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Introduction

Despite a national history replete with official acknowledgments of religious belief in the public sector, many school officials mistakenly believe that participation in or observation of religious events, songs, and slogans are violations of the Establishment Clause. That is simply not the case.

America's religious heritage manifests itself in many ways that openly reflect government acknowledgement and yet do not create an "establishment" problem. The employment of congressional Chaplains to offer daily prayers in Congress is a practice that has spanned two centuries. Moreover, the government has recognized national holidays with undeniable religious significance, such as Christmas and Thanksgiving. The language "In God We Trust" is statutorily prescribed as our national motto to be inscribed on our currency, and "one nation under God" is included as part of the Pledge of Allegiance to the American flag. Additionally, Congress has directed the President to proclaim a National Day of Prayer each year, and currently, every federal court opens proceedings with an announcement that concludes, "God save the United States and this Honorable Court." Furthermore, a portrayal of the Ten

Commandments decorates the courtroom of the United States Supreme Court, directly above the Justices' bench.

Thus, the Establishment Clause clearly does not create a *per se* restriction on religious expression, discussion, or even prayer in public life. Nor does the fear of Establishment Clause violations justify school officials in prohibiting private religious speech, including prayer, in public schools. Rather, the First Amendment to the United States Constitution protects both students' and teachers' personal rights to pray and schools' freedom to acknowledge the religious heritage of our nation.

I. SCHOOL-SPONSORED PRAYER IN PUBLIC SCHOOLS.

Under Establishment Clause jurisprudence, government absolutely “may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which ‘establishes a [state] religion or religious faith, or tends to do so.’” *Lee v. Weisman*, 505 U.S. 577, 587 (1992) (quoting *Lynch v. Donnelly*, 465 U.S. 668, 678 (1984)). Government also violates the Establishment Clause, however, if an “objective observer” would perceive the prayer “as a state endorsement of prayer in public schools.” *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 308 (2000) (quoting *Wallace v. Jaffree*, 472 U.S. 38, 76 (1985) (O’Connor, J., concurring in judgment)). Thus, any school-sponsored prayer in public schools is unconstitutional if it coerces students to participate in a religious activity, or if it indicates a state endorsement of religion.

Whether the prayer constitutes “government speech endorsing religion, which the Establishment Clause forbids,” or “private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect” is crucial. *Bd. of Educ. of Westside Cmty. Sch. v. Mergens*, 496 U.S. 226, 250 (1990). Accordingly, cases in which courts have found school prayer to be unconstitutional involve prayer initiated, or endorsed by school officials. *See, e.g., Engel v.*

Vitale, 370 U.S. 421 (1962) (daily prayer led by the principal or teachers); *Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203 (1963) (beginning each day with a required Bible or recitation of the Lord’s Prayer reading); *Santa Fe*, 530 U.S. 290 (student-led but school-sponsored prayer before high school football games). Conversely, student *initiated* prayers are not only permissible, but constitutionally protected. *See, e.g., Widmar v. Vincent*, 454 U.S. 263 (1981) (private religious student club at a university engaging in prayer).

A. Prayer in the Classroom.

The Supreme Court delivered a landmark decision against the recitation of “official prayer” in the public school classroom and held that in-class, teacher-led prayer in public schools violates the Establishment Clause. *Engel*, 370 U.S. at 430. In that case, parents of public school students in New York brought an action against a local school district which, pursuant to state law, authorized the school’s principal to require recitation of an officially approved prayer at the start of each school day. *Id.* at 422. The students’ parents argued that “the state laws requiring or permitting use of [officially approved prayer] must be struck down . . . because that prayer was composed by governmental officials as a part of a governmental program to further religious beliefs.” *Id.* at 426. The Court agreed and held that the government had no business authoring official prayers for public school students to recite. *Id.* at 426. Accordingly, the Court held the prayer unconstitutional, even though the prayer was “denominationally neutral” and its observance was voluntary. *Id.* at 430.

The following year, the Supreme Court held the recitation of the Lord’s Prayer¹ in the classroom unconstitutional. *Schempp*, 374 U.S. at 203. There, the Baltimore School District required the in-class reading of Bible verses and/or the recitation of the Lord’s Prayer at the beginning of each school day. *Id.* at 212 n.4. As part of the School District’s requirements,

¹ Matthew 6:9-13.

students were allowed to be excused from participating. *Id.* Nevertheless, the Court held that requiring the recitation of prayer (or reading from the Bible) was a school-sponsored religious exercise which violated the First Amendment's mandate that government shall "maintain strict neutrality, neither aiding nor opposing religion." *Id.* at 225.

Because the prayers in *Engel* and *Schempp* were school-sponsored, the decisions did not erode individual religious rights to religious expression while on school premises. Justice Douglas emphasized this distinction in his concurring opinion in *Engel*: "Under our Bill of Rights [sic] free play is given for making religion an active force in our lives. But 'if a religious heaven is to be worked into the affairs of our people, *it is to be done by individuals and groups, not by the Government.*'" *Engel*, 370 U.S. at 442–43 (Douglas, J., concurring) (emphasis added) (citing *McGowan v. Maryland*, 366 U.S. 420, 563 (1961) (Douglas, J., dissenting)). Similarly, the majority in *Schempp* noted that that "[t]he First Amendment . . . does not say that in every and all respects there shall be a separation of Church and State. Rather, it studiously defines the manner, the specific ways, in which there shall be no concert or union or dependency one on the other. That is the common sense of the matter." *Schempp*, 374 U.S. at 220 (quoting *Zorach v. Clauson*, 343 U.S. 306, 312 (1952)).

As long as prayer is "done by individuals and groups," *Engel*, 370 U.S. at 443 (Douglas, J., concurring) (citing *McGowan*, 366 U.S. at 563 (Douglas, J., dissenting)), it is protected by the Constitution. Indeed, as the Court declared in a more recent case, "nothing 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]." *Santa Fe*, 530 U.S. at 313.

B. Prayer at Graduation and Other Public School Events.

Along with prohibiting in-class, teacher-led prayers and Bible readings, the Supreme Court has also held that prayers offered at graduation and other public school events may violate the Establishment Clause. The Court has decided two primary cases regarding prayer at public school events. In the first of these decisions, *Lee v. Weisman*, the Court held that school-sponsored prayer at a middle school graduation was unconstitutional because it effectively coerced students to participate in a religious exercise. 505 U.S. at 629. Specifically, principals of public secondary schools in Providence, Rhode Island regularly invited clergy members to give invocations and benedictions at their schools' graduation ceremonies. *Id.* at 581. The middle school principal selected the clergyman to give the prayer (in this case a rabbi) and presented him with a pamphlet setting forth guidelines for “nonsectarian” prayer at school graduations. *Id.* The issue before the Court was whether “including clerical members who offer prayers as part of the official school graduation ceremony is consistent with the religion clauses of the First Amendment.” *Id.* at 580.

The Supreme Court held that the graduation prayer in *Lee* violated the Establishment Clause because the invocation was directly attributable to the State and the level of involvement and control by school officials was “pervasive, to the point of creating a state-sponsored and state-directed religious exercise in a public school.” *Id.* at 587. The Court concluded that because students' attendance at these events was “in a fair and real sense obligatory,” students were effectively coerced into participating in a religious practice. *Id.* at 586–87. Thus, the Court held that the prayers in *Lee* were unconstitutional. *Id.* at 629.

The second major Supreme Court decision regarding prayer at public school events was *Santa Fe Indep. Sch. Dist. v. Doe*, in which the Supreme Court held that the Establishment

Clause prohibits school officials from taking affirmative steps to facilitate prayer at school functions. 530 U.S. at 317. 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. Therefore, the Court held, the prayer policy in *Santa Fe* violated the Establishment Clause. *Id.*

In both *Lee* and *Santa Fe*, the Court analyzed prayers offered at public *primary and secondary* school events. The Court particularly noted that they “do not address whether that choice is acceptable if the affected citizens are mature adults.” *Lee*, 505 U.S. at 593. *See also Widmar*, 454 U.S. at 274 (“University students are, of course, young adults. They are less

impressionable than younger students and should be able to appreciate that the University's policy is one of neutrality toward religion.”).

Since the Supreme Court decisions in *Lee* and *Santa Fe*, 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 Circuits² 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 knowledge 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

² 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."

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 nonproselytizing. In *Jones v. Clear Creek Independent School District*, 977 F.2d 963, 965 (5th Cir 1992), the court upheld a school district's graduation prayer policy, ruling that the policy had the secular purpose of solemnization, and its primary effect was to solemnize the graduation ceremony, not to advance religion because the policy required that the "invocation be nonsectarian and nonproselytizing." *Id.* at 966-67. The court also held that because the policy merely allowed prayer upon student choice, it "keeps [the district] free of all involvement with religious institutions." *Id.* at 968.

Finally, the court held that the school did not unconstitutionally endorse religion because Clear Creek's policy "does not mandate a prayer. [It] does not even mandate an invocation; it merely permits one if the seniors so choose" *Id.* See also *Ingebretsen v. Jackson Pub Sch. Dist.*, 88 F.3d 274, 280 (5th Cir 1996) (upholding 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 held its decisions in *Clear Creek* and *Ingebretsen* are no longer good law, 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 decisions in *Clear Creek* and *Ingebretson*, which were decided before *Santa Fe*, is the absence in *Adler* of a majoritarian determination that prayer would occur.

Because of the age and maturity difference of college students, courts treat prayer at college and graduate schools differently. In *Chaudhuri v. Tennessee*, the Sixth Circuit upheld prayers offered at public university graduations, faculty meetings, dedication ceremonies, and guest-lectures. 130 F.3d 232, 238 (6th Cir. 1997). The court noted that *Lee* "attached particular importance to the youth of the audience and the risk of peer pressure and 'indirect coercion' in the primary and secondary school context." *Id.* Whereas in *Lee* there was a "heightened concern"

about “subtle coercive pressure in the elementary and secondary public schools,” there is no such coercion at public university and college events. *Id.* at 239. The court explained that there was “absolutely no risk” that “any . . . unwilling adult listener . . . would be indoctrinated by exposure to the prayers.” *Id.* Accordingly, the court concluded that “the obvious difference between [this plaintiff, a professor at a university,] and children at an impressionable stage of life ‘warrants a difference in constitutional results.’” *Id.* at 239 (citing *Edwards v. Aguillard*, 482 U.S. 578, 584 n.5 (1987)).

Likewise, the Seventh Circuit in *Tanford v. Brand* upheld a prayer at a public university graduation ceremony because

the mature stadium attendees were voluntarily present and free to ignore the cleric’s remarks. Most remained seated. Under these facts, in which the special concerns underlying the Supreme Court’s decision in *Lee* are absent, the district court correctly determined that *Lee* does not require the challenged practices to be struck down.

104 F.3d 982, 985–986 (7th Cir. 1997). The court additionally noted that many students had, in fact, boycotted the graduation, evidencing that there was “no coercion--real or otherwise--to participate.” *Id.* at 986. Therefore, the court concluded, the practice of prayer at public university graduations is “simply a tolerable acknowledgment of beliefs widely held among the people of this country” and a practice that is “widespread throughout the nation.” *Id.* (citing *Marsh v. Chambers*, 463 U.S. 783, 792 (1983)).

The single circuit that has struck down a prayer at a public university event did so in the narrow context of a military institution. In *Mellen v. Bunting*, the Fourth Circuit concluded that “supper prayer” in the mess hall at Virginia Military Institute violated the Establishment Clause because of the coercive military atmosphere. 327 F.3d 355, 371-372 (4th Cir. 2003). The Court in *Mellen* carefully distinguished the case from the decisions of its sister circuit in *Chaudhuri* and *Tanford*, which recognized the difference between young and mature students:

Although VMI's cadets are not children, in VMI's educational system they are uniquely susceptible to coercion. VMI's adversative method of education emphasizes the detailed regulation of conduct and the indoctrination of a strict moral code. Entering students are exposed to the "rat line," in which upperclassmen torment and berate new students, bonding "new cadets to their fellow sufferers and, when they have completed the 7-month experience, to their former tormentors." *United States v. Virginia*, 518 U.S. at 522. At VMI, even upperclassmen must submit to mandatory and ritualized activities, as obedience and conformity remain central tenets of the school's educational philosophy. In this atmosphere, General Bunting reinstated the supper prayer in 1995 to build solidarity and bring the Corps together as a family. In this context, VMI's cadets are plainly coerced into participating in a religious exercise. Because of VMI's coercive atmosphere, the Establishment Clause precludes school officials from sponsoring an official prayer, even for mature adults.

Id. In short, the coercive atmosphere produced by the military approach to academics at VMI suggested that the student were, in fact, coerced to participate in a religious activity in violation of the Establishment Clause. Thus, the decision in *Mellen* is narrow, applying only to military institutions that utilize strict, coercive tactics.

C. Moments of Silence

Many states allow or require schools to observe periods of silence at the commencement of the school day.³ Because many students and teachers silently pray during such periods of silence, they have been subjected to court challenges on Establishment Clause grounds,

³ ALABAMA: Ala. Code § 16-1-20 (1978); § 16-1-20.4 (2001); CONNECTICUT: Conn. Gen. Stat. Ann. § 10-16a (West 1978); DELAWARE: Del. Code Ann. tit. 14, § 4101A (1995); FLORIDA: Fla. Stat. Ann. § 1003.45 (West 2002); GEORGIA: Ga. Code Ann. § 20-2-1050 (West 1994); § 20-2-1051 (West 1969); ILLINOIS: 105 Ill. Comp. Stat. Ann. 20/1 (West 2007); 105 Ill. Comp. Stat. Ann. 20/5 (2003). Student Prayer; INDIANA: Ind. Code Ann. § 20-30-5-4.5 (West 2005); KANSAS: Kan. Stat. Ann. § 72-5308a (1969); KENTUCKY: Ky. Rev. Stat. Ann. § 158.175 (West 2000); LOUISIANA: La. Rev. Stat. Ann. § 17:2115 (2002); § 2115.3 (1995); MAINE: Me. Rev. Stat. Ann. tit. 20-A, § 4805 (1993); MARYLAND: Md. Code Ann., Educ. § 7-104 (West 1978); MASSACHUSETTS: Md. Code Ann., Educ. § 7-104 (West 1978); MICHIGAN: Mich. Comp. Laws Ann. § 380.1565 (West 1977); MISSISSIPPI: Miss. Code Ann. § 37-13-4.1 (West 1994); MONTANA: Mont. Code Ann. § 20-7-112 (1989); NEVADA: Nev. Rev. Stat. Ann. § 388.075 (West 1979); NEW HAMPSHIRE: N.H. Rev. Stat. Ann. § 189:1-b (2013); NEW JERSEY: N.J. Stat. Ann. § 18A:36-4 (West 1982) (held unconstitutional because it lacked its secular purpose in *May v. Cooperman*, 780 F.2d 240 (3d Cir. 1985)); NEW YORK: N.Y. Educ. Law § 3029-a (McKinney 1971); NORTH CAROLINA: N.C. Gen. Stat. Ann. § 115C-47(29) (1981); NORTH DAKOTA: N.D. Cent. Code § 15.1-19-03.1 (2001); OHIO: Ohio Rev. Code Ann. § 3313.601 (2002); OKLAHOMA: Okla. Stat. tit. 70, § 11-101.1 (1980); PENNSYLVANIA: 24 Pa. Stat. Ann. § 15-1516.1 (West 1972); **RHODE ISLAND:** R.I. Gen. Laws § 16-12-3.1 (1977); SOUTH CAROLINA: S.C. Code Ann. § 59-1-443 (1995); TENNESSEE: Tenn. Code Ann. § 49-6-1004 (West 1993); TEXAS: Tex. Educ. Code Ann. § 25.901 (Vernon 1995); UTAH: Utah Code Ann. § 53A-11-901.5 (West 1997); VIRGINIA: Va. Code Ann. § 22.1-203 (West 2000); § 22.1-203.1 (1994).

especially if the purpose of the moment of silence is to further religion. Most notably, in *Wallace v. Jaffree*, the Supreme Court struck down a statutorily mandated moment of silence “for meditation or voluntary prayer” in Alabama schools, 472 U.S. at 41, because the statute had “no secular purpose” and was enacted to “convey a message of state endorsement and promotion of prayer,” *Id.* at 56, 59. The Court relied heavily on comments made by the statute’s principal sponsor, who stated in the legislative record and testified in the case that he “did not have no [sic] other purpose in mind” than to “return voluntary prayer to our public schools.” *Id.* at 43, 57. Additionally, the Court noted that another section of Alabama law already imposed on schools a minute of silence “for meditation,” so “[t]he addition of ‘or voluntary prayer’ indicates that the State intended to characterize prayer as a favored practice.” *Id.* at 60.

The holding in *Wallace*, however, cannot be construed as a blanket restriction on moments of silence. Indeed, the Court specifically acknowledged that it had already affirmed Alabama’s moment of silence “for meditation,” and confined its decision to the moment of silence for “voluntary prayer.” *Id.* at 41–42 (citing *Wallace v. Jaffree*, 466 U.S. 924, (1984)). Thus, in light of the Court’s decision that a moment of silence in schools “for meditation” is constitutional, and given the heavy reliance of the Court on blatant admissions by the statute’s sponsor that the law was designed to “return . . . prayer to our public schools,” *Wallace* is a narrow holding limited to its facts.

Indeed, thirty-one states have statutes mandating or encouraging public school teachers to provide a period of silence at the commencement of each school day⁴ and many have been upheld in court.⁵

⁴ See *infra*, note 3.

⁵ E.g., *Gaines v. Anderson*, 421 F.Supp. 337 (D. Mass. 1976) (after examining “the legislative history, the statutory language, and its likely operation and effect,” the court stated that “the lack of any mandatory direction to students to meditate or pray clearly indicates a legislative purpose to maintain neutrality. . . . The fact that the . . . program

In conclusion, the Supreme Court has made it clear that prayers at public school events are unconstitutional when they coerce students to participate in religious activities or when they constitute a state endorsement of religion. Such coercion and endorsement are more likely to be found in secondary and primary schools where young students are more impressionable and less able to differentiate between state-sponsored prayer and private religious expression. Conversely, prayer at public university and college events, with the narrow exception of military schools, is less likely to be found unconstitutional because mature students are less susceptible to coercion and are more able to recognize true endorsement of religion. Moments of silence are generally upheld as long as they are not intended to promote, encourage, or endorse prayer or religion.

II. STUDENTS' PRIVATE PRAYER IN PUBLIC SCHOOLS.

A. Private Prayer by Students at School

The courts are nearly unanimous in holding that private student prayers are fully protected by the Constitution. In *Santa Fe*, 530 U.S. at 313, the Supreme Court declared that “nothing 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].” *See also, e.g., Chandler v. Siegelman*, 230 F.3d 1313, 1317 (11th Cir. 2000) [hereinafter *Chandler II*].

In *Chandler II*, the Court of Appeals for the Eleventh Circuit held that “[s]o long as the prayer is genuinely student-initiated, and not the product of any school policy which actively or surreptitiously encourages it, the speech is private and it is protected.” 230 F.3d at 1317. This case first came to the Eleventh Circuit in 1999 in a case now known as *Chandler I*, in which the court upheld an Alabama statute that permitted “non-sectarian, non-proselytizing student-

provides an opportunity for prayer for those students who desire to pray during the period of silence does not render the program unconstitutional”) (citation omitted); *Sherman v. Koch*, 623 F.3d 501 (7th Cir. 2010) (Illinois Silent Reflection and Student Prayer Act questioned and held constitutional because of its “secular purpose of having a uniform moment of quiet reflection to calm school children before they start the day”) (citation omitted).

initiated voluntary prayer” by students at public school events. *Chandler v. James*, 180 F.3d 1254, 1266 (11th Cir. 1999) [hereinafter *Chandler I*]. Though the court upheld the statute, *id.*, their decision was remanded by the Supreme Court after the Court handed down its decision in *Santa Fe*, 530 U.S. at 317. See *Chandler II*, 530 U.S. at 1256. In turn, the Eleventh Circuit issued another opinion on the case, now known as *Chandler II*, upholding its decision in *Chandler I*. *Chandler II*, 230 F.3d at 1316–17. To distinguish the statute from the policy declared invalid in *Santa Fe*, the court noted that “[not all] religious speech in schools is attributable to the State” and held that the Alabama statute fell into an area of speech that *Santa Fe* explicitly protected: “voluntarily praying at any time before, during, or after the school day.” *Id.* at 1316 (quoting *Santa Fe*, 530 U.S. at 313).⁶ Simply put, the court held that “a policy which *tolerates* religion does not improperly *endorse* it.”⁷ *Id.* at 1317.

Therefore, although the Supreme Court has held that the Constitution prohibits school officials from endorsing religion by promoting or leading prayers, the right of students to pray privately anytime and anywhere during the school day is afforded full Constitutional protection.

B. Student Prayer Groups and Bible Studies

The Free Speech Clause also guarantees religious student groups equal access to public facilities, even for the purpose of religious activities such as prayer. This principle was firmly established in *Widmar v. Vincent*, in which the Supreme Court struck down a university policy which prohibited use of facilities for religious purposes. 454 U.S. at 276. In that case, the Supreme Court decided that religious use of the university property constituted “forms of speech and association protected by the First Amendment,” *id.* at 269, and held that the university

⁶ The court also emphasized the fact that the injunction issued by the district court against the statute had prohibited “prayer in a public context at any school function” and only permitted students to pray “quietly,” without “unduly call[ing] attention thereto.” *Id.* at 1316 and n. 4. This injunction also violated students’ private right to pray. *Id.*

⁷ Subsequently, the Supreme Court denied certiorari. *Chandler v. Siegelman*, 533 U.S. 916 (2001).

violated the First Amendment by engaging in “content-based exclusion of religious speech,” *id.* at 277.

In *Widmar v. Vincent*, 454 U.S. 263, 276 (1981), the Supreme Court struck down a university policy which prohibited use of facilities for religious purposes. In that case, the University of Missouri at Kansas City (UMKC) encouraged an active campus life by opening its facilities to over 100 registered student groups. *Id.* at 265. One of those student groups, an evangelical Christian group known as Cornerstone, initially received the same access to facilities accorded to all students. *Id.* However, UMKC later denied Cornerstone access to campus facilities, citing a university ban on the use of facilities “for purposes of religious worship or religious teaching.” *Id.*

The Supreme Court held that Cornerstone’s proposed use of the forum—for religious worship and discussion—constituted “forms of speech and association protected by the First Amendment.” *Id.* at 269. Accordingly, the Court struck down UMKC’s policy because it amounted to unconstitutional “content-based exclusion of religious speech.” *Id.* at 277.

Widmar was a landmark decision and its core principle was reinforced in subsequent Supreme Court decisions. See *Bd. of Educ. v. Mergens*, 496 U.S. 226, 232-33 (1990); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 827, 843–44 (1995). For example, in *Rosenberger*, the University of Virginia refused to fund a Christian student group’s publication, even though it funded the publication of other student organizations. *Rosenberger v. Rector & Visitors of the Univ. of Va.* The Court struck down the school’s policy against funding “any activity that primarily promotes or manifests a particular belief in or about a deity or an ultimate reality,” *id.* at 825 (internal quotation mark omitted), ruling that the university’s actions amounted to “a

denial of [the Christian student group’s] right of free speech guaranteed by the First Amendment.” *Id.* at 837.

The Supreme Court has consistently held that the Establishment Clause does not justify the exclusion of religious organizations from use of public facilities generally open to the public. *Rosenberger*, 515 U.S. at 842 (“It does not violate the Establishment Clause for a public university to grant access to its facilities on a religion-neutral basis to a wide spectrum of student groups, including groups that use meeting rooms for sectarian activities, accompanied by some devotional exercises.”); *Mergens*, 549 U.S. at 248 (“[I]f a State refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion. The Establishment Clause does not license government to treat religion and those who teach or practice it, simply by virtue of their status as such, as subversive of American ideals and therefore subject to unique disabilities.”) (internal quotations omitted) (quoting *McDaniel v. Paty*, 435 U.S. 618, 641 (1978)); *Lamb's Chapel*, 508 U.S. at 395 (holding that allowing a religious organization to use school property poses no “realistic danger that the community would think that the District was endorsing religion or any particular creed....”); *Widmar*, 454 U.S. at 271 (U.S. 1981) (“We agree that the interest of the University in complying with its constitutional obligations may be characterized as compelling. It does not follow, however, that an ‘equal access’ policy would be incompatible with this Court's Establishment Clause cases.”).

III. TEACHERS’ AND FACULTY RIGHTS REGARDING PRAYER IN PUBLIC SCHOOLS.

While students enjoy a wide array of Constitutional rights in the schoolhouse—including the right to pray “at any time before, during, or after the schoolday,” *Santa Fe*, 530 U.S. at 313, teachers, school administrators, and faculty do not. Because a teacher’s speech is more easily attributable to the school, the risk of state endorsement of religion is especially great when a

teacher engages in religious speech around younger students. Accordingly, most cases challenging the right of teachers to express religious views in the classroom, especially among young students, have held that doing so impermissibly projects a state endorsement of religion because the teacher is perceived as a representative of the school. Thus, the right of teachers, administrators, and faculty to pray at school during the school day is significantly diminished.

While the Supreme Court has held that school-sponsored, teacher-led prayers in the classroom are unconstitutional, *see supra* Part I.A (discussing *Engel*, 370 U.S. 421 (1962) and *Schempp*, 374 U.S. 203 (1963)), it has not directly ruled on the right of a teacher or faculty members to pray privately at school. However, lower courts have generally held that teachers' free speech rights are significantly limited by the risk of Establishment Clause violations. *Bishop v. Aronov*, 926 F.2d 1066, 1076–77 (1991) (holding that a university professor could not express his religious views in class or hold “optional classes” in which he explained his religious viewpoint of the subject material); *Pelozo v. Capistrano Unified School District*, 37 F.3d 517, 522 (9th Cir. 1994), *cert. denied*, 515 U.S. 1173 (1995) (holding that a school did not violate a teacher's free speech rights by prohibiting him from speaking with students about his religious views any time students are required to be on campus); *Roberts v. Madigan*, 921 F.2d 1047, 1059 (10th Cir. 1990), *cert. denied*, 505 U.S. 1218 (1992) (holding that a school did not violate a teacher's free speech rights by forcing him to remove the Bible and Christian literature from his classroom library and prohibiting him from reading the Bible during silent reading time in class).

Furthermore, lower courts have also upheld restrictions on the right of coaches to pray with their teams before games at public schools. For example, in *Borden v. School District of Township of East Brunswick*, the head high school football coach (Borden) sued the school district for its policy which prohibited Borden from engaging in silent acts of “bowing his head

during his team's pre-meal grace and taking a knee with his team during a locker-room prayer.”
523 F.3d 153, 158 (3d Cir. 2008). Placing heavy emphasis on Borden's prior history of leading
the team in prayer, the court found that

[w]hen viewing the acts in light of Borden's twenty-three years of prior prayer
activities with the East Brunswick High School football team during which he
organized, participated in, and even led prayer activities with his team, a
reasonable observer would conclude that Borden was endorsing religion when he
engaged in these acts.

Id. at 159. Accordingly, the court ruled that the school district's policy was not unconstitutional
on its face or as applied to Borden and was, in fact, necessary for the school district to a violation
of the Establishment Clause. *Id.* at 179. Applying the endorsement test, the court reasoned that
Borden's past conduct signaled an unconstitutional endorsement of religion because his
involvement in silent prayer activities would lead a reasonable observer to conclude that Borden
was endorsing religion. *Id.* at 176.