

No. 11-50486

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CHRISTA SCHULTZ, et. al.,
Plaintiffs-Appellees

v.

MEDINA VALLEY INDEPENDENT SCHOOL DISTRICT
Defendant-Appellant

On appeal from the United States District Court,
Western District of Texas, San Antonio Division

**MEDINA VALLEY INDEPENDENT SCHOOL DISTRICT'S
OPPOSED EMERGENCY MOTION TO DISSOLVE TEMPORARY
RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

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**Medina Valley Independent School District’s Emergency Motion
To Dissolve Temporary Restraining Order and Preliminary Injunction**

TO THE HONORABLE JUDGES OF THE FIFTH CIRCUIT COURT OF APPEALS:

NOW COMES Medina Valley Independent School District (“the District”) and files its Emergency Motion to Dissolve Temporary Restraining Order and Preliminary Injunction.

**I.
Nature of the Emergency**

Pursuant to 5TH CIR. R. 8.4 and 27.3, Medina Valley Independent School District (hereinafter the “District”) seeks emergency relief from the District Court’s order granting Plaintiff’s Motion for Temporary Restraining Order and Preliminary Injunction entered on June 1, 2011, and the Amended Order granting Plaintiffs’ Motion for Temporary Restraining Order and Preliminary Injunction entered on June 1, 2011. (Attached as Exhibits 1 and 2). Emergency review and relief is necessitated due to the impending nature of the event at issue. Specifically, the event at issue is the District’s graduation ceremony scheduled for **this Saturday, June 4, 2011.** The District requests an emergency ruling on its Motion to Dissolve Temporary Restraining Order and Preliminary Injunction by **June 3, 2011.**

In this case, the District Court ordered that the District is “prohibited from allowing prayer” at its June 4, 2011 graduation ceremony, that the District shall instruct students “not to present a prayer,” and that student speakers could not “use the word prayer,”¹ and could not ask the audience to stand, “join in prayer,” bow their heads when speaking at the ceremony, “or end the remarks with ‘amen’ or in [a deity’s name] we pray.” Further, the District Court ordered that the District “make any necessary changes to the students’ revised remarks,” and “instruct the students that they must not deviate from the approved remarks in making their presentations.” Such restrictions are unnecessarily broad in scope and unnecessarily and improperly entangle the District in its students’ free exercise of their religion. Due to the impending date of the graduation ceremony, irreparable harm will occur if this matter is not addressed prior to June 4, 2011. The District Court’s TRO and Preliminary Injunction is inconsistent with federal and state law and forces the District to unconstitutionally restrict students’ federal constitutional rights of free exercise of religion as well as their free speech, exposing it to further potential litigation. Additionally, the District’s forced compliance with the TRO and Preliminary Injunction, if allowed to stand, will require the District to violate

¹ The District Court amended its original order of June 1, 2011, adding that students shall not “use the word ‘prayer’ unless it is used in the student’s expression of the student’s personal belief, as opposed to encouraging others who may not believe in the concept of prayer to join in and believe the same concept.”

the Texas Religious Viewpoints Antidiscrimination Act. *See* TEX. EDUC. CODE §§ 25.151-156. The District respectfully requests that this Court grant emergency relief, ***no later than June 3, 2011*** (the day before the graduation ceremony at issue), dissolving the District Court’s Order on Plaintiff’s Motion for Temporary Restraining Order and Preliminary Injunction and the District Court’s Amended Order on Plaintiffs’ Motion for TRO and Preliminary Injunction.

**II.
Statement of Jurisdiction**

This Court has jurisdiction over this matter under 28 U.S.C. § 1292 (a)(1), permitting interlocutory appeals of preliminary injunctions. Additionally, an appellate court may review the grant of a temporary restraining order (hereinafter “TRO”) when the TRO might have an irreparable consequence and can only effectively be challenged on appeal. *Carson v. American Brands, Inc.*, 450 U.S. 79, 84 (1981); *see Romer v. Green Point Sav. Bank*, 27 F.3d 12, 15-16 (2d Cir. 1994). Alternatively, this Court has jurisdiction under the collateral order doctrine. *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 545, 69 S.Ct. 1221 (1949).²

**III.
Standard of Review**

² As shown herein, the District Court’s order falls within the collateral order doctrine as it affects rights that will be irretrievably lost and effectively unreviewable in absence of an immediate appeal. *See Richardson-Merrell Inc. v. Koller*, 472 U.S. 424, 431, 105 S.Ct. 2757, 2761 (1985).

An appellate court reviews an order granting a preliminary injunction for an abuse of discretion. *Ashcroft v. ACLU*, 542 U.S. 656, 664 (2004); *Janvey v. Alguire*, 628 F.3d 164, 171 (5th Cir. 2010); *Karahas Boda Co. v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara*, 335 F.3d 357, 363 (5th Cir. 2003). However, even though “the ultimate decision whether to grant or deny a preliminary injunction is reviewed only for abuse of discretion, a decision grounded in erroneous legal principles is reviewed *de novo*.” *Karahas*, 335 F.3d at 363; *see Janvey*, 628 F.3d at 171. A district court abuses its discretion if it applies the law incorrectly. *Janvey*, 628 F.3d at 171 (stating that “conclusions of law...will be reversed if incorrect.”).

IV. Argument and Authorities

On or about May 27, 2011, Plaintiffs filed a complaint and motion seeking a TRO and preliminary injunction against the District. (Plaintiffs’ Motion for a Temporary Restraining Order and a Preliminary Injunction and its attachments are attached to this Motion as Exhibit 3, with its Supplemental Exhibits).³ Specifically, they requested that the district court prohibit the District from “sponsoring” any prayer at the June 4, 2011 graduation ceremony, including prohibiting student

³ Plaintiffs’ Supplemental Exhibits (Exhibits 3 through 17) in Support of Plaintiffs’ Motion for a Temporary Restraining Order and a Preliminary Injunction are attached as Exhibit 4.

speakers at the graduation ceremony from including any prayer in their speeches.⁴ A hearing in which all parties were present and represented by counsel occurred on May 31, 2011. The District Court entered its written order on June 1, 2011, prohibiting prayer at the June 4, 2011 graduation ceremony as well as prohibiting the District from allowing any student speakers' use of the words "amen" or "prayer." Additionally, the District Court prohibited the District from allowing any student speakers to ask the audience at the graduation ceremony to "stand," "join in prayer," or "bow their heads." The District Court further required that the District "make any necessary changes to...the students' revised remarks to ensure that those remarks comply with this Order." The District Court made the injunction order effective immediately and ordered it to be enforced by "incarceration or other sanctions."

In order to obtain a preliminary injunction, the plaintiff must show: (1) a substantial likelihood that he will prevail on the merits, (2) a substantial threat that plaintiff will suffer irreparable injury if the injunction is not granted, (3) that the threatened injury to plaintiff outweighs the threatened harm the injunction may do

⁴ In their Motion for Temporary Restraining Order and a Preliminary Injunction, Plaintiffs take issue with the District's graduation Order of Ceremonies program guide that states "Invocation" and "Benediction" as part of the ceremony. However, prior to the injunction hearing, in an effort to resolve this matter out of court, the District agreed to and has indeed removed the words "Invocation" and "Benediction" from its program guide, opting instead to use "Opening Remarks" and "Closing Remarks."

to defendant, and (4) that granting the preliminary injunction will not disserve the public interest. *Canal Auth. v. Callaway*, 489 F.2d 567, 572 (5th Cir.1974) A preliminary injunction is an extraordinary remedy that should only be granted if the party seeking the injunction has clearly carried the burden of persuasion on all four requirements. *Karahas*, 335 F.3d at 363. As a result, the decision to grant a preliminary injunction is to be treated as the exception rather than the rule. *Cherokee Pump & Equipment, Inc. v. Aurora Pump*, 38 F.3d 245, 249 (5th Cir. 1994).

Here, there is not a substantial likelihood that Plaintiffs would prevail on the merits, Plaintiffs' alleged threat of harm is outweighed by the harm brought to the District, and the injunction disserves the public's interest. In particular, established legal precedent protects student-initiated, student-given nonsectarian, nonproselytizing speech at graduation ceremonies. The limited public forum of a graduation ceremony, the neutral criteria for selection of graduation speakers, and the District's written disclaimer on the graduation program clarifying that the student speakers' message is a private expression of the student, and not endorsed or sponsored by the District, all establish that the District did not violate the Establishment Clause. Moreover, the District Court's sweeping, broad prohibitions of any form of student religious expression during the graduation speeches violates students' rights to free speech and free exercise of religion under

the United States Constitution as well as the Texas Religious Viewpoints Antidiscrimination Act.

A.

The District Court Did Not Follow Established Legal Precedent Regarding Students' Constitutional Rights

A crucial difference exists between government speech endorsing religion, which the Establishment Clause of the United States Constitution forbids, and private speech endorsing religion, which the Free Exercise and Free Speech Clauses of the U.S. Constitution protect. *See Board of Educ. Of Westside Community Schools (Dist. 66) v. Mergens*, 110 S. Ct. 2356 (1990). The Establishment Clause of the United States Constitution by no means imposes a prohibition on all religious expression in the public schools. *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 313 (2000), citing *Engel v. Vitale*, 370 U.S. 421, 430 (1962). Nothing in the Constitution, as interpreted by the Supreme Court, prohibits any public school student from voluntarily praying at any time before, during, or after the school day. *Id.* The two Religion clauses are intended to work together as “[t]he common purpose of the Religion Clauses ‘is to secure religious liberty.’” *Id.*, citing *Engel v. Vitale*, 370 U.S. 421, 430 (1962).

An Establishment Clause analysis calls for the difficult task of separating a student’s private message, which may be religious in character, from a state-sponsored religious message, protecting the former and prohibiting the latter. This

determination is of necessity, one of line-drawing, sometimes quite fine, based on the particular facts of each case. *Rosenberger v. Rector and Visitors of the Univ. of Va.*, 115 S. Ct. 2510 (1995).

Nonsectarian, nonproselytizing prayer initiated and led by students at graduation ceremonies is not unconstitutional per se. This Court has repeatedly upheld policies allowing a student to initiate nonproselytizing and nonsectarian prayer at graduation ceremonies against Establishment Clause challenges. In *Jones v. Clear Creek Indep. Sch. Dist.*, 977 F.2d 963 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 2950 (1993) (hereinafter “*Clear Creek II*”), this Court explicitly held that the school district’s policy “allowing a student-selected, student-given, nonsectarian, nonproselytizing invocation and benediction at a high school graduation ceremony....did not violate the dictates of the Establishment Clause. *Clear Creek II*, 977 F.3d at 968-72; *see also Doe v. Santa Fe Indep. Sch. Dist.*, 168 F.3d 806, 815 (5th Cir. 1999) *aff’d*, 530 U.S. 290, 120 S. Ct. 2266, 147 L. Ed. 2d 295 (2000), citing *Clear Creek II*. The constitutionality of allowing a student “to choose to pray at high school graduation to solemnize that once-in-a-lifetime event” was again upheld in *Ingebretsen on Behalf of Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274, 280 (5th Cir. 1996); *see also Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402, 406 (5th Cir. 1995). Likewise, in *Doe v. Tangipahoa Parish School Board*, this Court reflected on the facts and holding of *Clear Creek II*, stating

“[t]he student-driven nature of the prayers...and the lack of involvement with religious institutions allowed them to pass constitutional muster. *Doe*, 473 F.3d 188, 199 (5th Cir. 2006) *on reh'g en banc*, 494 F.3d 494 (5th Cir. 2007), citing *Jones v. Clear Creek Indep. Sch. Dist.*, 977 F.2d at 968-72.

Contrary to the Plaintiffs' allegations, *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) does not stand for the proposition that prayer initiated and led by students at *graduation* ceremonies violates the Establishment Clause. Indeed, the Supreme Court in *Santa Fe Indep. Sch. Dist. v. Doe* ruled on the issue of whether a school district's “policy permitting student-led, student-initiated prayer at **football games** violate[d] the Establishment Clause.” *Santa Fe Indep. Sch. Dist. v. Doe*, 528 U.S. 1002, (1999) (emphasis added). After the ruling in *Santa Fe*, the Eleventh Circuit Court of Appeals, en banc, upheld a school's policy that permitted seniors to elect to have unrestricted student-led messages at the beginning and end of graduation ceremonies. *Adler v. Duval County Sch. Bd.*, 250 F.3d 1330 (11th Cir. 2001), *cert denied*, 122 S. Ct. 664 (2001). In the court's opinion, the student messages made possible by this policy need not be constrained because the messages would constitute purely private speech. *Id.* In another case post-*Santa Fe*, the Eleventh Circuit held that a school district's allowing nonsectarian, nonproselytizing student-initiated prayer, invocations, and benedictions during such events as graduation ceremonies did not violate the Establishment Clause.

Chandler v. Siegelman, 230 F.3d 1313 (11th Cir. 2000), *cert. denied*, 121 S. Ct. 2521 (2001). The Eleventh Circuit court found that “*Santa Fe* condemns school *sponsorship* of student prayer, while *Chandler* condemns school *ensorship* of student prayer.” *Id.* at 1315. *Santa Fe* did not obliterate the distinction between State speech and private speech in the school context. *Id.* at 1316.

As in *Chandler*, the court order at issue is so overbroad that it equates all student religious speech addressed to a deity or in any way related to a prayer at a school function with State speech. *Id.* By requiring pre-screening and the elimination of references to prayer, the District Court has “eliminated any possibility of *private* student religious speech under any circumstances other than silently or behind closed doors.” *Id.* As noted by the Eleventh Circuit:

This the Constitution neither requires nor permits. The Establishment Clause does not require the elimination of private speech endorsing religion in public places. The Free Exercise Clause does not permit the State to confine religious speech to whispers or banish it to broom closets. If it did, the exercise of one’s religion would not be free at all.

Id.

The District has adopted and has followed a neutral policy concerning the selection of student speakers for its graduation ceremony, unlike the unconstitutional selection of speech and speakers by majority vote indicated in *Sante Fe*. As set out in Exhibit 4, attachments 10 and 11, the District Policy FNA

(Local) sets out the criteria for selection of student speakers. The following students were eligible to give opening and closing remarks at graduation: the top three academically ranked graduates, the class president, and student council officers. Of those, any could volunteer to provide the remarks and their names would be randomly drawn for selection. The policy further provided a limited public forum for opening and closing the ceremony. The policy also stated:

The topic of the opening and closing remarks shall be related to the purpose of the graduation ceremony and to the purpose of marking the opening and closing of the event; honoring the occasion, the participants, and those in attendance; bringing the audience to order; and focusing the audience on the purpose of the event. *See* Exhibit 3.

Additionally, on the graduation program guide itself, the District placed a disclaimer, which states: “The students who shall be speaking at the graduation ceremony were selected based on neutral criteria to deliver messages of the students’ own choices. The content of each student speaker’s message is the private expression of the individual student and does not reflect the endorsement, sponsorship, position, or expression of the District.” *See* Exhibit 5.

The District’s students, or a “majority vote,” do not and did not vote on who their graduation speakers would be nor on whether or not there would be prayer at the graduation ceremony. Instead, the District followed its local policy allowing student speakers to be chosen based on neutral criteria and refrained from

discriminating against the student speakers based on any religious viewpoint expressed by the student.

B.
***The District Court's Order Violates
the Texas Religious Antidiscrimination Act***

In 2007, the Texas legislature passed the Religious Viewpoints Antidiscrimination Act, which requires in part that school districts adopt a policy that establishes a limited public forum for student speakers at all school events at which a student is to “publicly speak,” specifically including graduation.⁵ See TEX. EDUC. CODE §§ 25.151-156. Student speakers using the limited public forum cannot be discriminated against based on expression of a religious viewpoint. See TEX. EDUC. CODE § 25.152(a)(1). Additionally, school districts must have neutral criteria for the selection of these student speakers. TEX. EDUC. CODE §

⁵ Even the District’s federal funding under the No Child Left Behind Act is predicated upon the District’s certifying in writing that it has no policy which prevents, or otherwise denies participation in constitutionally protected prayer in public schools as set forth in the Guidance issued by the U.S. Department of Education. See 20 U.S.C.A. § 7904 (b). According to the U.S. Department of Education Guidance, “[w]here students or other private graduation speakers are selected on the basis of genuinely neutral, evenhanded criteria and retain primary control over the content of their expression..., that expression is not attributable to the school and therefore may not be restricted because of its religious (or anti-religious) content. To avoid any mistaken perception that a school endorses student or other private speech that is not in fact attributable to the school, school officials may make appropriate, neutral disclaimers to clarify that such speech (whether religious or nonreligious) is the speaker’s and not the school’s.” U.S. Dept. of Educ., “Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools,” Feb. 7, 2003.

25.152(a)(2). While school districts must ensure that the speech is not offensively lewd, obscene, vulgar, or indecent, there are few other restrictions that can be placed on the speech. *See* TEX. EDUC. CODE § 25.152(a)(3). Graduation ceremonies must include a disclaimer (in writing, orally, or both) that clarifies that the student's speech does not reflect the endorsement, sponsorship, position, or expression by the school district. TEX. EDUC. CODE § 25.152(a)(4). The disclaimer must be provided for as long as a need exists to dispel confusion over the district's nonsponsorship of the student's speech. *Id.*

Here, the District fully complied with state law concerning graduation speeches, having implemented neutral criteria for the selection of speakers and providing the statutory disclaimer. Compliance with the district court's order, however, will result in the District being in violation of this state law, in essence, discriminating against students based on the religious content of their speeches. By requiring censorship of student speeches and by making broad and sweeping prohibitions of student religious expression in graduation speeches, the District Court unnecessarily and improperly entangles the District in its students' free speech and free exercise of religion rights.

C.

***The District Court Violated Fed. R. Civ. P. 52(a)(2)
and Fed. R. Civ. P. 65 by Failing to Make Specific
Findings of Fact and Conclusions of Law***

In entering a preliminary injunction, a court must state the reasons for the issuance of the injunction by defining the injury and describing why it is irreparable. FED. R. CIV. P. 65(d)(1); *Central Gulf S.S. Corp. v. International Paper Co.*, 477 F.2d 907, 907-08 (5th Cir. 1973). Additionally, the court must make findings of fact and conclusions of law. *See* FED. R. CIV. P. 52(a)(2). In this case, the district court did not make specific findings of fact and conclusions of law. Instead, the court made the following conclusory statements:

The Court finds:

1. Plaintiffs are likely to succeed on the merits of their claim that the inclusion of prayers at Medina Valley High School graduation ceremonies violates the Establishment Clause of the First Amendment to the U.S. Constitution.
2. Plaintiffs will suffer irreparable harm if the prayers are not enjoined.
3. The harm Plaintiffs will suffer if injunctive relief is denied substantially outweighs any harm that the School District will suffer if the injunction is granted.
4. The public interest supports issuance of injunctive relief.

(Exhibit 1 at 1-2). Moreover, the court did not state with the required specificity how exactly the Plaintiffs would suffer irreparable harm.

V. Conclusion and Relief Requested

The District Court abused its discretion in granting the TRO and Preliminary Injunction. The District clearly has not violated the Establishment Clause. The District Court erred in concluding that any religious language associated with

prayer used in a student's graduation speech violated the Establishment Clause. Indeed, the injunctive orders being appealed result in the violation of the student graduation speakers' free speech and free exercise of religion rights as well as state law.

The District requests that this Court grant this emergency motion and reverse and dissolve the Order on Plaintiffs' Motion for Temporary Restraining Order and Preliminary Injunction and Amended Order, and grant it any and all further relief to which it may be entitled.

Respectfully Submitted,

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ATTORNEYS FOR MEDINA VALLEY
INDEPENDENT SCHOOL DISTRICT

CERTIFICATION OF FACTS SUPPORTING EMERGENCY MOTION

I hereby certify that the facts stated supporting emergency consideration of this Motion are true and complete.

/s/ Joe R. Tanguma

Joe R. Tanguma
State Bar No. 24028025

CERTIFICATE OF SERVICE

I hereby certify that on June 2, 2011, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system and served the following in the manner listed below:

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