SUPREME COURT OF THE UNITED STATES

No. 99–62

SANTA FE INDEPENDENT SCHOOL DISTRICT, PETITIONER *v.* JANE DOE, INDIVIDUALLY AND AS NEXT FRIEND FOR HER MINOR CHILDREN, JANE AND JOHN DOE, ET AL.

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

[June 19, 2000]

CHIEF JUSTICE REHNQUIST, with whom JUSTICE SCALIA and JUSTICE THOMAS join, dissenting.

The Court distorts existing precedent to conclude that the school district's student-message program is invalid on its face under the Establishment Clause. But even more disturbing than its holding is the tone of the Court's opinion; it bristles with hostility to all things religious in public life. Neither the holding nor the tone of the opinion is faithful to the meaning of the Establishment Clause, when it is recalled that George Washington himself, at the request of the very Congress which passed the Bill of Rights, proclaimed a day of "public thanksgiving and prayer, to be observed by acknowledging with grateful hearts the many and signal favors of Almighty God." Presidential Proclamation, 1 Messages and Papers of the Presidents, 1789–1897, p. 64 (J. Richardson ed. 1897).

We do not learn until late in the Court's opinion that respondents in this case challenged the district's student-message program at football games before it had been put into practice. As the Court explained in *United States* v. *Salerno*, 481 U. S. 739, 745 (1987), the fact that a policy might "operate unconstitutionally under some conceivable set of circumstances is insufficient to render it wholly

invalid." See also *Bowen* v. *Kendrick*, 487 U. S. 589, 612 (1988). While there is an exception to this principle in the First Amendment overbreadth context because of our concern that people may refrain from speech out of fear of prosecution, *Los Angeles Police Dept.* v. *United Reporting Publishing Corp.*, 528 U. S. ___ (1999), ___ (slip op., at 5–7), there is no similar justification for Establishment Clause cases. No speech will be "chilled" by the existence of a government policy that might unconstitutionally endorse religion over nonreligion. Therefore, the question is not whether the district's policy *may be* applied in violation of the Establishment Clause, but whether it inevitably will be.

The Court, venturing into the realm of prophesy, decides that it "need not wait for the inevitable" and invalidates the district's policy on its face. See *ante*, at 24. To do so, it applies the most rigid version of the oft-criticized test of *Lemon* v. *Kurtzman*, 403 U. S. 602 (1971).[1]

Lemon has had a checkered career in the decisional law of this Court. See, *e.g.*, *Lamb's Chapel* v. *Center Moriches Union Free School Dist.*, 508 U. S. 384, 398–399 (1993) (SCALIA, J., concurring in judgment) (collecting opinions

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[1]The Court rightly points out that in facial challenges in the Establishment Clause context, we have looked to *Lemon*'s three factors to "guid[e] [t]he general nature of our inquiry." *Ante*, at 22–23 (internal quotation marks omitted) (citing *Bowen* v. *Kendrick*, 487 U. S. 589, 602 (1988)). In *Bowen*, we looked to *Lemon* as such a guide and determined that a federal grant program was not invalid on its face, noting that "[i]t has not been the Court's practice, in considering facial challenges to statutes of this kind, to strike them down in anticipation that particular applications may result in unconstitutional use of funds." 487 U. S., at 612 (internal quotation marks omitted). But here the Court, rather than look to *Lemon* as a guide, applies *Lemon*'s factors stringently and ignores *Bowen*'s admonition that mere anticipation of unconstitutional applications does not warrant striking a policy on its face.

criticizing *Lemon*); *Wallace* v. *Jaffree*, 472 U. S. 38, 108–114 (1985) (REHNQUIST, J., dissenting) (stating that *Lemon*'s "three-part test represents a determined effort to craft a workable rule from a historically faulty doctrine; but the rule can only be as sound as the doctrine it attempts to service" (internal quotation marks omitted)); *Committee for Public Ed. and Religious Liberty* v. *Regan*, 444 U. S. 646, 671 (1980) (STEVENS, J., dissenting) (deriding "the sisyphean task of trying to patch together the blurred, indistinct, and variable barrier described in *Lemon*"). We have even gone so far as to state that it has never been binding on us. *Lynch* v. *Donnelly*, 465 U. S. 668, 679 (1984) ("[W]e have repeatedly emphasized our unwillingness to be confined to any single test or criterion in this sensitive area. . . . In two cases, the Court did not even apply the *Lemon* 'test' [citing *Marsh* v. *Chambers*, 463 U. S. 783 (1983), and *Larson* v. *Valente*, 456 U. S. 228 (1982)"]). Indeed, in *Lee* v. *Weisman*, 505 U. S. 577 (1992), an opinion upon which the Court relies heavily today, we mentioned but did not feel compelled to apply the *Lemon* test. See also *Agostini* v. *Felton*, 521 U. S. 203, 233 (1997) (stating that *Lemon*'s entanglement test is merely "an aspect of the inquiry into a statute's effect"); *Hunt* v. *McNair*, 413 U. S. 734, 741 (1973) (stating that the *Lemon* factors are "no more than helpful signposts").

Even if it were appropriate to apply the *Lemon* test here, the district's student-message policy should not be invalidated on its face. The Court applies *Lemon* and holds that the "policy is invalid on its face because it establishes an improper majoritarian election on religion, and unquestionably has the purpose and creates the perception of encouraging the delivery of prayer at a series of important school events." *Ante*, at 26. The Court's reliance on each of these conclusions misses the mark.

First, the Court misconstrues the nature of the "majoritarian election" permitted by the policy as being an elec-

tion on "prayer" and "religion."[2] See *ante*, at 22, 26. To the contrary, the election permitted by the policy is a two-fold process whereby students vote first on whether to have a student speaker before football games at all, and second, if the students vote to have such a speaker, on who that speaker will be. App. 104–105. It is conceivable that the election could become one in which student candidates campaign on platforms that focus on whether or not they will pray if elected. It is also conceivable that the election could lead to a Christian prayer before 90 percent of the football games. If, upon implementation, the policy operated in this fashion, we would have a record before us to review whether the policy, as applied, violated the Establishment Clause or unduly suppressed minority viewpoints. But it is possible that the students might vote not to have a pregame speaker, in which case there would be no threat of a constitutional violation. It is also possible that the election would not focus on prayer, but on public speaking ability or social popularity. And if student campaigning did begin to focus on prayer, the school might decide to implement reasonable campaign restrictions.[3]

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[2] The Court attempts to support its misinterpretation of the nature of the election process by noting that the district stipulated to facts about the most recent election. See *ante*, at 25, n. 24. Of course, the most recent election was conducted under the *previous* policy– a policy that required an elected student speaker to give a pregame invocation. See App. 65–66, 99–100. There has not been an election under the policy at issue here, which expressly allows the student speaker to give a message as opposed to an invocation.

[3] The Court's reliance on language regarding the student referendum in *Board of Regents of Univ. of Wis. System* v. *Southworth*, 529 U. S. ___ (2000), to support its conclusion with respect to the election process is misplaced. That case primarily concerned free speech, and, more particularly, mandated financial support of a public forum. But as stated above, if this case were in the "as applied" context and we were presented with the appropriate record, our language in *Southworth* could become more applicable. In fact, *Southworth* itself demonstrates the impropriety

But the Court ignores these possibilities by holding that merely granting the student body the power to elect a speaker that may choose to pray, "regardless of the students' ultimate use of it, is not acceptable." *Ante*, at 25. The Court so holds despite that any speech that may occur as a result of the election process here would be *private*, not *government*, speech. The elected student, not the government, would choose what to say. Support for the Court's holding cannot be found in any of our cases. And it essentially invalidates all student elections. A newly elected student body president, or even a newly elected prom king or queen, could use opportunities for public speaking to say prayers. Under the Court's view, the mere grant of power to the students to vote for such offices, in light of the fear that those elected might publicly pray, violates the Establishment Clause.

Second, with respect to the policy's purpose, the Court holds that "the simple enactment of this policy, with the purpose and perception of school endorsement of student prayer, was a constitutional violation." *Ante*, at 24. But the policy itself has plausible secular purposes: "[T]o solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition." App. 104–105. Where a governmental body "expresses a plausible secular purpose" for an enactment, "courts should generally defer to that stated intent." *Wallace*, *supra*, at 74–75 (O'CONNOR, J., concurring in judgment); see also *Mueller* v. *Allen*, 463 U. S. 388, 394–395 (1983) (stressing this Court's "reluctance to attribute unconstitutional motives to States, particularly when a plausible secular purpose for the State's program may be discerned

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of making a decision with respect to the election process without a record of its operation. There we remanded in part for a determination of how the referendum functions. See *id*., at __ (slip op., at 16–17).

from the face of the statute"). The Court grants no deference to– and appears openly hostile toward– the policy's stated purposes, and wastes no time in concluding that they are a sham.

For example, the Court dismisses the secular purpose of solemnization by claiming that it "invites and encourages religious messages." *Ante*, at 14; Cf. *Lynch*, 465 U. S, at 693 (O'CONNOR, J., concurring) (discussing the "legitimate secular purposes of solemnizing public occasions"). The Court so concludes based on its rather strange view that a "religious message is the most obvious means of solemnizing an event." *Ante*, at 14. But it is easy to think of solemn messages that are not religious in nature, for example urging that a game be fought fairly. And sporting events often begin with a solemn rendition of our national anthem, with its concluding verse "And this be our motto: 'In God is our trust.'" Under the Court's logic, a public school that sponsors the singing of the national anthem before football games violates the Establishment Clause. Although the Court apparently believes that solemnizing football games is an illegitimate purpose, the voters in the school district seem to disagree. Nothing in the Establishment Clause prevents them from making this choice.[4]

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[4]The Court also determines that the use of the term "invocation" in the policy is an express endorsement of that type of message over all others. See *ante*, at 14–15. A less cynical view of the policy's text is that it permits many types of messages, including invocations. That a policy tolerates religion does not mean that it improperly endorses it. Indeed, as the majority reluctantly admits, the Free Exercise Clause mandates such tolerance. See *ante*, at 21 ("[N]othing in the Constitution as interpreted by this Court prohibits any public school student from voluntarily praying at any time before, during, or after the schoolday"); see also *Lynch* v. *Donnelly*, 465 U. S. 668, 673 (1984) ("Nor does the Constitution require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all

The Court bases its conclusion that the true purpose of the policy is to endorse student prayer on its view of the school district's history of Establishment Clause violations and the context in which the policy was written, that is, as "the latest step in developing litigation brought as a challenge to institutional practices that unquestionably violated the Establishment Clause." *Ante*, at 16, 17, and 22. But the context– attempted compliance with a District Court order– actually demonstrates that the school district was acting diligently to come within the governing constitutional law. The District Court ordered the school district to formulate a policy consistent with Fifth Circuit precedent, which permitted a school district to have a prayer-only policy. See *Jones* v. *Clear Creek Independent School Dist.*, 977 F. 2d 963 (CA5 1992). But the school district went further than required by the District Court order and eventually settled on a policy that gave the student speaker a choice to deliver either an invocation or a message. In so doing, the school district exhibited a willingness to comply with, and exceed, Establishment Clause restrictions. Thus, the policy cannot be viewed as having a sectarian purpose.[5]

The Court also relies on our decision in *Lee* v. *Weisman*, 505 U. S. 577 (1992), to support its conclusion. In *Lee*, we concluded that the content of the speech at issue, a

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religions, and forbids hostility toward any").

[5] *Wallace* v. *Jaffree*, 472 U. S. 38 (1985), is distinguishable on these grounds. There we struck down an Alabama statute that added an express reference to prayer to an existing statute providing a moment of silence for meditation. *Id.*, at 59. Here the school district added a secular alternative to a policy that originally provided only for prayer. More importantly, in *Wallace*, there was "unrebutted evidence" that pointed to a wholly religious purpose, *id.*, at 58, and Alabama "conceded in the courts below that the purpose of the statute was to make prayer part of daily classroom activity," *id.*, at 77–78 (O'CONNOR, J., concurring in judgment). There is no such evidence or concession here.

graduation prayer given by a rabbi, was "directed and controlled" by a school official. *Id*., at 588. In other words, at issue in *Lee* was *government* speech. Here, by contrast, the potential speech at issue, if the policy had been allowed to proceed, would be a message or invocation selected or created by a student. That is, if there were speech at issue here, it would be *private* speech. The "crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect," applies with particular force to the question of endorsement. *Board of Ed. of Westside Community Schools (Dist. 66)* v. *Mergens*, 496 U. S. 226, 250 (1990) (plurality opinion) (emphasis in original).

Had the policy been put into practice, the students may have chosen a speaker according to wholly secular criteria– like good public speaking skills or social popularity– and the student speaker may have chosen, on her own accord, to deliver a religious message. Such an application of the policy would likely pass constitutional muster. See *Lee*, *supra*, at 630, n. 8 (SOUTER, J., concurring) ("If the State had chosen its graduation day speakers according to wholly secular criteria, and if one of those speakers (not a state actor) had individually chosen to deliver a religious message, it would be harder to attribute an endorsement of religion to the State").

Finally, the Court seems to demand that a government policy be completely neutral as to content or be considered one that endorses religion. See *ante*, at 14. This is undoubtedly a new requirement, as our Establishment Clause jurisprudence simply does not mandate "content neutrality." That concept is found in our First Amendment *speech* cases and is used as a guide for determining when we apply strict scrutiny. For example, we look to "content neutrality" in reviewing loudness restrictions

imposed on speech in public forums, see *Ward* v. *Rock Against Racism*, 491 U. S. 781 (1989), and regulations against picketing, see *Boos* v. *Barry*, 485 U. S. 312 (1988). The Court seems to think that the fact that the policy is not content neutral somehow controls the Establishment Clause inquiry. See *ante*, at 14.

But even our speech jurisprudence would not require that all public school actions with respect to student speech be content neutral. See, *e.g.*, *Bethel School Dist. No. 403* v. *Fraser*, 478 U. S. 675 (1986) (allowing the imposition of sanctions against a student speaker who, in nominating a fellow student for elective office during an assembly, referred to his candidate in terms of an elaborate sexually explicit metaphor). Schools do not violate the First Amendment every time they restrict student speech to certain categories. But under the Court's view, a school policy under which the student body president is to solemnize the graduation ceremony by giving a favorable introduction to the guest speaker would be facially unconstitutional. Solemnization "invites and encourages" prayer and the policy's content limitations prohibit the student body president from giving a solemn, yet nonreligious, message like "commentary on United States foreign policy." See *ante*, at 14.

The policy at issue here may be applied in an unconstitutional manner, but it will be time enough to invalidate it if that is found to be the case. I would reverse the judgment of the Court of Appeals.