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STIPULATIONS

1. Naomi Abraham wrote Part I and Michel Debolt wrote Part II.
2. No statute enacted, case decided, or regulation promulgated after November 1, 2000 may be cited.
3. No additional New York statute may be decided nor may the Constitution of the State of New York be cited.
4. The only two issues presented in this appeal are:
 - a. whether Resolution 11 of the Bloomfield School Board of Bloomfield City School District is unconstitutional as applied because it violates the Plaintiff-Appellant's free speech rights under the First Amendment to the United States Constitution.
 - b. whether it is unconstitutional for the Bloomfield City School District to refrain from acting to stop the spontaneous recitation of prayer at Bloomfield High School home football games because it is a violation of the establishment Clause of the First Amendment to the United States Constitution.
5. No matters of evidence are at issue on this appeal.
6. All documents contained in this records have been duly authenticated according to the Federal Rule of Civil Procedure.
7. In this case in the United States District Court of the Northern District of New York, a three judge panel decided the case.

JURISDICTION

1. The United States District Court of the Northern District of New York had original jurisdiction over this civil action under 28 U.S.C. § 1331 (1997).
2. The Court of Appeals for the Second Circuit has appellate jurisdiction over the final decision of the District Court of the Northern District of New York under 28 U.S.C. § 1291 (1997).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. XIV, § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Resolution 11, Bloomfield School Board, Bloomfield City School District

School facilities may be used by district residents for holding social, civic, and representational meetings and entertainment events and other uses pertaining to the welfare of the community, provided that all meetings and events are nonexclusive and permit the full participation of all interested members of the student population.

QUESTIONS PRESENTED

1. Whether Resolution 11 of the Bloomfield School Board of Bloomfield City School District is unconstitutional as applied because it violates the Plaintiff-Appellant's free speech rights under the First Amendment to the United States Constitution; and
2. Whether it is unconstitutional for the Bloomfield City School District to refrain from acting to stop the spontaneous recitation of prayer at Bloomfield High School home football games because it is a violation of the establishment Clause of the First Amendment to the United States Constitution.

STATEMENT OF THE CASE

1. Appellant Jeremy Brown files a complaint in the Court of Appeals for the Second Circuit November 8, 2000, claiming that Resolution 11 of the Bloomfield School Board is unconstitutional because it violates the First Amendment rights of free speech and free assembly of him and the Bloomfield Chapter of the Boy Scouts of America by denying them access to the public school facilities based on their viewpoint and that the school's failure to stop the recitation of the Lord's Prayer at the school football games is a violation of the Establishment Clause of the First Amendment to the United States Constitution.

2. On November 9, 2000 Appellee filed a response to the complaint.
3. On November 11, 2000, the United States District Court of the Northern District of New York entered a Judgment for the Appellee.
4. On November 16, 2000, Appellant filed a Notice of Appeal in the United States Court of Appeals for the Second Circuit.
5. On November 25, 2000, the United States Court of Appeals for the Second Circuit issued a Grant of Appeal.

STATEMENT OF THE FACTS

Appellant Jeremy Brown is a sophomore at Bloomfield High School and a member of the Bloomfield High School football team. R-5. Jeremy Brown is also a student troop leader of the Bloomfield Chapter of the Boy Scouts of America (“Boy Scouts”). R-5; R-6.

Prior to July 2000, Jeremy Brown participated in meetings of the Boy Scouts that were held in Bloomfield High School classrooms. R-5. On June 13, 2000, Principal Hunt sent a letter to the School Board raising concern regarding the organizational and membership policies of an outside group using school facilities. R-5; R-10. After considering Principal Hunt’s letter, the Bloomfield School Board passed Resolution 11 on July 11, 2000 excluding groups with limited membership policies, and groups that don’t allow open attendance and participation at their meeting, from using of Bloomfield High School facilities. R-10. During the Board Meeting Regarding Resolution 11, the Board discussed the membership policies of a particular group excluding homosexual and female students from becoming members. R-10. The Board specifically discussed alternative phrasings of Resolution 11 in order to ensure that these membership practices would be prohibited. R-10. The Board was aware that if they passed a resolution that specifically prohibited the use of the facilities to groups based on the expressive association of the organization, as they wanted to, it would be an infringement of the groups First

Amendment rights. R-10. The Board specifically chose Resolution 11 so that the goal of suppressing a particular group's belief would be furthered while appearing viewpoint neutral. R-10; R-11. On July 25, 2000, Principal Hunt informed the Boy Scouts that under Resolution 11 they were prohibited from use of the School Facilities due to the organizations limited membership policies and meetings and events restricted to member attendance. R-5; R-6; R-13. Resolution 11 bars Jeremy Brown from using school facilities to meet with the Boy Scouts of America. R-5.

Prior to the 2000-2001 school year, Bloomfield High School's official policy allowed a student selected representative to lead the Lord's Prayer prior to the start of each school sponsored, home football game. R-6; R-17. For the current school year, the Bloomfield City School District terminated its official policy of student led prayer. R-6. Nevertheless, the Lord's Prayer continues to be recited aloud and in unison by people in attendance, including school officials charged with administrating the football game. R-6; R-16; R-18. The coach of the Bloomfield High School Football team, Brad Johnson, delays the start of each football game to allow completion of this prayer. R-6; R-17; R-18. This recitation of the Lord's Prayer at school football games, facilitated by school officials', forces Jeremy Brown's participation in Christian activities which are in opposition to his Jewish beliefs. R-6; R-7; R-18.

SUMMARY OF ARGUMENT

This court should strike down Resolution 11 as an unconstitutional violation of the First Amendment rights of free speech and association. Bloomfield School District has created a 'limited public forum'. This type of forum designation authorizes the School District to determine the types of content-based activities that are permitted or prohibited from the designated forum in order to further the purpose for which the forum was created. However, the decisions within the approved content-based categories of speech must be viewpoint neutral and reasonable unless they further an important or substantial government interest. A school facility is prohibited from merely discriminating against a private individual or group because of the morals and views that they express, without a compelling or substantial interest of the school. The school may not target the individual or the group for exclusion in order to suppress their voice or attempt force expression of an approved thought.

Bloomfield school district's Resolution 11 violates the First Amendment protections of speech and expressive association by creating an unreasonable non-neutral viewpoint-based exclusion of an approved category of speech that does address an important or substantial interest of the state. Resolution 11 was created to suppress the views of Jeremy Brown, the Boy Scouts and other private clubs. Resolution 11 is broadly drawn violating the right of individuals to privately associate without State scrutiny. Further, Resolution 11 is an attempt to impermissibly coerce a private club to dilute its views through forcing the inclusion of members with beliefs inconsistent with those expressed by the group. Therefore, this Court should declare Bloomfield School Board Resolution 11 unconstitutional and permanently enjoin its enforcement.

Bloomfield's practice of allowing pre-game prayer at its high school football games violates the Constitution's Establishment Clause. The Establishment Clause forbids the state from endorsing religion or acting so as to coerce individuals to adopt the views of a religion. Bloomfield unconstitutionally endorses religion through practices which both facilitate and create the impermissible impression of state support of religion. These practices include coordinating its regularly scheduled football games so as to include pre-game prayer and allowing Bloomfield representatives to participate in such prayer while carrying out their official school duties.

Bloomfield's practice of allowing prayer at its football games is also unconstitutional because it pressures individuals such as Jeremy Brown to conform their religious views to those of the majority. Supreme Court jurisprudence places the onus on Bloomfield to cease this coercion even where individuals could otherwise burden themselves to avoid the impermissible compulsion arising as a result of the Establishment Clause violation.

Claims of First Amendment speech or religious protection are no answer to the Establishment Clause violation arising from Bloomfield's conduct. Rectifying an Establishment Clause violation takes precedence over Constitutional claims regarding religious accommodation. Furthermore, claims regarding a Bloomfield created tradition of pre-game prayer do not involve the type of discernible burden on the free exercise of religion which judicial precedent holds as warranting Constitutional protection.

ARGUMENT

I. THIS COURT SHOULD REVERSE THE LOWER COURT AND FIND RESOLUTION 11 UNCONSTITUTIONAL BECAUSE IT VIOLATES THE PLAINTIFF'S FREE SPEECH RIGHTS UNDER THE FIRST AMENDMENT.

Resolution 11 impermissibly targets the Boy Scouts based on their expressed beliefs and casts a net so broad that it suppresses the right to expressive association of private organization. This is an unconstitutional violation of Jeremy Brown and the Bloomfield Chapter of the Boys Scouts of America's First Amendment Rights. Controlling authority has determined that "once it has opened a limited forum, however, the State must respect the lawful boundaries it has itself set. The State may not exclude speech where its distinction is not 'reasonable in light of the purpose served by the forum.'" Rosenberger v. Rector, 515 U.S. 819, 829 (1995) (citing Cornelius v. NAACP Legal Defense & Ed. Fund, 473 U.S. 788, 804-806 (1985)); see also Perry Educational Association v. Perry Local Educators, 460 U.S. 37, 46, 49 (1983); Lamb's Chapel v. Center Moriches Union Free School District, 508 U.S. 384, 394 (1993); Bronx Household of Faith v Community School District No.10, 127 F.3d 207, 213-216 (2nd Cir. 1997).

Resolution 11 should be struck down as unconstitutional, because (A) "Limited Public Forums" do not have unlimited power to suppress the First Amendment rights and (B) Resolution 11 seeks to unconstitutionally limit speech in the limited public forum created by Bloomfield School District. Since this case implicates issues of federal constitutional law, this court should review the district court's judgment de novo.

A. "LIMITED PUBLIC FORUMS" DO NOT HAVE UNLIMITED POWER TO SUPPRESS THE FIRST AMENDMENT.

Before considering the question of whether Resolution 11 is unconstitutional under the First Amendment, it must first be demonstrated that a limited public forum is not exempt from

the constitutional protection of that amendment, which affirms that “Congress shall make no law ...abridging the freedom of speech...”U.S. Const. amend. I.

1. “Limited Public Forums” are Not Exempt from First Amendment Protections.

Controlling authority clearly demonstrates that limited public forums are not exempt from First Amendment protections.

First Amendment rights must always be applied in light of the special characteristics of the environment’ in the particular case. And, where state-operated educational institutions are involved, this Court has long ‘the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental safeguards, to prescribe and control conduct in the schools.’

Healy v James, 408 U.S. 169, 180 (1972).

2. The Supreme Court provides for Suppression of First Amendment Rights when Demonstrably Necessary to Serve an “Important of Substantial Government Interest.”

a) The Government May Suppress First Amendment Rights if they Serve an “important or substantial government interest.”

The Supreme Court has come to recognize that suppression of some of our basic rights may be necessary at times to further an “important or substantial government interest,” see United States v. O’Brien, 391 U.S. 367(1968). The recognition that restrictions on our basic rights are at times necessary has led the court to put in place stringent requirements to ensure that all intrusions are limited, narrow, and targeted towards the compelling need of the government being addressed. See Id. at 376-377. The government is prohibited from suppressing or discriminating against speech based on the expression of an unpopular viewpoint.

b) Schools are Authorized to Determine the Type of Forum That Will Best Suit their Purpose.

“The Supreme Court has identified three types of forums: the traditional public forum; the designated public forum, sometimes called the ‘limited public forum’; and the nonpublic forum.” Bronx Household, 127 F.3d at 211. In a limited public forum, a school is allowed to place restrictions on the traditional freedoms of speech and association only to preserve the use for which it the facilities are designated. See Lamb’s Chapel, 508 U.S. at 390. It is well established that a school facility is prohibited from merely discriminating against a private individual or group because of the morals and views that they express, without a compelling or substantial interest of the school. The school may not target the individual or the group for exclusion in order to suppress their voice or attempt to force expression of a socially approved thought. "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." Tinker v. Des Moines Independent School District, 393 U.S. 503, 506 (1969) as cited in Healy, 408 U.S. at 180 and Perry, 460 U.S. at 44.

3. Limited Public Forums Are Prohibited From Indiscriminately Restricting Freedoms of Speech and Association.

The Court has created a delicate balance to provide the school with an ability to structure an appropriate and safe environment for its students while guarding against arbitrary and discriminatory decisions. The Supreme Court in Rosenberger, in reviewing the precedential history has carefully distinguished between the permissible restriction on content and the impermissible suppression of viewpoint:

Once it has opened a limited forum, however, the State must respect the lawful boundaries it has itself set. The State may not exclude speech where its distinction is not "reasonable in light of the purpose served by the forum," Thus, in

determining whether the State is acting to preserve the limits of the forum it has created so that the exclusion of a class of speech is legitimate, we have observed a distinction between, on the one hand, content discrimination, which may be permissible if it preserves the purposes of that limited forum, and, on the other hand, viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum's limitations... nor may it discriminate against speech on the basis of its viewpoint.

515 U.S. at 829-830 citing Lamb's Chapel, 508 U.S. at 392-393; Perry, 460 U.S. at 46, 49 citing Cornelius 473 U.S. at 804-806. Bronx Household, in applying the distinction set forth in Rosenberger and the line of cases both leading up to and following that decision, has further held that the “restrictions of speech in limited public forums will be upheld only if the restrictions are reasonable and viewpoint neutral.” 127 F.3d at 217. The determination of whether the limitation on the freedom of speech is based on a permissible content-based exclusion or an impermissible non-neutral viewpoint restriction is an important undertaking in order to guard against violations of the rights of students and community groups.

4. Summary of (A)

Bloomfield School District has created a ‘limited public forum’. This type of forum designation authorizes the School District to determine the types content-based activities that are permitted or excluded from using the designated forum in order to further the purpose for which the forum that was created. However, the decisions within the approved content-based categories of speech must be viewpoint neutral and reasonable unless they further an important or substantial government interest.

B. BLOOMFIELD SCHOOL DISTRICT’S RESOLUTION 11 IS A NON-NEUTRAL VIEWPOINT BASED EXCLUSION VIOLATING THE FIRST AMENDMENT.

1. The Boy Scouts of America’s Use of the “Limited Public Forum” Falls Within the Permissible Content-Based Categories of Speech (Social, Civic and Recreational) that the Forum was Designed to Facilitate and Should Be Provided Access to the Forum.

The Court has distinguished between content-based regulation that restricts an entire category of speech, and viewpoint-based regulation that excludes only a certain perspective within a category of speech. See Rosenberger 515 U.S. at 829-830, Perry, 460 U.S. at 46; Bronx Household, 127 F.3d at 217. Hence the school may “impose a blanket exclusion on certain types of speech, but once it allows expressive activities of a certain genre, it may not selectively deny access for other activities of that genre.” Travis v. Owego – Appalachian School District, 927 F.2d 688, 692 (2nd Cir. 1991). For instance, a school with a limited public forum that allows a Christian student social group to hold dances at the school couldn’t deny a Jewish student social group use of the facilities for a dance. In contrast in Bronx Household the court determined that since the forum was not open to the particular expression being requested, use for religious purposes, and had never been forum open for such purposes, then the school was within its power to exclude such use. See Bronx Household, 127 F.3d at 214. However the court has made a distinction between the organizations viewpoint and the content-based activity for which the organization is the forum. See, e.g. Rosenberger, 515 U.S. at 831 (“student journalistic efforts with religious editorial viewpoints”); Lamb Chapel, 508 U.S. at 393 (“religious organization presenting a movie on family issues and child rearing”). So that organizations with underlying expressed beliefs that are unpopular, or organizations engaged in additional activities that would be excluded but for which they are not requesting the forum, may not be excluded from use of

the limited public forum if the activity in which they are requesting the forum fits within the content-based category activity for which the forum is available.

Resolution 11 designates the use of the limited public forum by district residents for holding social, civic, and recreational meetings and entertainment events. The Bloomfield Chapter of the Boy Scouts is a private club where members engage in social, civic and recreational meetings and events. Jeremy Brown is a district resident that wants to use the school facilities to engage in these types of meetings and events with others students and district residents that have a similar interest and belief. Jeremy Brown and the Bloomfield Chapter of Boy Scouts fit squarely within the designated categories of content-based activities for which the school has developed the forum.

While allowing “limited public forums” to exclude large categories of expressive activities the court requires that decisions on use within allowed genre must be viewpoint neutral. Bronx Household in applying a line of cases “reiterated the distinction to be made between discrimination against speech because of subject matter, considered permissible to preserve the purposes of the limited forum, and viewpoint discrimination, considered impermissible if directed against speech within the limitation of the forum.” Bronx Household, 127 F.3d at 213. Having demonstrated that the Boy Scout activity falls within the permissible subject matter of the created limited public forum and should be granted use of the facilities.

2. Resolution 11 Suppresses Jeremy Brown and the Boy Scouts First Amendment Rights by Restricting Use of the Forum through View-Point Biased Exclusion Targeting the Expressed Beliefs of the Organization.

- a) **The “Nonexclusive” and “Full Participation” Clauses of Resolution 11, Targeting Private Clubs with Limited Membership Policies, are Used to Suppress Speech and Expressive Association within Categories of Content-Based Activities Otherwise Allowed by Bloomfield School District.**

"[T]he First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others." *Id.* at 219 citing Lamb Chapel, 508 U.S. at 394 (internal quotation marks omitted). The exclusion of groups, that have limited membership policies (excluded by the ‘nonexclusive’ clause) or hold events specifically for the participation of its members (excluded by the ‘full participation’ clause), from using the forum for activities that comport with permissible content-based activities (social, civic and recreational) is a suppression of the speech and expressed beliefs of those groups. Such suppression within content-based categories, otherwise in keeping with the purposes of the forum, must be carefully examined to determine whether it is necessary to further an important or substantial interest of the state.

- b) **Resolution 11’s Suppression of First Amendment Rights is Unrelated to Furthering any Important or Substantial Interest of the Government a Criteria Used to Determine the Constitutionality of Burdened Expression.**

In United States v Weslin, this Court looked beyond the apparent facial neutrality of the regulation in determining whether the burden on expression was constitutional. 156 F.3d 292, 297 (2nd Cir. 1998). In doing so it went through the three prong test in O’Brien,

The constitutionality of laws that burden expression while restricting proscribable conduct is determined by the criteria laid down in O’Brien. O’Brien establishes a

three-prong test: (i) the regulation must serve an important or substantial governmental interest; (ii) the interest must be unrelated to the suppression of expression; (iii) the incidental restriction of First Amendment freedoms must be narrowly tailored to that interest.

Id. citing United States v. O'Brien, 391 U.S. 367(1968) A close application of O'Brien is needed to determine whether the School District in suppressing speech and expressive association, important First Amendment Freedoms, was tailoring a response to address a substantial issue the School District facing.

i. Resolution 11 Fails the O'Brien test of Constitutionally Accepted Burdens on the First Amendment.

In determining the appropriate application and breadth of Resolution 11 in addressing the important and substantial state interest that is being protected, under the O'Brien test, the legislative history must be examined. According to the Excerpt of the Minutes of the Bloomfield School Board Meeting of July 11, 2000, Resolution 11 was created to suppress the unpopular beliefs of private clubs that maintained membership policies comporting with the groups values and to compel those groups to change these expressed belief by forcing them to abandon the expressive association policies that articulated the groups viewpoint. R-10. Resolution 11 was not developed to address a school system reeling from invidious discriminatory practices of clubs that prevented particular segments of the student body from participating in after-school events. Instead Resolution 11 was enacted to suppress a particular type of speech about a lifestyle choice belief of a group by preventing their participation in using the facilities for activities that are permissible in the forum.

There is also no indication in the Minutes that an “important and substantial government interest” was being protected. The Minutes indicate that the School District was responding to an

issue raised by one school principal in response to expressed views of the Boy Scouts, not actual discriminatory practices, that were unpopular and controversial and that the Principal lacked a regulation to prevent that types of speech from being expressed. “[T]he School District was obliged to be even-handed in administering its policies concerning access...Potential controversy is not a permissible basis on which to deny access to a designated or limited public forum where less controversial speakers on the same subject are admitted.” Travis, 927 F.2d at 693-694.

ii. Resolution 11 is Unconstitutional because it is a Broad and Over-Burdening Restriction on Speech Failing the O’Brien Test.

Additionally, according to O’Brien test a policy that suppresses speech in response to a state interest must be drawn narrowly. Here, Resolution 11 is drawn very broadly targeting all clubs that maintain membership policies or put forward activities and event for their members. The Court in Hsu v. Roslyn Union Free School acknowledged the importance of distinguishing between appropriate and inappropriate membership policies that proscribe the invited attendants at a meeting or an event. 85 F.3d 839, 870-871 (2nd Cir. 1996). The Hsu court recognized that a school must undertake the difficult balance of teaching toleration of unpopular views with the potential effects on students of limited membership practices.

[H]igh school students are subjected to discrimination and selection all the time: sports teams may be divided into girls and boys teams, some students may be allowed on the honor roll and others might not, upper-level courses may be open to juniors and seniors and others not, extracurricular activities may be closed to students who do not maintain a certain grade point average...Clearly, some types of discrimination are permissible in a high school settings, and some are not... It is a delicate task to supervise student discrimination and exclusion to ensure that it is consistent with ‘fundamental values’ and is not invidious.

Id. at 871. In Hsu the Court was determining whether the group could pick the leader of its club from a limited population based upon the beliefs of the organization. The Hsu Court limits the

holding of its case to that of club leadership. However, in our case, where the question that arises is whether the Resolution is able to narrowly target a similar state interest being put forward, the distinctions that the court is able to draw between groups is important.

Resolution 11 is so broad and over-reaching it scrutinizes the policies of all groups, clubs and organizations interested in using the forum to prevent its possible use by an organization with an unpopular viewpoint and membership policy. This prevents groups, such as those mentioned above in Hsu, from meeting or planning events for their membership. In this case the Boy Scouts membership policies are an articulation of the organization's beliefs and are not invidious discrimination merely to exclude a section of the student body; the membership policies are directly tied to the viewpoint being expressed by organizations. Casting so broad a net, as occurs in Resolution 11, the regulation does not permissibly respond to a substantial state interest but instead suppresses the First Amendment rights of all private groups, clubs and organizations.

- c) The “Nonexclusive” and “Full Participation” Clauses of Resolution 11 Suppresses the First Amendment Protected Right of Expressive Association of Private Clubs.**
 - i. Expressive Membership Policies of Private Clubs are Protected under the First Amendment Rights to Free Speech and expressive Association**

Membership policies of organizations have long been protected under the First Amendment as protected speech. See. NAACP v. Alabama, 357 U.S. 449 (1958); Bates v City of Little Rock, 361 U.S. 516, 523 (1960); NAACP v. Button, 371 U.S. 415 (1963); New York State Club Association v City of New York, 487 U.S. 1 (1988). “Among the rights protected by the First Amendment is the right of individuals to associate to further their personal beliefs. While

the freedom of association is not explicitly set out in the Amendment, it has long been held to be implicit in the freedoms of speech, assembly, and petition.” Healy, 408 U.S. at 181.

ii. Private Clubs are Protected Against Forced Association.

The Supreme Court in Jaycees recognizes that:

There can be no clearer example of an intrusion into the internal structure or affairs of an association that a regulation that forces the group to accept members it does not desire. Such a regulation may impair the ability of the original members to express only those views that brought them together. Freedom of association therefore plainly presupposes a freedom not to associate.

Roberts v. Jaycees, 468 U.S. 609, 623 (1984). To determine whether the limited membership policy of a private group may be forced to accept members that do not fit the policy, the court looks at the relationship between the membership policy and the views and beliefs of the group. “Public or judicial disapproval of a tenet of an organization’s expression does not justify the States efforts to compel the organization to accept members where such acceptance would derogate from the organization’s expressive message.” Boy Scouts of America v. Dale, 120 S.Ct. 2446, 2458(2000). In Jaycees, the Supreme Court determined that membership restrictions prohibiting women from becoming full voting members was unrelated to the group’s views and philosophies and therefore forcing association would not change the structure of the organization because. 468 U.S. at 621. A similar distinction occurred in Board of Directors of Rotary International v. Rotary Club of Duarte, which again determined that compelling non-discriminatory member policies on the Club were permissible because it would not affect the organizational activities or beliefs. 481 U.S. 537, 547-548 (1987). However, the Supreme Court in Dale determined “that the Boy Scouts is an expressive association and that forced inclusion of Dale [a member whose adult membership was being revoked for advocating a view inconsistent

with the Scouting value] would significantly affect its expression.” 120 S. Ct. at 2455. While the Dale court, unlike in this case, was responding directly to the issues surrounding the limited membership policies of the Boy Scouts; it is important to be aware of the nexus which ties private clubs to its membership policies as an expression of speech. As mentioned above, one of the goals Resolution 11 was designed to address was to force private clubs to open their membership in order to dilute the views of that group. “That way, groups that prohibit homosexual students from participating will have to change their discriminating policies or stop using school facilities.” R-10. This compelled change to membership policies of the Boy Scouts, a private club, is a direct suppression of the club’s First Amendment rights to Free Speech and Expressive Association.

Exclusion of a group from a forum based solely on its expressed membership while allowing groups without limited membership to utilize the forum for the same activity is viewpoint discriminatory in a manner similar to Lamb’s Chapel. “[T]he fact that the policy treated all religions alike was immaterial inasmuch as it discriminated between religious and secular viewpoints. Bronx Household, 127 F.3d at 219 citing Lamb’s Chapel, 508 U.S. at 393.

3. Resolution 11 is an Unreasonable Restriction of Access of the Bloomfield District’s Limited Public Forum.

Resolution 11 is an unreasonable restriction of access because in order for any group to use the forum the School District, by reviewing each membership policy, would be dispensing with the privacy that was established to protect people’s right to association and censoring those that have a policy that they find inconsistent with their message. “We hold that the immunity from state scrutiny of membership lists...[is] so related to the right of the members to pursue their lawful private interests privately and to associate freely with others in so doing as to come

within the protection of the Fourteenth Amendment....This Court has recognized the vital relationship between freedom to associate and privacy in one's associations.” NAACP v. Alabama, 357 U.S at 462,466. “The Constitution's protection is not limited to direct interference with fundamental rights. The requirement...that the NAACP disclose its membership lists was found to be an impermissible, though indirect, infringement of the members' association rights.” Healy, 408 U.S. at 183.

Resolution 11 is also an unreasonable restriction to access because the change that Bloomfield School Board made would prevent the uses of the facilities for many private social, civic and recreational clubs and from any group to be responsive to its own members. For instance if a civic club was meeting to plan and review events, an open membership policy would create a fluctuating and inconsistent planning board by changing the participants with each meeting, the structure of the group, and the message of the group. Furthermore, community competitive recreational club could not pick team members based on skill nor would it have an actual set team since any student could join at any time. Clubs and organizations need control over their policies so that the policies are reflective of their viewpoints and values. Resolution 11 excludes many of the types of activities and events for District Residents that the forum was created to facilitate.

4. Summary of (B).

Bloomfield school district’s Resolution 11 violates the First Amendment protections of speech and expressive association by creating an unreasonable non-neutral viewpoint-based exclusion of an approved category of speech that does address an important or substantial interest of the state. Resolution 11 was created to suppress the views of Jeremy Brown, the Boy Scouts and other private clubs. Resolution 11 is broadly drawn violating the right of individuals

to privately associate without State scrutiny. Further, Resolution 11 is an attempt to impermissibly coerce a private club to dilute its views through forcing the inclusion of members holding views inconsistent with those expressed by the group.

C. CONCLUSION

For the foregoing reasons, the decision of the United States District Court of the Northern District of New York denying plaintiff's motion declaring that Bloomfield School Board Resolution 11 violates the United States Constitution should be reversed and this Court should declare Bloomfield School Board Resolution 11 unconstitutional and permanently enjoin its enforcement.

II. THIS COURT SHOULD REVERSE THE LOWER COURT BECAUSE PRAYER CONDUCTED DURING SCHOOL SPONSORED FOOTBALL GAMES CREATES AN ENTANGLEMENT BETWEEN RELIGION AND THE STATE MADE IMPERMISSIBLE BY ARTICLE I OF THE CONSTITUTION.

The Establishment Clause contained within the Constitution’s First Amendment proscribes the government from enacting laws “respecting an establishment of religion”. Through the U.S. Constitution’s Fourteenth Amendment, this proscription has long been applied to the states and their agencies. See e.g., Everson v. Board of Education, 330 U.S. 1 (1947); School Dist. v. Schempp, 374 U.S. 203 (1963). In determining whether an Establishment Clause violation has arisen, the Supreme Court has employed different tests depending on the context of the proposed violation. Most recently, the Supreme Court determined the propriety of prayer before school football games by considering whether a school “coerce[d] anyone to support or participate in religion or its exercise, or otherwise act[ed] in a way which 'establishes a [state] religion or religious faith, or tends to do so.’” Santa Fe v. Doe, 530 U.S. 290, 120 S.Ct. 2266, 2275 (2000) (quoting Lee v. Weisman, 505 U.S. 577, 587 (1992)). Given the contemporaneousness of Santa Fe and the similarity to the football game setting created by Bloomfield School District (hereinafter “Bloomfield”), the same considerations apply in the case at issue. Since the immediate issue concerns matters of federal constitutional law, this court should review the district court's judgment de novo.

A. COORDINATED PRAYER AT A SCHOOL SPONSORED EXTRA CURRICULAR ACTIVITY CREATES THE IMPERMISSIBLE IMPRESSION OF SCHOOL ENDORSEMENT OF RELIGION.

In determining whether a school impermissibly endorsed religion, the Supreme Court in Santa Fe considered the combination of actual endorsement and endorsement perceived by an

objective observer attending a school sponsored event. See 120 S.Ct. at 2277. In particular, the Supreme Court noted that “[t]he actual or perceived endorsement of the [impermissible religious] message, moreover, is established by factors beyond just the text of the policy.” Id. at 2278. Several factors inherent to its football games establish Bloomfield’s impermissible endorsement of the prayer carried out therein.

1. School control of the football game creates the impression of school endorsement of pre-game prayer.

In Santa Fe, the Supreme Court considered situational factors as being relevant in determining that the delivery of pre-game prayer bore the impermissible imprint of school endorsement. In particular, the Court found the traditional presence of school sponsored cheerleaders and a band, the school’s name on the field and surrounding banners, and the display of school colors throughout the stadium as leading the objective observer to view “the inevitable pregame prayer as stamped with her school's seal of approval.” See id. While prayer in the instant case is not conveyed via a school controlled means of communication, a loudspeaker system, as it was in Santa Fe, the prayer, and its message, are similarly “delivered to a large audience assembled as part of a regularly scheduled, school-sponsored function conducted on school property.” Id. at 2277. The use of a school maintained loudspeaker system was but one factor contributing to the overall contextual setting which the Santa Fe Supreme Court found to give rise to the impermissible impression of school endorsement.

2. Delaying the start of the football game creates the impression that school policy endorses religion.

The US Supreme Court has ruled that a moment of silence legislated by a state with the intent of facilitating prayer in schools is “not consistent with the established principle that the

government must pursue a course of complete neutrality toward religion.” Wallace v. Jaffree, 472 U.S. 38, 60 (1985). By delaying the start of its football games to allow the completion of pre-game prayer (R-18), Bloomfield goes beyond the mere perception of endorsing prayer and actually promotes religion by facilitating its occurrence within the confines of a school sponsored event. To the objective observer, the delay for prayer must appear to be part of the school sponsored football game itself.

3. By allowing pre-game prayer, Bloomfield continues its prior official policy promoting religion.

After the Supreme Court’s decision in Santa Fe v. Doe, Bloomfield terminated its official policy of student led prayer. Nevertheless, Bloomfield allows, and even facilitates, the “tradition” of pre-game prayer to continue during the current 2000-2001 school year. In Santa Fe, the Supreme Court noted that the effects of a school’s change in policy regarding a “long-established tradition of sanctioning student-led prayer at varsity football games . . . must include an examination of the circumstances surrounding its enactment.” Santa Fe v. Doe, 120 S.Ct. at 2282. While the school in Santa Fe had changed its official policy, the Supreme Court viewed that school’s failure to take affirmative steps to give practical effect to the policy change as illustrative of the school’s view that the prior official policy would continue to apply. See id. at 2279. The Supreme Court further noted that “the Establishment Clause forbids a State to hide behind the application of formally neutral criteria and remain studiously oblivious to the effects of its actions.” Id. at 2278 n.21 (quoting Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753 (1995), 777 (O’Connor, J., concurring in part and concurring in judgment)).

It is the “duty of the courts to ‘distinguish a sham secular purpose from a sincere one.’” Santa Fe, 120 S.Ct. at 2282 (quoting Wallace, 472 U.S. at 75 (O’Connor, J., concurring in

judgment)). Bloomfield’s failure to take affirmative steps to implement its “official” change in policy and stop the prior tradition of school sponsored prayer renders its policy change a sham. Given Bloomfield’s failure to effectuate its policy change, and “in light of the school's history of regular delivery of a student-led prayer at athletic events, it is reasonable to infer that the specific purpose of the policy was to preserve a popular ‘state-sponsored religious practice.’” Santa Fe, 120 S.Ct. at 2279.

4. Participation of school officials in pre-game prayer creates the impression of school endorsement.

The participation of school teachers and other employees in pre-game prayer creates the impression of school sponsorship of such prayer. This effect is compounded where school representatives are not merely passive attendees but are actually charged with supervising the football games. R-16; R-18. This Court, quoting the Ninth Circuit, has indicated:

While at the high school, whether he is in the classroom or outside of it during contract time, [a public school teacher] is not just any ordinary citizen. He is a teacher. . . . He is clothed with the mantle of one who imparts knowledge and wisdom. His expressions of opinion are all the more believable because he is a teacher. The likelihood of high school students equating his views with those of the school is substantial.

Marchi v. Board of Coop. Educ. Servs., 173 F.3d 469, 477 (2nd Cir. 1999) (quoting Pelozza v. Capistrano Unified School District, 37 F.3d 517, 522 (9th Cir. 1994)).

In considering the participation of teachers and other school employees in prayers conducted during school sponsored basketball games, the Fifth Circuit Court of Appeals found that “coaches and other school employees are present as representatives of the school and their actions are representative of [school] policies.” Doe v. Duncanville Indep. Sch. Dist., 70 F.3d 402, 406 (5th Cir. 1995). This Court, quoting the US Supreme Court in Lemon v. Kurtzman, 403

U.S. 602 (1971), recognized that “schools have a constitutional duty to make ‘certain . . . that subsidized teachers do not inculcate religion.’” Marchi, 173 F.3d at 475.

5. Recitation of prayer in unison creates the impression of school coordination.

The coordinated manner in which the prayer occurs further creates the impression of School sponsorship. Rather than occurring sporadically or silently, individuals attending Bloomfield football games recite the Lord’s Prayer aloud and in unison. An objective observer is left to conclude one of two things:

- a tremendous coincidence has occurred in that fans just happened to start praying at the same time, elected to pray aloud, selected the exact same prayer to recite, and were fortuitously in the same location when the urge to pray came upon them; or
- the group prayer was in fact coordinated to occur in such a fashion.

Bloomfield contends that the pre-game prayer at issue is “spontaneous”. However, the lack of spontaneity and a sense of coordination seems unavoidable in light of the fact that the prayer at issue habitually recurs at the same time during events regularly scheduled by Bloomfield. The only question left to the objective observer is who is doing the coordinating. Given Bloomfield’s plenary control over football games and the related facilities combined with its tradition of school prayer, an objective observer could not but conclude that the school is also responsible for the presence of individuals praying aloud in unison.

6. Summary of (A).

While the Supreme Court has noted that the Constitution does not prohibit students from praying at “any time before, during, or after the school day”, “religious liberty protected by the Constitution is abridged when the State affirmatively sponsors the particular religious practice of

prayer.” Santa Fe, 120 S.Ct. at 2281. Bloomfield create an impermissible impression of state endorsement of religion by allowing coordinated prayer to occur in the context of a school sponsored football game. Bloomfield actually endorse religion by delaying the start of football games and allowing its representatives in their official capacities to participate directly in what is in reality a continuation of the prior official policy.

B. ALLOWING PRAYER AT SCHOOL SPONSORED, EXTRA-CURRICULAR EVENTS IMPERMISSIBLY COERCES ATTENDEES TO PARTICIPATE IN RELIGION.

1. Prayer at a school supervised and school controlled event impermissibly pressures dissenters to choose between participating and protesting.

In Lee, the Supreme Court found that a school’s supervision and control of a high school graduation creates public and peer pressure on attending students to participate in the religious exercise or maintain a respectful silence. The Supreme Court recognized that simply being forced to choose between such participation and protecting one’s beliefs through protest represents a real injury and concluded that schools may not, consistent with the Establishment Clause, place primary and secondary school children in the position of having to make such a choice. See 505 U.S. at 593. In reaching its decision, the Supreme Court focused on the individual dissenter’s impression of coercion when it said:

It is of little comfort to a dissenter, then, to be told that for her the act of standing or remaining in silence signifies mere respect, rather than participation. 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.

Id.

Bloomfield’s control and supervision of its football games give rise to the same pressures which the Supreme Court found intolerable in Lee. Dissenters at Bloomfield’s football games

have little choice but to participate or remain respectfully silent during a religious recitation antithetical to their personal beliefs, even where such action may give the impression of approving the majority's religious message. Furthermore, while the intolerable coercion in Lee arose at merely an annual graduation exercise, Bloomfield's policy of allowing prayer at football games results in religious coercion on a recurring regularly scheduled basis. The Supreme Court reiterated its position with respect to this type of coercion when it noted more recently that "[t]he constitutional command will not permit the District to exact religious conformity from a student as the price of joining her classmates at a varsity football game." Santa Fe, 120 S.Ct. at 2280-2281.

2. Bloomfield's policies facilitate the impermissible projection of majoritarian views on dissenters.

In Santa Fe, the Supreme Court noted that the employment of an election process by a school to identify a student speaker who would deliver a pre-game religious invocation ensured that the views of minority candidates would be effectively silenced. See id. at 2276. Regarding the constitutionality of the process employed, the Supreme Court noted:

It further empowers the student body majority with the authority to subject students of minority views to constitutionally improper messages. The award of that power alone, regardless of the students' ultimate use of it, is not acceptable. . . Such a system encourages divisiveness along religious lines and threatens the imposition of coercion upon those students not desiring to participate in a religious exercise. Simply by establishing this school-related procedure, which entrusts the inherently nongovernmental subject of religion to a majoritarian vote, a constitutional violation has occurred.

Id. at 2283. By rescinding its prior official policy and yet facilitating (and participating in) the continuation of its traditional pre-game prayer, Bloomfield impermissibly allow the unbridled projection of majoritarian religious views onto others. Where the Supreme Court found an organized, controlled process promoting majoritarian religious views at a school football game to

be unconstitutional in Santa Fe, they would surely find school facilitated silencing of such views through the uncontrolled brute force of majoritarian fan vociferation to be similarly unconstitutional.

Bloomfield may claim that they have no policy promoting majoritarian religious views. Yet, in actuality, they have several. They officially promote and coordinate football games during which a majority of attendees recite prayer aloud and in unison. Bloomfield conduct their football games in a manner which facilitates the completion of these pre-game prayers. Bloomfield allows its representatives in their supervisory capacities to actively participate when the prayers occur. As mentioned previously, "the Establishment Clause forbids a State to hide behind the application of formally neutral criteria and remain studiously oblivious to the effects of its actions." Id. at 2278. In this situation, Bloomfield's actions unconstitutionally facilitate the projection of the majority's views regarding an inherently non-governmental subject, religion, onto others who do not share those views.

3. The ability of dissenters to avoid religious coercion at school sponsored events is inapposite.

The Supreme Court's Establishment Clause jurisprudence has repeatedly focused on the state action at issue rather than the choices available to individual dissenters. See e.g., Santa Fe, 120 S.Ct. 2266; Lee, 505 U.S. 577. As such, the ability of an individual dissenter to simply avoid the effects of impermissible school coercion do not excuse an Establishment Clause violation.

a) The voluntary nature of football games does not mitigate an Establishment Clause violation.

In Santa Fe, the Supreme Court noted that, even where attendance is purely voluntary, "we are nevertheless persuaded that the delivery of a pre-game prayer has the improper effect of

coercing those present to participate in an act of religious worship.” 120 S.Ct. at 2280 As such, Bloomfield cannot preserve its current policy of allowing prayer at football games on the basis that dissenters can simply choose not to attend such games.

b) The ability of individuals to avoid impermissible coercion does not mitigate an Establishment Clause violation.

Requiring dissenters to wait apart until the prayer completes is no solution to the impermissible coercion resulting from Bloomfield’s allowing prayer at football games because such action shifts responsibility for Establishment Clause compliance from the state to the individual. In School Dist. v. Schempp, the Supreme Court considered whether the ability of students to absent themselves from a school class room during the reading of Bible scriptures mitigated an Establishment Clause violation. The Supreme Court ruled that the ability of dissenters to avoid the situation “furnishes no defense to a claim of unconstitutionality under the Establishment Clause”. 374 U.S. at 225.

Furthermore, separating dissenters so as to avoid impermissible coercion simply exacerbates the peer and public pressure which the Supreme Court found in Lee to be the source of injury to dissenters. For example, in ruling against prayer during school sponsored basketball games, the Fifth Circuit Court of Appeals noted that the twelve year old who abstained from her school basketball teams’ group prayers in Doe v. Duncanville Indep. Sch. Dist. was subjected to taunts from both fans and teachers questioning her Christianity. Duncanville, 70 F.3d at 404.

4 Summary of (B)

Bloomfield’s policy of allowing prayer at events which it controls and supervises impermissibly creates public and peer pressure on dissenters present. These individuals are forced to either conform their individual beliefs to those of the group or to distinguish

themselves from that group. Supreme Court jurisprudence holds this burden to be constitutionally impermissible even where individual dissenters could otherwise burden themselves to avoid the impermissible coercion arising as a result of the Establishment Clause violation.

C. PRAYER AT BLOOMFIELD’S FOOTBALL GAMES IS NOT PROTECTED BY THE FIRST AMENDMENT OF THE CONSTITUTION.

1. Free Speech protections do not mitigate an Establishment Clause violation.

Supreme Court jurisprudence clearly indicates that Establishment Clause violations supersede considerations regarding First Amendment religion protections. In Santa Fe, the Supreme Court noted that “the religious liberty protected by the Constitution is abridged when the State affirmatively sponsors the particular religious practice of prayer.” 120 S.Ct. at 2281. This view is consistent with and follows the view the Supreme Court previously laid out in Lee when it stated:

The principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause. It is beyond dispute that, at a minimum, the Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which "establishes a [state] religion or religious faith, or tends to do so."

505 U.S. at 587 (quoting Lynch v. Donnelly, 465 U.S. 668, 678 (1984)). As such, the creation of an Establishment Clause violation by Bloomfield’s conduct must be remedied irrespective of the First Amendment freedom of religion claims made by fans not otherwise parties to this suit.

2. No burden exists to warrant Bloomfield's accommodation of pre-game prayer.

Despite the recognition that the Establishment Clause sets a minimum standard regarding the state's involvement with religion, the Supreme Court has not identified a definitive rule regarding the extent to which the state may accommodate religion and still meet this standard. Nevertheless, "[w]hatever else may define the scope of accommodation permissible under the Establishment Clause, one requirement is clear: accommodation must lift a discernible burden on the free exercise of religion." Lee, 505 U.S. at 629. This Court of Appeals addressed the issue when it considered whether the First Amendment required that a school reschedule a high school graduation ceremony to accommodate a student's customary religious practice of observing the Sabbath on Saturdays. Smith v. Board of Education, 844 F.2d 90 (2nd Cir. 1988). The Court noted that the established religious practice simply made the student's religion more difficult to practice in general and "that it is not the type of burden on core religious freedom rising to the level of a violation of the free exercise clause." Id. at 94.

In the current case, the religious practice at issue consists of a pre-game prayer made traditional by Bloomfields' prior official policy and continuing practice. However, no one contends that any religion compels an invocation in the waning moments before "kick-off" of a school sponsored sporting event. In fact, the only burden that can be said to exist in Bloomfield not allowing pre-game prayer would be the changing of a tradition created by Bloomfield itself. Recognizing the importance to our society of sports and the customs which attend thereto, it can surely not be said that these traditions, even where they involve prayer, have become so indoctrinated that they have achieved the

jurisprudential status of religion warranting First Amendment protection. One cannot forget that fans and Bloomfield's representatives are free to pray for victory beyond the confines of its football game.

Certainly, "[i]t must not be forgotten then, that while concern must be given to define the protection granted to an objector or a dissenting nonbeliever, these same [First Amendment] Clauses exist to protect religion from government interference." Lee, 505 U.S. at 589. However, this case does not involve a school interfering with religion. Rather, this case involves the bringing of religion to school. As such, no burden, which the First Amendment would otherwise prohibit, arises from proscribing pre-game prayer.

3. Summary of (C)

Supreme Court jurisprudence places the responsibility for Establishment Clause compliance on the State, not on the individual. As such, Bloomfield must remedy the Establishment Clause violation arising from prayer at their football games, irrespective of First Amendment religious protection claims which may exist. Furthermore, a school created tradition involving pre-game prayer is not the type of "core religious freedom" to which the First Amendment's protections on religious accommodation apply.

D. CONCLUSION

For the foregoing reasons, the decision of the United States District Court of the Northern District of New York denying plaintiff's motion to declare that Bloomfield School Board's practice of allowing the recitation of the Lord's Prayer at Bloomfield High School football games violates the United States Constitution should be reversed and the case remanded for the District Court to determine an appropriate remedy.

Naomi Abraham
Attorney for Appellant

Michel Debolt
Attorney for Appellant