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Adler v. Duval County School Board: An Opportunity for Establishing Establishment Clause Limits on Student-Elected, Student-Led Prayer in Public Schools

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**ADLER V. DUVAL COUNTY SCHOOL BOARD: AN OPPORTUNITY
FOR ESTABLISHING ESTABLISHMENT CLAUSE LIMITS ON
STUDENT-ELECTED, STUDENT-LED PRAYER IN PUBLIC
SCHOOLS**

I. INTRODUCTION

Imagine this scenario: A family of four has recently been forced to relocate because the local factory in Anytown, U.S.A. has been closed and all workers have been laid off. With no job and no way to make a living, the family has no choice but to move. After having spent the last twenty years in Anytown, the family has to find a new community in which to find a home and settle. The timing of the lay-offs hits the family particularly hard because the school year has already started. A decision must, therefore, quickly be reached as to where to relocate so that the children can avoid being out of school for any serious length of time.

In deciding where to move, the family looks at several factors, including the availability of permanent employment, the size of the community, and the reputation of the school district. The family selects Someplace, U.S.A. as their destination and moves into their new neighborhood. The parents go back to work and the two children start school in the local public schools. The oldest child is a teenager in the twelfth grade and the younger sibling is in the eighth grade.

Because of the timing of the relocation, the children are integrated into their new schools in the middle of the school term. As a result, the oldest child missed out on the opportunity to vote in an election at the high school regarding the graduation ceremony for the senior class. In accordance with a school district policy entitled, "Invocation at Graduation", the students had voted on whether or not to deliver an invocation at graduation, with a majority of the students having voted in favor of delivering an invocation. In a follow-up election, in which the oldest child *is* able to participate, the students choose the student who will deliver the invocation. As luck would have it, the students extend the privilege of delivering the invocation at graduation to the "new kid"; a gesture to welcome the newest senior and to make everybody feel a part of the graduation; and an honor to the teen, but one of mixed blessing.

The oldest child returns home to deliver the news that the students have elected him to deliver an invocation at graduation. The news is delivered with enthusiasm on the one hand, for the teen has been singled out and recognized by his peers, but, on the other, is tempered with inner conflict and a fear of

disappointing his family and new friends. The problem stems from the difference in the form and substance of the family's religious belief system in relation to the rest of the community. The oldest child feels pressured to deliver an invocation consistent with the form of worship practiced by the majority of the community but has difficulty reconciling that with the belief system subscribed to by the family.

The parents are concerned that their teenager is being pressured to offer a prayer that is inconsistent with their family's traditional form of worship. They feel that any prayer offered, which differs in form from their traditional practice, would represent a rejection of their faith. They also worry that exposing the family's belief system, by openly challenging the school's policy, might result in condemnation of the family in the community and isolation and harassment of the children at school. The parents ultimately decide to raise their concerns with the principal at the high school and with school district administrators.

In confronting the school officials, the parents are met with hostility and resistance to flexibility in choosing whether the invocation should be delivered and the form it should take if given. They are threatened that should they decide to challenge the school policy, every teacher in the district will be told which family has dared challenge the beliefs of the community. Eventually, the children's classmates will also find out, as will their families and, undoubtedly, some strong feelings of animosity will be directed towards the sole family challenging a school policy supported by the rest of the community. What the family had not realized upon moving to Someplace was that the majority of their new community predominantly attended one church. Almost every community leader, school board member, school administrator, teacher, and student attended this church, and as a group they had decided prayer at graduation was a policy that would help preserve the solemnity of the ceremony and provide the proper mood.

The family now faces a nearly impossible decision. If they do nothing, and tolerate the religious beliefs of the majority of the community, their children will not be free to exercise their religious beliefs. They will be forced to practice the religious beliefs of others, particularly in light of the second election, selecting the teenager to be the voice of an invocation that he had no say in determining the very existence of. On the other hand, if the family decides to challenge the policy as a violation of the Constitutional ban on governmental establishment of religion, they are sure to invoke the wrath of the community, a community which they elected to move to, buy a house, and in which to raise their family. The family will surely become ostracized at the very least and may even, in an extreme case, be subjected to bomb threats, or

even worse, death threats. It is just this sort of Hobson's choice scenario¹ that has unfortunately become all too familiar in communities across the United States.²

Religious expression in public schools is a hot-button topic and one in which people tend to feel very strongly either for or against. In evaluating the United States Supreme Court cases dealing with religious expression, one gets the sense that recent developments, extending the power of the Establishment Clause³ to invalidate a school policy permitting student-elected, student-led prayer at a school activity as voluntary as a football game,⁴ have set the tone for future challenges to public school district policies that attempt to integrate religious practices or beliefs where participation is anything more than completely the voluntary action of an individual student.

The question arises, by extending the scope of its Establishment Clause jurisprudence, whether the Supreme Court has provided a test, bright line or otherwise, for determining what kinds of public school religious policies will

1. This scenario represents a Hobson's choice because it envisions a decision with no real viable alternatives. In this case, the family can either decide to look the other way and sacrifice their beliefs, or they can choose to stand up for their beliefs, which may lead to intimidation from school officials and others within the community. For examples of this very scenario playing itself out in real life, see *infra* note 2. In some instances, courts have recognized the need to protect families who are threatened for bringing claims against schools that institute religious practices by allowing the families to file their claim anonymously. Courts have even extended protection of these families to include sanctions for any person in the community who seeks out the identity of the anonymous families. The sanctions may embody a stern warning threatening contempt and even criminal liability. In *Santa Fe Independent School District v. Doe*, the District Court issued this warning to the "school [district] administration, officials, counselors, teachers, employees or servants of the School District, parents, students or anyone else", that:

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 HARSHTEST 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.

120 S. Ct. 2266, 2271 n.1 (2000).

2. See generally FRANK S. RAVITCH, *SCHOOL PRAYER AND DISCRIMINATION: THE CIVIL RIGHTS OF RELIGIOUS MINORITIES AND DISSENTERS* 3-18 (1999) (describing, in a chapter entitled "From Riots to Harassment," several instances of communities rising up in anger against the family challenging a school policy that advocates religion); ROBERT S. ALLEY, *WITHOUT A PRAYER: RELIGIOUS EXPRESSION IN PUBLIC SCHOOLS* 24 (1996) [hereinafter *WITHOUT A PRAYER*] (including "real-life stories of parents and children who, in exercising [their Constitutional] rights, have been harassed, taunted, insulted, and harmed by zealous citizens seeking to impose a particular definition of religion in public institutions").

3. U.S. CONST. amend. I.

4. See *Santa Fe Indep. Sch. Dist. v. Doe*, 120 S. Ct. 2266 (2000).

be held unconstitutional. An examination of a recent Eleventh Circuit case, *Adler v. Duval County School Board*,⁵ in both of its incarnations, in light of the *Santa Fe* decision, should shed some light on this question. This Note will examine how the *Santa Fe* decision impacts on a split between the Fifth and the Third and Ninth Circuits⁶ by examining the Eleventh Circuit's *Adler* decisions.⁷ Further, this Note will also discuss how the outcome in *Adler* might give the U.S. Supreme Court an opportunity to expand their Establishment Clause jurisprudence to go further than *Santa Fe* in limiting student-elected, student-led school prayer. Focusing on how the *Santa Fe* decision affected *Adler* will also shed some light on whether or not the Supreme Court resolved the Circuit split. Ultimately, this Note will argue that by extending the Establishment Clause to invalidate a school policy adopting student initiated prayer at school events as voluntary as football games, the Supreme Court established that *school* endorsed prayer at less voluntary occasions, like school graduation ceremonies, will not be tolerated. The Eleventh Circuit found a context, however, in the *Adler* case, in which student-elected, student-led prayer at a high school graduation was constitutional. This Note will focus on the ultimate resolution of the constitutionality of school prayer in the student-elected, student-led context to see to what extent prayer at an event like high school graduation should be permitted. The key will be whether the state has taken action to establish school prayer, which triggers the protections of the First Amendment Establishment Clause. The focus will be on the extent to which the Supreme Court will construe student-elected, student-led prayer to be state action. The final analysis will suggest that where it appears school districts are attempting to circumvent the prohibition against state establishment of school prayer by way of student-elected, student-led prayer, courts should find that the offered speech is not private speech, but rather *public* speech, endorsed by the state, in order to protect the minority

5. 206 F.3d 1070 (11th Cir.) (en banc) [hereinafter *Adler I*], *vacated*, 121 S. Ct. 31 (2000) (remanding the case for "further consideration in light of *Santa Fe Independent School District v. Doe*, 121 S. Ct. 2266 (2000)), *reinstated*, 2001 U.S. App. LEXIS 8880 (11th Cir.) (en banc) [hereinafter *Adler II*].

6. To illustrate the Circuit split, *see Jones v. Clear Creek Independent School District*, 977 F.2d 963 (5th Cir. 1992) (holding student elected school prayer at graduation was permitted); *ACLU of New Jersey v. Black Horse Pike Regional Board of Education*, 84 F.3d 1471 (3d Cir. 1996) (en banc) (holding student elected school prayer at graduation was unconstitutional); *Harris v. Joint School District No. 241*, 41 F.3d 447 (9th Cir. 1994), *vacated as moot* 515 U.S. 1154 (1995) (holding that student initiated, student planned graduation exercises that included prayer were unconstitutional). On appeal to the Supreme Court, the *Harris* case was dismissed because the student had already graduated and was no longer subject to injury; hence no case or controversy existed. 515 U.S. 1154.

7. The Eleventh Circuit sided with the Fifth Circuit's holding and rationale in the *Adler* decision. *See Adler I*, 206 F.3d at 1079 n.7, 1082-83. *See also Adler II*, 2001 U.S. App. LEXIS 8880.

from the tyranny of the majority that is evolving by way of an unconstitutional, pretextual state establishment of religion, the decisions by the Eleventh Circuit in the *Adler* case notwithstanding.

The scope of this paper is such that it would be overreaching to include a complete history of the Religion clauses and the jurisprudential development of all relevant doctrines. Instead this paper will focus on the cases which have led up to the recent school prayer decisions to properly put into context the current conflict over whether student-elected, student-led school prayer represents an unconstitutional violation of the prohibition against state establishment of religion.

II. BACKGROUND

The debate over the governmental endorsement of religion can be traced back to the time of the writing and ratification of the United States Constitution, and more specifically, to language the Framers included in the First Amendment.⁸ The language in the First Amendment provides that, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”⁹ Much has been written on the consequences of this language, including the debate over which clause takes precedence, the prohibition against establishing religion or the prohibition against restraining free exercise.¹⁰

Particular regard must be paid to the intent of the Framers, as it was they who laid the framework for the definitions and the consequences of the language they chose to employ. James Madison gave us a glimpse of the rationale behind the addition of a religion clause to the First Amendment when he wrote, “[w]ho does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other sects?”¹¹ In this sense, Madison recognized that giving the power to establish religion gave the majority an opportunity to tyrannize the minority. In addition, it was Thomas Jefferson who first gave life to the phrase “separation of church and state” when he wrote, “I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should ‘make no law respecting an establishment of religion, or prohibiting the free exercise thereof,’ thus building a wall of separation between church and state.” Given

8. *See, e.g.*, *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 304 (1963).

9. U.S. CONST. amend. I.

10. *See, e.g.*, JOHN WITTE JR., *RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT: ESSENTIAL RIGHTS AND LIBERTIES* (2000); RAVITCH, *supra* note 2; ROBERT S. ALLEY, *SCHOOL PRAYER: THE COURT, THE CONGRESS, AND THE FIRST AMENDMENT* (1994) [hereinafter *SCHOOL PRAYER*].

11. Robert S. Alley, *On Behalf of Religious Liberty: James Madison’s Memorial and Remonstrance*, 12 *THIS CONST.* 26, 27, 29 (1986).

these positions, it seems that the Founding Fathers recognized the primary importance of the Establishment clause's prohibition against the government establishing religion as paramount in preserving an individual's right to Free Exercise.¹² By contemplating the historical setting in which the Framers found themselves, this position, seeking to abolish any form of governmental tyranny with regard to religious expression, seems particularly prudent, especially in light of the reasons many colonists left Europe to "form a more perfect Union",¹³ to escape religious persecution.

The Fourteenth Amendment was adopted in 1868, almost eighty years after the ratification of the First Amendment as part of the Bill of Rights. The Fourteenth Amendment provides, "[n]o state shall . . . deprive any person of life, liberty, or property, without due process of law."¹⁴ The incorporation of First Amendment protections by the Fourteenth Amendment is significant because it makes applicable the protections of the Religion clauses to state actions.¹⁵ Thus, citizens are protected not only from actions by the federal government but also from state actions that violate the provisions of the Religion clauses.

The first United States Supreme Court case to take up the issue of the applicability of the Religion clauses to the states was handed down seventy years after the adoption of the Fourteenth Amendment in *Cantwell v. Connecticut*.¹⁶ In *Cantwell*, the Court held, "[t]he fundamental concept of liberty embodied in [the Fourteenth] Amendment embraces the liberties guaranteed by the First Amendment."¹⁷ The Court recognized that the Religion clauses of the First Amendment have a "double aspect" when Justice Roberts, for a unanimous Court, wrote:

On the one hand, [the First Amendment] forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. . . . On the other hand, it safeguards the free exercise of the chosen form of religion. Thus

12. For a fascinating discussion of the consequence of accommodating Free Exercise at the expense of Establishment, see WITHOUT A PRAYER, *supra* note 2, at 56-58. In his discussion, Professor Alley writes, "[o]nly complete separation of church and state, with absolutely no establishment, will guarantee free exercise of religion." *Id.* at 56. He goes on to add:

If free exercise is a natural right not conferred by any state, then any allowance for the control of conscience of any person or group, no matter how small, is a denial of the principle of free exercise for all others whatsoever. Indeed, there are degrees of establishment but there are no degrees of freedom of conscience: it's all or none.

Id. at 56.

13. U.S. CONST. preamble.

14. U.S. CONST. amend. XIV, § 1, cl. 2.

15. See, e.g., *Wallace v. Jaffree*, 472 U.S. 38, 49 (1985).

16. 310 U.S. 296 (1940).

17. *Id.* at 303.

the Amendment embraces two concepts, freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be.¹⁸

The Court thus acknowledged that the freedom to act, while a component of the free exercise protection, was not without a limit by holding that, “[c]onduct remains subject to regulation for the protection of society. The freedom to act must have appropriate definition to preserve the enforcement of the protection.”¹⁹ In turn the state must be able to justify its limitation of the freedom to act under the guise of “protection of society,” because “[i]n every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom.”²⁰ This case signaled further development of the Religion clause doctrines because boundaries had not been erected to establish the limits of the First Amendment’s prohibition against state establishment of religion and, in light of *Cantwell*, the limit to when and how a state could encroach on the freedom of expression in the name of “protection of society.”

The next case to come before the Supreme Court, relevant to this discussion, which implicated the Religion clauses was *Engel v. Vitale*.²¹ In *Engel*, Justice Black, writing for a 6-1 Court,²² declared a New York public school program of daily classroom prayer unconstitutional. The Board of Education of Union Free School District No. 9 enacted a daily prayer program that directed the “principal to cause the following prayer to be said aloud by each class in the presence of a teacher at the beginning of each school day: ‘Almighty God, we acknowledge our dependence upon Thee, and we be Thy blessings upon us, our parents, our teachers and our Country.’”²³ In his opinion, Justice Black wrote:

We think that by using its public school system to encourage recitation of the Regents’ prayer, the State of New York has adopted a practice wholly inconsistent with the Establishment Clause. There can, of course, be no doubt that New York’s program of daily classroom invocation of God’s blessings as prescribed in the Regents’ prayer is a religious activity. . . . The nature of such a prayer has always been religious, none of the respondents has denied this and the trial court expressly so found. . . . The New York laws officially prescribing the Regents’ prayer are inconsistent both with the purpose of the Establishment Clause and with the Establishment Clause itself.²⁴

This decision was a critical acknowledgement of two things. One, that the School District was an arm of the State and thus, any action taken by a school

18. *Id.*

19. *Id.* at 304.

20. *Id.*

21. 370 U.S. 421 (1962).

22. Justices Frankfurter and White took no part in the decision. *Id.* at 436.

23. *Id.* at 422.

24. *Id.* at 424-25, 433.

board was a state action governed by the Fourteenth Amendment. And two, that a prayer acknowledging “God” was enough to show an unconstitutional establishment of religion.²⁵

The next in this line of Establishment clause cases to come before the Supreme Court was *School District of Abington Township v. Schempp*.²⁶ In *Schempp*, the Court found two school policies of Bible reading and recitation of the Lord’s Prayer unconstitutional on Establishment Clause grounds.²⁷ The policy that Pennsylvania instituted required that, “[a]t least ten verses from the Holy Bible shall be read, without comment, at the opening of each public school on each school day.”²⁸ The Abington Township school district complied with the Pennsylvania law by broadcasting, under the supervision of a teacher, a recitation of the Bible verses and the Lord’s Prayer into each classroom.²⁹ Furthermore, students in the various classrooms were “asked to stand and join in repeating the prayer in unison.”³⁰ The other school policy being challenged, from Baltimore, Maryland, consisted of a similar “reading, without comment, of a chapter in the Holy Bible and/or the use of the Lord’s Prayer.”³¹ Both policies permitted students, with permission from their parents, to voluntarily remove themselves from participating in the exercises.³² The Court held both policies were unconstitutional because the State, in effect, violated the rule of “strict neutrality” by instituting a policy that showed a preference for religion.³³ The Court further held, “[t]he State must be steadfastly neutral in all matters of faith, and neither favor nor inhibit religion.”³⁴

The *Schempp* decision was a consolidation of two cases on appeal.³⁵ The holding in these two cases is significant because both school districts’ policies

25. This second point is worth noting because God can mean different things to different people, and therefore, state action that imposed a prayer to “God” in this case arguably did not establish any particular religion. If viewed in the context that not everyone prays, and of those individuals who do pray, not everyone prays to God, it looks more and more like the simple prayer to God establishes Christianity to the exclusion of other belief systems that may not incorporate a deity named God.

26. 374 U.S. 203 (1963).

27. *Id.* at 205.

28. *Id.*

29. *Id.* at 206-07.

30. *Id.* at 207.

31. *Id.* at 211.

32. *Id.* at 205, 212 n.4.

33. *Id.* at 295-96. The Court defined the rule of “strict neutrality” as a directive from the First Amendment that “commands not official hostility toward religion, but only a strict neutrality in matters of religion.” *Id.* at 295.

34. *Id.* at 299.

35. See *Schempp v. School Dist. of Abington Township*, 201 F. Supp. 815 (E.D. Pa. 1962), *aff’d*, 374 U.S. 203 (1963); *Murray v. Curlett*, 179 A.2d 698 (Md. 1962), *rev’d sub nom.* *School Dist. of Abington Township v. Schempp*, 374 U.S. 203 (1963).

of Bible reading and prayer recitation were held to be unconstitutional. Also of significance in this consolidation, in light of the beliefs of the challengers, is the outcome of the school policy that was contested in *Murray v. Curlett*.³⁶ *Murray* was an action, filed in state court, to compel rescission and cancellation of the school board policy.³⁷ The complainants were professed atheists.³⁸ The Maryland trial court dismissed the case, without leave to amend, on motion by the school board.³⁹ The Maryland Court of Appeals affirmed this decision.⁴⁰ In holding the school district's policy to be unconstitutional, the United States Supreme Court recognized the rights of an atheist family in regard to their right to be free from the tyranny of the majority belief. The Court had established that any school policy that showed preference for religion was unconstitutional, without regard to whether a majority of the community accepted the policy.

The case of *Lemon v. Kurtzman*⁴¹ presented the Court with another Establishment Clause case regarding state funding of private, parochial schools.⁴² The *Lemon* decision was also a consolidated decision, challenging state laws in Rhode Island⁴³ and Pennsylvania.⁴⁴ In both states, statutes had been enacted that provided state money for private schools and were challenged as violating, among other things, the First Amendment Religion clauses.⁴⁵ In its decision, the Court held that the state statutes were unconstitutional on First Amendment grounds because the state had become too entangled with religion.⁴⁶

The *Lemon* case also represents a significant doctrinal development in the Court's First Amendment religion clause jurisprudence. In its decision the Court established a three-part test to determine whether a state action was a violation of the First Amendment's prohibition against establishment.⁴⁷ The

36. 179 A.2d 698 (Md. 1962).

37. *Id.* at 699.

38. *Id.*

39. *Id.*

40. *Id.* at 704.

41. 403 U.S. 602 (1971).

42. *Id.* at 606.

43. *Id.* ("Rhode Island ha[d] adopted a statute under which the State pays directly to teachers in nonpublic elementary schools a supplement of 15% of their annual salary."). *See also* DiCenso v. Robinson, 316 F. Supp. 112, 113, 114 (D.R.I. 1970), *aff'd sub nom*, *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

44. 403 U.S. at 606 ("Pennsylvania ha[d] adopted a statutory program that provide[d] financial support to nonpublic . . . schools by way of reimbursement for the cost of teachers' salaries, textbooks, and instructional materials in specified secular subjects."). *See also* *Lemon v. Kurtzman*, 310 F. Supp. 35, 39 (E.D. Pa. 1969), *rev'd*, 403 U.S. 602 (1971).

45. 403 U.S. at 606.

46. *Id.* at 606, 614, 615, 625.

47. *Id.* at 612-13.

Lemon test's three elements required that a state law have: a) a secular purpose; b) a primary effect that "neither advances nor inhibits religion"; and c) no "excessive government entanglement with religion."⁴⁸ The Court had thus created a test by which to assess the constitutionality of state action in the face of the Establishment clause of the First Amendment.

The next development in the Court's extension of the religion clauses came in the case of *Stone v. Graham*.⁴⁹ This case represents an extension of the prohibition against the establishment of religion because the Court held unconstitutional a Kentucky law requiring the posting of the Ten Commandments "on the wall of each public classroom in the State."⁵⁰ The posters with the Ten Commandments were not purchased by the schools, but were instead purchased by way of private contributions.⁵¹ The case originated in the Kentucky court system where at both the trial level and at the Kentucky Supreme Court, the courts found that the Kentucky law could comport with a "secular program of education" and was, therefore, not unconstitutional.⁵² The United States Supreme Court granted certiorari, applied the *Lemon* test and found, contrary to the Kentucky courts, that the Kentucky law violated the secular purpose requirement.⁵³ In his dissent, Justice Rehnquist expressed his view that the Court should have given more deference to the secular purpose articulated by the Kentucky legislature and supported by the Kentucky courts.⁵⁴ This would not be the last time the elements of the *Lemon* test were criticized.⁵⁵

Another important decision, this time holding state action was not in violation of the Establishment clause, came in the case of *Lynch v. Donnelly*.⁵⁶ This case involved the City of Pawtucket's incorporation of a Nativity scene in its annual Christmas display.⁵⁷ The display included a Christmas tree, a Santa

48. *Id.*

49. 449 U.S. 39 (1980) (per curiam).

50. *Id.* at 39, 41.

51. *Id.* at 39.

52. *Stone v. Graham*, 599 S.W.2d 157, 157-58 (Ky.) (per curiam) (Clayton, J., concurring), *rev'd*, 449 U.S. 39 (1980) (per curiam).

53. 449 U.S. at 40-41.

54. *Id.* at 43-44. The secular purpose articulated by the Kentucky Legislature related to the impact the Ten Commandments have had "on the development of secular legal codes of the Western World." *Id.* at 45.

55. *See, e.g., Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 397-99 (1993) (Scalia, J., concurring). In his particularly colorful concurring opinion, Justice Scalia likened the *Lemon* test to "some ghoul in a late night horror movie" and referred to efforts to do away with the test as attempts to "drive[] pencils through the creature's heart." *Id.* at 398. It would seem Justice Scalia regarded the *Lemon* test to be severely outmoded in light of his wish that the test meet such a *ghastly* demise.

56. 465 U.S. 668 (1984).

57. *Id.* at 671.

Claus house, reindeer pulling Santa's sleigh, carolers, a cutout figure of a teddy bear, and candy-striped poles, in addition to the nativity scene including a Baby Jesus.⁵⁸ In applying the *Lemon* test, the Court found that there was a secular purpose, that the display neither advanced nor inhibited religion, and that there was no excessive entanglement with state and religion.⁵⁹ Though this case did not involve a policy in the public schools, it is particularly relevant because it is easy to see the Court's holding extending to a situation where a school permits a Christmas display to be erected during the holiday season. As a result of *Lynch*, so long as a Christmas display incorporates all the different holiday messages, from Santa Claus, to a Nativity scene, and even including Hanukkah, it will not necessarily be considered a state promotion or suppression of religion.

In the case of *Wallace v. Jaffrey*,⁶⁰ the Court declared an Alabama statute permitting public schools to institute a moment of silence unconstitutional on Establishment clause grounds.⁶¹ The Alabama law authorized teachers in public schools to hold a moment of silence during class.⁶² The relevant statutory language provided:

At the commencement of the first class of each day in all grades in all public schools the teacher in charge of the room in which each class is held may announce that a period of silence not to exceed one minute in duration shall be observed for meditation or voluntary prayer, and during any such period no other activities shall be engaged in.⁶³

The Court held that this Alabama law was passed in an effort to establish religion and was therefore unconstitutional.⁶⁴ The Court was not satisfied that despite the built-in choice between meditation and prayer the law was passed for any other purpose than to establish religion and, specifically, school prayer in the public school curriculum.⁶⁵ Also of significance in the *Wallace* decision was Justice Rehnquist's dissent in which he expressed his view that the Establishment clause prohibits governmental preference of one belief system over another, but did not require absolute neutrality between "religion and irreligion."⁶⁶

The Supreme Court extended its line of Establishment clause cases to invalidate a public school district policy permitting prayer at graduations in

58. *Id.*

59. *Id.* at 685.

60. 472 U.S. 38 (1985).

61. *Id.* at 41-42, 61.

62. *Id.* at 40 n.2.

63. *Id.*

64. *Id.* at 56, 59-60.

65. 472 U.S. at 58-60.

66. *Id.* at 113.

Lee v. Weisman.⁶⁷ The school district policy at issue in *Lee* permitted middle school and high school principals to invite a clergyman to offer invocation and benediction prayers at their school's formal graduation ceremony.⁶⁸ In *Lee*, the principal of a middle school invited a rabbi to pray at graduation with instructions to make the prayer nonsectarian.⁶⁹ The Court held that the school policy of allowing principals to invite members of the clergy to pray at graduation was an establishment of religion and consequently unconstitutional.⁷⁰ The Court found an action by a state official, in this case a public school principal, controlling the exercise of a formal religious observance in a ceremony where the state compels attendance to be a violation of the Establishment clause.⁷¹ The Court did not accept as an excuse that attendance at graduation was voluntary,⁷² that the prayers were brief,⁷³ that there was a good-faith attempt to accommodate people's beliefs by making the prayer nonsectarian,⁷⁴ and that the importance of the occasion would be lessened to many in attendance if there was no prayer.⁷⁵

With the *Lee* decision, the Court established that prayer at graduations would be unconstitutional so long as the school officials were responsible for including prayer in the graduation ceremony. The door was left open, however, to student initiated, student organized graduation ceremonies that included prayer. Thus, the issue of student-elected, student-led school prayer became the next battleground in the Courts of Appeals.

67. 505 U.S. 577, 599 (1992).

68. *Id.* at 581.

69. *Id.*

70. *Id.* at 599.

71. *Id.*

72. The Court acknowledged that there are events "which students, for all practical purposes, are obliged to attend." *Id.* at 589. The Court further concluded:

Everyone knows that in our society and in our culture high school graduation is one of life's most significant occasions. . . . Attendance may not be required by official decree, yet it is apparent that a student is not free to absent herself from the graduation exercise in any real sense of the term "voluntary," for absence would require forfeiture of those intangible benefits which have motivated the student through youth and all her high school years.

Id. at 595.

73. 505 U.S. at 594.

74. *Id.* at 588-90.

75. *Id.* at 595-96.

III. THE CIRCUIT SPLIT

A. *The Third and Ninth Circuits*

In a case before the Third Circuit Court of Appeals, *ACLU of New Jersey v. Black Horse Pike Regional Board of Education*,⁷⁶ a public school policy allowing the senior class to elect to have prayer at their high school graduation ceremony was held to be unconstitutional in violation of the Establishment clause.⁷⁷ The school district policy gave the seniors three choices, “prayer, a moment of reflection, or nothing at all.”⁷⁸ In finding that the school district policy was unconstitutional, the Third Circuit recognized that despite the student election to include prayer, the school officials can still influence the decision, which would represent the unconstitutional state endorsement of religion; and that the policy still imposes on those students in the minority the religious views of the majority, forcing them to either tolerate prayer or to not participate in their high school graduation.⁷⁹ The Third Circuit also seemed willing to find that student control of a state sponsored graduation at a public school would amount to a delegation of state power with the consequence being that any student action to establish a religious practice would be “just as constrained as [actions by] the state would be.”⁸⁰

In a similar case before the Ninth Circuit, *Harris v. Joint School District No. 241*,⁸¹ the court held unconstitutional a school board policy that allowed high school students to plan every aspect of their high school graduation.⁸² The students themselves decided by written ballots, without interference from the school officials, whether they would have prayer at their graduation ceremony.⁸³ The Ninth Circuit held that despite the policy permitting students to elect to have prayer as a part of their graduation, the state involvement was “pervasive enough to offend Establishment Clause concerns.”⁸⁴ This would seem to be particularly true in a community where the majority of the students and school officials belong to the same religious denomination. Without

76. 84 F.3d 1471 (3d Cir. 1996) (en banc). See also *C.H. v. Oliva*, 226 F.3d 198 (3d Cir. 2000) (en banc).

77. 84 F.3d at 1474.

78. *Id.* at 1475.

79. *Id.* at 1477-88. Also, for an in-depth look at the *Black Horse* decision, see Ann E. Stockman, Comment, *ACLU v. Black Horse Pike Regional Board of Education: The Black Sheep of Graduation Prayer Cases*, 83 MINN. L. REV. 1805 (1999).

80. *Id.* at 1483 (adopting the standard set forth in *Harris v. Joint Sch. Dist. No. 241*, 41 F.3d 447, 455 (9th Cir. 1994)).

81. *Harris v. Joint Sch. Dist. No. 241*, 41 F.3d 447 (9th Cir. 1994), *vacated as moot*, 515 U.S. 1154 (1995). See also *Cole v. Oroville Union High Sch. Dist.*, 228 F.3d 1092 (9th Cir. 2000).

82. 41 F.3d at 452, 454, 457, 458.

83. *Id.* at 452.

84. *Id.* at 454.

directly influencing the students in their capacity as school officials, it is clear that pressure is still exerted on the students to control the message of the graduation ceremony, and as such, the policy is a disguised attempt to allow state promotion of religion. Additionally, in *Harris*, the Ninth Circuit announced it was prepared to consider student control over a public school graduation ceremony was, for all intents and purposes, state action, which would implicate the protections of the Establishment Clause vis-à-vis the Fourteenth Amendment;⁸⁵ a standard, noted earlier, that was adopted by the Third Circuit in *Black Horse*.⁸⁶

B. *The Fifth Circuit*

Joining the fray on the other side of this Circuit split, the Fifth Circuit decided, in *Jones v. Clear Creek Independent School District*,⁸⁷ that student-initiated, student-led prayer at graduation was not a violation of the Establishment Clause.⁸⁸ In *Jones*, the Fifth Circuit upheld a graduation policy that permitted student selection of a student volunteer to deliver a nonsectarian prayer for the graduation ceremony.⁸⁹ The decision to have the prayer was reserved to the students.⁹⁰ The Fifth Circuit held that there was “less psychological pressure on students than the prayers at issue in *Lee* because all students, *after having participated in the decision of whether prayers will be given*, are aware that any prayers represent the will of their peers.”⁹¹ The Fifth Circuit justified this holding by claiming that fellow students “are less able to coerce participation than an authority figure from the state or clergy.”⁹² This holding seemingly ignores the influence of those school officials in small communities, where the majority of students and school officials may attend the same religious institution, who could use their status to exert pressure on students to initiate religious practices at school ceremonies like graduation; this would seem to allow for an end-run circumvention of the prohibitions of the Establishment Clause because, in essence, by coercing *student* action, the school officials who are actually behind the establishing of religion, are able to avoid scrutiny by the mere technicality of labeling the religious practice as

85. *Id.* at 455.

86. 84 F.3d 1471, 1483 (3d Cir. 1996) (en banc).

87. 977 F.2d 963 (5th Cir. 1992).

88. *Id.* at 964-65, 964 n.1. The Fifth Circuit did, however, in a subsequent decision, hold that school-sponsored prayer was not permitted at school sporting events. See *Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402 (5th Cir. 1995). This decision was reaffirmed by the Fifth Circuit in *Doe v. Santa Fe Independent School District*, 168 F.3d 806 (5th Cir. 1999). Thus, it would seem that *Jones* applied only to prayer at graduation and would not protect student-initiated prayer at sporting events if it appeared that the school had encouraged the prayer policy.

89. 977 F.2d at 964-65, 964 n.1.

90. *Id.* at 965 n.1.

91. *Id.* at 971.

92. *Id.*

student-elected and student-led. In finding student-elected, student-led prayer to not be an establishment of religion, and therefore, not a constitutional violation, the Fifth Circuit's decision is at conflict with the decisions from the Third and the Ninth Circuits.

IV. ADLER I

In *Adler v. Duval County School Board*,⁹³ the Eleventh Circuit had its opportunity to join in on the split that had evolved between the Fifth and the Third and Ninth Circuits. In holding that a school district policy allowing student-elected, student-led prayer was not in violation of the Establishment Clause,⁹⁴ the Eleventh Circuit sided with the Fifth Circuit. The Eleventh Circuit further indicated their affinity with the rationale of the Fifth Circuit by rejecting the argument that the state had “created a sufficient link to the student speaker to convert the student’s private speech into public, state-sponsored speech.”⁹⁵

In response to the Supreme Court’s decision in *Lee v. Weisman*, the Duval County School Board changed its graduation policy.⁹⁶ The new policy was instituted through a memo from the Superintendent that “there should be no prayer, benediction, or invocation at any graduation ceremonies.”⁹⁷ A follow-up memorandum sent out months later from the school district’s legal affairs officer, changed the policy yet again.⁹⁸ The new policy, as outlined by the legal affairs officer, indicated that some form of student-elected, student-led prayer at graduation might be constitutional.⁹⁹ This second memo, entitled “Graduation Prayers”, contained the following guidelines for use by school officials in determining what action to take “if the graduating students at your school desire to have some type of brief opening and/or closing message by a student”:

1. The use of a brief opening and/or closing message, not to exceed two minutes, at high school graduation exercises shall rest within the discretion of the graduating senior class;

93. 206 F.3d 1070 (11th Cir. 2000) (en banc) [hereinafter Adler I], *vacated*, 121 S. Ct. 31 (2000) (remanding the case for “further consideration in light of *Santa Fe Independent School District v. Doe*, 120 S. Ct. 2266 (2000)), *reinstated*, 2001 U.S. App. LEXIS 8880 (11th Cir. 2001) (en banc) [hereinafter Adler II].

94. *Id.* at 1071.

95. *Id.* at 1080 (holding that the “argument—that by providing the platform, the speech becomes public—goes too far”).

96. *Id.* at 1071.

97. *Id.* at 1071, 1071 n.1 (quoting a memorandum from the Duval County School District Superintendent).

98. 206 F. 3d at 1072.

99. *Id.*

2. The opening and/or closing message shall be given by a student volunteer, in the graduating senior class, chosen by the graduating senior class as a whole;
3. If the graduating senior class chooses to use an opening and/or closing message, the content of that message shall be prepared by the student volunteer and shall not be monitored or otherwise reviewed by Duval County School Board, its officers or employees.¹⁰⁰

The Duval County School Board was held to have “left in force with the acquiescence or tacit approval of the Board as its official policy” the contents of the “Graduation Prayers” memo.¹⁰¹ During the seventeen high school graduations that took place under the new policy, ten ceremonies had some form of religious message while the other seven “were entirely secular in nature.”¹⁰²

The first challenge to the school district’s policy came shortly before the class of 1993 graduated.¹⁰³ The suit sought injunctive relief to prevent the school district from permitting prayer at graduation.¹⁰⁴ The injunctive relief was denied on the grounds that the school district’s policy was constitutional¹⁰⁵ and the case was appealed to the Eleventh Circuit.¹⁰⁶ Because the complainants had all graduated by the time the case was in the appeal stage, the Eleventh Circuit held that the claims for injunctive relief were moot.¹⁰⁷ As a result, the school policy “remained the operative high school graduation policy for Duval County.”¹⁰⁸

Then, in 1998, another action¹⁰⁹ was brought seeking temporary and permanent injunctive relief, to prevent the Duval County School Board from “permitting, conducting, or sponsoring any religious exercises or prayer and instruction within the Duval County Public School District, including at School Board-sponsored graduation ceremonies.”¹¹⁰ The injunctive relief was denied and final judgment was entered in favor of the Duval County School Board.¹¹¹ On appeal, the Eleventh Circuit took up the issue of the constitutionality of

100. *Id.*

101. *Id.* (quoting the finding of the district court in *Adler v. Duval County School Board*, 851 F. Supp. 446, 449 (M.D. Fla. 1994).

102. *Id.* at 1072.

103. 206 F. 3d at 1072. *See also* *Adler*, 851 F. Supp 446.

104. *Id.*

105. *Id.* at 1072-73.

106. *Id.* at 1073. *See also* *Adler v. Duval County School Board*, 112 F.3d 1475 (11th Cir. 1997).

107. *Id.*

108. 206 F. 3d at 1073.

109. *Id.*

110. *Id.*

111. *Id.*

student-elected, student-led school prayer in light of the Supreme Court's decision in *Lee v. Weisman*, and the split between the Fifth and the Third and Ninth Circuits.

A. *The Majority Opinion*

The majority held, in this case, that the school district's policy was not an establishment of religion and was therefore constitutional.¹¹² The majority recognized that "Establishment Clause jurisprudence calls for the difficult task of separating a student's *private* message, which may be religious in character, from a state-sponsored religious message, protecting the former and prohibiting the latter."¹¹³ Implicit in this comment is the recognition that the religion clauses also contain a prohibition against limiting an individual's rights protected by the Free Exercise and Free Speech Clauses.¹¹⁴

In comparing the school policy challenged in *Lee*, the *Adler* majority was able to distinguish the facts in this case from those in *Lee* because in *Adler* the school district was not exercising a policy whereby school officials directed the inclusion of prayer in the graduation ceremony.¹¹⁵ The majority acknowledged the split between the Fifth and the Third and Ninth Circuits¹¹⁶ and sided with the Fifth by holding that the policy in the Duval County School District was facially constitutional based on "the absence of state involvement in each of the central decisions—whether a graduation message will be delivered, who may speak, and what the content of the speech may be."¹¹⁷ The majority found that under "the Duval County graduation policy . . . neither the School Board nor its principals may ordain, direct, establish, or endorse a religious prayer or message of any kind."¹¹⁸

The majority rejected the appellant's arguments that the student message had become state-sponsored speech.¹¹⁹ The first argument, "that by providing the platform and opportunity, the state has created a sufficient link to the student speaker to convert the student's private speech into public, state-sponsored speech" was held to have gone "too far."¹²⁰ This argument was rejected as overly broad because, "[t]o unnecessarily classify student speakers as government actors could render . . . students powerless to express religiously-inspired or religiously-influenced opinions at graduation."¹²¹ The

112. 206 F.3d at 1071.

113. *Id.* at 1074.

114. *See id.* at 1078.

115. *Id.* at 1076.

116. *Id.* at 1079 n.7.

117. 206 F. 3d at 1075.

118. *Id.* at 1076.

119. *Id.* at 1080.

120. *Id.*

121. *Id.* at 1081.

majority explained, “[t]he expression of religious beliefs, which are sacred to some listeners, may be offensive to others,” but found that “the Constitution does not prohibit the exercise of offensive speech at graduation ceremonies, religious or otherwise; it only prohibits state expressions of religion. . . . The occasional tolerance of speech we may deem offensive is one price we pay for the First Amendment and our democratic traditions.”¹²² The second argument, “that the majoritarian process of selecting the speaker shrouds the otherwise private speech of a student with the imprint of the state,” was rejected as illogical because, the majority reasoned, “[a]t most, a student speaker selected by a class vote is a representative of the student body, not an official of the state.”¹²³

The majority then applied the *Lee* coercion test, to assess the degree, if any, of “state control over the message at a graduation ceremony.”¹²⁴ The test focused on “whether the state has endorsed the message in an appreciable manner, which, when combined with the inherent nature of the graduation ceremony, obliges students to participate in a religious exercise.”¹²⁵ The majority found that “[w]hile there may be pressures on students to attend graduation and conform with their peers, the state’s complete control over a religious exercise, essential to *Lee*’s holding, is conspicuously absent here.”¹²⁶ The majority went on to hold that the school policy was constitutional on its face, that the complainants had not established that there were no set of circumstances under which the policy could be constitutional, and rejected the argument that the policy was coercive.¹²⁷

The majority went on to apply the *Lemon* test and reached the same result, that the school policy did “not facially violate the Establishment Clause.”¹²⁸ In evaluating whether the school policy had a “secular purpose”, the majority found that the policy was supported by three sufficiently secular purposes:

First . . . affording graduating students an opportunity to direct their own graduation ceremony by selecting a student speaker to express a message. . . . Second, the School Board policy allows students to solemnize graduation as a seminal educational experience. . . . [Third], the School Board’s policy also evinces an important and long accepted secular interest in permitting student freedom of expression, whether the content of the expression takes a secular or religious form.¹²⁹

122. 206 F. 3d at 1081.

123. *Id.* at 1080, 1082.

124. *Id.* at 1083.

125. *Id.*

126. *Id.* (citations omitted).

127. 206 F. 3d at 1083.

128. *Id.* at 1084-91, 1090-91.

129. *Id.* at 1084, 1085.

In finding that the school district had sufficient secular purposes for their graduation policy, the majority rejected the arguments that: (1) “the School Board promulgated the policy as a means to evade the strictures of *Lee*”; (2) “the policy’s solely sectarian purpose is established by the title of the . . . Memorandum, ‘Graduation Prayer’”; and (3) “comments made by some members of the School Board . . . evince a wholly sectarian purpose.”¹³⁰

The majority also found that the graduation policy did not violate the second prong of the *Lemon* test because, on its face, the policy permitted the student speaker to choose whether to deliver a secular, a religious, or a mixed message, and therefore, could not be held to have a primary effect of advancing religion.¹³¹ Likewise, the majority held that the Duval County graduation policy “does not excessively entangle the Board with religion” because the neutral, hands-off nature of the policy, in permitting student elections, was less problematic—less entangled—than if the school policy had been one of censorship.¹³² The majority concluded that “the Duval County school system’s policy of permitting graduating students to decide through a vote whether to have an unrestricted student graduation message at the beginning and/or closing of graduation ceremonies does not facially violate the Establishment Clause.”¹³³

B. *The Dissenting Opinion*

The dissent applied a similar analysis, incorporating state control, coercion, and the *Lemon* test and came to the conclusion that the school district’s policy was unconstitutional.¹³⁴ The dissent, like the majority, applied *Lee v. Weisman* as precedent in this school prayer at graduation case. Contrary to the majority, however, the dissent found that the level of state control and the extent of coercion weighed in favor of finding state action and, consequently, a violation of the Establishment Clause.¹³⁵ The dissent was troubled by the fact that the school administration retained control over the election process for the graduation ceremony and that the policy permitted an elected student’s message to be delivered, during a limited amount of time, at the beginning and/or the end of the ceremony.¹³⁶ The dissent reasoned that given the limited amount of time and based on the timing of when the student message would be delivered during graduation, it was clear that the school district had put into place a policy permitting only a limited range of speech.¹³⁷

130. *Id.* at 1085, 1085-89.

131. *Id.* at 1089-90.

132. 206 F. 3d at 1090.

133. *Id.* at 1090-91.

134. *Id.* at 1091-1103.

135. *Id.* at 1106.

136. *Id.* at 1092.

137. 206 F. 3d at 1092.

This finding, coupled with the district court's finding that in Duval County "invocations and benedictions have been traditional and are therefore familiar if not expected at high school graduation ceremonies"¹³⁸ led the dissent to find that the school district had sufficient control over the speech to shift the burden to the state to show that the "criteria for selecting the speaker . . . [is] not related to the content of the speech."¹³⁹ This was particularly true where it appeared that not only had the school involved itself in the choice to offer student speech during the graduation ceremony, but had also "in some ways encourage[d] the choice of prayer."¹⁴⁰ The dissent also found that the state had coerced participation in a religious exercise, noting "[s]tudents cannot be expected to express dissent [to student offered prayer] in this environment, with the obligation of polite participation and the school authorities' control over the student decorum."¹⁴¹

The dissent also took issue with the majority's application of the *Lemon* test.¹⁴² The dissent found that the secular justifications offered by the school district to explain the purpose behind the school policy were "at best incidental effects of the policy," and that the "dominant reason" for the policy, which only applied to "the portions of the [graduation] program historically devoted to prayer," was "to keep prayer in graduation ceremonies."¹⁴³

The dissent also found that the "primary effect" of the school policy was to advance "more prayer at public events."¹⁴⁴ The reason for this was that after *Lee*, it was unconstitutional to have the state provide for prayer at school graduations, which would have reduced the number of permitted, state-sanctioned prayers at graduation to zero. Now, the Duval County School District had, in effect, a policy that allowed for ten out of seventeen school graduation ceremonies, in the first year of the policy, to retain prayer at graduation. Therefore, the dissent reasoned, the Duval County school policy had, as its primary purpose, the "impermissible effect" of advancing a religious practice.¹⁴⁵

The dissent had found several independent justifications for finding the Duval County school policy of permitting student-elected, student-led prayer at graduation ceremonies to be unconstitutional. In its conclusion, the dissent noted, "Duval County has not adopted a blanket approach of neutrality toward religion or eliminated school sponsorship and control over graduation

138. *Id.*

139. *Id.* at 1095.

140. *Id.* at 1096.

141. *Id.* at 1097.

142. 206 F. 3d at 1097-1101.

143. *Id.* at 1098.

144. *Id.* at 1101-02, 1102.

145. *Id.* at 1102.

ceremonies.”¹⁴⁶ It added, “[t]he policy does not explicitly mention religion and does not require any speech at all, but its terms nonetheless promote religious expression.”¹⁴⁷ For these reasons, and because the school policy did not stand up to the coercion and *Lemon* tests, the dissent argued that the Duval County school policy should have been found to be unconstitutional.¹⁴⁸

V. SANTA FE INDEPENDENT SCHOOL DISTRICT V. DOE

The United States Supreme Court got its opportunity to resolve the split that had developed between the Fifth and Eleventh and the Third and Ninth Circuits by granting certiorari¹⁴⁹ in *Santa Fe Independent School District v. Doe*.¹⁵⁰ This case arose from the Fifth Circuit¹⁵¹ and involved questions regarding school prayer in two contexts, at graduation and at high school football games.¹⁵² The Supreme Court granted certiorari to hear only the issue regarding whether the student-initiated, student-led school prayer at the football games was a violation of the Establishment Clause.¹⁵³ The Court concluded that the School District’s policy of embracing prayer at the high school football games was unconstitutional.¹⁵⁴

The policy adopted by the Santa Fe Independent School District, originally titled “Prayer at Football Games,”¹⁵⁵ “authorized two student elections, the first to determine whether ‘invocations’ should be delivered, and the second to select the spokesperson to deliver them.”¹⁵⁶ The relevant language of the school board’s policy provided:

[E]ach 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.¹⁵⁷

146. *Id.* at 1105.

147. 206 F. 3d at 1081.

148. *Id.*

149. *See Santa Fe Indep. Sch. Dist. v. Doe*, 528 U.S. 1002 (1999).

150. 120 S. Ct. 2266 (2000).

151. *See Doe v. Santa Fe Indep. Sch. Dist.*, 168 F.3d 806 (5th Cir. 1999).

152. *Id.* at 809.

153. 120 S. Ct. at 2275. *See also Santa Fe Indep. Sch. Dist. v. Doe*, 528 U.S. 1002 (1999).

154. *Id.*

155. *Id.* at 2273. The name of the school district’s policy was later changed to “PRE-GAME CEREMONIES AT FOOTBALL GAMES.” *Id.* at 2273 n.6.

156. *Id.* at 2273.

157. *Id.* at 2273 n.6. The language cited here represents the school district’s amended policy entitled “Pre-Game Ceremonies at Football Games,” which was implemented subsequent to the “Prayer at Football Games” policy. The difference between the policies is highlighted by the

The policy not only set out the procedure for the student elections but, in a separate section, it also provided for a contingency should the policy be challenged and “enjoined by a court order.”¹⁵⁸ In the event that the policy was challenged and enjoined, the following language was added to the policy, “[a]ny message and/or invocation delivered by a student must be nonsectarian or nonproselytizing.”¹⁵⁹

In this case, under the “Prayer at Football Games” policy, the students elected to have a pre-game “invocation” and in a separate election, chose a “student council chaplain” who was to “deliver[] a prayer over the public address system before each varsity football game for the entire season.”¹⁶⁰ Subsequent to the elections, the policy was amended and renamed, “Pre-Game Ceremonies at Football Games.”¹⁶¹ The new policy coupled the words “statement” and “message” to “invocation” where the original policy had only used the term “invocation.”¹⁶² Even though the School District policy changed, no new election was held under the terms of the amended policy.¹⁶³ Essentially, then, the policy the students voted under established that what was to be delivered by the elected student before every home football game was an “invocation.”¹⁶⁴ This policy of establishing student-elected, student-led prayer before football games was challenged as a violation of the Establishment Clause of the First Amendment.

A. *The Majority Opinion*

Justice Stevens, writing for a 6-3 majority, opened his opinion by distinguishing between “government speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.”¹⁶⁵ In evaluating the School District’s policy, the Majority found that, “[i]n this case . . . 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

dropping of the word “prayer” from the title and the addition of “message” and “statement” language to go along with “invocation” in the amended policy. This is significant because the only policy actually voted on by the students spoke only to “prayer” and “invocation”; after amending the language, the School District did not hold a new election under the new policy. *Id.* at 2273 n.5, 2279.

158. 120 S. Ct. at 2273 n.6.

159. *Id.*

160. *Id.* at 2271.

161. *Id.* at 2273.

162. *Id.*

163. 120 S. Ct. at 2273 n.5, 2279.

164. *Id.*

165. *Id.* at 2275 (quoting *Board of Educ. of Westside Comm. Sch.v. Mergens*, 496 U.S. 226, 250 (1990)).

position.”¹⁶⁶ The conclusion the Majority arrived at was that “[t]he 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.”¹⁶⁷ The Court found that not only was “it clear that the students understood that the central question before them [in the election] was whether prayer should be a part of the pregame ceremony”, but also that “the evolution of the current policy . . . indicate[d] that the District intended to preserve the practice of prayer before football games”, especially in light of the District’s failure to conduct a new election under the new policy.¹⁶⁸

By not characterizing the speech as private, the implication was that the speech must belong to the state. After establishing state action, one of the questions became whether the speech attributable to the state was an endorsement of religion. The Majority sought the answer to that question by applying the first element of the *Lemon* test, to determine whether the Duval County School District policy had a “secular purpose.”¹⁶⁹ The School District argued that the purpose of their policy was to “foster free expression of private persons . . . promote good sportsmanship and student safety, and establish an appropriate environment for competition.”¹⁷⁰ Clearly not persuaded by the School District’s rationale, the Majority found that the “approval of only one specific kind of message, an ‘invocation,’ is not necessary to further any of [those] purposes.”¹⁷¹ They further added that it was “reasonable to infer that the specific purpose of the policy was to preserve a popular ‘state-sponsored religious practice.’”¹⁷²

Having found no “secular purpose” and after characterizing the speech as attributable to the state, not private speech, the Majority had sufficient grounds to find the School District’s policy violated the Establishment Clause as governmental endorsement of religion. But, before declaring the District’s policy unconstitutional, Justice Stevens analyzed the policy’s coercive effects. In particular, Justice Stevens was concerned with two aspects of coercion. The first aspect he considered was whether the policy coerced student participation in a religious ceremony. The School District argued “that there [wa]s no impermissible government coercion because the pregame messages [we]re the product of student choices.”¹⁷³ Justice Stevens disagreed, finding that because

166. *Id.* at 2277 (quoting *Lee v. Weisman*, 505 U.S. 577, 590 (1992)).

167. *Id.* at 2279.

168. 120 S. Ct. at 2278, 2279.

169. *Id.* at 2281-82.

170. *Id.* at 2278-79.

171. *Id.* at 2279.

172. *Id.*

173. 120 S. Ct. at 2279.

the School District had provided the “election mechanism” and the forum for the student debates “that presumably must [have] precede[d] each” of the elections, the District’s policy had “impermissibly invaded that private sphere” of “preservation and transmission of religious beliefs and worship.”¹⁷⁴ The School District’s policy, therefore, represented governmental control over student participation in religious expression, “a result”, according to the Majority, “at odds with the Establishment Clause.”¹⁷⁵

The second aspect of coercion that Justice Stevens addressed, for the Majority, pertained to whether coercion could exist at all, given the voluntary nature of attending football games. Here, the Majority distinguished attendance at football games from attendance at graduation ceremonies, finding, “the informal pressure to attend an athletic event is not as strong as a senior’s desire to attend her own graduation ceremony.”¹⁷⁶ Yet, despite the fact that attendance at football games might be considered less important than graduation, the Majority found that some of the participants, including band members, cheerleaders, and members of the football team, might be participating for “class credit” and that, therefore, their attendance was mandatory.¹⁷⁷ The Majority also found that the other students, whose commitments did not make attendance compulsory, might feel compelled to attend the games based on peer pressure or out of a yearning for a “complete educational experience” or they might “voluntarily choose not to attend.”¹⁷⁸ Either way, the Majority held, students should not be forced into the position where the decision as to whether to attend a football game is based on the “risk [of] facing a personally offensive religious ritual.”¹⁷⁹ Justice Stevens further held, “[e]ven 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.”¹⁸⁰

The Majority also found successful a facial challenge to the School District’s policy.¹⁸¹ They reasoned that if the purpose of the policy failed the secular purpose arm of the *Lemon* test, then the policy must be declared unconstitutional.¹⁸² The Majority held, “[w]e refuse to turn a blind eye to the context in which this policy arose, and that context quells any doubt that this

174. *Id.* at 2279-80.

175. *Id.* at 2280.

176. *Id.*

177. *Id.*

178. 120 S. Ct. 2280.

179. *Id.*

180. *Id.*

181. *Id.* at 2283.

182. *Id.* at 2282.

policy was implemented with the purpose of endorsing school prayer.”¹⁸³ Because the Duval County policy “unquestionably ha[d] the purpose and create[d] the perception of encouraging the delivery of prayer at a series of important school events”, the Majority found it facially unconstitutional.¹⁸⁴

For the reasons that the School District’s policy represented a coercive governmental endorsement of religion, with no secular purpose, the Majority declared the District’s policy unconstitutional.

B. The Dissenting Opinion

In a dissenting opinion, joined by Justices Scalia and Thomas, Chief Justice Rehnquist attacked the Majority’s holding based on “content neutrality” and private speech lines of reasoning. He wrote, “our Establishment Clause jurisprudence simply does not mandate ‘content neutrality.’”¹⁸⁵ Neutrality of the student message was not required, he argued, because the speech in question represented private speech.¹⁸⁶ To distinguish between private and government speech, the Chief Justice argued:

Here . . . the potential speech at issue . . . 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.”¹⁸⁷

By so arguing, the Chief Justice indicated that the District’s policy should be constitutional if the speech were completely free of any governmental influence and merely the product of one student’s choice to exercise his or her right to free exercise and free speech. By looking to the language of the school policy, he found that the inclusion of the words “message” and “statement” illustrated the School District’s recognition of the students’ freedom to elect and deliver a message free from the control of the school.¹⁸⁸ This, he argued, established that the student message was individual speech, not government speech.

The Dissent also took issue with the outcome of the facial challenge.¹⁸⁹ The Chief Justice was not convinced that the sole purpose of the School District’s policy was to establish school prayer and thought that more deference should have been given to the School District’s justifications: “To solemnize the event, to promote good sportsmanship and student safety, and to

183. *Id.*

184. 120 S. Ct. at 2283.

185. *Id.* at 2287.

186. *Id.*

187. *Id.*

188. *Id.* at 2286-87.

189. 120 S. Ct. at 2285.

establish the appropriate environment for competition.”¹⁹⁰ He argued that by amending the policy, the School District had created the possibility that the message could contain a non-religious message.¹⁹¹ He also seemed to indicate that because the amended policy had not been the subject of a new vote, it had not been implemented.¹⁹² For this reason, he would have found that the facial challenge was brought prematurely on the ground that “[h]ad the policy been put into practice . . . [it] would likely pass constitutional muster.”¹⁹³ For these reasons, Chief Justice Rehnquist and the other Dissenters would not have invalidated the School District’s policy.¹⁹⁴

VI. ADLER II

After vacating the Eleventh Circuit’s decision in *Adler I*, the Supreme Court remanded the case back to the Eleventh Circuit for reconsideration in light of *Santa Fe*.¹⁹⁵ Jurisdiction was, at that point, vested again in the Eleventh Circuit to render a decision in the *Adler* case. After reconsideration, the same en banc panel of the Eleventh Circuit that decided *Adler I*, held that *Santa Fe* did not alter their earlier decision and reinstated *Adler I*.¹⁹⁶

In an 8-4 decision, which saw two of the judges who had voted to uphold the school policy in *Adler I* switch sides to join in the dissent, the Eleventh Circuit held that *Santa Fe* did not “alter the outcome in this case” because the Supreme Court, in *Santa Fe*, did not “promulgate” any new rule of law which had not been applied in *Adler I*.¹⁹⁷ Therefore, the majority reasoned, there was no need to undertake a new analysis and the previous decision was reinstated. The court further noted that “it is impossible to say that the Duval County policy on its face violates the Establishment Clause without effectively banning all religious speech at school graduations *Santa Fe* does not go that far, and we are not prepared to take such a step.”¹⁹⁸

After reinstating their previous *Adler* decision, the majority reviewed its decision in *Adler I*, and compared it to *Santa Fe*. The Eleventh Circuit found that *Santa Fe* was a very fact driven decision with facts that were

190. *Id.* at 2286.

191. *Id.* at 2285.

192. *Id.* at 2285 n.2.

193. *Id.* at 2287. The Majority’s response to this line of reasoning argued that the policy in place at the time of the student elections contemplated only “invocations.” The only message, therefore, that the students had elected to incorporate related to prayer. The choice of message envisioned by the Dissent had not been voted on by the students, hence the students never had the opportunity to select a non-religious message. *Id.* at 2283 n.24.

194. 120 S. Ct. at 2288.

195. *See Adler v. Duval County Sch. Bd.*, 121 S. Ct. 31 (2000).

196. *See Adler II*, 2001 U.S. App. LEXIS 8880, at *2 (11th Cir. 2001).

197. *Id.* at *28-29.

198. *Id.* at *2-3.

“fundamentally different” from *Adler* and thus held that *Santa Fe* did not “erase the critical facts . . . that underla[id]” their opinion in *Adler I*.¹⁹⁹ The majority found that the basis for distinguishing the cases rested with the difference between the school policies with regard to the degree of school district control over the content of the delivered message and the extent to which the policies differed in inviting religious messages.²⁰⁰ The court found further divergence between the cases based on the secular purpose element of the *Lemon* test; because as the court had found in *Adler I*, the Duval County policy, as opposed to the Santa Fe policy, had a secular purpose.²⁰¹ Based on their ability to distinguish the facts in *Adler* from *Santa Fe*, and their finding that *Santa Fe* did not create a need for redoing their analysis, the majority reinstated their earlier opinion without offering any new analysis.

The dissent, which doubled in size from *Adler I*, took issue with the majority in two separate opinions. The first dissenting opinion took issue with the majority’s finding that the Duval County policy had a secular purpose.²⁰² According to Judge Kravitch:

[B]ecause the record reflects that the purpose of the Duval policy is to endorse prayer at graduation ceremonies, and because the scheme allowing the student majority to decide whether to include does not cure the problem of the policy’s impermissible, religious purpose, in my view the Duval policy fails to comply with the Supreme Court’s directive in *Santa Fe* and thus facially violates the Establishment Clause.²⁰³

In a separate dissent, Judge Carnes added to Judge Kravitch’s dissent by arguing that the majority should have spent less effort trying to distinguish *Santa Fe* factually from *Adler*, and more time trying to ascertain the message that the Supreme Court was trying to convey in *Santa Fe*.²⁰⁴ He argued that *Santa Fe* should have taught that “a school board may not delegate to the student body or some subgroup of it the power to do by majority vote what the school board itself may not do.”²⁰⁵ He added, “the majority should not be allowed to force its religious views on those in the minority. Our Constitution ensures that when it comes to religion, it is the conscience of the individual rather than the will of the majority that rules.”²⁰⁶ For these reasons he would have found that the Duval County policy facially violated the Establishment Clause.²⁰⁷

199. *Id.* at *33-34.

200. *Id.* at *16-25.

201. 2001 U.S. App. LEXIS 8880. at *26-28.

202. *See id.* at *34 (Kravitch, J., dissenting).

203. *Id.* at *45.

204. *See id.* at *49.

205. *Id.* at *50.

206. *Id.* at *55-56.

207. 2001 U.S. App. LEXIS 8880, at *50.

VII. AUTHOR'S ANALYSIS

The Supreme Court took on the issue of student-elected, student-led prayer in its *Santa Fe* decision and, by so doing, attempted to resolve a split that had developed among the Circuit Courts of Appeals. In *Santa Fe*, the Court had the opportunity to decide the issue of student-initiated prayer in two contexts.²⁰⁸ The choice to hear the issue of school prayer only in the context of student prayer at football games was significant. One possible explanation for why the Court chose not to hear the issue of prayer at graduation would be that the Court felt it was unnecessary to revisit the issue in light of past decisions.²⁰⁹ This position is undermined, however, by the existence of the Circuit split and the opportunity the case represented to resolve that split. Certainly, a better explanation is that the Court granted certiorari, limited to the issue of student-elected, student-led prayer at football games, because the message sent by a decision regarding prayer at football games would extend the Establishment Clause beyond the scope previously encompassed by the prayer at graduation cases. That is, if the Court were to invalidate a school policy permitting prayer at an activity seemingly more voluntary than a graduation ceremony, then surely a school policy instituting prayer at a graduation would be invalid. By extending its school prayer Establishment Clause jurisprudence to invalidate school policies instituting school prayer during activities that are not mandatory, the Court had seemingly laid down a fairly broad standard.

The Court arrived at its holding in *Santa Fe*, invalidating a school policy creating student elections to permit prayer at high school football games, by finding that the student-elected, student-led prayer was attributable to the state. Had the Court found otherwise, that the prayer delivered at football games, in accordance with the district's policy, was private speech, then the protections of the Free Speech and Free Exercise clauses of the First Amendment would have spared the policy and the speech would have been protected.

In a fact sensitive analysis, the Court attributed the prayer delivered at football games to government-endorsed speech. This represented an important doctrinal development driven by the focus on the procedure allowing for the student elections. In finding that the school district was ultimately behind the speech, the Court declared that a school district that controls the content of a message, to invite a religious practice, and coerces participation in that practice is in control of the speech ultimately delivered. This result firmly establishes that school districts who control the decision making process violate the

208. The Court had the opportunity to determine the constitutionality of school policies that permitted prayer at both graduation and at high school football games. See 120 S. Ct. at 2271-75. The Court only granted certiorari to hear the issue in the context of football games. See *Santa Fe Indep. Sch. Dist. v. Doe*, 528 U.S. 1002 (1999).

209. See, e.g., *Lee v. Weisman*, 505 U.S. 577 (1992).

Establishment Clause by instituting school policies permitting school prayer, even though the prayer is student-elected and student-led.

The holding in *Santa Fe* should have extended to the Circuit split that existed before it was decided. The Supreme Court, in particular, must have thought that the *Santa Fe* decision had an impact on the split and certainly, at least, on the rules promulgated in the Eleventh Circuit, based on the action taken by the Court to remand *Adler* back to the Eleventh Circuit for “further proceedings in light of” *Santa Fe*.²¹⁰ When, in *Adler II*, the Eleventh Circuit, on remand, reinstated *Adler I*, the split in the Circuits was left intact with cases in the Fifth and the Eleventh Circuits still at odds cases in the Third and Ninth. The unfortunate result of leaving the split unreconciled is that the constitutional question of whether policies of student-elected, student-led prayer at school graduation ceremonies are permissible are open and left to depend on the randomness of the geographical locale of the school district that has, or is establishing, a policy permitting students to elect to include a religious message in their graduation.

On remand, the Eleventh Circuit had the opportunity to revisit their decision in *Adler*. By reinstating their earlier decision after distinguishing the facts in *Santa Fe* as “fundamentally different,”²¹¹ the Eleventh Circuit added no new analysis, and thereby missed an opportunity to provide more depth to the legal debate between the Circuits, which could have provided the Supreme Court, should they again decide to grant certiorari in *Adler*, a better foundation to work from, in generating an opinion that clarifies Establishment Clause jurisprudence in the student-elected, student-led school prayer arena. Perhaps some members of the en banc panel realized that by vacating and remanding the case the Supreme Court was providing the Eleventh Circuit with the opportunity to more fully develop this body of legal scholarship. After all, Judge Carnes wrote in his dissent, “we ought to spend less time comparing the factual and procedural details of the *Santa Fe* case to this one and more time considering the lessons that decision teaches.”²¹²

The end result of *Adler II* is that the Circuit split remains unresolved. The question now is whether the continued existence of the Circuit split will prompt the Supreme Court to grant certiorari again in this case. Because this case involves a substantial issue pertaining to fundamental rights under the First Amendment, this case should have enough inertia to warrant a second look by the Supreme Court. This, coupled with a significant amount of treatment by the Courts of Appeals, should give the Supreme Court sufficient justification to grant certiorari. Based on a compelling need to resolve the split on a federal issue of substantial weight and with a solid foundation of legal

210. *Adler v. Duval County Sch. Bd.*, 121 S. Ct. 31 (2000).

211. *Adler II*, 2001 U.S. App. LEXIS 8880, at *9.

212. *Id.* at *50.

analysis to draw upon, the case is worthy of being granted review by the Court. After all, if the case had a compelling enough question, before *Adler II*, for the Court to grant certiorari, by virtue of the fact that *Adler II* was simply a reinstatement of the opinion vacated by the Supreme Court, it follows that the issue is still sufficiently vibrant for the Court to want to resolve it, especially in light of *Adler II*.

If the Supreme Court grants certiorari in *Adler*, the relevant analysis was set out in *Santa Fe*. In light of *Santa Fe*, the first step in analyzing the Duval County policy will involve an assessment of whether the action taken by the students in electing to have a speaker at graduation ceremonies is government action. This question will ultimately turn on a fact specific analysis of the extent to which the Duval County School District exerts control over the content of the message delivered by the student speaker, the extent to which the policy invites a religious message, and the extent to which the District coerces participation in the message. The ultimate resolution of this factual determination should be that the action represented government action.

The Supreme Court should not be persuaded, as was a majority of the Eleventh Circuit, that because the policy appears to be hands off that it does not exert some control over the content of the message. After all, were it not for the policy it would be true that in exactly none of the graduation ceremonies would prayer be allowed to be accommodated, whereas, after enacting the policy, ten out of seventeen graduation ceremonies had some form of religious message. Again, turning to Judge Carnes' dissent, "[s]ixty percent is no perfection, but it is close enough for government work."²¹³

The flip side of that argument, as noted in Judge Marcus' opinion for the majority in *Adler II*, is that the school district does not exert any control because "it cannot be plausibly argued that, on its face, the Duval County policy calls for a student vote on whether to mandate the inclusion of prayer in a graduation ceremony."²¹⁴ This position is tenuous at best, however, based on the logistical limitation imposed by the school district. The school district may not be mandating that the students elect up or down on whether to have prayer, but because of the limitation of the policy to provide the opportunity for student speech, only in the context of an opening or closing message, not to take longer than two minutes, and at a time when prayer had traditionally been offered during past graduations, it would seem that the school district is imposing an element of control over the possible types of messages deliverable. After all, by imposing the two minute limit and by directing that the speech will occur at the beginning and/or end of the graduation ceremony, it looks as if the district has asserted control over content and based on the

213. *Adler II*, 2001 U.S. App. LEXIS 8880, at *55.

214. *Id.* at *23.

context in which the speech is limited, even looks like the district is inviting some form of prayer or other religious solemnization of the graduation.

Another aspect for the Supreme Court to scrutinize, should the Court decide to hear this case, pertains to the level of coerced participation the Duval County School District creates. Based on the extension of Establishment Clause protections to ban prayer at a more voluntary school event such as football games in *Santa Fe*, it would seem that given an event like a high school graduation, the risks of forced participation are much greater. The analysis should focus, as it did in *Santa Fe*,²¹⁵ on those students who must participate, only this time in a graduation context. Though the situation is arguably different from a high school football game, there are still students who mandatorily participate in graduation, such as a band member playing “Pomp and Circumstance” during the graduation ceremony. In addition, unlike going to football games, going through graduation is a one-time right of passage event. Even though attending graduation is not a prerequisite for being awarded a diploma, it signals the end of formal education for many graduating seniors and even for those students pursuing more education, high school graduation is a portal one must pass through on the way to higher education. Because high school graduation is such an important event, mandatory participation should almost be presumed and any action taken by a school district to impose some form of ceremony during graduation should be perceived as coercing the participation of all students participating in the graduation ceremony. As such, the Duval County policy coerces student participation in what likely—based on ten out of seventeen graduation ceremonies—will be a religious ceremony at the beginning and/or end of the graduation ceremony.

The third significant factor in the Supreme Court’s decision in *Santa Fe* that should govern a Supreme Court analysis in *Adler* relates to the secular purpose of the Duval County policy. The Eleventh Circuit found that the Duval County policy had the non-religious purposes of enabling graduating seniors the “opportunity to direct their own graduation ceremony”, “solemnize graduation as a seminal education experience”, and of “permitting student freedom of expression.”²¹⁶ This was a critical determination because, based on *Santa Fe*, had the secular purpose analysis resulted in a finding of a non-secular, religious purpose, the policy would have been facially unconstitutional.²¹⁷ Contrary to the finding of the Eleventh Circuit, when viewed in its overall context, the Duval County policy “evinces an impermissible religious purpose.”²¹⁸ Several factors should play into this

215. See 120 S. Ct. at 2280.

216. Adler II, 2001 U.S. App. LEXIS 8880, at *8; Adler I, 206 F.3d at 1085.

217. 120 S. Ct. at 2281-82.

218. Adler II, 2001 U.S. App. LEXIS 8880, at *41 (Kravitch, J., dissenting).

analysis, everything from whether prayer was routinely a part of past ceremonies to the name of the policy itself. In this case, starting with the title of the memorandum establishing the Duval County policy, “Graduation Prayers”,²¹⁹ much about the school district policy makes the policy look like an attempt to circumvent the Constitutional prohibition on state endorsement of school prayer. After all, as noted earlier, given the option without a school policy to have zero prayer at graduation, in a district where prayer had traditionally been a part of graduation, it seems clear that the purpose of enacting a school policy such as the Duval County School District’s is to ensure that some form of school prayer is preserved. Because the policy was generated with an eye towards finding a way to get around the ban on school endorsed prayer at graduation and because it had the effect of generating, in sixty percent of the graduation ceremonies in Duval County in 1993, for example, some form of religious message, it seems pretty clear that the policy had the impermissible purpose of establishing prayer at graduation ceremonies.

The Supreme Court should grant certiorari in this case and the final outcome should be that the Duval County School District “Graduation Prayers” policy is held to be facially unconstitutional because, at a minimum, it has an impermissible religious purpose. In doing so, the Supreme Court should declare that attempts to circumvent the Establishment Clause by school district policies which are thinly veiled attempts to ensure that prayer remains a part of graduation ceremonies are unconstitutional and resolve the split among the Courts of Appeals on this issue. In the end, as Judge Carnes wrote, “the majority should not be allowed to force its religious views on those in the minority. Our Constitution ensures that when it comes to religion, it is the conscience of the individual rather than the will of the majority that rules.”²²⁰

This is not to say that student-elected, student-led prayer at graduation is necessarily unconstitutional. So long as the message is the manifestation of an individual, based on that individual’s own agenda, the exercise of Free Speech and Free Exercise should be protected. Thus, if a graduating senior, such as the valedictorian, were asked to speak at graduation, there can be no conflict with the Establishment Clause for the valedictorian to offer a religious message during a graduation speech because of the student’s right to Free Speech and Free Exercise. The conflict with the Establishment Clause arises only when the state, in this instance the school, attempts to control the student speech in an effort to impermissibly create the suggestion that prayer should be a part of graduation ceremonies. Unfortunately, line drawing becomes difficult in this context as school districts may, for example, attempt to shift the timing of the two minutes permitted for student speech to, say, the middle of the graduation ceremony. Because prayer is traditionally not delivered in the middle of a

219. 206 F.3d at 1072.

220. Adler II, 2001 U.S. App. LEXIS 8880, at *55-56.

ceremony, future school policies attempting this sort of manipulation may look arguably less and less like attempts to establish prayer. Despite the potential difficulty in developing an all-encompassing rule that would apply in each and every attempt to circumvent the Constitutional prohibition on state establishment of religion, the Supreme Court may get the opportunity to do just that, in the context of student-elected, student-led prayer at graduation ceremonies, if the Court decides to once again consider the *Adler* case.

As for the situation with the family in the introductory hypothetical, the oldest child is definitely between a rock and a hard place and there may not be a straightforward solution to his dilemma. The ultimate resolution of any Establishment Clause challenge to the school policy, in light of *Santa Fe* and maybe ultimately *Adler*, will depend on the level of control exerted by the school district over the content of the message, the degree to which the district encourages religious messages, and the extent of coerced participation. Another factor that will certainly be critical to a determination of the constitutionality of the school district's policy is the purpose of the policy. If the family can show that the purpose of the school policy was to establish prayer at the graduation ceremony then the policy facially violates the Constitution according to *Santa Fe*. Some evidence that the purpose may arguably be impermissible lies in the title of the policy, "Invocation at Graduation." Still more evidence of the policy's purpose might be found by looking at the school district's graduation traditions. If prayer has historically been a part of graduation the more the policy begins to look like it has the impermissible purpose of establishing prayer. Based on *Santa Fe*, it may be that the policy can be successfully challenged. In this hypothetical, a successful challenge would seem particularly gratifying, as the threat of tyranny by the majority and the restriction placed on the teenager's right to Free Exercise are particularly troubling. Unfortunately, based on real-life scenarios,²²¹ it may also be true that social pressures, and sometimes even threats, may be enough to sufficiently discourage challenging what may otherwise be an unconstitutional policy, whereby personal liberty is sacrificed at the hands of tyranny of the majority.

VIII. CONCLUSION

With the decision in the *Santa Fe* case, the Supreme Court appeared to have suggested a resolution to the Circuit split that had developed between the Fifth and Eleventh and the Third and Ninth Circuits. It seemed by remanding the *Adler* case,²²² that the Supreme Court had, in effect, sent an edict to the Eleventh Circuit, the message being that in extending the prohibition against

221. See *infra* note 2.

222. See *Adler v. Duval County School Board*, 121 S. Ct. 31 (2000).

school prayer to an event as voluntary as a high school football game, short of an independent, non-school sponsored message during a graduation ceremony, no school endorsed prayer, student-led, student-initiated or not, will be constitutionally permitted. Hopefully, the ultimate outcome in *Adler* will yield a decision that not only keeps intact the prohibition against state establishment of religion but also keeps intact every individual's right to Free Speech and Free Exercise, no matter what minority belief an individual may espouse. In the end, no person, adult or child, should have to endure the tyranny of government establishment of the majority's beliefs, simply because the majority has the sheer numbers to control an election. The religion clauses should not be read to kindle the idea of toleration, but instead, neutrality and non-favoritism. Nobody's beliefs should have to take a back seat to state interference simply because the majority of a community, at that particular place and time, feels otherwise. In the end, the *Santa Fe* decision represents an important moment in the history of school prayer jurisprudence because it represents an extension of the Establishment Clause to invalidate school policies that endorse religion to activities that extend beyond mandatory classroom participation, whether it be a high school graduation or attending a high school football game. The *Adler* case, then, represents an important crossroads opportunity for the Supreme Court. They should seize this historical moment to grant certiorari and to determine whether and to what extent the Duval County policy has the invidious purpose of school control over religious expression. In so doing, the message from *Santa Fe* should be trumpeted loud and clear, that preventing tyranny of the majority will provide students in public schools with meaningful choices throughout their scholastic experience, up through graduation, free from coercive school policies designed to force toleration at the expense of personal liberty.

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