

UNITED STATES COURT OF APPEALS  
FOR THE EIGHTH CIRCUIT

**JOHN DOE, A MINOR,** )  
**BY AND THROUGH** )  
**his mother and next friend, MARY** )  
**DOE, and MARY DOE,** )

Plaintiffs-Appellants, )

vs. )

**THE SCHOOL DISTRICT OF THE** )  
**CITY OF NORFOLK IN THE** )  
**COUNTY OF MADISON, a.k.a.** )  
**SCHOOL DISTRICT NUMBER** )  
**TWO OF MADISON COUNTY,** )  
**NEBRASKA, a political subdivision,** )  
**RANDY NELSON, in his individual** )  
**and official capacities, and JAMES** )  
**SCHEER, in his individual and** )  
**official capacities,** )

Defendants-Appellees. )

**CASE NO. 02-4135**

**BRIEF OF**  
**AMICUS CURIAE**  
**ANTI-DEFAMATION**  
**LEAGUE**

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## I. INTEREST OF AMICUS CURIAE

The Anti-Defamation League (“ADL”), as *amicus curiae*, submits this brief in support of appellants case.<sup>1</sup> ADL was organized in 1913 to advance good will and mutual understanding among Americans of all creeds and races, to combat racial, ethnic, and religious discrimination in the United States, and to fight hate, bigotry, and anti-Semitism. It is today one of the world’s leading civil and human rights organizations. Among ADL’s core beliefs is strict adherence to the separation of Church and State embodied in the establishment clause of the First Amendment. Separation, ADL believes, preserves religious freedom and protects our democracy.<sup>2</sup> ADL emphatically rejects the notion that the separation principle is inimical to religion, and holds, to the contrary, that a high wall of separation is essential to the continued flourishing of religious practice and beliefs in America, and to the protection of minority religions and their adherents. From day-to-day experience serving its constituents, ADL can testify that the more government and religion become entangled, the more threatening the environment becomes for each. In the familiar words of Justice Black: “A union of government and religion

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<sup>1</sup> The parties have consented to the filing of this brief. Copies of the letters of consent have been lodged with the Clerk of the Court. Counsel for a party did not author this brief in whole or in part, and no person or entity, other than the amici curiae, its members, and its counsel, has made a monetary contribution to the preparation and submission of this brief.

<sup>2</sup> In furtherance of this belief, ADL has participated in the major church-state cases of the last half-century. *See e.g.* ADL briefs *amicus curiae* filed in *Mitchell v. Helms*, 530 U.S. 793 (2000); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000).

tends to destroy government and degrade religion.” *Engel v. Vitale*, 370 U.S. 421, 431 (1962).

Amicus, in agreement with both petitioners, urge the Court to reaffirm the important distinction between private religious expression, permitted and protected by the First Amendment, and officially-sponsored religious activity, prohibited by the establishment clause. That line has been crossed here, allowing for government-sponsored religious observances in the public school setting, to the detriment of religious believers as well as non-believers.

## **II. ARGUMENT**

### **A. THE LEMON TEST APPLIES TO JIM SCHEER’S CONDUCT, NOT AN INFORMAL POLICY**

Norfolk High School has an informal policy allowing parents of graduating seniors, who are also school board members to speak at their child’s graduation ceremony. Nelson Dep., A-135. On its face, the policy does not have a religious purpose. But this case is not about the informal policy. This case is about the use of that policy by a public official to achieve an unconstitutional result. Justice Douglas, in a concurring opinion, pointed out the mockery that would be made of the establishment clause if unconstitutional activities could be carried on merely because no statute authorized the activities. *Sch. Dist. of Abington v. Schempp*, 374 U.S. 203, 307 (1963). This case involves analogous circumstances. If a school policy authorizing a school board official’s conduct would be unconstitutional, the actions are still unconstitutional even in the absence of a policy explicitly

authorizing them. *Id.* To find otherwise would eliminate the protection afforded by the establishment clause. It is not the mechanism used to advance a concept, but the evil against which the establishment clause protects, which is of concern. *Comm. for Pub. Educ. v. Nyquist*, 413 U.S. 756, 772 (1973). That “evil” is the advancement of religion by a government official accomplished with power their official position affords them. This brief will demonstrate that Jim Scheer (“Sheer”) unconstitutionally advanced a particular religion while acting in his official capacity. Such advancement cannot be allowed.

#### 1. School Board Members are Public Officials

Sheer, a school board member, is undoubtedly a public official. In *Rosenblatt v. Baer*, 383 U.S. 75 (1966), the Supreme Court held that the “public official designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs.” *Id.* at 85 (internal quotations omitted). Specifically, a school possesses the right to control “school-sponsored ... activities that students, parents, and members of public might reasonably perceive to bear the imprimatur of the school.” *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988) (emphasis added).

#### 2. Scheer Acted in His Official Capacity

While it is clear that Scheer is a public official, in order for his actions to be state action, he must have been acting within the purview of his governmental

power when he recited a Christian prayer at the 2000 graduation ceremony. “State action may be found only if there is such a ‘close nexus between the State and the challenged action’ that seemingly private behavior ‘may be fairly treated as that of the State itself.’” *Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 288 (2001) (quoting, *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974)). Such a nexus exists here.

A public high school graduation ceremony is clearly a school function. The School Board, including Scheer, exercised direct control over the ceremony by making the decision to remove prayer from the ceremony after learning of the Doe’s constitutional objection. Krivohlavek Dep., A-240-241; Nelson Dep., A-118-119, A-127. Scheer did not agree with this decision and after using his official position to gain access to the stage, pointedly recited a Christian prayer as an expression of his disagreement. The district court found that Scheer’s recitation of the prayer “clearly appeared to be private and not government-sanctioned.” Memorandum and Order, 21. The undisputed facts do not lead to this conclusion and the applicable law does not support it.<sup>3</sup>

In the present case, the line between Scheer’s public and private role was indistinguishably blurred. School Board President Brad Krivohlavek introduced Scheer to the audience by announcing “I’d like to introduce Board Member Jim

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<sup>3</sup> The District Court placed great emphasis on the absence of the entire School Board’s knowledge or encouragement of Scheer’s religious speech. This fact is not fatal to the Doe’s position. Simply because a school board member does not act in concert with the entire board does not remove his/her actions from the definition of state action.

Scheer who has a few words to share.” Krivohlavek admitted that he introduced Scheer with his title because he perceived Scheer to be speaking in his official capacity. Krivohlavek Dep., A-208-211, 257; Nelson Dep., A-164-165. Scheer’s position on the School Board allowed him to speak. Krivohlavek and Superintendent Nelson have acknowledged that school board members who speak at functions are generally perceived as speaking in their official capacity. *Id.* Members of the audience believed that Scheer was speaking in his official capacity as a school board member. *Id.* The printed program established Scheer’s official position and authority by listing him as a school board member. Graduation Program, A-64. Upon taking the stage, Scheer did not qualify his words by stating that he was speaking as a parent or private citizen. No other school official qualified Scheer’s words following his speech.<sup>4</sup> Superintendent Nelson has since admitted that he was pleased that Scheer prayed at the graduation ceremony. Nelson Dep., A-163.

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<sup>4</sup> Contrary to the District Court’s reasoning, the fact that other school board members were “shocked” (Memorandum and Order, A-476) by Scheer’s recitation of the Lord’s Prayer does not relieve them of the responsibility to remove any stigma of government-sanctioned advancement of religion. The government must act to “disassociate itself from private expression that might otherwise have been attributed to it.” *Doe v. Small*, 964 F.2d 611, 621 (7th Cir., 1992). Public school officials have a duty to regulate the content of public school activities. “While the school cannot dictate the actual words spoken, the school does retain control over the type of speech admissible at the ceremony. It is altogether fitting and proper that the school have the power to control what occurs at a graduation of its seniors.” *Lundberg v. West Monona Comm. Sch. Dist.*, 731 F.Supp. 331, 337 (N.D. Iowa, 1989). School officials have a duty to control their speech in a public school forum. Scheer and the other school officials failed to edit the content of Scheer’s recitation either prior to or during his speech. Scheer abused his position as a public official.

In light of these facts, Scheer's recitation of the Lord's Prayer could no longer be seen as private speech. Scheer chose to act at a school function where, due to his official position as a school board member, he had direct governmental control. He made his speech as a public school official in a school-sponsored forum. He was therefore acting within the purview of his governmental power when he recited the Lord's Prayer at the school's graduation ceremony.

3. Scheer's Recitation Had No Secular Purpose and Had the Principle Effect of Advancing Religion

An action passes the *Lemon* test only if it has "a secular legislative purpose," if its "principal or primary effect" is one that "neither advance[d] nor inhibit[ed] religion," and if it does "not foster an excessive government entanglement with religion." *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971) (quotations omitted). Under the *Lemon* test, Scheer's recitation of the Lord's Prayer may still be constitutional if: Scheer had a secular purpose in reciting it, it did not have the principle or primary effect of advancing religion and it did not foster excessive government-religious entanglement.<sup>5</sup>

Scheer's conduct fails this test. His recitation of the Lord's Prayer had no secular purpose. Sheer, as a school board member, was in a unique position of knowledge and power with respect to the inclusion or exclusion of prayer from the

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<sup>5</sup> The District Court centered its analysis on the fact that the policy allowing school board members who are also parents of graduating students to speak has a secular purpose. The District Court reasoned that the policy allows school board members to speak as parents, not as board members. As already shown, this case is not about an informal policy, this case is about the actions of a public school board member blatantly advancing religion at a school function.

2000 graduation ceremony. The School Board, as a whole, had determined to exclude prayer from the day's ceremony because of the Doe's constitutional objection. Regardless of this heightened awareness of the constitutional limitation of religious speech, Scheer chose to ignore the law and disregard the Constitution of the United States. After reflecting on the decision to exclude prayer from the days ceremony, Scheer decided to take to the stage and recite an undeniably Christian prayer to a captive student body. He did so after having been introduced not as a parent, but as a school board member. He was perceived to be speaking as a school board member. *Krivohlavek Dep.*, A-259; *Sealed John Doe Dep.*, 60:9-25; *Sealed Mary Doe Dep.*, 44:3-4. He did so without encountering the slightest measure of resistance from other school board members or school officials. When "the school 'permits' sectarian and proselytizing prayers – which, by definition, are designed to reflect, and even convert others to, a particular religious viewpoint ... such 'permission' undoubtedly conveys a message not only that the government endorses religion, but that it endorses a particular form of religion. *Doe v. Santa Fe Ind. Sch. Dist.*, 168 F.3d 806, 817-18 (5th Cir. 1999) (affirmed by *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000)).

Applying two lines of reasoning, the district court found that Sheer did not violate the Constitution by reciting the Lord's Prayer. First, the district court reasoned that the mere act of reciting a Christian prayer is *de minimis*. See Memorandum and Order, 18-19 ("Finding that the policy or Scheer's conduct

advances religion would ... require that [the Court] view it as more beneficial to and more an endorsement of religion”). The district court de-emphasized the symbolic nature of prayer and directly contradicted Supreme Court’s position. In *Lee v. Weisman*, 505 U.S. 577 (1992), the Supreme Court explicitly refuted the idea that prayer is *de minimis*. To claim a prayer *de minimus* “is an affront ... to all those for whom the prayers were an essential and profound recognition of divine authority.” *Id.* at 594. “Further, it is no defense to urge that the religious practices here may be relatively minor encroachments on the First Amendment. The breach of neutrality that is today a trickling stream may all too soon become a raging torrent and ... it is proper to take alarm at the first experiment on our liberties.” *Sch. Dist. of Abington v. Schempp*, 374 U.S. 203, 225 (1963) (citing *Everson v. Bd. of Educ.*, 330 U.S. 1, 65 (1947) (quotations omitted).

Second, the district court points to Scheer’s assertion that his recitation of the Lord’s Prayer was his way of showing the students his “due north.” Scheer Dep., A-175, 181. The district court cited this statement in support of its conclusion that Sheer’s recitation of the Lord’s Prayer had a secular purpose, i.e. was done as part of a “motivational speech” and was not intended to advance religion. The district court concluded that because the Doe’s had offered nothing to refute Scheer’s stated intent, summary judgment was appropriate. Intent is a unique question due to the fact that only the actor can know the truth regarding intent for sure – for that reason a grant of summary judgment based primarily on

the issue of intent and the defendant's testimony that he did not "intend" that which made his actions culpable is rarely appropriate. Whether a deposed witness is to be believed or not is a genuine issue of material fact and cannot be disposed of on summary judgment. *Bates v. Design of the Times, Inc.*, 261 Neb. 332, 337, 622 N.W.2d 684, 687 (Neb., 2001). The issue of Scheer's actual intent should have gone to the jury. Summary judgment was not appropriate in this instance.

Prayer is the "quintessential religious practice," which "implies that no secular purpose can be satisfied. The primary effect of prayer is the advancement of ones religious beliefs." *Jaffree v. Wallace.*, 705 F.2d 1526, 1534-35 (11th Cir. 1983) (affirmed by *Wallace v. Jaffrey*, 472 U.S. 38, 61 (1958)). By making a decidedly Christian statement in a public forum in his official capacity Scheer violated the Doe's constitutional rights, regardless of his stated intent. Amicus respectfully requests that this Court overturn district court's grant of summary judgment.

**B. THE LEE TEST SHOULD CONTROL THE RESULT OF THIS CASE**

The district court incorrectly applied the *Lemon* test as controlling the outcome of this case. The Supreme Court has shown that the *Lemon* test is not the only test to be applied in every establishment clause case. *Lynch v. Donnelly*, 465 U.S. 668, 679 (1984) ("[W]e have repeatedly emphasized our unwillingness to be confined to any single test or criterion in this sensitive area. ... In two cases, the Court did not even apply the *Lemon* test." (citing *Marsh v. Chambers*, 463 U.S.

783 (1983) and *Larson v. Valente*, 456 U.S. 228 (1982)) (internal quotations omitted).

*Lee v. Weisman* is most analogous to the facts of this case and it is *Lee* that the district court should have used as the governing legal precedent. 505 U.S. 577. *Lee* controls the outcome of this case because Scheer, a school official, knew the content and was aware of the implications of his words. He had unique knowledge beyond that of a private parent. He was aware of the implications behind his choice of words, he was on the school board when they voted to remove the invocation from the ceremony because of the Doe's constitutional objections. Scheer, fully aware of the consequences, attempted to speak as a parent to evade the Constitution. Under the *Lee* "coercion test" of whether a school-sponsored religious activity violates the establishment clause, unconstitutional coercion occurs when the government directs a formal religious exercise in such a way as to oblige the participation of objectors.

1. Scheer's Conduct Constituted State Action

Despite Scheer's stated intent that his remarks were not made in his official capacity, he was introduced as a school board member. Scheer would not have been allowed to speak had he just been a parent; Scheer was allowed to speak because he was a school board member, a member of the governmental body with direct and well-known control over the public forum at which he spoke. School officials and audience members viewed him as speaking in his official capacity.

Sheer was asked, in his official capacity to determine the appropriateness of allowing prayer at the 2000 graduation. After initially determining to exclude such prayer due to constitutional violation concerns, Scheer later determined that prayer should be included and proceeded to utilize his position as a public official to obtain a platform from which to deliver his message of religious inclusion at school sponsored functions. Scheer at no time before or after his recitation of a Christian prayer attempted to qualify his speech as private. No other school official qualified Scheer's speech as private expression. Scheer was acting within his governmental authority, in a public forum which fall under the control of his official position. His actions constitute action by the state.

## 2. Scheer Coerced Students Into Hearing Religious Messages at Their Public School Graduation

Students at the 2000 Graduation ceremony did not have a choice about whether or not to hear Scheer's prayer. While the school states that graduation is a purely voluntary school activity, the U.S. Supreme Court has consistently stated otherwise. *See Lee*, 505 U.S. 577, 586; *Santa Fe*, 530 U.S. 290, 292. At graduation the graduating seniors are in a sense, a captive audience. While attendance is not officially required, "it is apparent that a student is not free to absent herself from the graduation exercise in any real sense of the term 'voluntary,' for absence would require forfeiture of those intangible benefits which have motivated the student through youth and all her high school years." *Lee*, 505 U.S. 594.

This requirement provided Scheer with a vulnerable audience of school aged children susceptible to coercion. Scheer intentionally utilized his official position to gain access to the stage and the microphone at the 2000 graduation. Scheer did so knowing that members of the student body and audience who felt their constitution rights would be violated by including prayer in the ceremony would be forced to endure his recitation and endorsement of Christian sentiment.

The district court attempted to defuse this situation by pointing out that not all students participated in the prayer by standing, removing their caps and joining in the recitation. The Supreme Court has recognized that making a choice not to participate is not truly a choice when the non-participants are a minority. *Lee*, 505 U.S. 577, 593 (“what matters is that, given our social conventions, a reasonable dissenter in this milieu could believe that the group exercise signified her own participation or approval of it”). When a school sponsors a religious message during a school activity, the non-participants are coerced into participation. *Id.* This is especially of concern when the participants are secondary school children. “School children are especially susceptible to indoctrination, and while religious beliefs and doctrines contain some of the mores upon which we base our society, religion, like morality generally ... should not be forced upon our students in public schools.” *Lundberg*, supra., 731 F.Supp. 331, 348 (N.D. Iowa, 1989). Sponsoring a religious message “is impermissible because it sends the ancillary message to members of the audience who are nonadherents that they are outsiders,

not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.” *Santa Fe*, supra., 530 U.S. 309-310 (citing *Lynch*, supra., 465 U.S. 688 (O'Connor, J., concurring)). High school aged children susceptible to indoctrination and peer pressure should not be put into the position to make a choice to be part of the majority or the minority. In effect, the children are coerced into becoming participants in the Prayer.

The Supreme Court has observed “heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools.” See, e.g., *Schempp*, supra., 374 U.S. 307 (Goldberg, J., concurring); *Edwards v. Aguillard*, 482 U.S. 578, 584 (1987); *Bd. of Ed. of Westside Cmty. Sch. (Dist. 66) v. Mergens*, 496 U.S. 226, 261-262 (1990) (Kennedy, J., concurring). Scheer’s use of the school’s graduation ceremony as a backdrop for reciting the Lord’s Prayer may appear to the “dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy.” *Lee*, 505 U.S. 592.

Simply put, Scheer’s actions were unconstitutional. Scheer used his position to confine school aged children as a captive audience. As a result, the graduating high school seniors were coerced into hearing Scheer’s unconstitutional advancement of religion. He used this opportunity to recite a religious and decidedly Christian message, the Lord’s Prayer. Scheer spoke in his official

capacity as a school board member. He was not identified otherwise. The school's policy of allowing school board members to speak allowed Scheer to appear in front of the captive audience. However, it was also his position on the School Board that provided notice to Scheer that recitation of a prayer is unconstitutional. Scheer knowingly coerced school aged children to participate in a blatantly unconstitutional activity in a public school forum.

This case comes down to one point: "The Establishment Clause forbids state-sponsored prayers in public school settings no matter how nondenominational the prayers may be." *Lee*, 505 U.S. 610 (J. Souter concurring). Scheer, a state actor, violated the establishment clause by a reciting a Christian prayer in such a manner as to oblige the participation of objectors. His actions were unconstitutional. Summary judgment should be overturned.

## **CONCLUSION**

Summary judgment was inappropriate in this case. Sheer used a facially-neutral policy to carry out an unconstitutional objective: the advancement of religion by a government official while acting in his official capacity. Amicus asks this Court to uphold the precedent of the Supreme Court and to reaffirm the barricade protecting the boundary between the advancement of religion by public and private actors. Courts must keep in mind that "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.” *Wallace*, supra., 472 U.S. 61.

Based on the authorities and arguments cited above, Amicus respectfully requests that this Court grant the appeal and remand this matter to the district court for further hearing or for the entry of summary judgment in favor of the Does.

## CERTIFICATE OF SERVICE

This certifies the undersigned attorney has caused service of the **BRIEF OF AMICUS CURIAE IN SUPPORT OF APPELLANTS CASE** to be made pursuant to Fed.R.App.P. 31 via first class mail, postage prepaid, to the last known address of the following attorneys representing parties to this action, on this 12th day of February, 2003:

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