Prayer at Graduation Information Letter

Dear Concerned Citizens:

The purpose of this letter is to address the questions and concerns you may have regarding the use of school facilities for religious baccalaureate ceremonies, religious content within speeches given by valedictorians and salutatorians, and organized prayer at graduation ceremonies at public middle and high schools.

By way of introduction, ACLJ is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys have argued before the Supreme Court of the United States in a number of significant cases involving the freedoms of speech and religion. *See, e.g., Pleasant Grove City v. Summum*, Case No. 07-665, 129 S. Ct. 1125 (Feb. 25, 2009) (unanimously holding that a monument erected and maintained by the government on its own property constitutes government speech and does not create a right for private individuals to demand that the government erect other monuments); *McConnell v. FEC*, 540 U.S. 93 (2003) (unanimously holding that minors enjoy the protection of the First Amendment); *Lamb's Chapel v. Center Moriches Sch. Dist.*, 508 U.S. 384 (1993) (unanimously holding that denying a church access to public school premises to show a film series on parenting violated the First Amendment); *Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990) (holding by an 8-1 vote that allowing a student Bible club to meet on a public school's campus did not violate the Establishment Clause); *Bd. of Airport Comm'rs v. Jews for Jesus*, 482 U.S. 569 (1987) (unanimously striking down a public airport's ban on First Amendment activities).

This informational letter addresses the application of the First Amendment to graduation ceremonies involving middle and high schools; public colleges and universities have greater leeway to include a nondenominational invocation at their graduation ceremonies. *See Chaudhuri v. Tennessee*, 130 F.3d 232 (6th Cir. 1997); *Tanford v. Brand*, 104 F.3d 982 (7th Cir. 1997). *But see Mellen v. Bunting*, 327 F.3d 355 (4th Cir. 2003). *Please note that this letter is for informational purposes only and does not constitute legal advice or representation by the ACLJ.*

Overview of Supreme Court Cases

A. Lee v. Weisman

The Supreme Court's first analysis of graduation prayer came in *Lee v. Weisman*, 505 U.S. 577 (1992). In that case, principals of public secondary schools in Providence, Rhode Island regularly invited members of the clergy to give invocations and benedictions at their schools' graduation ceremonies. The middle school principal in *Lee* 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. 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." *Lee*, 505 U.S. at 580.

The Supreme Court struck down the graduation prayer in *Lee*, holding that the invocation was directly attributable to the State, and that 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. "State officials direct[ed] the performance of a formal religious exercise at promotional and graduation ceremonies for secondary schools" inasmuch as the principal decided that an invocation and a benediction should be given, and he directed and controlled the content of the prayer. *Id.* at 586-88. The Court concluded that students attending the graduation were in "a fair and real sense" coerced into participating in an exercise of religion. *Id.* at 586-87. Thus, it was the state sponsorship of graduation prayers in *Lee* that the Supreme Court found problematic.

B. Santa Fe Independent School District v. Doe

In *Santa Fe v. Independent School District v. Doe*, 530 U.S. 290 (2000), the Supreme Court held that the Establishment Clause of the First Amendment prohibits school officials from taking affirmative steps to facilitate prayer at school functions such as school football games. Several factors were key to the Court's ruling in *Santa Fe*:

> 1) the school board had historically been involved in prayer at school functions, *id.* at 309;
> 2) the school board adopted a policy allowing students to vote on whether to have an invocation or message before football games, *id.* at 297; and
> 3) 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.

The Court concluded that the school district "failed to divorce itself from the religious content in the invocations." *Id.* at 305. The Court also found the majoritarian selection process problematic and held that the prayers offered at football games bore the imprint of the State. *Id.*

Importantly, *Lee* and *Santa Fe* do not stand for the proposition that *all* student-led religious speech at graduation and related events is unconstitutional. This letter addresses the application of these and other decisions to three important questions:

- Are religious Baccalaureate services constitutionally permissible?
- Are valedictorians and salutatorians permitted to make religious remarks as a part of their speeches?
- May school officials permit invocations at graduation?

I. Are religious Baccalaureate services constitutionally permissible?

Yes. Students, community groups, area churches, and other private individuals are entitled to sponsor events such as religious baccalaureate services. If the school district has a policy of

allowing its facilities to be used by outside groups, it may not prevent a community or student group from using the facilities for the purposes of having a religious baccalaureate service. The school district, however, cannot sponsor such services.

In *Lee*, Justice Souter noted that religious students may "organize a privately sponsored baccalaureate if they desire the company of like-minded students." 505 U.S. at 629 (Souter, J., concurring). Moreover, if a public school district rents its facilities to non-school groups during non-school hours, then the district must rent to religious groups such as the organizers of a religious baccalaureate service. *See Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001) (invalidating a school district policy that opened school facilities to outside community uses, but excluded religious uses); *Lamb's Chapel*, 508 U.S. 384. A policy of equal access for private religious speech conveys a message "of neutrality rather than endorsement; if a State refused to let religious groups use facilities open to others, then it would demonstrate not neutrality but hostility toward religion." *Mergens*, 496 U.S. at 248.

Several federal cases have recognized the right of equal access to school facilities for privately-organized religious baccalaureate services. *See, e.g., Shumway v. Albany Co. Sch. Dist. No. 1*, 826 F. Supp. 1320, 1326 (D. Wyo. 1993) ("the [School] Board violated the First Amendment by denying the religious baccalaureate group access to the facilities contrary to its previous policy of open and equal access to the school facilities by discriminating against a particular point of view"); *Randall v. Pegan*, 765 F. Supp. 793, 796 (W.D.N.Y. 1991) (upholding the right of a student group to hold a baccalaureate service in the school auditorium).

It is important to note, however, that school districts may not control or sponsor religious baccalaureate services. *See, e.g., Carlino v. Gloucester City High Sch.*, 57 F. Supp. 2d 1 (D.N.J. 1999) (finding that a material issue of disputed fact existed with regard to an Establishment Clause claim on the issue of whether a Baccalaureate Service sponsored by a ministers' association was also controlled or sponsored, in part, by the school district); *Verbena United Methodist Church v. Chilton County*, 765 F. Supp. 704, 714 (M.D. Ala. 1991) (allowing a church to "rent and use the school auditorium to conduct a church-sponsored baccalaureate service would not automatically or necessarily represent an endorsement of religion and therefore violate the establishment clause," but the Establishment Clause required the school to disassociate itself from the service).

Guidelines issued by the U.S. Department of Education in 2003 affirm that public schools must grant equal access to facilities to private organizers of religious baccalaureate services, but they cannot organize such ceremonies themselves. The Guidelines state:

> Baccalaureate Ceremonies
> School officials may not mandate or organize religious ceremonies. However, if a school makes its facilities and related services available to other private groups, it must make its facilities and services available on the same terms to organizers of privately sponsored religious baccalaureate ceremonies. In addition, a school may disclaim official endorsement of events sponsored by private groups, provided it does so in a manner that neither favors nor disfavors groups that meet to engage in prayer or religious speech.

U.S. Dept. of Educ., *Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools*, 68 Fed. Reg. 9645 (Feb. 28, 2003).

II. Are valedictorians and salutatorians permitted to make religious remarks as a part of their speeches?

Yes, although such remarks must be "non-proselytizing" and "non-sectarian" in some jurisdictions.

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. One Guideline issued by the U.S. Department of Education in 2003 deals directly with this issue:

> Prayer at Graduation
> 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.

Id. (emphasis added). Thus, 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.

The Guidelines acknowledge that student expression is protected by the First Amendment, and the ability of schools to restrict or regulate student speech varies depending upon the circumstances. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969); *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675 (1986), *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988); *Morse v. Frederick*, 127 S. Ct. 2618 (2007). In *Tinker*—the seminal case on student expression—the Court declared that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." 393 U.S. at 506. Fearing disruption, a public school prohibited students from wearing black armbands to express their anti-Vietnam War sentiments. *Id.* at 504-05. The Court held that the school's policy violated students' Free Speech rights. *Id.* at 513-14. *Tinker* established that, in most situations, a school must show that the student's conduct "materially disrupts classwork or involves substantial disorder or invasion of the rights of others" before it may censor student expression due to its content. *Id.* at 513. Under *Tinker*, students' free speech rights are the strongest with regard to forms of personal expression such as armbands, t-shirts, buttons, and necklaces.

By contrast, in *Hazelwood*, the Court held that public school officials could exercise reasonable control over the content of a school-sponsored newspaper because it was viewed as part of the curriculum. *Hazelwood*, 484 U.S. at 270-71. The Court held that the school could prevent the publication of unsuitable material, including stories on pregnant students and divorces, because such material could be "erroneously attributed to the school" in that context. *Id.* at 263, 271. The newspaper was not considered to be a forum for speech because school officials did not exhibit an intent to open the newspaper to "indiscriminate use" by student reporters. *Id*. at 270. There is an important difference between a school's ability to silence a student's personal expression that happens to occur on school premises and a school's authority over school-sponsored publications and events that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school. *Id*. at 271. The greater the degree of control that a school exercises over the content of a particular event or publication, the greater the likelihood that the speech will bear the imprimatur of the school. *Id.* at 270. When student expression bears the imprimatur of the school, the school may regulate such expression in a manner that is "reasonably related to legitimate pedagogical concerns." *Id.* at 272.

With regard to speeches provided by valedictorians and salutatorians at graduations, the key question is whether such expression would be viewed as bearing the imprimatur of the school and, if so, whether *Hazelwood* requires regulations of such expression to be viewpoint neutral.[1] In the absence of a controlling opinion on these issues in a particular jurisdiction, 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. A reasonable person in attendance at a graduation ceremony understands that valedictorians and salutatorians are selected due to academic criteria and their remarks typically reflect their own views. Valedictorians and salutatorians should be able to share how their faith has impacted their lives without fear of censorship by school officials.

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[1] The **Second**, **Sixth**, **Ninth**, and **Eleventh Circuits** have required viewpoint neutrality for school-sponsored speech. *See, e.g., Peck v. Baldwinsville Central Sch. Dist*., 426 F.3d 617 (2d Cir. 2005) (court remanded case to district court to determine whether school officials' decision to cover religious content in elementary student poster was viewpoint neutral under *Hazelwood v. Kuhlmeier,* 484 U.S. 260 (1988)); *Kincaid v. Gibson*, 191 F.3d 719 (6th Cir. 1999), *rev'd on other grounds*, 236 F.3d 342, 346, 355 (6th Cir. 2001) (en banc) (University year book considered a limited public forum; viewpoint neutrality required even in a non-public forum); *Planned Parenthood of Southern Nevada v. Clark County Sch. Dist.*, 941 F.2d 817 (9th Cir. 1991) (held, ads within school district's school-sponsored publications were nonpublic forums; however, "distinctions drawn [must be] reasonable in light of the purpose served by the forum and [must be] viewpoint neutral"; *Searcey v. Harris*, 888 F.2d 1314 (11th Cir. 1989) (even where high school career day constitutes a nonpublic forum, school must remain viewpoint neutral with regard to participating guest speakers under *Hazelwood* analysis). Conversely, the **First**, **Third**, and **Tenth Circuits** have held that viewpoint neutrality is *not* required with regard to government controlled or sponsored speech, at least in some circumstances. *See, e.g., Fleming v. Jefferson County Sch. Dist. R-1*, 298 F.3d 918 (10th Cir. 2002) (held, school could exclude, *inter alia*, religious symbols from tile project; tile project permanently affixed to school hallways found a non-public forum and bore imprimatur of school where school exerted "significant" editorial control and held school asserted reasonable pedagogical concerns after school shooting tragedy); *C.H. ex rel Z.H. v. Oliva*, 195 F.3d 167 (3d Cir. 1999) (upheld school decision to prohibit student from reading Bible story to first grade class; viewpoint based decisions permissible in non-public forum where reasonably related to pedagogical concern over young age of students), *aff'd in relevant part and vacated in part*, 226 F.3d 198 (3d Cir. 2000) (en banc) (vacated decision below in part on procedural grounds; court equally divided on the question of viewpoint neutrality, thus affirmed without explication); *Ward v. Hickey*, 996 F.2d 448 (1st Cir. 1993) (teacher's classroom speech subject to restrictions reasonably related to pedagogical concerns; viewpoint neutrality not required).

A related issue is whether public schools may (or must) require that student speakers refrain from including "sectarian" or "proselytizing" religious speech in their graduation addresses. In *Cole v. Oroville Union High School District*, 228 F.3d 1092 (9th Cir. 2000)—applicable in Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington—the Ninth Circuit held that the Establishment Clause requires school officials to ensure that student speakers at graduation ceremonies do not include "sectarian" or "proselytizing" comments in their speeches. A co-valedictorian composed a speech which included many "proselytizing and religious references to Jesus" and encouraged members of the audience to accept God in their lives. *Id.* at 1096-97. The school principal, who reviewed all student speeches to be given at graduation, forbade the student from delivering the speech as written and instructed him to purge "sectarian" and "proselytizing" language. The Ninth Circuit held that the Establishment Clause required the school to ensure that sectarian speech and prayer were not part of the graduation ceremonies. *Id.* at 1101. The court found the school's "plenary control over the graduation ceremony, especially student speech," to be significant. *Id.* at 1102.

Moreover, in *Lassonde v. Pleasanton Unified Sch. Dist.*, 320 F.3d 979 (9th Cir. 2003), the Ninth Circuit applied *Cole* and held that a public school could not allow a co-salutatorian to include sectarian or proselytizing remarks in his speech even if a disclaimer was included. The student drafted a speech that "quoted extensively from the Bible" and was intended to encourage other students to accept Christ. *Id.* at 981. The school "advised [the student] that *references to God as they related to [his] own beliefs were permissible*, but that proselytizing comments were not." *Id.* (emphasis added). The school allowed the student to retain "several personal references to his religion" in his speech. *Id.* The Ninth Circuit held that the school's actions were required by the Establishment Clause due to the control that the school exercised over the graduation ceremony. *Id.* at 984. *But see Sands v. Morongo Unified Sch. Dist.*, 809 P.2d 809 (Cal. 1991) (nonsectarian religious invocations and benedictions at public high school graduation ceremonies violate the First Amendment and the California Constitution).

In sum, even in states within the Ninth Circuit, the First Amendment does not prohibit valedictorians and salutatorians from including references to God as they relate to their own beliefs in their speeches in a non-proselytizing manner.

III. May school officials permit invocations at graduation?

In some jurisdictions. The graduating class or other groups of students may not typically collectively decide whether to have prayer at graduation. However, federal court opinions governing six states (Alabama, Florida, Georgia, Louisiana, Mississippi, and Texas) provide that, in limited circumstances, if students elect a fellow student to speak on the basis of neutral criteria, the student may include religious expression as part of his or her presentation. On the other hand, opinions affecting Alaska, Arizona, California, Delaware, the District of Columbia, Hawaii, Idaho, Iowa, Kentucky, Montana, Nevada, New Jersey, Oregon, Pennsylvania, Virginia, Washington, and West Virginia limit the ability of schools to allow student-led prayer at graduation. In any event, it is clear that school officials and teachers must not be involved in any way in determining whether to have a prayer or selecting the prayer itself or the person presenting it.

Eleventh Circuit Decisions (governing Alabama, Florida, and Georgia)

In *Chandler v. Siegelman*, 230 F.3d 1313 (11th Cir. 2000), the U.S. Court of Appeals for the Eleventh Circuit (governing Alabama, Florida, and Georgia) invalidated a portion of an injunction which barred students from praying at any school function while upholding a portion which enjoined the school district from aiding or inducing school sanctioned religious activity. The court distinguished *Santa Fe* from its earlier decision in *Chandler* by stating: "*Santa Fe* condemns school *sponsorship* of student prayer. *Chandler* condemns school *censorship* of student prayer." *Id.* at 1315. The Eleventh Circuit stated, "So 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." *Id.* at 1317. "[I]f nothing in the Constitution . . . prohibits any public school student from voluntarily praying at any time before, during, or after the school day, then it does not prohibit prayer aloud or in front of others, as in the case of an audience assembled for some other purpose." *Id.* at 1316-17.

In a subsequent opinion, the Eleventh Circuit further discussed the *Chandler* decision:

> Under *Chandler II*, read as a whole, a prayer is not "student-initiated," and hence constitutional, simply because the initial idea for the prayer was a student's. For example, the fact that a student may come up with the idea of having the Lord's Prayer recited over his school's loudspeakers each day does not mean the prayer is "student initiated," and so constitutional, under *Chandler II*. . . . School personnel may not facilitate prayer simply because a student requests or leads it.
>
> The true test of constitutionality is whether the school encouraged, facilitated, or in any way conducted the prayer. *Chandler II* used the phrase "student-initiated" to mean "independently student organized and conducted," as opposed to "school sponsored" or "school conducted." . . . While purely private prayer by students is constitutionally protected, prayer that is led, encouraged, or facilitated by school personnel is constitutionally prohibited.

Holloman v. Harland, 370 F.3d 1252, 1287 (11th Cir. 2004).

In addition, the Eleventh Circuit addressed graduation prayer in *Adler v. Duval County School Board* in March 2000, only a few months before the Supreme Court decided *Santa Fe*. *Adler v. Duval County Sch. Bd.*, 206 F.3d 1070 (11th Cir. 2000) (en banc), *vacated by* 531 U.S. 801 (2000). The Supreme Court vacated the decision and remanded it for further consideration in light of the decision in *Santa Fe*. On remand, the Eleventh Circuit distinguished the facts in *Santa Fe* and upheld its previous en banc decision. *Adler v. Duval County School Board*, 250 F.3d 1330 (11th Cir. 2001) (en banc).

In *Adler*, the Eleventh Circuit upheld a school board policy on graduation speakers. The school board passed a policy entitled "Graduation Prayers" which allowed the graduating class to decide whether to have a brief opening or closing "message," not to exceed two minutes in length, at the graduation ceremony. If the graduating class decided to have a message, then the class would

select the graduating student who would give the message. 250 F.3d at 1345. The policy explicitly provided that no school official could monitor or review the message that was to be given. *Id.*

The Eleventh Circuit found two distinguishing features in the school board policy when compared to the policy in *Santa Fe*. First, this policy expressly prohibited school officials from having any input into the content of the message, while the *Santa Fe* policy gave school officials some editorial control over the content of the student speech. Second, while the *Santa Fe* policy referred to an "invocation or message," the policy in *Adler* referred only to a student "message." *Id.* at 1336. Even though the policy was entitled "Graduation Prayers," the fact that the policy did not use the term "invocation" convinced the *Adler* court that the policy did not evince the same "preference" for religious speech that was fatal to the *Santa Fe* policy. *Id.* at 1338. The court explained, "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 [means] that the message delivered, be it secular or sectarian or both, is not state-sponsored." *Id.* at 1342.

Fifth Circuit Decisions (governing Louisiana, Mississippi, and Texas)

When the Supreme Court decided *Lee*, it also vacated and remanded a Fifth Circuit decision, *Jones v. Clear Creek Indep. Sch. Dist.*, 930 F.2d 416 (5th Cir. 1991), which had upheld student-initiated graduation prayer. After considering the implications of *Lee*, the Fifth Circuit again upheld the graduation prayer policy. 977 F.2d 963 (5th Cir. 1992). The Clear Creek Independent School District had passed a Resolution "permitting public high school seniors to choose student volunteers to deliver nonsectarian, nonproselytizing invocations at their graduation ceremonies." *Id.* at 964. The Fifth Circuit upheld the Resolution in light of *Lee*, holding that the Resolution had the secular purpose of solemnizing an important occasion. *Id.* at 966. Moreover,

> [t]he Resolution can only advance religion by increasing religious conviction among graduation attendees, which means attracting new believers or increasing the faith of the faithful. Its requirement that any invocation be nonsectarian and nonproselytizing minimizes any such advancement of religion. . . . [T]he nonsectarian nature of a prayer remains relevant to the extent to which a prayer advances religion. . . . The Resolution may or may not have any religious effect. The students may or may not employ the name of any deity; heads may or may not be bowed; indeed, an invocation may or may not appear on the program. If the students choose a nonproselytizing, nonsectarian prayer, the effect may well marshall attendees' extant religiosity for the secular purpose of solemnization; but no one would likely expect the advancement of religion by the initiation or increase of religious faith through these prayers. The Resolution's primary effect is secular.

Id. at 967. In addition, the court stated:

> Unlike the policy at issue in *Lee,* [the school's policy here] does not mandate a prayer. The Resolution does not even mandate an invocation; it merely permits

> one if the seniors so choose. Moreover, the students present Clear Creek with *their* proposed invocation under the Resolution, while in *Lee* the school explained its idea for an invocation to a member of an organized religion and directed him to deliver it. . . . Concerning endorsement, the instant case more closely parallels *Mergens* because a graduating high school senior *who participates in the decision as to whether her graduation will include an invocation by a fellow student volunteer* will understand that any religious references are the result of student, not government, choice.

Id. at 968-69.

Since the Supreme Court denied review in the case, 508 U.S. 967 (1993), it remains binding precedent in the Fifth Circuit, protecting student-initiated, nonsectarian graduation prayers in Louisiana, Mississippi, and Texas. *See also Doe v. Tangipahoa Parish Sch. Bd.*, 473 F.3d 188, 198 (5th Cir. 2006), *vacated on standing grounds by* 494 F.3d 494 (5th Cir. 2007) ("consistent with our holding in *Jones*, the consent judgment between Doe and the Board provides that student-led prayers may be permitted during graduation ceremonies, so long as they do not have a coercive effect"); *Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274 (5th Cir. 1996) (upholding the practice of "nonsectarian, nonproselytizing student initiated voluntary prayer at high school commencement as condoned by *Jones II*").

Third Circuit Decisions (includes Delaware, New Jersey, and Pennsylvania)

In *ACLU v. Black Horse Pike Reg'l Bd. of Educ.*, 84 F.3d 1471 (3d Cir. 1996), the Third Circuit invalidated a policy which gave senior high school students the ability to decide by vote whether their graduation would include prayer, a moment of silence, or neither. The school's faculty was not involved in the students' decision or the prayer itself. While the school "had a longstanding tradition of including a nonsectarian invocation and benediction in high school graduation ceremonies," it adopted a new policy once *Lee* was decided. *Id.* at 1475. The Third Circuit stated that a significant number of students did not want prayer at graduation and should not be forced to confront religious content at their graduations. The court found it significant that the school's purpose "in reexamining its policy was to provide an option that might allow the 'longstanding tradition' of graduation prayer to survive the prohibitions of [*Lee*]." *Id.* at 1480. The court also noted that the school maintained control over the graduation and limited the types of messages which were allowed. The Third Circuit concluded that allowing students to vote on whether to include prayer at graduation violated the Establishment Clause. *See also Brody v. Spang*, 957 F.2d 1108 (3d Cir. 1992) (prior to *Lee*; remanding for determination of whether the school has opened a public forum for speech at graduation and noting that it is possible, but unlikely, that the school has done so).

Ninth Circuit Decisions (includes Alaska, Arizona, California, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington)

The Ninth Circuit's decisions in *Cole* and *Lassonde*—discussed in the previous section—suggest that a policy providing for invocations at graduation or allowing students to elect one student to

speak at graduation who is free to include prayer would be found unconstitutional within the Ninth Circuit.

Decisions in Other Circuits

Several other courts have considered how the First Amendment affects permissible religious content at graduations.

- *Doe v. Sch. Dist. of Norfolk*, 340 F.3d 605 (8th Cir. 2003) (school board member's spontaneous recitation of a prayer at a graduation ceremony during his personal remarks was not sponsored by the school and did not bear the school's imprint, so it was private speech rather than government speech for purposes of the Establishment Clause) – covering Arkansas, Iowa, Missouri, Minnesota, Nebraska, North Dakota, and South Dakota
- *Committee For Voluntary Prayer v. Wimberly*, 704 A.2d 1199 (D.C. Cir. 1997) (holding that a proposed prayer initiative permitting "non-sectarian, non-proselytizing student-initiated voluntary prayer, invocations and/or benedictions" at graduation and other school events violated the Establishment Clause) – covering the District of Columbia
- *Bauchman v. West High Sch.*, 132 F.3d 542, 547 n.4, 548 (10th Cir. 1997) (enjoining a choir's performance of two religious songs at a graduation ceremony pending appeal) – covering Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming
- *Corder v. Lewis Palmer Sch. Dist. No. 38*, 568 F. Supp. 2d 1237 (D. Colo. 2008), *appeal filed*, No. 08-1293 (10th Cir. Aug. 19, 2008) (oral argument occurred March 11, 2009) (valedictorian plaintiff's First Amendment rights not violated when required to apologize after giving different speech with religious content during graduation than previously submitted for school official's review; school retained control over valedictorian speeches by screening content beforehand, and thus the speeches were considered "school sponsored speech," *id.* at 1245; educators may exert "reasonable" editorial control over school sponsored speech for legitimate pedagogical concerns, which may be satisfied by mere "desire to avoid controversy within a school environment," *id.*; thus, defendant school could impose viewpoint based decision to prevent disruptive religious debate, *id.*; court distinguished *Adler v. Duval County Sch. Bd.*, 250 F.3d 1330, on its facts, where school policy in *Adler* retained no editorial control over graduation speakers, 568 F. Supp. 2d at 1246 n.5)—covering Colorado
- *Nurre v. Whitehead*, 520 F. Supp. 2d 1222 (W.D. Wash. 2007) (holding that a superintendent's denial of a high school wind ensemble's request to play "Ave Maria" at a graduation ceremony did not violate the students' freedom of speech and was supported by a desire to avoid an Establishment Clause violation) – covering western Washington
- *Doe v. Gossage*, Case No. 1:06CV-070-M, 2006 U.S. Dist. LEXIS 34613 (W.D. Ky. 2006) (memorandum opinion) (enjoining high school policy allowing students to select a student representative to give a brief opening or closing message at graduation) – covering western Kentucky

- *Ashby v. Isle of Wight County Sch. Bd.*, 354 F. Supp. 2d 616 (E.D. Va. 2004) (rejecting free speech claim of a student who requested to sing a song with religious lyrics at her graduation; the court stated that the school acted to prevent an Establishment Clause violation because the school substantially controlled the event and reviewed the content of speakers) – covering eastern Virginia
- *Deveney v. Bd. of Educ.*, 231 F. Supp. 2d 483 (S.D.W. Va. 2002) (enjoining a high school's graduation prayer policy which allowed the senior class officers to vote on whether a nonsectarian and nonproselytizing invocation should be given by a student volunteer at graduation) – covering southern West Virginia
- *Skarin v. Woodbine Cmty. Sch. Dist.*, 204 F. Supp. 2d 1195 (S.D. Iowa 2002) (enjoining performance of a religious song ("The Lord's Prayer") by the school choir at graduation ceremonies in order to prevent violation of the Establishment Clause) – covering southern Iowa
- *Gearon v. Loudoun County Sch. Bd.*, 844 F. Supp. 1097 (E.D. Va. 1993) (invalidating policy allowing students to decide whether to include prayer at graduation under the Establishment Clause) – covering eastern Virginia
- *Albright v. Bd. of Educ. Of Granite Sch. Dist.*, 765 F. Supp. 682 (D. Utah 1991) (pre-*Lee v. Weisman,* on motion for preliminary injunction, court held balance of hardships did *not* "decidedly tip" in plaintiffs' favor, and thus, defendant school district not enjoined from permitting students to decide whether prayer ought to be included in graduation ceremony in circumstances similar to those found in *Jones v. Clear Creek Indep. Sch. Dist.* 930 F.2d 416, *discussed supra*, where policy 1) permitted prayer rather than requiring it; 2) prayer was given by students; 3) prayer was non proselytizing, non denominational, and non doctrinal; and 4) prayer was offered under voluntary and non coercive circumstances)—covering the Central division of Utah
- *Lundberg v. West Monoma Cmty. Sch. Dist.*, 731 F. Supp. 331 (N.D. Iowa 1989) (before *Lee*; prohibiting invocations as part of a graduation ceremony is required by the Establishment Clause and does not violate students' free speech or free exercise rights) – covering northern Iowa

Conclusion

The Supreme Court's decisions in *Lee* and *Santa Fe* left open several issues regarding religious expression at graduation events that lower courts have addressed in a variety of ways. Principals and school boards will look to lower court opinions in their jurisdictions (if any) that deal with these issues for guidance. Please feel free to share this informational letter with school officials, students, and parents. *Please note that this letter is for informational purposes only and does not constitute legal advice or representation by the ACLJ.*

Sincerely,

AMERICAN CENTER FOR
LAW AND JUSTICE

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