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# MEMORANDUM

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## Introduction

The First Amendment to the United States Constitution prohibits the government from "abridging the freedom of speech." U.S. Const. amend. I. This prohibition applies to state and local governments through the Fourteenth Amendment. *See Cantwell v. Connecticut*, 310 U.S. 296, 303 (1940); *Lovell v. City of Griffin*, 303 U.S. 444, 450 (1938). Thus, state and local government entities—including school boards—must respect First Amendment protections to the same extent as the federal government. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943).

Students maintain free speech rights while at public school, *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969), including the right to expression within certain parameters, *id.* at 514, and the right to *not* speak, *Barnette*, 319 U.S. at 642 (emphasis added).

## Limitations On Students' Free Speech Rights.

*Tinker* is the hallmark case for student free speech rights, famously declaring that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker*, 393 U.S. at 506. In *Tinker*, students were suspended because they wore black arm bands to protest the Vietnam War. *Id.* at 504. The Court held the "Constitution . . . [did] not permit officials of the State to deny [the students'] form of expression." *Id.* at 514.

Because the students that wore arm bands engaged in "silent, passive expression of opinion, unaccompanied by any disorder or disturbance" and they "neither interrupted school activities nor sought to intrude in the school affairs or the lives of others," the Court held that the students' actions did not rise to the level of a "substantial disruption of or material interference with school activities." *Id.* at 508, 514. The Court explained that restrictions on student expression are only appropriate to "avoid material and substantial interference with schoolwork or discipline." *Id.* at 514.

Students' free speech rights in the public school are not, however, coextensive with the free speech rights of adults in other settings, and the school board has some authority to determine "what manner of speech in the classroom or in a school assembly is inappropriate." *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682-83 (1986). After its decision in *Tinker*, the Supreme Court carved out three exceptions to the free speech rights of students. Lewd speech, *Fraser*, 478 U.S. at 485, speech promoting illegal drug use, *Morse v. Frederick*, 551 U.S. 393, 403 (2007), and school-sponsored speech, *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 272–73 (1988) are three categories of speech that school officials can censor and restrict.

In *Fraser*, a principal suspended a student for using explicit sexual metaphors in a speech delivered to the student body at a school assembly. *Id.* at 677–78. The Court stated that "it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse." *Id.* at 683. The Court further stated that "[t]he First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech such as respondent's would undermine the school's basic educational mission." *Id.* at 685. The Court upheld the suspension, noting that school is "no place for a sexually explicit monologue directed

towards an unsuspecting audience of teenage students," and that the First Amendment does not prevent schools from disallowing lewd language. *Id.*

In *Morse,* the Court held that "a principal may, consistent with the First Amendment, restrict student speech at a school event, when that speech is reasonably viewed as promoting illegal drug use." 551 U.S. at 403. In *Morse*, a student had unfurled a fourteen-foot banner which read "BONG HiTS 4 JESUS" at a school-sponsored event. *Id.* at 397. The principal ordered the student to remove the banner and later suspended him for violating the school board's policy that prohibited "public expression that . . . advocates the use of substances that are illegal to minors." *Id.* at 398 (internal citations omitted). Because of the "special characteristics of school environment," and the governmental interest in deterring drug abuse by students, the Court held that "[t]he First Amendment does not require schools to tolerate at school events student expression that contributes to those dangers." *Id.* at 409–10 (internal citations omitted).

The Supreme Court also held that the First Amendment does not forbid public schools from censoring the content of a school-sponsored newspaper. *Hazelwood*, 484 U.S. at 272–73. In *Hazelwood*, a principal refused to allow the school's student-run newspaper to print two articles that included sensitive personal information about students at the school. *Id.* at 263–64. Borrowing language from *Fraser*, the Court ruled that "a school may in its capacity as publisher of a school newspaper or producer of a school play 'disassociate itself,' . . . from speech that is, for example . . . biased or prejudiced, vulgar or profane, or unsuitable for immature audiences." *Id*. at 271 (internal citations omitted). Accordingly, the Court held that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns." *Id.* at 273.

Other than the exceptions discussed above, students retain broad free speech rights, including most importantly, the right of religious expression. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 313 (2000): "[N]othing in the Constitution as interpreted by this Court prohibits any public school student from voluntarily praying at any time before, during, or after the schoolday [sic]." *Doe*, 530 U.S. at 313.

**Graduation Prayer**

In *Santa Fe*, however, the Court significantly limited students' rights to pray at school sponsored events, including sporting events and graduations. In that case, the Santa Fe School District instituted a policy "that permits, but does not require, prayer initiated and led by a student at all home [football] games." *Id.* at 294. Several factors were key to the Court's holding that the school district's policy was unconstitutional. First, the school board had historically involved prayer at school functions even before the policy was implemented. *Id.* at 309. Second, the school board adopted a policy allowing students to vote on whether to have an invocation or message before football games. *Id.* at 297. Third, the policy also allowed students to elect the student who would give the invocation or message at each football game during the school year. *Id.* at 297–98. Finally, the prayers were "broadcast over the school's public address system, which remains subject to the control of school officials." *Id.* at 307.

Taking these factors into account, the Court held that the policy allowing prayer at the football games was "invalid on its face because it establishes an improper majoritarian election on religion, and unquestionably has the purpose and creates the perception of encouraging the delivery of prayer at a series of important school events." *Id.* at 317. Additionally, the prayers were unconstitutional as applied because "the realities of the situation plainly reveal that [the

school district's] policy involves both perceived and actual endorsement of religion" and "the District failed to divorce itself from the religious content in the invocations." *Id.* at 305.

The *Santa Fe* decision has impacted the free speech rights of students at graduation ceremonies although the lower courts are split on whether student-initiated-led prayer at high school graduations is constitutional. Some courts have held that any prayer at high school graduations violates the Establishment Clause. Courts within the Third, Fourth, Sixth, and Ninth Circuits[1] have held that graduation prayer is unconstitutional regardless of whether it is student led and initiated. *See ACLU v. Black Horse Pike Regional Bd. of Educ*., 84 F.3d 1471 (3rd Cir. 1996); *Deveney v. Bd. of Educ*., 231 F. Supp. 2d 483 (S.D. W. Va. 2002); *Gearon v. Loudoun County Sch. Bd*., 844 F. Supp. 1097 (E.D. Va. 1993); *Doe v. Gossage*, 2006 U.S. Dist. LEXIS 34613 (W.D. Ky. 2006); *Harris v. Joint Sch. Dist*. No. 241, 41 F.3d 447 (9th Cir. 1994). *Cf. Doe v. Sch. Dist. of the City of Norfolk*, 340 F.3d 605 (8th Cir. 2003) (Parent's impromptu, unauthorized prayer at high school graduation did not violate the Establishment Clause because school authorities did not authorize or have any foreknowledge of the prayer.)

The court's decision in *ACLU v. Black Horse Pike Regional Bd. of Educ*., 84 F.3d 1471 (3rd Cir. 1996) is illustrative of the reasoning employed to hold that graduation prayer is unconstitutional. There, the court struck down a school policy allowing graduating students to

[1] Courts within the First, Second, Seventh, Eighth and Tenth Circuits have not addressed the constitutionality of graduation prayer. The First Circuit includes the States of Maine, Massachusetts, Rhode Island, New Hampshire, Puerto Rico. The Second Circuit includes the States of Connecticut, New York, Vermont. The Third Circuit covers Pennsylvania, Delaware, New Jersey. The Fourth Circuit covers Maryland, Virginia, West Virginia, North Carolina, and South Carolina. The Sixth Circuit includes Kentucky, Tennessee, Ohio and Michigan. The Seventh Circuit includes Illinois, Indiana and Wisconsin. The Eighth Circuit covers Arkansas, North Dakota, South Dakota, Missouri, Iowa, Nebraska, and Minnesota. The Ninth Circuit includes Alaska, Arizona, California, Idaho, Montana, Nevada, Oregon, Washington, and Hawaii. The Tenth Circuit includes Utah, Colorado, Kansas, New Mexico, Oklahoma, and Wyoming.

decide whether prayer would be included in the graduation ceremony as well as the nature of any such prayer. Relying on the Supreme Court's decision in *Lee v. Weisman*, the court stated:

> Although the state's involvement here is certainly less evident [than in *Lee*], the student referendum does not erase the state's imprint from this graduation prayer. Graduation at Highland Regional High School, like graduation at nearly any other school, is a school sponsored event. School officials decide the sequence of events and the order of speakers on the program, and ceremonies are typically held on school property at no cost to the students. The atmosphere at Highland's graduations is characterized by order and uniformity. School officials necessarily "retain a high degree of control over the precise contents of the program, the speeches, the timing, the movements, the dress, and the decorum of the students."
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> Delegation of one aspect of the ceremony to a plurality of students does not constitute the absence of school officials' control over the graduation. Students decided the question of prayer at graduation only because school officials agreed to let them decide that one question. Although the delegation here may appear to many to be no more than a neutral means of deciding whether prayer should be included in the graduation, it does not insulate the School Board from the reach of the First Amendment. "Courts must keep in mind both the fundamental place held by the Establishment Clause in our constitutional scheme and the myriad, subtle ways in which the Establishment Clause values can be eroded."

84 F.3d at 1479 (citations omitted).

The Courts of Appeal for the Fifth and Eleventh Circuits have held that graduation prayers are constitutional under some circumstances. The Court of Appeals for the Fifth Circuit, which covers Louisiana, Mississippi and Texas has held that student-initiated, student-led prayer at graduation is constitutional, provided that it is nonsectarian and nonprosyletizing. In *Ingebretsen v. Jackson Pub Sch. Dist*, 88 F.3d 274, 280 (5th Cir 1996), the court upheld a portion of a Mississippi statute which allowed students to choose to solemnize their graduation ceremonies with a student-led and initiated, non-proselytizing and nonsectarian prayer).

In 2007, however, a Texas federal district court opined that the Fifth's Circuit's graduation prayer cases, to the extent they approve "a majoritarian election on religion" were overruled by the Supreme Court's decision in *Santa Fe*. *See Does 1-7 v. Round Rock Indep. Sch. Dist*., 540 F.

Supp. 2d 735, 750 (W.D. Tex. 2007) (Denying defendants' Motion to Dismiss "because Plaintiffs have stated a cognizable claim for relief by alleging that school policy impermissibly attempted to inject religious activities into the 2007 graduation ceremonies by mandating a student majoritarian election on prayer."). Although the Fifth Circuit has not yet specifically overruled *Ingebretsen*, the *Round Rock* court is probably correct.

The Eleventh Circuit, covering Florida, Georgia and Alabama has also upheld a school district policy which allowed a student-led, student initiated "message" that could include prayer. In *Adler v. Duval County Sch. Bd.*, 206 F.3d 1070, 1072 (11th Cir. 2001) (en banc), *judgment vacated by* 531 U.S. 801 (2000) (mem.), and *reinstated*, 250 F.3d 1330 (11th Cir. 2001) (en banc), the Court of Appeals for the Eleventh Circuit upheld a Florida school board policy permitting graduating seniors to elect a student to deliver a "message," which the school could not in any way censor or monitor, at their graduation ceremony. The court held that this "message" was private speech protected by the Free Speech and Free Exercise Clauses. "The total absence of state involvement in deciding whether there will be a graduation message, who will speak, or what the speaker may say combined with the student speaker's complete autonomy over the content of the message convinces us that the message delivered, be it secular or sectarian or both, is not state-sponsored." 206 F.3d at 1071.

Distinguishing the Supreme Court's decision in *Lee v. Weisman*, the court noted that under the Duval policy, the district, as the state actor, had "no control over who will draft the message (if there be any message at all) or what its contents may be." *Id*. at 1076. The court concluded, "The selection of a graduation student speaker by a secular criterion (not controlled by the state) to deliver a message (not restricted in content by the state) does not violate the Establishment Clause." *Id*. at 1074. Finally, the court disagreed with the Fifth Circuit that the Establishment

Clause required prayers to be nonsectarian and nonproselytizing. Rather under the Free Speech Clause, the prayers are the speech of the students and not subject to censorship by the school district. *Id*. at 1079 n.7.

The salient distinction between *Adler* which was decided after the Supreme Court's decision in *Santa Fe* and the Fifth Circuit's decision in *Ingebretson,* which was decided before *Santa Fe*, is the absence in *Adler* of a majoritarian determination that prayer would occur.

**Valedictory Speeches**

*Santa Fe* does not control the issue of religious expression by valedictorians and salutatorians because, as the Supreme Court has explained, "there is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." As the Eleventh Circuit recognized in *Adler*, student speech is not attributable to the government simply because it is delivered in a public setting: "The proposition that schools do not endorse everything they fail to censor is not complicated." *Mergens*, 496 U.S. at 250; *Adler*, 206 F.3d at 1074.

The First Amendment's protection extends to religious remarks by valedictorians and salutatorians as a part of their graduation speeches. When a school selects a student to speak at graduation through neutral, even-handed criteria (*e.g.,* valedictorians or salutatorians selected to speak due to their grade point averages), and the student is given primary control of the content of the speech, such expression should not be limited due to its religious content.

Notably, with regard to graduation speeches written by valedictorians and salutatorians, the expression cannot reasonably be viewed as bearing the imprimatur of the school. A reasonable person in attendance at a graduation ceremony understands that valedictorians and

salutatorians are selected due to neutral academic criteria and their remarks typically reflect their own views. As such, graduation speeches by valedictorians and salutatorians should be reasonably understood as *the student's own expression* rather than speech controlled or sponsored by the school. The First Amendment thus protects the right of valedictorians and salutatorians to share how their faith has impacted their lives. *See Adler*, 206 F.3d at 1074.

One Guideline issued by the U.S. Department of Education in 2003 supports the proposition that valedictory or salutatory addresses are protected by the First Amendment from censorship due to religious content:

> Prayer at Graduation
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> School officials may not mandate or organize prayer at graduation or select speakers for such events in a manner that favors religious speech such as prayer. *Where students or other private graduation speakers are selected on the basis of genuinely neutral, evenhanded criteria and retain primary control over the content of their expression, however, that expression is not attributable to the school and therefore may not be restricted because of its religious (or anti-religious) content.* To avoid any mistaken perception that a school endorses student or other private speech that is not in fact attributable to the school, school officials may make appropriate, neutral disclaimers to clarify that such speech (whether religious or nonreligious) is the speaker's and not the school's.

U.S. Dept. of Educ., *Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools*, 68 Fed. Reg. 9645 (Feb. 28, 2003) (emphasis added). Thus, under the Guidelines, valedictorians and salutatorians should be able to include religious content in their speeches, at least where they "retain primary control over the content of their expression," because they are selected on the basis of neutral criteria. Public schools that do not comply with the Guidelines risk losing their federal funding. *Id.*

**Students' Right To Refrain From Speaking**

Just as government agents may not limit students' free speech rights other than by the restrictions discussed above, they also may not require students to espouse a particular belief or

viewpoint. Seven decades ago in *West Virginia State Board of Education v. Barnette*, the Supreme Court held that a West Virginia Board of Education policy requiring students to regularly recite the pledge of allegiance "transcend[ed] constitutional limitations . . . and invade[d] the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control." 319 U.S. 624, 642 (1943). The Court reasoned that because the Constitution "protects the citizen against the State itself and all of its creatures—Boards of Education not excepted," public education must not be "partisan or enemy of any class, creed, party, or faction." *Id.* at 637. Accordingly, the Court famously stated,

> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.

*Id.* at 642. Thus, legislatures and school boards may not, without violating the Constitution, require students to speak, believe, or adopt any particular viewpoint.