No. 08-1566

# In The Supreme Court of the United States

BRITTANY McCOMB, and MARIANNA McCOMB, by her best friend, CONSTANCE J. McCOMB,
*Petitioners*,

v.

GRETCHEN CREHAN, ROY THOMPSON, and CHRISTOPHER SEFCHECK, individually and in their official capacities as employees of Foothill High School, and the Clark County School District, a political subdivision of the State of Nevada, and WALT RULFFES, in his official capacity as Superintendent of the Clark County School District, a political subdivision of the State of Nevada, et al.,
*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## REPLY BRIEF FOR PETITIONERS

Anand Agneshwar
*Counsel of Record*
Vijay Baliga
ARNOLD & PORTER LLP
399 Park Avenue
New York, NY 10022
Tel: (212) 715-1000

Douglas H. Clark
LAW OFFICES OF DOUGLAS H. CLARK, P.C.
2595 South Torrey Pines Drive
Las Vegas, NV 89146
Tel: (702) 388-1333

James J. Knicely
KNICELY & ASSOCIATES, P.C.
487 McLaws Circle, Suite 2
Williamsburg, VA 23185
Tel: (757) 253-0026

John W. Whitehead
Douglas R. McKusick
THE RUTHERFORD INSTITUTE
1440 Sachem Place
Charlottesville, VA 22906
Tel: (434) 978-3888

October 15, 2009 — *Counsel for Petitioners*

Blank Page

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**OTHER AUTHORITIES**

Blank Page

## INTRODUCTION

Respondents' primary argument is that the Establishment Clause required them to censor Brittany McComb ("Brittany" or "Petitioner") -- one of three public high school students selected because of their G.P.A. to write and give speeches at a graduation ceremony -- solely because she spoke about the key to her success in school (her faith in Christ) and told others that they could likewise succeed. *See* Plaintiffs' First Amended Complaint ("Compl.") at ¶¶ 16-21 (Petitioners' Appendix ("App.") at 24-25) This Court should grant certiorari to make clear that the Establishment Clause does not stretch so broadly to stifle personal student speech simply because it reflects a sectarian religious orientation. Yet the Ninth Circuit repeatedly has reached that conclusion[1] and it again did so here despite the presence of viewpoint discrimination between the student graduation speakers.

These overbroad Ninth Circuit rulings are taking a cumulative and unnecessary toll on Free Speech, well beyond this Court's expressed concerns with school prayer. *See, e.g.*, *Nurre v. Whitehead*, No. 07-35867, 2009 WL 2857196 (9th Cir. Sept. 8, 2009) (Censoring school band instrumental performance of *Ave Maria* from school graduation

---

[1] *Cole v. Oroville Union High School District*, 228 F.3d 1092, 1103 (9th Cir. 2000), and *Lassonde v. Pleasanton Unified School District*, 320 F.3d 979 (9th Cir. 2003).

ceremony because of its religious orientation). There are over 17,000 public schools in the Ninth Circuit[2] and this orientation undoubtedly stifles student speech across the West Coast. As such, we urge the Court to review this case and settle this question once and for all.

[2] *See* http://schooltree.org (tallying total number of public schools located within each State of the Union) (last visited Oct. 15, 2009).

## I. The Decision Below Runs Contrary to *Weisman* and *Santa Fe*

Respondents first argue that this case is not certworthy because the speech at issue was not really Brittany's but that of the School District. In particular, Respondents claim that because school officials asked to review the students' speeches before they were given, the school had plenary control of the event. Petitioners' Opposition Brief ("Opp.") at 3-5. In Respondent's view, whatever student speech was given created the perception of being endorsed by the school district and became subject to Establishment Clause limitations under *Lee v. Weisman*, 505 U.S. 577 (1992), and *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000). *See id.*

Let us be clear -- the school district did not exercise "plenary control" over Brittany's speech by virtue of the principal's review of her speech. But even if the principal's review somehow gave the school district some control over what types of speeches should be prohibited -- for example, pornographic or incendiary speeches designed to disrupt the event -- that type of control does not mean that the school endorses whatever speech is permitted to go forward. Nor does that review suggest *primary* control over the "content" of wholly student-authored expression. The simple fact that the principal asks to review the speech does not entwine the school district with the substantive content of the speech. Otherwise, *any* speech that would be barred if given by the principal in his

official capacity would by definition be barred if given by the student. There is no logical stopping point to such an doctrine.

In fact, Respondent's "plenary control" argument flows from a misreading of the scope of *Weisman* and *Santa Fe*. Those cases involved school districts that, respectively, inserted themselves into the substantive content of school prayer, and actively encouraged student-initiated school prayer. *See generally, Weisman*, 505 U.S. 577, and *Santa Fe*, 530 U.S. 290. The school in *Weisman* selected a rabbi to deliver an "invocation" and "benediction" to the graduating class and provided materials for him to use in delivering the prayers (*Weisman*, 505 U.S. at 581); the school in *Santa Fe* engineered the election of a student speaker for a school event for the specific purpose of delivering a *prayer* to the student audience (*Santa Fe*, 530 U.S. at 296-97). Neither of these factual scenarios is remotely analogous to the situation here -- where no prayer was involved and where the student was one of three valedictorians invited to speak because of her class rank and informed that she could speak about what was important to her. *See* Compl. at ¶¶ 16-21 (App. at 24-25).

Nor does Respondents' invocation of Clark County School District Regulation ("Regulation") 6113.2 add anything material to their argument. Opp. At 4-5. That regulation was designed to encourage student speech (*see* Regulation 6113.2 (App. At 3)); it emphasizes a distinction between situations where neutrally selected students exercise

"primary control of the content of the expression" and when they do not. *Id.* Here, Brittany not only authored the content of her speech, she was solely and primarily responsible for its delivery. Compl. at ¶¶ 32-33 (App. at 30). There was no school policy against religious expression at graduation (*Id.*); indeed, where the expression was the student's and the student was selected by neutral criteria, school policy favored permitting the religious expression. Regulation 6113.2 (App. at 3).

Respondent's logic and the logic of the decision below would result in the censorship of any and all student-initiated speech that takes on a religious orientation so long as the speech reached the desk of a school official before it was given. The Ninth Circuit in fact appears to be headed towards that extreme. In its recent decision in *Nurre v. Whitehead*, No. 07-35867, 2009 WL 2857196 (9th Cir. Sept. 8, 2009), the Court upheld a school's prohibition on a student playing an instrumental version of *Ave Maria* at a high school graduation ceremony, due to the "religious nature" of the song. *Id.*, 2009 WL 2857196 at *5. The dissent in that case realized this went far beyond *Santa Fe* and *Weisman*, and raised concerns as to the ultimate effect of this ban:

> [I]f the majority's reasoning on this issue becomes widely adopted, the practical effect will be for public school administrators to chill - or even kill - musical and artistic presentations by their students in school-sponsored

> limited public fora where those presentations contain any trace of religious inspiration, for fear of criticism by a member of the public, however extreme that person's views may be.

*Id.*, 2009 WL 2857196 at *9.

Petitioners respectfully request the Court to provide clarity as to whether the far reaching Establishment Clause Defense advanced by Respondents, that would justify the removal of all student-initiated religious speech with a sectarian component from graduation ceremonies, reflects a proper understanding of the balance between the Free Speech and Establishment Clauses.

## II. The Permissibility of a Student-Initiated Speech Should Not Depend on a Distinction Between Proselytizing and Non-Proselytizing Speech

Respondents implicitly acknowledge that their "plenary control" argument proves too much by arguing that Brittany's speech violated the Establishment Clause for another reason -- , that it constituted "proselytizing." *See generally* Opp. at 25-27. To date, this Court has not permitted censorship of student religious speech based on whether it is non-proselytizing or proselytizing.

The sole definition of the term relied upon by Respondents derives from *Cole*, 228 F.3d at 1103,

and a Fifth Circuit case on which it relies (*Doe v. Santa Fe Ind. Sch. Dist.*, 168 F.3d 806, 817-18 (5th Cir. 1999)). In these authorities, proselytizing is any comment "designed to reflect, and even convert others to a particular religious viewpoint."[3] *Id.* This Court should grant certiorari and hold that the Constitution does not permit school districts to prohibit speech that otherwise would be viewed as that of the non-governmental speaker solely because it falls within a highly subjective and overbroad distinction between "proselytizing" and "non-proselytizing" speech.

For one thing, courts are ill-equipped to distinguish between proselytizing and non-proselytizing religious speech. It is moreover unclear why "proselytizing" *speech* is inherently coercive but non-proselytizing speech is not. Consider the following two examples. A student gives a twenty minute speech that is suffused with references to God and God's role in the student's life and successes. The speech is personal and contains no exhortation to others to convert. A second student gives a nearly identical speech but then adds "I am where I am because of my Buddhist faith and if you follow the Buddhist Eightfold Path I believe you will succeed and find happiness as I have." It

---

[3] The *Cole* Court also relied on *Follett v. McCormick*, 321 U.S. 573, 576-77 (1944), and *Murdock v. Pennsylvania*, 319 U.S. 105, 108-10 (1943) to equate prayer with what it termed to be the "religious practice" of door-to-door evangelizing. *Cole*, 228 F.3d at 1104.

cannot credibly be contended that the second speech presents Establishment Clause concerns while the first does not, and yet that is the substance of the Ninth Circuit's judgment in this case. *See* Oral Argument before the Ninth Circuit in *McComb v. Crehan*, 07-16194 (Mar. 10, 2009), http://www.ca9.uscourts.gov/media/view_subpage.php?pk_id=0000002983 (last visited Oct. 15, 2009).

Inevitably, this distinction between proselytizing and non-proselytizing speech is devolving into more invidious viewpoint discrimination based on the extent to which the speech is deemed to be sectarian. That in fact is what Petitioners believe occurred here. Two students gave speeches with religious orientations. *See* Compl. at ¶¶ 64-66 (App. at 36-41). Janelle Oehler ("Janelle") spoke about God and her beliefs in a non-sectarian, but arguably proselytizing, manner. *Id.* Brittany's speech contained references to her particular faith in Christ which Respondents deemed to be proselytizing. *Id.* Janelle's speech was deemed acceptable but Brittany's was not. *Id.*

While Respondents clumsily argue that the greater number of "I"s and "me"s in Janelle's speech warranted the disparate treatment (*see* Opp. at 9-10), the record in fact reflects that every time Brittany wrote "Christ" or "Jesus" in her draft speech school district officials struck them out and then censored the speech by turning off the microphone in the presence of parents, classmates and friends (*see* Compl. ¶¶ 56-64 (App. at 35-36); "Filling That Void" (App. at 58). By contrast,

Janelle was permitted to advocate that prayer and a relationship to God is the path to personal success:

> [O]ur meal is never started without prayer. My Heavenly Father plays an extremely important role in my life. I am confident that I would not be standing before you today if I had not included Him in my life. He is the One who truly understands our individual needs. . . . I would be nothing without Him [God]. Find your inspiration. Living with the hope for a brighter future will make a significant difference in our lives, provide us with true inner happiness and personal success. If we strive to be more motivated by inspiration, we will find ourselves more satisfied, as if we had enjoyed a complete balanced and nutritional spaghetti dinner.

Excerpt of Janelle's Speech (App. at 8).

While Brittany may have spoken about her faith at greater length, the principal distinction in the speeches was that Brittany's was avowedly sectarian and Janelle's was not.

Far from preventing an Establishment Clause violation, by selectively intervening to censor Brittany's commencement speech, the Respondents committed one by preferring a "civic-religious"

speech over a sectarian one. *See Weisman*, 505 U.S. at 588.

Finally, it is not at all clear what standards the Ninth Circuit is using to determine what is and what is not proselytizing. Respondents' actions in this case are tainted with the standardless personal predilections found unconstitutional in *Forsyth County, Georgia v. Nationalist Movement*, 505 U.S. 123 (1992), and its progeny. There is no First Amendment doctrine that permits, let alone encourages, such a linear and potentially discriminatory approach to student-initiated religious speech. To the contrary, the Court has cautioned that religous clause cases are intensely fact-specific and that the entire context must be examined. Indeed, in *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819 (1995), Justice O'Connor stated in her concurring opinion that these types of cases "depend[] on the hard task of judging-sifting through the details and determining whether the challenged program offends the Establishment Clause." *Id.* at 847; *see also Weisman*, 505 U.S. at 597 (noting that "[o]ur Establishment Clause jurisprudence remains a delicate and fact-sensitive one"). Instead of deliberate fact-finding, the Ninth Circuit has opted for a form of summary justice based on an "I know it when I see it" standard that is, in fact, standardless. We respectfully request that this Court use this petition to reaffirm the principle that context matters in the evaluation of student-initiated high school graduation speeches.

## III. This Court Should Reconcile A Clear Difference in Jurisprudence Between the Circuits

Over the past several years, circuit and district courts have been interpreting the scope of *Weisman* and *Santa Fe* with differing and contrasting results that requires clarification from this Court. The Ninth's Circuit's decision below, its recent decision in *Nurre* and its earlier decisions in *Cole*, 228 F.3d at 1103, and *Lassonde*, 320 F.3d at 979-80, took a stunningly broad view of the Establishment Clause's reach -- virtually any involvement by the school officials in the student's speech gave the speech the appearance of being endorsed by the school district. The Eleventh and Eighth Circuits have reached different results interpreting the same two Supreme Court cases. The Eleventh Circuit in *Adler v. Duval County School Board*, 250 F.3d 1330 (11th Cir. 2001), and the Eighth Circuit in *Doe v. School District of Norfolk*, 340 F.3d 605 (8th Cir. 2003), both rejected the argument that *Santa Fe* and *Weisman* require a "total ban" on religious references at school functions. *See Adler* 250 F.3d at 1332-33; *Norfolk*, 340 F.3d at 611-12. In those cases, the ceremonies at issue were school-sponsored events on school premises under school control. *Id.* The speeches were broadcast by the schools using school equipment. *Id.* Before determining whether censorship was necessary, the *Adler* and *Norfolk* Courts examined the entire context in which the speech was made and ultimately concluded that no Establishment Clause issues existed. *Id.*

There is therefore a clear need for this Court to intervene and clarify the proper analytical approach to such questions and the scope of the Establishment Clause's reach.

## IV. Petitioners Have Fairly Presented All Issues Which Remain Ripe for Review

Respondents urge that the issues presented in this case have previously been addressed in the Petitions for Certiorari in the *Cole* and *Lassonde* cases, and thus do not need to be revisited by this Court. To the contrary, this case presents an invidious example of viewpoint discrimination that was not pressed in *Cole* and *Lassonde*, and occurred in the instant matter precisely *because* this Court did not grant certiorari in those cases. As such, the Court should do so now.[4]

---

[4] Respondents also assert that *Grupo Mexicano de Desarrollo v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 319 n.3 (1999), and *N.C.A.A. v. Smith*, 525 U.S. 459, 470 (1999) prohibit Petitioners from raising claims related to Entanglement, Viewpoint Discrimination and Equal Protection. Opp. at 22. *Grupo Mexicano* and *N.C.A.A.*, both involved attempts by the parties to argue novel theories not raised in the Court below. *See Grupo Mexicano*, 527 U.S. at n.3; *N.C.A.A.*, 525 U.S. at 470. Here, Petitioners' Entanglement and Viewpoint Discrimination claims are both inextricably intertwined with the First Amendment claims pled in the Amended Complaint briefed and raised fully below. Comp. ¶¶ 67-90 (App. at 41-48). Similarly, all claims attendant to Equal Protection were also pled in the Amended Complaint and raised in Petitioners' Equal Protection Clause arguments below as well. Compl. ¶¶ 91-97 (App. at 48-50). Despite Respondents' assertions to the

Footnote continued on next page

## CONCLUSION

The Petition for a writ of certiorari should be granted.

Respectfully submitted,


Anand Agneshwar
*Counsel of Record*
VIJAY BALIGA
ARNOLD & PORTER LLP
399 Park Avenue
New York, NY 10022
Tel: (212) 715-1000

James J. Knicely
KNICELY & ASSOCIATES, P.C.
487 McLaws Circle
Suite 2
Williamsburg, VA 23185
Tel: (757) 253-0026

Douglas H. Clark
LAW OFFICES OF DOUGLAS H. CLARK, P.C.
2595 South Torrey Pines Drive
Las Vegas, NV 89146
Tel: (702) 388-1333

John W. Whitehead
Douglas R. McKusick
THE RUTHERFORD INSTITUTE
1440 Sachem Place
Charlottesville, VA 22906
Tel: (434) 978-3888

*Counsel for Petitioners*


October 15, 2009

---

Footnote continued from previous page
contrary, Petitioners' use of Supreme Court case law to support these claims (as opposed to the Ninth Circuit case law used below) does not render the claims "novel" or an "issue of first instance." They have been presented as issues in the case from its inception.