

# JANN-MICHAEL GREENBURG

Board Member  
Scottsdale Unified School District No. 48 Governing Board

December 17, 2020

*Via Electronic Delivery Only*

Ms. Michelle Marshall  
General Counsel  
Scottsdale Unified School District No. 48  
8500 E. Jackrabbit Road  
Scottsdale, AZ 85250  
mmarshall@susd.org

Dear Ms. Marshall:

## **RE: INVOCATION DURING ALL DISTRICT ATHLETIC AWARDS BANQUETS**

I am writing concerning an apparent violation of the First and Fourteenth Amendments of the United States Constitution. Specifically, Scottsdale Unified School District No. 48's ("SUSD") Athletics Department organizes multiple "All-District Athletic Awards Banquets" that feature religious invocations in violation of the Establishment Clause. I am requesting that this matter be reviewed by counsel and that district personnel be reminded that invocations at official district events are unconstitutional. I further request that SUSD cease this practice moving forward. Continuing this practice not only creates unnecessary liability for SUSD, but also serves to alienate members in our community who do not share the views expressed in the invocations. My reasoning is set forth below.

### **I. BACKGROUND**

SUSD's All-District Athletic Awards Banquets honor select SUSD students who participate in sports programs at each SUSD high school. The event is paid for by SUSD and features SUSD branded banners, event programs, and plaques given to the honorees. Further, honorees are introduced by their SUSD team coaches and called to the front of the banquet hall alongside their fellow teammates to be recognized and given their plaques. All attendees are invited by SUSD employees. Standard attendees include members of SUSD's governing board, SUSD's superintendent and various assistant superintendents, school principals, teachers, other SUSD employees, and, of course, SUSD students and their families and friends.

SUSD has held these official banquets since at least December 4, 2017, and to date has had eight of them, two of which I attended. At all eight of these banquets, SUSD invited Rev. Dr. Bruce R. Johnson, Scottsdale Presbyterian Church's pastor, to conduct an "invocation," which is identified as such in SUSD's event programs. The invocation occurs after guests are seated and Mr. Nathan Slater, SUSD's Athletics Director, has concluded his welcome remarks.

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## II. LAW

The First Amendment of the United States Constitution provides in part that “Congress shall make no law respecting the establishment of religion or prohibiting the free exercise thereof.” These clauses (the Establishment Clause and Free Exercise Clause, respectively) apply to states by virtue of the Fourteenth Amendment.<sup>1</sup> Since 1940, the Supreme Court has addressed prayer in public schools and at public school events on a number of occasions.<sup>2</sup> At issue in the present case is the apparent violation of the Establishment Clause, the test for which requires the government to demonstrate that its practice (1) reflects a clearly secular purpose, (2) has a primary effect that neither advances nor inhibits religion, and (3) avoids excessive government entanglement with religion.<sup>3</sup> *Lee v. Weisman* is particularly instructive here.

In *Lee*, public school principals were permitted to invite clergy members to give invocations and benedictions at middle and high school graduations. In one instance, a middle school principal invited a rabbi to give an invocation and benediction during a middle school graduation. The Supreme Court held that such invocations and benedictions were unconstitutional, even if nonsectarian.<sup>4</sup> The court found that

[a] school official, a principal, decided that an invocation and a benediction should be given; this is a choice attributable to the State, and from a constitutional perspective it is as if a state statute decreed that the prayers must occur. The principal chose the religious participant, here a rabbi, and that choice is also attributable to the State . . . the potential

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<sup>1</sup> *Cantwell v. State of Connecticut*, 310 U.S. 296, 303 to 304 (1940) (holding that the Establishment and Free Exercise Clauses apply to the actions of state legislatures by virtue of the Fourteenth Amendment); *Everson v. Board of Education of Township of Ewing, in County of Mercer*, 330 U.S. 1, 8 and 15 (1947) (holding that the First Amendment, including the Establishment Clause, applies to states by virtue of the Fourteenth Amendment and that the government may not aid one or all religions, or prefer one religion over another).

<sup>2</sup> *Engel v. Vitale*, 370 U.S. 421, 424 and 430 to 434 (1962) (finding that New York’s laws officially incorporating the Regent’s prayer in public schools violates the Establishment Clause, even though the prayer was non-denominational and students were not coerced to participate in its recitation); *School District of Abington Township, Pennsylvania v. Schempp*, 374 U.S. 203, 223 to 225 (1963) (finding that state laws requiring the daily reading of verses from the Holy Bible and the recitation of the Lord’s Prayer by students in unison in public schools violates the Establishment Clause, even though students could excuse themselves from participation); *Stone v. Graham*, 449 U.S. 39, 39 to 43 (1980) (finding that the posting of the Ten Commandments on walls in public school classrooms violates the Establishment Clause, even if the posters are financed by voluntary private contributions); *Wallace v. Jaffree*, 472 U.S. 38, 55 to 61 (1985) (finding that an Alabama law providing for meditation or voluntary prayer in public schools violated the Establishment Clause as the sponsor of the legislation made clear the law was enacted for the sole purpose of reintroducing prayer into public schools and thus had no secular purpose whatsoever); *Lee v. Weisman*, 505 U.S. 577, 586 to 587 (1992) (finding that the invitation of clergy to deliver invocations and benedictions at public school graduation ceremonies violated the Establishment clause, even if they were civic or nonsectarian in nature); *Santa Fe Independent School District v. Doe*, 530 U.S. 290, 301 (2000) (finding that a public-school district’s policy permitting student-led, student-initiated prayer during football games violated the Establishment Clause, even where students voted on whether to have such invocations and elected a student to deliver them, even if they were nonsectarian and nonproselytizing in nature).

<sup>3</sup> *Lemon v. Kurtzman*, 403 U.S. 602 (1971).

<sup>4</sup> *Lee*, 505 U.S. at 586 to 587.

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for divisiveness over the choice of a particular member of the clergy to conduct the ceremony is apparent.<sup>5</sup>

The Court further addressed whether the voluntary nature of high school graduations meant that there was no government “coercion” to participate in religious activity. The Court explained that high school graduations are not truly voluntary occasions for the student, even if such attendance is neither required for graduation nor receipt of a diploma.<sup>6</sup> The Court argued that the

[l]aw reaches past formalism. And to say that a teenage student has a real choice not to attend her high school graduation is formalistic in the extreme . . . absence would require forfeiture of those intangible benefits which have motivated the student through youth and all her high school years. Graduation is a time for family and those closest to the student to celebrate success and express mutual wishes of gratitude and respect, all to the end of impressing upon the young person the role that it is his or her right and duty to assume in the community and all of its diverse parts.<sup>7</sup>

To this end, the Court determined that

. . . the school district’s supervision and control of a high school graduation ceremony places public pressure, as well as peer pressure, on attending students to stand as a group or, at least, maintain respectful silence during the invocation and benediction. This pressure, though subtle and indirect, can be as real as overt compulsion . . . Finding no violation under these circumstances would place objectors in the dilemma of participating, with all that implies, or protesting.<sup>8</sup>

Consequently, the Court found that “[i]n this atmosphere the state-imposed character of an invocation and benediction by clergy selected by the school combine to make the prayer a state-sanctioned religious exercise in which the student was left with no alternative but to submit,”<sup>9</sup> in violation of the Establishment Clause.

### III. ANALYSIS

Certain facts differentiate the present situation from *Lee* and other relevant Supreme Court cases. Namely, that the event at issue is not a middle school or high school graduation and it occurs on private property as opposed to school grounds. However, these differences do not alter the reasoning provided by the Court in *Lee*. Still at issue is a decision by public school employees to include a religious invocation at an official district event.

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<sup>5</sup> *Id.* at 587.

<sup>6</sup> *Id.* at 593 to 599.

<sup>7</sup> *Id.* at 595.

<sup>8</sup> *Id.* at 593.

<sup>9</sup> *Id.* at 597.

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First, SUSD’s Athletics Director is a district employee and, as noted by the Court in *Lee*, a public-school official’s decision to include an invocation is a choice attributable to the state just “. . . as if a state statute decreed that the prayers must occur.”

Second, while the present awards event is not a graduation ceremony, the event is similarly meaningful to honored students. Like a graduation ceremony, its purpose is to “celebrate success and express mutual wishes of gratitude and respect” for the students’ hard work on and off the field. Like a graduation, honored students are introduced by SUSD coaches, receive plaques of recognition, have their photos taken (alongside their teammates), and, in some cases, receive scholarships. Similar to a graduation, district employees also “. . . retain a high degree of control over the precise contents of the program, the speeches, the timing, the movements, the dress, and the decorum of the students.”<sup>10</sup>

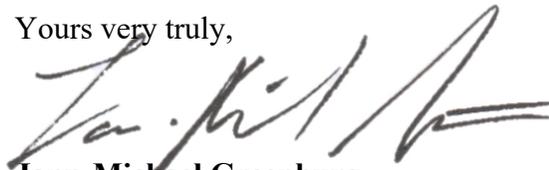
Even if an argument could be made that the two events are entirely different, the Court has separately held that student-led prayer at football games is unconstitutional, even if it is nonsectarian in nature and attendance by those present is entirely voluntary.<sup>11</sup> Thus, the mere fact that the awards ceremony is not a graduation is no hinderance to this analysis.

Finally, while attendance is (in theory) entirely voluntary, honored students face similar pressure to attend these events. They are nominated by their coaches and are mostly nominated alongside other select members of their team. Parents (and close friends) are also invited to attend to share in the celebrations. Likewise, their names are listed in the program. Further, as the Court has noted in multiple cases, it cannot be argued that the issue of the invocation is resolved by the ability of attendees to leave for its duration.<sup>12</sup> Even if it could, leaving is essentially impossible given that the invocation occurs when everyone is already seated for dinner.

## IV. CONCLUSION

Based on the above, I believe SUSD’s inclusion of a religious invocation during its All-District Athletic Awards Banquets is unconstitutional. I ask that SUSD cease having invocations at future SUSD events.

Yours very truly,



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<sup>10</sup> *Lee*, 505 U.S. at 597.

<sup>11</sup> See *Santa Fe Independent School District v. Doe*, 530 U.S. 290, 301 (2000).

<sup>12</sup> *Lee*, 505 U.S. at 596; *Engel v. Vitale*, 370 U.S. 421, 430 (1962); *School District of Abington Township, Pennsylvania v. Schempp*, 374 U.S. 203, 224 to 225 (1963).