STUDENT'S RELIGIOUS SPEECH, BECAUSE IT IS RELIGIOUS, FROM A SCHOOL EVENT.

Respondents do not dispute that a public high school may set aside a moment before a football game for a student to deliver a public message solemnizing the event, promoting good sportsmanship and student safety, and establishing the appropriate environment for the competition. The sole question is whether, as respondents submit, the high school must actively prohibit that student speaker from invoking God's name, uttering religious words, or saying a prayer.

A. This Court's First Amendment Jurisprudence Validates the School's Neutral Speech Policy.

Three mutually reinforcing strands of this Court's jurisprudence demonstrate that a public high school such as Santa Fe constitutionally need not (indeed, constitutionally cannot) prohibit the student from religious speech in his or her pre-game statement to the crowd.

First, the Court's cases striking down government school prayer have carefully distinguished governmental religious speech from protected private religious speech. Second, in a series of related cases, the Court has held that student religious speech in a school forum is not attributable to the State and therefore does not violate the Establishment Clause. Indeed, it is constitutionally impermissible for the government to discriminate against religion and prevent a student from engaging in religious speech at a school event. Third, the Court has similarly held that decisions by private individuals to use neutrally available government aid for religious purposes are not attributable to the State for purposes of the Establishment ***6** Clause, a principle akin to the theory of neutrality employed in the student speech cases.

1. The Court has held that the Establishment Clause prohibits government-composed, government-delivered, or government-required prayer in classes or at graduation ceremonies. [FN2]

> FN2. The Establishment Clause generally does not prohibit governmental religious speech at non-school events so long as no one is compelled to speak or indicate agreement with the religious message. See Lynch v. Donnelly, 465 U.S. 668 (1984); Marsh v. Chambers, 463 U.S. 783 (1983); see also County of Allegheny v. ACLU, 492 U.S. 573, 655 (1989) (Kennedy, J., concurring and dissenting). The examples of such governmental religious speech are pervasive and long-standing. The President issues Thanksgiving Day proclamations; this Court starts its sessions with a plea that "God save the United States and this Honorable Court"; both Houses of Congress begin the day with official prayer; the phrase "In God We Trust" adorns our currency; the list goes on.

The facts in the leading case, Engel v. Vitale, 370 U.S. 421 (1962), are well-known. A school board in New York had directed that teachers and students begin each school day with an official prayer: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country." Id. at 422. The Court struck down the policy, stating 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." Id. at 425.

In concurrence, Justice Douglas emphasized a critical theme that would recur in the Court's decisions in subsequent years: "Under our Bill of Rights free play is given for making religion an active force in our lives. But if a religious leaven is to be worked into the affairs of our people, it is to be done by individuals and groups, not by the Government." Id. at 442-43 (Douglas, J., concurring) (quotation omitted; emphasis added). ***7** "The First Amendment leaves the Government in a position not of hostility to religion but of neutrality." Id. at 443.

In Lee v. Weisman, 505 U.S. 577 (1992), the Court held that Engel applied to public school graduation ceremonies. The Court pointed to the following "dominant facts": The school had "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." Id. at 586-87; see also id. at 588 (State made "decision to include a prayer"). Moreover, the school principal selected the clergy member and "directed and controlled the content of the prayers." Id. at 588. The degree of school involvement "made it clear that the graduation prayers bore the imprint of the State." Id. at 590. In concurrence, Justice Blackmun, joined by Justices Stevens and O'Connor, reiterated the critical facts: The "government composes official

prayers, selects the member of the clergy to deliver the prayer, [and] has the prayer delivered at a public school event." Id. at 603 (Blackmun, J., concurring) (quotation omitted).

But the Lee Court cabined its holding in a way important to this case by stressing the critical distinction between (i) individual religious speech in schools, which is protected by the Constitution, and (ii) government-required religious speech in schools, which the Court held to be prohibited by the Constitution. The Court stated, for example, that "the First Amendment does not allow the government to stifle prayers." Id. at 589 (emphasis added). The Court explained that "religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State." Id.

The problem the Court identified in Lee, therefore, was not that students were exposed to religious speech, but that they were exposed to governmental religious speech. "In religious debate or expression the government is not a prime participant .... A state-created orthodoxy puts at grave risk *8 that freedom of belief and conscience which are the sole assurance that religious faith is real, not imposed." Id. at 591-92 (emphasis added). The First Amendment thus is not concerned with actions that do not "so directly or substantially involve the state in religious exercises or in the favoring of religion." Id. at 598 (quotation omitted; emphasis added).

Given that private individuals can engage in religious speech in school settings, the Court recognized that "there will be instances when religious values, religious practices, and religious persons will have some interaction with the public schools and their students." Id. at 598-99. But that is hardly some constitutional vice; to the contrary, it is a constitutional virtue. Indeed, the Court expressly warned that "[a] relentless and all- pervasive attempt to exclude religion from every aspect of public life could itself become inconsistent with the Constitution." Id. at 598.

In a concurring opinion, Justice Souter, joined by Justices Stevens and O'Connor, elaborated by distinguishing the situation in Lee from a hypothetical policy that presumably would satisfy the Constitution (a policy that happens to be precisely akin to that employed by Santa Fe High School for football games): "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." Id. at 630 n.8 (Souter, J., concurring) (emphasis added) (citing Witters v. Washington Dept. of Services for the Blind, 474 U.S. 481 (1986)).

The opinions and analyses of the Engel and Lee Courts foreshadowed -- and effectively approved in advance -- the Santa Fe High School policy at issue here. The Establishment Clause permits a student speaker to deliver a religious message in a neutrally available school forum, so long as the school *9 itself does not select, compose, deliver, or require a religious message.

2. We need not rely solely on statements in Lee and Engel, however, to support our argument. In a series of cases over the last two decades, the Court has held that the government does not violate the Establishment Clause when private speakers avail themselves of a neutrally available school forum to engage in religious speech. Indeed, the Court has held that the Constitution prohibits the government from excluding private religious speech, because it is religious, from a school event.

These cases arose after certain schools and plaintiffs read Engel and other decisions as license (or judicial compulsion) to eradicate all traces of religion, government and private, from the public schools. The Court has rejected these homogenizing efforts to cleanse public schools of private religious expression, emphasizing time and again the critical distinction "between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." Rosenberger, 515 U.S. at 841 (quoting Mergens, 496 U.S. at 250).

The cases affirming this dispositive principle are by now familiar: Widmar, Mergens, Lamb's Chapel, Rosenberger, and Pinette. Because of their importance to this case, we briefly review each.

In Widmar v. Vincent, the Court held that the Constitution "forbids a State to enforce certain exclusions [of religious speakers] from a forum generally open to the public, even if it was not required to create the forum in the first place." 454 U.S. 263, 267-68 (1981). A public university had justified its exclusion of religious speakers by citing the Establishment Clause as interpreted in Tilton v. Richardson, 403 U.S. 672 (1973), but the Court in Widmar reaffirmed "the right of religious speakers to use public forums on equal terms with *10 others." 454 U.S. at 273 n.12. As the Court stated, "by creating a forum the [State] does not thereby endorse or promote any of the particular ideas aired there." Id. at 272 n.10.

In Board of Ed. of Westside Community Schools v. Mergens, 496 U.S. 226 (1990), the Court extended the principle of Widmar to the high school context -- in a case where Congress through the Equal Access Act had mandated equal treatment of religious speech in public schools. A high school religious group sought permission to meet at the high school, as other groups did. The school denied the request, arguing that "official recognition of [the students'] proposed club would effectively incorporate religious activities into the school's official program, endorse participation in the religious club, and provide the club with an official platform to proselytize other students." Id. at 247-48. The Court, without dissent on the constitutional issue, rejected that Establishment Clause argument. The Court relied on the "crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." Id. at 250 (plurality). The Court added that "[t]he proposition that schools do not endorse everything they fail to censor is not complicated." Id. (emphasis added). And if a state "refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion." Id. at 248 (plurality).

The Court reached the same conclusion in Lamb's Chapel v. Center Moriches Union Free School Dist., 508 U.S. 384 (1993). The Court struck down a school board rule that allowed schools to open their facilities except to religious uses. The Court unanimously concluded that the policy violated the Free Speech Clause and stated that "there would have been no realistic danger that the community would think that the *11 District was endorsing religion or any particular creed" by allowing religious uses in the school. Id. at 395.

The Court again relied on the neutrality principle in Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819 (1995). The University of Virginia authorized the payment of printing costs for a variety of student organization publications, but withheld payment for a religious group on the ground that the group's student paper "primarily promotes or manifests a particular belief in or about a deity or an ultimate reality." Id. at 823.

The Court first held that the University had engaged in impermissible viewpoint discrimination by excluding those "student journalistic efforts with religious editorial viewpoints." Id. at 831. As to the Establishment Clause analysis, the Court began with the "central lesson": A "significant factor in upholding governmental programs in the face of Establishment Clause attack is their neutrality towards religion." Id. at 839. In the speech context, the Court stated: "[M]ore than once have we rejected the position that the Establishment Clause even justifies, much less requires, a refusal to extend free speech rights to religious speakers who participate in broad-reaching government programs neutral in design." Id.

The Court found that a program including payments for expenses of the religious magazine as well as other student publications would be "neutral toward religion." Id. at 840. Such a program would respect the "critical difference between governmentspeech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." Id. at 841 (quotation omitted); see also id. at 834 (speech of "private persons" and "University's own speech" controlled "by different principles"); id. (referring to "distinction between the University's own favored message and the private speech of students").

***12** The Court applied those same principles of neutrality outside the educational context in Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753 (1995). The State there had excluded a private religious display (a cross) from a public square generally open to private displays.

The Court stated that "private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression." Id. at 760. A plurality stated that the Establishment Clause "was never meant, and has never been read by this Court, to serve as an impediment to purely private religious speech connected to the State only through its occurrence in a public forum." Id. at 767 (plurality opinion of Scalia, J., joined by Rehnquist, C.J., Kennedy and Thomas, JJ.).

In a concurring opinion, Justice Souter, joined by Justices O'Connor and Breyer, largely agreed with those principles, albeit finding that a state disclaimer might be necessary in cases of fixed visual displays. Id. at 784 (Souter, J., concurring). As to the need for a disclaimer, the concurring Justices distinguished a fixed visual display from an individual's verbal speech: "When an individual speaks in a public forum, it is reasonable for an observer to attribute the speech, first and foremost, to the speaker, while an unattended display (and any message it conveys) can naturally be viewed as belonging to the owner of the land on which it stands." Id. at 786.

In sum, as this series of cases makes clear, state action prohibiting a student speaker from engaging in religious speech, because it is religious, is a First Amendment violation. But even if it were not a First Amendment free speech/free exercise violation to exclude religious speech, these cases show that it is surely not a First Amendment Establishment Clause violation for a school to permit religious speech on a neutral basis at a school event. As Justice Kennedy has explained, "in some circumstances the First Amendment may require that ***13** government property be available for use by religious groups, and even where not required, such use has long been permitted." County of Allegheny v. ACLU, 492 U.S. 573, 667 (1989) (Kennedy, J., concurring and dissenting) (citations omitted; emphasis added).

3. The principle that the government does not violate the Establishment Clause

when it enacts a neutral program available to religious and non-religious alike finds additional doctrinal support in a separate strand of this Court's Establishment Clause jurisprudence. The Court has rejected challenges to government programs through which a "religious" individual or religious organization may take advantage of a neutrally available government benefit (the analytic equivalent of the neutrally available school speech forum). Four cases illustrate this principle.

In Mueller v. Allen, 463 U.S. 388 (1983), the Court considered a tax deduction program that allowed deductions for school expenses, including for parents who sent their children to religious schools. Citing Widmar, the Court held that where religion is advanced only "as a result of decisions of individual parents 'no imprimatur of state approval' can be deemed to have been conferred on any particular religion, or on religion generally." Id. at 399 (quoting Widmar, 454 U.S. at 274).

The Court applied the same principle in Witters v. Washington Dept. of Services for the Blind, 474 U.S. 481 (1986). The government provided financial assistance to blind students, one of whom used the assistance to attend a seminary. The Court, through Justice Marshall, stated: "Nor does the mere circumstance that petitioner has chosen to use neutrally available state aid to help pay for his religious education confer any message of state endorsement of religion." Id. at 488-89.

Mueller and Witters laid the constitutional foundation for the Court's decision in Zobrest v. Catalina Foothills School Dist., 509 U.S. 1 (1993). There, the school district provided ***14** sign-language interpreters to students, but refused to provide them to students attending religious schools on the ground that the assistance would violate the Establishment Clause. The Court rejected that defense: "[T]he statute ensures that a government-paid interpreter will be present in a sectarian school only as a result of the private decision of individual parents." Id. at 10.

Finally, in Agostini v. Felton, 521 U.S. 203 (1997), the Court relied on Mueller, Witters, and Zobrest in concluding that Title I's aid program did not violate the Establishment Clause. The Court held that the Constitution permits government aid to students on "a neutral basis" -- aid available regardless whether the student attends a sectarian or non-sectarian school. Id. at 234-35. Such a program "cannot reasonably be viewed as an endorsement of religion." Id. at 235.

4. The decisions in Widmar, Mergens, Lamb's Chapel, Rosenberger, and Pinette -- when read together with Lee v. Weisman and cases such as Mueller, Witters, Zobrest, and Agostini -- establish two critical principles that speak directly to the issue in this case. First, the Establishment Clause permits a citizen or student or religious group to utilize a neutrally available school forum to speak religious words or invoke God's name or say a prayer. Second, if the government were to prevent citizens or students at a school event from religious speech, because it is religious, the government would violate the free speech and free exercise [FN3] rights of the speakers.

> FN3. See Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 532 (1993) ("protections of the Free Exercise Clause pertain if the law at issue discriminates against some or all religious beliefs").

These principles, which validate the policy at issue in this case, should not be controversial. The President of the ACLU, for example, has correctly analyzed the issue presented here: ***15** [T]he First Amendment would protect the right of a

student speaker to voluntarily make religious statements even at a school-sponsored event. ... [I]f the student were truly expressing his or her own views, that should be protected. Justice Souter made precisely this point in his concurring opinion in Weisman. ... "If the State had chosen its graduation 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."
Nadine Strossen, How Much God in the Schools? A Discussion of Religion's Role in the Classroom, 4 Wm. & Mary Bill Rts. J. 607, 631 (1995) (quoting Lee, 505 U.S. at 630 n.8 (Souter, J., concurring)).

B. A Disclaimer is Not Constitutionally Necessary Here; In Any Event, the Court Need Not Consider That Issue in the Context of This Facial Challenge.

This case involves a student's verbal speech at a school event, as opposed to a fixed visual display in a public square. As a result, the school need not issue a disclaimer to eliminate any claimed audience misperception of government endorsement of a student's private speech.

Seven Justices suggested as much in Pinette, with Justice Souter, joined by Justices O'Connor and Breyer, explaining the rationale in concurrence: "When an individual speaks in a public forum, it is reasonable for an observer to attribute the speech, first and foremost, to the speaker, while an unattended display (and any message it conveys) can naturally be viewed as belonging to the owner of the land on which it stands." 515 U.S. at 786 (Souter, J., concurring). A four-Justice plurality added that the Court's "Religion Clause jurisprudence is complex enough without the addition of th[e] highly litigable feature" of sometimes-mandatory government disclaimers. *16Id. at 769 n.4 (Scalia, J., joined by Rehnquist, C.J., and Kennedy and Thomas, JJ.).

That said, the Court in this case need not consider whether and/or under what circumstances a disclaimer ever might be necessary, for two reasons.

First, this is a facial challenge to the Santa Fe High School football game policy. The Court thus could uphold the school's policy against the facial attack and simply leave for another day the question whether and/or under what circumstances a disclaimer ever might be necessary. See Pinette, 515 U.S. at 784, 794 n.2 (Souter, J., concurring) (even a fixed display in the public square would not violate the Establishment Clause "in large part because of the possibility of affixing a sign to the cross adequately disclaiming any government sponsorship or endorsement of it"; "there is no reason to presume that an adequate disclaimer could not have been drafted"); Mergens, 496 U.S. at 270 (Marshall, J., concurring) (voting to uphold program at issue in Mergens because school could allow private "religious speech" and affirmatively "disclaim[] any endorsement" of the private speech when necessary).

Second, and buttressing the first point, we understand that Santa Fe High School in fact issued the following oral disclaimer over the public address system at games after October 15 of this past season:
Marian Ward, a Santa Fe High School Student, has been selected by her peers to deliver a message of her own choice. Santa Fe ISD does not require, suggest, or endorse the contents of Ms. Ward's choice of a pre-game message. The purpose of the message is to solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition. [FN4]

FN4. This statement is recited in an October 15, 1999, letter agreement

between counsel in a separate case involving student pre-game speech at Santa Fe High School football games. See Ward v. Santa Fe Independent School District, No. G-99-556 (S.D. Tex., Houston Division). We have been informed that the letter agreement reciting that statement is part of the record in that case.

***17** As the Court concluded in Pinette and Mergens, this kind of disclaimer, while not constitutionally necessary, would leave the audience (even the "unreasonable" listeners) with absolutely no doubt that the student's speech is not approved or endorsed by the government. See Pinette, 515 U.S. at 776 (O'Connor, J., joined by Souter and Breyer, JJ., concurring) ("In context, a disclaimer helps remove doubt about state approval of respondents' religious message."); id. at 769 (plurality opinion of Scalia, J., joined by Rehnquist, C.J., and Kennedy and Thomas, JJ.) ("If Ohio is concerned about misperceptions, nothing prevents it from requiring all private displays in the square to be identified as such."); id. at 784 (Souter, J., joined by O'Connor and Breyer, JJ., concurring) ("I vote to affirm in large part because of the possibility of affixing a sign to the cross adequately disclaiming any government sponsorship or endorsement of it."); Mergens, 496 U.S. at 251 (plurality opinion of O'Connor, J.) ("To the extent a school makes clear that its recognition of respondents' proposed club is not an endorsement of the views of the club's participants, ... students will reasonably understand that the school's official recognition of the club evinces neutrality toward, rather than endorsement of, religious speech."). [FN5]

FN5. In this case, moreover, any chance of widespread audience confusion is all but nonexistent given that the students themselves elect the speaker and are thus necessarily aware of the school policy.

In short, a disclaimer is not constitutionally required here. But given that this is a facial challenge and given the current practice at Santa Fe High School, the Court could leave for ***18** another day the question whether and/or under what circumstances a disclaimer ever might be necessary.

C. The Scarcity of the Forum Does Not Alter the Constitutional Analysis.

The forum in this case is scarce, in the sense that only one student uses it at each home varsity football game, and there are only three to six home games a year. But the fact of scarcity does not alter the neutrality analysis.

First, as the Court in Rosenberger explained, the government's provision of a neutral forum does not suddenly become problematic if only a few speakers can utilize the forum. In such circumstances, it is "incumbent on the State ... to ration or allocate the scarce resources on some acceptable neutral principle; but nothing in our decision [in Lamb's Chapel] indicated that scarcity would give the State the right to exercise viewpoint discrimination that is otherwise impermissible." 515 U.S. at 835. The Court thus flatly rejected the suggestion that scarcity provided a rationale for discrimination against religious speech: "The government cannot justify viewpoint discrimination among private speakers on the economic fact of scarcity. Had the meeting rooms in Lamb's Chapel been scarce, had the demand been greater than the supply, our decision would have been no different." Id.

Justices Marshall and Brennan also helpfully analyzed the possible effects of scarcity in their separate opinion in Mergens. Considering the possibility of a

forum that did not "include the participation of more than one advocacy- oriented group," 496 U.S. at 268 (Marshall, J., concurring), those two Justices still did not suggest that such a development would be unconstitutional. Rather, that fact would simply make the school responsible, they said, to "affirmatively disclaim any endorsement" of the private speech. Id.

Second, and this is important, the school here does not decide whether the speaker will utter religious words, nor does ***19** the school premise availability of the forum on whether the speaker will utter religious words. The forum is neutral, and the choice whether to invoke God' s name or speak religious words is within the sole discretion of the student.

Compare, by contrast, a situation where the government could allow only a single school group to meet on school grounds. Suppose that a number of clubs applied for the facility. Suppose further that the school chose a religious club -- because it was religious -- rather than allocating the scarce facility on a religion-neutral basis. In that case, an Establishment Clause issue would arise. In this case, however, the school has done nothing to favor or promote a speaker who may choose to speak religious words over a speaker who may choose not to speak religious words.

D. The Sole Issue Here is the Facial Constitutionality of a High School Policy That Permits, But Does Not Require, Student Religious Speech at Extracurricular Football Games.

The Court has stated that Establishment Clause jurisprudence is "delicate and fact-sensitive," Lee, 505 U.S. at 597, and that "[e]very government practice must be judged in its unique circumstances," Lynch v. Donnelly, 465 U.S. 668, 694 (1984) (O'Connor, J., concurring). In this case, that principle suggests particular attention to the following points.

First and most importantly, as we have already explained, this case involves a facial challenge to a student speech policy where the student is free to speak a religious message -- or not -- as he or she sees fit.

Second, as we have said, the Court could uphold the student speech policy without reaching the question whether and/or under what circumstances a disclaimer ever might be necessary.

***20** Third this case involves a high school. The Court need not consider whether the same principles would apply to elementary school events.

Fourth, the speech policy before the Court applies only to football games. A football game is extracurricular and more in the nature of a student event than are curricular, school-dominated events such as graduations and daily classes. While graduations and classes unmistakably bear "the imprint of the State," Lee, 505 U.S. at 590, extracurricular activities generally provide an opportunity for students to participate without the same degree of school control. To be sure, faculty advisors or coaches are important, but the football team, the debate team, the cheerleading squad, the newspaper, the yearbook, the school play are activities designed to give students an extra degree of freedom to grow and learn and err in a less autocratic, less structured environment. In short, the coercive, state-dominated atmosphere described in Lee simply does not translate to extracurricular events such as football games. Cf. Mergens, 496 U.S. at 267 (Marshall, J., concurring) ("To the extent that a school emphasizes the autonomy of its students, ... there is a corresponding decrease in the likelihood that student speech will be regarded as school speech.").

II. RESPONDENTS' POSITION WOULD REQUIRE PUBLIC SCHOOLS TO ACT AS AGGRESSIVE "RELIGION CENSORS."

By allowing the student speaker to say what he or she chooses (so long as the message is within the very broad bounds of the school policy), the Santa Fe school district avoids entangling itself in the difficult task of determining what is religious speech and what is not. Respondents' position, by contrast, would generate enormous practical problems that only highlight the flaws in their argument.

If the student speaker must avoid "prayer," as respondents demand, does that mean all references to God? What about ***21** references to the "Father"? The "Father above"? Must the student avoid a reference to "our Creator"? Can the student ask the crowd to observe a moment of silence for the crowd members "to pray" as they wish? Can the student refer to the afterlife? Can the student, without invoking God, use phrases that originated in the Bible? Is the word "bless" ok?

Who knows. What we do know is that the public schools -- and then the courts -- would have to monitor the private speech of individuals to make these and hundreds of other nuanced judgments and try to draw a line between religious and non-religious speech. But just as this Court is "ill-equipped to sit as a national theology board," County of Allegheny, 492 U.S. at 678 (Kennedy, J., concurring and dissenting), so too Santa Fe High School is ill- equipped to sit as a local Religion Censor, ordered by this Court to painstakingly eliminate all traces of private religious expression from its school. See Mergens, 496 U.S. at 253 (plurality) (denial of the forum to religious groups "might well create greater entanglement problems in the form of invasive monitoring to prevent religious speech at meetings at which such speech might occur"); cf. Lee, 505 U.S. at 616-17 (Souter, J., concurring) (regarding judicial review of speech for sectarian influences: "I can hardly imagine a subject less amenable to the competence of the federal judiciary, or more deliberately to be avoided where possible.").

And the school would need to play the role of Religion Censor not just at football games, but at all school events and gatherings. What to do about: A student running for student council who wants to say at an pre-election debate that the philosopher most influential to her was Jesus Christ and to explain why? A student at an awards banquet who wants to give thanks to God? A football captain who speaks to the team before the game and wishes to say a prayer and to ask God to bless the team? A student newspaper writer who wishes to write why his religion is important to him?

***22** Logically at least, all are prohibited in respondents' Orwellian world. The schools throughout the country would have to review statements and messages at all school events to ferret out religious content. Schools would necessarily engage in "government censorship, to ensure that all student [speech] meet some baseline standard of secular orthodoxy." Rosenberger, 515 U.S. at 844. As the Court stated in Rosenberger, however, the "first danger to liberty lies in granting the State the power to examine publications to determine whether or not they are based on some ultimate idea and, if so, for the State to classify them." Id. at 835.

There should be no mistake, then, about what's at stake here. If the theory advanced by respondents is to become enshrined in this Court's case law, the full extermination of private religious speech from the public schools would be well on its way. See Adler v. Duval County School Bd., 174 F.3d 1236, 1256- 57 (11th Cir. 1999) (Marcus, J., dissenting) ("[T]he majority opinion has come perilously close to pronouncing an absolute rule that would excise all private religious expression from a public graduation ceremony ....").

The Court should adhere to the principle of neutrality, avoid entangling schools in the review of student speech for religious words and influences, and uphold the Santa Fe policy.

III. THE SCHOOL POLICY SERVES LEGITIMATE PUBLIC PURPOSES.

The express purpose of the Santa Fe policy for football games is "to solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition." Pet. App. F1. Those are "legitimate secular purposes." Lynch, 465 U.S. at 693 (O'Connor, J., concurring) ("solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society" are legitimate secular purposes).

***23** The policy also provides an opportunity for the individual student speakers to express themselves publicly, thereby improving their own confidence and skills. And it allows the student speakers to seek unity within and reflection among the student body, thereby helping to heal some of the schisms and frustrations that inevitably develop in high schools. One need not reflect long on some of the horrific events in this country's public high schools in the past year to appreciate the desirability and validity of such goals.

The court of appeals did cast negative aspersions on the fact that the school policy states that the student may give an "message and/or invocation." But that language is neutral toward religious speech -- and thus is entirely permissible. As Justice O'Connor explained in Wallace v. Jaffree, even if a "statute specifies that a student may choose to pray silently during a quiet moment, the State has not thereby encouraged prayer over other specified alternatives." 472 U.S. 38, 73 (1985) (O'Connor, J., concurring). Thus, Justice O'Connor noted that a neutral moment of silence law "that is clearly drafted and implemented so as to permit prayer, meditation, and reflection within the prescribed period, without endorsing one alternative over the others," would pass muster. Id. at 76.

Chief Justice Burger and Justice White both concurred with Justice O'Connor's analysis on this point. Chief Justice Burger explained: "To suggest that a moment-of-silence statute that includes the word 'prayer' unconstitutionally endorses religion, while one that simply provides for a moment of silence does not, manifests not neutrality but hostility toward religion." Id. at 85 (Burger, C.J., dissenting). The Chief Justice agreed with Justice O'Connor that it "makes no sense to say" that a state "endorse[s] prayer" by specifying that "voluntary prayer is one of the authorized activities." Id. And Justice White noted that the student who asked whether he can pray during a moment of silence must be told "yes," and "[i]f that is the case, I would not invalidate a statute that at the outset ***24** provided the legislative answer to the question, 'May I pray?"' Id. at 91 (White, J., dissenting).

As Justice O'Connor suggested in Wallace, it would be a bizarre rule, to put it charitably, that condemned a school policy where a student could give a "message and/or invocation," but allowed a policy where a student could give a "message" -- when in fact the student was free under both policies to speak religious words. If the Constitution turned on such a strange distinction, the school here surely would re-adopt its policy without the word "invocation" and then school officials would spend their time answering "yes" to students asking whether they could utter religious words. That makes no sense, as the three Justices who addressed the issue concluded in Wallace.

In that regard, we note that the five-Justice majority opinion in Wallace never said that inclusion of the word "prayer" as a mere alternative rendered the Alabama statute unconstitutional. Rather, there was "unrebutted evidence of legislative intent," id. at 58 -- evidence that "ma[de] it unnecessary, and indeed inappropriate, to evaluate the practical significance of the addition of the words 'or voluntary prayer' to the statute." Id. at 61.

Santa Fe's policy carefully follows the path charted by Justice O'Connor in Wallace. The policy's neutral phrase "message and/or invocation" makes clear that the student may -- but need not -- choose to invoke God's name or speak religious words.

But "the neutral language is itself skewed," respondents no doubt will argue. To begin with, such a suggestion borders on the incoherent, particularly in the context of a facial challenge. More to the point, a fundamental problem to which student speech policies such as Santa Fe's must respond is that many people have misread Engel and Lee v. Weisman to require the wholesale elimination of religious speech -- even private religious speech -- from the public schools. Indeed, the Court ***25** can take judicial notice of the fact that those cases led to such widespread misinterpretation by public school officials that the President in 1995 ordered the Secretary of Education to distribute guidelines nationwide explaining that student religious speech is not only permitted, but protected, in public schools. See Secretary Riley's Statement on Religious Expression, http://www.ed.gov/Speeches/08-1995/ religion.html (May 1998) ("The purpose of promulgating these presidential guidelines [in 1995] was to end much of the confusion regarding religious expression in our nation's public schools .... Schools may not discriminate against private religious expression by students ....").

The Santa Fe policy also combats that widespread misinterpretation by clarifying in a neutral way that religious speech is simply an alternative that is permitted, but not required, from student speakers at football games -- akin to what the presidential guidelines stated and this Court held in Widmar, Mergens, Lamb's Chapel, and Rosenberger.

IV. CONJURING UP SOME FUTURE "PARADE OF HORRIBLES" IS NOT A BASIS FOR STRIKING DOWN THE POLICY ON ITS FACE.

Respondents may suggest that most speakers at football games ultimately will choose to say religious words. But in this facial challenge to the policy, with no record to analyze, there is no basis to assume that the forum in fact will be used primarily by speakers employing religious words. See United States v. Salerno, 481 U.S. 739, 745 (1987). The Court here has only to determine "whether it is possible for the [policy] to be implemented in a constitutional manner." Mergens, 496 U.S. at 260 (Kennedy, J., concurring); see also Bowen v. Kendrick, 487 U.S. 589, 612 (1988).

In any event, if most speakers express religious words, that development could raise (at most) claims of audience confusion over whether the government had somehow encouraged or ***26** endorsed religion. Of course, a disclaimer making clear that the private speech is not approved or endorsed by the state, while not constitutionally necessary with respect to an individual's verbal speech, see Pinette, 515 U.S. at 786 (Souter, J., concurring), would eliminate any conceivable problem, see Mergens, 496 U.S. at 266-70 (Marshall, J., concurring).

There is a more direct and persuasive answer, however, to this kind of argument. The fact that some percentage (even 100%) of the speakers at a public school event

may choose to engage in religious speech in a neutrally available forum cannot be a constitutional problem any more than if 100% of government workers donate a portion of their salaries to religious organizations. Cf. Witters, 474 U.S. at 486; see also Agostini, 521 U.S. at 229 ("Nor are we willing to conclude that the constitutionality of an aid program depends on the number of sectarian school students who happen to receive the otherwise neutral aid."); Mueller, 463 U.S. at 401 ("We would be loath to adopt a rule grounding the constitutionality of a facially neutral law on annual reports reciting the extent to which various classes of citizens claimed benefits under the law.").

Consider the following practical example of the problems with this kind of approach: If High School A has events where 10% of the students utter religious words, High School B holds events where 50% of the students utter religious words, and High School C has events where 95% of the students utter religious words, what result? Do the percentages matter? Do the relative percentages matter? How? Does High School C have to tell some students to stop speaking religious words? Which ones? (And what exactly are sufficiently "religious words" to use in making this calculation, in any event?) [FN6]

FN6. Respondents may also raise the specter that school officials will in fact coerce students into providing religious messages. If so, that will provide occasion for an as-applied challenge to the school's implementation of its policy. See Bowen, 487 U.S. at 618-21; Pinette, 515 U.S. at 766 (plurality opinion of Scalia, J.) (discussing hypothetical applications where a "governmental entity manipulates its administration of a public forum").

***27** V. THE COURT'S PRECEDENTS HAVE LONG FOUND GOVERNMENT NEUTRALITY TOWARD RELIGION CONSISTENT WITH THE ESTABLISHMENT CLAUSE.

In Establishment Clause cases, the search for an overarching test is not always necessary, see Lee, 505 U.S. at 586, and can sometimes be counterproductive or even harmful, see Board of Ed. of Kiryas Joel Village School Dist. v. Grumet, 512 U.S. 687, 718 (1994) (O'Connor, J., concurring) ("Any test that must deal with widely disparate situations risks being so vague as to be useless. ... Lemon has, with some justification, been criticized on this score.").

The Court, of course, has been closely and deeply divided regarding the appropriate test and way to analyze government practices (i) that favor or promote religion over non-religion and (ii) that are deeply rooted in our history and tradition. See Lee, 505 U.S. at 632 (Scalia, J., dissenting) (decision "lays waste a tradition that is as old as public-school graduation ceremonies themselves"); County of Allegheny, 492 U.S. at 657 (Kennedy, J., concurring and dissenting) ("A test for implementing the protections of the Establishment Clause that, if applied with consistency, would invalidate longstanding traditions cannot be a proper reading of the Clause."); Lynch, 465 U.S. at 674 (upholding government's nativity display: "There is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789."); Marsh, 463 U.S. at 792 (legislative prayer constitutional because it has become "part of the fabric of our society"); Engel, 370 U.S. at 446 (Stewart, J., ***28** dissenting) ("What is relevant to the issue here is ... the history of the religious traditions of our people ...").

But those deep juridical divisions about the proper Establishment Clause "test" and analysis have by and large disappeared -- or been muted as irrelevant -- when the Court has analyzed laws neutral toward religion in cases such as Widmar,

Mergens, Lamb's Chapel, and Witters. As Justice Thomas has explained, while the Court's Establishment Clause jurisprudence arguably is "in hopeless disarray" in several areas, the principle that government neutrality satisfies the Establishment Clause "has enjoyed an uncharacteristic degree of consensus." Rosenberger, 515 U.S. at 861 (Thomas, J., concurring). No matter what Establishment Clause test might be employed, the Court generally has held that a law neutral toward religion satisfies Establishment Clause scrutiny (with a limited exception not relevant to this case [FN7]).

> FN7. The Court has suggested that neutrality may not suffice in that limited class of cases where government monies in a neutral benefits program would go directly to religious institutions. Of course, that exception is of questionable validity and is inconsistent with the thrust of the Court's modern jurisprudence establishing neutrality as an Establishment Clause safe harbor. See Rosenberger, 515 U.S. at 852-63 (Thomas, J., concurring). But this case, in any event, does not involve a funding program.

It is true, of course, that some citizens hostile to religion in any form may argue that even government neutrality toward private religion is still "too favorable" toward religion. These citizens may not want to see private displays of religion in the open public square (as in Pinette), to hear private individuals express religion in the public square (as here), to read religious speech as an expressly listed alternative in a student speech policy, to know that religion is obtaining taxpayer-funded assistance on a neutral basis (as with police and fire protection for churches), to see places of worship built alongside other buildings in residential communities (as most zoning ordinances allow). Some citizens may want to be free of *29 private religious speech and organizations just as much as they want to be free from the government's "exercise of religion." But offense at one's fellow citizens is not and cannot be the Establishment Clause test, at least not without relegating religious organizations and religious speakers to bottom-of-the-barrel status in our society -- below socialists and Nazis and Klan members and panhandlers and ideological and political advocacy groups of all stripes, all of whom may use the neutrally available public square and receive neutrally available government aid.

The Religion Clauses, of course, do not require any such "hostility to religion, religious ideas, religious people, or religious schools." Kiryas Joel, 512 U.S. at 717 (O'Connor, J., concurring). On the contrary, the Constitution, this Court's precedents, and our traditions demand that government accord religious speech, religious people, and religious organizations at least the same treatment as their secular counterparts. This Court therefore has stated time and again, and often unanimously, that government neutrality toward religion-- meaning no discrimination between religious and non-religious organizations, people, and speech -- is not an Establishment Clause violation. Striking down a law neutral toward religion, the Court has said, would reflect the "hostility to religion" that the Constitution neither requires nor permits. Rosenberger, 515 U.S. at 846; see generally Eugene Volokh, Equal Treatment is Not Establishment, 13 Notre Dame J. L. Ethics & Pub. Pol'y 341 (1999).

Respondents ask this Court to ignore the neutrality of the school policy and, as a necessary result, to cleanse public schools throughout the country of private religious speech. The Court should reject respondents' submission and affirm, as it has done many times before, that a neutral government policy of the kind maintained by Santa Fe High School satisfies the Establishment Clause.

*30 CONCLUSION

For the foregoing reasons, as well as those set forth in petitioner's brief, the decision of the court of appeals should be reversed.

U.S.Amicus.Brief,1999.
Santa Fe Independent School Dist. v. Doe
1999 WL 1272963

Briefs and Other Related Documents (Back to top)

- 2000 WL 374300, 68 USLW 3654 (Oral Argument) Oral Argument (Mar. 29, 2000)

- 2000 WL 340270 (Appellate Brief) SUPPLEMENTAL BRIEF FOR PETITIONER (Mar. 28, 2000)

- 2000 WL 340266 (Appellate Brief) SUPPLEMENTAL BRIEF FOR RESPONDENTS (Mar. 27, 2000)

- 2000 WL 263824 (Appellate Brief) REPLY BRIEF FOR PETITIONER (Mar. 08, 2000)

- 2000 WL 140838 (Appellate Brief) BRIEF AMICI CURIAE OF THE AMERICAN JEWISH CONGRESS, AMERICAN JEWISH COMMITTEE, AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, ANTI-DEFAMATION LEAGUE, COUNCIL ON RELIGIOUS FREEDOM, HADASSAH, INTERFAITH ALLIANCE, JEWISH COUNCIL FOR PUBLIC AFFAIRS , NATIONAL PEARL, PEOPLE FOR THE AMERICAN WAY FOUNDATION, SOKA GAKKAI INTERNATIONAL-USA, AND UNITARIAN UNIVERSALIST ASSOCIATION IN SUPPORT OF RESPONDENTS (Feb. 02, 2000)

- 2000 WL 140928 (Appellate Brief) BRIEF FOR RESPONDENTS (Feb. 02, 2000)

- 2000 WL 126190 (Appellate Brief) BRIEF AMICUS CURIAE FOR THE BAPTIST JOINT COMMITTEE ON PUBLIC AFFAIRS, J.M. DAWSON INSTITUTE OF CHURCH-STATE STUDIES, AND GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS, IN SUPPORT OF RESPONDENTS (Jan. 31, 2000)

- 1999 WL 1272941 (Appellate Brief) MOTION FOR LEAVE TO FILE BRIEF AND BRIEF AMICUS CURIAE OF THE RUTHERFORD INSTITUTE IN SUPPORT OF PETITIONER (Dec. 30, 1999)

- 1999 WL 1272942 (Appellate Brief) Brief on the Merits of Amici Curiae State of Texas, Attorney General of Texas John Cornyn, Governor of Texas George W. Bush, States of Alabama, Kansas, Louisiana, Mississippi, Nebraska, South Carolina, and Tennessee in Support of Petitioner (Dec. 30, 1999)

- 1999 WL 1272948 (Appellate Brief) BRIEF FOR THE CHRISTIAN LEGAL SOCIETY AS AMICUS CURIAE IN SUPPORT OF PETITIONER (Dec. 30, 1999)

- 1999 WL 1272950 (Appellate Brief) BRIEF OF AMICI CURIAE SPEARMAN INDEPENDENT SCHOOL DISTRICT, CARTHAGE INDEPENDENT SCHOOL DISTRICT, DILLEY INDEPENDENT SCHOOL DISTRICT, IRAAN-SHEFFIELD INDEPENDENT SCHOOL DISTRICT, McCAMEY INDEPENDENT SCHOOL DISTRICT, MADISONVILLE INDEPENDENT SCHOOL DI STRICT, NEWTON INDEPENDENT SCHOOL DISTRICT and LORENA INDEPENDENT SCHOOL DISTRICT, IN SUPPORT OF PETITIONER (Dec. 30, 1999)

- 1999 WL 1272967 (Appellate Brief) BRIEF OF THE NORTHSTAR LEGAL CENTER AS AMICUS CURIAE IN SUPPORT OF PETITIONER (Dec. 30, 1999)

• 1999 WL 1269304 (Appellate Brief) BRIEF OF TEXAS PUBLIC SCHOOL STUDENTS, THEIR PARENTS, AND THE LIBERTY LEGAL INSTITUTE AS AMICI CURIAE IN SUPPORT OF PETITIONER (Dec. 29, 1999)

• 1999 WL 1269325 (Appellate Brief) BRIEF FOR PETITIONER (Dec. 29, 1999)

• 1999 WL 1272953 (Appellate Brief) BRIEF OF AMICUS CURIAE THE TEXAS ASSOCIATION OF SCHOOL BOARDS LEGAL ASSISTANCE FUND IN SUPPORT OF PETITIONER (Dec. 29, 1999)

• 1999 WL 1272970 (Appellate Brief) BRIEF OF LIBERTY COUNSEL AND LIBERTY ALLIANCE AS AMICUS CURIAE IN SUPPORT OF PETITIONER (Dec. 29, 1999)

• 1999 WL 1276928 (Appellate Brief) BRIEF AMICUS CURIAE OF SENATOR JAMES M. INHOFE (R OKLAHOMA); CONGRESSMEN MARK E. SOUDER (R IN 4), JOSEPH R. PITTS (R yPA 16yr2000026040;0001;;ES;PAADCS16;1000636;r), RICHARD K. ARMEY (R TX 26), TOM DELAY (R TX 22), ROBERT B. ADERHOLT (R AL 4), BOB BA RR (R GA 7), ROSCOE G. BARTLETT (R MD 6), JOE L. BARTON (R TX 6), HELEN CHENOWETH-HAGE (R ID 1), JAMES DEMINT (R SC 4), JAY W. DICKEY (R AK 4), VIRGIL H. GOODE, JR. (D VA 5), RALPH M. HALL (D TX 4), JOHN N. HOSTETTLER (R IN 8), SAM JOHNSON (R TX (Dec. 29, 1999)

• 1999 WL 33612744 (Joint Appendix) (Dec. 29, 1999)

• 1999 WL 1269303 (Appellate Brief) BRIEF AMICI CURIAE FOR MARIAN WARD AND OTHER STUDENTS AND PARENTS OF SANTA FE INDEPENDENT SCHOOL DISTRICT IN SUPPORT OF PETITIONER (Dec. 28, 1999)

• 1999 WL 1259991 (Appellate Brief) BRIEF OF AMICI CURIAE THE TEXAS JUSTICE FOUNDATION AND LISTED STUDENTS, PARENTS, TEACHERS, LEGISLATORS, AND BLANCO INDEPENDENT SCHOOL DISTRICT AS AMICI SUPPORTING PETITIONER (Dec. 23, 1999)

• 1999 WL 1267471 (Appellate Brief) BRIEF OF STUDENT PRESS LAW CENTER, AMICUS CURIAE, IN SUPPORT OF NEITHER PARTY (Dec. 23, 1999)

• 1999 WL 33611439 (Appellate Filing) Response to Petition for Writ of Certiorari (Oct. 08, 1999)

• 1999 WL 33611367 (Appellate Filing) Petitioner's Supplemental Brief in Support of the Petition for Writ of Certiorari (Aug. 24, 1999)

• 1999 WL 33611382 (Appellate Filing) Motion for Leave to File Brief and Brief Amicus Curiae of the Rutherford Institute for the Petition for Writ of Certiorari (Aug. 06, 1999)

• 1999 WL 33611383 (Appellate Filing) Motion for Leave to File Brief and Brief Amicus Curiae of the Rutherford Institute for the Petition for Writ of Certiorari (Aug. 06, 1999)

• 1999 WL 33611385 (Appellate Filing) Brief of Amici Curiae State of Texas, Attorney General of Texas John Cornyn, Governor of Texas George W. Bush, States of Alabama, Colorado, Kansas, Louisiana, Mississippi, Nebraska, South Carolina, and Tennessee in Support of Petitioner (Aug. 06, 1999)

• 1999 WL 33611384 (Appellate Filing) Brief Amici Curiae for Stephanie Vega and Other Students and Parents of Santa Fe Independent School District in Support of Petitioner (Aug. 04, 1999)

• 1999 WL 33611365 (Appellate Filing) Petition for Writ of Certiorari (Jul. 06,

Briefs and Other Related Documents

Supreme Court of the United States

SANTA FE INDEPENDENT SCHOOL DISTRICT,
Petitioner,
v.
Jane DOE, Individually and as Next Friend for Her Minor Children, Jane and John Doe, et al.

No. 99-62.

Argued March 29, 2000.
Decided June 19, 2000.

Students and their parents filed § 1983 action against school district, alleging that district's policies and practices, including policy of permitting student-led, student-initiated **prayer** before football games, violated Establishment Clause and demanding prospective injunctive and declaratory relief in addition to money damages. The United States District Court for the Southern District of Texas, Samual B. Kent, J., ordered district to enact more restrictive policy, allowing only nonsectarian, nonproselytizing **prayer,** and appeals were taken. The United States Court of Appeals for the Fifth Circuit, 168 F.3d 806, determined that even modified policy violated Establishment Clause. District's petition for certiorari was granted. The Supreme Court, Justice Stevens, held that: (1) student-led, student-initiated invocations prior to football games did not amount to private speech; (2) policy of permitting such invocations was impermissibly coercive; and (3) challenge to policy was not premature, as it was invalid on its face.

Affirmed.

Chief Justice Rehnquist filed a dissenting opinion, in which Justices Scalia and Thomas joined.

West Headnotes

[1] Constitutional Law ⚿274(2)
92k274(2)

The Fourteenth Amendment imposes the First Amendment's substantive limitations on the legislative power of the States and their political subdivisions. U.S.C.A. Const.Amends. 1, 14.

[2] Constitutional Law ⚿84.5(3)
92k84.5(3)

[2] Schools ⚿165
345k165

Student-led, student-initiated invocations prior to football games, as authorized by policy of public school district, did not amount to private speech, for purposes of Establishment Clause, as invocations were given over school's public address system by speaker who was elected by majority of student body, invocations took place on government property at government- sponsored, school-related events, expressed purposes of policy encouraged selection of religious message, and audience would perceive message as public expression of majority views delivered with district's approval. U.S.C.A. Const.Amend. 1.

[3] Constitutional Law ⚿82(9)
92k82(9)

Selective access does not transform government property into a public forum for First Amendment purposes. U.S.C.A. Const.Amend. 1.

[4] Constitutional Law ⚿82(1)
92k82(1)

Fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

[5] Constitutional Law ⚿84.1
92k84.1

The Establishment Clause forbids a State to hide behind the application of formally neutral criteria and remain studiously oblivious to the effects of its actions. U.S.C.A. Const.Amend. 1.

[6] Constitutional Law ⚿84.5(3)
92k84.5(3)

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. U.S.C.A. Const.Amend. 1.

[7] Constitutional Law ⚷84.1
92k84.1

When a governmental entity professes a secular purpose for an arguably religious policy, the government's characterization is entitled to some deference, but it is nonetheless the duty of the courts to distinguish a sham secular purpose from a sincere one. U.S.C.A. Const.Amend. 1.

[8] Constitutional Law ⚷84.5(3)
92k84.5(3)

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. U.S.C.A. Const.Amend. 1.

[9] Constitutional Law ⚷84.5(3)
92k84.5(3)

[9] Schools ⚷165
345k165

Public school district's policy of permitting student-led, student-initiated invocations or statements before high school football games was impermissibly coercive, despite policy's mechanism of authorizing student elections to determine whether invocations would be given and which student would lead them, as such elections were product of district decision and encouraged divisiveness along religious lines, students' decision to attend football games could not be deemed entirely voluntary, and, even if attendance was voluntary, district could not compel student to choose between religious conformity and foregoing attendance at game. U.S.C.A. Const.Amend. 1.

[10] Constitutional Law ⚷84.1
92k84.1

The preservation and transmission of religious beliefs and worship is a responsibility and a choice committed to the private sphere. U.S.C.A. Const.Amend. 1.

[11] Constitutional Law ⚷84.1
92k84.1

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. U.S.C.A. Const.Amend. 1.

[12] Constitutional Law ⚷84.1
92k84.1

The government may no more use social pressure to enforce religious orthodoxy than it may use more direct means. U.S.C.A. Const.Amend. 1.

[13] Constitutional Law ⚷84.5(3)
92k84.5(3)

The Religion Clauses of the First Amendment do not impose a prohibition on all religious activity in public schools. U.S.C.A. Const.Amend. 1.

[14] Constitutional Law ⚷84.5(3)
92k84.5(3)

First Amendment's Religion Clauses do not prohibit any public school student from voluntarily praying at any time before, during, or after the schoolday. U.S.C.A. Const.Amend. 1.

[15] Constitutional Law ⚷46(1)
92k46(1)

Students' and parents' challenge to constitutionality of public school district's policy of permitting student-led, student-initiated invocations or statements before high school football games was not premature, although no message had actually been delivered under policy, as policy was invalid on its face because it established improper majoritarian, student-body election on religion, and had purpose of, and created perception of, encouraging delivery of **prayer** at series of important school events. U.S.C.A. Const.Amend. 1.

[16] Constitutional Law ⚷84.1
92k84.1

Under the *Lemon* standard, a court must invalidate a statute challenged under the Establishment Clause if it lacks a secular legislative purpose. U.S.C.A. Const.Amend. 1.

[17] Constitutional Law ⚷84.5(3)
92k84.5(3)

[17] Schools ⚿165
345k165

Public school district's policy of permitting student-led, student-initiated invocations or statements before high school football games lacked valid secular purpose, but was instead implemented with purpose of endorsing school **prayer,** in light of text of policy, which reflected district's involvement in election of speaker and content of message, and evolution of policy, which arose in response to issue of school **prayer.** U.S.C.A. Const.Amend. 1.

[18] Constitutional Law ⚿84.1
92k84.1

Whether a government activity violates the Establishment Clause is in large part a legal question to be answered on the basis of judicial interpretation of social facts; every government practice must be judged in its unique circumstances. U.S.C.A. Const.Amend. 1.

****2268 *290** *Syllabus* [FN*]

FN* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

Prior to 1995, a student elected as **Santa Fe** High School's student council chaplain delivered a **prayer** over the public address system before each home varsity football game. Respondents, Mormon and Catholic students or alumni and their mothers, filed a suit challenging this practice and others under the Establishment Clause of the First Amendment. While the suit was pending, petitioner school district (District) adopted a different policy, ****2269** which authorizes two student elections, the first to determine whether "invocations" should be delivered at games, and the second to select the spokesperson to deliver them. After the students held elections authorizing such **prayers** and selecting a spokesperson, the District Court entered an order modifying the policy to permit only nonsectarian, nonproselytizing **prayer.** The Fifth Circuit held that, even as modified by the District Court, the football **prayer** policy was invalid.

Held: The District's policy permitting student-led, student-initiated **prayer** at football games violates the Establishment Clause. Pp. 2275-2283.

(a) The Court's analysis is guided by the principles endorsed in *Lee v. Weisman,* 505 U.S. 577, 112 S.Ct. 2649, 120 L.Ed.2d 467. There, in concluding that a **prayer** delivered by a rabbi at a graduation ceremony violated the Establishment Clause, the Court held 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 that establishes a state religion or religious faith, or tends to do so, *id.,* at 587, 112 S.Ct. 2649. The District argues unpersuasively that these principles are inapplicable because the policy's messages are private student speech, not public speech. The delivery of a message such as the invocation here--on school property, at school-sponsored events, 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. Although the District relies heavily on this Court's cases addressing public forums, *e.g., Rosenberger v. Rector and Visitors of Univ. of Va.,* 515 U.S. 819, 115 S.Ct. 2510, 132 L.Ed.2d 700, it is clear that the District's ***291** pregame ceremony is not the type of forum discussed in such cases. The District simply does not evince an intent to open its ceremony to indiscriminate use by the student body generally, see, *e.g., Hazelwood School Dist. v. Kuhlmeier,* 484 U.S. 260, 270, 108 S.Ct. 562, 98 L.Ed.2d 592, but, rather, allows only one student, the same student for the entire season, to give the invocation, which is subject to particular regulations that confine the content and topic of the student's message. The majoritarian process implemented by the District guarantees, by definition, that minority candidates will never prevail and that their views will be effectively silenced. See *Board of Regents of Univ. of Wis. System v. Southworth,* 529 U.S. 217, 235, 120 S.Ct. 1346, 146 L.Ed.2d 193. Moreover, the District has failed to divorce itself from the invocations' religious content. The policy involves both perceived and actual endorsement of religion, see *Lee,* 505 U.S., at 590, 112 S.Ct. 2649, declaring that the student elections take place because the District "has chosen to permit" student-delivered invocations, that the invocation "shall" be conducted "by the high school student council" "[u]pon advice and direction of the high school principal," and that it must be consistent with the policy's goals, which include "solemniz[ing] the event." A religious message is the most obvious method of solemnizing an event. Indeed, the only type of message expressly endorsed in the policy is an "invocation," a term which primarily describes an

appeal for divine assistance and, as used in the past at **Santa Fe** High School, has always entailed a focused religious message. A conclusion that the message is not "private speech" is also established by factors beyond the policy's text, including the official setting in which the invocation is delivered, see, *e.g., Wallace v. Jaffree,* 472 U.S. 38, 73, 76, 105 S.Ct. 2479, 86 L.Ed.2d 29, by the policy's sham secular purposes, see *id.,* at 75, 105 S.Ct. 2479, and by its history, which indicates that the District intended to preserve its long-sanctioned practice of **prayer** before football games, see *Lee,* 505 U.S., at 596, 112 S.Ct. 2649. Pp. 2275-2279.

****2270** (b) The Court rejects the District's argument that its policy is distinguishable from the graduation **prayer** in *Lee* because it does not coerce students to participate in religious observances. The first part of this argument--that there is no impermissible government coercion because the pregame messages are the product of student choices--fails for the reasons discussed above explaining why the mechanism of the dual elections and student speaker do not turn public speech into private speech. 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 students' views are not unanimous on that issue. One of the Establishment Clause's purposes is to remove debate over this kind of issue from governmental supervision or control. See *Lee,* 505 U.S., at 589, 112 S.Ct. 2649. Although the ultimate choice of student speaker is attributable to the students, the District's decision ***292** to hold the constitutionally problematic election is clearly a choice attributable to the State, *id.,* at 587, 112 S.Ct. 2649. The second part of the District's argument--that there is no coercion here because attendance at an extracurricular event, unlike a graduation ceremony, is voluntary--is unpersuasive. For some students, such as cheerleaders, members of the band, and the team members themselves, attendance at football games is mandated, sometimes for class credit. The District's argument also minimizes the immense social pressure, or truly genuine desire, felt by many students to be involved in the extracurricular event that is American high school football. *Id.,* at 593, 112 S.Ct. 2649. The Constitution demands that schools not force on students the difficult choice between attending these games and avoiding personally offensive religious rituals. See *id.,* at 596, 112 S.Ct. 2649. Pp. 2279-2281.

(c) The Court also rejects the District's argument that respondents' facial challenge to the policy necessarily must fail because it is premature: No invocation has as yet been delivered under the policy. This argument assumes that the Court is concerned only with the serious constitutional injury that occurs when a student is forced to participate in an act of religious worship because she chooses to attend a school event. But the Constitution also requires that the Court keep in mind the myriad, subtle ways in which Establishment Clause values can be eroded, *Lynch v. Donnelly,* 465 U.S. 668, 694, 104 S.Ct. 1355, 79 L.Ed.2d 604, and guard against other different, yet equally important, constitutional injuries. One is the mere passage by the District of a policy that has the purpose and perception of government establishment of religion. See, *e.g., Bowen v. Kendrick,* 487 U.S. 589, 602, 108 S.Ct. 2562, 101 L.Ed.2d 520; *Lemon v. Kurtzman,* 403 U.S. 602, 612, 91 S.Ct. 2105, 29 L.Ed.2d 745. As discussed above, the policy's text and the circumstances surrounding its enactment reveal that it has such a purpose. Another constitutional violation warranting the Court's attention is the District's implementation of an electoral process that subjects the issue of **prayer** to a majoritarian vote. Through its election scheme, the District has established a governmental mechanism that turns the school into a forum for religious debate and empowers the student body majority to subject students of minority views to constitutionally improper messages. The award of that power alone is not acceptable. Cf. *Board of Regents of Univ. of Wis. System v. Southworth,* 529 U.S. 217, 120 S.Ct. 1346, 146 L.Ed.2d 193. For the foregoing reasons, the policy is invalid on its face. Pp. 2281-2283.

168 F.3d 806, affirmed.

STEVENS, J., delivered the opinion of the Court, in which O'CONNOR, KENNEDY, SOUTER, GINSBURG, and BREYER, JJ., joined. REHNQUIST, ***293** C.J., filed a dissenting opinion, in which ****2271** SCALIA and THOMAS, JJ., joined, *post,* p. 2283.

Jay A. Sekulow, for petitioner.

John Cornyn, Austin, TX, for Texas, et al., as amici curiae by special leave of the Court.

Anthony P. Griffin, Galveston, TX, for respondent.

***294** Justice STEVENS delivered the opinion of the Court.

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. [FN1]

FN1. A decision, the Fifth Circuit Court of Appeals noted, that many District officials "apparently neither agreed with nor particularly respected." 168 F.3d 806, 809, n. 1 (C.A.5 1999). About a month after the complaint was filed, the District Court entered an order that provided, in part:
"[A]ny further attempt on the part of District or school administration, officials, counsellors, teachers, employees or servants of the School District, parents, students or anyone else, overtly or covertly to ferret out the identities of the Plaintiffs in this cause, by means of bogus petitions, questionnaires, individual interrogation, or downright 'snooping', will cease immediately. ANYONE TAKING ANY ACTION ON SCHOOL PROPERTY, DURING SCHOOL HOURS, OR WITH SCHOOL RESOURCES OR APPROVAL FOR PURPOSES OF ATTEMPTING TO ELICIT THE NAMES OR IDENTITIES OF THE PLAINTIFFS IN THIS CAUSE OF ACTION, BY OR ON BEHALF OF ANY OF THESE INDIVIDUALS, WILL FACE THE HARSHEST POSSIBLE CONTEMPT SANCTIONS FROM THIS COURT, AND MAY ADDITIONALLY FACE CRIMINAL LIABILITY. The Court wants these proceedings addressed on their merits, and not on the basis of intimidation or harassment of the participants on either side." App. 34-35.

***295** 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, ****2272** [FN2] and to deliver overtly Christian **prayers** over the public address system at home football games.

FN2. At the 1994 graduation ceremony the senior class president delivered this invocation:
"Please bow your heads.
"Dear heavenly Father, thank you for allowing us to gather here safely tonight. We thank you for the wonderful year you have allowed us to spend together as students of **Santa Fe.** We thank you for our teachers who have devoted many hours to each of us. Thank you, Lord, for our parents and may each one receive the special blessing. We pray also for a blessing and guidance as each student moves forward in the future. Lord, bless this ceremony and give us all a safe journey home. In Jesus' name we pray." *Id.*, at 19.

On May 10, 1995, the District Court entered an interim order addressing a number of different issues. [FN3] With respect ***296** 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." App. 32.

FN3. For example, it prohibited school officials from endorsing or participating in the baccalaureate ceremony sponsored by the **Santa Fe** Ministerial Alliance, and ordered the District to establish

policies to deal with
"manifest First Amendment infractions of teachers, counsellors, or other District or school officials or personnel, such as ridiculing, berating or holding up for inappropriate scrutiny or examination the beliefs of any individual students. Similarly, the School District will establish or clarify existing procedures for excluding overt or covert sectarian and proselytizing religious teaching, such as the use of blatantly denominational religious terms in spelling lessons, denominational religious songs and poems in English or choir classes, denominational religious stories and parables in grammar lessons and the like, while at the same time allowing for frank and open discussion of moral, religious, and societal views and beliefs, which are non-denominational and non-judgmental." *Id.*, at 34.

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 ***297** their graduation ceremonies.' " 168 F.3d 806, 811 (C.A.5 1999) (emphasis deleted).

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." App. 52. In a second vote the class elected two seniors to deliver the invocation and benediction. [FN4]

FN4. 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." *Id.*, at 53. 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." *Id.*, at 54.

In July, the District enacted another policy eliminating the requirement that invocations and benedictions be "nonsectarian ****2273** and nonproselytising," 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 nonproselytising," 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: "[T]he district's high school students voted to determine whether a student would deliver **prayer** at varsity football games.... The students chose to allow a ***298** student to say a **prayer** at football games." *Id.*, at 65. A week later, in a separate election, they selected a student "to deliver the **prayer** at varsity football games." *Id.*, at 66.

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." [FN5] It is the validity of that policy that is before us. [FN6]

FN5. Despite these changes, the school did not conduct another election, under the October policy, to supersede the results of the August policy election.

FN6. 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." *Id.*, at 104-105.

***299** The District Court did enter an order precluding enforcement of the first, open-ended policy. Relying on our decision in *Lee v. Weisman,* 505 U.S. 577, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992), it held that the school's "action must not 'coerce anyone to support or participate in' a religious exercise." App. to Pet. for Cert. E7. Applying that test, it concluded that the graduation **prayers** appealed "to distinctively Christian beliefs," [FN7] and that delivering a ****2274 prayer** "over the school's public address system prior to each football and baseball game coerces student participation in religious events." [FN8] Both parties appealed, the District contending that the enjoined portion of the October policy was permissible and the Does contending that both alternatives violated the Establishment Clause. The Court of Appeals majority agreed with the Does.

FN7. "The graduation **prayers** at issue in the instant case, in contrast, are infused with explicit references to Jesus Christ and otherwise appeal to distinctively Christian beliefs. The Court accordingly finds that use of these **prayers** during graduation ceremonies, considered in light of the overall manner in which they were delivered, violated the Establishment Clause." App. to Pet. for Cert. E8.

FN8. *Id.*, at E8-E9.

The decision of the Court of Appeals followed Fifth Circuit precedent that had announced two rules. In *Jones v. Clear Creek Independent School Dist.,* 977 F.2d 963 (C.A.5 1992), that court held that student-led **prayer** that was approved by a vote of the students and was nonsectarian and nonproselytizing was permissible at high school graduation ceremonies. On the other hand, in later cases the Fifth Circuit made it clear that the *Clear Creek* rule applied only to high school ***300** graduations and that school-encouraged **prayer** was constitutionally impermissible at school-related sporting events. Thus, in *Doe v. Duncanville Independent School Dist.,* 70 F.3d 402 (C.A.5 1995), it had described a high school graduation as "a significant, once in-a- lifetime event" to be contrasted with athletic events in "a setting that is far less solemn and extraordinary." *Id.,* at 406-407. [FN9]

FN9. Because the dissent overlooks this case, it incorrectly assumes that a "**prayer**-only policy" at football games was permissible in the Fifth Circuit. See *post,* at 2286 (opinion of REHNQUIST, C.J.).

In its opinion in this case, the Court of Appeals explained:

"The controlling feature here is the same as in *Duncanville:* The **prayers** are to be delivered *at football games*--hardly the sober type of annual event that can be appropriately solemnized with **prayer.** The distinction to which [the District] points is simply one without difference. Regardless of whether the **prayers** are selected by vote or spontaneously initiated at these frequently-recurring, informal, school-sponsored events, school officials are present and have the authority to stop the **prayers.** Thus, as we indicated in *Duncanville,* our decision in *Clear Creek II* hinged on the singular context and singularly serious nature of a graduation ceremony. Outside that nurturing context, a Clear Creek **Prayer** Policy cannot survive. We therefore reverse the district court's holding that [the District's] alternative Clear Creek **Prayer** Policy can be extended to football games, irrespective of the presence of the nonsectarian, nonproselytizing restrictions." 168 F.3d, at 823.

The dissenting judge rejected the majority's distinction between graduation ceremonies and football games. In his ***301** opinion the District's

October policy created a limited public forum that had a secular purpose [FN10] and provided neutral accommodation of noncoerced, private, religious speech. [FN11]

> FN10. "There are in fact several secular reasons for allowing a brief, serious message before football games--some of which [the District] has listed in its policy. At sporting events, messages and/or invocations can promote, among other things, honest and fair play, clean competition, individual challenge to be one's best, importance of team work, and many more goals that the majority could conceive would it only pause to do so.
> "Having again relinquished all editorial control, [the District] has created a limited public forum for the students to give brief statements or **prayers** concerning the value of those goals and the methods for achieving them." 168 F.3d, at 835.

> FN11. "The majority fails to realize that what is at issue in this *facial challenge* to this school policy is the neutral accommodation of non- coerced, private, religious speech, which allows students, selected by students, to express their personal viewpoints. The state is not involved. The school board has neither scripted, supervised, endorsed, suggested, nor edited these personal viewpoints. Yet the majority imposes a judicial curse upon sectarian religious speech." *Id.*, at 836.

****2275** We granted the District's petition for certiorari, limited to the following question: "Whether petitioner's policy permitting student-led, student-initiated **prayer** at football games violates the Establishment Clause." 528 U.S. 1002, 120 S.Ct. 494, 145 L.Ed.2d 381 (1999). We conclude, as did the Court of Appeals, that it does.

II

[1] 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. *Wallace v. Jaffree,* 472 U.S. 38, 49-50, 105 S.Ct. 2479, 86 L.Ed.2d 29 (1985) . In *Lee v. Weisman,* 505 U.S. 577, 112 S.Ct. 2649, 120 L.Ed.2d 467 (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 ***302** 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.' " *Id.,* at 587, 112 S.Ct. 2649 (citations omitted) (quoting *Lynch v. Donnelly,* 465 U.S. 668, 678, 104 S.Ct. 1355, 79 L.Ed.2d 604 (1984)).

[2] 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." *Board of Ed. of Westside Community Schools (Dist.66) v. Mergens,* 496 U.S. 226, 250, 110 S.Ct. 2356, 110 L.Ed.2d 191 (1990) (opinion of O'CONNOR, J.). We certainly agree with that distinction, but we are not persuaded that the pregame invocations should be regarded as "private speech."

[3] 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, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995). Although the District relies heavily on *Rosenberger* and similar cases involving such ***303** forums, [FN12] it is clear that the pregame ceremony is not the type of forum discussed in those cases. [FN13] ****2276** The **Santa Fe** school officials simply do not "evince either 'by policy or by practice,' any intent to open the [pregame ceremony] to 'indiscriminate use,' ... by the student body generally." *Hazelwood School Dist. v. Kuhlmeier,* 484 U.S. 260, 270, 108 S.Ct. 562, 98 L.Ed.2d 592 (1988) (quoting *Perry Ed. Assn. v. Perry Local Educators' Assn.,* 460 U.S. 37, 47, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983)). 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, see *infra,* at 2277-2278, 2278-2279. By comparison, in *Perry* we rejected a claim that the school had created a limited public forum in its school mail system despite the fact that it had allowed far more speakers to address a much broader range of topics than the policy at issue here. [FN14] As we concluded in *Perry,* "selective access does not transform government property into a public forum." 460 U.S., at 47, 103 S.Ct. 948.

FN12. See, *e.g.,* Brief for Petitioner 44-48, citing *Rosenberger v. Rector and Visitors of Univ. of Va.,* 515 U.S. 819, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995) (limited public forum); *Widmar v. Vincent,* 454 U.S. 263, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981) (limited public forum); *Capitol Square Review and Advisory Bd. v. Pinette,* 515 U.S. 753, 115 S.Ct. 2440, 132 L.Ed.2d 650 (1995) (traditional public forum); *Lamb's Chapel v. Center Moriches Union Free School Dist.,* 508 U.S. 384, 113 S.Ct. 2141, 124 L.Ed.2d 352 (1993) (limited public forum). Although the District relies on these public forum cases, it does not actually argue that the pregame ceremony constitutes such a forum.

FN13. A conclusion that the District had created a public forum would help shed light on whether the resulting speech is public or private, but we also note that we have never held the mere creation of a public forum shields the government entity from scrutiny under the Establishment Clause. See, *e.g., Pinette,* 515 U.S., at 772, 115 S.Ct. 2440 (O'CONNOR, J., concurring in part and concurring in judgment) ("I see no necessity to carve out ... an exception to the endorsement test for the public forum context").

FN14. The school's internal mail system in *Perry* was open to various private organizations such as "[l]ocal parochial schools, church groups, YMCA's, and Cub Scout units." 460 U.S., at 39, n. 2, 103 S.Ct. 948.

***304** 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.

[4] Recently, in *Board of Regents of Univ. of Wis. System v. Southworth,* 529 U.S. 217, 120 S.Ct. 1346, 146 L.Ed.2d 193 (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." *Id.,* at 235, 120 S.Ct. 1346.

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. [FN15] Because "fundamental rights may not be ***305** submitted to vote; they depend on the outcome of no elections," *West Virginia Bd. of Ed. v. Barnette,* 319 U.S. 624, 638, 63 S.Ct. 1178, 87 L.Ed. 1628 (1943), the District's elections are insufficient safeguards of diverse student speech.

FN15. 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.
The fact that the District's policy provides for the election of the speaker only after the majority has voted on her message identifies an obvious distinction between this case and the typical election of a "student body president, or even a newly elected prom king or queen." *Post,* at 2285.

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 ****2277** 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." 505 U.S., at 594, 112 S.Ct. 2649. 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' " [FN16] or by characterizing the individual student as the "circuit-breaker" [FN17] 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." *Id.,* at 590, 112 S.Ct. 2649.

FN16. Brief for Petitioner 19 (quoting *Board of Ed. of Westside Community Schools (Dist.66) v. Mergens,* 496 U.S. 226, 248, 110 S.Ct. 2356, 110 L.Ed.2d 191 (1990) (plurality opinion)).

FN17. Tr. of Oral Arg. 7.

The District has attempted to disentangle itself from the religious messages by developing the two-step student ***306** 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." App. 104 (emphasis added). The elections thus "shall" be conducted "by the high school student council" and "[u]pon advice and direction of the high school principal." *Id.,* at 104-105. 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." *Ibid.*

[5] 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 sportsmanship" 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. [FN18] 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 ***307** assistance. [FN19] 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 ****2278** how the students understand the policy. The results of the elections described in the parties' stipulation [FN20] make it clear that the students understood that the central question before them was whether **prayer** should be a part of the pregame ceremony. [FN21] We recognize the important role that public worship plays in many communities, as well as the sincere desire to include public **prayer** as a part of various occasions so as to mark those occasions' significance. But such religious activity in public schools, as elsewhere, must comport with the First Amendment.

FN18. THE CHIEF JUSTICE's hypothetical of the student body president asked by the school to introduce a guest speaker with a biography of her accomplishments, see *post,* at 2287-2288 (dissenting opinion), obviously would pose no problems under the Establishment Clause.

FN19. See, *e.g.,* Webster's Third New International Dictionary 1190 (1993) (defining "invocation" as "a **prayer** of entreaty that is usu[ally] a call for the divine presence and is offered at the beginning of a meeting or service of worship").

FN20. See *supra,* at 2272-2273, and n. 4.

FN21. Even if the plain language of the October policy were facially neutral, "the Establishment Clause forbids a State to hide behind the application of formally neutral criteria and remain studiously oblivious to the effects of its actions." *Capitol Square Review and Advisory Bd. v. Pinette,* 515 U.S., at 777, 115 S.Ct. 2440 (O'CONNOR, J., concurring in part and concurring in judgment); see also *Church of Lukumi Babalu Aye, Inc. v. Hialeah,* 508 U.S. 520, 534-535, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993) (making the same point in the Free Exercise Clause context).

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 *308 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 "[t]he board has chosen to permit" the elected student to rise and give the "statement or invocation."

[6] 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." *Wallace,* 472 U.S., at 73, 76, 105 S.Ct. 2479 (O'CONNOR, J., concurring in judgment); see also *Capitol Square Review and Advisory Bd. v. Pinette,* 515 U.S. 753, 777, 115 S.Ct. 2440, 132 L.Ed.2d 650 (1995) (O'CONNOR, J., concurring in part and concurring in judgment). 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.

[7] The text and history of this policy, moreover, reinforce our objective student's perception that the **prayer** is, in actuality, encouraged by the school. When a governmental entity professes a secular purpose for an arguably religious policy, the government's characterization is, of course, entitled to some deference. But it is nonetheless the duty of the courts to "distinguis[h] a sham secular purpose from a sincere one." *Wallace,* 472 U.S., at 75, 105 S.Ct. 2479 (O'CONNOR, J., concurring in judgment).

*309 According to the District, the secular purposes of the policy are to "foste[r] free expression of private persons ... as well [as to] solemniz[e] sporting events, promot[e] good sportsmanship and student safety, and establis [h] an appropriate environment **2279 for competition." Brief for Petitioner 14. We note, however, that the District's approval of only one specific kind of message, an "invocation," is not necessary to further any of these purposes. Additionally, the fact that only one student is permitted to give a content-limited message suggests that this policy does little to "foste [r] free expression." Furthermore, regardless of whether one considers a sporting event an appropriate occasion for solemnity, the use of an invocation to foster such solemnity is impermissible when, in actuality, it constitutes **prayer** sponsored by the school. And it is unclear what type of message would be both appropriately "solemnizing" under the District's policy and yet nonreligious.

Most striking to us is the evolution of the current policy from the long- sanctioned office of "Student Chaplain" to the candidly titled "**Prayer** at Football Games" regulation. This history indicates that the District intended to preserve the practice of **prayer** before football games. The conclusion that the District viewed the October policy simply as a continuation of the previous policies is dramatically illustrated by the fact that the school did not conduct a new election, pursuant to the current policy, to replace the results of the previous election, which occurred under the former policy. Given these observations, and in light of the school's history of regular delivery of a student-led **prayer** at athletic events, it is reasonable to infer that the specific purpose of the policy was to preserve a popular "state-sponsored religious practice." *Lee,* 505 U.S., at 596, 112 S.Ct. 2649.

[8] 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 *310 message to adherents that they are insiders, favored members of the political community." *Lynch,* 465 U.S., at 688, 104 S.Ct. 1355 (O'CONNOR, J., concurring). 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

[9] 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," App. 65, and the controversy in this case demonstrates that the views of the students are not unanimous on that issue.

[10] 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." 505 U.S., at 589, 112 S.Ct. 2649. The two student elections authorized ***311** by the policy, coupled with ****2280** the debates that presumably must precede each, impermissibly invade that private sphere. The election mechanism, when considered in light of the history in which the policy in question evolved, reflects a device the District put in place that determines whether religious messages will be delivered at home football games. The mechanism encourages divisiveness along religious lines in a public school setting, a result at odds with the Establishment Clause. Although it is true that the ultimate choice of student speaker is "attributable to the students," Brief for Petitioner 40, the District's decision to hold the constitutionally problematic election is clearly "a choice attributable to the State," *Lee,* 505 U.S., at 587, 112 S.Ct. 2649.

The District further argues that attendance at the commencement ceremonies at issue in *Lee* "differs dramatically" from attendance at high school football games, which it contends "are of no more than passing interest to many students" and are "decidedly extracurricular," thus dissipating any coercion. Brief for Petitioner 41. Attendance at a high school football game, unlike showing up for class, is certainly not required in order to receive a diploma. Moreover, we may assume that the District is correct in arguing that the informal pressure to attend an athletic event is not as strong as a senior's desire to attend her own graduation ceremony.

[11] There are some students, however, such as cheerleaders, members of the band, and, of course, the team members themselves, for whom seasonal commitments mandate their attendance, sometimes for class credit. The District also minimizes the importance to many students of attending and participating in extracurricular activities as part of a complete educational experience. As we noted in *Lee,* "[l]aw reaches past formalism." 505 U.S., at 595, 112 S.Ct. 2649. 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 ***312** 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." *Id.,* at 593, 112 S.Ct. 2649. 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 attending these games and avoiding personally offensive religious rituals 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 "[i]t 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." *Id.,* at 596, 112 S.Ct. 2649.

[12] 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." *Id.,* at 594, 112 S.Ct. 2649. As in *Lee,* "[w]hat to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices, in a school context may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy." *Id.,* at 592, 112 S.Ct. 2649. The constitutional command will not permit the District "to exact religious conformity from a student as the ****2281** price" of joining her classmates at a varsity football game. [FN22]

> FN22. "We think the Government's position that this interest suffices to force students to choose between compliance or forfeiture demonstrates fundamental inconsistency in its argumentation. It fails to acknowledge that what for many of Deborah's classmates and their parents was a spiritual imperative was for Daniel and Deborah Weisman religious conformance compelled by the State. While in some societies the wishes of the majority might prevail, the Establishment Clause of the First Amendment is addressed to this contingency and rejects the balance urged upon us. The Constitution forbids the State to exact religious conformity from a student as the price of attending her own high school graduation. This is the calculus the Constitution commands." *Lee,* 505 U.S., at 595-596, 112 S.Ct. 2649.

[13][14] ***313** The Religion Clauses of the First Amendment prevent the government from making any law respecting the establishment of religion or prohibiting the free exercise thereof. By no means do these commands impose a prohibition on all religious activity in our public schools. See, *e.g., Lamb's Chapel v. Center Moriches Union Free School Dist.,* 508 U.S. 384, 395, 113 S.Ct. 2141, 124 L.Ed.2d 352 (1993); *Board of Ed. of Westside Community Schools (Dist.66) v. Mergens,* 496 U.S. 226, 110 S.Ct. 2356, 110 L.Ed.2d 191 (1990); *Wallace,* 472 U.S., at 59, 105 S.Ct. 2479. Indeed, the common purpose of the Religion Clauses "is to secure religious liberty." *Engel v. Vitale,* 370 U.S. 421, 430, 82 S.Ct. 1261, 8 L.Ed.2d 601 (1962). Thus, nothing in the Constitution as interpreted by this Court prohibits any public school student from voluntarily praying at any time before, during, or after the schoolday. But the religious liberty protected by the Constitution is abridged when the State affirmatively sponsors the particular religious practice of **prayer.**

IV

[15] Finally, the District argues repeatedly that the Does have made a premature facial challenge to the October policy that necessarily must fail. The District emphasizes, quite correctly, that until a student actually delivers a solemnizing message under the latest version of the policy, there can be no certainty that any of the statements or invocations will be religious. Thus, it concludes, the October policy necessarily survives a facial challenge.

This argument, however, assumes that we are concerned only with the serious constitutional injury that occurs when a student is forced to participate in an act of religious worship ***314** because she chooses to attend a school event. But the Constitution also requires that we keep in mind "the myriad, subtle ways in which Establishment Clause values can be eroded," *Lynch,* 465 U.S., at 694, 104 S.Ct. 1355 (O'CONNOR, J., concurring), and that we guard against other different, yet equally important, constitutional injuries. One is the mere passage by the District of a policy that has the purpose and perception of government establishment of religion. Another is the implementation of a governmental electoral process that subjects the issue of **prayer** to a majoritarian vote.

[16] The District argues that the facial challenge must fail because "**Santa Fe's** Football Policy cannot be invalidated on the basis of some 'possibility or even likelihood' of an unconstitutional application." Brief for Petitioner 17 (quoting *Bowen v. Kendrick,* 487 U.S. 589, 613, 108 S.Ct. 2562, 101 L.Ed.2d 520 (1988)). Our Establishment Clause cases involving facial challenges, however, have not focused solely on the possible applications of the statute, but rather have considered whether the statute has an unconstitutional purpose. Writing for the Court in *Bowen,* THE CHIEF JUSTICE concluded that "[a]s in previous cases involving facial challenges on Establishment Clause grounds, *e.g., Edwards v. Aguillard,* [482 U.S. 578, 107 S.Ct. 2573, 96 L.Ed.2d 510 (1987)]; *Mueller v. Allen,* 463 U.S. 388, 103 S.Ct. 3062, ****2282** 77 L.Ed.2d 721 (1983), we assess the constitutionality of an enactment by reference to the three factors first articulated in *Lemon v. Kurtzman,* 403 U.S. 602, 612, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971) ..., which guides '[t]he general nature of our inquiry in this area,' *Mueller v. Allen, supra,* at 394, 103 S.Ct. 3062." 487 U.S., at 602, 108 S.Ct. 2562. Under the *Lemon* standard, a court must invalidate a statute if it lacks "a secular legislative purpose." *Lemon v. Kurtzman,* 403 U.S. 602, 612, 91

S.Ct. 2105, 29 L.Ed.2d 745 (1971). It is therefore proper, as part of this facial challenge, for us to examine the purpose of the October policy.

[17] As discussed, *supra,* at 2277-2278, 2278-2279, the text of the October policy alone reveals that it has an unconstitutional purpose. The plain language of the policy clearly spells out the extent of school involvement in both the election of the speaker ***315** and the content of the message. Additionally, the text of the October policy specifies only one, clearly preferred message--that of **Santa Fe's** traditional religious "invocation." Finally, the extremely selective access of the policy and other content restrictions confirm that it is not a content-neutral regulation that creates a limited public forum for the expression of student speech. Our examination, however, need not stop at an analysis of the text of the policy.

[18] This case comes to us as the latest step in developing litigation brought as a challenge to institutional practices that unquestionably violated the Establishment Clause. One of those practices was the District's long-established tradition of sanctioning student-led **prayer** at varsity football games. The narrow question before us is whether implementation of the October policy insulates the continuation of such **prayers** from constitutional scrutiny. It does not. Our inquiry into this question not only can, but must, include an examination of the circumstances surrounding its enactment. Whether a government activity violates the Establishment Clause is "in large part a legal question to be answered on the basis of judicial interpretation of social facts.... Every government practice must be judged in its unique circumstances...." *Lynch,* 465 U.S., at 693-694, 104 S.Ct. 1355 (O'CONNOR, J., concurring). Our discussion in the previous sections, *supra,* at 2277-2279, demonstrates that in this case the District's direct involvement with school **prayer** exceeds constitutional limits.

The District, nevertheless, asks us to pretend that we do not recognize what every **Santa Fe** High School student understands clearly--that this policy is about **prayer.** The District further asks us to accept what is obviously untrue: that these messages are necessary to "solemnize" a football game and that this single-student, year-long position is essential to the protection of student speech. We refuse to turn a blind eye to the context in which this policy arose, and that context quells any doubt that this policy was implemented with the purpose of endorsing school **prayer.**

***316** Therefore, the simple enactment of this policy, with the purpose and perception of school endorsement of student **prayer,** was a constitutional violation. We need not wait for the inevitable to confirm and magnify the constitutional injury. In *Wallace,* for example, we invalidated Alabama's as yet unimplemented and voluntary "moment of silence" statute based on our conclusion that it was enacted "for the sole purpose of expressing the State's endorsement of **prayer** activities for one minute at the beginning of each school day." 472 U.S., at 60, 105 S.Ct. 2479; see also *Church of Lukumi Babalu Aye, Inc. v. Hialeah,* 508 U.S. 520, 532, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993). Therefore, even if no **Santa Fe** High School student were ever to offer a religious message, the October policy fails a facial challenge because the attempt by the District to encourage **prayer** is also at issue. Government efforts to endorse religion cannot evade constitutional ****2283** reproach based solely on the remote possibility that those attempts may fail.

This policy likewise does not survive a facial challenge because it impermissibly imposes upon the student body a majoritarian election on the issue of **prayer.** Through its election scheme, the District has established a governmental electoral mechanism that turns the school into a forum for religious debate. It further empowers the student body majority with the authority to subject students of minority views to constitutionally improper messages. The award of that power alone, regardless of the students' ultimate use of it, is not acceptable. [FN23] Like the referendum in *Board of Regents of Univ. of Wis. System v. Southworth,* 529 U.S. ***317** 217, 120 S.Ct. 1346, 146 L.Ed.2d 193 (2000), the election mechanism established by the District undermines the essential protection of minority viewpoints. Such a system encourages divisiveness along religious lines and threatens the imposition of coercion upon those students not desiring to participate in a religious exercise. Simply by establishing this school-related procedure, which entrusts the inherently nongovernmental subject of religion to a majoritarian vote, a constitutional violation has occurred. [FN24] No further injury is required for the policy to fail a facial challenge.

FN23. THE CHIEF JUSTICE accuses us of "essentially invalidat[ing] all student elections," see *post,* at 2285. This is obvious hyperbole. We have concluded that the resulting religious message under

this policy would be attributable to the school, not just the student, see *supra,* at 2275- 2279. For this reason, we now hold only that the District's decision to allow the student majority to control whether students of minority views are subjected to a school-sponsored **prayer** violates the Establishment Clause.

FN24. THE CHIEF JUSTICE contends that we have "misconstrue[d] the nature ... [of] the policy as being an election on '**prayer**' and 'religion,' " *post,* at 2285. We therefore reiterate that the District has stipulated to the facts that the most recent election was held "to determine whether a student would deliver ***prayer*** at varsity football games," that the "students chose to allow a student to say a ***prayer*** at football games," and that a second election was then held "to determine which student would deliver the ***prayer.***" App. 65-66 (emphases added). Furthermore, the policy was titled "***Prayer*** at Football Games." *Id.,* at 99 (emphasis added). Although the District has since eliminated the word "**prayer**" from the policy, it apparently viewed that change as sufficiently minor as to make holding a new election unnecessary.

To properly examine this policy on its face, we "must be deemed aware of the history and context of the community and forum," *Pinette,* 515 U.S., at 780, 115 S.Ct. 2440 (O'CONNOR, J., concurring in part and concurring in judgment). Our examination of those circumstances above leads to the conclusion that this policy does not provide the District with the constitutional safe harbor it sought. 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 judgment of the Court of Appeals is, accordingly, affirmed.

It is so ordered.

***318** 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 ****2284** God." Presidential Proclamation, 1 Messages and Papers of the Presidents, 1789-1897, p. 64 (J. Richardson ed. 1897).

We do not learn until late in the Court's opinion that respondents in this case challenged the district's student-message program at football games before it had been put into practice. As the Court explained in *United States v. Salerno,* 481 U.S. 739, 745, 107 S.Ct. 2095, 95 L.Ed.2d 697 (1987), the fact that a policy might "operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly invalid." See also *Bowen v. Kendrick,* 487 U.S. 589, 612, 108 S.Ct. 2562, 101 L.Ed.2d 520 (1988). While there is an exception to this principle in the First Amendment overbreadth context because of our concern that people may refrain from speech out of fear of prosecution, *Los Angeles Police Dept. v. United Reporting Publishing Corp.,* 528 U.S. 32, 38-40, 120 S.Ct. 483, 145 L.Ed.2d 451 (1999), there is no similar justification for Establishment Clause cases. No speech will be "chilled" by the existence of a government policy that might unconstitutionally endorse religion over nonreligion. Therefore, the question is not whether the district's policy *may be* applied in violation of the Establishment Clause, but whether it inevitably will be.

***319** The Court, venturing into the realm of prophecy, decides that it "need not wait for the inevitable" and invalidates the district's policy on its face. See *ante,* at 2282. To do so, it applies the most rigid version of the oft-criticized test of *Lemon v. Kurtzman,* 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971). [FN1]

FN1. The Court rightly points out that in facial challenges in the Establishment Clause context, we have looked to *Lemon's* three factors to "guid[e][t]he general nature of our inquiry." *Ante,* at 2282 (internal quotation marks omitted) (citing *Bowen v. Kendrick,* 487 U.S. 589, 602, 108 S.Ct. 2562, 101 L.Ed.2d 520 (1988)). In *Bowen,* we looked to *Lemon* as such a guide and determined that a federal grant program was not invalid on its face, noting that "[i]t has not been the Court's practice, in considering facial challenges to statutes of this kind, to strike them down in anticipation that particular applications may result in unconstitutional use of funds." 487 U.S., at 612, 108 S.Ct. 2562 (internal quotation marks omitted). But here the Court, rather

> than looking to *Lemon* as a guide, applies *Lemon's* factors stringently and ignores *Bowen's* admonition that mere anticipation of unconstitutional applications does not warrant striking a policy on its face.

Lemon has had a checkered career in the decisional law of this Court. See, *e.g., Lamb's Chapel v. Center Moriches Union Free School Dist.,* 508 U.S. 384, 398-399, 113 S.Ct. 2141, 124 L.Ed.2d 352 (1993) (SCALIA, J., concurring in judgment) (collecting opinions criticizing *Lemon*); *Wallace v. Jaffree,* 472 U.S. 38, 108-114, 105 S.Ct. 2479, 86 L.Ed.2d 29 (1985) (REHNQUIST, J., dissenting) (stating that *Lemon's* "three-part test represents a determined effort to craft a workable rule from a historically faulty doctrine; but the rule can only be as sound as the doctrine it attempts to service" (internal quotation marks omitted)); *Committee for Public Ed. and Religious Liberty v. Regan,* 444 U.S. 646, 671, 100 S.Ct. 840, 63 L.Ed.2d 94 (1980) (STEVENS, J., dissenting) (deriding "the sisyphean task of trying to patch together the blurred, indistinct, and variable barrier described in *Lemon* "). We have even gone so far as to state that it has never been binding on us. *Lynch v. Donnelly,* 465 U.S. 668, 679, 104 S.Ct. 1355, 79 L.Ed.2d 604 (1984) ("[W]e have repeatedly emphasized our unwillingness to be confined to any single test or criterion in this sensitive area .... In two cases, the Court did not even apply the *Lemon* 'test' [citing *Marsh* ***320** *v. Chambers,* 463 U.S. 783, 103 S.Ct. 3330, 77 L.Ed.2d 1019 (1983), and *Larson v. Valente,* 456 U.S. 228, 102 S.Ct. 1673, 72 L.Ed.2d 33 (1982)]"). Indeed, in *Lee v. Weisman,* 505 U.S. 577, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992), an opinion upon which the Court relies heavily today, we mentioned, but did not feel compelled to apply, the *Lemon* test. See also *Agostini v. Felton,* 521 U.S. 203, 233, 117 S.Ct. 1997, 138 L.Ed.2d 391 ****2285** (1997) (stating that *Lemon's* entanglement test is merely "an aspect of the inquiry into a statute's effect"); *Hunt v. McNair,* 413 U.S. 734, 741, 93 S.Ct. 2868, 37 L.Ed.2d 923 (1973) (stating that the *Lemon* factors are "no more than helpful signposts").

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." *Ante,* at 2283. 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." [FN2] See *ante,* at 2281, 2283. 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. App. 104-105. It is conceivable that the election could become one in which student candidates campaign on platforms that focus on whether or not they will ***321** 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. [FN3]

> FN2. The Court attempts to support its misinterpretation of the nature of the election process by noting that the district stipulated to facts about the most recent election. See *ante,* at 2283, n. 24. Of course, the most recent election was conducted under the *previous* policy--a policy that required an elected student speaker to give a pregame invocation. See App. 65-66, 99-100. There has not been an election under the policy at issue here, which expressly allows the student speaker to give a message as opposed to an invocation.

> FN3. The Court's reliance on language regarding the student referendum in *Board of Regents of Univ. of Wis. System v. Southworth,* 529 U.S. 217, 120 S.Ct. 1346, 146 L.Ed.2d 193 (2000), to support its conclusion with respect to the election process is misplaced. That case primarily concerned free speech, and, more particularly, mandated financial support of a public forum. But as stated above, if this case were in the "as applied" context and we were presented with the appropriate record, our language in *Southworth* could become more applicable. In fact, *Southworth* itself demonstrates the impropriety of making a decision with respect to the election process without a record of its operation. There we remanded in part for a determination of

how the referendum functions. See *id.,* at 235-236, 120 S.Ct. 1346.

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." *Ante,* at 2283. 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 ***322** to the students to vote for such ****2286** 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." *Ante,* at 2282. But the policy itself has plausible secular purposes: "[T]o solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition." App. 104-105. Where a governmental body "expresses a plausible secular purpose" for an enactment, "courts should generally defer to that stated intent." *Wallace,* 472 U.S., at 74-75, 105 S.Ct. 2479 (O'CONNOR, J., concurring in judgment); see also *Mueller v. Allen,* 463 U.S. 388, 394-395, 103 S.Ct. 3062, 77 L.Ed.2d 721 (1983) (stressing this Court's "reluctance to attribute unconstitutional motives to the States, particularly when a plausible secular purpose for the State's program may be discerned from the face of the statute"). The Court grants no deference to--and appears openly hostile toward--the policy's stated purposes, and wastes no time in concluding that they are a sham.

For example, the Court dismisses the secular purpose of solemnization by claiming that it "invites and encourages religious messages." *Ante,* at 2277; Cf. *Lynch,* 465 U. S, at 693, 104 S.Ct. 1355 (O'CONNOR, J., concurring) (discussing the "legitimate secular purposes of solemnizing public occasions"). The Court so concludes based on its rather strange view that a "religious message is the most obvious means of solemnizing an event." *Ante,* at 2277. But it is easy to think of solemn messages that are not religious in nature, for example urging that a game be fought fairly. And sporting events often begin with a solemn rendition of our national anthem, with its concluding verse "And this be our motto: 'In God is our trust.' " Under the Court's logic, a public school that sponsors ***323** the singing of the national anthem before football games violates the Establishment Clause. Although the Court apparently believes that solemnizing football games is an illegitimate purpose, the voters in the school district seem to disagree. Nothing in the Establishment Clause prevents them from making this choice. [FN4]

FN4. The Court also determines that the use of the term "invocation" in the policy is an express endorsement of that type of message over all others. See *ante,* at 2277-2278. A less cynical view of the policy's text is that it permits many types of messages, including invocations. That a policy tolerates religion does not mean that it improperly endorses it. Indeed, as the majority reluctantly admits, the Free Exercise Clause mandates such tolerance. See *ante,* at 2281 ("[N]othing in the Constitution as interpreted by this Court prohibits any public school student from voluntarily praying at any time before, during, or after the schoolday"); see also *Lynch v. Donnelly,* 465 U.S. 668, 673, 104 S.Ct. 1355, 79 L.Ed.2d 604 (1984) ("Nor does the Constitution require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any").

The Court bases its conclusion that the true purpose of the policy is to endorse student **prayer** on its view of the school district's history of Establishment Clause violations and the context in which the policy was written, that is, as "the latest step in developing litigation brought as a challenge to institutional practices that unquestionably violated the Establishment Clause." *Ante,* at 2278-2279, 2282. But the context-- attempted compliance with a District Court order--actually demonstrates that the school district was acting diligently to come within the governing constitutional law. The District Court ordered the school district to formulate a policy consistent with Fifth Circuit precedent, which permitted a school district to have a **prayer**-only policy. See *Jones v. Clear Creek Independent School Dist.,* 977 F.2d 963 (C.A.5 1992). But the school district went further than required by the District Court order and eventually settled ****2287** on a policy that gave the student speaker a choice to

deliver either an *324 invocation or a message. In so doing, the school district exhibited a willingness to comply with, and exceed, Establishment Clause restrictions. Thus, the policy cannot be viewed as having a sectarian purpose. [FN5]

FN5. *Wallace v. Jaffree,* 472 U.S. 38, 105 S.Ct. 2479, 86 L.Ed.2d 29 (1985), is distinguishable on these grounds. There we struck down an Alabama statute that added an express reference to **prayer** to an existing statute providing a moment of silence for meditation. *Id.,* at 59, 105 S.Ct. 2479. Here the school district added a secular alternative to a policy that originally provided only for **prayer.** More importantly, in *Wallace,* there was "unrebutted evidence" that pointed to a wholly religious purpose, *id.,* at 58, 105 S.Ct. 2479, and Alabama "conceded in the courts below that the purpose of the statute was to make **prayer** part of daily classroom activity," *id.,* at 77-78, 105 S.Ct. 2479 (O'CONNOR, J., concurring in judgment). There is no such evidence or concession here.

The Court also relies on our decision in *Lee v. Weisman,* 505 U.S. 577, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992), to support its conclusion. In *Lee,* we concluded that the content of the speech at issue, a graduation **prayer** given by a rabbi, was "directed and controlled" by a school official. *Id.,* at 588, 112 S.Ct. 2649. In other words, at issue in *Lee* was *government* speech. Here, by contrast, the potential speech at issue, if the policy had been allowed to proceed, would be a message or invocation selected or created by a student. That is, if there were speech at issue here, it would be *private* speech. The "crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect," applies with particular force to the question of endorsement. *Board of Ed. of Westside Community Schools (Dist.66) v. Mergens,* 496 U.S. 226, 250, 110 S.Ct. 2356, 110 L.Ed.2d 191 (1990) (plurality opinion) (emphasis in original).

Had the policy been put into practice, the students may have chosen a speaker according to wholly secular criteria--like good public speaking skills or social popularity--and the student speaker may have chosen, on her own accord, to deliver a religious message. Such an application of the policy *325 would likely pass constitutional muster. See *Lee, supra,* at 630, n. 8, 112 S.Ct. 2649 (SOUTER, J., concurring) ("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 be harder to attribute an endorsement of religion to the State").

Finally, the Court seems to demand that a government policy be completely neutral as to content or be considered one that endorses religion. See *ante,* at 2276-2277. 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. For example, we look to "content neutrality" in reviewing loudness restrictions imposed on speech in public forums, see *Ward v. Rock Against Racism,* 491 U.S. 781, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989), and regulations against picketing, see *Boos v. Barry,* 485 U.S. 312, 108 S.Ct. 1157, 99 L.Ed.2d 333 (1988). The Court seems to think that the fact that the policy is not content neutral somehow controls the Establishment Clause inquiry. See *ante,* at 2276-2277.

But even our speech jurisprudence would not require that all public school actions with respect to student speech be content neutral. See, *e.g., Bethel School Dist. No. 403 v. Fraser,* 478 U.S. 675, 106 S.Ct. 3159, 92 L.Ed.2d 549 (1986) (allowing the imposition of sanctions against a student speaker who, in nominating a fellow student for elective office during an assembly, referred to his candidate in terms of an elaborate sexually explicit metaphor). **2288 Schools do not violate the First Amendment every time they restrict student speech to certain categories. But under the Court's view, a school policy under which the student body president is to solemnize the graduation ceremony by giving a favorable introduction to the guest speaker would be facially unconstitutional. Solemnization "invites and encourages" **prayer** and the policy's content limitations *326 prohibit the student body president from giving a solemn, yet nonreligious, message like "commentary on United States foreign policy." See *ante,* at 2277.

The policy at issue here may be applied in an unconstitutional manner, but it will be time enough to invalidate it if that is found to be the case. I would reverse the judgment of the Court of Appeals.

Briefs and Other Related Documents (Back to top)

. 2000 WL 374300, 68 USLW 3654 (Oral Argument) Oral Argument (Mar. 29, 2000)

. 2000 WL 340270 (Appellate Brief) SUPPLEMENTAL BRIEF FOR PETITIONER (Mar. 28, 2000)

. 2000 WL 340266 (Appellate Brief) SUPPLEMENTAL BRIEF FOR RESPONDENTS (Mar. 27, 2000)

. 2000 WL 263824 (Appellate Brief) REPLY BRIEF FOR PETITIONER (Mar. 08, 2000)

. 2000 WL 140838 (Appellate Brief) BRIEF AMICI CURIAE OF THE AMERICAN JEWISH CONGRESS, AMERICAN JEWISH COMMITTEE, AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE, ANTI-DEFAMATION LEAGUE, COUNCIL ON RELIGIOUS FREEDOM, HADASSAH, INTERFAITH ALLIANCE, JEWISH COUNCIL FOR PUBLIC AFFAIRS , NATIONAL PEARL, PEOPLE FOR THE AMERICAN WAY FOUNDATION, SOKA GAKKAI INTERNATIONAL-USA, AND UNITARIAN UNIVERSALIST ASSOCIATION IN SUPPORT OF RESPONDENTS (Feb. 02, 2000)

. 2000 WL 140928 (Appellate Brief) BRIEF FOR RESPONDENTS (Feb. 02, 2000)

. 2000 WL 126190 (Appellate Brief) BRIEF AMICUS CURIAE FOR THE BAPTIST JOINT COMMITTEE ON PUBLIC AFFAIRS, J.M. DAWSON INSTITUTE OF CHURCH-STATE STUDIES, AND GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS, IN SUPPORT OF RESPONDENTS (Jan. 31, 2000)

. 1999 WL 1272941 (Appellate Brief) MOTION FOR LEAVE TO FILE BRIEF AND BRIEF AMICUS CURIAE OF THE RUTHERFORD INSTITUTE IN SUPPORT OF PETITIONER (Dec. 30, 1999)

. 1999 WL 1272942 (Appellate Brief) Brief on the Merits of Amici Curiae State of Texas, Attorney General of Texas John Cornyn, Governor of Texas George W. Bush, States of Alabama, Kansas, Louisiana, Mississippi, Nebraska, South Carolina, and Tennessee in Support of Petitioner (Dec. 30, 1999)

. 1999 WL 1272948 (Appellate Brief) BRIEF FOR THE CHRISTIAN LEGAL SOCIETY AS AMICUS CURIAE IN SUPPORT OF PETITIONER (Dec. 30, 1999)

. 1999 WL 1272950 (Appellate Brief) BRIEF OF AMICI CURIAE SPEARMAN INDEPENDENT SCHOOL DISTRICT, CARTHAGE INDEPENDENT SCHOOL DISTRICT, DILLEY INDEPENDENT SCHOOL DISTRICT, IRAAN-SHEFFIELD INDEPENDENT SCHOOL DISTRICT, McCAMEY INDEPENDENT SCHOOL DISTRICT, MADISONVILLE INDEPENDENT SCHOOL DI STRICT, NEWTON INDEPENDENT SCHOOL DISTRICT and LORENA INDEPENDENT SCHOOL DISTRICT, IN SUPPORT OF PETITIONER (Dec. 30, 1999)

. 1999 WL 1272963 (Appellate Brief) BRIEF OF AMICI CURIAE CONGRESSMAN STEVE LARGENT AND CONGRESSMAN J.C. WATTS IN SUPPORT OF PETITIONER (Dec. 30, 1999)

. 1999 WL 1272967 (Appellate Brief) BRIEF OF THE NORTHSTAR LEGAL CENTER AS AMICUS CURIAE IN SUPPORT OF PETITIONER (Dec. 30, 1999)

. 1999 WL 1269304 (Appellate Brief) BRIEF OF TEXAS PUBLIC SCHOOL STUDENTS, THEIR PARENTS, AND THE LIBERTY LEGAL INSTITUTE AS AMICI CURIAE IN SUPPORT OF PETITIONER (Dec. 29, 1999)

. 1999 WL 1269325 (Appellate Brief) BRIEF FOR PETITIONER (Dec. 29, 1999)

. 1999 WL 1272953 (Appellate Brief) BRIEF OF AMICUS CURIAE THE TEXAS ASSOCIATION OF SCHOOL BOARDS LEGAL ASSISTANCE FUND IN SUPPORT OF PETITIONER (Dec. 29, 1999)

. 1999 WL 1272970 (Appellate Brief) BRIEF OF LIBERTY COUNSEL AND LIBERTY ALLIANCE AS AMICUS CURIAE IN SUPPORT OF PETITIONER (Dec. 29, 1999)

. 1999 WL 1276928 (Appellate Brief) BRIEF AMICUS CURIAE OF SENATOR JAMES M. INHOFE (R OKLAHOMA); CONGRESSMEN MARK E. SOUDER (R IN 4), JOSEPH R. PITTS (R yPA 16yr2000026040;0001;;ES;PAADCS16;1000636;r), RICHARD K. ARMEY (R TX 26), TOM DELAY (R

TX 22), ROBERT B. ADERHOLT (R AL 4), BOB BA RR (R GA 7), ROSCOE G. BARTLETT (R MD 6), JOE L. BARTON (R TX 6), HELEN CHENOWETH-HAGE (R ID 1), JAMES DEMINT (R SC 4), JAY W. DICKEY (R AK 4), VIRGIL H. GOODE, JR. (D VA 5), RALPH M. HALL (D TX 4), JOHN N. HOSTETTLER (R IN 8), SAM JOHNSON (R TX (Dec. 29, 1999)

. 1999 WL 33612744 (Joint Appendix) (Dec. 29, 1999)

. 1999 WL 1269303 (Appellate Brief) BRIEF AMICI CURIAE FOR MARIAN WARD AND OTHER STUDENTS AND PARENTS OF SANTA FE INDEPENDENT SCHOOL DISTRICT IN SUPPORT OF PETITIONER (Dec. 28, 1999)

. 1999 WL 1259991 (Appellate Brief) BRIEF OF AMICI CURIAE THE TEXAS JUSTICE FOUNDATION AND LISTED STUDENTS, PARENTS, TEACHERS, LEGISLATORS, AND BLANCO INDEPENDENT SCHOOL DISTRICT AS AMICI SUPPORTING PETITIONER (Dec. 23, 1999)

. 1999 WL 1267471 (Appellate Brief) BRIEF OF STUDENT PRESS LAW CENTER, AMICUS CURIAE, IN SUPPORT OF NEITHER PARTY (Dec. 23, 1999)

. 1999 WL 33611439 (Appellate Filing) Response to Petition for Writ of Certiorari (Oct. 08, 1999)

. 1999 WL 33611367 (Appellate Filing) Petitioner's Supplemental Brief in Support of the Petition for Writ of Certiorari (Aug. 24, 1999)

. 1999 WL 33611382 (Appellate Filing) Motion for Leave to File Brief and Brief Amicus Curiae of the Rutherford Institute for the Petition for Writ of Certiorari (Aug. 06, 1999)

. 1999 WL 33611383 (Appellate Filing) Motion for Leave to File Brief and Brief Amicus Curiae of the Rutherford Institute for the Petition for Writ of Certiorari (Aug. 06, 1999)

. 1999 WL 33611385 (Appellate Filing) Brief of Amici Curiae State of Texas, Attorney General of Texas John Cornyn, Governor of Texas George W. Bush, States of Alabama, Colorado, Kansas, Louisiana, Mississippi, Nebraska, South Carolina, and Tennessee in Support of Petitioner (Aug. 06, 1999)

. 1999 WL 33611384 (Appellate Filing) Brief Amici Curiae for Stephanie Vega and Other Students and Parents of Santa Fe Independent School District in Support of Petitioner (Aug. 04, 1999)

. 1999 WL 33611365 (Appellate Filing) Petition for Writ of Certiorari (Jul. 06, 1999)

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Brett Kavanaugh – Florida School Vouchers

Allegation: Brett Kavanaugh demonstrated his hostility both to the separation of church and state and to public education when he defended the constitutionality of a Florida school voucher program that drains taxpayers' money from public schools to pay for students to attend religious schools. *Bush v. Holmes*, 767 So. 2d 668 (2000).

Facts:

- **While an attorney in private practice, Mr. Kavanaugh was part of a large team of lawyers representing Florida state officials in defending Florida's opportunity scholarship program, which provided children in failing public schools with access to a high-quality education and has improved the quality of Florida's public schools.**
  - ✓ The opportunity scholarship program is **a limited program** that allows **students at failing public schools to** transfer to a better public school or a private school at public expense.
  - ✓ The **opportunity scholarship program is carefully tailored** to give choice to those parents who need it and to spur public school improvement through competition.
  - ✓ **Religious and non-religious private schools** are allowed to participate in the program on an equal basis and all public funds **are directed by the private and independent choices of parents.**
  - ✓ In two separate evaluations, researchers have found that **Florida's opportunity scholarship program has raised student achievement in Florida's worst public schools**. A 2003 study specifically found that "**voucher competition in Florida is leading to significant improvement in public schools**" and that "Florida's low-performing schools are improving in direct proportion to the challenge they face from voucher competition."
- **A three-judge panel of Florida's Court of Appeal for the First District unanimously agreed with the position taken by Florida officials. All three of these judges were appointees of Lawton Chiles, the former Democratic Governor of Florida.** The Florida Supreme Court refused to review the Court of Appeal's decision. *See Bush v. Holmes*, 767 So. 2d 668 (2000).
- **The Florida officials were not arguing for an extension in the law. For decades Florida's K-12 system made use of contracts with private schools to educate tens of thousands of students in private schools.**
- **During Mr. Kavanaugh's involvement in this litigation, the main issue was whether the Florida Constitution prohibited the use of state funds to pay for the K-12 education of students attending private schools, regardless of whether they were religious or nonsectarian.**

- ✓ The team of lawyers representing Florida officials, including Mr. Kavanaugh, argued that the Florida Constitution's affirmative mandate for the State to provide for "a uniform, efficient, safe, secure, and high quality system of free public schools" did not preclude the use of public funds for private school education, particularly where the Legislature found such use was necessary.

- ✓ The Florida program has specific safeguards to protect against discrimination and coerced religious activity. Participating private schools must agree to comply with Federal anti-discrimination laws and not compel any opportunity scholarship student to profess a specific ideological belief, to pray, or to worship.

➢ **Florida's opportunity scholarship program enjoys substantial support among Florida's African-American population. The Urban League of Greater Miami, for example, intervened in court proceedings to defend the constitutionality of the program.**

➢ **The U.S. Supreme Court has upheld the constitutionality of a school voucher program in Cleveland that is similar to Florida's opportunity scholarship program. *See Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).**

- ✓ The U.S. Supreme Court held in 2002 that Cleveland's school voucher program was consistent with the First Amendment's Establishment Clause because it treated religious and non-religious private schools equally and all funds were guided by the private and independent choices of parents.

- ✓ The *Zelman* decision vindicated the position that Mr. Kavanaugh had advocated on behalf of his client.

➢ **In this litigation Mr. Kavanaugh was defending the constitutionality of the opportunity scholarship program on behalf of his clients. As their attorney, Mr. Kavanaugh had a duty to zealously represent his clients' position and make the best argument on their behalf.**

- ✓ Lawyers have an ethical obligation to make all reasonable arguments that will advance their clients' interests. According to Rule 3.1 of the ABA's Model Rules of Professional Conduct, a lawyer may make any argument if "there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law." Lawyers would violate their ethical duties to their client if they made only arguments with which they would agree were they a judge.

District Court of Appeal of Florida,
First District.

John Ellis "Jeb" BUSH, in his official capacity as Governor of the State of Florida and Chairman of the State Board of Education; Attorney General Robert A. Butterworth, Secretary of Education Tom Gallagher, Secretary of State Katherine Harris, Comptroller Robert Milligan, Commissioner of Insurance and State Treasurer Bill Nelson, Commissioner of Agriculture Bob Crawford, in their official capacities and as members of the State Board of Education; and Florida Department of Education, Appellants,

v.

Ruth D. HOLMES; Gregory and Susan Watson on behalf of themselves and their minor children Sarah, Seth, and Sybil Watson; Rebecca Hale, on behalf of herself and her minor child, Jessica Dennis; John Rigsby, on behalf of himself and his minor children, Thaddeus and Porsche Rigsby; Queen E. Nelson, on behalf of herself and her minor grandchild, Ashley Wilson; Samuel Watts on behalf of himself and his minor children, Rondale, Reynard, and Rebecca Watts; Linda Lerner; Betsy H. Kaplan; Florida State Conference of Branches of NAACP; Citizens' Coalition for Public Schools; The Florida Congress of Parents and Teachers (a/k/a "Florida PTA"); Florida Education Association/United, AFT AFL-CIO, a labor organization and Florida taxpayer; and Pat Tornillo, Jr., Andy Ford, Rita Moody, Mary Lopez, and Robert F. Lee, as Florida taxpayers, Appellees.

Brenda McShane, in her own behalf as natural guardian of her child, Brenisha McShane; Dermita Merkman, in her own behalf and as natural guardian of her child, Jessica Merkman; Tracy Richardson, in her own behalf and as natural guardian of her child, Khaliah Clanton; Sharon Mallety, in her own behalf and as natural guardian of her child, Jermall Bell; Barbara Landrum, in her own behalf and as natural guardian of her children, Laquila and Stacy Marie Wheeler; and Urban League Of Greater Miami, Inc., Appellants,

v.

Ruth D. Holmes; Gregory And Susan Watson on behalf of themselves and their minor children Sarah, Seth, and Sybil Watson; Rebecca Hale, on behalf of herself and her minor child, Jessica Dennis; John Rigsby, on behalf of himself and his minor children, Thaddeus and Porsche Rigsby; Queen E. Nelson, on behalf of herself and her minor grandchild, Ashley Wilson; Samuel Watts on behalf of himself and his minor children, Rondale, Reynard, and Rebecca Watts; Linda Lerner; Betsy H. Kaplan; Florida State Conference of Branches of NAACP; Citizens' Coalition for Public Schools; Florida Congress of Parents and Teachers (a/k/a "Florida PTA"); Florida Education Association/United, AFT AFL-CIO, a labor organization and Florida taxpayer; and Pat Tornillo, Jr., Andy Ford, Rita Moody, Mary Lopez, and Robert F. Lee, as Florida taxpayers,
Appellees.

Nos. 1D00-1121 and 1D00-1150.

Oct. 3, 2000.

Individuals filed separate complaints alleging that opportunity scholarship program (OSP) statute violated state and federal constitutions. The Circuit Court, Leon County, L. Ralph Smith, J., granted motion to consolidate and found that OSP, insofar as it establishes program through which state pays tuition for certain students to attend private schools, is unconstitutional on its face under constitutional section providing for public education. State defendants and parents of students receiving opportunity scholarships appealed. The District Court of Appeal, Kahn, J., held that: (1) entering judgment holding OSP statute unconstitutional on its face without trial or evidence and without motion for summary judgment or judgment on pleadings constituted harmless error, and (2) OSP statute, insofar as it establishes program through which state pays tuition for certain students to attend private schools, is not unconstitutional on its face under constitutional section providing for public education.

Reversed and remanded.

West Headnotes

[1] Judgment ⚷183
228k183

[1] Pleading ⚷343
302k343

Entering judgment holding opportunity scholarship program (OSP) statute unconstitutional on its face without trial or evidence and without motion for summary judgment or judgment on pleadings was erroneous. West's F.S.A. Const. Art. 9, § 1; West's F.S.A. § 229.0537.

[2] Appeal and Error ⚷1073(1)
30k1073(1)

Entering judgment holding opportunity scholarship program (OSP) statute unconstitutional on its face without trial or evidence and without motion for summary judgment or judgment on pleadings constituted harmless error, where prejudice was not demonstrated and parties had adequate notice, time to respond, and opportunity to be heard. West's F.S.A. Const. Art. 9, § 1; West's F.S.A. §§ 59.041, 229.0537

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[3] Schools ⚷3
345k3

Opportunity scholarship program (OSP) statute, insofar as it establishes program through which state pays tuition for certain students to attend private schools, is not unconstitutional on its face under constitutional section providing for public education; although constitution directs that public education be accomplished through system of free public schools, nothing clearly prohibits legislature from allowing well delineated use of public funds for private school education. West's F.S.A. Const. Art. 9, § 1; West's F.S.A. § 229.0537.

[4] Constitutional Law ⚷26
92k26

The Florida Constitution is a limitation upon, rather than a grant of, power.

[5] Constitutional Law ⚷48(1)
92k48(1)

Although implied constitutional prohibitions are recognized, a reviewing court must not be overly anxious to strike an enactment that merely is not specifically provided for in the organic document.

[6] Constitutional Law ⚷48(1)
92k48(1)

[6] Constitutional Law ⚷48(3)
92k48(3)

When a legislative enactment is challenged, the court should be liberal in its interpretation; every doubt should be resolved in favor of the constitutionality of the law, and the law should not be held invalid unless clearly unconstitutional beyond a reasonable doubt.

[7] Constitutional Law ⚷14
92k14

The principle of "expressio unius est exclusio alterius," which holds that to express or include one thing implies the exclusion of the other or of the alternative, should be used sparingly with respect to the constitution.

[8] Constitutional Law ⚷12
92k12

[8] Constitutional Law ⚷13
92k13

Courts must be mindful that the constitution is what the people intended it to be; its dominant note is the general welfare, and it was not intended to bind like a strait-jacket, but contemplated experimentation for the common good.

[9] Appeal and Error ⚷170(2)
30k170(2)

District Court of Appeal would decline to consider constitutional arguments challenging statute, where trial court determined that such arguments contained mixed questions of law and fact and did not address arguments, but only addressed alternative claim of facial constitutionality that could be decided without presentation of evidence.

***670** Frank R. Jimenez, Acting General Counsel, and Reginald J. Brown, Deputy General Counsel, Tallahassee; Charles T. Canady, Washington, D.C.; Carol A. Licko, Thomson, Muraro, Razook & Hart, P.A., Miami; and Jay P. Lefkowitz and Brett M. Kavanaugh of Kirkland & Ellis, Washington, D.C.,

for Appellants John Ellis" Jeb" Bush, et al.

Thomas E. Warner, Solicitor General of Florida, Louis F. Hubener, Assistant Attorney General, James A. Peters, Special Counsel, and Richard A. Hixson, Deputy Solicitor General, Tallahassee, for Robert A. Butterworth, Attorney General of Florida.

Harry L. Hooper, General Counsel, Comptroller's Office, Tallahassee, for Robert Milligan, Florida Comptroller.

Michael Olenick, General Counsel, Tallahassee, for Florida Department of Education.

Kenneth W. Sukhia of Fowler, White, Gillen, Boggs, Villareal and Banker, P.A., Tallahassee; and Clint Bolick and Matthew Berry, Institute for Justice, Washington, D.C., for Appellants Brenda McShane, et al.

Frank A. Shepherd of Pacific Legal Foundation, Miami, for Amici Curiae Independent Voices for Better Education, Teachers for Better Education, Ira J. Paul, Robert N. Wright, and Pacific Legal Foundation; and Paul D. Clement, Jeffrey M. Telep, and Jeffrey S. Bucholtz of King & Spalding, Washington, D.C., for Amici Curiae The Center for Education Reform, American Education Reform Foundation, American Legislative Exchange Council, Children First CEO America, Education Leaders Council, Floridians for School Choice, " I Have a Dream" Foundation of Washington, D.C., and Mayor Bret Schundler, Republican Mayor of Jersey City, New Jersey, and founder of Empower the People on behalf of Appellants Brenda McShane, et al.

Ronald G. Meyer of Meyer and Brooks, P.A., Tallahassee; Robert H. Chanin, John M. West, and Alice O'Brien of Bredhoff & Kaiser, P.L.L.C., Washington, D.C.; Andrew H. Kayton, American Civil Liberties Union Foundation of Florida, Inc., Miami; Michael A. Sussman of National Association for Advancement of Colored People, New York; Julie Underwood, General Counsel of National School Boards Association, Virginia; Elliot M. Mincberg and Judith E. Schaeffer, of People for the American Way Foundation, Washington, D.C.; Marc D. Stern of American Jewish Congress, New York; Steven K. Green and Ayesha N. Khan, Americans United for Separation of Church and State, Washington, D.C.; Steven R. Shapiro of American Civil Liberties Union Foundation, New York; Jeffrey P. Sinensky and Kara H. Stein of the American Jewish Committee, New York; Joan Peppard, Anti-Defamation League, Miami; and Elizabeth J. Coleman and Steven M. Freeman of Anti-Defamation League, New York, for Appellees Ruth D. Holmes, et al.

W. Dexter Douglass and Thomas P. Crapps of Douglass Law Firm, Tallahassee; Marvin E. Frankel and Justine A. Harris of Kramer Levin Naftalis & Frankel LLP, New York; David Strom of the American Federation of Teachers, Washington, D.C.; Pamela L. Cooper, General Counsel, Florida Teaching Profession-NEA, Tallahassee, for Appellees Florida Education Association/United, AFT AFL-CIO, et al.

KAHN, J.

This is a consolidated appeal from a final judgment declaring section 229.0537, Florida Statutes (1999), "insofar as it establishes a program through which the State pays for certain students to attend private schools," facially unconstitutional under article IX, section 1 of the Florida Constitution. [FN1] Section 229.0537 contains the provisions ***671** of Florida's Opportunity Scholarship Program (OSP) and is part of a larger comprehensive legislative program addressing Florida's public schools. *See* Ch. 99-398, Laws of Fla. For the reasons explained below, we reverse and remand this case for further proceedings. In so doing, we emphasize that our holding addresses only the narrow issue of the facial constitutionality of the OSP under article IX, section 1 of the Florida Constitution.

> FN1. Article IX, section 1 provides:
> Public education.--The education of children is a fundamental value of the people of the State of Florida. It is, therefore, a paramount duty of the state to make adequate provision for the education of all children residing within its borders. Adequate provision shall be made by law for a uniform, efficient, safe, secure, and high quality system of free public schools that allows students to obtain a high quality education and for the establishment, maintenance, and operation of institutions of higher learning and other public education programs that the needs of the people may require.

I. BACKGROUND

Section 229.0537 became law on June 21, 1999. *See* Ch. 99-398, § 78, at 4368, Laws of Fla. The next day, the appellees in this consolidated appeal, a group of parents, Florida citizens, and interest groups, filed a

complaint alleging that section 229.0537 violated certain constitutional provisions: (1) article I, section 3 of the Florida Constitution [FN2]; (2) article IX, section 1 of the Florida Constitution; (3) article IX, section 6 of the Florida Constitution [FN3]; and (4) the Establishment Clause of the First Amendment to the U.S. Constitution. On July 29, 1999, the Florida Education Association and others (FEA), filed a complaint challenging the constitutionality of section 229.0537 on the same four grounds raised by the appellees. [FN4] The complaints named as defendants Governor John Ellis "Jeb" Bush and cabinet members, in their official capacities and as members of the State Board of Education, in addition to the Florida Department of Education ("State defendants").

FN2. Article 1, section 3 provides:
Religious freedom.--There shall be no law respecting the establishment of religion or prohibiting or penalizing the free exercise thereof. Religious freedom shall not justify practices inconsistent with public morals, peace or safety. No revenue of the state or any political subdivision or agency thereof shall ever be taken from the public treasury directly or indirectly in aid of any church, sect, or religious denomination or in aid of any sectarian institution.

FN3. Article IX, section 6 provides:
State school fund.--The income derived from the state school fund shall, and the principal of the fund may, be appropriated, but only to the support and maintenance of free public schools.

FN4. The record on appeal does not contain the complaint(s) filed by the FEA.

The FEA filed a motion to consolidate the two cases and the trial court granted this motion. A group of parents and guardians of students receiving opportunity scholarships ("the parents"), moved to intervene in both cases, and the trial court also granted these motions. The parents thereafter moved to dismiss the article IX, section 1 claims for lack of standing, justiciability, and failure to state a claim. Following a hearing, the trial court denied these motions.

The trial court held a case management conference on December 2, 1999. The court explained that the purpose of the conference was for the parties to identify "the issues that would require the presentation of evidence to resolve those issues and those issues that dealt with the challenge of the constitutionality of the statute on its face." After hearing arguments from the parties, the court deferred consideration of whether the statute was unconstitutional under the religion clauses in the Florida and U.S. constitutions. The court did decide, however, that it could consider the argument that section 229.0537 violated article IX, section 1 on its face because, in the trial court's view, this challenge did not require an evidentiary basis. Accordingly, on December 8, 1999, the trial court entered an order setting ***672** a final hearing for February 24, 2000, and directing the parties to file briefs on "the issue of the facial constitutionality of the Opportunity Scholarship Program, Fla. Stat., Section 229.0537, under Article IX, Section 1 of the Florida Constitution...."

On December 30, 1999, the plaintiffs filed separate briefs and attachments. On January 28, 2000, the State defendants filed Objections to Final Hearing Procedure or, in the Alternative, Motion to Strike Plaintiffs' Briefs. The State defendants argued for the first time that the trial court's summary resolution of the facial constitutionality of the statute "is on the brink of an abyss." The State defendants also argued that the plaintiffs "present myriad factual arguments masked as legal arguments."

On February 4, 2000, the plaintiffs filed responses challenging the timeliness of the defendants' objections, and on February 7, 2000, the trial court conducted a hearing on the objections. The court stated that "[t]his is the final hearing on the facial constitutionality of this statute" and ruled that it was "exercising its inherent power to limit the issues that are going to be tried, and these issues are going to be strictly matters of law." The trial court denied the State's motion to strike the initial briefs and confirmed the final hearing date of February 24, 2000. On February 17, the court rendered an order in accordance with these rulings and denying defendants' objections to the final hearing procedure.

On February 24, the court heard oral argument from the parties and amici curiae. On March 14, 2000, the trial court entered a final judgment holding that "[s]ection 229.0537, Fla. Stat., insofar as it establishes a program through which the State pays tuition for certain students to attend private schools, is declared to be unconstitutional on its face under Article IX, § 1 of the Florida Constitution."

The State defendants filed a timely notice of appeal, assigned case number 1D00-1121 in this court. The parents filed a separate notice of appeal, assigned

case number 1D00-1150. This court granted appellees' motion to consolidate the cases.

Appellants raise essentially two points in this consolidated appeal. First, appellants assert that the trial court denied them due process and a fair trial by ignoring the Florida Rules of Civil Procedure and entering final judgment without trial or evidence, upon disputed facts, and without a motion for summary judgment or judgment on the pleadings. Second, appellants assert that the trial court erred in holding the OSP facially unconstitutional under article IX, section 1 of the Florida Constitution.

II. WHETHER THE PROCEDURE EMPLOYED BY THE TRIAL COURT WARRANTS REVERSAL

[1][2] Regarding the first point, the trial court did err in the procedure it employed because nothing in the Florida Rules of Civil Procedure authorizes this procedure. We find this constituted harmless error, however, because the parties had adequate notice, time to respond, and an opportunity to be heard, and appellants have not demonstrated any prejudice much less "a miscarriage of justice." *See* § 59.041, Fla. Stat. (1999) ("No judgment shall be set aside or reversed ... for error as to any matter of pleading or procedure, unless in the opinion of the court to which application is made, after an examination of the entire case it shall appear that the error complained of has resulted in a miscarriage of justice."). The cases relied upon by appellants involve situations where a trial court failed to set a matter for trial pursuant to Rule 1.440. *See Orange Lake Country Club, Inc. v. Levin,* 645 So.2d 60, 62 (Fla. 5th DCA 1994) (finding trial court erred in entering judgment where, among other things, trial court failed to set matter for trial pursuant to Rule 1.440); *Ramos v. Menks,* 509 So.2d 1123, 1124 (Fla. 1st DCA 1986) (reversing final judgment and remanding for further proceedings where trial court failed to follow ***673** Rule 1.440); *Bennett v. Continental Chems. Inc.,* 492 So.2d 724, 727 (Fla. 1st DCA 1986) (en banc) (holding that "strict compliance with rule 1.440 is mandatory"). That is not the situation here. Moreover, appellants appear to have acquiesced in the procedure adopted by the trial court, objecting only to the plaintiffs' fact-intensive assertions. *See Bennett v. Ward,* 667 So.2d 378, 380 (Fla. 1st DCA 1995) (explaining that appellant "may have waived objection not only to notice of trial but, more fundamentally, to the apparent omission altogether of any bench trial or evidentiary hearing" where, although no motion for summary judgment was ever filed, trial court held hearing and entered final judgment of foreclosure); *Frank v. Pioneer Metals, Inc.,* 121 So.2d 685, 688 (Fla. 3d DCA 1960) (rejecting appellant's argument that the trial court erred by transferring the case to the equity side of the court: "[W]e are constrained to point out that by the appellant's failure to timely object to that procedure which she now contends to be irregular, she will be deemed to have waived the objection by acquiescence. Procedural matters not objected to in the trial court cannot be raised upon appeal."). We thus conclude that the procedure employed by the trial court, although erroneous, does not warrant reversal.

III. WHETHER THE OSP IS FACIALLY UNCONSTITUTIONAL UNDER ARTICLE IX, SECTION I OF THE FLORIDA CONSTITUTION

[3] As a substantive matter, appellants argue that the trial court erred in finding the OSP facially unconstitutional under article IX, section 1. In particular, appellants assert that the trial court should not have relied on the principle of expressio unius est exclusio alterius in finding that the Florida Constitution does not permit the Legislature to enact the OSP. We agree with appellants and, for the reasons set forth below, we reverse on this point and remand this case for further proceedings.

A.

In striking the OSP as facially unconstitutional, the trial court stated:

> By providing state funds for some students to obtain a K-12 education through private schools, as an alternative to the high quality education available through the system of free public schools, the legislature has violated the mandate of the Florida Constitution, adopted by the electorate of this state. Tax dollars may not be used to send the children of this state to private schools as provided by the Opportunity Scholarship Program.

Recognizing that nothing in the constitution directly limits the authority of the Legislature to establish the OSP, the trial court nonetheless concluded, "[T]he negative implication is evident."

[4][5][6] The Florida Constitution is a limitation upon, rather than a grant of, power. *See Board of Public Instruction for County of Sumter v. Wright,* 76 So.2d 863, 864 (Fla.1955) ("This court has consistently adhered to the fundamental principle that our state constitution is a limitation upon, rather than a grant of, power."); *Taylor v. Dorsey,* 155 Fla. 305, 19 So.2d 876, 881 (1944) (" 'Our state constitution is

a limitation upon power, and, unless legislation duly passed be clearly contrary to some express or implied prohibition contained therein, the courts have no authority to pronounce it invalid.' ") (quoting *Chapman v. Reddick,* 41 Fla. 120, 25 So. 673, 677 (1899)). Although implied constitutional prohibitions are recognized, a reviewing court must not be overly anxious to strike an enactment that merely is not specifically provided for in the organic document. Indeed, "[w]hen a legislative enactment is challenged the court should be liberal in its interpretation; every doubt should be resolved in favor of the constitutionality of the law, and the law should not be held invalid unless clearly unconstitutional beyond a reasonable doubt." *Taylor,* 19 So.2d at 882. Recognizing these principles, appellants argue that the trial court ***674** erred in relying on another maxim, expressio unius est exclusio alterius, in finding section 229.0537 facially unconstitutional.

[7] This argument has merit. The principle of expressio unius est exclusio alterius is "[a] canon of construction holding that to express or include one thing implies the exclusion of the other, or of the alternative." *Black's Law Dictionary* 602 (7th ed.1999). This principle should be used sparingly with respect to the constitution. *See Taylor,* 19 So.2d at 881 (explaining that the expressio unius maxim "should be sparingly used in construing the constitution"). As appellants explain, and appellees acknowledge, the trial court did not find that article IX, section 1, by its terms, expressly prohibits state-funded scholarships for children to attend a private school; instead, the trial court found an implied prohibition. Specifically, the trial court found that "[b]ecause Article IX, section 1 directs that public education, K-12, be accomplished through a 'system of free public schools,' that is, in effect, a prohibition on the Legislature to provide a K-12 public education in any other way." Despite the fact that the constitution does not, by its terms, expressly direct that the State may only fulfill its obligation to provide education "through" the public school system, the trial court arrived at the "evident" negative implication.

In applying the expressio unius principle to this case, the trial court quoted a portion of the Florida Supreme Court's opinion in *Weinberger v. Board of Public Instruction of St. Johns County* :

> The principle is well established that, where the Constitution expressly provides the manner of doing a thing, it impliedly forbids its being done in a substantially different manner. Even though the Constitution does not in terms prohibit the doing of a thing in another manner, the fact that it has prescribed the manner in which the thing shall be done is itself a prohibition against a different manner of doing it. Therefore, when the Constitution prescribes the manner of doing an act, the manner prescribed is exclusive, and it is beyond the power of the Legislature to enact a statute that would defeat the purpose of the constitutional provision.

93 Fla. 470, 112 So. 253, 256 (1927) (citations omitted). In *Weinberger* and the other cases relied upon by the trial court, however, the expressio unius principle found its way into the analysis only because the constitution forbade any action other than that specified in the constitution, and the action taken by the Legislature defeated the purpose of the constitutional provision. *See id.* at 254-56 (finding bonds proposed to be issued by Board of Public Instruction void ab initio because their maturity dates did not conform to article 12, section 17 of the Florida Constitution, which specified that "[a]ny bonds issued hereunder shall become payable within thirty years from the date of issuance in annual installments which shall commence not more than three years after the date of issue"); *State ex rel. Murphy v. Barnes,* 24 Fla. 29, 3 So. 433, 433-34 (1888) (finding that statute providing for compensation of county solicitors by the State violated Florida Constitution provision that "[t]he compensation of all county school officers shall be paid from the school fund of their respective counties, and all other county officers receiving stated salaries shall be paid from the general funds of their respective counties" and explaining that "[w]hen a constitution directs how a thing shall be done, that is in effect a prohibition to its being done in any other way"). *See also Sullivan v. Askew,* 348 So.2d 312, 315-16 (Fla.1977) (quoting *In re Advisory Opinion of the Governor Civil Rights,* 306 So.2d 520, 522-23 (Fla.1975) (quoting *Weinberger*), and holding that Governor had sole, unrestricted, and unlimited discretion to exercise pardon power and procedures adopted by Governor for exercise of that exclusive power were consistent with constitutional grant of authority); *In re Advisory Opinion of the Governor Civil Rights,* 306 So.2d 520, 522-23 ***675** (Fla.1975) (quoting *Weinberger* and advising that provisions for suspension and automatic reinstatement of civil rights contained in Correctional Reform Act of 1974 infringed on Governor's constitutional duties and responsibilities relating to executive clemency); *In re Investigation of a Circuit Judge,* 93 So.2d 601, 606-08 (Fla.1957) (citing *Weinberger* and finding

that where constitution creates office, fixes its term, and provides under what conditions officer may be removed before expiration of term, neither Legislature nor any other authority has power to remove or suspend such officer in any manner other than that provided in constitution); *State ex rel. Ellars v. Board of County Comm'rs of Orange County,* 147 Fla. 278, 3 So.2d 360, 362-63 (1941) (quoting *Weinberger* and finding statute, which fixed compensation of county solicitors of criminal courts of record in counties having population between 70,000 and 100,000, was valid general law applicable to office of county solicitor of criminal court of Orange County and was not subject to constitutional prohibition against enactment of special or local laws regulating fees of county officers); *State ex rel. Church v. Yeats,* 74 Fla. 509, 77 So. 262, 264 (1917) ("Article 19 leaves the determination of its enforcement to the registered voters of the counties and election districts, irrespective of race or color, to be determined by a majority of the aggregate; the statute requires two majorities, one of the white and the other the colored registered voters, and in this it clearly defeats the purpose of the Constitution in local option article, which this court has said was to remit to the registered voters of each county the settlement of the issue whether the sale of intoxicating wines or beer should be prohibited within the county.").

In contrast, in this case, nothing in article IX, section 1 clearly prohibits the Legislature from allowing the well-delineated use [FN5] of public funds for private school education, particularly in circumstances where the Legislature finds such use is necessary. We therefore reject the trial court's finding that the constitution not only mandates that the State "make adequate provision for the education of all children" in Florida, but that it also prescribes the sole means for implementation of that mandate. Contrary to the conclusion of the trial court, and the argument advanced by appellees, article IX, section 1 does not unalterably hitch the requirement to make adequate provision for education to a single, specified engine, that being the public school system.

> FN5. *See* § 229.0537(2)(a), Fla. Stat. (1999) (explaining that to receive an opportunity scholarship to attend a participating private school, a student must have "spent the prior school year in attendance at a public school that has been designated pursuant to s. 229.57 as performance grade category 'F,' failing to make adequate progress, and that has had two school years in a 4-year period of such low performance, and the student's attendance occurred during a school year in which such designation was in effect" or the student has been assigned to such a school for the next school year).

[8] In passing section 229.0537, the Legislature made specific findings indicating it sought to advance, not defeat, the purpose of article IX, section 1:

> The purpose of this section is to provide enhanced opportunity for students in this state to gain the knowledge and skills necessary for postsecondary education, a technical education, or the world of work. The Legislature recognizes that the voters of the State of Florida, in the November 1998 general election, amended s. 1, Art. IX of the Florida Constitution so as to make education a paramount duty of the state. *The Legislature finds that the State Constitution requires the state to provide the opportunity to obtain a high-quality education. The Legislature further finds that a student should not be compelled, against the wishes of the student's parent or guardian, to remain in a school found by the state to be failing for 2 years in a 4-year period.* The Legislature shall make available opportunity ***676** scholarships in order to give parents and guardians the opportunity for their children to attend a public school that is performing satisfactorily or to attend an eligible private school when the parent or guardian chooses to apply the equivalent of the public education funds generated by his or her child to the cost of tuition in the eligible private school as provided in paragraph (6)(a). Eligibility of a private school shall include the control and accountability requirements that, coupled with the exercise of parental choice, are reasonably necessary to secure the educational public purpose, as delineated in subsection (4).

§ 229.0537(1), Fla. Stat. (1999) (emphasis added). Although, in establishing the OSP, the Legislature recognized that some public schools may not perform at an acceptable level, the Legislature attempted to improve those schools by raising expectations for and creating competition among schools, while at the same time not penalizing the students attending failing schools. *See* Ch. 99-398, at 4273, Laws of Fla. ("WHEREAS, children will have the best opportunity to obtain a high-quality education in the public education system of this state and that system can best be enhanced when positive parental influences are present, when we allocate resources efficiently and concentrate resources to enhance a safe, secure, and disciplined classroom learning environment, when we support teachers, when we reinforce shared high academic expectations, and when we promptly reward success and promptly identify failure, as well as

promptly appraise the public of both successes and failures ..."). We must be mindful that "[t]he Constitution is what the people intended it to be; its dominant note is the general welfare; it was not intended to bind like a strait-jacket but contemplated experimentation for the common good." *State v. State Bd. of Admin.*, 157 Fla. 360, 25 So.2d 880, 884 (1946).

B.

We note that the Legislature has, in the past, established a program providing public funds for certain students to attend private schools. *See Scavella v. School Bd. of Dade County,* 363 So.2d 1095 (Fla.1978). In *Scavella* the Florida Supreme Court indicated that "the state is responsible for providing adequate educational opportunities for all children" and "all Florida residents have the right to attend this public school system for free." *Id.* at 1098. The court explained that "[r]ealizing that the public schools may not have the special facilities or instructional personnel to provide an adequate educational opportunity for the exceptional students, the legislature has allowed the school boards to make contractual arrangements with private schools." *Id.; see* § 230.23(4)(m)2., Fla. Stat. (1977).

Scavella involved a challenge to a statute that allowed school boards to cap the amount of money paid to a private school in these contractual arrangements. *See Scavella,* 363 So.2d at 1098; § 230.23(4)(m)7., Fla. Stat. (1977). The supreme court interpreted this statute to mean that school boards could not impose a cap that would deprive "any student of a right to a free education" and found the statute, as interpreted, constitutional. *See Scavella,* 363 So.2d at 1099. As pointed out by appellees and the trial court, however, *Scavella* did not involve a challenge under article IX, section 1.

Nevertheless, in *Scavella,* the supreme court upheld a legislative program authorizing the payment of private school tuition for students whose needs could not be met in the public schools and specified that, in implementing this program, students could not be deprived of "a right to a free education." By analogy, the OSP statute does not deprive students of "a right to a free education" and requires participating private schools to "[a]ccept as full tuition and fees the amount provided by the state for each student." § 229.0537(4)(i), Fla. Stat. (1999).

***677** C.

Based on the foregoing, we hold that the trial court erred in finding the OSP facially unconstitutional under article IX, section 1. Nothing in that constitutional provision prohibits the action taken by the Legislature. The trial court erred by employing the exclusio unius principle to find an implied prohibition.

IV. OTHER CONSTITUTIONAL ISSUES

[9] Appellees have asserted that, even if the trial court erred in its application of article IX, section 1, the order on appeal should be affirmed on alternative constitutional grounds. Specifically, appellees assert that the OSP violates (1) article IX, section 6 of the Florida Constitution; (2) article I, section 3 of the Florida Constitution; and (3) the Establishment Clause of the United States Constitution.

Following the case management conference, the trial court determined that only the facial constitutionality of the OSP under article IX, section 1, could be decided without the presentation of evidence. In the court's view, the remaining issues appeared to constitute mixed questions of fact and law. This court has explained that such issues are inappropriate for initial determination on appeal:

> The rule followed by the Florida courts, as we interpret prior decisions, is that the question of the constitutionality of a statute is an issue of law, or of mixed fact and law, depending upon the nature of the statute brought into question and the scope of its threatened operation as against the party attacking the statute. While there are circumstances in which trial courts are permitted to adjudicate the merits of constitutional issues in ruling on a motion to dismiss, ... the circumstances of the particular case determine whether this is appropriate. The preferable rule, properly applied here, appears to be that if the complaint's well-pleaded allegations entitle the plaintiff to a declaration of rights, the motion to dismiss should be denied and the plaintiff allowed to adduce evidence in behalf of his pleading.
>
> The wisdom of this rule is particularly evident in this case where we have been asked to rule for the first time on constitutional questions of considerable magnitude, without the benefit of any record except the various complaints and motions directed to the complaints, including appellees' motion to dismiss, the granting of which sparked this appeal. It is a familiar canon of appellate review that appellate courts are loath to rule upon

> issues not directly ruled upon by the trial court. Courts prefer that the constitutionality of a statute be considered first by a trial court. This rule is relaxed if the constitutional issues are fully briefed and relate to matters of law exclusively, ... and the full record is before the court.

Glendale Fed. Sav. & Loan Ass'n v. State, Dep't of Ins., 485 So.2d 1321, 1324-25 (Fla. 1st DCA 1986) (citations and footnote omitted). Accordingly, we decline to consider the alternative constitutional arguments asserted by appellees.

V. CONCLUSION

In sum, although we find the trial court erred regarding the procedure it employed in considering the facial constitutionality of the OSP under article IX, section 1, we find that error harmless in this case. We further find, however, that the trial court erred in holding the OSP facially unconstitutional under this provision. The trial court must now consider the remaining allegations raised by appellees, as to which we express no opinion.

REVERSED and REMANDED for further proceedings.

WEBSTER and VAN NORTWICK, JJ., CONCUR.

767 So.2d 668, 147 Ed. Law Rep. 1125, 25 Fla. L. Weekly D2385

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