

No. 11-50486

**In the
United States Court of Appeals
for the Fifth Circuit**

CHRISTA SCHULTZ, ET AL.,
Plaintiffs-Appellees,

v.

MEDINA VALLEY INDEPENDENT SCHOOL DISTRICT,
Defendant-Appellant.

On Appeal from the United States District Court
for the Western District of Texas

BRIEF OF THE STATE OF TEXAS AS AMICUS CURIAE

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**STATEMENT OF THE IDENTITY, INTEREST,
AND SOURCE OF AUTHORITY OF AMICUS CURIAE**

Attorney General Greg Abbott files this brief on behalf of the State of Texas pursuant to Federal Rule of Appellate Procedure 29(a). *See* FED. R. APP. P. 29(a) (“[A] [S]tate may file an amicus-curiae brief without the consent of the parties or leave of court”).

The State of Texas has an interest in this case for two reasons. First, the district court’s ruling misapplies the Establishment Clause in a way that threatens the rights of Texas students to freely express their religious beliefs in public settings. Second, the ruling calls into question the constitutionality of a state statute. *See* TEX. EDUC. CODE § 25.156.

Like many school districts across the State, Medina Valley Independent School District, located just west of San Antonio in Castroville, Texas, enacted a “Student Expression” policy as required by section 25.152 of the Texas Education Code. And Medina Valley’s specific policy is similar to the model policy provided by the Legislature for use by school districts across the State. *See* TEX. EDUC. CODE § 25.156. The State of Texas has an interest (that is especially keen during graduation season) in the proper interpretation of the provisions of the United States Constitution that affect the implementation of student-expression policies pursuant to the Education Code.

INTRODUCTION AND SUMMARY OF ARGUMENT

The First Amendment to the United States Constitution commands that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech[.]” U.S. CONST. amend. I. And the Supreme Court has asserted that, through the Fourteenth Amendment, these limitations apply to the States and their political subdivisions. *E.g.*, *Wallace v. Jaffree*, 472 U.S. 38, 49-50 (1985). The Constitution’s religion clauses have long been understood to permit the federal and state governments—and most assuredly private citizens—to acknowledge the religions and religious practices of the American people. This is of course unsurprising, for as the Supreme Court has noted, “[w]e are a religious people whose institutions presuppose a Supreme Being.” *Zorach v. Clauson*, 343 U.S. 306, 313 (1952).

Permissible religious acknowledgments include public prayer at government-sponsored events. Indeed, each branch of government has a tradition of opening its sessions with prayers, a practice that the Supreme Court approved in *Marsh v. Chambers*, 463 U.S. 783 (1983).¹ Government acknowledgments of religion such as

1. Federal and state legislative sessions open with prayers, often given by chaplains who are paid government employees. *Marsh*, 463 U.S. at 794-95 (1983). Presidential and gubernatorial inaugurations have traditionally contained an opening prayer. *See Newdow v. Roberts*, 603 F.3d 1002, 1019-20 (D.C. Cir. 2010) (Kavanaugh, J., concurring), *cert. denied*, 2011 WL 1832888 (May 16, 2011). And the United States Supreme Court and other federal courts open each session with the traditional prayer “God save the United States and this honorable court.” *Lynch v. Donnelly*, 465 U.S. 668, 693 (1984) (O’Connor, J., concurring).

these publicly offered prayers serve the constitutionally legitimate purposes of “solemnizing public occasions, expressing confidence in the future, and encouraging the recognition of what is worthy of appreciation in society.” *Lynch*, 465 U.S. at 693 (O’Connor, J., concurring).

This case does not involve a prayer offered by a government official. Indeed, it does not even involve a governmental decision to conduct a prayer. Rather, it involves a school district’s policy permitting students to prepare and deliver opening and closing remarks at graduation ceremonies and the potential decisions made by those students to include religious references or a prayer within those remarks. The district court entered a preliminary injunction precluding Medina Valley from following its graduation policy and practice. Amended Order on Plaintiffs’ Motion for Temporary Restraining Order and Preliminary Injunction (hereafter Amended Order). That decision is erroneous for two primary reasons. First, Medina Valley’s policy is consistent with the Constitution because the student-led speeches at issue do not violate the religion clauses. And second, in attempting to remedy a constitutional violation that does not exist, the district court has ordered Medina Valley to act in a way that would abridge students’ fundamental right to speak freely and prohibit students’ free exercise of their religious beliefs.

ARGUMENT

The Medina Valley graduation ceremonies have traditionally included opening and closing remarks given by graduating students. These remarks are currently governed by Medina Valley’s “Student Rights and Responsibilities: Student Expression” policy. *See* Student Rights and Responsibilities: Student Expression, *available at* [http://www.tasb.org/policy/pol/private/163908/pol.cfm?DisplayPage=FNA\(LOCAL\).pdf](http://www.tasb.org/policy/pol/private/163908/pol.cfm?DisplayPage=FNA(LOCAL).pdf) (hereafter Student Expression Policy). Graduating students who hold certain positions of honor (the top three academically ranked students, the class president, and student council officers) are eligible to volunteer to speak, and the two speakers are selected through a random drawing of all eligible volunteers. Student Expression Policy at 3.

Medina Valley’s guidance to the students regarding the content of their opening and closing remarks does not address religion or prayer at all:

The topic of the opening and closing remarks shall be related to the purpose of the graduation ceremony and to the purpose of marking the opening and closing of the event; honoring the occasion, the participants, and those in attendance; bringing the audience to order; and focusing the audience on the purpose of the event.

Id. at 3. The District commits to “treat a student’s voluntary expression of a religious viewpoint, if any, on an otherwise permissible subject in the same manner the District treats a student’s voluntary expression of a secular or other viewpoint” and to “not

discriminate against the student based on a religious viewpoint expressed by the student on an otherwise permissible subject.” *Id.* at 4. The graduation program must also contain a disclaimer explaining that the student speakers “deliver messages of the students’ own choices” and the speech is “the private expression of the individual student and does not reflect the endorsement, sponsorship, position, or expression of the District.” *Id.*

Medina Valley’s policy was enacted pursuant to section 25.152 of the Education Code, which (1) prohibits school districts from “discriminat[ing] against” a student’s publicly stated “voluntary expression of a religious viewpoint,” and (2) requires the district to eliminate any actual or perceived affirmative school sponsorship of any student’s religious expression. TEX. EDUC. CODE § 25.152. The Medina Valley policy is similar to the “Model Policy Governing Voluntary Religious Expression in Public Schools” that the Legislature has provided to guide school districts across the State. *See* TEX. EDUC. CODE § 25.156. Thus, the shadow of uncertainty cast by the district court’s erroneous decision extends far beyond Castroville, Texas.

I. MEDINA VALLEY’S GRADUATION POLICY AND PRACTICES ARE CONSISTENT WITH THE RELIGION CLAUSES OF THE UNITED STATES CONSTITUTION.

A. The Appropriate Analytical Framework for This Case is the Coercion Test.

The Supreme Court addressed the constitutionality of clergy-led middle- and high-school graduation prayers in *Lee v. Weisman*, 505 U.S. 577 (1992). The Supreme Court noted at the outset of its opinion that “the question before [the Court was] whether including clerical members who offer prayers as part of the official school graduation ceremony is consistent with [the Constitution].” *Id.* at 580. In *Lee*, the Supreme Court reviewed (1) a policy which permitted principals to invite clergy to provide invocations and benedictions, and (2) a practice in which invited clergy were customarily given written guidelines and verbal instructions that the graduation remarks should be inclusive and nonsectarian. *Id.* at 581. The Supreme Court elected not to apply the often-criticized three-prong *Lemon* test in reviewing the graduation prayers.² Instead, the Supreme Court applied the coercion test, finding that the government involvement with religion was “pervasive, to the point of creating a state-sponsored and state-directed religious exercise.” *Id.* at 587. That was the case because, in the Supreme Court’s view, the school’s selection of a clergy member to

2. Under *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971), government practices satisfy the Establishment clause test when they (1) have a secular purpose; (2) have a primary effect that neither advances nor inhibits religion; and (3) avoids excessive government entanglement with religion.

offer prayers, and the school's guidelines regarding the content of the prayers, amounted to the school "direct[ing] and control[ling] the content of the prayers." *Id.* at 588.

Following its decision in *Lee*, the Supreme Court granted certiorari in *Jones v. Clear Creek Independent School District*, 930 F.2d 416 (5th Cir. 1991), *vacated*, 505 U.S. 1215 (1992), a case in which this Court had upheld Clear Creek's graduation prayer policy. The Supreme Court vacated this Court's decision and remanded the case for further consideration in light of *Lee*. Upon reconsideration, this Court once again upheld Clear Creek's invocation policy. *Jones v. Clear Creek Indep. Sch. Dist.*, 977 F.2d 963, 965 (1992). The Court noted that *Lee* "considered [the] *Lemon* analysis unnecessary to decide whether [Principal] Lee violated the Establishment Clause. The [Supreme] Court instead held Lee's actions unconstitutional under a coercion analysis." *Id.* at 966 (citing *Lee*, 505 U.S. at 586-87); *see also id.* at 969 ("[T]he *Lee* Court invalidated the Providence school district's policy on its evaluation of the coercive effect of Lee's actions. The Court held that Lee *coerced* graduation attendees to join in a formal religious exercise."). As understood by this Court in *Jones*, *Lee* held that "unconstitutional coercion [occurs] when (1) the government directs (2) a formal religious exercise (3) in such a way as to oblige the participation

of objectors.” *Id.* at 970. The court upheld Clear Creek’s policy because it did not fail any, much less all three, of the elements of the coercion test. *Id.*

To be sure, in *Jones* the Court also analyzed Clear Creek’s policy under four other tests that the Supreme Court has employed, at one time or another, when reviewing Establishment Clause challenges to public school policies: secular purpose, primary effect, entanglement, and endorsement. *See id.* at 966-69. However, given the Supreme Court’s exclusive reliance on the coercion test for analyzing graduation prayers in *Lee*, that can be the only appropriate test for resolving Establishment Clause challenges in graduation cases.³

B. Medina Valley’s Policy and Practice Including Student-Led Opening and Closing Remarks at Graduation Ceremonies Satisfies the Coercion Test.

Like the Clear Creek policy upheld in *Jones*, Medina Valley’s policy satisfies each of the three coercion-test prongs. First, as *Jones* recognized, the Supreme Court’s analysis in *Lee* “repeatedly stresse[d] the government’s direct and complete control over the graduation prayers . . . as determinative of the establishment clause

3. The Supreme Court’s decision striking down student-led, student-initiated prayers at Texas high school football games changes neither the applicable test, nor the proper outcome, in this case. First, in *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000), the Supreme Court acknowledges without purporting to overrule this Court’s decision on remand in *Jones*. *Id.* at 299-301. And second, the Supreme Court notes the Fifth Circuit’s recognition that football games are “‘a setting that is far less solemn and extraordinary’” than graduation ceremonies, *id.* at 300 (quoting *Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402, 406-07 (5th Cir. 1995)), and that football games are “hardly the sober type of annual event that can be appropriately solemnized with prayer,” *id.* (quoting *Doe v. Santa Fe Indep. Sch. Dist.*, 168 F.3d 806, 823 (5th Cir. 1999)).

question.” *Jones*, 977 F.2d at 970. The Clear Creek policy, however, had the students vote on whether to include an invocation. *Id.* Medina Valley’s policy provides for student speakers at graduation, but whether to include any religious message at all in the remarks is at the students’ discretion. Student Expression Policy at 3. Both Clear Creek and Medina Valley avoid the *Lee* problem of having a religious official speak. And both Clear Creek and Medina Valley avoid the *Lee* problem of exercising control over (and Medina Valley goes an additional step further by not giving even minimal guidance to) the religious content of the message offered. *See Jones*, 977 F.2d at 971. Medina Valley’s policy of randomly selecting two speakers and allowing them to offer their own remarks is thus not the sort of government “direction” prohibited in *Lee*.

Second, *Lee* characterized the rabbi’s prayer “as a ‘formal religious observance.’” *Id.* (quoting *Lee*, 505 U.S. at 587). The Clear Creek policy “tolerates nonsectarian, non-proselytizing prayer, but does not require or favor it.” *Id.* Medina Valley’s policy, by contrast is not even a prayer policy. It tolerates, without favor or disfavor, either a religious or a secular message. Student Expression Policy at 3. Medina Valley’s student-expression policy thus poses even less of an Establishment Clause risk than the prayer policy upheld by this Court in *Jones*.

Third, the constitutionally impermissible pressure to participate in religious exercise found in *Lee* is not present. In *Jones*, the Court noted that the students' election to have the invocation makes the students aware that the prayers represent the will of their fellow students, rather than clergy. *Jones*, 977 F.2d at 971. Medina Valley's policy similarly places the decision whether to include a religious message in the hands of students (albeit the two speakers, not the entire graduating class), rather than in the hands of the school administrators or clergy. Any reasonable person—and any person who reads the disclaimer in the graduation program—would understand that the remarks express the views of the speaker alone and create no impression of government-coerced religious belief. Moreover, *Jones* recognized, as had the Supreme Court before it, that graduating seniors are less susceptible to coercion than younger students might be. *Id.* (citing *Bd. of Educ. of Westside Cmty. Schs. v. Mergens*, 496 U.S. 226, 235-37 (1990)).

Finally, Medina Valley's traditional practice of calling the students' remarks an "invocation" and "benediction" in the graduation program does not create a constitutional problem. First, it does nothing to alter the character of the speech—it remains student speech. And second, using those traditional names serves the permissible function of solemnizing the graduation remarks in a way that calling them "Opening Remarks of the Class President," for example, might not.

II. THE DISTRICT COURT'S ORDER CREATES—RATHER THAN ALLEVIATES—CONSTITUTIONAL VIOLATIONS.

If the district court had erred only in its determination that plaintiffs are likely to succeed on their claim that Medina Valley's policies and practices violate the Constitution, Amended Order at 1, the Court's swift attention would still be warranted. But that was not the district court's only error. In its efforts to remedy a non-existent constitutional violation, the district court ordered Medina Valley to abridge the free speech and free exercise rights of its graduation speakers, *id.* at 3, and threatened Medina Valley officials with incarceration and other sanctions if they fail to commit these First Amendment violations, *id.* at 4. Because Medina Valley officials are currently faced with the choice to either (1) obey the district court's order and violate the First Amendment rights of the student speakers, or (2) permit the students to freely speak and risk incarceration and other contempt sanctions, emergency relief from this Court is not just warranted, it is required.

It is well established that students retain First Amendment protections on school grounds and at school functions: "First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the school house gate." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969). In a "limited

public forum,” which exists where a public school endeavors to allow students to express their own views, the State “must not discriminate against speech on the basis of viewpoint.” *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106 (2001). And discrimination against religious, as opposed to secular, expression is quintessential viewpoint discrimination. *Id.* at 107. Both the Education Code and Medina Valley’s policy give effect to these non-discrimination principles. TEX. EDUC. CODE §§ 25.151, 25.152(a)(1); Student Expression Policy at 1, 4.

The district court’s order fails to account for Medina Valley’s obligations to respect the First Amendment rights of the student speakers. The order requires Medina Valley to instruct the student speakers (1) “to modify their remarks to be statements of their own beliefs as opposed to leading the audience in prayer;” (2) “that they may not ask audience members to ‘stand,’ ‘join in prayer,’ or ‘bow their heads,’ they may not end their remarks with ‘amen’ or ‘in [a deity’s name] we pray;” and (3) they are not permitted to “present a prayer” or “deliver a message that would commonly be understood to be a prayer, nor use the word ‘prayer’ unless it is used in the student’s expression of the student’s personal belief.” Amended Order at 3. Medina Valley is also ordered to “review, and make any necessary changes to, the students’ revised remarks to ensure that those remarks comply with this Order, and shall instruct the students that they must not deviate from the approved remarks.” *Id.*

at 3-4. Imposing these requirements on Medina Valley creates just the sort of First Amendment concerns that schools are required to avoid. *See Good News Club*, 533 U.S. at 106-07. Moreover, the district court’s order seemingly runs afoul of the *Lee v. Weisman* decision the district court purports to follow: the State is not permitted to play a role in “direct[ing] and control[ing] the content of the prayers,” *Lee*, 505 U.S. at 588; *see also id.* at 589 (“religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State”); *id.* at 590 (“our precedents do not permit school officials to assist in composing prayers as an incident to a formal exercise for their students”).

Medina Valley is thus entitled to emergency relief from the district court’s order mandating that it suppress its students’ religious speech and control the message offered by student speakers.⁴

4. In *Doe v. Santa Fe Independent School District*, this Court characterized its decision in *Jones* as holding that a graduation prayer policy must have a “nonsectarian, nonproselytizing” requirement in order to pass constitutional muster. 168 F.3d at 814-16. In his dissent, Judge Jolly states (1) that this is not a fair reading of the *Jones* decision, and (2) imposing a “nonsectarian, nonproselytizing” requirement upon student speakers actually creates constitutional problems. *Id.* at 824-25, 829-31 (Jolly, J., dissenting). The State agrees with Judge Jolly. Thus, in our view, *Jones* (not *Doe*) provides the applicable standard. Moreover, because Medina Valley’s policy is a student-expression policy, rather than a prayer policy, there is no reason for those in attendance to believe that the school district endorses any speech containing a religious element. And this is reinforced by the disclaimer printed in the graduation program that makes clear that the content of the message “does not reflect the endorsement, sponsorship, position, or expression of the District.” Student Expression Policy at 4.

But even if the Court disagrees, *Doe*’s preference for “nonsectarian, nonproselytizing” graduation prayers offers no support for the district court’s order requiring Medina Valley to micro-manage the content of the students’ speeches.

Medina Valley's policy permitting students to prepare and deliver opening and closing remarks at graduation is constitutional, even when in practice those remarks may address the speaker's religious faith or contain a prayer. Indeed, the district court's order requiring Medina Valley to control the content of the students' speech abridges the students' First Amendment rights.

CONCLUSION

The Court should grant Medina Valley Independent School District's Opposed Emergency Motion to Dissolve Temporary Restraining Order and Preliminary Injunction.

Respectfully submitted,

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