

No. 03-71278

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IN THE SUPREME COURT OF THE UNITED STATES

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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 Court of Appeals for the Fourteenth Circuit,  
*Spackler v. Bushwood County Sch. Bd.*, 4 D.3d 919 (14th Cir. 2003).

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BRIEF FOR PETITIONER

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Number 207  
Counsel for Petitioner

## **QUESTION PRESENTED**

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

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## STATEMENT OF THE CASE

Bushwood County High School (“BCHS”) annually holds an Awards Ceremony on the day before graduation. *Spackler v. Bushwood County Sch. Bd.*, 833 D. Supp. 58, 58 (M.D. Davis 2003). The Awards Ceremony honors the valedictorian, the salutatorian, and students in all grade levels who have achieved *cum laude* status, but students are not required to attend the ceremony in order to graduate or receive awards. *Id.* at 59. The Awards Ceremony has nearly always had guest or student speakers for the past eighty years, and, over the years, different policies have governed their selection. *Id.* The policy currently under attack allows students receiving awards to vote on whether one of their own will give an opening message and, if the answer to the first question is yes, on who will give the opening message. *Id.* at 60. The voting is administered by the student council, and the Bushwood County School Board (“Board”) only reviews the content of the message for vulgarity, profanity, obscenity, libel, and slander. *Id.*

### A. History of Speakers at the Awards Ceremony

The Board has had speakers at school assemblies and events for a long time. *Id.* at 59. From 1923 to 1992, a member of the clergy delivered a religious invocation at the Awards Ceremony in all but two years. *Id.* In response to the decision of the Supreme Court of the United States in *Lee v. Weisman*, 505 U.S. 577 (1992), the Board adopted a new speakers policy in 1992 that utilized students rather than members of the clergy. *Spackler*, 833 D. Supp. at 59.

This new policy (“1992 policy”), in effect from 1993 to 2000, expressly allowed for an invocation at the Awards Ceremony. *Id.* Students receiving awards would first vote on whether to have a student delivered prayer at the ceremony. *Id.* If the answer on the first vote was yes, the students receiving awards would then vote on who from among them would deliver the prayer. *Id.* These votes were administered by the student council, and a prayer was delivered in

six of the eight years the policy was in effect. *Id.* In 1996, a student delivered a vulgar and offensive prayer. *Id.* In response, the Board modified the policy to allow the administration to review prayers for vulgarity, profanity, obscenity, libel, and slander. *Id.*

#### **B. The Current Policy That Is Under Attack**

At an open meeting in 2000, the Board was warned that the then current speakers policy was unconstitutional in light of the decision in *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000). *Spackler*, 833 D. Supp. at 60. Several parents commented on the policy at this meeting. *Id.* Some recommended doing away with the invocation because churches rather than school events were the proper places for prayers. *Id.* Others favored retaining the policy because the invocation instilled positive values and allowed the students “to express an important part of their lives.” *Id.* The District Court found that the opinions expressed at the meeting apparently reflected the opinions of the Board members. *Id.* The Board met several times over the next weeks and considered several proposals for a new policy. *Id.* These proposals ran the gamut from explicitly calling for prayer to banning all religious speech. *Id.* The Board finally adopted the following policy (“2000 policy”): The students receiving the award would decide, in a vote administered by the student council, whether an opening *message* would be delivered by one of their own. *Id.* If the answer to the first question was yes, there would be a second vote on who would deliver the message. *Id.* This second vote would be held after those students wishing to give a message declared their candidacies and presented their proposed messages to the voters. *Id.* The Board published the following explanatory note regarding the 2000 policy:

This reflects an attempt by the Bushwood County School Board to arrive at a policy that values the opinions and beliefs of its constituent members. This policy does not signal a radical departure from the prior policy, yet it recognizes that the Board cannot lawfully call for a prayer. This policy allows for the students to be a part of the ceremony by expressing their opinions, regardless of its (sic) secular or sectarian nature. The power of review reserved by the administration is limited to a

non-substantive power; the content of the speech may only be altered to protect against vulgarity, profanity, obscenity, libel, and slander.

*Id.*

In the first year under the 2000 policy, a student spoke about how fighting cancer stimulated his desire to do well in school, but in the second year, 2002, the message was a prayer. *Id.* In 2002, after the first vote authorizing a student message, three students campaigned to deliver it. *Id.* Two of the three proposed to give religious messages. *Id.* The prayer that was eventually delivered “asked for guidance from above” and gave thanks to “the Almighty” for the blessings He had bestowed. *Id.* at 61. These speeches are carried by the school’s speaker system. *Id.* at 62.

### **C. Procedural History**

The plaintiffs, a sophomore at BCHS who has a GPA that is likely to qualify for *cum laude* status and his father, sought an injunction pursuant to 42 U.S.C. § 1983, in November 2002 to prevent an opening message from being delivered at any further Awards Ceremonies. *Spackler v. Bushwood County Sch. Bd.*, 4 D.3d 919, 921 (14th Cir. 2003). The District Court applied the tests used in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and *Lee*, and also analyzed the 2000 policy in light of *Santa Fe*. *Spackler*, 833 D. Supp. at 64. After a two day bench trial, *Spackler*, 4 D.3d at 921, the District Court concluded that the Board’s policy did not violate the Establishment Clause and denied injunctive relief. *Spackler*, 833 D. Supp. at 64. The plaintiffs filed an appeal, *Spackler*, 4 D.3d at 921, and the Circuit Court reversed the judgment of the District Court after concluding that it wrongly interpreted all three of the above cases. *Spackler*, 4 D.3d at 925.



## **SUMMARY OF THE ARGUMENT**

The Board's 2000 policy on messages given at the Awards Ceremony was neutral: it neither favored nor disfavored religious speech at the expense of secular speech. Although the past policies of the Bushwood County School System were not always neutral in this regard, whenever concerns about the constitutionality of a speaking policy were raised, the Board promptly responded with efforts to conform with the Constitution. The Board members reflected the diverse opinions of their community regarding religious speech at the Awards Ceremony, and crafted a compromise that remained true to the Constitution while allowing students receiving awards to have some control over the ceremony honoring them by allowing them to choose how they would solemnize the proceedings.

For these reasons, the Board's policy can fairly be said to have the secular purposes of allowing the honored students to have control of and solemnize an event important to them. Because the policy is completely neutral towards religion and leaves the decision completely in the hands of students, it does not have the effect of advancing religion. Because the purpose of the new policy was to avoid unlawfully calling for a prayer, it does not excessively entangle the administration with religion.

Even though school equipment is used at the Awards Ceremony and the ceremony is properly a school function, the state officials are not engaged in directing the performance of a religious exercise. Instead, school officials are engaged in directing the performance of a neutral exercise that allows students, of their own free will, to express as a group a message that reflects their own group viewpoint, whether that viewpoint is religious or secular. Indeed, in the first year the policy was in effect, a secular message was chosen. Also, the Awards Ceremony does

not obligate the attendance of students because it is neither a once in a lifetime event that is a rite of passage into adulthood nor a frequent social event that is enjoyed by most students and that directly demands the attendance of some students. For all of these reasons, the 2000 policy does not violate the Establishment Clause of the U.S. Constitution.

### ARGUMENT

As the District Court aptly pointed out, “the Supreme Court has not provided a particularly clear roadmap for Establishment Clause analysis.” *Spackler v. Bushwood County Sch. Bd.*, 833 D. Supp. 58, 61 (M.D. Davis 2003). The Court has sometimes applied the three prong test found in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), but declined to apply that test in a seminal Establishment Clause case dealing with religious speech delivered during a graduation ceremony, *Lee v. Weisman*, 505 U.S. 577 (1992). The most recent case dealing with religious speech delivered at a school-related event, *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000), invokes both *Lee* and *Lemon*. These cases involve a maze of standards and are further confused by a multitude of concurring and dissenting opinions. What must be remembered, however, is that whichever test is applied, there are basic legal principles that guide all Establishment Clause analysis.

First, the Establishment Clause, as found in U.S. Const. amend. I, only applies to state action through U.S. Const. amend. XIV. “[T]here is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and the Free Exercise Clauses protect.” *Bd. of Educ. v. Mergens*, 496 U.S. 226, 250 (1990). No matter how sectarian a speech delivered at the Awards Ceremony may be, unless that speech can properly be called government speech, there can be no Establishment Clause violation. Second, Establishment Clause analysis is necessarily fact

specific, and “[e]very government practice must be judged in its unique circumstances.” *Santa Fe*, 530 U.S. at 315 (quoting *Lynch v. Donnelly*, 465 U.S. 665, 693-694 (1984) (O'Connor, J., concurring)). Thus, analogies between fact patterns will be faulty if they are based on superficial similarities or if they ignore that certain facts are only crucial in relation to other facts.

**I. THE CIRCUIT COURT ERRONEOUSLY APPLIED THE *LEMON* TEST BY WRONGLY CONCLUDING THAT THE 2000 POLICY DID NOT HAVE A SECULAR PURPOSE AND HAD A PRIMARY EFFECT THAT NEITHER ADVANCED OR INHIBITED RELIGION, AND THE DISTRICT COURT WAS CORRECT IN CONCLUDING THAT THE 2000 POLICY AVOIDED EXCESSIVE ENTANGLEMENT WITH RELIGION.**

The Supreme Court of the United States, in *Lemon*, created a three prong test for use in Establishment Clause analysis. Under that test, state practices do not run afoul of the Constitution if they “(1) reflect a clearly secular purpose; (2) have a primary effect that neither advances nor inhibits religion; and (3) avoid excessive government entanglement with religion.” *Lee*, 505 U.S. at 584-85. Although there is confusion as to whether the “excessive entanglement” prong should be considered as a separate standard or as illuminating the “primary effect” analysis, the Supreme Court still studies “excessive entanglement” issues when conducting *Lemon* analysis. *See Agostini v. Felton*, 521 U.S. 203, 232 (1997).

**A. The Circuit Court should have recognized that the 2000 policy reflected several secular purposes.**

The Board, in explaining its adoption of the 2000 policy, said that the policy allowed students to be a part of the ceremony by expressing their opinions. *Spackler*, 833 D. Supp. at 60. Also, the District Court said that the opening message allowed by the 2000 policy solemnized the occasion by “impart[ing] a sense of importance and formality upon the ceremony.” *Id.* at 61. These are legitimate secular purposes advanced by the 2000 policy, and this is all that is required by the first prong of the *Lemon* test. In fact, the policy could satisfy the

secular purpose prong even if part of its motivation was religious and would only fail the prong if it was “entirely motivated by a purpose to advance religion.” *Wallace v. Jaffree*, 472 U.S. 38, 56 (1985).

The Circuit Court ignored the Board’s stated purpose for its policy and said that the language of the policy and the history behind it showed that the Board was trying to maneuver around the Constitution. *Spackler*, 4 D.3d at 922. Although the 2000 policy is “only a few words different” from the 1992 policy, *id.*, those few words removed all preference for religious speech and adopted an entirely neutral policy. Furthermore, the Board did state that the 2000 policy was not a radical departure from the 1992 policy, *Spackler*, 833 D. Supp. at 60, but the many elements retained—such as the voting procedures, the level of student control, and the minimal amount of administrative review—are all nonreligious in nature. Finally, although the Board’s speaking policies have a long history of preferring religious speech, the Board has not waited for lawsuits before changing its speaking policies when concerns about the constitutionality of those policies have come to its attention.

Courts must accord deference to the Board’s stated purposes unless those purposes are “insincere or a ‘sham.’” *Adler v. Duval County Sch. Bd.*, 206 F.3d 1070, 1084 (11th Cir.) (en banc), *vacated and remanded for reconsideration*, 531 U.S. 801 (2000), *opinion reinstated on remand*, 250 F.3d 1330 (11th Cir.) (quoting *Edwards v. Aguillard*, 482 U.S. 578, 586 (1987)).<sup>1</sup> The Court of Appeals failed to accord this deference to the Board and assumed that the Board was an ideological monolith bent on subverting constitutional protections. This assumption, however, contradicts the findings of the District Court. The District Court found that the

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<sup>1</sup> I will hereafter use *Adler I* to refer specifically, in textual references, to the original en banc opinion of the 11th Circuit and will use *Adler II* to refer specifically, in textual references, to the 11th Circuit opinion reinstating *Adler I*.

opinions expressed by the public apparently reflected those of the Board members. As some of these opinions were in favor of not allowing prayer at all, the Board's decision is revealed, not as a sham, but as a compromise between two opposing camps in the best traditions of the legislative process.

The Court of Appeals relies on *Santa Fe*, which found that the stated secular purposes of a speaking policy for football games were insincere. *Santa Fe*, 530 U.S. at 309. In *Santa Fe*, the defendant school district utilized a two-step voting procedure for the student selection of student speakers, a procedure very similar to the one utilized by the Board. There were many facts that called into question the sincerity of the school district in *Santa Fe*, however. First, the policy change only came in response to a lawsuit. *Id.* at 294. Second, the school district was constantly changing its policy, sometimes tightening controls on religious speech and sometimes loosening. *Id.* at 295-97. Third, the final version of the policy, while allowing for a generic "message," only specified an invocation as a "clearly preferred message." *Id.* at 315. Fourth, while claiming that a purpose of the policy was to advance free expression, the election was conducted on the advice and direction of the school principal, and the school district retained the power to edit the substantive content of the message in order to conform it to the goals of the school district's policy. *Id.* at 298, n.6. Finally, the Fifth Circuit said that many district officials "'apparently neither agreed with nor particularly respected'" the District Court's decision to allow the plaintiffs to litigate anonymously, *id.* at 294, n.1 (quoting 168 F.3d 806, 809, n.1 (5th Cir. 1999)), and the District Court was forced to threaten sanctions and criminal liability against those trying to discover the plaintiffs' identities. *Id.* The above characteristics of the *Santa Fe* policy, not found in our case, all tend to show that the Santa Fe school district was insincere in the speaking policy purposes it expressed.

The facts in our case are much more closely analogous to those found in *Adler*. The voting procedures for selecting graduation speakers in *Adler* also utilized a two-step voting process run by students. *Adler*, 206 F.3d at 1072. In *Adler I*, the court held the secular purpose prong to be satisfied because the policy was facially neutral. In *Adler v. Duval County School Board*, 250 F.3d 1330 (11th Cir. 2001), the court reinstated *Adler I*, vacated for reconsideration in light of *Santa Fe*, by distinguishing *Santa Fe*. Specifically, the court noted that critical to the Supreme Court’s reasoning was that the *Santa Fe* policy significantly regulated the content of the student message and invited religious speech by its very terms. *Santa Fe*, 530 U.S. at 303. These facial defects are absent from both the 2000 policy and the *Adler* policy. For these reasons, the 2000 policy clearly has legitimately secular purposes and satisfies the first prong of the *Lemon* test.

**B. The Circuit Court should have recognized that the 2000 policy did not have the primary effect of advancing religion because the policy was neutral on its face and served legitimately secular purposes.**

For a policy to have the primary effect of advancing religion, “it must be fair to say that the government itself has advanced religion through its own activities and influence.” *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. Amos*, 483 U.S. 327, 337 (1987). Because the 2000 policy is neutral on its face, and, as outlined above, has several legitimately secular purposes, the Board is not advancing religion through its activities and influence. In finding that the graduation speaker policy did not advance religion even in light of *Santa Fe*, *Adler II* emphasized that the policy was “entirely neutral regarding whether a message [was] to be given, and if a message [was] to be given, the content of that message.” *Adler*, 250 F.3d at 1337. The 2000 policy is in all relevant respects identical to the *Adler* policy except that in our case the Board retains the power to review messages for vulgarity,

profanity, obscenity, libel, and slander. *Spackler*, 833 D. Supp. at 59-60.

Although the Court of Appeals makes much of this control as furthering the public perception of sponsorship, it concedes that the control is not over content. *Spackler*, 4 D.3d at 923. The control is very limited and is only over areas where secularism and sectarianism are not factors. The standard for public perception is whether an objective person, familiar with the policy, its history, and its implementation, would perceive the policy as a state endorsement of prayer. *Santa Fe*, 530 U.S. at 308. Given the legitimate secular purposes and the facial neutrality of the 2000 policy, an objective, knowledgeable observer would not see it as an endorsement of prayer.

**C. The District Court was correct in concluding that the 2000 policy avoided excessive entanglement with religion because the policy was facially neutral and the purpose behind its revision was to avoid entanglement problems.**

The Circuit Court declined to analyze the “Excessive Entanglement” of the *Lemon* test, but the District Court noted that the policy purposed avoiding entanglement problems. *Spackler*, 833 D. Supp. at 62. Since the policy is also facially neutral, the policy avoids an excessive entanglement with religion. In *Adler I*, the court emphasized the facial neutrality of the policy in finding no excessive entanglement and noted that much of the same evidence used in analyzing the first two prongs was also useful in analyzing the last prong. *Adler*, 206 F.3d at 1090. For the foregoing reasons, the 2000 policy does not fail the *Lemon* test.

**II. THE CIRCUIT COURT ERRONEOUSLY APPLIED THE LEE TEST BY WRONGLY CONCLUDING THAT STATE OFFICIALS DIRECTED THE PERFORMANCE OF A FORMAL RELIGIOUS EXERCISE AT THE AWARDS CEREMONY AND THAT ATTENDANCE AND PARTICIPATION IN THE AWARDS CEREMONY WAS OBLIGATORY.**

In *Lee v. Weisman*, 505 U.S. 577 (1992), the Court found unconstitutional a policy that allowed principals to invite a member of the clergy to give a nonsectarian prayer at

graduation. At the particular school where the policy was challenged, school officials customarily gave the invited member of the clergy a pamphlet that made recommendations on the type of prayer to give, and the principal advised giving a nonsectarian prayer. *Id.* at 581. In finding this practice unconstitutional, the Court said the following:

These dominant facts mark and control the confines of our decision: State officials direct the performance of a formal religious exercise at promotional and graduation ceremonies for secondary schools. Even for those students who object to the religious exercise, their attendance and participation in the state-sponsored religious activity are in a fair and real sense obligatory, though the school district does not require attendance as a condition for receipt of the diploma.

*Id.* at 585. This test looks at two factors: whether the state officials are directing a formal religious exercise and whether attendance at the religious exercise is coerced.

**A. The Circuit Court should have held that the Board did not direct the performance of a formal religious exercise because, although the Board funded the equipment used in amplifying religious speech and organized the school event at which the religious speech was given, the Board was only directing the performance of a completely neutral process.**

As opposed to *Lee*, in our case state officials are not directing the performance of a formal religious exercise. School equipment is used at the Awards Ceremony to carry the voice of the speaker, *Spackler*, 833 D. Supp. at 62, and the ceremony is a school function, but this alone is not enough to violate the Establishment Clause. *See Santa Fe*, 530 U.S. at 302. The student selected in *Santa Fe* was seen as a tool of the state because he was elected according to a policy favoring religion, only one student was allowed to give a speech, and this speech was subject to content review. *Id.* at 302. In our case, the school officials are directing the performance of a speech by a person freely chosen by the students pursuant to a completely neutral policy. That the Board is not directing the performance of a formal religious exercise is



best demonstrated by the fact that, in the first year the 2000 policy was in effect, a secular speech was given. *Spackler*, 833 D. Supp. at 60.

The *Santa Fe* Court, in analyzing the coercion factor under *Lee*, said that the policy violated the establishment clause because “it impermissibly impose[d] upon the student body a majoritarian election on the issue of prayer.” *Santa Fe*, 530 U.S. at 316. The Court further said that the election system established by the school district undermined the essential protection of minority viewpoints. *Id.* at 317. The majority statement of this analysis is so strong as to, perhaps, lead some to think that this type of coercion by itself is enough to violate the Establishment Clause. The Court made clear, however, that it was not “‘invalidat[ing] all student elections,’” *id.* at 317, n.23 (quoting 530 U.S. at 321 (Rehnquist, C.J., dissenting)), because the Court had already “concluded that the resulting religious message under this policy would be attributable to the school, not just the student.” *Id.* Thus, coercion alone will not violate the Establishment Clause.

What must be remembered in applying these tests is that the Establishment Clause only prohibits the promotion of religion by *the state*, not by *the individual*. When deciding whether the state has violated the Establishment Clause, only state actions, and state actions alone, are looked at. Because the 2000 policy is completely neutral and because this neutrality is not a mask for impermissible state action, the Board’s 2000 policy does not violate the Establishment Clause, whether the election process is coercive or not.

**B. The Circuit Court should have held that the Board’s 2000 policy did not coerce religious attendance because, although the election process used is somewhat coercive, the event in question is neither a once-in-a-lifetime event of great moment nor a frequent and popular social event directly obligating the attendance of a portion of the student body.**

The Awards Ceremony is an annual event that a high school student could be honored at over four years. Unlike graduation, the Awards Ceremony is not a once-in-a-lifetime event that serves as a rite of passage to adulthood. Unlike football games, the Awards Ceremony is not “a traditional gathering[] of a school community” and does not require a portion of the student body to participate. *Santa Fe*, 530 U.S. at 312. Although the Court of Appeals notes that the Awards Ceremony honors a greater achievement than mere graduation, *Spackler*, 4 D.3d at 924, coercion analysis in this context focuses on peer pressure rather than on absolute merit. *See Santa Fe*, 530 U.S. at 311-12; *Lee*, 505 U.S. at 592-93.

In terms of peer pressure, the greatest difference between the Awards Ceremony and graduation and football games is that the Awards Ceremony is elite. Any student can attend a football game and most students graduate. Thus, the pressure being exerted on the student is all in one direction and comes from the whole student body. For the Awards Ceremony, the peer pressure is exerted by a much smaller group, and there will likely be a counter peer pressure from students who are not academically successful. Even though the election process is somewhat coercive, the Awards Ceremony is not the same type of event as a graduation or a football game, so the peer pressure concerns are not as great. Therefore, the 2000 policy does not coerce religious attendance. For the foregoing reasons, the 2000 policy does not fail the *Lee* test.

## CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the Fourteenth Circuit should be reversed.

Respectfully submitted,

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