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IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TEXAS  
SAN ANTONIO DIVISION

CHRISTA SCHULTZ and DANNY SCHULTZ, )  
both individually and as parents )  
and guardians of minor child )  
C.S., a student in the Medina )  
Valley Independent School )  
District; C.S., a minor, )  
individually, by his next best )  
friends Christa Schultz and Danny )  
Schultz; and TREVOR SCHULTZ, )  
individually, )

Plaintiffs, )

vs. )

MEDINA VALLY INDEPENDENT )  
SCHOOL DISTRICT, )  
Defendant. )

) Docket No. SA-11-CA-422-FB  
)  
) San Antonio, Texas  
) May 31, 2011  
)  
)

TRANSCRIPT OF HEARING ON TEMPORARY RESTRAINING ORDER AND  
PRELIMINARY INJUNCTION  
BEFORE THE HONORABLE FRED BIERY  
CHIEF UNITED STATES DISTRICT JUDGE

TRANSCRIPT ORDERED BY: Donald Flanary, III, Esquire

A P P E A R A N C E S:

FOR THE PLAINTIFFS:

AMERICANS UNITED FOR SEPARATION OF CHURCH AND STATE  
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6 computer-aided transcription.

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1 (Open court)

2 THE COURT: Good morning, ladies and gentlemen. We  
3 have a civil matter. Ironically, we had a criminal matter this  
4 morning involving a Christopher Henry Aragon who defrauded a  
5 bank here of about a half a million dollars. And I sent him to  
6 prison. He is a proud graduate of Medina Valley High School,  
7 four or five years ago. He's 24, so it would have been about  
8 six years ago. At any rate, he has a lot of issues and  
9 apparently was a pretty good young con artist because he got  
10 these bankers to give him a lot of money, and loaned him -- at  
11 the age of 20 he conned a Mercedes dealership into buying  
12 \$170,000 Mercedes based on what his inheritance was going to  
13 be. So he'll be in prison for the next four and a half years.

14 All right. But this case, involving Medina Valley,  
15 is a civil case, Christa Schultz and Danny Schultz,  
16 individually and as parents and guardians of minor children, as  
17 plaintiffs, versus the Medina Valley Independent School  
18 District. If I might have lead counsel for the plaintiff  
19 announce and introduce all of those related to the plaintiffs'  
20 side of the case.

21 MS. KHAN: Good morning, Your Honor. Ayesha Khan for  
22 the plaintiffs. With me is Don Flanary.

23 THE COURT: Okay.

24 MS. KHAN: And my clients are going through the  
25 security line as we speak.

1 THE COURT: Oh, okay.

2 MS. KHAN: They're on their way in.

3 THE COURT: Okay. And you have other folks here with  
4 your staff or not?

5 MS. KHAN: I'll let Don introduce.

6 MR. FLANARY: Your Honor, we do have some clerks from  
7 our office here.

8 THE COURT: Okay. All right. That's fine.

9 All right. And then Mr. Wood, or someone for the  
10 defense, to introduce those with you.

11 MR. WOOD: Thank you, Judge. Craig Wood with Walsh  
12 Anderson here on behalf of Medina Valley Independent School  
13 District. I have with me my colleague, Elena Cerna, from our  
14 San Antonio office as well. Like to introduce some of the  
15 people from Medina Valley Independent School District,  
16 Mr. Stansberry, the superintendent; Mr. Martinez, the assistant  
17 superintendent; Mr. Nesbit, another assistant superintendent;  
18 Mr. Tyler, our high school principal.

19 THE COURT: Okay.

20 MR. WOOD: Mr. Ruiz, our board president, president  
21 of the board of trustees.

22 MR. HOLZHAUS: Paul Holzhaus, assistant  
23 superintendent.

24 MR. WOOD: Mr. Paul Holzhaus, assistant  
25 superintendent as well.

1 THE COURT: Okay. Good. Very well. Thank you.

2 MR. WOOD: Thank you, Judge.

3 THE COURT: All right. Mr. Miller, if you could call  
4 and see -- I don't want to start, obviously, till the  
5 plaintiffs are here and see if they're making it through out  
6 there. I think we have a big crowd of other cases going on, so  
7 it may be a little bit of a long line.

8 Let me introduce the court family.

9 All right. Mr. Flanary, did something occur?

10 MR. FLANARY: One of the plaintiffs, Mrs. Schultz,  
11 she's in a wheelchair and she doesn't have a picture ID with  
12 her. She needs a waiver from the Court to make it through the  
13 security.

14 THE COURT: Okay. Well, that's fine.

15 Ms. Sullivan, go tell them.

16 LAW CLERK: I will.

17 THE COURT: Mr. Flanary, you don't find her to be a  
18 threat?

19 MR. FLANARY: No, Your Honor.

20 (Discussion off the record)

21 THE COURT: All right. Well, we can introduce the  
22 other folks here. Mr. Miller, who is our court security  
23 officer, as long as you behave yourselves reasonably well, you  
24 won't have any intimate dealings with Mr. Miller.

25 Mr. Miller is retired from the United States Air

1 Force where he served, among other places, in the White House  
2 for both the Honor Guard for President Ford and President  
3 Carter.

4 For those of you involved in high school football  
5 over the last 20 years, Mr. Miller can be seen on Friday and  
6 Saturday nights with a black and white referee shirt on, and  
7 probably has refereed some Medina Valley High School games over  
8 the last 20 years.

9 Ms. Vela, seated here -- and we do this at the  
10 beginning of all of the new civil cases. So this, today, is  
11 both -- for two purposes. One, the injunction and temporary  
12 restraining order that's being requested, and also as an  
13 initial status conference because this is a civil docket case.

14 Everything okay out there now?

15 COURT SECURITY OFFICER: Yes, Your Honor. One  
16 individual forgot their ID, and they're on their way through --  
17 coming through right now.

18 THE COURT: Okay. All right. Ms. Vela here is the  
19 chief administrative officer of the Court. She's a proud  
20 graduate of Kennedy High School here in the Edgewood district  
21 and is a deputy United States district clerk and takes care of  
22 all the administrative functions of the Court, the setting of  
23 the docket and that sort of thing, and the exhibits during any  
24 of these hearings or trials.

25 Seated to Ms. Vela's right is Mr. Poage. He is the

1 official court reporter, who's hoping that you all will spend  
2 lots of money having him transcribe this so that he can put  
3 your money in his bank account.

4 Up until a year ago, tomorrow, Mr. Poage had been the  
5 rookie of the court family. He's only been with us for  
6 16 years. Ms. Vela, Mr. Rodriguez and I -- Mr. Rodriguez being  
7 the chambers manager, a graduate of Burbank High School -- we  
8 have been together in the state and federal judicial system now  
9 for 32 and a half years. And Mr. Rodriguez and I are convinced  
10 that Ms. Vela knows what she's doing after 32 years. And  
11 Mr. Rodriguez and I are still working on it, but we hope to get  
12 there.

13 Ms. Sullivan, whom you saw earlier, and she'll be  
14 back here in a moment, she is one of the Court's three lawyers  
15 on the court family, and she and Ms. Christmas have been my  
16 lawyers for 21 years here in the federal system and at the  
17 Court of Appeals. So they, also, are reasonably experienced in  
18 all these kind of things.

19 (Plaintiffs present)

20 THE COURT: This is, as we said -- and welcome now --  
21 Ms. Khan and Mr. Flanary, you all's folks are here now?

22 MS. KHAN: Yes, Your Honor.

23 THE COURT: Okay. This is a matter involving the  
24 Medina Valley Independent School District and allegations of  
25 the plaintiffs that -- the plaintiffs allege that the school

1 district has violated various aspects of the Constitution in  
2 terms of separation of powers and freedom of religion or from  
3 religion. There are also, as I understand it, some free speech  
4 issues.

5 And it's -- that the courts have addressed these in  
6 various cases, some of which are in Texas that I'll be asking  
7 counsel to speak to, the Round Rock case that my colleague,  
8 Judge Sparks, had some years back, and the Santa Fe Independent  
9 School District that now former Judge Sam Kent had down in the  
10 Galveston area.

11 Unfortunately, former Judge Kent is now sitting in a  
12 federal prison, but that does not take away from the fact that  
13 he at one time when he was an appropriate member of the federal  
14 judiciary, that he had a case with, apparently, some issues  
15 that are similar.

16 And, of course, there are other parts of employing  
17 and gaining injunctive relief in terms of irreparable harm and  
18 likelihood of success on the merit and so forth.

19 So with that, Ms. Khan or Mr. Flanary, would you all  
20 like to make an opening summary statement of no longer than  
21 ten minutes?

22 MS. KHAN: Yes, Your Honor. Thank you.

23 THE COURT: You may proceed. You can pull that down  
24 if you want to. There you go.

25 MS. KHAN: Lee versus Weisman, which is a Supreme

1 Court case from 1992, said that graduation is an environment  
2 analogous to a classroom setting. The Fifth Circuit has  
3 repeatedly held, in a series of decisions beginning in 1997,  
4 that prayers cannot be incorporated into formal school  
5 activities, whether that happens at the school's initiative.  
6 The Court discussed that in *Karen B. versus Treen*. Whether it  
7 happens at the initiative of students or outsiders. That was  
8 discussed in *Meltzer and Ingrebretsen*. Or if it's  
9 spontaneously done by the joint initiative of students and  
10 teachers. That's *Doe versus Duncanville*. In fact, the Fifth  
11 Circuit may perhaps be the circuit with the most cases on  
12 prayer in the public school setting.

13 And as the Court referred to *Doe versus Santa Fe*  
14 earlier today, that involved students being allowed to present  
15 an invocation or a message at athletic events. The Court  
16 talked -- in striking down the policy that was at play there,  
17 the Court talked about a series of factors that concerned the  
18 Court. And every single one of them is present here.

19 THE COURT: And the one that's authoritative, of  
20 course, it started with then Judge Kent, but ultimately the one  
21 that counts is the Supreme Court. So that was a case that went  
22 all the way to the Supreme Court?

23 MS. KHAN: Yes, Your Honor. Except I would qualify a  
24 little bit to say that at issue in that case were prayers that  
25 were being presented at both graduation and at athletic events.

1 And the Fifth Circuit decided both questions, and the Supreme  
2 Court only took cert. on the athletic events piece of it. So  
3 the Fifth Circuit's ruling on graduation do remain as a  
4 precedential ruling -- a precedential ruling by the Fifth  
5 Circuit.

6 THE COURT: So do you find -- do you find Santa Fe to  
7 be authoritative and non-distinguishable enough at the Fifth  
8 Circuit level for it to be binding on this Court?

9 MS. KHAN: I do. I think there are important points  
10 of law established by the Fifth Circuit with respect to  
11 graduation in that case, and also dispositive and precedential  
12 holdings by the Supreme Court that pertain here. And let me  
13 just talk briefly a little bit about both of those.

14 To start with the Supreme Court, the factors that the  
15 Court looked to there, all of which are present here, were that  
16 the prayer was authorized by the school. We have that here as  
17 well.

18 That students, at least some students, were required  
19 to attend the event. We have that, as well, here. We have  
20 that in one of the plaintiff's, C.S.'s, declaration in  
21 paragraph 8, about how, as a band member, he was required to be  
22 at the graduation ceremonies.

23 It takes place on government property, at a  
24 government event. It's not a real forum, Your Honor. And this  
25 is where the Fifth Circuit decision comes into play. The Fifth

1 Circuit talked about how graduation cannot be turned into a  
2 limited public forum. You can't call it something and thereby  
3 transform it into that.

4 Because a limited public forum is a context in which  
5 dueling presentations are allowed about topics of social or  
6 political significance. That's not what a graduation ceremony  
7 is. And here, they further limited the particular portions of  
8 the messages, with which we're taking issue, to invocations and  
9 benedictions. That's how they're denominated, both in past  
10 programs, and we also have here today the current year's  
11 program for 2011, the ceremony that's coming up on June 4th.  
12 And that, too, retains the invocation and benediction label.

13 And Doe versus Santa Fe in the Fifth Circuit, and  
14 also the Supreme Court, talked about how those terms are  
15 religious terms. And by incorporating them into here the  
16 program, in Doe versus Santa Fe the policy, the school district  
17 invites religious messages, which is entirely contra to what a  
18 limited public forum is, which is where students have  
19 unfettered discretion to say what they wish about topics of  
20 social or political significance.

21 And then, finally, the last factor that remains here,  
22 and was also troubling to the Court in Doe versus Santa Fe, is  
23 that only one student gives a message. And that does --  
24 undercuts the claim that the policy is designed to foster free  
25 expression.

1           I wanted to just go back and inform the Court that  
2 the policy that the defendants have passed, that they are going  
3 to use to justify their practice, is one we have now submitted  
4 to the Court. It's Exhibit 10. And you'll see there that the  
5 policy limits the opening and closing remarks, which is how the  
6 policy denominates things, although the program doesn't. The  
7 policy says that these remarks have to relate to the purpose of  
8 the ceremony and the purpose of opening and closing remarks,  
9 honor the occasion, bring the audience to order, and focus the  
10 audience on the purpose of the event.

11           That's indistinguishable from Santa Fe, which was  
12 troubled by the fact that the required remarks were to  
13 "solemnize the event, promote good sportsmanship and establish  
14 an appropriate environment." There's no difference. That, of  
15 course, was talking about athletic events, and here we're  
16 talking about graduation. But both constrained, severely, the  
17 content of the students' messages.

18           The last thing I wanted to point to is Doe versus  
19 Duncanville, which is another Fifth Circuit case that talked  
20 about coaches' participation in prayer, student initiated  
21 prayer at team practices and games. And the Court there said  
22 that school employees cannot participate in student initiated  
23 prayer. Not only can they not lead it or direct it or bring it  
24 about, but they can't participate in it.

25           And I'm going to read you a quote. "If, while acting

1 in their official capacities, DISD" -- because it was the  
2 Duncanville Independent School District -- "DISD employees join  
3 hands in a prayer circle or otherwise manifest approval and  
4 solidarity with student religious exercises, they cross the  
5 line between respect for religion and endorsement of religion."

6 The evidence here shows that the school officials at  
7 graduation regularly stand at the direction of the person  
8 standing at the podium. They bow their heads, and they join  
9 with the school community in prayer. That's in several  
10 declarations we've submitted to the Court. And that provides  
11 yet another problem with what the school district is doing  
12 here.

13 THE COURT: All right. And we're going a little bit  
14 over the ten minutes, but I have some questions. And then,  
15 Ms. Wood and Ms. Turner, I'll hear from you all.

16 Tell me, going back to the policy that you read, if  
17 someone were to -- a student, because we're talking about, in  
18 this context, a student who does this as opposed to a religious  
19 person -- a priest or rabbi?

20 MS. KHAN: Yes, Your Honor.

21 THE COURT: Okay. Because that's definitely out,  
22 correct, as far as the school -- the public funding inviting  
23 some minister of the gospel or priest or rabbi?

24 MS. KHAN: Yes, Your Honor. That was decided --  
25 those were the facts in Lee versus Weisman.

1           THE COURT: Right. So if a student, and you called  
2 it -- if instead of the program saying "invocation" or  
3 "benediction," or at a football game if a student were to get  
4 up and talk about those kinds of things that are in the policy,  
5 without using any secular references, is that okay in terms  
6 of -- oh, let me think. May we enjoy this evening and keep the  
7 people of Joplin, Missouri in our thoughts. Is that okay?

8           MS. KHAN: Yes, with a caveat. And I think you  
9 misspoke when you were asking the question, if it was only  
10 "secular." If it were only secular, yes. If it were only  
11 secular, then there would be no problem. And let me point a  
12 fact out here. If you look at the program -- and the program  
13 for 2009, for example, is Exhibit 8 -- it has the invocation  
14 before a welcome message. So there already are opening remarks  
15 in these programs, non-prayerful opening remarks. And  
16 likewise, the benediction comes after a farewell message.

17           So were they to remove the prayer portions of this,  
18 they would not be deprived of an opening and a closing  
19 presentation. And both of those are also given by students.

20           THE COURT: Okay. Anything else right now?

21           MS. KHAN: No, Your Honor.

22           THE COURT: Mr. Wood or Ms. Turner.

23           MR. WOOD: Thank you, Judge. And I don't believe I  
24 was articulate. It's Ms. Cerna. Ms. Elena Cerna is my --

25           THE COURT: Oh, I'm sorry. I misheard. All right.

1 Good. Thank you.

2 MR. WOOD: Your Honor, here on behalf of Medina  
3 Valley Independent School District, what I want to stress to  
4 you is that the district is very steadfast in its commitment to  
5 honor the First Amendment rights of all citizens. We feel  
6 that's very important. If we stood in the same stead as the  
7 cases that were referenced earlier, we wouldn't be here this  
8 morning because my advice to my clients would be that you --  
9 this issue has been decided.

10 As Your Honor is no doubt aware, about four years ago  
11 there was a statute passed to govern the school districts in  
12 the State of Texas with respect to tolerance for religious  
13 expression. And in 21.152 of the Education Code -- excuse  
14 me -- 25.152 of the Education Code the district is now required  
15 to create a limited public forum in various settings. And one  
16 of the settings that they are required to create a limited  
17 public forum is graduation. This particular district has  
18 looked at the situation and includes things such as football  
19 games, as well.

20 Once they do that, create a limited public forum,  
21 Your Honor, they follow the policy that counsel has already  
22 referred you to, and that is board policy FNA local. That  
23 policy is the model policy that's developed along with that  
24 statute, that says that we walk that fine line between the  
25 establishment clause and the rights of expressions of students.

1           The particular purpose of that statute, Your Honor,  
2 was to honor the fact that students do sometimes wish to  
3 express religious viewpoints and ought not be penalized for  
4 doing so. There ought to be fora in which they are permitted  
5 to do that.

6           The particular manner of selection, Your Honor, for  
7 board FNA local is a neutral selection policy. On Page 3 of 5  
8 of that policy you will see that only students who are  
9 graduating and who hold one of the following positions of  
10 honor, based on neutral criteria, are even eligible to be  
11 considered to use the limited public forum. Those include the  
12 top three academically ranked graduates, the class president  
13 and student council officers. Students are also precluded,  
14 Your Honor, if they've been in a disciplinary alternative  
15 education program during the time period leading up to  
16 graduation.

17           Any of those students who are going to be eligible to  
18 use the limited public forum can put their name in the hat, if  
19 you will, Your Honor, to be considered for selection. There is  
20 a drawing. And the first student who is drawn, the first name  
21 that is drawn will give the opening remarks with respect to the  
22 graduation ceremony. The second student who is drawn gives the  
23 closing remarks with respect to the ceremony.

24           THE COURT: Who gives the invocation?

25           MR. WOOD: The invocation -- and, Your Honor, what I

1 would suggest to you is the term "invocation" -- the first  
2 student who is selected is the one who gives the invocation.

3 THE COURT: Oh.

4 MR. WOOD: The term "invocation" in this sense is  
5 literally no more than a historical leftover in the sense that  
6 the graduation program has looked -- the same sort of order has  
7 been used for years prior to the adoption of this particular  
8 statute and this particular policy. And so they have followed  
9 the same template and the same order of events with respect to  
10 speakers at graduation, but the invocation, such as it is, is  
11 given by the first student whose name is selected.

12 Those students are not given any guidance with  
13 respect to what the topic of their graduation speech will be.  
14 They are advised that the subject of the addresses shall be  
15 related to the purpose of the graduation ceremony, marking and  
16 honoring the occasion, honoring the participants and those in  
17 attendance, and the student's perspective on purpose,  
18 achievement, life, school, graduation and looking forward to  
19 the future. That's the only sort of guidance that is available  
20 to students with respect to what they can say.

21 There are also certain guidance -- there is certain  
22 guidance provided with respect to what they can't say. And so  
23 they're not allowed to use obscene, vulgar language, things  
24 that are lewd, indecent, anything that promotes illegal drug  
25 use. And those criteria are contained in --

1 THE COURT: What happens if they do? Is there a  
2 hook, somebody with a hook?

3 MR. WOOD: We don't have to get to that point, Your  
4 Honor, because one of the things that is required is that the  
5 student is required to submit their proposed speech to an  
6 administrator to be reviewed to make sure that it does not  
7 violate those particular criteria. But again, no guidance with  
8 respect to what can be said.

9 All that the district is trying to do in this  
10 particular instance, Your Honor, is adhere to that state  
11 statute. It says that we're required to do that. We're  
12 attempting to balance those First Amendment interests of all  
13 parties involved. And I will acknowledge, Your Honor, in a  
14 community like Medina Valley it is not unusual for there to be  
15 a student selected who would, in fact, make some sort of  
16 reference to some sort of religious deity.

17 I will also tell you that in the last couple of years  
18 that the closing remarks made by the student had no religious  
19 connotation whatsoever.

20 THE COURT: Well, that's what they call the  
21 benediction.

22 MR. WOOD: That's what they call the benediction.  
23 Yes, Your Honor. It's labeled as the benediction. But in the  
24 last couple of years there has not been any religious speech  
25 given by the student who closes the ceremony.

1 THE COURT: Well, do you agree or disagree that the  
2 terms invoke -- an "invocation" and "benediction" come out of a  
3 clear western culture, religious context?

4 MR. WOOD: They may derive in that manner, Your  
5 Honor. I would probably have to concede that point, that they  
6 derive that. I would also say that they may have been watered  
7 down to the point -- at this point where it does not  
8 necessarily -- obviously, from the fact that our last two  
9 people who gave the, quote, benediction didn't give any type of  
10 religious message would suggest that they certainly didn't take  
11 it to mean that way. I think those terms have been watered  
12 down.

13 THE COURT: Well, perhaps. But arguably, religion in  
14 total has been watered down but -- there are all different  
15 kinds now. But in terms of the historical use of those words,  
16 it still has the meaning of invoking some higher power or --  
17 and you have within the Catholic church the Benedictine monks,  
18 and the Benedictine Order and so forth. So, obviously, there's  
19 a historical religious connection. I mean, if that's part of  
20 the problem, separate and apart from the state statute, which  
21 we'll talk about, but why wouldn't it be easier and solve the  
22 problem to say "opening remarks" as opposed to "invocation"?  
23 And I believe Ms. Khan said, at least on last year's program,  
24 you had the opening remarks -- I mean, excuse me, the  
25 invocation and then the welcoming. How is that different?

1 MR. WOOD: Those were given by the same person, is my  
2 understanding, Your Honor; that it just is -- it falls in that  
3 particular place on the program. And the, quote,  
4 invocation/opening remarks are offered by the first student.

5 THE COURT: Okay. So is it a line item invocation,  
6 opening remarks, or does it go together?

7 MR. WOOD: I haven't seen that program, Your Honor,  
8 so I'm not certain.

9 THE COURT: But it's -- okay.

10 (Looking at a document)

11 MR. WOOD: These appear to be -- these appear to be  
12 separate line items, Your Honor. And I can't -- this year's --  
13 let me ask my clients, if I may, Your Honor, rather than speak  
14 out of turn.

15 THE COURT: Sure. And if it's the same person for  
16 both the invocation and opening and the farewell and  
17 benediction.

18 MS. KHAN: Your Honor, may I be heard to speak  
19 quickly just to that point? I'd just like to point the Court  
20 to our Exhibit 8, which is the 2009 program. And I'd like to  
21 furnish the Court with Exhibit 18, which is the 2011 program.

22 THE COURT: Uh-huh.

23 MS. KHAN: If I may hand that to the Court?

24 THE COURT: Sure.

25 MS. KHAN: In both instances it is not the same

1 person delivering the two different messages that bookend the  
2 program. And if one looks at the top ten percent listing --  
3 the students are individually listed, the top ten percent of  
4 the class -- you'll notice that the names will match up to  
5 indicate that all of those four kids giving those four  
6 different messages are students.

7 THE COURT: I was going to say, I've got four  
8 different young people.

9 MR. WOOD: That is correct, Your Honor. I'm informed  
10 by my client that there are four students all selected pursuant  
11 to board policy FNA local.

12 THE COURT: So the -- so someone within the power  
13 structure is making some kind of distinction between a farewell  
14 message and a benediction?

15 MR. WOOD: There are separate messages, Your Honor.  
16 I acknowledge that.

17 THE COURT: Okay. Now, I think -- and, of course,  
18 obviously, we just got this case, and we have at any given time  
19 400 other cases besides the ones that come in on Friday  
20 afternoon. But I think I understand that there are -- there is  
21 some case law that makes a distinction -- the example that I  
22 was given -- Ms. Sullivan was trying to brief me on this.

23 By the way, you all who have created this dispute owe  
24 Ms. Sullivan an extra holiday because she spent the weekend  
25 dealing with this. She won't get any extra pay.

1           That if -- in the traditional valedictory address  
2 that if the young person says -- and I did this 45 years ago,  
3 but I can't remember everything I said. But if the young  
4 person were to say: I've been able to achieve this because my  
5 parents provided well and I went to Sunday school and this,  
6 that and the other, that that's okay, in sort of an indirect  
7 sort of a way, as opposed to a specific religious statement  
8 which could, of course, cross the line of proselytizing, but a  
9 specific religious belief statement in the context of the  
10 program, of what's called an invocation. Is there a  
11 distinction there, either -- well, first of all, any federal  
12 cases that speak to that?

13           MR. WOOD: I believe, Your Honor, so long as we're  
14 talking about a limited public forum -- and I think that the  
15 statute here and the board's policy is designed to specifically  
16 make the straight and narrow, right down the middle of the  
17 First Amendment there. I think, provided that the students are  
18 neutrally selected, that whatever speech they give is their own  
19 speech, and the fact that we have the disclaimer that says  
20 these students are going to express speech that does not  
21 necessarily reflect the viewpoint of the school district.

22           THE COURT: Okay. Is there a disclaimer?

23           MR. WOOD: There is a disclaimer, Your Honor.

24           THE COURT: Okay. I heard about that. And do the  
25 people who give the invocation and benediction, are their words

1 precensored and prereviewed?

2 MR. WOOD: I believe that they are, Your Honor.

3 Is that correct, Mr. Martinez?

4 Yes. Their words are prereviewed. And they must  
5 adhere just to the criteria of FNA local. They're not  
6 prereviewed in the sense that we're -- they're told what their  
7 topics are or anything like that. They're just -- they must  
8 meet the criteria of FNA local.

9 THE COURT: Okay. And within the context of that  
10 presentation and the historical tradition of the invocation and  
11 the benediction, it is alleged in the pleadings that those  
12 particular parts of the program are done differently by having  
13 the audience stand and bow. Is that correct?

14 MR. WOOD: I don't know, Your Honor.

15 Is that --

16 THE COURT: Well, we'll have to hear testimony.

17 MR. WOOD: Yeah. We'll have to hear testimony on  
18 that, Your Honor. I don't know whether --

19 THE COURT: And if that's true, is that not a  
20 historical religious indicia of -- I mean, in other words,  
21 if -- oh, let's say that some child of a different religious  
22 background happened to find, by circumstances of life, that  
23 they were in Dearborn, Michigan, going to a public school where  
24 the majority were Muslim kids. And so three times a day the  
25 Muslim kids are allowed to kneel towards Mecca, and that makes

1 the non-Muslim child, Christian or otherwise, feel  
2 uncomfortable, which obviously is the purpose of the  
3 Constitution, to protect the non-Muslim kids from having to do  
4 what the majority Muslims do, or a kid who might -- whose  
5 parents get moved to Brooklyn, New York, find themselves in a  
6 neighborhood where everybody -- all the men wear hats and have  
7 long beards and all the kids at school eat kosher food, but  
8 they can't make the majority Gentile do what they do.

9           So if -- in this context if the evidence is that the  
10 person giving the invocation and benediction say, "Please rise  
11 and bow your head," is that not a religious overtone?

12           MR. WOOD: If the person -- if the person making the  
13 speech, the student making the speech asks that, I'm not  
14 certain, Your Honor. I do think there would be a difference if  
15 the school officials asked that that occur. I think I would  
16 have to concede that if the school officials directed people to  
17 stand or bow their heads --

18           THE COURT: The student has been selected by the  
19 school officials.

20           MR. WOOD: But the student has been selected just on  
21 a neutral criteria, Your Honor. And the student could, as  
22 well, give a speech -- a Muslim prayer under this selection  
23 policy.

24           THE COURT: I think --

25           MR. WOOD: They could give a speech relating to --

1 THE COURT: If that happened, wouldn't the  
2 non-Muslims take offense and say: We had to sit here and  
3 listen to something that we don't believe in?

4 MR. WOOD: Your Honor, I guess the whole concept of  
5 the freedom of expression part of the First Amendment is that  
6 we are going to be subjected to speech that we don't  
7 necessarily agree with. And so, yes, they might take offense.  
8 But they're entitled to use the limited public forum in a  
9 manner that they choose.

10 THE COURT: So if a Muslim child were selected and  
11 said -- instead of saying, "Please stand and bow your head,"  
12 said, "Please kneel and do the arm motion and face Mecca," does  
13 that violate the rights of the non-Muslim?

14 MR. WOOD: I don't believe that it does, Your Honor.  
15 In fact, when this statute was originally enacted, that was my  
16 advice to my clients is, you understand that the agenda of the  
17 legislator who passed this particular statute was to see that  
18 there was an opportunity for religious speech in a public  
19 setting. But you must be tolerant, under the First Amendment,  
20 of whatever religious speech is selected as a result -- or  
21 nonreligious speech is selected as a result of this neutral  
22 criteria.

23 And so if it is a Muslim prayer, if it is someone  
24 endorsing some sort of other belief, whether it be a nonbelief  
25 or whatever it might be, it is incumbent upon the school

1 district to be tolerant of that, so long as it does not violate  
2 these criteria with respect to being obscene.

3 Now, are the non-Muslims going to be uncomfortable in  
4 that situation? I would imagine that they are.

5 THE COURT: How about Ku Klux Klan or white  
6 supremacy?

7 MR. WOOD: Your Honor, I think those are the ones  
8 that would fall into the category that are prohibited, in the  
9 sense that that type of speech, I believe, would be considered  
10 to fall. It would result in material and substantial  
11 interference with school activities or rights of others. I  
12 think that also could incite or advocate imminent lawless  
13 action and likely to incite or produce such action. And it  
14 could be considered, certainly, vulgar or indecent.

15 THE COURT: I'm afraid to even ask this next  
16 question. But, of course, the cases that Ms. -- and by the  
17 way, we've gone over the ten minutes and we'll have plenty of  
18 time. I think perhaps the evidentiary portion won't have to be  
19 as long as we might otherwise have expected, and we can get  
20 into this legal aspect.

21 But the question is, the cases, of course, we've been  
22 talking about have some years of age on them, whereas you said  
23 this statute is only four years old. Has the statute been  
24 addressed or is this first impression?

25 MR. WOOD: This is first impression, Your Honor, as

1 far as I'm --

2 THE COURT: Thank you so much. Thank you so much.

3 MR. WOOD: You're quite welcome, Your Honor. Now,  
4 I --

5 THE COURT: And I'm supposed to do this by Saturday,  
6 right?

7 MR. WOOD: Exactly. That's our graduation ceremony.

8 And, Your Honor, you know, I've spoken with opposing  
9 counsel, and I stressed to them that what the district is doing  
10 is adhering to the state statute. We're adhering to the board  
11 policy. That's our commitment to them. We understand that  
12 they may suggest that that runs afoul of the First Amendment,  
13 and they may make that argument. And certainly, if that's the  
14 case, then, you know, we understand that there's an argument to  
15 -- I told my clients when this statute was enacted that we  
16 would likely see challenges to the statute.

17 It was written in a manner to try to avoid the  
18 problems of the predecessor cases. It was written in a manner  
19 that is designed to walk down the middle of the First  
20 Amendment, between the establishment and written -- or freedom  
21 of expression clauses. But whether it does that --

22 THE COURT: And how long has this district been  
23 employing that procedure that you outlined?

24 MR. WOOD: Their policy was adopted in 2007, Your  
25 Honor, so four years ago. September 13th of 2007.

1           THE COURT: So, again, the plaintiffs have alleged  
2 that, at least to the extent they've had experience with it,  
3 that there were sectarian statements made under the heading of  
4 invocation and benediction, as opposed to neutral, nonsectarian  
5 and secular statements. And is there -- it's a short track  
6 record, but is there a pattern that it's always been sectarian  
7 religious statements in those two categories?

8           MR. WOOD: I cannot speak to whether it was sectarian  
9 or not. I will have to hear that during the evidentiary  
10 portion. But what I would suggest to you is I think that the  
11 purpose of the statute is to permit even sectarian statements,  
12 understanding that there may be a substantial number of the  
13 people in the audience who disagree with that particular  
14 viewpoint. But I think it was intended to allow a student to  
15 make a sectarian statement. They were the ones selected as the  
16 speaker pursuant to the neutral policy. And if that's the  
17 decision that they -- or the speech they decide to make, I  
18 think we, as the school district, are obliged under the statute  
19 to be tolerant of that.

20           THE COURT: Well, assuming all of that to be true and  
21 that the statute ultimately is upheld, to the extent that no  
22 matter how watered down the terms may be, would it not solve  
23 some of the problem for those who still see religious  
24 connotation to the terms "invocation" and "benediction," to at  
25 least take those terms out?

1 MR. WOOD: I think the school district would be  
2 amenable to that, Your Honor. Again, I think that the  
3 derivative of those is -- or the origin of those is, the  
4 historical context of, this is the order that graduation  
5 ceremony has been since, you know, your last client or your  
6 last attendee in here from Medina Valley was graduating from  
7 school, that I'm sure the program looked about the same at that  
8 point. And I think it's just been followed historically ever  
9 since then. But I think we are amenable to considering that,  
10 Your Honor.

11 THE COURT: Okay. So I don't know if -- I mean,  
12 we're talking about this year. I don't know what you tell  
13 these two young ladies this year who are going to have the  
14 invocation and the welcome, or what you call that if you don't  
15 call it an invocation. I guess you could call it Welcome  
16 Number 1 and Welcome Number 2 but --

17 MR. WOOD: I mean, we certainly can --

18 THE COURT: Have these already been printed en masse?

19 MR. WOOD: No, they have not. The final graduation  
20 program has not been printed.

21 THE COURT: Oh, well, that's good. So there's no an  
22 expense factor loss issue to balance?

23 MR. WOOD: No, there's not, Your Honor. And, in  
24 fact, again, I'll stress the first thing I said since I came to  
25 the podium, and that is we're committed to respecting the First

1 Amendment rights of everyone. So to the extent that there  
2 needs to be some alteration in order to do that, we certainly  
3 are amenable to that.

4 THE COURT: Okay. All right. Let me hear rebuttal  
5 from Ms. Khan about this aspect of this statute, and then we'll  
6 put on a little bit of evidence to -- and/or summary or  
7 stipulation if there's things that are not in controversy.

8 By the way, I was -- when I was referring to having  
9 made that kind of speech 45 years ago, this past Saturday, as a  
10 matter of fact, it occurred to me that one of my good friends  
11 who -- we used to spend the night at each other's house back  
12 and forth from the first grade on, he grew up to coach at a  
13 place called Medina Valley, Coach Sides. I don't know if he's  
14 retired or not, Lynn Sides.

15 And, of course, it was also ironic that we lived in  
16 a -- we had Little Flower down the road, and kids went to  
17 Little Flower. We had Woodlawn Christian around Woodlawn Lake.  
18 We had Woodlawn Methodist. And we had the only major or the --  
19 not the only major, but the new synagogue, and all of the  
20 Jewish kids lived around the synagogue. In fact, one of --  
21 Mrs. Katz, Linda Katz' mother, still had the tattoo that the  
22 Nazi Christians had put on her.

23 But some of us always thought it was rather  
24 uncomfortable for the Mandells and the Laudersteins and the  
25 Epsteins -- and, of course, this was long before all of these

1 cases had been brought -- that every morning there would be an  
2 invocation of Jesus Christ. And some of us kind of -- and the  
3 Jewish kids, of course, stood and took it. But we always kind  
4 of wondered about what if we had been in their place or if --  
5 because we never heard a Jewish prayer.

6 At any rate. And, obviously, the courts have spoken  
7 to that. And as Mr. Wood pointed out, the legislative folks  
8 have tried their best to walk that line. And so that's the  
9 dilemma that we have. And whether the statute, I gather, that  
10 has not been addressed -- whether that statute addresses those  
11 competing issues of free speech and public debate and not  
12 having people be exposed to religious talk that by -- paid for  
13 by public funds, that they don't want to be exposed to.

14 So, Ms. Khan, the statute.

15 MS. KHAN: Well, I don't think the Court needs to  
16 reach the constitutionality of the state statute to decide this  
17 case. And let me try to break down for you why.

18 First of all, we are challenging here the defendant's  
19 actions, their behavior. We have not, at this point,  
20 challenged the constitutionality of the Texas statute.

21 THE COURT: Thank you.

22 MS. KHAN: We didn't want to ruin your weekend that  
23 much.

24 THE COURT: I think, to use a religious phrase, that  
25 cup has now passed.

1 MS. KHAN: And even they don't comply with their own  
2 policy. Okay? And I think this is really important. The  
3 policy is Exhibit 10. And I'm going to walk through, very  
4 quickly, some of the things that reflect their noncompliance  
5 with their own policy.

6 First of all, the policy requires the inclusion of a  
7 disclaimer. That is at the bottom of Page 4 of Exhibit 10.

8 THE COURT: Okay. I have -- hold on. I have  
9 Exhibit 18.

10 MS. KHAN: Exhibit 18 is the program for 2011.

11 THE COURT: And so I need these other exhibits.

12 MS. KHAN: Exhibit 10 -- these were filed with the  
13 Court yesterday, which may explain why they're new to the  
14 Court.

15 THE COURT: Okay. Go ahead.

16 MS. KHAN: Okay. At the bottom of Page 4 is the  
17 contents -- now, this is the school district's own policy, that  
18 Mr. Wood referred to extensively. That disclaimer, if one --  
19 if the Court looks at the 2009 program and the 2007 program,  
20 which are Exhibits 8 and 9, there is no disclaimer at all on  
21 those programs.

22 THE COURT: How about for this year?

23 MS. KHAN: This year there appears to be an eleventh  
24 hour addition to the program to include a disclaimer this year.  
25 Though the statute has been around since 2007, there has not,

1 in the past, been a disclaimer.

2 THE COURT: Well, we're only talking about this year,  
3 though.

4 MS. KHAN: Yes, Your Honor. But what's happening  
5 this year needs to be understood in the context of a  
6 long-standing history. So, for example, in Doe versus  
7 Duncanville by the time it came to the preliminary injunction  
8 hearing, the defendant said: Oh, no, we're not going to pray  
9 anymore with these kids. And the Court still said a  
10 preliminary injunction was appropriate because, you know,  
11 voluntary secession at the eleventh hour of unconstitutional  
12 activity doesn't preclude the need for a preliminary  
13 injunction.

14 But let me also point out, there's a difference, and  
15 an important difference, between the disclaimer that their  
16 policy requires and the disclaimer in the model policy in the  
17 Texas statute. The Texas statute disclaimer in the model  
18 policy -- I don't know if -- the Court probably may not have  
19 the statute before it. But again, it's Section 25.152. Does  
20 Your Honor have the statute now?

21 THE COURT: I think I just got it.

22 MS. KHAN: Okay. If one looks at the end -- the last  
23 paragraph of Article III of the model policy.

24 THE COURT: Okay.

25 MS. KHAN: Article III is entitled: Student Speakers

1 at Graduation Ceremonies. The last sentence of that policy --  
2 I'm sorry -- of that disclaimer is, I'm quoting, "The contents  
3 of these messages were prepared by the student volunteers, and  
4 the district refrained from any interaction with student  
5 speakers regarding the student speakers' viewpoints on  
6 permissible subjects."

7 That sentence is missing from the disclaimer on the  
8 2011 program and from the disclaimer that's required by their  
9 own policy. And I submit to you that the reason it's missing  
10 is because this district, as Mr. Wood explained, does in fact  
11 review these statements.

12 And the Ninth Circuit held in two cases, Cole and  
13 Lassonde, both of which were cited in our papers, that when the  
14 government reviews and restricts the content, like the policy  
15 does here, that that becomes the government's endorsed speech.  
16 It can't pass this off as truly private speech of the student  
17 speakers.

18 THE COURT: Okay. So if the words "invocation" --  
19 and let's try to take this step by step. And I don't disagree  
20 with your analysis, I think you cited Duncanville, that if  
21 there's a violation, in order to make it enforceable and  
22 subject to holding people in contempt and going to jail, that  
23 there has to be injunctive relief. But so you probably, at  
24 this early juncture, are entitled to that -- if nothing else,  
25 to say: Not only by agreement, but you will take out the words

1 "invocation" and "benediction." Okay? And then -- and then  
2 what if the injunction also included that the disclaimer must  
3 be that that's in the statute?

4 MS. KHAN: Well, Your Honor, I don't think you can  
5 unring a bell here. You have a long-standing history, up to  
6 this day, of the term "invocation" and "benediction" being in  
7 there. These kids know what's being asked for. If you change  
8 the message, it's not going to change that there's Welcome 1  
9 and Welcome 2. And how are kids going to make sense of that?  
10 They already have their speeches planned. They're prayers.  
11 And the reason they're prayers is because they've always been  
12 prayers. And changing the name of something isn't going to  
13 change either that history or the content of their  
14 presentations or their understanding of what's expected of them  
15 for that particular time slot.

16 THE COURT: So what relief would you -- again, if --  
17 the past, I suppose you could amend and sue for damages, but  
18 that's over. And, of course, as a practical matter, we know  
19 that probably in a lot of small town school districts in Texas  
20 prayers go on in the tradition that they've gone on for a  
21 hundred years but nobody files a lawsuit. And so -- and until  
22 somebody files a lawsuit, the issue is not before the Court.  
23 We can't go out and say: Hey, you're violating the  
24 Constitution.

25 MS. KHAN: Absolutely, Your Honor.

1           THE COURT: So as far as the past years, if the  
2 plaintiffs want to file a damage lawsuit at some point, we'll  
3 deal with that. But for right now, for this coming Saturday,  
4 what relief -- are you asking that the Court order Ms. Petty  
5 not to say anything about God?

6           MS. KHAN: Your Honor, we are asking for the Court to  
7 order the defendant, as part of their program, not to include  
8 messages during the invocation and benediction portions of the  
9 ceremony.

10          THE COURT: Not to include what? I'm sorry?

11          MS. KHAN: Not to include any messages, meaning to  
12 omit the invocation and benediction portions of their ceremony.

13          THE COURT: So then Ms. Petty might sue me.

14          MS. KHAN: Well, Ms. Petty could sue you, but  
15 Ms. Petty would lose. And Ms. Petty could sue the school  
16 district, and she'd lose, too, because students don't have the  
17 right -- and I refer you back, again, to Cole and Lassonde,  
18 which are Ninth Circuit cases in exactly that context, which is  
19 where students tried to sue because they wanted to include  
20 prayerful messages, and the school precluded them from doing  
21 so. And the Court -- and the Ninth Circuit there said they  
22 have no free speech right, in a context virtually identical to  
23 this one, to include religious messages in their remarks.

24                 It's government endorsed speech. The government has  
25 the right to make decisions and the obligation under the

1 establishment clause to make decisions about what is and is not  
2 included in government endorsed messages.

3 I wanted to also point out to the Court that the  
4 policy also departs from the Texas statute's model policy in  
5 two other ways. One is that it further shrinks the pool of  
6 available students who are eligible down to a very small group  
7 of kids. The Texas model policy includes class officers in the  
8 group of kids. Even then it's a fairly small group. But the  
9 district's policy changes that to just the class president. So  
10 it shrinks it further.

11 And similarly, the Texas statute and the list of  
12 impermissible messages that Mr. Wood referred to has only the  
13 first paragraph, the one that talks about obscene, vulgar,  
14 offensively lewd or indecent. The district has added -- one,  
15 two, three, four -- five additional paragraphs that limit what  
16 kids can say. So this policy departs from the Texas statute in  
17 important ways that go to limiting the type of speech and  
18 limiting the students who are eligible to present the speech.

19 Both of those factors have troubled the courts. Doe  
20 versus Santa Fe talked about the kinds of restrictions that are  
21 placed on students' messages. And the restriction speaks to  
22 the government's tailoring of the presentation and, therefore,  
23 the greater level of endorsement that the government puts into  
24 these messages.

25 THE COURT: Okay. Let me ask you, so if the Court

1 grants the relief that you're asking for and Ms. Petty, without  
2 anyone from the school district stopping her, even though they  
3 may say, well, the Judge says we're not going to have an  
4 invocation. And she's weeping and wailing because she's been  
5 planning, this is her big moment for graduation, the only time  
6 she'll graduate from high school, and I'm sure she has people  
7 who want her to give the invocation, fellow students, family,  
8 so forth. And she, by hook or crook, to use a phrase, gets up  
9 and does it anyway, what am I -- am I supposed to put her in  
10 jail for contempt, or am I supposed to put these folks in jail  
11 for contempt because they didn't grab Ms. Petty physically and  
12 say, no, you can't do that? What am I -- what's the Court  
13 supposed to do?

14 MS. KHAN: Your Honor, that's a question to which an  
15 answer is difficult to formulate. I think these are very fact  
16 intensive questions.

17 THE COURT: Well, I hope you get to be a federal  
18 judge some day and you can deal with that.

19 MS. KHAN: That would make me very delighted,  
20 actually.

21 But, you know, the question to me in that  
22 circumstance would be whether there was any kind of collusion  
23 that the district brought to that presentation. First of all,  
24 if the -- that person is not otherwise slated to speak. So if  
25 the person is not allowed to speak, which under the law I

1 submit is the district's entitlement to preclude, then I think  
2 that risk is diminished.

3           If another student who is slated to speak and remains  
4 slated to speak, despite the preliminary injunction, were to do  
5 that, I think the -- I would expect the district to treat that  
6 person in the same way that the district would treat any other  
7 speaker who decided to go on a rant about, you know, safe sex  
8 or needle distribution and HIV prevention or to sing Alice  
9 Cooper's *School's Out for Summer*. I mean, there's certain  
10 understandings that these kids bring to the table of what is  
11 appropriate for their remarks. And if they depart from that, I  
12 assume the school could turn off the mike. It could get up and  
13 say, you know: That was not a scripted message that we  
14 understood to be part of what the student was planning to  
15 present.

16           I think there are steps the district could take in  
17 that circumstance. I would want school officials not to  
18 participate in that prayer, not to stand up and bow their heads  
19 when the student went off script and made this kind of  
20 presentation.

21           But the Court certainly wouldn't punish the student.  
22 The student is not a party to this litigation. There wouldn't  
23 be jurisdiction to do that. The district is party, and they  
24 control the order of ceremonies. They control that microphone.  
25 And there are certainly things they could do if a different

1 student were to go off script.

2 THE COURT: All right. And if -- in classic  
3 injunction law there's a balancing of not only the -- or do you  
4 agree that even the plaintiffs in this case still have to show  
5 irreparable harm?

6 MS. KHAN: To obtain a preliminary injunction? Yes,  
7 they do need to show that without a preliminary injunction  
8 there would be irreparable harm.

9 THE COURT: All right. And so they have alleged, and  
10 I have no doubt that they felt embarrassed in the past when  
11 they did not stand and they sat and other people around them  
12 made fun of them or whispered or whatever the allegations were.  
13 I have no doubt that they've suffered some harm.

14 But is there not also, in an injunction proceeding, a  
15 balancing act of, well, what about potential harm and loss on  
16 the other side? And in this case, I mean, these are adult  
17 people who are not going to -- in terms of the district, I'm  
18 talking about, and in terms of Mr. and Ms. Schultz.

19 (Ms. Khan sneezed)

20 THE COURT: You okay?

21 MS. KHAN: I'm fine. Thank you, Your Honor.

22 THE COURT: All right. Welcome to Texas.

23 MS. KHAN: No. This came with me from Washington,  
24 D.C., unfortunately.

25 THE COURT: It will get worse while you're here.

1           So, again, going back to my earlier observation, that  
2 this particular year -- and I'll -- from what you've presented  
3 so far, I'll grant you that at the very least the district  
4 needs to go back and revisit their policy and do literally what  
5 the statute says and so forth. And unless somebody asks for  
6 it, then the Court -- this Court is not going to make a ruling  
7 on something that's not been asked for, i.e., the  
8 constitutionality of the state statute.

9           But in terms of following the state statute and  
10 following its own policy, I think you have probably met that  
11 burden from the legal presentation.

12           On the other hand, if we're balancing harm -- and we  
13 have adults involved in both instances. And I certainly would  
14 expect that the adults involved in the school district on  
15 public funds are going to follow this Court's order and do not  
16 want to go to jail. On the other hand, the Court also has to  
17 balance, I think, the alleged irreparable harm to the Schultz  
18 child who -- there's one graduating this year?

19           MS. KHAN: Yes, Your Honor.

20           THE COURT: And the Petty child. And let's see.  
21 There was another one here. The benediction. And the  
22 Gerard -- Callison Gerard child who would be giving the  
23 benediction, in terms of all of these adults, rightfully,  
24 wrongfully, I'm sure not intentionally, but have created this  
25 situation where the young people are going to be the ones to

1 suffer the harm also, in terms of those who were going to get  
2 their moment in the sun.

3           So is there not a balancing factor this year? Now,  
4 I've got some thoughts about years to come. But you see the  
5 Court's concern?

6           MS. KHAN: I do, Your Honor. The balancing is  
7 between the public interest and the irreparable harm to the  
8 plaintiffs. And the case law is quite clear, that there's no  
9 public interest whatsoever, meaning zero, in a constitutional  
10 violation. So doing anything that protects the ability to  
11 persist with a past violation --

12           THE COURT: But you said you haven't alleged a  
13 constitutional violation?

14           MS. KHAN: Oh, absolutely. Their actions violate the  
15 Constitution.

16           THE COURT: Okay. But not the constitutionality of  
17 the statute you have not raised?

18           MS. KHAN: That's right. Absolutely, we are alleging  
19 that their invitation to a student to deliver an invocation and  
20 a benediction is profoundly unconstitutional. It's  
21 indefensible under long-standing case law. And to simply  
22 restyle it, give it another name, doesn't undo that harm.

23           And the public's interest and the student's interest  
24 in presenting an unconstitutional message can't possibly be  
25 taken to outweigh or even diminish a constitutional violation.

1 The fact that the school district has a long-standing interest  
2 in a constitutional violation and the student may have an  
3 interest in helping in their unconstitutional violation cannot  
4 be taken to weigh in that balance.

5 And let me also say this. This student didn't come  
6 to them and ask to present a religious message. And there is  
7 evidence in the record that -- well, actually, let me back up  
8 there. I'm not entirely positive, but it is my understanding  
9 that some of the other speakers, like the valedictorian, has in  
10 the past included religious messages. So the prayer is not the  
11 only portion of the ceremony where students are given an  
12 opportunity. So if the valedictorian gets up there, as I  
13 understand has happened in past years, and says, "I owe a debt  
14 to a higher power for where I am today," that would be the kind  
15 of message that a student has created and adopts and endorses  
16 and speaks personally about.

17 In this case the school has asked the student to  
18 deliver an invocation. The school has asked the student to  
19 deliver the benediction. This isn't the students coming to the  
20 district and saying: Oh, please, please, let me say this.  
21 It's important to me.

22 THE COURT: And I suppose, theoretically, there could  
23 be a secular invocation and benediction given, although, again,  
24 it flies in the face of the historical use of those terms. But  
25 that's a good point.

1 All right. Give me what you feel are -- and, first  
2 of all, as far as the documentary evidence, Mr. -- so the  
3 record is complete, Mr. Wood, do you have any objection to  
4 these various programs and statutes and exhibits and so forth?

5 MR. WOOD: I don't have any objection, Your Honor, to  
6 the statute -- the statutes being included, the policies being  
7 included and the school district's programs being included.

8 THE COURT: Okay. Other than those kinds of  
9 undeniable documents, Ms. Khan, are there other things that we  
10 need to look at in terms of admissibility or -- I mean, you  
11 haven't slipped anything in that has *Mein Kampf* or anything  
12 like that?

13 MS. KHAN: Well, I do want to point the Court to the  
14 standards that govern the admission of evidence at the  
15 preliminary injunction stage.

16 THE COURT: Okay.

17 MS. KHAN: And there's a case University of Texas  
18 versus Camenisch, which is a U.S. Supreme Court case at 451  
19 U.S., and I'm talking about a pin site, 395, discussion at that  
20 particular page, where the Court said they're generally less  
21 formal, the evidence is less complete, the evidential  
22 requirements are also less formal. And the Fifth Circuit has  
23 explicitly said in *Sierra Club versus FDIC*, which is 992 F.2d  
24 at 551, that the Court can rely on hearsay.

25 So, you know, the sort of emergency nature of this --

1 and mind you, this case is especially emergent because, you  
2 know, we filed our complaint the day after learning they were  
3 going to persist with including the prayers. So our  
4 declarations also include important information about the  
5 long-standing history in this district. It's not just  
6 graduation prayer. Coaches lead sporting events, games,  
7 practices, in group prayer. Every athletic event includes a  
8 prayer. These people are not complying with long-standing  
9 federal law and --

10 THE COURT: But the one that's before us right now is  
11 graduation.

12 MS. KHAN: Yes, Your Honor. But I also really want  
13 to, you know, sort of frame this. And that's what the Court  
14 did in Doe versus Santa Fe, for example. It didn't just talk  
15 about the four corners of this policy. It talked about the  
16 history here and what the purpose of this policy was. And I  
17 think it's difficult not to put yourself in the shoes of the  
18 students and the community and the families who are going to  
19 perceive these presentations as government endorsed when every  
20 other prayer that the school district presents is also  
21 government endorsed.

22 THE COURT: All right. Well, and these great legal  
23 and constitutional issues take many years to evolve from the  
24 time that the federal courts speak until things actually get  
25 done in practice. And, indeed, I lived that process myself.

1 One of the lawyers for -- with the Thurgood Marshall team was a  
2 fellow named Harry Bellinger who practiced -- who lived about  
3 five miles east, or maybe not even that far. But in the  
4 1930s Mr. Bellinger was financially well enough off to go to  
5 law school. And his family paid taxes that supported a place  
6 called UT Austin, which is 75 miles up the road. But in the  
7 1930s Mr. Bellinger had to go to Pennsylvania to go to law  
8 school because he was not allowed to go there, in Austin, even  
9 though his family helped pay for it.

10 MS. KHAN: Wow.

11 THE COURT: And that didn't change until San Antonio  
12 lawyers named Maverick and Cadena brought a lawsuit called  
13 Sweatt versus Painter in the 1950s that finally desegregated  
14 UT law school. At the same time Mr. Bellinger was making it  
15 possible for his daughter and me to meet, because he helped to  
16 bring Thurgood -- I mean, Brown versus The Board. And as we  
17 all recall -- and so she and I were probably about the fourth  
18 graduating class to be integrated in San Antonio. It took --  
19 but it took from 1954, when we were in the first grade, to 1966  
20 to fully begin to implement Brown versus The Board.

21 And similarly, in 1896 the same Supreme Court, albeit  
22 different justices, said in Plessy, it's okay. You can have  
23 separate but equal. So it took 58 years to get from Plessy to  
24 Brown. So these things take a while.

25 And I have no doubt that if the good folks of Medina

1 Valley Independent School District are informed by the Court  
2 that things have changed and they need to follow Supreme Court  
3 and federal court law, I'm sure they will do that, both --  
4 football games, whatever it may be, hopefully without the  
5 necessity of more litigation and cost and so forth. But the  
6 law is the law.

7 Now, if the people of the United States want to amend  
8 the Constitution to make this a theocracy like you have in  
9 Israel or Afghanistan or other places, then that's fine. The  
10 people can do that. But they have to amend the Constitution.  
11 And until that time the Constitution will be interpreted and  
12 enforced by the federal courts.

13 And part of the -- in fact, there was a -- I think it  
14 was an Iranian lawyer somewhere recently, that were here in  
15 town, that were amazed -- I'm pretty sure it was an Iranian  
16 lawyer that -- who was amazed that in our society, although it  
17 takes a while to get there and implement, that if the federal  
18 courts and the Supreme Court say this is what the Constitution  
19 means, whether it's guns, prayer, whatever it may be, that we  
20 collectively say: Okay, that's the law.

21 Whereas in Iran, which is the theocracy, run by the  
22 religious folks, with no tolerance for those of different  
23 religious beliefs, that the Supreme Court might say A, and the  
24 theocracy government says: Nope, too bad. We're not going to  
25 do that. So we are blessed.

1           In fact, I'll give you one other example of how we  
2 take this for granted. Are any of you naturalized Americans  
3 by -- okay. We native born Americans I think take this for  
4 granted, and I did until -- I had been doing this kind of work  
5 for 25 years. And a lady on my jury was a naturalized American  
6 from a Latin American country. And I explained, after the jury  
7 verdict, that this particular defendant was only going to be  
8 sentenced to life in prison because the government of the  
9 United States had agreed not to extradite the defendant because  
10 he came from a Latin American country that does not have the  
11 death penalty, because of the religious influence of the  
12 Catholic church.

13           And I said that exactly like I just said it. And  
14 she -- it was as if she knew what I was going to say. Her hand  
15 immediately rose up. And she said: Oh, no, Judge. I have to  
16 correct you. We have the death penalty in Latin America. You  
17 just don't go to court before the government kills you. And I  
18 thought: Yeah, well, that's right. But we take all this Rule  
19 of Law for granted. And so I'm assuming that everyone involved  
20 will honor that American tradition.

21           All right. The exhibits are admitted. Any oral  
22 testimony -- and the standards that you alluded to will be  
23 followed in terms of taking into account the declarations of  
24 the plaintiffs and so forth. Any other oral testimony?

25           MS. KHAN: No, Your Honor. I believe we have

1 submitted everything we would like the Court to know in the  
2 form of declarations and other evidence.

3 My recollection of when Mr. Wood was talking was that  
4 there were two issues that there -- there was some lack of  
5 clarity on. One is whether the prayer-giver asks the audience  
6 to stand and bow their heads. I believe you turned. And I, at  
7 least, saw some head-nodding. I'm not sure if that's accurate.  
8 But I'm wondering if there's any necessity to take testimony on  
9 that. And the other is whether they were sectarian or not.

10 It seems to me that perhaps rather than trying to  
11 take dueling information or potentially dueling information on  
12 that, these graduation ceremonies, I assume, are videoed. And  
13 perhaps the best thing -- I offer this up as a suggestion for  
14 how to proceed -- would be to simply have the defendants  
15 furnish the Court, perhaps by close of business today, with  
16 videos of the graduation ceremony of the last two years. And  
17 then Your Honor is actually relying on the actual  
18 contemporaneous evidence about what happened there rather than  
19 having competing, somewhat stale recollections now, going back  
20 potentially several years.

21 THE COURT: Okay. All right. Mr. Wood, would you  
22 step up? You, of course, came to the show late, as we did, and  
23 haven't had an opportunity to do all of -- perhaps as much  
24 opportunity, certainly, to do all of the documentary exhibit  
25 types of things. And I'll ask you to refrain from answering

1 for just a moment. But the question will be: Do you wish to  
2 put on oral testimony, supplement the record with exhibits, as  
3 the plaintiffs have done? And certainly, I think the video --  
4 when we have these criminal cases -- and the DPS troopers now  
5 have the camera, and I have a motion to suppress, the camera  
6 doesn't lie about who said what and what the context of it was.  
7 So if that's not too much of a problem, if you could do that.

8           And while I'm thinking of it, at the very least, the  
9 full disclaimer under the statute will be put into the program.  
10 So that will be an affirmative order.

11           MR. WOOD: May I address that, Your Honor?

12           THE COURT: Uh-huh.

13           MR. WOOD: That particular point? The statute itself  
14 says this -- and I'm looking at 25.152. Because the statute  
15 doesn't -- the statute only requires that there be a  
16 disclaimer.

17           THE COURT: Ah.

18           MR. WOOD: 25.152(a)(4) says that it shall state,  
19 either in writing, orally or both, that the student speech does  
20 not reflect the endorsement, sponsorship, position or  
21 expression of the district.

22           THE COURT: Okay. So it doesn't have a suggested  
23 disclaimer?

24           MR. WOOD: The statute itself does not. Now, the  
25 model policy does speak to a disclaimer. And the model policy

1 contains a more extensive disclaimer. It just adds one  
2 additional sentence to the disclaimer that Medina Valley has  
3 already incorporated in its policy. But the statute does not  
4 require that any particular language be used with respect to  
5 the disclaimer. And, in fact, again, the disclaimer can simply  
6 be given orally.

7 THE COURT: Okay. Well, and -- okay. And I'm  
8 reading the disclaimer here. And I'm sure there are several  
9 different ways to get the same message across, and I think that  
10 suffices for right now without -- in terms of constitutional  
11 issues, or following the statute.

12 Now, on the constitutional issues there will also be  
13 an injunction that these speakers, if at all, will not say:  
14 Stand and bow your heads. Because that obviously has a  
15 religious connotation to it.

16 The word "invocation" and "benediction" will not be  
17 in the program this year and --

18 MR. WOOD: May I speak to that, too, Your Honor?

19 THE COURT: Uh-huh.

20 MR. WOOD: When I initially consulted with counsel,  
21 when I first learned that this lawsuit had been filed, that was  
22 one of the issues that I discussed with Mr. Flanary. And I  
23 told him that my understanding was that those were historical  
24 leftovers and that the district was willing to remove those.  
25 And I think counsel will confirm that we agreed that we would

1 remove those.

2 THE COURT: So no invocation, no benediction, no  
3 stand and bow your head. And these young people will need to  
4 be -- of any of them, but especially those who otherwise had  
5 been in the invocation, benediction part, will be instructed  
6 that they are not to have people stand and bow. Everyone will  
7 remain seated for that, just as they would for the valedictory.  
8 Now, the National Anthem, obviously, is a secular statement of  
9 our country, not religious. So that's all right.

10 Now, again, I'm trying not to -- what is the  
11 Hippocratic oath? First do no harm. And I -- while I  
12 appreciate the harm that the Schultz family has felt and the  
13 embarrassment and so forth, and the Court is addressing that as  
14 best it can this year, and then hopefully people can sit down  
15 and deal with the issues within their community in a civil,  
16 adult, mature way. Maybe if they let the kids do it, it could  
17 get done better. But at any rate.

18 That's like, I've told people that it appears that  
19 the women are really taking over the government and the legal  
20 community. And I said, well, you know, we've had 500 years to  
21 make a mess of it, so now you all can help fix it.

22 MR. WOOD: My wife reminds me of that regularly.

23 THE COURT: At any rate, certainly in the future  
24 year -- and we're dealing here on a short time span, the things  
25 that Ms. Khan mentioned about how this selection process and

1 whether it's broad enough to include people who might say  
2 things other than what these folks would say, think that needs  
3 to be addressed. It's too late for this year, obviously.

4 MR. WOOD: I think with respect to that, one of the  
5 things, Your Honor, I would point to is, again, the statute  
6 itself does not address that particularly, but the model policy  
7 says that we can have student council officers, class officers  
8 of the graduating class, which would be the seniors, the top  
9 three academically ranked graduates or a shorter or longer list  
10 of student leaders, as the school district may designate.

11 And so, again, the statute does not mandate any  
12 particular list. It just mandates that a group of students be  
13 identified in a neutral selection policy.

14 THE COURT: Yeah. And to the extent that there are  
15 conflicts between the policy and what's actually done, that  
16 needs to be addressed for consistency purposes. But as we've  
17 discussed, that does not rise, today at least, to the level of  
18 constitutional inquiry.

19 So there will be no standing and bowing of the head.  
20 There will be no words "invocation," "benediction" in the  
21 ceremony. And hopefully some creative educator can figure  
22 up -- figure out, again going back to the balancing act, to  
23 find some different nomenclature to put in instead of  
24 "invocation" and "benediction," that's nonreligious.

25 MR. WOOD: Understood.

1 THE COURT: And so that Ms. Petty -- and I think this  
2 is probably a young lady, Callison Gerard.

3 MR. WOOD: Yes, I believe that is.

4 THE COURT: So that they still have their moment in  
5 the sun. And though it would be good of them if -- well, they  
6 will. They will not say "may we pray" or "please join me in  
7 prayer" and so forth, in terms of those clearly religious  
8 statements. On the other hand, if what they have written and  
9 they choose to go with that and it talks about Muhammad or  
10 Allah or the Torah or whatever it may talk about, they may do  
11 that. They might want to try to tone it down in terms of  
12 having it be a little more secular. But they will not say  
13 "amen," "in the name of the Father, the Son and the Holy  
14 Ghost," and so forth, or whatever other phrases like that might  
15 be connected to other denominations.

16 But that's the best I can do for right now. And now,  
17 in terms of an actual formal order, consider this a formal  
18 order. I will expect the school district people to sit down  
19 with these young ladies and the people who are printing the  
20 book -- or the program, rather, to take care of these issues.  
21 And those in charge at the adult level will tell the student  
22 leaders what they're expected to do. And Ms. -- the two young  
23 ladies whom I referenced earlier will be instructed as to what  
24 the Court has decided. And then everybody count to ten, take a  
25 deep breath and let these kids enjoy their special moment so --

1 including young Mr. Schultz.

2 All right. Anything else, Ms. Khan, at this time?

3 MS. KHAN: I'm just wondering if the Court would  
4 consider asking -- including in the order that the  
5 presentations during the restyled portions actually be secular  
6 messages rather than religious messages. I'm concerned about  
7 the lack of clarity between -- on the one hand, you can't say  
8 "may we pray," you can't say "amen," you can't have certain  
9 religious terms in there, but you can have other kinds of  
10 religious terms.

11 THE COURT: Well, on the other hand, we talk -- as we  
12 talked earlier, if the valedictorian gets up and says -- goes  
13 on for two minutes about: I'm here today because of my Sunday  
14 school teacher and my parents made me pray and we said "now I  
15 lay me down to sleep" every night, and we said the Lord's  
16 Prayer before dinner, and goes on for four or five minutes,  
17 obviously, that's religious type speech.

18 MS. KHAN: That's right, Your Honor. It's not a  
19 prayer, though. And that's what I was -- there is a difference  
20 between that and a prayer. And I think we understand what that  
21 difference is. And that's -- I think that would clarify for  
22 these young kids and for the school district what's in and  
23 what's out, if the Court could include that the message shall  
24 not be a prayer.

25 THE COURT: Well, I will put that in there: It's not

1 to be a prayer. On the other hand, if these young ladies get  
2 up and say the same thing without invoking a deity, or they  
3 make a personal statement: I believe, myself, in a higher  
4 being, like I think Mr. Wood used that phrase. And they can  
5 make a personal statement of their own belief. I think that's  
6 certainly acceptable.

7 MS. KHAN: I agree with that, Your Honor. It's --

8 THE COURT: But in terms of invoking the power of the  
9 higher deity and what we normally think of as a prayer, yes, I  
10 agree.

11 Is that clear, Mr. Wood?

12 MR. WOOD: That's clear to me, Your Honor.

13 THE COURT: Okay. And, obviously, you may have to be  
14 involved in helping this as counsel as well.

15 Yes, ma'am. I'm sorry. You had --

16 MS. KHAN: No, that's it, Your Honor. I wasn't sure  
17 if you were directing your comments to me or Mr. Wood.

18 THE COURT: Okay. Now, what's going to happen is  
19 Ms. Sullivan is going to -- I've got a whole bunch of tomatoes  
20 that I've got to pick before they spoil. I grow --

21 MS. KHAN: Some things are more important than other  
22 things.

23 THE COURT: No, I think I've done my job.

24 Ms. Sullivan is going to draft what we've talked about and cite  
25 some of the cases. It won't be a lengthy formal order, but we

1 need to have something on the record so that you all will have  
2 guidance. And it's on the record and, therefore, punishable by  
3 contempt if it's not followed.

4 She is then going to fax or email that to you all for  
5 any modification, tweaking, that sort of thing.

6 I will try my best to sign it, certainly, no later  
7 than Thursday at noon. I'm hoping that you all will be able to  
8 get -- Ms. Sullivan's certainly going to work on it and get it  
9 to you. You all can look at it, so forth. If there are items  
10 that the counsel cannot agree on in terms of tweaking or  
11 additional language, then I'll decide. But hopefully we can  
12 get to a point of an agreed order at least as to form. And,  
13 obviously, Medina Valley doesn't have to agree to what the  
14 Court is ordering but -- and then I hope that in the long haul  
15 that the people who have various interests and concerns about  
16 these issues will -- long before graduation and football season  
17 next school year, will sit down and come to some community  
18 consensus on how to deal with these issues.

19 Ms. Khan, you said nothing else.

20 Mr. Wood, anything else?

21 MR. WOOD: No, thank you, Your Honor. We appreciate  
22 your time.

23 THE COURT: We're in recess.

24 MS. KHAN: Your Honor.

25 THE COURT: I'm sorry.

1 MS. KHAN: Oh, I'm sorry. I do have two housekeeping  
2 matters. One is I think you told us when you'll sign it. I'm  
3 wondering if there's any information about when Ms. Sullivan  
4 might have the order ready. And I ask only because I'm  
5 scheduled to be on a plane for a considerable part of tomorrow.  
6 And I, obviously, don't want to be unable to participate.

7 THE COURT: Oh, I think she'll have something this  
8 afternoon.

9 LAW CLERK: Or if it's easier for you all to try and  
10 draft it, and then I can -- if that's easier, that's fine, too.  
11 We can work together however you all want.

12 MS. KHAN: Is there a way for us to communicate with  
13 you?

14 LAW CLERK: Sure.

15 THE COURT: Sure. We have smoke signals. We have  
16 signal flags.

17 MS. KHAN: How shall we -- shall we talk after?

18 LAW CLERK: We'll get together. Yeah.

19 MS. KHAN: And then the other thing is the Court, as  
20 I understood it, has asked for videos to be presented,  
21 furnished to the Court but --

22 THE COURT: Sure. Again, to make it a part of the  
23 record. I'm sure there's some, if not professional, homemade  
24 video out there. If you can't get them, you can't get them.

25 MR. WOOD: I'm advised that we do not have any kind

1 of video that we maintain, Your Honor.

2 THE COURT: Okay. Well, at some point I suspect  
3 somebody videoed it before. But if need -- if we need to make  
4 the record, it doesn't have to be by 5:00 because this thing --  
5 I hope it doesn't go on a whole lot longer. But if it does,  
6 the Court will deal with it.

7 But why don't you do that. And your plane leaves at  
8 what time tomorrow?

9 MS. KHAN: I believe it's about 11:30.

10 THE COURT: Okay. Well, why don't you go back. And  
11 Mr. Wood, you all take a stab at -- in fact, Ms. Khan, why  
12 don't you draft it first? You all are the one who brought the  
13 lawsuit, send it to Mr. Wood. Joani has her -- Ms. Sullivan.  
14 Excuse me. When I call her Joani, it makes her feel younger.  
15 Ms. Sullivan has her notes. Mr. Poage has written it all down.  
16 I think we've touched all the bases.

17 And so, Ms. Khan, you take the first stab at it.  
18 Mr. Wood, you look at it. Ms. Sullivan will look at it. And  
19 I'm sure you all together can get something for me to sign  
20 tomorrow or Thursday, no later than Thursday. Okay? All  
21 right. Thank you. We're in recess.

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23 (End of requested transcript)

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I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter. I further certify that the transcript fees and format comply with those prescribed by the Court and the Judicial Conference of the United States.

Date: 6/2/2011

/s/ Chris Poage  
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