

OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE
THE SUPREME COURT
OF THE
UNITED STATES

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

CASE NO: 99-62 *c.2*

PLACE: Washington, D.C.

DATE: Wednesday, March 29, 2000

PAGES: 1-55

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IN THE SUPREME COURT OF THE UNITED STATES

3 SANTA FE INDEPENDENT SCHOOL :

4 DISTRICT, :
:

5 Petitioner : _____

6 v. : No. 99-62

7 JANE DOE, INDIVIDUALLY AND AS :

8 NEXT FRIEND FOR HER MINOR :

10 MINOR CHILDREN, ET AL.

Wednesday, March 29, 2000

14 The above-entitled matter came on for oral
15 argument before the Supreme Court of the United States at
16 10:05 a.m.

17 APPEARANCES:

18 JAY A. SEKULOW, ESQ., Washington, D.C.; on behalf of the
19 Petitioner.

20 JOHN CORNYN, ESQ., Attorney General, Austin, Texas; on
21 behalf of Texas, et al., as amicus curiae, supporting
22 the petitioner.

23 ANTHONY P. GRIFFIN, ESQ., Galveston, Texas; on behalf of
24 the Respondents.

25

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P R O C E E D I N G S

(10:05 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument now in Number 99-62, the Santa Fe Independent School District v. Jane Doe, et al.

Mr Sekulow.

ORAL ARGUMENT OF JAY A. SEKULOW

ON BEHALF OF THE PETITIONER

9 MR. SEKULOW: Mr. Chief Justice, and may it
10 please the Court:

Santa Fe Independent School District has adopted a neutral policy which simply permits student-led, student-initiated speech at football games. The policy, which can be found in its entirety at pages 104 and 105 of the joint appendix, allows for the individual student to determine the content of the message. That message may include a prayer at the student's discretion. The policy does not violate the Establishment Clause, and the United States Court of Appeals for the Fifth Circuit is wrong and should be reversed.

21 The Santa Fe policy creates a venue for student
22 expression. It is neutral as to religious or secular
23 speech. The policy serves the important and legitimate
24 goals of solemnizing the event, promoting good
25 sportsmanship and student safety, and establishing the

1 appropriate environment for competition. In fact --

2 QUESTION: Restraints, are they not?

3 MR. SEKULOW: I think it's similar to the
4 topical restriction that you would see in a limited public
5 forum case, a Rosenberger, for instance, in the situation
6 there, where it had to be related to educational mission.
7 Clearly --

8 QUESTION: Well, it's a little more precise and
9 constrained than that, is it not? For example, could the
10 message be, break their necks, make them wrecks, buckle
11 down, boys?

12 MR. SEKULOW: I would think the school
13 district --

14 (Laughter.)

15 MR. SEKULOW: I think the school district would
16 have the authority, and that's more of a Bethel v. Fraser
17 question than an Establishment Clause issue. I think
18 under normal school district authority they can control
19 the nature of what's going to be said in that regard.

20 The policy also specifically states that it can
21 be utilized to establish the appropriate environment for
22 competition. Clearly, Justice Ginsburg, that would not,
23 but that would be a neutral criteria applied. It would
24 not be --

25 QUESTION: Would it not -- rather than an

1 Establishment Clause problem, what if somebody chose to
2 speak on the subject that, all religion's bunk?

3 MR. SEKULOW: We --

4 QUESTION: I mean, does that comport with the --
5 I'm not sure what solemnizing a football game is, but
6 assuming there is such a process --

7 (Laughter.)

8 QUESTION: -- would that comport with it?

9 MR. SEKULOW: Well, I think that in a situation
10 like that it would be perfectly appropriate, if the
11 student felt that was going to create the appropriate
12 environment for competition, to engage in that kind of
13 speech. This is a broad policy. It's not this limited
14 policy here. For instance --

15 QUESTION: Then what does -- just tell me --
16 maybe this is not important, but what is it, what would it
17 be to solemnize a football game? I thought at least it
18 would require religion, or require religious messages to
19 sound religious, and you say no, it doesn't.

20 MR. SEKULOW: No, I --

21 QUESTION: What is solemnization here?

22 MR. SEKULOW: Solemnization is bringing about
23 respect, honor, and dignity, and a secular invocation,
24 even, could take place. It doesn't have to be religious,
25 but a secular solemnized message --

1 QUESTION: What is a secular invocation?

2 MR. SEKULOW: Let every one here -- I ask
3 everybody's participation for student safety, and let's
4 encourage good sportsmanship. That's an invocation.
5 That's petitioning for assistance.

6 QUESTION: Well, that's a nice speech, but it's
7 not what we normally mean by invocation.

8 MR. SEKULOW: But even --

9 QUESTION: And one of the problems, it seems to
10 me, with your case, and one of the problems with the
11 premise of your argument is that it assumes that this
12 language, which we see on the face of the policy now, is
13 descriptive of what, in fact, is going on.

14 And I will be candid to say that it seems to me
15 that it is asking us to shut our eyes to what the sequence
16 of provisions for this practice shows, and the sequence of
17 provisions shows that we started out with a student
18 chaplain and an invocation and, after the lawsuit was
19 brought, the student chaplain became a speaker, and the
20 invocation gained the alternative of a noninvocation, but
21 it seems to me that there isn't a very realistic basis to
22 suggest that anything different is going on, or intended
23 to go on, from what went on and was intended to go on
24 before the lawsuit.

25 MR. SEKULOW: First, this is a facial challenge,

1 and the respondents bear the burden here of establishing
2 that there's no basis upon which the policy can be
3 implemented in a constitutional way.

4 Secondly, there's an independent circuit-breaker
5 here.

6 QUESTION: But the -- on a facial challenge, we
7 are not required to close our eyes to the context in which
8 the language has come to be. We don't wait for a specific
9 application, e.g., a Hail Mary. I guess --

10 MR. SEKULOW: Hail Mary would probably be
11 appropriate.

12 QUESTION: But we don't wait for that, but we
13 don't close our eyes to the context in which the policy
14 arose.

15 MR. SEKULOW: I think that's correct, and the
16 context upon which this policy arose was after the
17 decision in Lee v. Weisman litigation in this case arose,
18 this school district, pursuant to a district court order,
19 adopted a policy which was actually broader than the
20 district court's order, and here I think it's important to
21 emphasize that the individual student selected, if, in
22 fact, there is a decision to have a student give a
23 message, that that student is the circuit-breaker. That
24 student determines the message. There is no way to know
25 what that student's going to say.

1 QUESTION: Let me ask you about that --

2 MR. SEKULOW: Yes, Justice.

3 QUESTION: -- Mr. Sekulow, and to conserve your
4 time I'll just state my concern --

5 MR. SEKULOW: Sure.

6 QUESTION: -- rather than ask a series of
7 questions. I assume that the election is offered to us as
8 a saving feature of the program, yet an election doesn't
9 mean anything without a campaign, and if we had a campaign
10 it seems to me that the students might say, I will be a
11 very good speaker, representative of the school, because I
12 am well-trained and well-motivated to give inspirational
13 prayers. Another student has a poster saying, no prayers
14 in school, and they have a school election, based on the
15 issue of whether or not there should be prayer.

16 Now, that is the kind of thing, I think, that
17 our Establishment Clause wants to keep out of the schools.
18 We have a school electoral mechanism, a governmental
19 mechanism for selecting a speaker, and one of the criteria
20 is, I should think, whether or not prayers are going to be
21 given.

22 MR. SEKULOW: There's two responses --

23 QUESTION: And if -- and I'll just finish. And
24 if it's not, then it seems to me we're just avoiding the
25 question, and the hard question is, can you give a prayer?

1 MR. SEKULOW: Well, there is not a majority vote
2 on prayer in this case. First of all, the way that the
3 structure is set up, the individual student determines
4 content and, secondly, with regard to the approach here,
5 that individual student will make the decision whether, in
6 fact, to include a secular message or a religious message.

7 QUESTION: But the point of the question, of
8 course, is that there may well be a campaign among
9 students to be chosen and, if that's the situation, then
10 how do you respond to Justice Kennedy's question?

11 MR. SEKULOW: The district court -- and this
12 policy came out of the context of a district court order,
13 which specifically stated that there would be no
14 campaigning allowed on campus. Now, that was implemented
15 by the district court judge and served as the basis --

16 QUESTION: But it could be off-campus.

17 MR. SEKULOW: Sure it could, certainly, but
18 again there is an independent speaker here, and that is
19 the student and no one knows, whether they campaigned or
20 not, what that high school student might say, and I think
21 specifically to strike this policy down requires that the
22 Establishment Clause now place an affirmative obligation
23 on the school district to censor only the religious
24 message of the student and that --

25 QUESTION: Do you think there's a First

1 Amendment problem in a rule that prohibits campaigning?

2 MR. SEKULOW: Well, that would be a different
3 case, and --

4 QUESTION: But it would be rather strange to be
5 relying on such a rule.

6 MR. SEKULOW: Well, that's the policy that the
7 district court issued and that is -- the order, rather,
8 that the district court issued.

9 QUESTION: Well, I guess Justice Kennedy's
10 problem would be eliminated if the school simply said, the
11 captain of the football team shall deliver the solemnizing
12 message or invocation.

13 MR. SEKULOW: I think it would be -- again, as
14 long as it's a neutral criteria --

15 QUESTION: And if that's the only thing
16 that's -- you know, that has to be fiddled with in this
17 arrangement we haven't achieved a whole lot here.

18 MR. SEKULOW: Well, I suspect that --

19 QUESTION: Or perhaps they could say the student
20 with the highest grade, or something else, and then you
21 wouldn't have the election, and then it would be okay.

22 MR. SEKULOW: As long as there's a neutral
23 criterion. Here --

24 QUESTION: Now, before this, I guess before Lee
25 v. Weisman the school used to have somebody deliver a --

1 an invocation --

2 MR. SEKULOW: There was a chaplain.

3 QUESTION: -- which was -- was it nonsectarian
4 religious?

5 MR. SEKULOW: There is nothing in the record
6 regarding the specific content of the prayers under this
7 policy, and there's nothing in the record really about --

8 QUESTION: It could have been, though.

9 MR. SEKULOW: It could have been. That was up
10 to the individual student.

11 QUESTION: Whereas under this policy you must
12 allow the student, if he wishes, to invoke Jesus Christ,
13 or --

14 MR. SEKULOW: That's correct.

15 QUESTION: -- or say a Hail Mary, or anything
16 else.

17 MR. SEKULOW: That's correct.

18 QUESTION: That's a real advance.

19 MR. SEKULOW: The school district has taken a
20 hands-off approach here. If it's individual student
21 speech -- in Mergens, the opinion there focused on, and
22 again it was mentioned in Rosenberger, that there's a
23 crucial difference between the Government as a speaker and
24 a private speaker, and in Lee v. Weisman, Justice Kennedy,
25 the context there was the assumption that the State was

1 the speaker. The State ordered --

2 QUESTION: Well, when the student goes to the
3 community as the representative of the school, I should
4 think we would want to have some ongoing supervision by
5 the regular faculty. We should encourage students to go
6 out into community affairs. I'm just not sure what the
7 faculty ought to do if they are selecting the speaker and
8 if five members are sitting around on a faculty committee,
9 do we encourage this young person to give prayers or don't
10 we? It seems to me that is the question we ought to
11 answer in this case --

12 MR. SEKULOW: That's correct.

13 QUESTION: -- if we can.

14 MR. SEKULOW: And we stay neutral. This school
15 district has adopted a hands-off policy. The policy
16 itself states, on page 104 of the joint appendix, that the
17 student volunteer who is selected by his or her classmates
18 may decide what message or invocation to deliver.

19 QUESTION: Yes, but what do we do about the
20 history?

21 MR. SEKULOW: I think the history is relevant
22 only in this context, that before there was the decision
23 Lee v. Weisman, school districts like this one and others
24 around the country, there was prayer going on and speeches
25 going on in sporting events, or at sporting events and, in

1 this particular case, this school district is trying to
2 comply with this Court's Establishment Clause
3 jurisprudence by adopting a neutral --

4 QUESTION: Mr. Sekulow, would it comply equally
5 well if the school district said, now, football is a big
6 event in this school district and everybody comes to the
7 game Friday night, so we want to have everybody, all the
8 registered voters -- there are more adults than the school
9 students. They are interested in what's going on. The
10 electorate will be the registered voters, and then there
11 will be people who come forward as volunteers, same thing.
12 Just substitute for the student body of the high school
13 the electorate of the district. Would that be equally
14 constitutional?

15 MR. SEKULOW: Well, I think the question first
16 would be whether the -- a school district would have the
17 authority to call a general election. I suspect not.
18 Secondly, again if it's a neutral criteria --

19 QUESTION: Whoever -- the school district says,
20 we would like this to be as democratic as possible, so we
21 want to use the democratic process.

22 MR. SEKULOW: If it's -- it would depend -- it's
23 too late in the day to argue that facts and circumstances
24 don't have an impact. Of course it would, and I think in
25 that particular case it would depend whether the policy's

1 neutral.

2 This policy allows the student to participate,
3 to continue to have participation throughout the process.
4 They could also vote not to have a message under this
5 policy. The school district was operating under the
6 context of litigation, where there was a district court
7 order that specifically stated, adopt a prayer-only policy
8 pursuant to a Fifth Circuit decision, Jones v. Clear
9 Creek. This school district --

10 QUESTION: Mr. Sekulow, I don't think that --
11 perhaps I didn't convey clearly enough what I meant.
12 Registered voters, I think you shied away from that,
13 because that sounds like the Government designating the
14 electorate.

15 Here, too, the student -- these are not students
16 acting individually when they're voting. It's the
17 students as a body, as an electoral body that the school
18 district has designated that will be the decision-maker.

19 MR. SEKULOW: Justice Ginsburg, students and
20 adults and members of the community vote throughout both
21 the student's academic life and when they're an adult, and
22 I think if a school district was trying to inculcate the
23 idea of a democratic society and participation, that it
24 would encourage a student voter.

25 The question about whether the adults could

1 vote, I think if there was authority assuming that they
2 could vote, as long, again, as it's a neutral policy and a
3 neutral practice, that's what --

4 QUESTION: Well, we had a case decided just this
5 term dealing with submitting to student election the
6 participation and use of student fees for certain purposes
7 and expressed some concerns about that mechanism, didn't
8 we?

9 MR. SEKULOW: That's correct, and in Southworth
10 the concern was the issue of viewpoint neutrality in
11 regard to majoritarian vote. Here, the viewpoint
12 neutrality is expressed in that the individual student is
13 the speaker, and there is no majoritarian vote under this
14 policy. This is a plurality.

15 QUESTION: Well, I don't have too much -- in
16 Southworth we'd already -- our predicate was there'd
17 already been invasion of First Amendment rights, and this
18 was just a corrective, and here the whole question is, ab
19 initio, what are the --

20 MR. SEKULOW: That's correct. I think --

21 QUESTION: -- the rights of this -- it seems to
22 me what we're concerned about is avoiding the schools
23 becoming a forum for religious debates, and one thing we
24 could do is say, it is unconstitutional, illegal to say a
25 prayer at all. Never. This is a very costly intervention

1 when the school seeks to go out into the community. I
2 understand that.

3 MR. SEKULOW: There would be very serious First
4 Amendment issues.

5 QUESTION: Now, if we don't adopt that wooden,
6 rigid rule, then we still are looking for some mechanism
7 to ensure neutrality, to keep divisiveness out, and I
8 haven't seen what it is in this case.

9 MR. SEKULOW: The neutrality -- sorry.

10 QUESTION: I think the election thing doesn't
11 work, for the reasons I suggested and that Justice
12 Ginsburg has been asking you about.

13 MR. SEKULOW: Well, I think the ultimate
14 circuit-breaker exists here even under this election
15 context, and that is, the independent, individual student
16 who decides to make the message, if they're selected by
17 their peers, determines the content. I think we --

18 QUESTION: Well, but Mr. Sekulow, even if we --
19 and I'm -- because of my first question I don't -- I'm
20 sure you will understand I don't find that enough of an
21 answer.

22 But assuming it is, if the student who is chosen
23 exercises that student's choice to pray, we are still
24 faced with a system in which it is the school or the
25 school district that provides the forum in which this is

1 going to appear, requires the attendance of a certain
2 number of students to be there and, therefore, requires
3 those students to sit there while a prayer is going on.
4 What more do we need to decide the Establishment Clause
5 case?

6 MR. SEKULOW: I think, Justice Souter, this is a
7 policy that this school district adopted utilizing a
8 neutral criteria. We're presuming that we know what the
9 students are going to say.

10 QUESTION: And I'm assuming -- I'm assuming for
11 the sake of the question --

12 MR. SEKULOW: Okay.

13 QUESTION: -- that the criterion will be
14 accepted as neutral.

15 MR. SEKULOW: Okay.

16 QUESTION: And I'm taking it to the next step,
17 and I'm saying, if the student who is given this neutral
18 option chooses to use that option to pray, the school
19 district is forcing schoolchildren to sit there and
20 participate in this praying ceremony.

21 MR. SEKULOW: I --

22 QUESTION: And it seems to me that's as far as
23 we have to go to decide the case, even on your premise.

24 MR. SEKULOW: Justice Souter, in Lee v. Weisman
25 your concurrence, footnote 9, states that if there is a

1 neutral policy and the student -- and the speaker, not a
2 State actor, engages in speech of their own choice, that
3 even if it's religious, it doesn't violate the
4 Establishment Clause.

5 QUESTION: We're talking here not about a
6 neutral choice to engage in kinds of speech. That was
7 going on, for example, in Rosenberger. I didn't accept
8 the characterization, but that was the Court's
9 characterization of it, and that's the law.

10 MR. SEKULOW: But then we're left with --

11 QUESTION: This is not a neutral speech policy.
12 The premise of my question is that we are not having a
13 discussion about religion. It is not merely religious
14 subject matter. It is religious worship. It is an act of
15 religious practice.

16 MR. SEKULOW: And that -- if the student decides
17 to engage in a prayer, that is speech protected by the
18 First Amendment, and to then say that a policy --

19 QUESTION: As private speech. The question is
20 whether that speech can be, in effect, involuntarily
21 inflicted upon those who may not want it by the power of
22 the State.

23 QUESTION: Mr. Sekulow, is --

24 MR. SEKULOW: We think not. The student doesn't
25 become a State actor.

Justice Scalia.

QUESTION: Is there a distinction between prayer as violating the First Amendment and proselytization, or for that matter criticizing religion as violating the First Amendment?

MR. SEKULOW: All speech is protected by the First Amendment, and I think that the school district would be placed in the position of censor if they were to determine that that was not going to be allowed.

QUESTION: That may be a weakness in Rosenberger, but it has nothing to do, it seems to me, with the point that is being raised here.

MR. SEKULOW: I think it has -- with respect, Justice Souter, has everything to do with it, because it requires the affirmative obligation to censor the student's speech.

Mr. Chief Justice, I'd like to reserve the remainder of my time for rebuttal.

QUESTION: Very well, Mr. Sekulow.

General Cornyn, we'll hear from you.

ORAL ARGUMENT OF JOHN CORNYN

ON BEHALF OF TEXAS, ET AL., AS AMICUS CURIAE,

SUPPORTING THE PETITIONER

GENERAL CORNYN: Mr. Chief Justice, may it
be Court:

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1 Respondents ask this Court to simply assume the
2 worst of the school officials involved and of the students
3 who will ultimately be the speakers under this policy,
4 which has yet to be applied because its application has
5 been suspended while this litigation goes forward.

6 We submit that under the standard of review of a
7 facial challenge that respondents' burden is heavy to show
8 that it could never be constitutionally applied, and we
9 believe this school district, just as in Agostini, is
10 entitled to the presumption that school officials will
11 faithfully discharge their duties according to the law, as
12 laid down by this Court.

13 There is no evidence to support the conclusions
14 offered by the respondents that this is somehow a sham, or
15 a pretext. Indeed, the trial court below found that any
16 incidents which gave rise to this litigation were isolated
17 incidents.

18 QUESTION: General, do you assert that this
19 facial challenge has to fail simply because it is not
20 necessarily the case that whatever student is selected
21 will deliver a prayer or a religious invocation? Is that
22 alone enough to defeat the facial challenge?

23 GENERAL CORNYN: No, Your Honor. We believe
24 that this policy is one which the school officials
25 attempted to come up with in light of this Court's

1 decision in Lee v. Weisman, in light of the controlling
2 Fifth Circuit precedent, at least that the district court
3 felt was controlling.

4 Jones v. Clear Creek, they were trying to work
5 their way out of a very practical problem. How do we
6 avoid getting sued for Establishment Clause violations?
7 How do we avoid getting sued for a violation of the free
8 speech clause?

9 QUESTION: I thought your answer to Justice
10 Scalia would be yes, it's completely sufficient. We don't
11 know how this policy is going to --

12 QUESTION: You surprised me.

13 QUESTION: Maybe nobody will --

14 (Laughter.)

15 GENERAL CORNYN: I misspoke if that was my
16 answer. I did -- I -- excuse me. I did misspeak, then.
17 We believe this policy does pass muster under a facial
18 challenge, because we don't know what the choice is
19 ultimately going to be by the student, the selected
20 speaker. There is no way that respondents or anyone else
21 can predict how the student chosen through this neutral
22 mechanism is ultimately going to respond to this --

23 QUESTION: As soon as it's in place once and
24 they give one prayer, then the case is back. Is that
25 right?

1 GENERAL CORNYN: I think not, Your Honor, and
2 let me just -- unless the Court is going to say the school
3 district must engage in viewpoint discrimination --

4 QUESTION: But that's your basic substantive
5 argument. I mean, that was the -- I understand that.

6 Is there any -- I mean, there are prayers in
7 public places, they're called invocations, in Congress,
8 here, at the inauguration of the President and so forth,
9 and I gather that in Texas this is a big community event,
10 but I take it no one is saying that for that reason they
11 could have an invocation of God's name.

12 GENERAL CORNYN: Well, the only reason we
13 believe --

14 QUESTION: I mean, it's --

15 GENERAL CORNYN: -- that this policy is
16 constitutional is because it is neutral with regard to the
17 message.

18 QUESTION: General Cornyn --

19 QUESTION: All right. So you're not saying --

20 QUESTION: -- on the neutrality, may I ask you,
21 that's been repeated by Mr. Sekulow and you. In, I think
22 it was Justice Kennedy's opinion in Rosenberger, he
23 defined neutral criterion this way. He said, there must
24 be good reason to believe that over time the criterion
25 will yield expression reflecting the whole spectrum of

1 political speech.

2 So if you're going to assert on a facial
3 challenge that you have a neutral criterion, what reason
4 is there to believe in this case that, over time, what we
5 will see as a result of the policy the State has
6 initiated, that there will be the full spectrum of speech
7 resulting?

8 GENERAL CORNYN: Of course, this facial
9 challenge, the policy that has yet to actually be applied,
10 we can only be left to speculate, but let me suggest that
11 in *Bethel v. Fraser*, Matthew Fraser, who was disciplined
12 for making a sexually explicit speech when nominating a
13 fellow student for student council, was later elected by
14 his peers to speak at the graduation ceremony, and I think
15 respondent's argument is really just wrong in that it
16 assumes what the nature of the speech will ultimately be,
17 the criterion upon which the student will be selected.

18 QUESTION: General, I assume that that statement
19 in *Rosenberger*, which said the full spectrum of political
20 speech, focused on political speech because that's what
21 the policy that the school put in place was intended to
22 foster.

23 If it's a limited-purpose forum in this case I
24 think all you would have to defend is that there would be
25 the full spectrum of solemnizing and of solemnizing

1 speech, which would be students saying, you know, let's
2 pause in memory of the members of the football team last
3 year who got killed in a car crash, or whatever.

4 Why would you want to defend the proposition
5 that all manner of political speech would -- I mean,
6 surely all manner of political speech wouldn't be allowed
7 in this case. It's only solemnizing speech that --

8 GENERAL CORNYN: Under Cornelius and other cases
9 by this Court the school officials can keep the students
10 on topic for the purpose for which the opportunity to
11 speak is allowed, but solemnization --

12 QUESTION: Let's assume that they stay on topic
13 and, taking Justice Ginsburg's question as limited to
14 that, I think she's asking a factual question, not a
15 question about precedent but a question about fact, what
16 could be expected, and let me just add a footnote to her
17 question. Is there any reason that anyone would expect
18 that we would get a solemnizing speech to the effect that
19 religion is bunk?

20 GENERAL CORNYN: I just don't think any of us
21 know, and I don't think the Court should have to guess.

22 QUESTION: But the question is, do we have
23 reason, if we're going to apply this definition of
24 neutrality, and assuming it's appropriate, do we have
25 reason to believe that, over time, that kind of a spectrum

1 of expression on religious subjects is going to occur
2 here, and I mean, the point of my question is, I don't
3 think there's any reason to expect that there's going to
4 be a speech at those football games saying religion is
5 bunk.

6 GENERAL CORNYN: Respectfully, Your Honor, we
7 just don't know, and I don't think --

8 QUESTION: Well --

9 QUESTION: That's what's worrying -- look, from
10 an Establishment Clause point of view, this is a
11 mechanism. It seems to me that the school district has
12 figured out a way to have a prayer, but the mechanism
13 itself seems to leave minority religions out more. I
14 mean, instead of a general prayer, you'd have something
15 that reflected the majority view, which is understandable,
16 but from the point of view of the -- I'm not saying it's a
17 bad speech.

18 I am saying, though, that wouldn't the minority
19 person be likely more left out under the policy that you
20 advocate today, that even under a policy that said some
21 kind of nondenominational prayer like an invocation was
22 okay.

23 GENERAL CORNYN: Your Honor, in a world where
24 free speech is valued, where private free speech is
25 valued, we are all inundated by messages we disagree with

1 and find ourselves in a minority status from -- on a
2 daily, perhaps hourly basis.

3 QUESTION: That's true, but the purpose of the
4 Establishment Clause is to allow families to raise their
5 children in the religion of their choice, and we have
6 schools favoring one religion over another, and giving
7 that kind of message, isn't that very contrary to the
8 purpose?

9 GENERAL CORNYN: Respectfully, Justice Breyer, I
10 disagree. This is not the Government speaking. This is a
11 private individual speaking as a matter of their own
12 volition and free choice.

13 QUESTION: Well, but it is through the mechanism
14 of the school organizing a majoritarian vote to determine
15 it, which is a very unusual sort of an arrangement. I
16 don't think we've addressed anything like that before.

17 GENERAL CORNYN: Justice O'Connor, of course, as
18 this Court's observed, there are always going to be
19 interaction between school officials and religious
20 expression, and it's impossible to totally separate the
21 two. This --

22 QUESTION: Well, presumably if this mechanism is
23 approved here the same thing could be done in every
24 classroom every day, and let the students decide each day
25 on a speaker for the day to start the class and so forth.

1 I think, you know, we have to look at the
2 extended application of this concept.

3 GENERAL CORNYN: We certainly do not submit that
4 this could occur in the classroom which, as the Court
5 observed, risks the appearance of Government entanglement,
6 and with compulsory education requirements and the like.
7 This is an extracurricular event.

8 QUESTION: But may I ask this question, just to
9 be sure I have it in mind?

10 GENERAL CORNYN: Yes.

11 QUESTION: The person who's elected gives the
12 solemnizing invocation for every football game at home,
13 right?

14 GENERAL CORNYN: Message or invocation.

15 QUESTION: Whatever it is, but repeated
16 messages, so that if the school disapproved of the first
17 message that the person gave, the person could continue to
18 give the same message over and over again? Say he used
19 foul language in his message, for example. Could they
20 tell him not to do that next time?

21 GENERAL CORNYN: Yes, sir, they could. They
22 could, Justice Stevens. The Court has made clear that
23 they can -- that the school officials can maintain good
24 order and make sure that --

25 QUESTION: And supposing he made an appeal to

1 one particular denomination. Say 90 percent of the people
2 in school were Mormons, and he made some specific appeal
3 to people of that religion, could they suggest next time
4 he not do that?

5 GENERAL CORNYN: If it was not on topic --

6 QUESTION: Well, it's right within -- squarely
7 within the language of the policy. Could they suggest to
8 him that maybe that had gone overboard a little bit?

9 GENERAL CORNYN: May I answer the question?

10 QUESTION: Yes, you may, shortly.

11 GENERAL CORNYN: It would be impermissible for
12 school officials to edit or censor the content or the
13 speech, as long as it was on topic.

14 QUESTION: Even if it's overtly sectarian?

15 GENERAL CORNYN: As long as it's on topic,
16 that's correct.

17 QUESTION: Thank you, General Cornyn.

18 GENERAL CORNYN: Thank you.

19 QUESTION: Mr. Griffin, we'll hear from you.

20 ORAL ARGUMENT OF ANTHONY P. GRIFFIN

21 ON BEHALF OF THE RESPONDENTS

22 MR. GRIFFIN: Mr. Chief Justice, may it please
23 the Court:

24 In July of 1996 there was a hearing held in the
25 district court in Galveston, Texas. In that hearing, the

1 court, the district court, took testimony and part of the
2 testimony came from the Dogs, as they're affectionately
3 known, in this case.

4 QUESTION: Could I ask you about that? That's
5 just a curiosity I have in this case. I don't even know
6 who the plaintiffs are. Is there -- how come it's Jane
7 Doe? I mean, are these minors? Is -- or what?

8 MR. GRIFFIN: One parent is -- one parent, one
9 group of plaintiffs were Catholic, a Catholic family.
10 Another group of families were a Mormon family.

11 QUESTION: Do people have rights to sue
12 anonymously in Federal court? Is anybody who just doesn't
13 want it known that he's bring a lawsuit, he's ashamed of
14 it for one reason or another, can sue anonymously? I
15 didn't know we could do that.

16 MR. GRIFFIN: I think the jurisprudence is, if
17 there is a threat of intimidation, if there's a threat of
18 violence, if there's a threat -- and I think there was
19 testimony that -- within the temporary injunction when the
20 case first started that there was this threat, and the
21 district court had entered an order instructing not to
22 ferret out the names, and when there was an attempt to
23 ferret out the names --

24 QUESTION: Well, how does the district court
25 have authority to do that?

1 MR. GRIFFIN: Well, he had an attempt -- he had
2 the authority to protect the plaintiffs, in other words,
3 from any threat. The names of the plaintiffs were known
4 to the defendant.

5 QUESTION: What was the threat?

6 MR. GRIFFIN: The threat was, we had information
7 that certain children were intimidated, certain children
8 were pushed, certain plaintiffs, certain people who were
9 not plaintiffs had to pull their children out of the
10 school because of protesting the prayer policies that
11 existed in Santa Fe, and that there was a intimate threat
12 that the district court saw it necessary to protect.

13 QUESTION: Well, do you think the district court
14 just has complete discretion to grant anonymity that way?

15 MR. GRIFFIN: I don't think the district court
16 has the complete discretion, and I think that one of the
17 issues that we briefed at the trial court below was that
18 issue, and when we got to the -- into the hearing of July
19 of 19 and 96, the district court said, now that we're
20 going into a hearing, these names must be revealed, but we
21 will do it under protection. He did not seal that
22 courtroom. He asked the press not to publish their names,
23 but their names ultimately became --

24 QUESTION: Their names ultimately were --

25 MR. GRIFFIN: Yes. Their names ultimately

1 became known to the public and -- but they were not
2 published in the newspaper, and in this hearing one of the
3 most fundamental things that happened in the hearing after
4 the district court had gone through the problem of the
5 injunction, after the district court had instructed not to
6 ferret out the names, after the court had heard testimony
7 in terms of intimidation, the district court looked at the
8 plaintiff, known as Susan Doe in the record, and he asked
9 her, what is the big deal?

10 And she looked at the court and she said, I
11 teach my children at home religion, and I don't want to go
12 down, and I don't think it's necessary for me to go down
13 to the school and interview every one of the teachers and
14 find out their religious faith. That's the backdrop of
15 this case.

16 In this case, the policy of Santa Fe Independent
17 School District is unconstitutional on its face and it's
18 also unconstitutional as applied. It endorses religion,
19 its whole purpose was religion, and what, in fact, they
20 do, they weave a web, and they seek to have this Court
21 ignore their history.

22 On page 94 of the joint exhibit, joint appendix
23 of this Court, it has the chaplain policy that existed
24 long after Lee v. Weisman and if my memory serves me well,
25 Lee v. Weisman was decided in 1992. This lawsuit was

1 brought in 1995, and that chaplain's description, that
2 official description, says that he will lead -- he or she
3 will lead the Pledge of Allegiance, that he or she will
4 say a prayer at all meetings, not just some meetings, all
5 meetings, that he or she will lead the prayer at football
6 games and baseball games, or athletic events, and in the
7 joint stipulations that the parties filed --

8 QUESTION: Of course, it wasn't clear at the
9 time -- in fact, it still isn't clear, is it? -- that Lee
10 v. Weisman applies to football games. It surely applies
11 to commencements, where the -- your client's child would
12 presumably have to go, but your client's child doesn't
13 have to go to football games, and it may well be that the
14 rigid rule we adopted in Lee v. Weisman that you cannot
15 have even nondenominational invocation at graduation,
16 would not apply to football games.

17 MR. GRIFFIN: Justice Scalia, I think that's a
18 good point, but one of the things -- we oftentimes speak
19 to our lawyers, and one of the things we cited in our
20 briefs was, the lawyer for Santa Fe admitted to the
21 district court that Lee v. Weisman had not been
22 extended -- excuse me. Jones had not been extended to
23 football.

24 In other words, the Fifth Circuit had allowed
25 graduation -- had allowed graduation prayer in a limited

1 context, and the court said, how about football, and
2 counsel admitted, well, it hasn't been extended, but we
3 want to press it as far as we can press it. That's the
4 admission of their lawyer.

5 Now, even if it's not extended --

6 QUESTION: Is that so strange that an attorney
7 would want to press a particular decision the way his
8 clients wanted to go as far as it could be pressed?

9 MR. GRIFFIN: It's strange in this context, that
10 you have a official policy that's still in existence in
11 1996, 1995 that defines a chaplain to do prayer at all
12 events and all meetings, and that's a student officer.

13 QUESTION: That isn't the present policy, is it?

14 MR. GRIFFIN: Well, it changes, and if I can
15 address the Court's -- what, in fact, occurred, Chief
16 Justice, what in fact occurred is, after the lawsuit was
17 filed, the school district then said, let's conduct a vote
18 to determine whether there's prayer, in other words,
19 majoritarian vote. They vote even before the change of
20 the policy.

21 QUESTION: Well, what's that got to do with it?

22 MR. GRIFFIN: Well, they then changed the
23 policy, and they changed the policy in September of 1995,
24 and in September of 1995 they changed it to read,
25 prayer -- excuse me. The board has elected to allow an

1 invocation, and then, once they looked at the policy once
2 more, and I know this Court has instructed us not to take
3 the caption of a -- an act to make a determination as to
4 the meaning of the act.

5 The caption of the act said, prayer at football
6 games. The meaning of the act, when you look at the very
7 words, when they are modified in September of 1995, they
8 included the board, which is government-only involvement,
9 had elected to allow --

10 QUESTION: Mr. --

11 MR. GRIFFIN: -- an invocation.

12 QUESTION: I'm curious to know why you're going
13 into these antecedent details when the question we granted
14 certiorari on is the present policy.

15 MR. GRIFFIN: Two reasons, Your Honor. If we go
16 to the amendment in February of 1996, the present policy,
17 that present policy was changed to include the words,
18 message and/or invocation.

19 QUESTION: And how does that bear on your
20 argument?

21 MR. GRIFFIN: Well, two points. There were
22 existing policies in existence at the school district that
23 allow silent prayer. There was existing policies in the
24 school district that allow people -- the students to
25 express their religious beliefs. There were -- there was

1 no need for to basically isolate prayer and give it a free
2 pass, and that's what those present policies did.

3 Answering the Chief Justice's question directly,
4 I don't think we can divorce ourselves from the history
5 and the context of this policy.

6 QUESTION: Well, I'm not saying that you can't
7 try your case or argue the case that way. On the other
8 hand, for this Court to take individual school districts
9 and say that we don't accept at face value what their
10 policy is puts us on a very difficult course for later
11 cases.

12 I take it that even if this school district had
13 had no prior history of the type you describe, that you
14 would object to this policy.

15 MR. GRIFFIN: Yes. It's majoritarian prayer.
16 Absolutely.

17 QUESTION: Well, it can be majoritarian prayer,
18 and you expect that in most cases it will be, but it need
19 not be.

20 MR. GRIFFIN: No.

21 QUESTION: I mean, on it's face, it need not be.

22 MR. GRIFFIN: On it's face, it's majoritarian
23 prayer, that in fact the school board comes in --

24 QUESTION: No, but the majority can elect
25 somebody who does not want to give a prayer.

1 MR. GRIFFIN: They can.

2 QUESTION: So then it's not necessarily
3 majoritarian prayer.

4 MR. GRIFFIN: And they can elect to give, they
5 can elect a person to give a prayer for the next 10 years
6 who will not give a prayer.

7 QUESTION: But you can't say that in every case
8 it's going to produce a prayer. You just can't. Now, you
9 may suspect that in most cases it will, but you know, when
10 we appoint chaplains in the Armed Forces on the basis of
11 what the needs of the members of the Armed Forces are, you
12 can predict that the majority of them are going to be
13 Christian chaplains, but that doesn't mean that the
14 Government is favoring one sect over another.

15 Why does it necessarily mean here that the
16 Government is favoring prayer over nonprayer? It's just
17 opened it up and say, you do what you want. It knows what
18 the result will be, as you predict.

19 MR. GRIFFIN: Well, we -- well, may I address
20 that, Justice Scalia?

21 QUESTION: I hope you will.

22 MR. GRIFFIN: Okay. I will attempt so.

23 It doesn't open the forum. It doesn't create a
24 diversity of views. It doesn't create a circumstance
25 where a student can stand up and say, you know, religion,

1 to borrow the words of Justice Souter, religion is bunk.
2 There's nothing in the face of this policy that allows --
3 and I think the Attorney General has admitted as much. He
4 has stood before this Court and said, well, if it's
5 outside the realm, we can -- the student can still be
6 disciplined. There are still governmental problems.

7 QUESTION: Why -- I don't think that you have to
8 show, in order to prove this is a neutral law, that
9 somebody can get up and say religion is bunk.

10 I mean, we have a provision for a Thanksgiving
11 proclamation. Now, I assume a President can, if he
12 wishes, issue a neutral one that is nonreligious, or he
13 can issue a religious one. I cannot imagine his issuing
14 one that says religion is bunk, because it does not
15 pertain to the subject matter for which the proclamation
16 was designed, and it's the same thing at football games.
17 The only reason religion is bunk is out is because it's
18 not within the subject matter of solemnizing the occasion.

19 MR. GRIFFIN: Student-initiated prayer in my
20 mind has it that if I have a different faith, or faith, I
21 can pray before the football game, I can pray after the
22 football game, I can even pray during the football game.
23 In other words -- but I don't need the Government's forum.
24 I don't need to hold the Government hostage and say, I
25 have an absolute right to take over the microphone, to

1 take over the stage. You have to let me speak.

2 QUESTION: So you would --

3 MR. GRIFFIN: That's not the concept --

4 QUESTION: So you would say that even if these
5 speakers were chosen by lot, and they were widely
6 representative speakers on a statistical basis, that if,
7 by chance, one out of five were giving prayers, that it
8 would be an unlawful exercise one -- that one-fifth of the
9 time?

10 MR. GRIFFIN: It depends on, Justice Kennedy,
11 what the policy would say. If it says, you're chosen by
12 lot to give a message and/or invocation, absolutely right,
13 the policy still fails.

14 QUESTION: They're chosen by lot to represent
15 the school and give the school a good name.

16 MR. GRIFFIN: Tougher question. I think they
17 can -- they -- if they're chosen by lot to give the school
18 a good name, then I think that's a tougher question. It
19 may be an as-applied case. In other words, we look at the
20 history and see how it's applied.

21 QUESTION: Well, I'd like to know just a little
22 bit about that. In Justice Scalia's example, where you
23 want to recognize the fact that there's been an accident
24 where team members have been killed, or some terrible
25 tragedy is -- it would seem to me very odd not to have an

1 invocation in that circumstance.

2 MR. GRIFFIN: I think oftentimes when there's
3 disaster people bond in their churches. I think
4 oftentimes people express their religious beliefs. In
5 fact, under the current policies in the stipulations, and
6 I think it was tab 9, the policies allowed for expressing
7 religious beliefs. I don't think that you can subject it
8 to a majority vote, majoritarian vote, and then say that's
9 a neutral policy.

10 QUESTION: Well, let me ask you this. Suppose
11 that the school had no stated policy but did allow the
12 captain of the team before every game to get up and say
13 something, and suppose the captain on occasion says
14 something in the nature of a prayer, is that somehow
15 invalid?

16 MR. GRIFFIN: I still think that it's
17 problematic. I think that's also --

18 QUESTION: I would have thought that would not
19 be school-directed at all.

20 MR. GRIFFIN: I think, in borrowing this Court's
21 language, this Court oftentimes has said that we look at
22 the particular facts of a case. We would want to know,
23 for example, is this directive consistent. It is the
24 same --

25 QUESTION: Then you would have an as-applied

1 challenge, and in this --

2 MR. GRIFFIN: Yes.

3 QUESTION: -- very case the language, as you
4 pointed out, is message or invocation. Suppose all that
5 the policy said was message and dropped, or invocation.
6 Could you maintain a facial challenge?

7 MR. GRIFFIN: I've thought about that, and let
8 me see if I can address it this way. You can still, in my
9 way of thinking, maintain a facial challenge even if it
10 just says message, and I think that one of the problems
11 that we face in terms of the facial challenge is, I don't
12 think we can divorce ourselves from the history and the
13 context of what's going on.

14 If that speech is given at the same time, if
15 it's given at the same time that the chaplain gave his
16 speech, everyone understands what's going on there.

17 Everyone --

18 QUESTION: So you can never purge the past. If
19 you put even a policy that looks like it has nothing to do
20 with religion --

21 MR. GRIFFIN: I think you can purge the past. I
22 would never say that, and Chief -- excuse me, Justice
23 Ginsburg, I would never say that.

24 QUESTION: If it says just message, that seems
25 to be purged. I mean, it isn't even alluding to anything

1 that even sounds like a prayer, as you believe invocation
2 does.

3 MR. GRIFFIN: Justice Scalia, this Court has
4 oftentimes looked at pretext. In fact, the Fifth Circuit
5 described this policy, even --

6 QUESTION: But not even a facial challenge. I
7 mean, bear in mind this is a facial -- I mean, I think the
8 question is whether you could maintain a facial challenge
9 if they just used the word message.

10 MR. GRIFFIN: And I know it sounds strange, but
11 I'm willing to say that yes, you can maintain a facial
12 challenge even if they took away the word, invocation --

13 QUESTION: Mr. --

14 MR. GRIFFIN: -- because if it's --

15 QUESTION: No, I didn't mean to interrupt you.

16 MR. GRIFFIN: If it's given at the same time, if
17 it's given under the same policy, if everything is
18 consistent with the past policy, the Court is entitled to
19 look at that, and when you look at the words of this, it
20 is subject to a vote, the issue of --

21 QUESTION: Okay, but your answer, I take it -- I
22 think your answer would be different if the school in
23 order, in its view, to comply with Lee and Weisman ended
24 the practice of football prayers, and then at some time
25 later, maybe even simultaneously, enacted a new policy

1 that at 2:00 every afternoon in the school 5 minutes will
2 be given over during a break between periods for an
3 elected student to give any message that the student
4 wanted, would you find that that, the 5-minute message
5 statement, would equally be susceptible to a facial
6 challenge on Establishment Clause grounds?

7 MR. GRIFFIN: I'd still have a problem with it.

8 QUESTION: You would even then?

9 MR. GRIFFIN: I would still have a problem with
10 it. I would not have a problem if it was a diversity of
11 views. I would not have a problem if it opened the forum
12 up consistent with Mergens, consistent with Lamb Chapel,
13 and opened the forum up to create a diversity of views.

14 QUESTION: Okay, students chosen by lot, then.

15 A rotation of students.

16 MR. GRIFFIN: It gives both --

17 QUESTION: In the course of the year, 180
18 students could speak.

19 MR. GRIFFIN: By lot, by grade point average,
20 by, you know --

21 QUESTION: But if you had the 180 students --
22 well, it wouldn't be 180. If you had a student a week at
23 every football game, given the choice to speak at the time
24 the invocation used to occur, you would have the problem.

25 MR. GRIFFIN: Yes, and there's another problem

1 with --

2 QUESTION: So context is everything.

3 QUESTION: Why is -- why -- can I -- I don't
4 what to -- if you're finished with this, because I've a
5 different question I wanted to ask.

6 MR. GRIFFIN: Okay. May I --

7 QUESTION: Yes.

8 MR. GRIFFIN: There's another problem, though.

9 There has been a description that this is an
10 extracurricular activity. It doesn't take a creative
11 genius to start the first part of the day with the notion
12 that the first part of class is extracurricular. The
13 first 15 minutes of every day we're going to have
14 extracurricular. We pass a policy that says, wink, wink,
15 students, you understand, we're going to have a message.

16 QUESTION: Well, but I --

17 MR. GRIFFIN: They conduct a -- excuse me.

18 QUESTION: I think that if you say
19 extracurricular but you have to be in class, that's not
20 the same as going to a football game. Nobody has to go to
21 a football game.

22 MR. GRIFFIN: In the briefs of the parties,
23 Chief Justice, there has been a description of football
24 where they deminimize football. One of the amicuses says
25 football is football in Texas. We supported the amicus

1 and said, football is football. The district court said,
2 football is awfully more important in Texas.

3 QUESTION: Well, it may be more important in the
4 eyes of lots of people than classes, but is different in
5 that nobody -- am I right in saying that nobody is
6 required to go to a football game?

7 MR. GRIFFIN: The band, Chief Justice, is.

8 QUESTION: Well --

9 MR. GRIFFIN: One of our plaintiffs was a band
10 member.

11 QUESTION: Well, say students. Students who are
12 not in the band or on the team.

13 MR. GRIFFIN: Students who are not in the band,
14 the cheerleaders, anyone who supports the team.

15 QUESTION: Is anybody forced to be a
16 cheerleader, or a band member, or a football player?

17 MR. GRIFFIN: When you're a teenager, yes.

18 (Laughter.)

19 MR. GRIFFIN: And that's spoken from experience.
20 In the --

21 QUESTION: It seems to me that part of the
22 problem is that it's very important for kids to have
23 school activities after hours. That's when they keep out
24 of trouble, their advisors are close hand, at close hand,
25 and what we seem to be saying in order to accept your

1 position is that we want minimum guidance from the
2 schools. That's somewhat counterintuitive.

3 MR. GRIFFIN: But there's not minimum guidance
4 in this policy, and I understand the Court's dilemma, but
5 there's -- in this policy itself, they admit, even though
6 when speaking to the Court -- the policy itself admits
7 that there is guidance. They not only set the forum up,
8 they have interaction of the principal, who gives
9 direction on the election.

10 As the Attorney General says, if the speech is
11 improper, we can still discipline. That is not minimal
12 guidance. That is not a diverse forum, and if you look at
13 the brief of the respondent, at no point in time do they
14 tell this Court what type of forum it is.

15 I don't see any words saying it's a limited
16 forum. I don't see a word saying it's a public forum,
17 because what, in fact, the Fifth Circuit said was, it was
18 a sham, and the only way that you make it anything other
19 than a sham is, you have to ignore you're electing one
20 speaker to speak at all the games on a majority vote, and
21 the Fifth Circuit not only called it a sham, it said the
22 only way you can do it is put your tongue in cheek and
23 ignore the facts in this case.

24 QUESTION: Suppose I thought that there are
25 certain public events where you can have a -- call it

1 solemnizing, or I don't know the word to use to describe
2 it, but you can invoke God's name -- say the Inauguration,
3 say the meeting of the Court, say Congress sessions.
4 Certain public events, you can.

5 MR. GRIFFIN: Absolutely.

6 QUESTION: If absolutely, then absolutely we
7 then have to draw a line between the ones you can and the
8 ones you can't, and why -- that's what I'd like you to
9 focus on, and there are certainly a lot of people who say,
10 look, high school football games in small communities are
11 really not all that different from the Inauguration,
12 frankly.

13 (Laughter.)

14 QUESTION: They're big public events, and so if
15 you're trying to draw a line, cut through all this and
16 just say it's not like a graduation, it's a big public
17 event, and it's exactly the same thing, and I'd just like
18 you to focus upon that.

19 MR. GRIFFIN: In reading this Court's opinions,
20 it has admonished we in the public that this area of law
21 is not necessarily consistent, in other words, straight
22 across the line.

23 QUESTION: Suppose I wanted --

24 MR. GRIFFIN: And that's acceptable. I think
25 that's acceptable, and it's acceptable to this degree. I

1 think that the debate that goes on in Congress is a little
2 bit different.

3 Now, we can take notice that in -- with respect
4 to the chaplain, even though it's part of a legislative
5 act, they've had this same debate. That's how divisive
6 religion oftentimes becomes in the fiat, that when they
7 seek to nominate a chaplain who was someone other than
8 Protestant, all -- everything broke loose.

9 (Laughter.)

10 MR. GRIFFIN: And it became part of the debate.

11 Now, I recognize that it is not a straight-line
12 consistency, but I think, and I will submit to the Court
13 this posture is prudent with respect to secondary schools
14 has been consistent.

15 QUESTION: I don't get your point. The
16 congressional chaplain is unconstitutional?

17 MR. GRIFFIN: No, I didn't say that, and I would
18 never say that.

19 QUESTION: Oh, then therefore anything that
20 could lead to some sectarian controversy is not
21 necessarily unconstitutional.

22 MR. GRIFFIN: Absolutely.

23 QUESTION: You cannot eliminate that possibility
24 100 percent without driving religion out of public life
25 entirely.

1 MR. GRIFFIN: Absolutely. When we drive down
2 the street, we pray to our God. It's part of our idiom.

3 QUESTION: You're right on the point I'd like
4 you to address, because whether it's a straight line or a
5 crooked line, or whatever the line is, you agree there is
6 a line, and my question is, why doesn't high school
7 football fall on the permissive side of the line rather
8 than the impermissible side? That's what I'd like you to
9 focus on. Why?

10 MR. GRIFFIN: Schools are different.

11 QUESTION: Because?

12 MR. GRIFFIN: Because --

13 QUESTION: Anything associated with a school is
14 more likely to be on the impermissible side of the line,
15 even if it's extracurricular and a community event?

16 MR. GRIFFIN: Absolutely.

17 QUESTION: Because?

18 MR. GRIFFIN: Anyone --

19 QUESTION: Because?

20 MR. GRIFFIN: Because children need that type of
21 protection. Children, the school district works as a
22 parent. This Court's case law, for example, in discipline
23 cases oftentimes says that these children can be
24 disciplined because they work as parents, and they don't
25 have the same rights as an adult. That's clear.

1 QUESTION: But Mr. Griffin, some school
2 functions are educational. The school is acting as a
3 parent to the children, teaching them, education.

4 But other school functions in many communities
5 are social. It's the focus of social activity, and my
6 impression is that that's what school football games are
7 in Texas. There's very little of the instructional
8 involved in it. It is a community exercise.

9 MR. GRIFFIN: With due respect to --

10 QUESTION: I'll bet you there are even people
11 who go to those games who don't have any kids in the
12 school.

13 MR. GRIFFIN: With due respect to Your Honor,
14 athletic events serve a tremendous function throughout
15 this country. It teaches leadership. It teaches
16 following rules. It teaches following the rules of the
17 game. It teaches sportsmanship. They serve a tremendous
18 function. They're just as part of that school as any
19 other event.

20 And when they put on the side of that stadium
21 the Santa Fe Indians, when they invite folks in, and they
22 bus them in through those buses, when the principal and
23 everyone else shows up, and there's a social pressure that
24 you've got to go to the football game, and when we idolize
25 football players to such a degree that they obtain special

1 rank in our schools, absolutely, they're part of the
2 school system, as well as the pep rally that we hold
3 during the school, before we ever -- if a major game is
4 coming up, there's a pep rally, and we let everybody out,
5 and we go idolize our football game.

6 So I respectfully disagree that with respect to
7 football, football is football, and it is part of our
8 system.

9 QUESTION: But in stressing the importance of
10 football, I don't understand you to be making a
11 distinction between, say, dramatic plays, other assemblies
12 that might be less popular in the community. Would you
13 say that this policy would be all right if it were limited
14 to school concerts, school dramas, any place where the
15 schoolchildren are assembled?

16 MR. GRIFFIN: No, I would not say this policy
17 would be all right under drama or any other play, or any
18 other circumstance and the reason is, it still should
19 apply to football as well as baseball, as well as drama,
20 is because there's still that pressure.

21 When we get those slips to tell us that we have
22 to spend extra money to buy a uniform for our child that
23 we don't want to go to, we're compelled as parents because
24 our school districts expects it of us, so it applies
25 across the board.

1 This Court has said --

2 QUESTION: Excuse me, social compulsion is
3 certainly not enough. I mean, in many communities you
4 could say, oh, all the kids belong -- they're socially
5 compelled to belong to the Boy Scouts. That doesn't
6 render the Boy Scouts, you know, the Government for
7 purposes of what things it can do and can't do.

8 MR. GRIFFIN: I agree.

9 QUESTION: So you can't just use social pressure
10 alone as the justification.

11 MR. GRIFFIN: And I have not attempted to do
12 that. I have attempted, Justice Scalia, to address your
13 concern that football was somehow different and it was
14 outside the realm of the regular function, the classroom,
15 and that we can somehow say, well, since it's football,
16 let's just let them pray, let's let them do anything they
17 want.

18 And there's not a school district in this
19 country -- they would cringe, and the administrators would
20 cringe if I as a lawyer stood up in front of a board and
21 said, you know what, this is football, they should be able
22 to do anything they want, and I think that's what I was
23 attempting to address.

24 This Court has said that we should not ever
25 subject the right of free speech and press and fundamental

1 rights of liberty and property to a vote, and it should
2 not depend on the outcome of a vote.

3 This Court has also said in Southworth that
4 majoritarian vote is simply not viewpoint-neutral, and
5 this whole notion that somehow this becomes viewpoint-
6 neutral as we change the words from chaplain to message --
7 excuse me, to invocation, and then message or invocation,
8 is to put our heads in the sand and ignore the culture and
9 the historical phenomenon of what is happening in Santa
10 Fe, Texas.

11 It has been my honor. I thank the Court.

12 QUESTION: Thank you, Mr. Griffin.

13 Mr. Sekulow, you have 3 minute remaining.

14 REBUTTAL ARGUMENT OF JAY A. SEKULOW

15 ON BEHALF OF THE PETITIONER

16 MR. SEKULOW: Thank you, Mr. Chief Justice.

17 First, this is a facial challenge. This policy
18 has never been applied, never been implemented. There is
19 not a religious speech exception to the First Amendment.
20 The idea that a student in a talent show would be told, it
21 would be appropriate to sing John Lennon's song, Imagine,
22 but another student would not be able to sing Amazing
23 Grace is censorship.

24 The position of the respondents is that there is
25 an affirmative obligation to censor only one type of

1 speech, even if it was just a message policy.

2 QUESTION: Well, there is only one speech under
3 the policy that the school board has adopted. That's why
4 you're bringing in all the cases where the religious group
5 was one among many. Here, whoever speaks, it's just one
6 speaker. No one else can talk.

7 MR. SEKULOW: Well, in that context, the Equal
8 Access Act was triggered if there was only one
9 noncurriculum-related student group, so the fact that it's
10 one speaker --

11 QUESTION: Then there -- there's another to have
12 equal access. Here, there isn't. It's one alone. It's
13 not one among many.

14 MR. SEKULOW: And that one student, that one
15 student determines the content of their message. There is
16 no majoritarian vote here on the content of the message.
17 The disclaimer's in the policy. It states on page 104
18 that the student volunteer who is selected determines the
19 content of the message. That is private speech.

20 To make -- to have these individual students
21 become Government speakers -- and that's what this would
22 require, that an individual student, selected by her
23 peers, determines to give a content of a message, say a
24 nonprayer, just talks about the importance of
25 sportsmanship, that student message would be okay. But if

1 that same student the next week, or the next home football
2 game, were to give a prayer --

3 QUESTION: If under this policy it turned out
4 that every speech was an invocation, including of the
5 Deity, then what would you say about an as-applied
6 challenge?

7 MR. SEKULOW: Well, I would say this is a facial
8 challenge and that would be an as-applied challenge, and
9 there would have to be empirical evidence that, in fact,
10 there was forum domination.

11 But here again, though, this is individual
12 student speech, and even if there was one student speaker,
13 that student made -- the first week of the home football
14 game give a secular message, and the next week a prayer,
15 there's no -- the student is the circuit-breaker here, and
16 the important issue in our view is that in fact you were
17 to have this policy, which does protect a message and/or
18 invocation.

19 To strike it down requires there be an
20 affirmative obligation to censor a student speaker, and
21 that would be because the student speaker might --

22 QUESTION: But the student speaker, at least on
23 this record that we have, and we have a brief to that
24 effect, says, I'm not going to try to disguise what I'm
25 doing. I want to say a prayer, and that's what I'm going

1 to do. In fact, didn't she even sue to establish her
2 right to say a prayer?

3 MR. SEKULOW: The Court's referring to the Ward
4 litigation and interesting, there, the school district was
5 actually sued because, in trying to comply with the Fifth
6 Circuit Court of Appeals decision, they adopted a
7 guideline that said, message only, and specifically stated
8 that there would be no religious message being allowed to
9 be given at all, and a district court judge issued a
10 temporary restraining order saying that that's viewpoint
11 discrimination, which is exactly our point.

12 QUESTION: But you're switching from the point
13 that I was making. Isn't it somewhat imaginary to say, we
14 have to wait when we're told, I'm going to be honest about
15 it. I want to give a prayer, not some message.

16 MR. SEKULOW: Mr. Chief Justice, I see my time
17 has expired.

18 CHIEF JUSTICE REHNQUIST: Thank you, Mr.
19 Sekulow.

20 (Laughter.)

21 (Whereupon, at 11:04 a.m., the case in the
22 above-entitled matter was submitted.)

23

24

25

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

SANTA FE INDEPENDENT SCHOOL DISTRICT, Petitioner v. JANE DOE,
INDIVIDUALLY AND AS NEXT FRIEND FOR HER MINOR CHILDREN, JANE
AND JOHN DOE, MINOR CHILDREN, ET AL.
CASE NO: 99-62

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Donna M. Federico

(REPORTER)