

No. 08-3826

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

MICHAEL STRATECHUK,
Plaintiff-Appellant

v.

BOARD OF DIRECTORS, SOUTH ORANGE-
MAPLEWOOD SCHOOL DISTRICT, et al
Defendants-Appellees

Appeal from the Order of August 29, 2008,
the United States District Court for the District
of New Jersey at 2-04-CV-06189

**BRIEF OF THE AMERICAN JEWISH CONGRESS, ANTI-DEFAMATION
LEAGUE, NATIONAL COUNCIL OF JEWISH WOMEN, AMERICAN
JEWISH COMMITTEE, AND THE JEWISH COUNCIL FOR PUBLIC
AFFAIRS AS *AMICI CURIAE* IN SUPPORT OF APPELLEES**

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CORPORATE DISCLOSURE STATEMENT

Amici are non-profit corporations and thus no disclosure statement is required.

STATEMENT OF CONSENT TO FILE AMICI BRIEF

All parties have consented to the filing of an *amicus* brief by these parties.

INTEREST OF AMICI CURIAE

The **American Jewish Congress** (“AJC”) is an association of Jewish Americans organized to defend Jewish interests at home and abroad through public policy advocacy by using diplomacy, legislation, and the courts. The AJC was organized post-World War I to provide a voice for the Jews of Europe at the Versailles Peace Conference and to establish a mechanism for democratic decision-making for the Jewish community in the United States. Among its current projects are advocating for religious freedom, including the separation of church and state.

The **Anti-Defamation League** was founded in 1913 to stop the defamation of the Jewish people and to secure justice and fair treatment for all. The ADL fights anti-Semitism and all forms of bigotry, defends democratic ideals, and protects civil rights for all. Its ultimate purpose is to secure justice and fair treatment for all citizens and end forever unjust and unfair discrimination against and ridicule of any sect or group.

The **National Council of Jewish Women** is a volunteer organization that champions the needs of women, children, and families, including advocating on such issues as child welfare, women’s rights, and reproductive freedom.

The **American Jewish Committee** was established in 1906 by a small group of American Jews concerned about pogroms then aimed at Russian Jews. The Committee determined that the best way to protect Jewish populations in danger was to work towards a world in which all peoples were accorded respect and dignity. The Committee today seeks to promote pluralistic and democratic societies where all minorities are protected.

The **Jewish Council For Public Affairs** seeks to serve as the representative voice of the organized American Jewish community in addressing three interrelated goals: (1) to safeguard the rights of Jews in the United States and everywhere; (2) to further the safety and security of Israel; and (3) to protect, preserve and promote a just American society that is democratic and pluralistic, and that furthers harmonious relations between various religions, ethnic groups, and races. The Council believes that the Jewish community has a direct stake and an ethical imperative to assure that America remains wedded to the Bill of Rights and committed to the rule of law.

The *amici* respectfully submits this Brief on behalf of their members supporting appellees the Board of Directors South Orange-Maplewood School District, *et al.*

STATEMENT OF ISSUE PRESENTED

This appeal presents the following two questions:

1. Do the School Board's Policy and/or actions to reduce the religious holiday content of school music concerts, while authorizing the performance of religious music at concerts and the inclusion of religious content in the curriculum, constitute the overt "hostility," "affirmative opposition," or "callous indifference" to religion that would violate the Establishment Clause?

2. Do public school students have a First Amendment right to receive information and ideas about religion in general and to sing or play religious holiday music in particular and, if they do, did the School Board's actions violate those rights?

The District Court determined that the School Board's Policy and/or actions did not violate the Establishment Clause (Question 1) or Plaintiff's First Amendment expressive rights. The District Court did not directly address whether public school students have a First Amendment right to receive information and ideas about religion in general and to sing or play religious holiday music in particular (Question 2).

STATEMENT OF THE CASE

A. Procedural History

This case is before this Court for the second time. Plaintiff initiated this case in December of 2004, asserting, then as now, that policies and/or actions of the South Orange-Maplewood Board of Education violated the First Amendment's Establishment Clause as well as asserted rights under that Amendment to receive information and ideas, to learn, and to academic freedom.

In September, 2005, the District Court granted Defendants' Motion to Dismiss, finding that Plaintiff failed to state a claim under either theory. That Opinion characterized Plaintiff's factual allegations this way:

before the 2004-2005 school year, Defendants permitted the inclusion of religious music in the district's public schools, and allowed students to learn about, listen to, and participate in the presentation of religious music, including traditional Christmas music, during curricular and co-curricular activities and events within the school. . . . During the 2004-2005 school year, Defendants created, adopted, and implemented the Religion in the Schools policy. . . . Pursuant to such, all religious music is banned from the public schools in the district, and students and student groups are no longer permitted to learn about, listen to, and participate in the presentation of traditional Christmas music during such curricular and co-curricular events as year-end holiday concerts, assemblies, and recitals. . . . Plaintiff argues that by targeting religious music for censorship and disfavored treatment, Defendants' policy conveys the impermissible, government-sponsored message of disapproval of and hostility toward religion, particularly Christianity.

2005 Slip Op. at 2-3 (intervening record citations deleted)

Plaintiff appealed the dismissal and in October, 2006, this Court, per Judges Smith, Aldisert and Roth, reversed and remanded. *Stratechuk v. Bd. of Education*, 200 Fed. Appx. 91, 95 (3d Cir. 2006). This Court concluded the District Court had erred in considering School District Policy 2270, which was the District's official written "Religion in the Schools" policy. Plaintiff had not attached the Policy to their Complaint and had objected to the District Court's consideration of it at that stage of the proceedings. This Court agreed, concluding that the policy the Plaintiff's Complaint described and challenged differed from the written version (Policy 2270). The Court remanded the matter to allow Plaintiff to prove that the "the policy in place in 2004-2005 is different from the official policy," and that the actual policy violated the First Amendment. 200 Fed. Appx. at 95. This Court added that "[o]nce the contours of the relevant South Orange-Maplewood policy are established, South Orange-Maplewood is of course free to test the legal sufficiency of Stratechuk's First Amendment claim." *Ibid.*

Thereafter, Plaintiff filed a Second Amended Complaint and the parties filed cross-motions for summary judgment. By Opinion and Order issued August 29, 2008, the District Court granted Defendants' Motion and denied Plaintiff's. The District Court found there were no genuine issues of material fact but rather "intense clashes between [the parties] as to the legal import and significance of the undisputed facts." Slip Op. at 16. Plaintiff timely appealed.

B. Factual Summary of the Summary Judgment Record

In April, 2001, the South Orange-Maplewood Board of Education adopted Policy 2270, entitled “Religion in the Schools” (the “Policy”). It appears the 2001 action was actually a reaffirmation of a Policy adopted in the early 1990s, undertaken as part of the Board’s revision of its policy manual.

Policy 2270 addresses various issues related to the broad subject of “Religion in the Schools,” and it is at the heart of this case. Addressing the central matter referenced in this Court’s remand, the District Court found the School District’s Policy was as set forth in Policy 2270 but as “viewed through the interpretive lens” of a subsequent memorandum, dated October 29, 2004, written by a Fine Arts Supervisor, Nicholas Santoro. *See Slip Op.* at 16 n.7.

On the broad subject of the “Treatment of Religion in the Curriculum,” Policy 2270 authorized the inclusion of religious literature, music, drama, dance and visual arts in the curriculum when that material “achieves specific goals of the written curriculum in the various fields of study”; was “presented objectively”; and that doing so “neither inhibits nor advances any religious point of view.” (A-365) On the sub-topic of “Treatment of Religious Holidays in Classrooms, School Buildings, Programs or Concerts,” the Policy reiterated that “[r]eligious music, like any other music, can only be used if it achieves specific goals of the music curriculum.” (A-366) More specifically, the Policy directed that “[m]usic programs prepared or presented by

student groups as an outcome of the curriculum shall not have a religious orientation or focus on religious holidays.” (A-366)

Mr. Santoro’s October 29, 2004, memo to the District Music Staff followed a meeting he participated in with the District’s Superintendent, Assistant Superintendent, and legal counsel. The purpose of the meeting was “to review the requirements of Policy 2270 . . . and to resolve various parent concerns regarding the implementation of the policy.” Slip Op. at 6, *citing* to O’Neill Certificate, Exh. I (No. 37-12) at SO0142.

The District Court described the meeting:

According to Assistant Superintendent Memoli, the discussion at that meeting involved “what we do for the students in this district, what is best for them so that we feel that we’re treating everyone on an equal basis, what was educationally sound,” . . . and making sure that “no child feels uncomfortable in celebrating a holiday that wasn’t their own,” Assistant Superintendent Memoli stated that he “want[s] the students to feel comfortable when they’re in this school system building and in their classroom; and, anything that makes them uncomfortable effects [sic] their ability to learn.”

Slip Op. at 7 (intervening record citations omitted).

Mr. Santoro’s post-meeting memo advised the music department staff that “[t]he Board policy, as it is written” – Policy 2270 – “will be implemented” and went on to describe “what we will do.” (A-249) Those steps included “avoid[ing] any selection which is considered to represent any religious holiday, be it Christmas, Hanukkah,

etc.,” both in vocal and instrumental settings, and instead choosing to perform “seasonal selections.” (A-249)

To the extent Mr. Santoro’s memo imposed more stringent limitations than Policy 2270, he thereafter made clear, in interactions with individual teachers, that the Policy governed. “[Y]ou can teach about the different holidays in your music classes” as “[c]lassroom work is not a ‘program’” within the meaning of Policy 2270 he wrote one teacher (Barbara Eames). (A-369) Mr. Santoro also advised Ms. Eames that Vivaldi’s “*Gloria in Exceliso Deo*” (“*Cum Sancto Spiritu*”) (which translates to “Glory be to God on high” and “The Holy Ghost”) could be performed because “[t]he [holiday] program does not have a religious orientation” and the selection “does not refer to a holiday.”¹ (A-370)

1 The English translation of the *Gloria* from its original Latin text is:

Glory be to God on high.
And on earth peace towards men of good will.
We praise thee. We bless thee.
We worship thee. We glorify thee.
We give thanks to thee for thy great glory.
O Lord God, heavenly King God the Father almighty.
O Lord, the only-begotten Son Jesus Christ.
O Lord God, Lamb of God, Son of the Father.
Thou that takest away the sins of the world, have mercy upon
us.
Thou that takest away the sins of the world, receive our
prayer.

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In October of 2005, the Board of Education amended Policy 2270 by removing the direction in the portion on “Treatment of Religious Holidays in Classrooms, School Buildings, Programs or Concerts” that “Music programs prepared or presented by student groups as an outcome of the curriculum shall not have a religious orientation or focus on religious holidays.” In its stead, the School Board adopted regulations on this subject. As to “Religion as part of the Music and Art Curricula” and “Celebration of Religious Holidays Prohibited,” the regulations distinguished between secondary (grades 6-12) and elementary grade students. For the older group, the “performance of music with a religious text is appropriate when doing so is an outgrowth of the curriculum” but musical performances were not to be “celebrations of particular religious holidays.” (A-386) For younger students, “performances of music with a religious text shall be avoided.” More specifically addressing musical concerts held “during holiday seasons” for the older students, the regulations directed that they “not

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Thou that sittest at the right of the Father, have mercy upon us.

For thou only art Holy. Thou only art the Lord. Thou only art the Most High.

Thou only, O Jesu Christ, with the Holy Ghost, art Most High in the glory of God the Father. Amen.

See http://en.wikipedia.org/wiki/Gloria_in_Excelsis_Deo (accessed January 15, 2009). Vivaldi is, of course, an outstanding classical composer whose works are widely performed and studied and the *Gloria* is one of his most famous pieces.

be ‘holiday concerts,’ which celebrate religious holidays.’ (A-387) Instead, those concerts were to “include selections which support the music curriculum, and which showcase instructions received by students in musical theory, history, and/or technique.” (A-387)

At all times from 2001 (or, it appears, from the early 1990’s) to the present, the Board’s Policy permitted religious literature, music, drama, dance and visual arts when tied to the curriculum and presented objectively and neutrally. At all times, including post 2004, the holiday concert included music with religious content. In addition to the Gloria (referred to in the Opinion’s listing of musical pieces, Slip Op. at 11 as “Laudamus Te”), the pieces that the student musicians performed post-2004 included:

- “*Concerto VIII, Fatto per la notte de natale*”: By Arcangelo Corelli, known as the “Christmas Concerto.”
- “*Wade in the Water*”: Originally a Negro spiritual and since popularized by others; described as relating to both the Old and New Testaments, the verses reflecting the Israelites escape from Egypt as per Exodus:14 and the chorus the text of John 5:4. See http://en.wikipedia.org/wiki/Wade_in_the_Water (accessed January 15, 2009).
- “*Waters of Babylon*”: Actually “By the Waters of Babylon,” music to the words of Psalm 137 (“By the waters of Babylon, there we sat and wept, when we remembered thee, O Zion.”). See http://cpdl.org/wiki/index.php/Psalm_137 (accessed January 15, 2009).
- “*Agnus Dei/Cum Sanctis*”: Both selections are parts of Mozart’s famous Requiem, literally translated as “Lamb Of God,” a phrase originally referring to Jesus Christ, and “With the Saints.”
- *Jubilate* (actually “*Jubilate Deo*”): By Michael Praetorius, a 16th century German composer. The text is from Psalm 100 and the title translates to

“In the Lord Rejoicing.” See http://www.cpd1.org/wiki/index.php/Psalm_100 (accessed January 15, 2009).

- “*Ich will den Herrn Loben*”: By Georg Philipp Telemann, translated as “I Want to Praise the Lord,” the text in German of Psalm 34. See http://209.85.165.100/translate_c?hl=en&sl=de&u=http://www.labbe.de/liederbaum/index.asp%3Ft (accessed January 22, 2009)

All of these pieces have religious themes and content. They are all serious pieces of music, by esteemed composers (Mozart, Bach) that have substantial merit, to both study and perform, apart from their religious content. The pieces are not, however, either traditional Christmas carols or songs that focus on the Christmas holiday *per se*. That, it appears, was a change of sorts from holiday concerts held before the 2004-2005 school year, which had included traditional Christmas carols and Chanukah songs. Music teachers continued, however, to teach holiday songs in class.

There had been some unhappiness that the pre-2004 concert play lists were too religiously and/or Christian-oriented. One parent complained in 2003 that her child was practicing Christmas music and there had been periodic complaints dating back to the mid-1990s. The Board, apparently spurred by the 2003 complaint, asked the Superintendent, during an annual performance review in the Spring of 2004, to take action to have Policy 2270 implemented more consistently. That process ultimately led to the September, 2004 meeting and, in turn, to the October, 2004 memo. As the District Court described it:

According to Superintendent Horoschak, “board members had heard from some community members about instrumental

music that they felt, people felt represented a celebration of Christmas holidays and also there ha[d] been discussion about the fact *that you really can't balance all religious groups in these representations* in these types of performances." . . . Ultimately, the School Board indicated that the outcome that it desired was "that [Policy 2270] would be consistently implemented, that it be supervised, that there wouldn't be so much discretion at every – by every faculty member," . . . and discussed with him drafting regulations regarding Policy 2270

Slip Op. at 6 (intervening record citations omitted, emphasis added).

There was opposition to the October, 2004 memo, just as there had been prior to taking it. The music teachers were apparently displeased with the change, as their email chatter confirms.

SUMMARY OF ARGUMENT

Establishment Clause challenges invariably address government efforts to promote religion or elevate one religion over others. *Everson v. Bd. of Education of Ewing Twp.*, 330 U.S. 1, 15-16 (1947). It is the rare Establishment Clause case that challenges government action reducing the role of religion, here in the form of reduced religious holiday content at school concerts, and rarer yet that a case succeeds on that theory. No Supreme Court decision, and no case that Plaintiff cites or *amici* have found, has invalidated government action on that basis.

Supreme Court decisions do, however, suggest that actions motivated by or reflecting overt “hostility,” “affirmative opposition,” or “callous indifference” to religion – that sought to establish a “religion of secularism” or an atheistic or “antireligious state” – might violate the Establishment Clause. *School District of Abington Twp. v. Schempp*, 374 U.S. 203 (1963). Here, nothing in the Defendants’ deliberations or actions approaches those standards. Similarly, nothing suggests a hidden agenda at odds with the announced policy as, for example, did the record in *Kitzmiller v. Dover Area School District*, 400 F. Supp. 2d 707 (M.D. Pa. 2005). The School Board here determined that reducing the religious holiday content at concerts made sense, as did permitting religious content in the curriculum under appropriate circumstances, including religious music at concerts.

The challenged policy does not prevent the performance of religious music, as the religious music in the partial play list, described in the Statement of Facts, confirms. A school policy that permits the performance of religious music, as well as the study of religious matters in other classes, is not anti-religious. At most, the Policy, as implemented post-2004, limited the singing of Christmas carols and other holiday songs. That limitation violates no constitutional right.

To Plaintiff, every action that reduces the role of religion in the public sphere is both *antireligious* and an Establishment Clause violation. Plaintiff's position reflects a dualistic world view that permits only friends or enemies of religion and not the existence of a third group – those who seek to act neutrally toward religion. The Supreme Court has wisely rejected that approach. *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 610 (1989).

Plaintiff's asserted First Amendment rights – to receive information and ideas about religion in general and to sing or play religious holiday music in particular – do not exist. Students have no First Amendment right to have specific content, religious or otherwise, taught to them. Government must respect the free exercise of religion and cannot, in general, censor the media, but it need not make available a church or a printing press. Indeed, *Tinker* and its progeny, most recently *Morse v. Frederick*, 127 S. Ct. 2618 (2007), grant leeway to school officials even when they are limiting speech.

But this case is not a case about censoring student expression. Students are free to express religious ideas as they choose; they are free to critique the District policy and to advocate its change; and they remain able to use the ballot box to change school policies with which they disagree.

Plaintiff unsuccessfully attempts to fit within the language of *Bd. of Education, Island Trees Union Free School District v. Pico*, 457 U.S. 853, 867 (1982), that “the Constitution protects the right to receive information and ideas.” *Pico* makes clear that the right to receive information exists as a corollary to the right to disseminate information and that neither right creates a right to have government create, or facilitate the creation of, the content that others will then disseminate and receive. *Pico* is also a thin reed, a narrowly-framed plurality decision of at most four justices and more accurately three, arising under quite different circumstances that were central to the holding.

ARGUMENT

I. THE SCHOOL BOARD'S ACTIONS TO REDUCE THE RELIGIOUS HOLIDAY CONTENT OF SCHOOL MUSIC CONCERTS DOES NOT VIOLATE THE ESTABLISHMENT CLAUSE

A. Introduction

At the heart of Plaintiff's argument Establishment Clause claim is an overly simplistic and erroneous Manichean² worldview. If you are not my friend, you are my enemy. If you are not for me, you are against me. If you do not promote religion in schools and throughout society to the maximum permissible extent, you are an enemy of religion. More particularly, their argument seeks to support a specific religion: Christianity. That is apparent from the Complaint, which several times describes the school district as conveying "the message of disfavor of and hostility toward Christianity," and from the stated goals of the public interest law center that drafted it.³

² Manichean refers to "a dualistic philosophy dividing the world between good and evil principles. <http://en.wiktionary.org/wiki/Manicheanism> (accessed January 16, 2009).

³ The Thomas More Law Center "seeks to preserve America's Christian heritage through litigation and education." The Center's website continues:

We live in a culture increasingly hostile to Christians and their faith. . . . The Thomas More Law Center affirms the

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But the Establishment Clause does not subscribe to that “for-me-or-against-me” approach. It assumes that a position of neutrality toward religion – neither friend nor foe – is possible. Indeed, neutrality towards religion is the paradigm under the Establishment Clause (and likewise under the Free Exercise Clause, which is not at issue here). *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756, 788 (1973); *School District of Abington Twp. v. Schempp*, 374 U.S. 203, 222 (1963).

More important here, Establishment Clause jurisprudence recognizes that neutrality towards religion is quite distinct from hostility towards it. The Eleventh Circuit has recognized that a contrary conclusion would “totally eviscerate the establishment clause,” and that “distinctions must be drawn to recognize not simply

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right of Christians to publicly practice their religion and freely express their religious beliefs.

and, referring to this case,

[The Thomas More Law Center] is currently engaged in a legal challenge to a New Jersey school district that banned Christmas music (without words) because it was religious.

http://www.thomasmore.org/default-sb_thomasmore.html?636618512;
<http://www.thomasmore.org/qry/page.taf?id=38>; and
<http://www.thomasmore.org/qry/page.taf?id=19> (accessed January 13, 2009).

The Center’s very purpose – to promote the role of one religion in public life – butts up against the Establishment Clause’s anti-favoritism principle. Minimally, that purpose seeks to move the line the Establishment Clause draws so as to allow greater promotion of religion in general or a specific religion.

‘religious’ and ‘anti-religious’ but ‘non-religious’ governmental activity as well.” *Smith v. Bd. of Comm’rs*, 827 F.2d 684, 692 n.9 (11th Cir. 1987), *quoting* in part *Grove v. Mead School District No. 354*, 753 F.2d 1528, 1536 (9th Cir.) (Canby, J., concurring), *cert. denied*, 474 U.S. 826 (1985). Confirming this point, the Supreme Court has noted that “[a] secular state . . . is not the same as an atheistic or antireligious state.” *County of Allegheny v. American Civil Liberties Union*, 492 U.S. 573, 610 (1989). Were that not the case, almost every government action vis-a-vis religion would fall into one of two columns – pro- or anti-religion, promoting or hostile to – and be subject to Establishment Clause attack in either event. That is the logic of Plaintiff’s legal theory; indeed, that theory would, ironically, subject actions that sought to allow more religious content to that same black or white analysis.

The Constitution accepts that persons, such as public school board officials, may support religion in their own lives but think its role in the public school setting should be limited; they may believe that religion, absent a legitimate link to curriculum, should be addressed at home, and that if families desire a fuller religious experience for their children, at faith-based private schools. The Constitution likewise accepts and supports persons who believe that religious expression in school, primarily in the form of holiday concerts, have promoted the songs of one religion over others and that doing so may offend the sensibilities, if not the rights, of those who practice the non-preferred religion. And the Constitution supports the rights of school officials, in that context, to

decide that the current extent of performing religious holiday music is neither a sound part of curriculum nor a necessary and positive part of school life; that ensuring fairness, however measured, is difficult to accomplish; and that pleasing everyone while maintaining religious holiday music at concerts is harder yet. Besides, there is a wealth of wonderful, age and skill appropriate, non-religiously themed music or religious music that is not holiday-oriented that concert planners can access and students can enjoy performing. Indeed, some of the most famous and studied music is religious in nature; as an example, Bach was an organist and concert master at various churches and wrote much of his music for performances there.

That this case arose in a school setting is typical; education has been at the epicenter of Establishment Clause concerns. This likely reflects two facts: that education is the most common of our governmental run institutions, found in every community, and education plays an important role in the upbringing of our children. In 1973, in *Nyquist*, the Supreme Court described “the relationship between religion and education” as the source of “[m]ost of the [Establishment Clause] cases coming to this Court.” 413 U.S. at 772. The Court had decided enough such cases to discern two distinct strains: “those dealing with religious activities within the public schools, and those involving public aid in varying forms to sectarian educational institutions.” *Id.* at 772 (intervening footnote omitted).

Amici are religiously-based organizations. They support religion and its value to individuals and society. They do not support those who are hostile to religion or would seek to establish an atheistic society. They particularly support, in this day and world, educating children and youth both about religions other than their own and about the role of religious motivations in past history and current events. Doing so, they believe, is essential to understanding both.

But *amici* are members of a minority religion. Establishment Clause cases in their common iteration are invariably a concern to *amici* and its members because the religion being established is invariably the majority religion. At the same time, decisions to reduce religious content commonly have their origin in efforts to be fairer to religious minorities. This is the rare Establishment Clause case in which the effort to be fair to adherents of all religions is attacked as both anti-religious and unconstitutionally so. It is neither.

B. Neither The School Board's Policy Nor Its Implementation Violate The Establishment Clause

The typical Establishment Clause case involves the promotion of one religion over others or of religion generally, usually via techniques of “sponsorship, financial support, and active involvement of the sovereign in religious activity.” *Nyquist*, 413 U.S. at 772. In *County of Allegheny*, 492 U.S. at 590-91, the Supreme Court summarized Establishment Clause jurisprudence:

In the course of adjudicating specific cases, this Court has come to understand the Establishment Clause to mean that government may not promote or affiliate itself with any religious doctrine or organization, may not discriminate among persons on the basis of their religious beliefs and practices, may not delegate a governmental power to a religious institution, and may not involve itself too deeply in such an institution's affairs.

(intervening footnotes omitted). Forty years earlier, in *Everson v. Bd. of Education of Ewing Twp.*, 330 U.S. 1, 15-16 (1947), the Supreme Court, after a lengthy history recitation replete with quotation from James Madison's *Memorial and Remonstrance Against Religious Assessments*, described the purposes of the Clause this way:

The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between Church and State."

Justice Blackmun's lead opinion in *County of Allegheny*, 492 U.S. at 591, also quotes that excerpt (aside from the last sentence).

What is noteworthy is that not one of the many proscriptions in those two exegeses of the Establishment Clause has anything to do with Plaintiff's claim here. The focus in those summaries is on the establishment of a favored religion at the expense of others, not the broad *disestablishment* of all religion.

Amici recognize that Establishment Clause cases require that government action “neither ‘advanc[e] nor ‘inhibit[]’ religion,” *e.g.*, *Nyquist*, 413 U.S. at 773; that “no religion [may] be sponsored or favored, none commanded, and none inhibited.” *Walz v. Tax Comm’n*, 397 U.S. 664, 669 (1970). “Inhibiting” a religion in that context is often the corollary of advancing other religions. Nonetheless, it may be that the Establishment Clause (as opposed to the free exercise clause that Plaintiff did not plead here)⁴ extends beyond the texts quoted above to reach government action that disfavors *all* religion at the expense of strict secularism. But that construction would not square with the history of the origins of the Establishment Clause, as described at length in *Everson*.

No case that Plaintiff cites to nor that *amici* are aware of has found an Establishment Clause violation on that theory. At the same time, the Supreme Court has suggested the possibility of this analysis. In *School District of Abington Twp. v.*

⁴ More commonly, government action that assertedly inhibits a person from practicing his or her religion is presented as a Free Exercise Clause violation.

Schempp, 374 U.S. 203, 225 (1963), the Court responded to and rejected concerns that its decision would result in establishing “a ‘religion of secularism’ . . . in the schools”:

We agree of course that the State may not establish a “religion of secularism” in the sense of affirmatively opposing or showing hostility to religion, thus “preferring those who believe in no religion over those who do believe.” *Zorach v. Clauson, supra*, 343 U.S. at 314 We do not agree, however, that this decision in any sense has that effect.

Justice Goldberg, concurring in *Schempp*, 374 U.S. at 306, added that “a brooding and pervasive devotion to the secular and a passive, or even active, hostility to the religious” would to him seem unconstitutional. *See also County of Allegheny*, 492 U.S. at 610 (distinguishing a “secular state” from an “atheistic or antireligious” one).

Zorach v. Clauson, 343 U.S. 306 (1952), the case referenced in the *Schempp* majority excerpt quoted above, upheld a public school program releasing students and teachers to participate in religious instruction or devotional exercises during the school day.⁵ The Court found that manner of accommodation to religious practice

5 The Court, 343 U.S. at 313, described the practices the policy permitted:

A catholic student applies to his teacher for permission to leave the school during hours on a Holy Day of Obligation to attend a mass. A Jewish student asks his teacher for permission to be excused for Yom Kippur. A Protestant wants the afternoon off for a family baptismal ceremony.

This indicates that the policy was reserved for the special and relatively rare occasion.

permissible, noting, *id.* at 314, that the Constitution did not require government to “show a callous indifference to religious groups.” Non-accommodation in these circumstances, the Court stated, “would be preferring those who believe in no religion over those who do believe.” *Ibid.* It continued:

Government may not finance religious groups nor undertake religious instruction nor blend secular and sectarian education nor use secular institutions to force one or some religion on any person. But we find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence. The government must be neutral when it comes to competition between sects. It may not thrust any sect on any person. It may not make a religious observance compulsory. It may not coerce anyone to attend church, to observe a religious holiday, or to take religious instruction. But it can close its doors or suspend its operations as to those who want to repair to their religious sanctuary for worship or instruction. No more than that is undertaken here.

Not excusing students and faculty from school so that they can participate in important religious activities, or excusing them to do so, is quite different in its impact on the exercise of religious beliefs than is singing, or not singing, Christmas carols at a winter concert. A teacher or student who has missed Yom Kippur or Ash Wednesday services cannot make them up, and many will feel a loss at having done so. In contrast, children of all ages can sing carols in a multitude of settings outside the public schools and to their heart’s delight.

The argument that school board actions that diminished the role of formal religion had the effect of creating, impermissibly, the “religion of secularism” referenced in *Schempp* has been raised, and rejected, in several cases. It has never been accepted. In *Smith v. Bd. of Comm’rs, supra*, originally a “school prayer case,” intervenors contended that textbooks in home economics, history, and social studies “omit[ted] certain historical events with religious significance” and “uniformly ignore[d] the religious aspect of most American culture.” 827 F.2d at 693. These omissions, they argued, unconstitutionally promoted the religion of secular humanism.⁶ The district court agreed, factually and legally. The Eleventh Circuit rejected the contention and finding. Recognizing the discretion of school boards in the area of curriculum, the Court held that no “objective observer” could conclude that via the reduced discussion of religion “the State of Alabama was conveying a message of approval of the religion of secular humanism” or “a message of government disapproval of theistic religions.” 827 F.2d at 693-94. The Ninth Circuit rejected a similar claim in *Grove v. Mead School District*, 753 F.2d 1528 (9th Cir. 1985). Judge Canby, concurring, at 1536, made the acute observation that “so long as plaintiffs deem that which is ‘secular’ in orientation to be anti-religious, they are not dealing in the same

⁶ The district court had found that 44 textbooks violated the Establishment Clause because they devoted insufficient coverage to religion. 827 F.2d at 688. *Smith* began as a case challenging school prayer but evolved into a case, pursued by intervenors as a counter-attack, focused on textbook content.

linguistic currency as the Supreme Court's establishment decisions.” As noted earlier, the Supreme Court has rejected that equation. *See County of Allegheny*, 492 U.S. at 610.

Nothing in this record, using the terms from *Schempp* and *Zorach*, suggests a “hostility,” “affirmative opposition,” or “callous indifference” to religion. Similarly, nothing in this record suggests an effort to impose a “religion of secularism” or, in the words of *County of Allegheny*, to create an “atheistic or antireligious” society. To the contrary, the Policy permits religious content in the curriculum when pertinent and objectively taught. There is nothing in the deliberations of the Board or the meeting prior to the October, 2004 memorandum that suggest a hidden agenda at odds with the public action as, for example, was revealed to be the case with the effort of the Dover School Board to introduce “intelligent design” into the science curriculum. *See Kitzmiller v. Dover Area School District*, 400 F. Supp. 2d 707, (M.D. Pa. 2005).

Surely, a School Board seeking to create an atheistic environment would go far beyond tweaking the musical selections at a wintertime concert. Surely, a School Board with that aim would not permit religious music at concerts or religious content in curriculum. *Amici* suggest that, in general, to have constitutional significance, to suggest the type of activity and intent to create the religion of secularism, the

governmental action at issue must reach more broadly than is the case here.⁷ *See Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 273 (1988); *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) (establishing as threshold for court intervention that challenged action “directly and sharply implicate” First Amendment concerns).

At all times, the Board’s policy has permitted religious content when it is tied to specific curriculum goals, is objectively presented; and neither inhibits nor advances any religious point of view. The trial court, fairly reading the text of Policy 2270 “through the interpretive lens” of the subsequent memo, wrote (*see* Slip Op. at 26) that Policy 2270 “clearly indicates an effort to include religious material when appropriate, provided that it is presented objectively and that it fits within the curriculum.” The Policy has at all times authorized teachers to teach the religious basis of religious holidays, in the way permitted by *Schempp* and many other cases, but not to promote that religion or to celebrate the holiday. *See Schempp*, 374 U.S. at 225 (“study of the Bible or of religion, when presented objectively as part of a secular program of education” can be constitutional).⁸ It has authorized the study of religious music when

⁷ We say “in general” because we are all too aware that terrible events in history that all rightly condemn sometimes begin with relatively innocuous acts, of discrimination or otherwise.

⁸ Curriculum that did not hew to the *Schempp* rules and, instead, expressly sought to further religion generally or a religion specifically would state a clear Establishment Clause violation.

for purposes other than advancing religion *per se*, and has likewise authorized teaching of religion in history and related courses, when appropriate to an understanding of the subject matter being taught.

On the narrower subject of student concerts, the original policy permitted religious music when it “achieves specific goals of the music curriculum” and added the limitation that music programs “not have a religious orientation or focus on religious holidays.” That policy does not prohibit all religious music, or even all Christmas carols, but merely requires that they be presented in a way that reflects curriculum and does not create a religiously-focused musical concert. The concert policy was later modified, essentially maintaining the policy as written for secondary level students and directing that “performances of music with a religious text” should be avoided in the elementary grades. That distinct rule for younger children satisfies the First Amendment. *School District of the City of Grand Rapids v. Ball*, 473 U.S. 373, 390 (1985).

It is impossible to conclude that the school policy prevents the performance of religious music. The partial play list, described in the Statement of Facts, belies any such assertion. It is equally impossible to conclude that a school policy that permits the performance of religious music, as well as the study of religious matters in other classes, is anti-religious. At most, the Policy, as implemented post-2004, limited the singing of Christmas carols and other holiday songs. That limitation is not of

constitutional dimension. Some may compare the District's Policy to something concocted by the Grinch, from Dr. Seuss's tale. We do not accept that characterization. But even if accurate, the District's actions are now less constitutional.

To this point, we have not explicitly analyzed Plaintiff's claim under the commonly applied tri-partite test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971). In some respects, the *Lemon* test fits inexactly to a claim of this nature and is, instead, designed for a typical claim that government action promotes religion. Thus, the *Lemon* test looks to see that there is a secular and not merely a religious purpose for the action being challenged; that the primary effect neither advances nor inhibits religion; and that the challenged action or policy will not result in an "excessive government entanglement with religion." 403 U. S. at 612-13.

We have discussed in detail that the effect here is not to inhibit religion in ways meaningful under Supreme Court precedent. We add now that there was no religious, or in the context of this case *anti*-religious, purpose at all, only a secular one. There is not a shred of evidence that the School Board acted on anti-religious motivations. Similarly, there is no entanglement here of the type that concerns *Lemon*, which is the broad Establishment Clause prohibition, as expressed in *County of Allegheny*, 492 U.S. at 591, that government "may not involve itself too deeply in . . . [a religious]

institution’s affairs.” In the words of *Lemon*, 403 U.S. at 614, “[t]he objective is to prevent, as far as possible, the intrusion of either into the precincts of the other.”⁹

Here, there is no involvement in a religious institution’s affairs and no entanglement at all. Secular music teachers must read the policy and, applying common sense to the task at hand, prepare appropriate playlists. At most, a secular supervisor reviews the list for compliance with policy. There is no involvement with religious entities or persons, who have no role to play at all. The comparison to *Lemon* itself is instructive. There, the inherent religious character of the church-related schools that were receiving state aid required the Legislature to provide for “careful governmental controls and surveillance by state authorities in order to ensure that state aid supports only secular education.” 403 U.S. at 616. The nature of the government oversight of church activities required to avoid an Establishment Clause violation led ineluctably to an excessive entanglement. Here, no oversight at all is necessary.

⁹ The Supreme Court added this fuller description of the type of entanglements with which it was concerned as it directed courts how to perform the analysis:

In order to determine whether the government entanglement with religion is excessive, we must examine the character and purposes of the *institutions that are benefited*, the nature of *the aid* that the State provides, and the *resulting relationship* between the government and the religious authority.

403 U.S. at 615 (emphasis supplied). Here, no religious institution benefits, there is no State aid to religion, and there is no relationship between the government and any religious authority.

One final and further observation helps to expose the flaw in Plaintiff's argument. Many decisions reached by the Supreme Court in free exercise clause cases – declaring unconstitutional school prayer and bible-reading, student led prayer at football games, and benedictions at graduation, *see Schempp; Engel v. Vitale*, 370 U.S. 421 (1962); *Lee v. Weisman*, 505 U.S. 577 (1992) – result in reductions in religious activity. Under Plaintiff's analysis, these actions, if undertaken by an executive branch agency, would violate the Establishment Clause. Each of those actions is, in the same sense that Plaintiff uses the terms, "hostile" to religion and/or "inhibits" religious practices. And since the practical reality was that the prayers in these settings were majority-driven, the actions can be (mis)characterized as targeting a specific religion – Christianity. It seems more than unlikely that actions taken in furtherance of free exercise rights or to remedy an Establishment Clause violation would produce Establishment Clause violations.

In this respect, the Establishment Clause exists in substantial part to protect rights under the Free Exercise Clause. As the Supreme Court explained in *Schempp*, 374 U.S. at 222, the "wholesome 'neutrality'" required by the Establishment Clause

stems from a recognition of the teachings of history that powerful sects or groups might bring about a fusion of governmental and religious functions or a concert or dependency of one upon the other to the end that official support of the State or Federal Government would be placed behind the tenets of one or of all orthodoxies. This the Establishment Clause prohibits. And a further reason for neutrality is found in the Free Exercise Clause, which

recognizes the value of religious training, teaching and observance and, more particularly, the right of every person to freely choose his own course with reference thereto, free of any compulsion from the state. This the Free Exercise Clause guarantees. Thus, as we have seen, the two clauses may overlap.

As is the case with the Bill of Rights generally, the Free Exercise and Establishment Clauses exist to protect minority rights. *See Santa Fe Independent School District v. Doe*, 530 U.S. 290, 304-305 (2000); *Wallace v. Jaffree*, 472 U.S. 38, 52 (1985).

Florey v. Sioux Falls School District, 619 F.2d 1319 (8th Cir. 1980), is an excellent example of this conundrum. In response to citizen complaints that prior Christmas concerts constituted “religious exercises,” the School Board created a committee to recommend a policy on the subject, which the Board thereafter adopted. Under that policy, religious literature, music, drama and the arts in the curriculum and in school activities were permissible if “intrinsic to the learning experience” and “presented objectively,” and the “emphasis on religious themes . . . should be only as extensive as necessary for a balanced and comprehensive study of these areas.” The new policies, while hardly anti-religious in any meaningful view, resulted in concerts that contained less religious content. In this respect, the District Court found that the pre-policy concerts both “exceeded the boundaries of what is constitutionally permissible under the Establishment Clause” and would not be permissible under the new rules. The Court of Appeals rejected a challenge that the new policy continued to promote religion in violation of the Establishment Clause. Under Plaintiff’s theory, in

which any diminution of religious content equates to an anti-religious animus, the School District's revised policy would be an Establishment Clause violation.

Some may argue in response that there is a meaningful difference between remedies for court-found violations and executive branch actions taken without that finding. *Amici* offer two responses.

First, executives are not and should not be constrained to act only in the aftermath of a violation. Surely it would have been preferable had the Santa Fe Independent School District revised its prayer-at-football-games policy without court action. What a court will find constitutional, or not, is not always, or often, predictable in this area. *Lynch v. Donnelly*, 465 U.S. 668, 678 (1984) (“The Establishment Clause . . . is not a precise, detailed provision in a legal code capable of ready application.”).

Second, the Constitution does not require the School to promote religion to the constitutionally permitted maximum and its failure to do so does not make it anti-religious in any constitutionally significant way. School districts can determine how close to the “Establishment Clause line” they wish to place themselves; they can even change a spot they have previously chosen; and they act constitutionally as they do so. There is a substantial distance between what school boards may do without violating the Establishment Clause in allowing religion in their schools, and what they can do to reduce the religious focus of school concerts, again without violating that same Clause.

This last point essentially encapsulates the point with which we began this Argument: that it is possible to decide not to promote religion in schools without being an enemy of religion.

The School Board's actions were not anti-religious or pro-atheistic, but neutral as to religion. The School Board's Policy approved the appropriate inclusion of religious material in curriculum. Its Policy and actions were a fairly considered effort to promote the constitutional value of religious neutrality in the secular setting of public schools. The School Board's actions do not violate the Establishment Clause.

II. THE SCHOOL BOARD'S ACTIONS DO NOT VIOLATE ANY ASSERTED FIRST AMENDMENT RIGHTS TO RECEIVE INFORMATION AND IDEAS ABOUT RELIGION IN GENERAL AND TO SING OR PLAY RELIGIOUS HOLIDAY MUSIC IN PARTICULAR

Plaintiff's First Amended Complaint asserted (at ¶ 15) that the challenged school policy "denied" students "the ability to learn about, listen to, and participate in the presentation of [religious] music." Doing those things, the Complaint asserted, was good for students – they "advance[] a student's knowledge and appreciation of the role that religion has played in the social, cultural, and historical development of civilization" – and were "properly a part of a comprehensive educational program." (*Id.*, ¶¶ 16-17). The School Board policy, Plaintiff asserted, "unconstitutionally deprived Plaintiff and his minor children of their right to receive information and ideas, their right to learn, and their right to academic freedom, which are guaranteed under the First Amendment." (*Id.*, ¶¶ 16-17). There is no such right. To boot, Plaintiff's

assertion that they were denied the ability to “learn about, listen to, and participate in the presentation of [religious] music” is, as we showed earlier, flatly incorrect.

Students have no constitutional right to have any specific course content taught to them. They have no right to have a specific language (Japanese or Latin, for example), science (advanced physics), or history course (Tudor England) offered, despite what many will identify as their pedagogical benefits. Students have no constitutional right to a music program, let alone one that has concerts, seasonally or otherwise. They have no constitutional right to insist that the music at those concerts be in any style, by any composer, or convey any particular theme, nor can they successfully assert a First Amendment challenge that the music they sought was not selected. The notion that students have a First Amendment right to have religious content provided to them in a public school has no provenance.¹⁰ Indeed, a course on “religious music,” unless

¹⁰ Plaintiff also asserts a violation of a “right to academic freedom,” a term that is usually applied to faculty in the university setting. In the words of the American Association of University Professors, academic freedom

is the essential characteristic of an institution of higher education. It encompasses the right of faculty to full freedom in research and in the publication of results, freedom in the classroom in discussing their subject, and the right of faculty to be free from institutional censorship or discipline when they speak or write as citizens to the goal that faculty should be able to *research, write, and speak out on unpopular subjects, without fear of reprisal.*

Continued on following page

tightly tied to music history and theory, would raise serious Establishment Clause concerns, as previously discussed.

It is not merely that schools can, within limits, restrict students' rights of expression "in light of the special characteristics of the school environment." *Morse v. Frederick*, 127 S. Ct. 2618, 2621 (2007); *Bethel School District No. 403 v. Fraser*, 478 U. S. 675 (1986); *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503, 506 (1969). Those cases address situations in which students sought to express their views – on the war in Vietnam in *Tinker*, via an elaborate sexual metaphor in *Fraser*, on drug use in *Morse*. At issue was whether school authorities could prohibit the expression and/or penalize the speakers (answered in the negative in *Tinker*, in the affirmative in *Fraser* and *Morse*).

More fundamentally, Plaintiffs' First Amendment claim is at odds with the principle central to the Bill of Rights: that the First Ten Amendments restrain government actions that limit private action but do not impose affirmative duties on government. *See, e.g., Lyng v. Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 451 (1988) ("Free Exercise Clause is written in terms of what the government cannot do to the individual, not in terms of what the individual can exact from the

Continued from previous page

(emphasis supplied) <http://www.aaup.org/AAUP/about/mission/glossary.htm> (accessed January 16, 2009). It has no applicability here and we do not discuss it further.

government.” Government must respect the free exercise of religion but need not make available a church. Government cannot censure the media but need not provide a printing press or even a bullhorn. So too, a school board does not approach a free exercise violation when it engages in the quintessential governmental task of establishing school curriculum, choosing to teach some subjects and not others.¹¹ *Bd. of Education, Island Trees Union Free School District No. 26 v. Pico*, 457 U.S. 853, 863 (1982) (recognizing local school boards’ “broad discretion in the management of school affairs”).

To be sure, the Supreme Court has several times referenced that “the Constitution protects the right to receive information and ideas.” *See Pico*, 457 U.S. at 867 (citing cases). Plaintiff’s First Amendment claim echoes that phrase. But the discussion in *Pico* and in the cases *Pico* cites make clear that the right to receive information exists as a corollary to the right to disseminate information – it is a truism that if speakers cannot speak, nobody can hear – and that neither right creates a right to have government create, or facilitate the creation of, the content that others will then disseminate and receive.

¹¹ Clearly, curriculum choices can violate the Establishment Clause. *See, e.g., Epperson v. Arkansas*, 393 U.S. 97 (1968); *Widmar v. Vincent*, 454 U.S. 263, 271 n.9 (1981); *Kitzmiller v. Dover Area School District*, 400 F. Supp. 2d 707 (M.D. Pa. 2005) case.

Hazelwood School District v. Kuhlmeier, 484 U.S. 260, 269-70 (1988), confirms the distinction between “tolerat[ing] particular student speech,” at issue in *Tinker* and “require[ing] a school affirmatively to promote particular student speech.” *Pico*, 457 U.S. at 862, makes the same distinction (“Respondents have not sought to compel their school Board to add to the school library shelves any books that students desire to read” but challenged only “the *removal* from school libraries of books originally placed there by the school authorities, or without objection from them.” (emphasis in original)); *see also* 457 U.S. at 878 (Stevens, J., concurring (“I do not suggest that the State has any affirmative obligation to provide students with information or ideas”))).

The Supreme Court in *Hazelwood* explained:

The former question addresses educators’ ability to silence a student’s personal expression that happens to occur on the school premises. The latter question concerns educators’ authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school. These activities may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audience.

484 U.S. at 271. School concerts clearly fit within that latter category (“expressive activities”), as the District Court found. Slip Op. at 35. But neither category encompasses a First Amendment right to be taught specified subject matter. Rather, *Hazelwood* reaffirmed limits on the school’s ability to restrict speech in activities that

appear to “bear the imprimatur of the school,” *id.* at 271, such as the student newspaper there at issue.¹²

For a school decision “exercising editorial control over the style and content of student speech in school-sponsored expressive activities” to violate the First Amendment, the school action must serve “no valid educational purpose.” *Id.* at 273. *Hazelwood* recognizes that avoiding controversy and instead seeking neutrality on matters of public concern is precisely such a “valid educational purpose.” *Id.* at 272. This Court concurs. *See Brody Through Sugzdinis v. Spang*, 957 F.2d 1108, 1122 (3d Cir. 1992) (“[a] wide variety of policy justifications may pass muster under this test. And “‘reasonable’ grounds for content based restrictions include the desire to avoid controversy . . . and an interest in maintaining the appearance of neutrality . . . provided that these are not simply pretexts for viewpoint discrimination.” *Id.* (internal citations omitted)).

Pico does not alter the analysis. *Pico*, from its first sentence, is narrowly focused on the removal of books from a school library so as to avoid having the First Amendment establish a right to receive content; carefully distinguished that subject

¹² *Hazelwood* also requires that school facilities not have converted themselves into “public forums,” something they can do by opening its facilities “for indiscriminate use by the general public” and making it less a school and more akin to a public park. *Id.* at 267. The District Court found that the School District had not done so. Slip Op. at 36 (“The Court is not aware of any evidence” supporting a contrary conclusion).

from curriculum matters; expressly recognized the “broad discretion” of the school board “in the management of school affairs”; and is a plurality of at best four justices and arguably three, depending on how one views Mr. Justice Blackmun’s concurrence, particularly as applied here. *See* 457 U.S. at 853, 859, and 863. In no reasonable reading of *Pico* does it establish a student’s constitutional right to insist that curriculum include content, religious or otherwise, that they wish to have taught to them.

Interestingly, *amici* think there is little doubt that the school board readily satisfies the position in Justice Blackmun’s concurrence. Justice Blackmun sought the “proper balance” between the “limited constitutional restriction” that he thought the First Amendment imposed and “the necessarily broad state authority to regulate education.” 457 U.S. at 879. That balance, Justice Blackmun determined, was achieved by finding a First Amendment violation only when school officials removed books “for the *purpose* of restricting access to the political ideas or social perspectives discussed in them, when that action is motivated simply by the officials’ disapproval of the ideas involved.” 457 U.S. at 879-80 (emphasis in original). Even allowing for the differing factual scenarios between *Pico* and this case, there is no basis to conclude that school officials were seeking to restrict access to religious content because they *disapproved* of that content.

In truth, there are no expressive rights at issue here. Students are free to express religious and other ideas as they choose, in school subject to the “special

characteristics” recognized in *Tinker* and its progeny, and out-of-school without any apparent limitation. They are free to critique the District policy and to advocate its change. They retain, as well, their fundamental constitutional right to use the ballot box to change, in ways that may or may not be constitutional, school policies with which they disagree.

This is not a situation in which a student commandeered the microphone at a concert or school assembly and sang a religious song not on the concert play list. Nor does it address the school’s ability to censor presentations at an “open mike” concert. Those are both examples of student attempts at expression in the school concert setting. Nor is it even one in which the school rejected the Wind Ensemble’s choice of what to play at graduation, the scenario presented in *Nurre v. Whitehead*, 520 F. Supp. 2d 1222 (W.D. Wa. 2007). All of those situations *do* implicate established First Amendment rights; *Tinker* controls their resolution and there is no reason to speculate on the result. It is sufficient to note that the facts and legal assertions here differ meaningfully from those scenarios, and that the First Amendment Rights Plaintiff asserts – to receive religious information and ideas in the public school setting; to learn about religion, again in that setting; and to academic freedom – do not exist.

For these many reasons, the School Board’s actions do not violate Plaintiff’s First Amendment expressive rights.

CONCLUSION

For these reasons, *amici curiae* respectfully submit that the lower court order granting summary judgment to Defendants should be affirmed.

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CERTIFICATION OF BAR MEMBERSHIP

I hereby certify that I am admitted to practice before this Court.

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CERTIFICATE OF COMPLIANCE

I hereby certify that pursuant to Fed. R. App. P. 32(a)(5)(A) and 32(a)(7)(B), the foregoing Appellant's Opening Brief is proportionally spaced, has a typeface of 14 points Times New Roman, and contains 8570 words.

I further certify that the foregoing brief filed electronically (E-Brief) complies with the electronic filing requirements:

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I hereby certify that on January 26, 2009, I caused two copies of the foregoing document to be served upon the following counsel of record by United States mail, postage prepaid:

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