

No. 03-71278

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IN THE SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 2003

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BUSHWOOD COUNTY SCHOOL BOARD,

*Petitioner,*

v.

KARL SPACKLER,

*Respondent.*

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**On Writ of Certiorari to the United States Supreme Court**

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**BRIEF FOR THE PETITIONER**

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September 19, 2003

Counsel for Petitioner  
Number 314

## **QUESTION PRESENTED**

Whether Bushwood County School Board's policy that allows student speakers at an awards ceremony violates the Establishment Clause of the First Amendment.

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## STATEMENT OF THE CASE

Each year, the Bushwood County High School (BCHS) holds an Awards Ceremony to honor its students' academic achievement. *Spackler v. Bushwood County Sch. Bd.*, 4 D.3d 919, 919 (14th Cir. 2003). During the ceremony, BCHS recognizes those students in each grade who achieved *cum laude* status, as well as the valedictorian and salutatorian of the graduating class. *Id.* The school invites all award recipients to the ceremony, but the school does not require them to attend, nor does it refuse honors to those who do not attend the ceremony. *Id.*

The Bushwood County School Board (Board) governs body for BCHS and its policies. In addition, the Board is involved in the process of inviting speakers to BCHS, and has invited both secular and religious speakers to various events at BCHS, including the graduation and awards ceremonies. *Id.* For the vast majority of years between 1923 and 1992, the Board and BCHS invited members of the clergy to give a religious invocation prior to the Awards Ceremony. *Id.*

In 1992, the Board changed its speaker policy in light of the decision in *Lee v. Weisman*, 505 U.S. 577 (1992). *Spackler*, 4 D.3d at 919. This new policy expressly permitted an invocation at the beginning of the Awards Ceremony, but it left the issue of whether to have an invocation and who should give the invocation up to a student vote. *Id.* at 919-20. The student council at BCHS conducted the votes, and they polled only the students who were to receive awards at the ceremony. *Id.* at 920. The students first voted whether to have a student give an invocation and if the majority wanted an invocation, a second vote determined which student award recipient would pray. *Id.* This policy was in effect from 1993 until 2000, and during six of the eight years one of

the selected student gave a religious invocation. *Id.* During one year there was no prayer, and during one year a student gave an offensive and vulgar speech mocking what is known in the Judeo-Christian tradition as “the Lord’s Prayer.” *Id.* After this generally offensive prayer, the Board modified its policy to allow a school official to review of the speaker’s invocation. *Id.* The Board limited this power of review by the school to a non-substantive ability to edit elements of vulgarity, profanity, obscenity, libel and slander from the prayer. *Id.*

In 2000, during a Board meeting open to the public, a parent and local attorney informed the Board of the Supreme Court’s decision in *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000). *Spackler*, 4 D.3d at 920. This parent felt that the Board’s current policy on speakers at the Awards Ceremony violated the First Amendment Establishment Clause. *Id.* After hearing this, the other parents in attendance offered opinions both for and against permitting prayer at the Awards Ceremony. *Id.*

After this meeting, the Board drafted a new policy concerning speakers at the Awards Ceremony. *Id.* The new policy again allowed for a student vote on the issue of the speaker at the Awards Ceremony, but this policy made no express mention of prayer or religious invocation. *Id.* Instead, the new policy referred only to an “opening message.” *Id.* Another new element of the Board policy was that if the students voted to have an opening message, the students who want to speak at the ceremony must present their proposed message to the students eligible to vote. *Id.* As before, the administration reserved only the non-substantive editing power to review the speech for vulgarity, profanity, obscenity, libel and slander. *Id.* at 921.

The Board explained that this new policy attempted to value the opinions of the parents and students in the school district. *Id.* The Board made clear that the new policy intended to recognize that the Board could not lawfully require prayer. *Id.* The Board stated that it wanted students to be involved in their ceremony, and to do so by expressing their own secular or religious views. *Id.* The Board also emphasized that its power of review was only non-substantive, with no review power over the subject content. *Id.*

The Respondents in this case are a sophomore honor student at BCHS and his father. *Id.* They sought an injunction preventing a speech from being delivered at the 2003 Awards Ceremony and any ceremony thereafter. *Id.* The Respondents alleged that the Board policy encouraged prayer at the Awards Ceremony and thus violated the First Amendment. *Spackler v. Bushwood County Sch. Bd.*, 833 D. Supp. 58 (M.D.D. 2003). The District Court held that the policy of allowing students to decide awards assembly speakers did not violate the establishment clause under the test created in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and that the Board policy did not place an impermissible amount of psychological pressure on students to participate in religious exercises. *Id.*

On appeal, the Respondents asked the United States Court of Appeals for the Fourteenth Circuit to determine whether the Board policy was facially unconstitutional. *Spackler*, 4 D.3d at 921. The court followed the precedents of *Lee* and *Santa Fe* and ruled that the Board policy at issue did violate the Establishment Clause and was therefore unconstitutional. *Id.* at 923-925. The court also determined that under the *Lemon* test, the Board policy failed, because it had no secular purpose and the policy allowed and encouraged a student to present a prayer at the Awards Ceremony. *Id.* at 922-23. Petitioner filed a petition for a writ of certiorari, which this Court granted.

## SUMMARY OF ARGUMENT

The United States Supreme Court has refused to adopt one single test to determine Establishment Clause cases. In *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971), however, the Court developed a rough guide for drawing the often indistinct line between permissible and impermissible government interaction with religion. This test requires a secular purpose for the state action, a primary effect that neither advances nor prohibits religion, and an avoidance of excessive entanglement with religion.

The Bushwood County School Board policy allowing for student speakers at an awards ceremony survives all three elements of the *Lemon* test. The policy does serve a secular purpose in that it allows student expression at a ceremony held in the students' honor and it also provides a way to solemnize the awards ceremony. The policy's primary effect neither advances nor inhibits religion but rather encourages student views, either secular or religious in nature. Finally, the policy does not create an excessive entanglement of the government with religion because the Board has a limited role in the entire speaker process.

The Respondents' claim also fails under the *Lee* coercion analysis and the *Santa Fe* private versus state-sponsored speech examination. Unlike the policy in *Lee*, the Board's policy does not create pervasive state involvement, does not compel attendance and participation in a religious exercise at an event of singular importance to every student, and the Board's policy permits objectors the option to avoid the ceremony. The Board's policy is also distinguishable from *Santa Fe* in that the student speech is private speech. The selected student's speech is not subject to content or topic regulations, and the policy does not require that an invocation or religious message be given.



## DISCUSSION

### **I. WHILE THE SUPREME COURT IS NOT BOUND TO USE IT, THE BUSHWOOD COUNTY SCHOOL BOARD POLICY SURVIVES ALL THREE PARTS OF THE *LEMON* TEST.**

#### **A. THE SUPREME COURT IS NOT CONFINED TO A SINGLE TEST TO DETERMINE THE RESULT OF ESTABLISHMENT CLAUSE CHALLENGES**

Determining the constitutionality of state statutes and policies under the Establishment Clause is an extremely fact-sensitive process, and the result of the challenge depends on the particular facts involved. The Court has explained that the purpose of the Establishment Clause is “to prevent, as far as possible, the intrusion of either [the church or the state] into the precincts of the other.” *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971). The Court has also recognized, however, that it is not always possible to have a total separation between the two, as it is inevitable that there will be some interaction between government and religious groups. *Id.* As a result, the Court has consistently declined to “take a rigid, absolutist view of the Establishment Clause.” *Lynch v. Donnelly*, 465 U.S. 668, 678 (1984). Due to the complexity of the society in which we live, and its emphasis on diversity, an absolutist approach to Establishment Clause cases would seem overly simplistic, and would fail to take in the wide spectrum of realities in the world today. *Id.*

While precedent clearly serves as a guide in the decision-making process of the Court, often the Court’s holding in Establishment cases has come from individual facts specific to the case before the court. The Court has closely examined the challenged policy or statute in order to determine whether it truly establishes a religion or religious faith or tends to do so. In *Lynch*, the Court referred to this scrutiny as a “line-drawing process” in which the Court tries to determine where to draw the sometimes crooked line

between acceptable and barred relationships between church and state. 465 U.S. at 678-679.

In the “line-drawing process,” the Court has repeatedly declined to adopt one single test for determining the result of the Establishment Clause challenge. Nevertheless, the Court has, in most Establishment Clause cases, used the test developed in *Lemon* at least as a starting point for its consideration of the facts of the case. *Lemon*, 403 U.S. at 612-13. In the *Lemon* test, the Court asks whether the challenged law or policy has a secular purpose, whether its principal or primary effect is to advance or inhibit religion, and finally, whether it creates an excessive entanglement of government with religion. *Id.*

#### B. THE SCHOOL BOARD POLICY HAS A SECULAR PURPOSE

The first criterion of the *Lemon* test is that the state action, policy, or statute must have a secular purpose. *Lemon*, 403 U.S. at 612. If the statute does not pass this first criterion, then the Court does not need to consider the second or third criteria. *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985). The test does not require that *every* reason for the policy be secular, but there must be at least *one* secular purpose behind the policy. *Lynch*, 465 U.S. at 680 (emphasis added). In looking at the reasons for the state action, the Court does not focus solely on the religious aspects of the activity. *Id.* To do so, the Court has said, would lead to the invalidation of the state or governmental action in every challenge brought under the Establishment Clause. *Id.* The *Lynch* Court also indicated that even if a government action lacks a secular purpose, the Court has only invalidated such actions if it is clear that the statute or activity was motivated solely by religious considerations. *Id.*

The Bushwood County School Board (Board) policy permitting student speakers at the Awards Ceremony does have a secular purpose. The Board policy permits students who are award recipients to have an opportunity to direct their own ceremony by selecting a speaker from among themselves. In addition, it permits student freedom of expression, by allowing the student to form his or her own speech, subject only to censorship for vulgar or libelous content. In addition, the student speaker's speech can serve as a solemnization of this special year-end Awards Ceremony, during which student achievement is praised and rewarded. The policy may have *a* religious purpose in that it allows sectarian speech by a student, but clearly, here, the secular purposes of the speech are both more definite and prominent.

In applying this part of the test, the Court has also found it appropriate to ask whether the government or state actor's intention in creating the legislation or policy is to endorse or disapprove of religion. *Wallace*, 472 U.S. at 56 (1985). The First Amendment requires that a statute must be invalidated if it is entirely motivated by a purpose to advance religion, even though it may pass the first criterion because it has at least one secular purpose. *Id.* The Court will consider the plain text of the statute, as well as any stated purpose the government actor gives for the statute or policy, to determine whether there is a plausible secular purpose. *See, e.g., Mueller v. Allen*, 463 U.S. 388, 394-395 (1983) and *Wallace*, 472 U.S. at 65 (Powell, J. concurring).

In the explaining the policy, the Board states that it is attempting to reflect the views of all of its constituents (the students and parents of the Bushwood County schools). The Board adopted this new policy after hearing the varied opinions of parents at an open meeting, and so it is plausible to assume that the Board attempted to draft a

policy that would appease both those for and those against student prayer at the awards ceremony. In other words, the Board states that its policy will neither advance religion nor inhibit it; that it is a policy neutral toward religion. The Board also states that this policy “recognizes that the Board cannot lawfully call for a prayer.” *Spackler v. Bushwood County Sch. Bd.*, 4 D.3d 919, 921 (14th Cir. 2003). The Board, therefore, makes clear that its policy is intended not to call for prayer, as it understands that to do so would be illegal. If, as here, there is a plausible secular purpose for the Board action, either in the text or in the stated purpose of the policy, and where it appears from the record that the Board has stated that its policy neither endorses nor advances religious messages over secular ones, then the Court should generally defer to that stated intent. *See Comm. for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 773 (1973) (discussing court deference to stated intent). In this matter, therefore, the Court should find that the Board policy passes the first criterion of the *Lemon* test.

### C. THE SCHOOL BOARD POLICY HAS A PRIMARY EFFECT THAT NEITHER ADVANCES NOR PROHIBITS RELIGION

The second criterion of the *Lemon* test is similar to the first. Under this element, the principal or primary effect of the State’s action must be one that neither advances nor inhibits religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971). An endorsement of religion in general, or of a particular religion violates the Establishment Clause because it puts the “power, prestige, and financial support of government” behind a religion or a belief, which puts “indirect coercive pressure upon religious [or non-religious] minorities to conform” to the government’s approved faith. *Engel v. Vitale*, 370 U.S. 421, 431 (1962). The “endorsement” test does not prevent federal or state actors from acknowledging religion or from considering religion as they make laws or policies.

*Wallace v. Jaffree*, 472 U.S. 38, 70 (1985) (O'Connor, J. concurring). Instead, the endorsement test prevents government actors from conveying or attempting to convey a message that the government prefers a religion or particular set of religious beliefs. *Id.* Essentially, the *Lemon* endorsement inquiry is whether the government's purpose is to endorse religion and whether the statute conveys a message of endorsement. *Id.* at 69.

In her concurrence, Justice O'Connor declares that the crucial question under the second prong of the *Lemon* test is whether the "[Board] has conveyed or attempted to convey the message that [students] should use the [opening message] for prayer." *Wallace*, 472 U.S. at 73. In this case, the Board has not conveyed or attempted to convey that the opening message should be a prayer. In fact, the Board expressly states that it cannot lawfully call for a prayer, and that its new opening message policy should prevent the Board as a State actor from requiring the students to pray. Here the Board does not endorse one religion over another nor does it endorse religion over non-religion, but rather permits the student speaker to choose whether his or her opening message will be secular or sectarian.

Finally, Justice O'Connor's *Wallace* concurrence states that the endorsement test is subject to an objective test: Would an objective observer who knew the text of the policy, the history behind the policy, and the implementation of the policy, perceive it as a state endorsement of prayer or religion? *Wallace*, 472 U.S. at 76. In the instant case, an objective observer would not perceive an endorsement of prayer from the plain text of the policy, or its stated purpose. The Board is clearly trying to avoid any endorsement of prayer, and thus changed its policy to comport with more recent Establishment case precedent. Throughout the history of the policy, the Board did endorse prayer, and the

Board does state that this policy is not a *radical* departure from prior policies (emphasis added). This is a true statement, in that the policy could still potentially allow for prayer, although it does not require it. However, the Board does seem to recognize that this policy is nevertheless a departure, albeit not a radical one, because now the Board does not mandate nor endorse religion and/or prayer. Finally, in the implementation of the policy, there is no sign of Board endorsement of prayer, as now the students are in control of the process of whether to even have a speaker, and if so, who the speaker will be, based on hearing his speech. Not all of the speeches have been religious, and the Board has only controlled non-substantive aspects of the speech. In total, an objective observer would be hard pressed to find the primary effect of this policy to be endorsement of prayer or religion. The actual secular effects of solemnization and student expression outweigh any potential religious effect this policy may have, and thus, the policy passes the second prong of the *Lemon* test.

#### D. THE SCHOOL BOARD POLICY AVOIDS EXCESSIVE ENTANGLEMENT WITH RELIGION

The third prong of the *Lemon* test attempts to determine whether the State policy avoids excessive entanglement of the state with religion. *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971). In *Lemon*, the Court looked at two state statutes that involved salary supplements and reimbursements paid to teachers of secular subjects in nonpublic schools. *Id.* at 607-09. The Court found that the statute required “comprehensive, discriminating, and continuing state surveillance” in order to ensure that the State respected the limits of the First Amendment. *Id.* at 619. This surveillance and the various statute restrictions gave rise to the excessive state entanglement with religion in *Lemon*. *Id.*

According to *Lynch*, the question of entanglement is one of kind and degree. 465 U.S. at 684. The Board policy at issue in this case does not benefit any religious institutions. It does not create a policy of giving financial aid to religious groups, and it creates no on-going relationship between the Board and religious groups. In addition, the Board has a limited degree of involvement with religion as a result of this policy. Unlike in *Lee v. Weisman*, 505 U.S. 577, 587 (1992), the Board here has no pervasive involvement in the potential religious activity that may result from its policy. The students, not a school official, decide whether a religious message may be given; the students, not a school official, select the speaker; and the school official does not suggest any content nor provide content restrictions beyond the bounds of basic decency and prevention of illegal libel or slander. The Board here is not put in the place of doing anything more than an annual review of potentially religious content. This does not rise to the level of entanglement present in *Lemon* or *Lee*.

Political divisiveness is another element of the entanglement of church and state. If the State policy or law creates political divisions along religious lines, the State has created an evil that the First Amendment intended to prevent. *Lemon*, 403 U.S. at 622. Under our system, the Constitution has determined that government is to be entirely excluded from the arena of religion, and it is impermissible for the government to become entangled with religion in the democratic political system. *Id.* at 625. In this case, parents spoke out at the open board meeting on both sides of the issue of whether to have prayer at the Awards Ceremony. There is, as a result, a potential for political divisiveness at the local Board level. However, “political divisiveness alone cannot serve to invalidate otherwise permissible conduct.” *Lynch*, 465 U.S. at 684. Thus far, under

the *Lemon* test, the Board policy appears to be otherwise permissible under the First Amendment. In addition, the Court does not even need to make an inquiry into the amount or degree of political divisiveness present in this case, as no inquiry is required where there is not direct subsidy from the state to religious institutions. *Id.* In sum, the Board policy at issue here survives the third prong of the *Lemon* test.

## **II. THE BOARD POLICY DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE UNDER THE *LEE* COERCION ANALYSIS.**

The Supreme Court decided *Lee v. Weisman*, 505 U.S. 577 (1992), an Establishment Clause case, over twenty years after the Court decided *Lemon*. In this case, the Court chose not to reconsider its decision from *Lemon*, but instead invalidated the state policy at issue because of its coercive effect on the students affected. *Lee*, 505 U.S. at 586. The Court determined that the school in the case, as a state actor, was involved so pervasively with the religious activity at issue, and because its action had an indirect coercive effect on the students, the school policy violated the Constitution.

The Court began the case by stating that “at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which ‘established a state religion or religious faith, or tends to do so.’” *Lee*, 505 U.S. at 587 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 678 (1984)). The Court looked first at the degree of involvement of the state in the religious activity. In this case, the school official, a principal, determined whether a prayer should be given, chose a member of the clergy to deliver the prayer, and then further, guided the cleric as to the content of the prayer. *Id.* at 587-88. In the instant case, the students involved in the Awards Ceremony choose whether to have a speaker, and then the students vote on who will give an opening message. The school’s only



involvement is to monitor or edit the speech for illegal and offensive statements. The Board's extremely limited, and rather passive involvement in the speaker selection process does not rise to the level in *Lee* that made it clear to the Court and the participants in the ceremony that the State had placed its stamp of approval on the graduation prayers and thus put school-age children who objected to the prayers in an indefensible position of having to listen to and participate in the prayers. *Id.* at 590.

The Court felt particular concern for the fact that elementary and secondary students would be susceptible to an indirect coercive pressure to participate in the religious practice of the school. The Petitioner feels, however, as did a plurality of the Court in *Board of Education of Westside Community Schools v. Mergens*, 496 U.S. 226, 250 (1990), that "secondary school students are mature enough and likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis," particularly intelligent honor students. The students at BCHS understand the policy, as they participate in it, and they know the limited editorial power of the Board, and the greater power of selection that they possess. Further, student attendance at the Awards Ceremony is voluntary. The Awards Ceremony at issue here, in addition, is far less likely to be considered a seminal event from which a student has no real option to absent him or herself.

The Court in *School District of Abington v. Schempp*, 374 U.S. 203, 308 (1963) (Goldberg, J. concurring), stated that the key to Constitutional adjudication is the "ability and willingness to distinguish between real threat and mere shadow." In the instant case, there is no real threat that the Board policy will substantially involve the state in religion so as to have a serious impact on the students of BCHS. The Board involvement in the

opening message, which is not explicitly religious – it may be either secular or sectarian - is not pervasive. The Board does not compel or require attendance or participation in the opening message. The Awards Ceremony is not an event of singular importance to every student, and if a student objected to the potentially religious message, he or she had a real alternative to avoid participation. Here, there is definitely no real threat of abridging student rights under the Establishment Clause, and there is arguably not even a mere shadow of coercion. As a result, the Board policy is constitutionally valid, even under the coercion analysis of *Lee*.

### **III. THE BOARD POLICY IS PRIVATE SPEECH AND THEREFORE DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE.**

In 2000, the Court decided *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000), another Establishment case. This case dealt with a school policy that allowed students to lead and initiate invocations prior to football games. *Id.* The Court held that these prayers were not private speech, and as public speech in a non-limited public forum, violated the Establishment Clause. *Id.*

The Court in *Santa Fe* began by analyzing the school policy under the *Lee* idea that a school cannot coerce anyone into supporting or participating in a religious activity. *Santa Fe*, 530 U.S. at 302. The Court noted that there is a difference between constitutionally forbidden government speech endorsing religion and constitutionally acceptable private speech endorsing religion. *Id.* The Court went on to determine, however, that when students delivered messages under the school policy, the students would be delivering state-sponsored as opposed to private speech. *Id.* The Court reached this decision because the speech was subject to “particular regulations that confine the content and topic of the student message” and because the policy, “by its terms, invites

and encourages religious messages.” *Id.* at 303, 306. These two crucial facts are not present in the instant case, and that is a critical difference. The Board does not control the content or the topic of the student message, save for non-substantive review for vulgarity or libel and slander, which are illegal. Further, the Board policy does not, in any explicit or implicit way, encourage a religious opening message. The policy is entirely neutral as to whether a message is to be given, and as to what the content of the message is. The student’s speech is his or hers alone and thus is private speech. As private speech, the student’s opening message may be religious or secular in nature, and will not violate the Establishment Clause. The Bushwood County School Board policy clearly passes the private versus government-sponsored speech test of *Santa Fe*.

### CONCLUSION

For the reasons set forth above, the Petitioner respectfully requests that this Honorable Court reverse the decision of the United States Court of Appeals for the Fourteenth Circuit.

Respectfully submitted,

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Number 314