No. 09-_____

In The Supreme Court of the United States

KATHRYN NURRE,

Petitioner,

v.

DR. CAROL WHITEHEAD,
in her individual and official capacity as
Superintendent of Everett School District No. 2,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the censorship of a student-selected, instrumental-only performance of "Ave Maria" within a limited public forum at a high school graduation ceremony violate the First Amendment's Free Speech Clause?

PARTIES TO THE PROCEEDINGS

Petitioner in this case is Kathryn Nurre. Respondent is Dr. Carol Whitehead, in her individual and official capacity as Superintendent of Everett School District No. 2, a governmental entity created, existing and operating under the laws of the State of Washington.

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OPINIONS BELOW

The divided panel opinion of the United States Court of Appeals for the Ninth Circuit is reported as *Nurre v. Whitehead*, 580 F.3d 1087 (9th Cir. 2009), and is set forth in the Appendix beginning at 1a. The opinion of the district court is reported as *Nurre v. Whitehead*, 520 F. Supp. 2d 1222 (W.D. Wash. 2007), and is set forth in the Appendix beginning at 32a.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on September 8, 2009. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution provides as follows:

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

Everett School District No. 2 School Board Procedure 2340P titled "Religious-Related Activities and Practices" provides, in relevant parts, as follows:

> I. Religious services, programs or assemblies shall not be conducted in school facilities during school hours or in connection with any school sponsored orschool related activity. Speakers and/or programs that convey a religious or devotional message are prohibited.

This restriction does not preclude the presentation of choral or musical assemblies, which may use religious music or literature as a part of the program or assembly.

Musical, artistic and dramatic presentations, which have a religious theme maybe included in course work and programs on the basis of their particular artistic and educational value or traditional secular usage. They shall be presented in a neutral, non-devotional manner, be related to the objective of the instructional program, and be accompanied by comparable artistic works of a non-religious nature.

Since a variety of activities are included as part of a holiday theme, care must be exercised to focus on the historical and secular aspects of the holiday rather than its devotional meanings. Music programs shall not use the religious aspect of a holiday as the underlying message or theme. Pageants, plays and other dramatic activities shall not be used to convey religious messages. Religious symbols such as nativity scenes, if used, shall be displayed in conjunction with a variety of secular holiday symbols so that the total presentation emphasizes the cultural rather than religious significance if the holiday.

STATEMENT OF THE CASE

Petitioner Kathryn Nurre brought this action seeking relief under 42 U.S.C. § 1983, alleging that Respondent, Superintendent Carol Whitehead, had engaged in unjustified censorship of expression and had taken actions exhibiting hostility toward religion, all in violation of Nurre's rights under U.S. Const. amend. I. The United States District Court for the Western District of Washington granted Respondent summary judgment on all the claims. 71a. A divided panel of the Court of Appeals for the Ninth Circuit affirmed that judgment. 2a.

In June 2006, Nurre was a student at Henry M. Jackson High School ("JHS"), a secondary school operated by the Everett, Washington, School District No. 2. She received her high school diploma at graduation ceremonies held in the Everett Events Center on June 17, 2006.

During her senior year and for the two previous school years, Nurre was a member of the JHS Wind Ensemble, an instrumental music group that is the most advanced instrumental group at JHS (ER at 117)[1]. She played alto saxophone in the Wind Ensemble and, like other members, was selected based upon merit after auditioning. The Director of the Wind Ensemble was Lesley Moffat, JHS's Director of instrumental music since the 2002-2003 school year (ER at 115-16).

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[1] "ER" references are to the Excerpts of Record filed in the appeal to the Court of Appeals.

As in previous years, the Wind Ensemble was expected to perform at the 2006 JHS graduation ceremonies. Part of this traditional performance by the Wind Ensemble included the selection by the Ensemble's graduating seniors of an instrumental work to be performed at graduation (ER at 118, 245). In May of 2006, the Wind Ensemble seniors, including Nurre, met with Moffat about selecting a piece to play at graduation. During this meeting, the members noted that the previous three senior classes had all chosen the same piece, "On a Hymnsong of Phillip Bliss" (ER at 122-24, 125-26). Nurre and her fellow seniors wanted to select and play a different song. The only serious choice that emerged from this discussion was a piece the Ensemble had performed earlier in the year: Franz Biebl's "Ave Maria" (ER at 125, 127, 251). The choice of Biebl's 1964 composition was unanimous.[2] (ER at 128, 251).

The seniors chose to play Biebl's "Ave Maria" because of its beauty, its suitability to the Ensemble's sound, and the memory of the song from previous performances (ER at 126, 264). The performance of "Ave Maria" would be wholly instrumental with no singing or lyrics. Nurre and the other seniors did not choose the piece because of

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[2] Biebl's 1964 rendition of *Ave Maria* is completely different from the more familiar Franz Schubert version, Op. 25, No. 6, composed in 1825. *Compare* the Biebl version sung by the Cornell Glee Club at http://www.youtube.com/watch?v=wCXnhYgoHDw&feature=related (last viewed November 18, 2009), with the Schubert version sung by Luciano Pavarotti at http://www.youtube.com/watch?v=2uYrmYXsujI (last viewed November 18, 2009).

any religious message it might convey (ER at 128, 258-59). The Ensemble had previously performed Biebl's "Ave Maria" at a winter concert; the Latin title was listed in the program for that concert. (ER at 126, 246).

Music Director Moffat sent copies of the music to Terry Cheshire, Principal of JHS, and Karst Brandsma, the District's Associate Superintendent for Instruction. Moffat wrote in an accompanying note that the senior members chose "Ave Maria" as their instrumental selection for the ceremony (ER at 150). On the top of the musical score she forwarded, Moffat wrote in bold "Not sung," indicating there would be no vocal parts or lyrics (ER at 175).

Principal Cheshire took note of the selection because of an alleged controversy that arose relating to the 2005 JHS graduation ceremony. A student choir had performed a song titled "Up Above My Head". The song contained references to "God" and "angels", but did not contain references to any particular religion.[3] School officials stated during

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[3] As set forth at http://www.mp3lyrics.org/k/kirk-franklin/up-above-my-head/, the lyrics are:

Up above my head I hear music in the air
Up above my head there's a melody so bright
And fair
I can hear when I'm all alone
Even in those times when I feel all hope is gone
Up above my head I hear joybells ringing
Up above my head I hear angels singing
There must be a God somewhere
There must be a God somewhere

I hear music in the air
I hear music everywhere

deposition that they received complaints about the religious nature of "Up Above My Head," but the *only* specifically documented complaint about the earlier 2005 graduation that Respondent admitted to the record was a single letter to the editor of a local paper mocking the educational competence of the Superintendent and her subordinates:

> I would like to express my puzzlement over how. . .[the] superintendent, south area executive director, principal and choir director can justify classroom civics instruction on the importance of our national and state constitutions specifically relating to policy regarding religious activity, while willfully disregarding the same by sponsorship of nonsecular entertainment during a public graduation ceremony. . . . Is that the final lesson of our students' education? If, in fact, the lesson was to demonstrate the meaning of hypocrisy, an "A" grade should be awarded. . . .

(ER 287). Principal Cheshire contacted District Executive Director Lynn Evans, who in turn contacted Superintendent Carol Whitehead to discuss the students' selection of "Ave Maria" (ER at 222). Whitehead then convened a meeting with Evans and Brandsma to discuss the students' selection.

There must be a God somewhere

There must be a God somewhere
There must be a God somewhere
There must be a God somewhere

Without student input or involvement, the administrators unilaterally decided to prohibit the seniors from playing "Ave Maria" at the graduation (ER at 223). Whitehead testified that "we made the decision that because the title of the piece would be on the program and it's 'Ave Maria' and that many people would see that as religious in nature, that we would ask the band to select something different" (ER at 223-24). Her sole concern and that of those attending the meeting was the listing of the two-word title in the program (ER at 216, 228), though no one at the meeting admitted to knowing what the words "Ave Maria" meant, other than it seemed to have a religious connotation (ER at 229). Whitehead stated that it would not have been "appropriate" to allow the students to play "Ave Maria" without listing the title in the program, even though titles to numerous other instrumental pieces played at the beginning of the graduation ceremonies by the Jazz Combo were not identified in the printed program except under the more general heading "Prelude Concert." (ER at 225-26).

Following the meeting, Associate Superintendent Brandsma sent an e-mail at Whitehead's direction, to high school principals concerning musical selections for the respective high school graduations (ER at 148). After requesting that the principals provide a copy of the selections to be played or sung with copies of any lyrics, Brandsma noted that School Board Policy 2340 and Procedure 2340P allowed for musical presentations with religious themes if the selections are based upon their artistic and educational value and are

accompanied by comparable works of a non-religious nature. Brandsma nevertheless insisted that

> music selections for graduation be entirely secular in nature. My rationale is based on the nature of the event. It is a commencement program in celebration of senior students earning their high school diploma. It is not a music concert. Musical selections should add to the celebration and should not be a separate event. Invited guests of graduates are a captive audience. I understand that attendance is voluntary, but I believe that few students (and their invited guests) would want to miss the culminating event of their academic career. And lastly there is insufficient time at graduation to balance comparable artistic works.

(ER at 148).

After receiving a copy of Brandsma's e-mail, and a discussion with Principal Cheshire, Moffat asked for clarification and suggested that the program simply list the piece as "A selection by France [sic] Biebl" (ER at 130). But Cheshire told her that this would not be "ethical," although he did not elaborate as to how this would be unethical (ER at 131).

The Respondent's decision upset Nurre and the other Ensemble seniors particularly because every previous year seniors had selected their own music without censorship. (ER at 131-32, 254) The censorship was difficult to understand because the Ensemble had previously performed it earlier in a school concert (ER at 260). Rather than boycott the ceremony, the seniors performed a movement from Holst's "Second Suite for Military Band," at the June 17, 2006, graduation ceremony (ER at 132, 236).

The graduation program included numerous other student-performed instrumental and vocal selections, as well as student speakers from the Class of 2006. The JHS Jazz Combo opened the graduation program with six separate *instrumental* works: "Freedom Jazz Dance," "Day by Day," "Let's Fall in Love," Unforgettable," "Un Poco Loco," and "Traveling Light." (ER 225) Next followed the instrumental-only processional to the tune of Elgar's "Pomp and Circumstance," which was also used for the recessional. (ER 146) Once in, the assembled graduates stood to the "National Anthem," sung by Aubrey Logan of the Class of 2006. (ER 146). Following opening remarks and a speech entitled "New Beginnings" by a Class Speaker, the JHS Choir performed "Mother Africa." *Id.*[4] Two more

[4] There are also lyrics to "Pomp and Circumstance" which include repeating twice the following phrase: "God who made thee mighty, Make thee mightier yet." See 85a. The 2006 performances of Elgar's "Pomp and Circumstance" at the JHS graduation and the censorship of Biebl's "Ave Maria" also contrasts with the first performance of "Pomp and Circumstance" in the United States at Yale University's 1905 graduation, which was preceded by *'Seek Him that maketh the seven stars'* from Elgar's *Light of Life (Lux Christi),* and Martin Luther's *Eine Feste Burg (A Mighty*

Class Speakers followed with speeches on "Echos" and "Joy, Peace, Love, Happiness" before the graduating class was formally presented for graduation. *Id.* Thus, despite the School policy permitting music with religious themes to be performed at school programs when accompanied by works of a non-religious nature, Superintendent Whitehead interpreted that policy as permitting *only* secular music in the face of potential controversy at graduation.

Nurre filed this action against the Respondent Superintendent in her individual and official capacities and requesting relief under 42 U.S.C. § 1983. The Complaint alleged that the Respondent's action in refusing to allow the solely instrumental performance of "Ave Maria" at the graduation deprived Nurre of her rights under (1) the Free Speech Clause of the First Amendment, (2) the Establishment Clause of the First Amendment, and (3) the Equal Protection Clause of the Fourteenth Amendment. After discovery, the parties filed cross-motions for summary judgment. On those motions, the District Court granted the Respondent's motion and denied Nurre's motion (71a), and Nurre appealed.

A divided panel of the Court of Appeals for the Ninth Circuit affirmed the judgment. Addressing Nurre's First Amendment free speech claim, the panel majority noted that the Respondent did not

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Fortress). Sir Edward received an Honorary Doctor of Music from Yale at the exercise. *See* Elgar, *His Music – Pomp and Circumstance,* http://www.elgar.org/3pomp-b.htm (last viewed November 17, 2009).

challenge Nurre's claim that a limited public forum existed within the context of the JHS graduation ceremony, allowing senior wind ensemble members such as Nurre to engage in expression by choosing a piece to perform at the ceremony (11a). However, the panel majority found the restriction on Nurre's expression to be reasonable because "the District was acting to avoid a repeat of the 2005 controversy by prohibiting any reference to religion at its graduation ceremonies. District administrators recognized the evident religious nature of 'Ave Maria' and took into consideration the compulsory nature of the graduation ceremony." (12a).

In dissent, Judge Milan Smith declared that Nurre's First Amendment free speech rights were violated and warned that the majority's opinion would have the practical effect of causing school administrators to purge student artistic presentations of works of fundamental importance to our cultural heritage. Assessing the reasonableness of the restriction, Judge Smith wrote that "[i]n my view, purging such a ceremony of all vestiges of religiously inspired art and culture-including those works with even the most attenuated connections to religion-did not advance the purpose of recognizing and providing a forum for student achievement." (26a-27a).

REASONS FOR GRANTING THE WRIT

The censorship in this case involves political correctness run amuck, with art and student expression sacrificed to a heckler's veto that seeks to sanitize even the remotest vestige of religion from

public life. As the dissenting judge below warned, the practical effect of the panel majority's opinion "will be for public school administrators to chill—or even kill—musical and artistic presentations by their students in school-sponsored limited public fora where those presentations contain any trace of religious inspiration[.]"(23a). The majority's view legitimizes and endorses discriminatory decision-making keyed to "avoidance of controversy" and appeasement of narrow-minded social sensitivities banning all religious viewpoints. It also blinks at a clear record showing that the performance was permissible under existing School policy that permits the balancing of musical works to advance student expression and legitimate educational objectives. By misapplying the captive audience doctrine and perpetuating the legal fiction that expression with "religious connotations" may be proscribed at high school graduation ceremonies to avoid controversy (notwithstanding the absence of any legitimate Establishment Clause concern), the decision below sanctions censorship of artistic expression without any legitimate reason.

The Ninth Circuit's decision places at great risk countless opportunities for students nationwide to perform selected musical works of religiously-inspired origin. It also threatens important pedagogical interests forming the backbone of Western Art and Culture. In doing so, the underlying rationale for decision poses a significant challenge to principles set forth in the decisions of this Court and other circuit courts. And because it stands for the proposition that school administrators and other public officials may with impunity

sacrifice individual student expression to avoid offending the too easily offended, it warrants plenary review by this Court.

I.

A.

In *Tinker v. Des Moines,* 393 U.S. 503, 510 (1969), this Court made clear that student speech may not be censored based simply on "an urgent wish to *avoid the controversy* which might result from the expression." Writing for the Court, Justice Fortas declared that the "mere desire to avoid the *discomfort* and *unpleasantness* that always accompany an unpopular viewpoint" is simply not sufficient without more to censor student speech. *Id.* at 510. The protection afforded student speech by the First Amendment is plainly implicated here in light of the Respondent's concession in the lower courts that a limited public forum for expression existed under the established policies and practices for JHS graduation ceremonies. (11a) School officials admittedly opened the graduation ceremony for expression by the senior wind ensemble members by allowing them to choose a piece to perform at their graduation. *See Rosenberger v. Rector and Visitors of Univ. of Va.,* 515 U.S. 819, 829 (1995) (limited public forum is created when the government opens a forum for expression by certain groups on certain topics). [5]

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[5] There is also no serious dispute about whether Biebl's "Ave Maria" was constitutionally-protected expression. Both the district and circuit courts found that the music, even if performed without lyrics, constituted expression for purposes of the First Amendment. (9a, 43a).

The panel majority's decision in this case runs counter to the principles established in *Tinker* and *Rosenberger*. The majority transparently admits that "the District was acting to avoid a repeat of the 2005 controversy by prohibiting any reference to religion at its graduation ceremonies."(12a). In upholding this action, the majority rolls back the clock to sanction pre-*Tinker* standardless censorship of student speech simply to avoid official discomfort with controversy. Here, Superintendent Whitehead admittedly stopped the seniors-selected performance of "Ave Maria" "because it is a religious piece"(ER 227), and because she wanted to avoid complaints like those received after the 2005 graduation about the religious nature of a song, not because of any compelling state interest or constitutional mandate. (ER 86, 217-218). The Superintendent's motivation for the censorship was a desire to placate the anti-religious views of the writer of a solitary critical editorial about a song sung at the prior year's graduation, as well as other irrational misconceptions discussed below. Her decision to exclude all religious speech, in effect, excluded all

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"[A] narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a 'particularized message,' *cf. Spence v. Washington*, 418 U.S. 405, 411 (1974) (per curiam), would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll." *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 569 (1995) (emphasis added). Likewise, the school and district officials had opened the graduation ceremony for expression by the senior wind ensemble members (11a). Nurre and her wind ensemble classmates thus had a First Amendment interest in their choice to perform Biebl's "Ave Maria."

religious viewpoints and was undertaken with the intent to eliminate those viewpoints *en masse*.[6]

In approving this censorship, the Ninth Circuit panel employed forum analysis and a low-threshold view of what constitutes a "reasonable" basis for censorship. However, the "reasonableness" standard for adjudging a restriction on First

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[6] Although the panel majority held that "this is not a case of viewpoint discrimination" because "Nurre concedes that she was not attempting to express any specific religious viewpoint, but that she sought only to 'play a pretty piece,'" (relying on selected language from *Rosenberger*), Superintendent Whitehead's decision to exclude all religious viewpoints did run afoul of *Rosenberger*, where this Court not only stated that "[d]iscrimination against speech because of its message is presumed to be unconstitutional (515 U. S. at 828) but also *rejected* the argument that government was permitted to "discriminate against an entire class of viewpoints." That argument was deemed to be flawed because it was found to rest on "an insupportable assumption that all debate is bipolar and that anti-religious speech is the only response to religious speech." The Court continued: "[o]ur understanding of the complex and multifaceted nature of public discourse has not embraced such a contrived description of the marketplace of ideas. If the topic of debate is, for example, racism, then exclusion of several views on that problem is just as offensive to the First Amendment as exclusion of only one. It is as objectionable to exclude both a theistic and an atheistic perspective on the debate as it is to exclude one, the other, or yet another political, economic, or social viewpoint." *Rosenberger*, 515 U.S. at 832. Here, Whitehead's rejection of all religious music in favor of the performance of only secular music for graduation constitutes viewpoint discrimination because it was based on a "suspect" classification that acts to exclude multiple religious viewpoints, and permits all secular viewpoints. In both *Rosenberger*, and in *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993), the Court found the exclusion of all speech with religious perspectives was impermissible viewpoint discrimination.

Amendment freedoms is not "toothless." *Thornburgh v. Abbott*, 490 U.S. 401, 414 (1989); *cf. City of Cleburne, Texas v. Cleburne Living Center, Inc.*, 473 U. S. 432, 449 (1985) (No rational basis for governmental action taken in deference to the fears, wishes or objections of some faction of the body politic). Indeed, this Court held in *Tinker*, 393 U.S. at 509, that censorship of student speech is not reasonable if based upon an undifferentiated fear of controversy. A fear of controversy was precisely the basis identified by the Respondent and the decision below as justification for prohibiting the performance of "Ave Maria." As such, justification for the censorship of the performance was constitutionally inadequate and Nurre's right to Free Speech was patently violated.

The Ninth Circuit's ruling in this case is also unreasonable in its reliance on the legal fiction that anything having "religious connotations" must be excised from culminating school events. The majority's rationale was as follows:

> [W]e confine our analysis to a narrow conclusion that when there is a captive audience at a graduation ceremony which spans a finite amount of time, and during which the demand for equal time is so great that comparable non-religious musical works might not be presented, it is reasonable for a school official to prohibit the performance of an obviously religious piece.

(13a). This holding is contrary to this Court's precedents on several counts.

First, Superintendent Whitehead disclaimed knowing what the words *Ave Maria* even meant, though she viewed it as having a "religious connotation." (ER 229). It should be apparent that guesswork about "religious connotations" ought not override precious rights secured under the First Amendment's Free Speech Clause.

Second, this Court's seminal decision outlining the boundaries of religion in school graduation ceremonies is *Lee v. Weisman,* 505 U. S. 577 (1992). In *Lee*, the Court found a clear Establishment Clause violation arising from the principal's direct and active involvement in prescribing graduation prayer, thereby coercing a captive audience to participate in the *religious exercise* of prayer. Here, there was no religious exercise such as a sermon, prayer or worship. Nor was there any religious message. The song was to be performed instrumentally, with no lyrics. School officials did not select the song, the seniors did, as they had in years before, by custom and tradition. In doing so, they had no religious motivation. The rendition of the song was the Franz Biebl melody, not the familiar Franz Schubert melody which might otherwise conjure up a sense of religious familiarity. Thus, the constitutional injury in *Lee* --- forcing participants to participate in a state-prescribed religious exercise--- is entirely missing in this case and the music and its selection, and manner of performance, could not be more disparate in terms of constitutional consequences. The fact that some

expression might have "religious connotations," i.e., some suggestion of religious meaning (even if accurate in this case), does not translate into coercing someone to participate in a "religious exercise." The Superintendent's arbitrary extension of the law to stop the Wind Ensemble's performance, in light of the boundaries established by *Lee v. Weisman,* is thus arbitrary and unreasonable, and certainly not mandated by the Establishment Clause.

Third, the Ninth Circuit panel's captive audience justification also does not withstand analysis under either *Lee* (for the reasons stated above), or the Court's other principal captive audience case, *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974). That case involved "car card" advertising in a bus line run by the City in its proprietary capacity. The court rejected a constitutional challenge based on the captive audience theory finding that protections for speech in commercial venues had historically been less robust and more subject to regulation or restriction than other speech. More importantly, this Court has recognized the reality that "[t]he plain, if at times disquieting, truth is that in our pluralistic society, constantly proliferating new and ingenious forms of expression, 'we are inescapably captive audiences for many purposes.' . . . . Much that we encounter offends our esthetic, if not our political and moral, sensibilities. Nevertheless, the Constitution does not permit government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or

viewer." *Erznoznik v. City of Jacksonville,* 422 U.S. 205, 210 (1975).

Fourth, the panel's unreasonable conclusion that "the demand for equal time is so great that comparable non-religious musical works might not be presented" at graduation is wholly belied by the record. Fully eight secular-oriented instrumental works were presented during the graduation program, six at the beginning and two for the processional and recessional. (ER 146, 225) In addition, two musical works were sung by class members, along with three student-delivered speeches. This panoply of "senior" speech fully mitigated any impact that an instrumental performance of Biebl's "Ave Maria" might have had on the ceremony. Whitehead's skewed interpretation of School policy (that otherwise permits religious songs in a balanced environment) was unreasonable in light of the purpose of the forum and the remaining musical performances that occurred. Far from being seen for religious connotations, the performance would, as Judge Smith recognized, advance the very purpose of the graduation ceremony to "acknowledge the achievements of the Jackson High students" and provide them with "the opportunity to express themselves through speech and music." (26a). Its censorship completely undermined these purposes and was unreasonable in light of those purposes.

In sum, Superintendent Whitehead's decision to censor amounted to pristine censorship of all religious viewpoints and unreasonable on several counts. It was based on guesswork and an

undifferentiated fear of controversy. The performance did not require attendees to participate in a religious exercise because there was no religious exercise. Accordingly, the audience was no more "captive" to the performance than it was in listening to the other music (some with, and more without, lyrics) and numerous speeches at the event, which some may have considered equally offensive. There was no Establishment Clause violation. To the contrary, Whitehead's decision flew in the face of established school policy that permitted religiously-inspired works to be performed when they could be balanced with comparable non-religious musical works. Finally, Whitehead's action was contrary to the very purposes of the graduation ceremony in recognizing student expression and achievement without viewpoint discrimination

B.

Although school officials maintained Nurre's group was censored based on "complaints" from the 2005 graduation, they were able to substantiate only one complaint in the record, a letter to the local newspaper (ER 287). The author of that letter exhibited an extreme notion of the requirements of the Establishment Clause, arguing that all religious "entertainment" must be excluded from government supported venues or events. But as this Court and others have pointed out, the Establishment Clause is not violated by the display of art and other memorials containing religious themes or images in

publicly-supported venues.[7] Nor does government necessarily violate the Establishment Clause by simply facilitating the opportunity for individuals to participate in religious education, or by providing public school venues for religious meetings or activities, or adopting other programs that indirectly benefit religion.[8]

In like manner, school officials do not have an absolute and cavalier right to quash student speech simply because of selective public dissatisfaction with the expression. In *Good News Club v. Milford Cent. School*, 533 U.S. 98, 119 (2001), the school district argued that it prevented religious organizations from using school facilities because of the danger that children and other members of the public would view such access as an endorsement of religion. The Court refused to accept this "modified heckler's veto" based on perceptions of certain members of the public. In *Reno v. American Civil*

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[7] *See Lynch v. Donnelly*, 465 U.S. 668, 683 (1984) ("display of the crèche is no more an advancement or endorsement of religion than the Congressional and Executive recognition of the origins of the Holiday itself as "Christ's Mass," or the exhibition of literally hundreds of religious paintings in governmentally supported museums."); *Van Orden v. Perry*, 545 U.S. 677 (2005); *Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402, 407 (5th Cir. 1995) ("the Establishment Clause does not prohibit . . . choirs from singing religious songs as part of a secular music program[.]").

[8] *See Widmar v.Vincent*, 454 U.S. 263 (1981); *Witters v. Svcs. for the Blind*, 474 U.S. 481, 489 (1986); *Muller v. Allen*, 463 U. S. 388 (1983); *Mergens v. Westside School District*, 496 U.S. 226 (1990); *Lamb's Chapel, supra*; *Good News Club v. Milford Cent. School*, 533 U.S. 98, 106 (2001); *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993).

Liberties Union, 521 U.S. 844, 880 (1997), this Court likewise struck down a provision of the Communications Decency Act which had the effect of "confer[ing] broad powers of censorship, in the form of a "heckler's veto," upon any opponent of indecent speech.

To silence patently unobjectionable, constitutionally-protected expression merely because of the possibility that extremists may consider it objectionable is simply not reasonable. There must be "a specific showing of constitutionally valid reasons to regulate [the] speech" in question, *Tinker, supra,* 393 U. S. at 510-11, or a showing "that substantial privacy interests are being invaded in an essentially intolerable manner. . . . *Cohen v. California*, 403 U.S. 15, 21 (1971). "A less stringent analysis would permit a government to slight the First Amendment's role 'in affording the public access to information, discussion, debate, and enlightening ideas.'" *Consolidated Edison Co. of New York, Inc. v. Public Service Commission of New York,* 447 U.S. 530, 541 (1980) (*quoting First National Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978)). A contest of letter writing campaigns to newspapers ought not dictate whether expression is subject to censorship under our constitutional jurisprudence.

Indeed, because of the absence of a demonstrable Establishment Clause violation, which the panel majority notably failed to find in this case (20a-21a), it is axiomatic that "the purported state interest asserted here--in achieving *greater separation* of church and State than is already

ensured under the Establishment Clause of the Federal Constitution--is *limited* by the Free Exercise Clause and in this case by the Free Speech Clause as well." *See Widmar v. Vincent*, *supra*, 454 U. S. at 276. Undifferentiated fear of "religious connotations" does not create an Establishment Clause violation, nor does it permit arbitrary censorship of student speech.

C.

The Ninth Circuit's determination that it is reasonable to bow to unreasonable views of a vocal few puts it in direct conflict not only with the principles of *Tinker, Rosenberger*, *Widmar* and *Good News*, but also principles established and followed in decisions from other circuits. For example, in *Americans United for Separation of Church and State v. City of Grand Rapids*, 980 F.2d 1538 (6th Cir. 1992), the court rejected an Establishment Clause challenge to the placement of a menorah in a public park to celebrate Chanukah. In applying the endorsement test, the court warned against the danger that religious expression will be suppressed in response to those who look upon religion with a "jaundiced eye." Summing up this principle, the court wrote:

> This case presents another challenge to the right of free speech from those who do not like the message at issue or the manner in which it is presented. We believe that the plaintiffs' argument presents a new threat to religious speech in the concept of the

> "Ignoramus's Veto." The Ignoramus's Veto lies in the hands of those determined to see an endorsement of religion, even though a reasonable person, and any minimally informed person, knows that no endorsement is intended, or conveyed, by adherence to the traditional public forum doctrine. . . . We refuse to rest important constitutional doctrines on such *unrealistic legal fictions.*

Id. at 1553 (emphasis added).

Similarly, in *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252 (11th Cir. 2004), the court rejected the claim of school officials that they were justified in disciplining a student for engaging in an symbolic protest during the classroom recitation of the Pledge of Allegiance because the student's expression disturbed other students. The court cited *Tinker* for the principle that school officials may not justify silencing expression on the basis that the expression causes discomfort. The student's expression was not "removed from the realm of constitutional protection simply because [other] students cloaked their disagreement in the guise of offense or disgust. Holloman's behavior was not directed 'toward' anyone or any group and could not be construed by a reasonable person (including a high school student) as a personal offense or insult." *Holloman*, 370 F.3d at 1275.

II.

The signal sent by the Ninth Circuit's ruling in this case will likely, as predicted in Judge Smith's dissenting opinion, have a profound and unnecessarily adverse, potentially nationwide, impact upon student artistic expression. The panel majority's decision effectively instructs school districts around the country that it is in their best interest to err on the side of censorship, not only in situations that actually violate the Establishment Clause, but whenever school administrators themselves believe that the "religious connotations" *might* come into play "in light of [their] past experience and [their] understanding of the law." (21a). This grievously misguided message requires correction lest the culture be irreparably impoverished and innocent student expression vanquished by a judicially-sanctioned tyranny of the intolerant ignoramus.

Without the guidance of this Court, there is every reason to believe that school administrators nationwide will conclude that the "reasonable", safer course is simply to sacrifice student rights to expression and the right to receive information, *i.e.*, exposure to art with religious themes or inspiration. From an administrator's point of view, a blanket ban on religious works is much easier to implement than a policy that carefully balances legitimate Establishment Clause concerns with student freedoms in the particular situation. A blanket ban may be "reasonably perceived as an attempt to avoid conflict with the Establishment Clause," and thus be approved by the courts. (18a). The Ninth Circuit

decision creates a perverse incentive for administrators to take the safe route and avoid potential liability by infringing student rights. And because under the Ninth Circuit's decision administrators need only act with the desire to avoid controversy, there is no substantial limitation on official censorship.[9]

The effect of such a blanket ban on arts education would be dramatic. Major works that are obviously religiously inspired, such as Handel's *Messiah* and Mozart's *Requiem*, would be at immediate risk for removal from the music curriculum. Other less obvious classical works would also need to be avoided. Indeed, it may be impossible to compile a complete catalog of significant religiously inspired music. Johan Sebastian Bach,[10] Joseph Haydn,[11] Ludwig van

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[9] Superintendent Whitehead attempts to hide behind the cloak of qualified immunity on grounds that there is no clearly established law. However, once a school has opened up a limited forum, it "must respect the lawful boundaries it has itself set." *Rosenberger,* 515 U.S. at 832; *Good News Club,*, 533 U.S. at 109-10; *see also Lamb's Chapel*, 508 U.S. at 393-94 (1993). Moreover, not only is the case law on unlawful viewpoint discrimination settled, one need only read the contemporaneous e-mail from Choir Director Hunt sent to school administrators pointing out the obvious censorship and Free Speech violation arising from their ban on religiously-inspired music and the unreasonableness of that ban. See Hunt E-mail, 84a-86a.

[10] List of Bach's Works,
http://jsbach.org/completecategory.html

[11] List of Haydn's Works,
http://www.classicalarchives.com/haydn.html

Beethoven,[12] Franz Schubert,[13] Felix Mendelssohn,[14] Johannes Brahms,[15] and many others drew upon Christian themes for inspiration; Richard Wagner borrowed from Norse mythology for his famous opera cycle *Der Ring des Nibelungen*[16]; still others found inspiration in the divine pantheon worshipped by ancient Greeks and Romans. None are "entirely secular," and all are therefore subject to censorship by school officials under the Ninth Circuit's rationale for decision here.

More recent musical compositions are also at risk. Indeed, as Judge Smith notes, even "current popular music comprises a significant number of works that, though originally inspired by religion, have since become largely secularized."(26a). The piece at issue in this case—Franz Biebl's *Ave Maria*—was composed in 1964.[17] Students who perform rock-and-roll or pop tunes are likely to encounter problems. The Beatles sang about "Mother Mary" in *Let it Be*. *Stairway to Heaven* by Led Zeppelin, *The Prayer* by Celine Dion, and *Livin'*

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[12] List of Beethoven's Works, http://www.lvbeethoven.com/Oeuvres/ListOpus.html

[13] List of Schubert's Sacred Works, http://www.franzschubert.org.uk/works/sacred.html

[14] List of Mendelssohn's Sacred Works, http://www.classical.net/music/composer/works/mendelssohn/stage.php#sac

[15] List of Brahms' Works, http://w3.rz-berlin.mpg.de/cmp/brahms_works.html

[16] Der Ring des Nibelungen, http://www.economicexpert.com/a/Der:Ring:des:Nibelungen.htm

[17] Franz Biebl Biography, http://www.classiccat.net/biebl_f/biography.htm

on a Prayer by Jon Bon Jovi all contain allusions to religion in their titles. *Survivor* by Destiny's Child could be banned for the line "I'm not gonna compromise my Christianity." Rufus Wainwright's *Hallelujah*, which uses stories of King David from the Hebrew Bible as an allegory for the pitfalls of romance, would surely be rejected. References to Christianity are prominent in country music as well, as evidenced by Carrie Underwood's number-one hit *Jesus Take the Wheel*, Lee Greenwood's *God Bless the U.S.A.*, and even The Charlie Daniels Band's *The Devil Went Down to Georgia*. The extent of potential censorship is tremendous and touches every musical genre from every time period.

Musical theater works are similarly threatened. Many popular pieces for the stage lifted their plots from stories of the Bible; see, for example, *Joseph and the Amazing Technicolor Dreamcoat* and *Jesus Christ Superstar*, both by seven-time Tony winner Andrew Lloyd Webber, and *Godspell* by six-time Tony award nominee Stephen Schwartz. Other works, such as Jerry Brock and Sheldon Harnick's *Fiddler on the Roof*, are not based upon scripture but could be stricken simply for their emphasis on religious concepts and cultures. *Fiddler on the Roof* is the seventh most frequently performed musical in American high schools.[18] And the performance of Rogers and Hammerstein's *Sound of Music* might be barred in light of the Roman Catholic context and religious themes throughout the musical.

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[18] Richard Zoglin, *Bye Bye, Birdie. Hello, Rent*, TIME, May 15, 2008, at 51.

Nothing in the Ninth Circuit's opinion indicates that its rationale is to be limited solely to the musical context. The creep of precedents, in response to unrelenting assaults of disgruntled hecklers, may be expected to reach out to the visual arts or musical theatre works as well. Students could be deprived of the opportunity to study pieces of widely recognized artistic merit, such as Leonardo da Vinci's famous *The Last Supper*, simply because they contain religious themes. Michelangelo's paintings on the Sistine Chapel ceiling and his sculptures *David* and *Pietà* would also be candidates for removal. Even the slimmest connection to religion is sufficient to justify censorship under the decision below. Biebl's *Ave Maria* was rejected merely because its title sounded religious to school administrators, even though the song itself had no religious content since it was an unfamiliar piece performed without lyrics. (9a, n. 4). Sculptures like *God*, by Morton Schamberg, could meet a similar fate. Its title is clearly religiously inspired, which is enough to get it banned from schools, but the work actually depicts a twisted pipe on a wooden block.[19] Similarly, Francis Bacon's abstract series would probably not have any religious implications for most viewers, except for those who knew the title he gave them: *Three Studies for Figures at the Base of a Crucifixion*.[20]

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[19] Image available at http://www.nga.gov/exhibitions/2006/dada/artwork/von.shtm

[20] Image available at http://www.tate.org.uk/britain/exhibitions/francisbacon/roomguide/4.shtm

A purely secular educational system, purged of any reference to any religion, threatens to deprive American youth of a rich and diverse cultural heritage. Art, music, literature, and history show us where we have come from and bring meaning to our lives. As Judge Smith put it, "[t]he taking of such unnecessary measures by school administrators will only foster the *increasingly* sterile and hypersensitive way in which students may express themselves [...] and hasten the retrogression of our young into Philistines, who have little or no understanding of our civic and cultural heritage." (emphasis added) (24a). The judiciary's complicity in restricting the range and diversity of voices in American education cannot be ignored or minimized. By granting school administrators standardless power to censor anything with even the slightest connection to religion, the Ninth Circuit's decision has done a great disservice to public school students around the country, restricting rights of free expression, jeopardizing academic freedom, and narrowing tenets encouraging a broad-based education. Unless this Court intervenes, school administrators will have every legal incentive under such mistaken decisions to continue their reaction to controversy by purging altogether religiously inspired works of music, art, and literature from public education.

CONCLUSION

For the reasons stated above, this Court should grant certiorari in this case to provide much-needed guidance to government and school officials

who, at the expense of constitutionally-protected expression, choose to yield to hecklers seeking the extirpation of even trace allusions to religion at publicly-supported events.

Respectfully submitted,

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No. 09-_____

In The Supreme Court of the United States

KATHRYN NURRE,

Petitioner,

v.

DR. CAROL WHITEHEAD,
in her individual and official capacity as
Superintendent of Everett School District No. 2,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

APPENDIX

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 07-35867

KATHRYN NURRE,	)	
Plaintiff-Appellant,	)	
	)	
v.	)	No. 07-35867
	)	D.C. No.
CAROL WHITEHEAD, in	)	CV-06-00901-RSL
her official and individual	)	
capacity as the	)	OPINION
Superintendent of Everett	)	
School District No. 2,	)	
Defendant-Appellee.	)	

Appeal from the United States District Court
for the Western District of Washington
Robert S. Lasnik, Chief District Judge, Presiding

Argued and Submitted
January 22, 2009—Seattle, Washington

BEFORE: BEEZER, TALLMAN, and SMITH, Circuit Judges

RICHARD C. TALLMAN Circuit Judge. Once again we enter the legal labyrinth of a student's First Amendment right to free speech. There exists a delicate balance between protecting a student's right

to speak freely and necessary actions taken by school administrators to avoid collision with the Establishment Clause. While finding our way is never easy, we here endeavor to provide guidance to assist both school districts and their students.

Kathryn Nurre ("Nurre") sought to perform an instrumental version of "Ave Maria"[1] at her public high school's graduation ceremony. Dr. Carol Whitehead ("Whitehead"), superintendent of Everett School District No. 2 (the "District"), in which Nurre's high school is located, declared that the piece could not be played at the ceremony because it could be seen as endorsing religion. Nurre subsequently sued Whitehead in both her individual and official capacities for alleged violations of Nurre's First and Fourteenth Amendment rights. Nurre now appeals dismissal of her civil rights claims brought under 42 U.S.C. § 1983.

Supreme Court precedent and the law of our circuit counsel us to find that there was no violation of Nurre's constitutional rights. Therefore, we affirm the ruling of the district judge.

I

Everett School District No. 2 is a large western Washington school district consisting of twenty-five individual schools. The Henry M. Jackson High

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[1] "Ave Maria" is Latin for "Hail Mary," and was written by Franz Biebl to put to music the words of a well known Roman Catholic prayer.

School[2] ("JHS") is one of three high schools within the District. JHS conducts an annual graduation ceremony featuring speakers, musical selections, a presentation of diplomas, and a ceremonial tassel turn led by one designated student. All graduation ceremonies are sanctioned by the District and held at the local convention center in Everett.

Prior to the 2005 graduation ceremony, newly-hired JHS principal Terry Cheshire ("Cheshire") reviewed the titles of all musical selections to be performed for the audience of students, family, and friends. Seeing no issue with any piece proposed by the school's musical directors, Cheshire approved the performance of all requested selections. At graduation, the student choir performed "Up Above My Head," a vocal piece which included express references to "God," "heaven," and "angels." Immediately following graduation, the District received complaints from graduation attendees regarding the religiously-themed musical selections, and the local newspaper, *The Everett Herald,* printed indignant letters to the editor complaining about religious statements included in the ceremony's music performed before the audience.

As the 2006 graduation neared, Cheshire again previewed the titles to each ensemble's musical selections for the ceremony. In keeping with her three-year tradition, the high school band director, Leslie Moffat ("Moffat"), permitted the graduating

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[2] Named in honor of Everett's native son, former United States Congressman and Senator Henry M. "Scoop" Jackson.

members of her Wind Ensemble to select a piece from their musical repertoire which they wished to perform during the ceremony. Though all three previous classes had selected "On a Hymnsong of Philip Bliss," the 2006 graduates, including Nurre, chose instead to perform "Ave Maria," which they believed showcased their talent and the culmination of their instrumental work. Moffat sent this title and other graduation selections-including, *inter alia,* "Pomp and Circumstance"-to Cheshire for approval. Cheshire immediately recognized "Ave Maria" as a religious piece. Recalling prior complaints over the 2005 religious musical selection, instead of approving them, he forwarded the lists on to the District's associate superintendent Karst Brandsma ("Brandsma").

District administrators, including Brandsma and Whitehead, then held a meeting to determine the appropriateness of performing "Ave Maria" at the JHS graduation. They determined that because the title and meaning of the piece had religious connotations-and would be easily identified as such by attendees merely by the title alone-they would ask the Wind Ensemble to select another piece. Brandsma then sent an e-mail to all principals in the District explaining that musical selections for all graduations within the District should be purely secular in nature. The e-mail also reminded the principals that while District policies typically permitted performance of religious music at mid-year concerts-so long as it was performed for its artistic value and alongside an equal number of other non-

religious works-graduation was a unique event where such contemporaneous balanced performances were impracticable. Following this direction, Nurre and the other senior Wind Ensemble members reluctantly elected to perform the fourth movement of Gustav Holst's "Second Suite in F for Military Band."

Nurre filed suit in the Western District of Washington bringing three 42 U.S.C. §1983 claims alleging violations of her rights under the First Amendment and the Equal Protection Clause. In 2007, the district court held that Whitehead was immune from suit under the doctrine of qualified immunity. *Nurre v Whitehead*, 520 F. Supp. 2d 1240 (W.D. Wash. 2007). The court also found that the District had not violated any of Nurre's constitutionally protected rights, and therefore no municipal liability could attach to the District through Whitehead in her official capacity. *Id.* at 1228-36, 1240-42. All claims for injunctive relief were dismissed because those claims became moot upon Nurre's graduation from JHS. *Id.* at 1226. Nurre timely appeals.

II

We review a district court's grant of summary judgment de novo. *Dietrich v. John Ascuaga's Nugget*, 548 F.3d 892, 896 (9th Cir. 2008). In determining whether summary judgment was appropriate, we view the evidence in the light most favorable to Nurre, the non-moving party. *Id.* A grant of summary

judgment is inappropriate if there is "any genuine issue of material fact or the district court incorrectly applied the substantive law." *Blankenhorn v. City of Orange*, 485 F.3d 463, 470 (9th Cir. 2007).

III

All § 1983 claims must be premised on a constitutional violation. *See Johnson v. Knowles,* 113 F.3d 1114, 1117 (9th Cir.1997) ("To state a claim for relief under section 1983, the Plaintiffs must plead two essential elements: 1) that the Defendants acted under color of state law; and 2) that the Defendants caused them to be deprived of a right secured by the Constitution and laws of the United States.") (citing *Howerton v. Gabica,* 708 F.2d 380, 382 (9th Cir.1983)). If the government official, in this case Superintendent Whitehead, did not violate the claimant's rights under the Constitution, no relief lies within the statute, whether the official is sued in her individual or official capacity.[3] 42 U.S.C. § 1983.

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[3] If, as our colleague Judge Milan Smith contends, Whitehead had violated Nurre's constitutional rights, we would then need to determine whether she was protected by qualified immunity. *Harlow v. Fitzgerald,* 457 U.S. 800, 806-807 (1982). We agree with Judge Smith that the state of the law is such that no reasonable school administrator would have known that such action would violate constitutional rights and qualified immunity would attach to Whitehead. Because qualified immunity does not apply to municipalities, we would then have to determine under *Monell* whether the Everett School District is liable for acts taken in furtherance of district policy by Whitehead. *Leatherman v. Tarrant County Narcotics Intelligence & Coordination,* 507 U.S. 163,

Because we hold that Nurre's rights were not violated, her action against Whitehead must fail.

Nurre first claims that Whitehead censored her speech-i.e., her performance of instrumental music-in violation of the First Amendment's protection of free speech. Second, she claims that Whitehead acted with hostility toward religion in violation of the First Amendment's Establishment Clause. Finally, she argues that in treating her and her classmates differently than past JHS graduating classes, Whitehead violated the Equal Protection Clause of the Fourteenth Amendment. We examine each in turn.

A

The First Amendment declares that "Congress shall make no law ... abridging the freedom of speech." U.S. CONST. amend. I. It is applicable to the states through the Fourteenth Amendment, and the Supreme Court has, on multiple occasions,

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166-167 (1993); *see also Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690, 693 (1978) (holding that local governments and their entities may be sued when an "official policy is responsible for a deprivation of rights protected by the Constitution"). However, because there was no constitutional violation in this case-a prerequisite for finding liability against either the superintendent or the school district-we need not determine whether qualified immunity applies or municipal liability attaches.

reminded us that "students do not 'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.' " *Morse v. Frederick,* 551 U.S. 393, 127 S.Ct. 2618, 2622, 168 L.Ed.2d 290 (2007) (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.,* 393 U.S. 503, 506 (1969)). However, our precedent also recognizes that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings," *Bethel Sch. Dist. No. 403 v. Fraser,* 478 U.S. 675, 682 (1986), and that students' rights "must be applied in light of the special characteristics of the school environment." *Hazelwood Sch. Dist. v. Kuhlmeier,* 484 U.S. 260, 266 (1988) (internal quotation marks and citation omitted).

As a threshold matter, we first decide whether the music Nurre sought to perform constitutes protected speech. It is clear to us that purely instrumental music-i.e., music with no lyrics-is speech. In *Ward v. Rock Against Racism,* 491 U.S. 781, 790 (1989), the Supreme Court noted that "[m]usic is one of the oldest forms of human expression," and "as a form of expression and communication, [it] is protected under the First Amendment." And, in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston,* 515 U.S. 557, 569 (1995), the Court explained that "the Constitution looks beyond written or spoken words as mediums of expression," and protects, under the First Amendment, the "painting of Jackson Pollock, music of Arnold Schöenberg, or Jabber-wocky verse of Lewis Carroll." Then, in *White*

v. City of Sparks, 500 F.3d 953, 955 (9th Cir.2007), we said that both "arts and entertainment constitute protected forms of expression," including "music without words." Nurre and her classmates sought to perform an entirely instrumental arrangement of Franz Biebl's "Ave Maria,"[4] which we hold is speech as contemplated by the First Amendment.

However, our determination that the requested performance would have been speech does not end our inquiry. The next question is whether Nurre's right to engage in that speech was in some way abridged. "Nothing in the Constitution requires the Government freely to grant access to all who wish to exercise their right to free speech on every type of Government property without regard to the nature of the property or to the disruption that might be caused by the speaker's activities." *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.,* 473 U.S. 788, 799-800 (1985). Therefore, we must determine the type of forum created by the government when Nurre sought to perform "Ave Maria"-that is, the relevant forum-and then assess whether the District's restriction was constitutionally permissible in light of that forum.

First, while schools are typically non-public fora, they may become a public forum "if school authorities

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[4] While Franz Biebl's "Ave Maria" does include words to the well-known prayer, and the arrangement available for high school wind ensemble includes them between each staff in the score, Moffat had the Wind Ensemble perform the piece *sans* lyrics.

have 'by policy or by practice' opened those facilities 'for indiscriminate use by the general public,' or by some segment of the public, such as student organizations." *Hazelwood,* 484 U.S. at 267 (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37, 46 n. 7, 47, (1983)). Nurre does not claim that a school, or even a graduation ceremony, is normally anything but a non-public forum. Instead, she argues that school administrators created, in this instance, a "limited public forum" by permitting students to select musical pieces to perform during graduation. "[T]he term 'limited public forum' ... refer[s] to a type of nonpublic forum that the government intentionally has opened to certain groups or to certain topics." *DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ.,* 196 F.3d 958, 965 (9th Cir.1999).

We have never definitively determined what forum is created when a school district holds graduation, or, as in this case, when part of the graduation ceremony presents student-selected work.[5] However, we need not answer the question, as

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[5] Though we considered student speech at graduation in both *Lassonde v. Pleasanton Unified School District,* 320 F.3d 979 (9th Cir.2003), and *Cole v. Oroville Union High School District,* 228 F.3d 1092 (9th Cir.2000), we did not find those cases appropriate for making a forum determination. Instead, we held there that the dangers of entangling religious speech into a convocation where the audience was essentially captive and composed of impressionable adolescents outweighed the individual's interest in presenting proselytistic speech. *Lassonde,* 320 F.3d at 983; *Cole,* 228 F.3d at 1101. *See also Doe v. Madison Sch. Dist.*

the District does not challenge Nurre's contention that a limited public forum existed here. Instead, it simply argues that the restriction placed on Nurre was reasonable in light of the purpose served by graduation ceremonies. Therefore, we assume, without deciding, that a limited public forum was created.

Second, we must align the proper constitutional test with the forum created. "In a nonpublic forum opened for a limited purpose, restrictions on access 'can be based on subject matter ... so long as the distinctions drawn are reasonable in light of the purpose served by the forum' and all the surrounding circumstances." *DiLoreto,* 196 F.3d at 967 (alterations in original) (quoting *Cornelius,* 473 U.S. at 806, 809); *see also Rosenberger v. Rector and Visitors of Univ. of Va.,* 515 U.S. 819, 829 (1995); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.,* 508 U.S. 384, 392-93 (1993). "The 'reasonableness' analysis focuses on whether the limitation is consistent with preserving the property for the purpose to which it is dedicated." *Id.* For

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No. 321, 177 F.3d 789, 799 (9th Cir.1999) (en banc) (dismissing for lack of jurisdiction suit against school district for censorship of graduation speech); *Harris v. Joint Sch. Dist. No. 241,* 41 F.3d 447 (9th Cir.1994), *cert. granted and judgment vacated* 515 U.S. 1154 (1995), and *cert. granted and judgment vacated sub nom. Citizens Pres. Am.'s Heritage, Inc. v. Harris,* 515 U.S. 1155 (1995) (where the Supreme Court ordered the case dismissed as moot, including, *inter alia,* the lower court's holding regarding forum at a graduation).

example, in *DiLoreto,* we found that a District's concern regarding disruption and controversy were legitimate reasons for restricting content, given the fact that the forum was a fence at a high school baseball park and the audience included impressionable adolescents in a school setting. 196 F.3d at 697. The Third Circuit has also recognized that a school acts reasonably when it takes steps to avoid controversy or maintain an appearance of neutrality. *Brody ex rel. Sugzdinis v. Spang,* 957 F.2d 1108, 1122 (3d Cir.1992) (citing *Cornelius,* 473 U.S. at 811) (noting, in remanding to the district court for further fact finding, that a consent-decree provision which expressly restricts a student's proselytistic speech at graduation might be a valid restriction in a limited public forum); *Student Coal. for Peace v. Lower Merion Sch. Dist. Bd. of Sch. Dirs.,* 776 F.2d 431, 437 (3d Cir.1985) (where the court held that banning the use of school facilities for an anti-nuclear exposition was a reasonable restriction on a student organization when the school acted to both avoid political controversy and appear neutral).

Here, the District was acting to avoid a repeat of the 2005 controversy by prohibiting any reference to religion at its graduation ceremonies. District administrators recognized the evident religious nature of "Ave Maria" and took into consideration the compulsory nature of a graduation ceremony. *See Good News Club v. Milford Cent. Sch.,* 533 U.S. 98, 115 (2001) ("[W]e conclude[ ] that attendance at the graduation exercise was obligatory."); *Lassonde,* 320 F.3d at 985 ("The graduation ceremony was a school-

sponsored function that all graduating seniors could be expected to attend."). Furthermore, the District's policies regarding religious musical performance at traditional concerts evidence a desire to remain neutral with regard to all religions, and perform pieces for their artistic value alongside other comparable selections. While these ceremonies are held to celebrate and showcase students' achievements, the practical limitations of a graduation ceremony preclude performance of comparable pieces.

Contrary to Judge Milan Smith's understanding of our holding, we do not seek to remove all religious musical work from a school ensemble's repertoire. Nor do we intend to substantially limit when such music may be played. We agree with him that religious pieces form the backbone of the musical arts. To ignore such a fact would be to dismiss centuries of music history. Instead, we confine our analysis to the narrow conclusion that when there is a captive audience at a graduation ceremony, which spans a finite amount of time, and during which the demand for equal time is so great that comparable non-religious musical works might not be presented, it is reasonable for a school official to prohibit the performance of an obviously religious piece.

We therefore hold that the District's action in keeping all musical performances at graduation "entirely secular" in nature was reasonable in light of the circumstances surrounding a high school

graduation, and therefore it did not violate Nurre's right to free speech.[6]

B

Nurre next claims that the District violated the Establishment Clause of the First Amendment by acting in a manner hostile toward religion. The Supreme Court has explained that the Constitution "affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any." *Lynch v. Donnelly,* 465 U.S. 668, 673 (1984). We apply the traditional test set forth by the Court in *Lemon v. Kurtzman,* 403 U.S. 602 (1971), to determine whether the District has acted with hostility toward religion. *Catholic League v. San Francisco,* 567 F.3d 595, 599 (9th Cir.2009); *see also Am. Family Ass'n, Inc. v. San Francisco,* 277 F.3d 1114, 1121 (9th Cir.2002), *cert. denied,* 537 U.S. 886 (2002) ("Although the *Lemon* test is perhaps most frequently used in cases involving government

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[6] We note that this is not a case involving viewpoint discrimination, which would be impermissible no matter the forum. Nurre concedes that she was not attempting to express any specific religious viewpoint, but that she sought only to "play a pretty piece." *See Rosenberger,* 515 U.S. at 829 ("When the government targets not subject matter, but *particular views taken by speakers* on a subject, the violation of the First Amendment is [viewpoint discrimination].... The government must abstain from regulating speech when the *specific motivating ideology or the opinion or perspective of the speaker* is the rationale for the restriction." (emphases added)).

allegedly giving *preference* to a religion, the *Lemon* test accommodates the analysis of a claim brought under a hostility to religion theory as well.").

The *Lemon* test analyzes whether the government's actions have offended the Establishment Clause. In order for governmental conduct to survive the test, and therefore be found to not violate the Clause, the conduct must (1) have a secular purpose, (2) not have as its principal or primary effect the advancement or inhibition of religion, and (3) not foster an excessive governmental entanglement with religion. *Lemon,* 403 U.S. at 612-13.

1

The purpose prong of the *Lemon* test asks whether government's actual purpose is to endorse or disapprove of religion." *Kreisner v. City of San Diego,* 1 F.3d 775, 782 (9th Cir.1993) (quoting *Lynch,* 465 U.S. at 690 (O'Connor, J., concurring)). Here, we look to see whether the "government acts with the ostensible and predominant purpose" of inhibiting religion. *McCreary County v. ACLU,* 545 U.S. 844, 860 (2005). "A reviewing court must be 'reluctant to attribute unconstitutional motives' to government actors in the face of a plausible secular purpose." *Kreisner,* 1 F.3d at 782 (quoting *Mueller v. Allen,* 463 U.S. 388, 394-95 (1983)). We have made it clear that "[g]overnmental actions taken to avoid potential Establishment Clause violations have a valid secular

purpose under *Lemon.*" *Vasquez v. L.A. County,* 487 F.3d 1246, 1255 (9th Cir.2007), *cert. denied,* 128 S.Ct. 711 (2007). Any other standard would prove unworkable. *Id.*

The District admitted, and Nurre does not contest, that it prohibited the Wind Ensemble's performance of "Ave Maria" in an effort to avoid conflict with the Establishment Clause.[7] Therefore we find the first prong of the *Lemon* test satisfied.

2

The second prong of the *Lemon* test requires us to determine if the District's action has a "principal or primary effect ... that ... advances [or] inhibits religion." 403 U.S. at 612. "Governmental action has the primary effect of advancing or disapproving of religion if it is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices." *Vasquez,* 487 F.3d at 1256 (internal citation and quotation marks omitted). This is an objective test, asking whether a reasonable observer who is "informed ... [and] familiar with the history of the government practice at issue," would perceive the

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[7] We part ways with Judge Smith's determination that Whitehead did not act to avoid an Establishment Clause violation. There was no evidence in the record to suggest any other reason for her action to apply the district's neutrality policy.

action as having a predominately non-secular effect. *Id.* (alteration in original) (internal citation and quotation marks omitted). As we noted in *Catholic League,* "whereas in the purpose inquiry, we are reluctant to attribute unconstitutional motives to government actors in the face of a plausible secular purpose, no such presumption applies in the effects analysis." 567 F.3d at 604 n. 9 (internal citations and quotation marks omitted). The "objective observer" here is presumed to comprehend the "difference between what the government intends and what it produces," because he must understand the effect of what was actually conveyed. *Id.*

To determine whether the primary message had a disapproving effect on religion, we must view the restriction "as a whole." *Am. Family Ass'n,* 277 F.3d at 1122; *see also Catholic League,* 567 F.3d at 605. Because the message can be impacted by its context, it is important to not separate portions of the restriction and view them in isolation. *Catholic League,* 567 F.3d at 605 (citing *Lynch,* 465 U.S. at 694 (O'Connor, J., concurring)). We will view the restriction in its totality and in light of the surrounding circumstances. *Id.*

In *Vasquez,* we considered whether removal of a cross from public land showed governmental hostility toward religion. We said no, finding that removal was "more reasonably viewed as an effort to restore [the government's] neutrality and to ensure their continued compliance with the Establishment Clause." *Vasquez,* 487 F.3d at 1257. The action was

taken "only after the presence of crosses on other municipal seals had been held to be unconstitutional." *Id.*

Similarly, here the District took actions reasonably perceived as an attempt to avoid conflict with the Establishment Clause. The year prior to Nurre's graduation, ceremony attendees had complained that the choir's performance of a musical piece referencing angels, God, and heaven illustrated the District's preference for one type of religion over another. Permitting a performance of "Ave Maria"-an obviously religious piece based on the title printed in the program-at graduation could have had the same impact. A reasonable person, informed as to the history of the District's prohibition on the Wind Ensemble's performance, would understand that the action had the secular effect of maintaining neutrality and ensuring the District's continued compliance with the Establishment Clause.

3

The final prong of the *Lemon* test seeks to bar governmental conduct that "foster[s] excessive government[al] entanglement with religion." 403 U.S. at 613. "[T]he Establishment Clause does not prohibit all entanglements; only excessive ones that demonstrate that a government program has the impermissible effect of advancing [or evidencing hostility toward] religion." *Prince v. Jacoby,* 303 F.3d 1074, 1096 (9th Cir.2002), *cert. denied,* 540 U.S. 813

(2003). "Entanglement is a question of kind and degree," *Lynch,* 465 U.S. at 684, and this "prong seeks to minimize the interference of religious authorities with secular affairs and secular authorities in religious affairs." *Cammack v. Waihee,* 932 F.2d 765, 780 (9th Cir.1991).

As we have explained, there are two types of entanglement: administrative entanglement and political entanglement. *Vernon v. City of L.A.,* 27 F.3d 1385, 1399 (9th Cir.1994); *see also Lemon,* 403 U.S. at 619-23. "Administrative entanglement typically involves comprehensive, discriminating, and continuing state surveillance of religion." *Vernon,* 27 F.3d at 1399. "[P]olitical entanglement [occurs when] political divisiveness result[s] from government action which divides citizens along political lines," and by itself is insufficient to constitute excessive entanglement. *Id.* at 1401; *Am. Family Ass'n,* 277 F.3d at 1123; *Cammack,* 932 F.2d at 781.

While Nurre makes a credible claim that there was entanglement, she fails to make any concrete arguments regarding which type of entanglement existed. Therefore, we consider both. First, as we stated in *Brown v. Woodland Joint Unified School District,* 27 F.3d 1373, 1384 (9th Cir.1994), "one-time review, which was conducted in response to [ ] complaints ... clearly does not cause the School District to become entangled with religion." *See also Catholic League,* 567 F.3d at 609 (Berzon, J., concurring) (noting that the resolutions at issue "were not repeated or pervasive, but discrete"). Here,

the District requested that all music remain secular in direct response to multiple complaints that the JHS graduation had included religious music in the past. This inquiry occurred only once that year and was done merely by reviewing song titles for overtly religious references. Further, there is no evidence that the policy sent via e-mail from Brandsma to the District's high school principals applied to anything other than graduation or that it trumped the existing District policy for any other musical performances.

Second, the policy at issue did not create political entanglement. Importantly, "the political entanglement inquiry seems to be applied mainly in cases involving direct financial subsidies paid to parochial schools or to teachers in parochial schools." *Vernon,* 27 F.3d at 1401 (citations omitted). It is obvious that this type of entanglement is not at issue here. Also, absent from the record is any evidence that this policy caused political divisiveness. We do not engage in hypothesizing about what political response might occur in such a case. As Justice O'Connor noted in *Lynch,* "[g]uessing the potential for political divisiveness inherent in a government practice is simply too speculative an enterprise." 465 U.S. at 689 (O'Connor, J., concurring).

Because we find that the District satisfied all three prongs of the *Lemon* test, we hold that its conduct did not violate the Establishment Clause.

Finally, we also wish to make clear that we do not hold that the performance of music, even "Ave

Maria," would necessarily violate the Establishment Clause. We hold only that Whitehead's actions were reasonable in light of her past experience and her understanding of the law and did not violate Nurre's constitutional rights.

C

Nurre's final claim is that the District violated her right to equal protection of the law under the Fourteenth Amendment. She argues that the District unreasonably treated her, and the other senior Wind Ensemble members, differently than past classes who were permitted to select the music performed. She attempts to invoke the "class of one" theory, set forth by the Supreme Court in *Village of Willowbrook v. Olech,* 528 U.S. 562, 564-65 (2000) (per curiam). "When an equal protection claim is premised on unique treatment rather than on a classification, the Supreme Court has described it as a 'class of one' claim." *N. Pacifica LLC v. City of Pacifica,* 526 F.3d 478, 486 (9th Cir.2008) (citing *Vill. of Willowbrook,* 528 U.S. at 564). Neither we, nor the Supreme Court, have ever applied a "class of one" theory in this context and we do not extend it to cover this case.

To the extent Nurre claims-apart from her "class of one" argument-that the District violated the Equal Protection Clause, we apply rational basis review. This is because "a classification neither involving fundamental rights nor proceeding along suspect lines ... cannot run afoul of the Equal Protection

Clause if there is a rational relationship between disparity of treatment and some legitimate governmental purpose." *Cent. State Univ. v. Am. Ass'n of Univ. Professors,* 526 U.S. 124, 127-28 (1999) (alteration in original) (internal quotation marks and citations omitted). A claim that one group of graduates was permitted to select a song for graduation while another was not certainly involves neither a fundamental right nor a suspect class.

The District had a legitimate interest in avoiding what it believed could cause confrontation with the Establishment Clause. *Cf. Capitol Square Review & Advisory Bd. v. Pinette,* 515 U.S. 753, 761-62 (1995) (holding "that compliance with the Establishment Clause is a state interest sufficiently compelling to justify ... restrictions on speech"). Its requirement that all musical selections be secular was a reasonable action taken to avoid confrontation with the Establishment Clause. Because the District's action passes muster under rational-basis review, it did not violate Nurre's rights under the Equal Protection Clause.

IV

We hold that Nurre's equitable claims are moot now that she has graduated from Jackson High School. While Nurre could maintain a post-graduation claim for monetary damages, we hold that the district court properly granted summary judgment to the defendants-Whitehead and the

District-because Nurre failed to show any constitutional violation.

AFFIRMED.

MILAN D. SMITH, JR., Circuit Judge, dissenting in part, but concurring in the judgment:

I write separately because I disagree with the majority's conclusion that banning the playing of an instrumental version of the musical number *Ave Maria* at the Jackson High School graduation ceremony was a reasonable restraint on freedom of expression. I would hold that, in prohibiting Nurre and her classmates from playing their selected piece of music, the School District misjudged the Establishment Clause's requirements and, in so doing, violated Nurre's First Amendment rights.[1] I am concerned that, if the majority's reasoning on this issue becomes widely adopted, the practical effect will be for public school administrators to chill-or even kill-musical and artistic presentations by their students in school-sponsored limited public fora where those presentations contain any trace of religious inspiration, for fear of criticism by a member of the public, however extreme that person's views may be.

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[1] I agree with the majority that there was no violation of either the First Amendment Establishment Clause or the Fourteenth Amendment Equal Protection Clause.

The First Amendment neither requires nor condones such a result. The taking of such unnecessary measures by school administrators will only foster the increasingly sterile and hypersensitive way in which students may express themselves in such fora, and hasten the retrogression of our young into a nation of Philistines, who have little or no understanding of our civic and cultural heritage. Nonetheless, as much as I deplore what was done in this case, because the relevant guiding principles in this area are unsettled, I believe that Dr. Whitehead and the School District are entitled to qualified immunity, and I therefore concur in the judgment.

The School District concedes that the graduation ceremony in this case was a limited public forum. Assuming, as the majority does, that such is the case, the restrictions imposed in this instance pass muster only if the restrictions are: (1) viewpoint neutral and (2) reasonable in light of the purpose served by the forum. *Faith Ctr. Church Evangelistic Ministries v. Glover,* 480 F.3d 891, 907-08 (9th Cir.2007) ("'The challenged regulation need only be reasonable, as long as the regulation is not an effort to suppress the speaker's activity due to disagreement with the speaker's view.'") (quoting *Int'l Soc'y for Krishna Consciousness v. Lee,* 505 U.S. 672, 679 (1992))), *overruled on other grounds by Winter v. Natural Res. Def. Council,* 129 S.Ct. 365 (2008). I believe that the School District's restriction here fails that test. Though the prohibition was viewpoint neutral, it was

not "reasonable in light of the purpose served by the forum," *id.* at 897.

To gauge the reasonableness of the School District's restriction, it is important first to appreciate the far-reaching influence of religion and religious institutions on music. It is undisputed that much of the music composed in the Western World during the musical eras known as the medieval, baroque, and classical periods was fostered by one or more of the major European Christian denominations. *See Doe v. Duncanville Ind. Sch. Dist.,* 70 F.3d 402, 407 (5th Cir.1995) (crediting testimony that "60-75 percent of serious choral music is based on sacred themes or text"); Richard Collin Mangrum, *Shall We Sing? Shall We Sing Religious Music in Public Schools?,* 38 CREIGHTON L. R EV. 815, 866 (2005) ("[A]pproximately forty-four percent of the music recommended by the Music Educators National Conference for inclusion in the public school curriculum-for the secular purposes of preserving 'America's vast and varied music heritage,'-has religious significance."); ALL MUSIC GUIDE TO CLASSICAL MUSIC 1539 (Chris Woodstra, et al. eds., Backbeat Books 2005) (noting Pope Gregory's role in spurring medieval monophonic Gregorian chants); *id.* at 1541 (describing how "Protestantism's emphasis on the Scriptures" significantly influenced J.S. Bach's baroque compositions).

Though largely fostered in connection with the church, some of these religiously-prompted works are now performed primarily to express an artistic,

secular message. As a result, current popular music comprises a significant number of works that, though originally inspired by religion, have since become largely secularized. Handel's *Hallelujah Chorus* from *The Messiah,* Steffen and Ward Howe's *The Battle Hymn of the Republic,* Beethoven's *Ode to Joy,* Mozart's *Requiem Mass in D minor,* and Purvis and Black's *When the Saints Go Marching In,* are but a few examples. When performed instrumentally and without lyrics, moreover, these and similar pieces take on an even more secular character.

Though it is a more contemporary composition, the Jackson High School students' selected piece is one such work. It is an arrangement for wind instruments originally written by twentieth-century German composer Franz Biebl. Biebl composed the original work in 1964 for performance, not in a church, but by a firemens' chorus. Here, the purpose of the graduation ceremony-including the wind ensemble's performance of the piece-was to acknowledge the achievements of the Jackson High School students. That recognition included the opportunity to express themselves through speech and music.

The School District justified its decision to prohibit the performance by citing its goal of making the event "entirely secular in nature."[2] In my view,

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[2] In marked contrast to what was done in this case, in previous years the School District had condoned the ensemble's playing a piece titled *On a Hymnsong of Phillip Bliss* at the school's graduation ceremony. A "hymn" is

purging such a ceremony of all vestiges of religiously inspired art and culture-including those works with even the most attenuated connections to religion-did not advance the purpose of recognizing and providing a forum for student achievement. To the contrary, given religion's pervasive influence on classical music discussed above, the censorship did the opposite, curtailing the students' secular artistic expression. That prohibition was therefore unreasonable in light of the forum's purpose.

Taking a contrary view, the majority relies on our decision in *DiLoreto v. Downey Unified School District Board of Education,* 196 F.3d 958, 967 (9th Cir.1999), as well as out-of-circuit cases, *Brody ex rel. Sugzdinis v. Spang,* 957 F.2d 1108, 1122 (3d Cir.1992), and *Student Coalition for Peace v. Lower Merion School District Board of School Directors,* 776 F.2d 431, 437 (3d Cir.1985), to support its conclusion that the ban was reasonable in light of the forum's purpose. None of these cases, however, is on point. In *DiLoreto,* we held that it was reasonable for a school district to prohibit a large banner advertisement of the Ten Commandments-an obvious attempt at proselytization-on school property. *See* 196 F.3d at 962, 967. In *Brody,* the Third Circuit noted that restricting a student's overtly evangelizing graduation speech would be acceptable. 957 F.2d at 1122. And in *Student Coalition for Peace,* the court

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defined as, among other things, a "song of praise to God" and a "metrical composition adapted for singing in a religious service." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1111 (2002).

held that a school district could prohibit a large partisan political rally on school grounds that could potentially generate significant controversy and disruption. 776 F.2d at 437.

Unlike in *Student Coalition for Peace,* the wind ensemble's playing of *Ave Maria* here would not have risked creating a disruption or generating appreciable controversy. In that sense, the piece is distinguishable from *Up Above My Head,* the song performed at the Jackson High School 2005 graduation, which proclaimed, "I hear music in the air, oh Lord.... I really do believe there's a heaven somewhere" and which, according to Whitehead, contained references to Jesus Christ. In contrast, the playing of the *Ave Maria* arrangement could not have reasonably been interpreted to convey a religious message, nor was any such message intended. Rather, as Nurre stated, it was simply "a pretty piece." She further explained that, "it's the kind of piece that can make your graduation memorable because we actually learned to play it really well. And we wanted to play something that we enjoyed playing." For this reason, unlike as in *DiLoreto,* the performance would not have been viewed as proselytizing; as stated, the arrangement contains no words at all.

Though the majority does not reach this issue, the censorship also cannot be justified by relying on the so-called Establishment Clause defense. That defense is available only if the District's "refusal to allow the students to[perform *Ave Maria*] as part of the

graduation was necessary to avoid violating the Establishment Clause." *Cole v. Oroville Union High Sch. Dist.,* 228 F.3d 1092, 1101 (9th Cir.2000) (citing *Santa Fe Indep. Sch. Dist. v. Doe,* 530 U.S. 290 (2000); *Lee v. Weisman,* 505 U.S. 577 (1992)); *see also Hills v. Scottsdale Unified Sch. Dist.,* 329 F.3d 1044 (9th Cir.2003). A school district may be obligated to censor religious messages for two reasons: (1) "to avoid the appearance of government sponsorship of religion"; and (2) to not "impermissibly coerc[e] ... dissenters, requiring them to participate in a religious practice even by their silence." *Lassonde v. Pleasanton Unified Sch. Dist.,* 320 F.3d 979, 983 (9th Cir.2003) (citing *Cole,* 228 F.3d at 1101, 1104).

Neither reason is present here. Whitehead stated that she and the other administrators "made the decision" "because the title of the piece would be on the program and it's *Ave Maria* and that many people would see that as religious in nature." The majority relies on this justification and calls *Ave Maria* an "obviously religious piece," Maj. Op. at n. 1, and a "well known Roman Catholic prayer," *id.* at 12744. However, as stated, the tune is not that of the better-known piece by Schubert, but a relatively obscure contemporary work, unlikely to trigger a religious association in most audiences. And even Whitehead, a school administrator with a doctoral degree and formal training in the place of religion in public schools, admitted that she did not know the meaning

of the words "Ave Maria," but only had a vague sense that the term had some religious origin.[3]

Simply allowing the playing of a student-selected instrumental classical musical piece (with a title in a dead language whose meaning would be unrecognizable to most attendees of the graduation) cannot reasonably be construed as "government sponsorship of religion," *id.* For similar reasons, merely attending an event where one of the several musical numbers is an obscure classical piece does not constitute "participat[-ing] in a religious practice," *id.,* even if the title of that piece happens to be a Latin expression for a religious invocation. While governments have "a compelling interest in not committing *actual* Establishment Clause violations," there is no legitimate interest "in discriminating against religion in whatever other context it pleases, so long as it claims some connection, however attenuated, to establishment concerns." *Locke v. Davey,* 540 U.S. 712, 730 n. 2 (2004) (Scalia, J., dissenting) (internal citations omitted). As I see it, that is essentially what occurred here.

I readily acknowledge that no bright lines exist in this complex field of First Amendment law, and I sympathize with school officials, who often find themselves in a Catch-22, subject to criticism and

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[3] As amicus for Nurre notes, many common proper nouns for secular entities have religious origins. For example, the cities Los Angeles (originally "our lady of the city of the angels"), San Diego ("Saint Didacus"), and Las Cruces ("the crosses") each contain overt religious references.

potential law suits regardless of the position they take. Because of this unfortunate reality, I conclude that qualified immunity is appropriate in this case. But I also believe that, unless the courts provide balanced guidance on where those not-so-bright lines lie, we only perpetuate the confusion, encourage further litigation, and stunt student artistic expression in violation of the First Amendment.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

KATHRYN NURRE,	)	Case No.: C06-901RSL
Plaintiff	)	JUDGE ROBERT S.
	)	LASNIK
v.	)	
	)	
CAROL WHITEHEAD, in her official and individual capacity as the Superintendent of Everett School District No. 2,	)	
Defendant	)	ORDER

I. INTRODUCTION

This matter comes before the Court on "Defendant's Motion for Summary Judgment" (Dkt. # 8) (hereinafter "Motion") and "Plaintiff Nurre's Motion for Summary Judgment Under CR 56(A)" (Dkt. # 17) (hereinafter "Cross-Motion"). In June of 2006, the Henry A. Jackson High School ("JHS") Wind Ensemble was not allowed to perform Franz Biebl's instrumental arrangement of "Ave Maria" at the 2006 JHS graduation ceremony in Everett, Washington. Plaintiff commenced this action claiming that defendant violated plaintiff's rights under the Free Speech, Establishment, and Equal

Protection Clauses of the United States Constitution by prohibiting the performance of "Ave Maria." For the reasons set forth below, the Court grants defendant's Motion and denies plaintiff's Cross-Motion.[1]

II. DISCUSSION

A. Background

In June of 2006, plaintiff was a senior at JHS, which is operated and controlled by Everett School District No. 2 (hereinafter the "School District"). *See* Dkt. # 18 (Nurre Decl.) at ¶¶ 3-5[2]; Dkt. # 5 at ¶ 4. During plaintiff's senior year, and for the two prior school years, plaintiff was a member of the JHS Wind Ensemble (hereinafter "Wind Ensemble"). *See* Dkt. # 18 at ¶ 7. As in previous years, the Wind Ensemble was selected to perform at the 2006 JHS graduation ceremony. *Id.* at ¶ 10. From at least 2002, the Wind Ensemble's graduating seniors selected an instrumental piece that the Wind Ensemble performed at graduation. *See* Dkt. # 9, Ex. 3 (Moffat

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[1] Neither party requested oral argument under Local Civil Rule 7(b)(4). Accordingly, the Court decides this matter on the memoranda, declarations, and exhibits submitted by the parties.

[2] The Court denies defendant's motion to strike plaintiff Nurre's declaration given the representation that plaintiff physically signed her declaration when it was filed on April 24, 2007. *See* Dkt. # 27 n. 3 (motion to strike); Dkt. # 30 (Supplemental Declaration) at ¶¶ 2-3 (declaring that plaintiff physically signed her declaration when it was filed).

Dep.) at 17:4-15. In 2003-2005, the Wind Ensemble's seniors selected "On a Hymnsong of Phillip Bliss," which was played at graduation. *Id.* at 31-33. In May 2006, the Wind Ensemble's seniors unanimously selected a different song to play at graduation: an instrumental piece titled "Ave Maria"[3] composed by Franz Biebl. *Id.* at 35; Dkt. # 18 at ¶¶ 12-16. The Wind Ensemble had previously played Franz Biebl's "Ave Maria" at a school music concert. *See* Dkt. # 19, Ex. A (Moffat Dep.) at 36:14-23.

After the selection of "Ave Maria," the Wind Ensemble's director, Lesley Moffat sent copies of the music to be performed at graduation, including Biebl's "Ave Maria," to JHS's Principal, Terry Cheshire, and to the School District's Associate Superintendent for Instruction, Karst Brandsma. *See* Dkt. # 9, Ex. 3 (Moffat Dep.) at Dep. Ex. 5. Principal Cheshire forwarded this information to Lynn Evans, the School District's Executive Director of Instruction and Curriculum. *See* Dkt. # 12 (Cheshire Decl.) at ¶ 3. Ms. Evans, in turn, took the Wind Ensemble's selection of "Ave Maria" to her supervisor, Ms. Brandsma. *See* Dkt. # 11 (Evans Decl.) at ¶ 3.

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[3] Under Fed.R.Evid. 201, the Court takes judicial notice that "Ave Maria" means "Hail Mary." *See Webster's II New Riverside University Dictionary* 141 (1984) (defining "Ave Maria" as "The Hail Mary."); *Webster's Third New International Dictionary* 150 (1981) (unabridged) (defining "ave maria" as "1. a salutation to the Virgin Mary combined as now used in the Roman Catholic Church with a prayer to her as mother of God."); Dkt. # 9, Ex. 1 (Nurre Dep.) at 35:22-36:6; Dkt. # 9 at Ex. 3 (Moffat Dep) at 59:22-24.

Thereafter, defendant Whitehead called a meeting with Ms. Brandsma and Ms. Evans to discuss the Wind Ensemble's selection of "Ave Maria." *See* Dkt. # 9, Ex. 2 (Whitehead Dep.) at 75:24-77:2. At this meeting, the decision was made to "deny the request from the students and the band teacher to play Ave Maria at the commencement." *Id.* at 77:13-15.

Ms. Moffat was informed of this decision when she received a copy of an e-mail from Ms. Brandsma "requesting that music selections for graduation be entirely *secular* in nature." *See* Dkt. # 19, Ex. A (Moffat Dep.) at 38-39; Dep. Ex. 4 (emphasis in original). Ms. Moffat then had a conversation with Principal Cheshire where Ms. Moffat asked whether it would be permissible to change the name of the song or list the name of the song differently in the program. *See* Dkt. # 12 (Cheshire Decl.) at ¶ 4. Principal Cheshire responded to this request by stating that "it would be unethical to inaccurately or untruthfully list the titles to pieces." *Id.;* Dkt. # 9, Ex. 3 (Moffat Dep.) at 40-41. Based on this decision, Ms. Moffat informed the Wind Ensemble that they needed to select a different piece of music to play at graduation. *See* Dkt. # 9, Ex. 3 (Moffat Dep.) at 41:15-42:5. Ultimately, the Wind Ensemble's seniors selected the fourth movement of the "Holst Second Suite in F," which was played at the JHS graduation on June 17, 2006. *See id.* at 42; Dkt. # 10, Ex. 6 (2006 JHS graduation program listing the performance of Gustav Holst's "Second Suite for Military Band").

B. Analysis

This matter comes before the Court on cross-motions for summary judgment on claims arising under 42 U.S.C. § 1983. Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). A § 1983 claimant must prove "two essential elements: 1) that the Defendants acted under color of state law; and 2) that the Defendants caused [plaintiff] to be deprived of a right secured by the Constitution and the laws of the United States." *Johnson v. Knowles,* 113 F.3d 1114, 1117 (9th Cir.1997); 42 U.S.C. § 1983. In her answer, defendant admits that she was acting under the color of the law of the State of Washington. *See* Dkt. # 5 (Answer) at ¶ 4; Dkt. # 1 (Complaint) at ¶ 4. Accordingly, the Court need only determine whether defendant deprived plaintiff of a constitutional right.[4]

1. Claim for declaratory relief

As an initial matter, in her motion, defendant requests dismissal of plaintiff's claim for declaratory relief[5] as moot because plaintiff has graduated and

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[4] The Court also notes for the record that defendant "acknowledges Everett School District does not possess Eleventh Amendment immunity." *See* Motion at 13.

[5] Although not expressly identified as a claim for declaratory relief, the Court construes paragraph A in plaintiff's prayer

will never again participate in an Everett School District graduation ceremony. *See* Motion at 11. The Court agrees. Now that plaintiff has graduated, her claims for declaratory relief are dismissed as MOOT. *See Cole v. Oroville Union High Sch. Dist.,* 228 F.3d 1092, 1099 (9th Cir.2000) ("[A] student's graduation moots his claims for declaratory and injunctive relief against school officials"); *Doe v. Madison Sch. Dist. No. 321,* 177 F.3d 789, 798 (9th Cir.1999) ("[T]he student-plaintiff already has suffered any injury that would result from the alleged forced participation in prayers that were part of the student-plaintiff's graduation ceremony. Because we cannot remedy the student-plaintiff's injury with injunctive or declaratory relief, the student-plaintiff's claims for those forms of relief are moot."). This issue, however, is not dispositive in this case because plaintiff's claims for damages remain. *See* Dkt. # 1 at 9, ¶ B; *Doe,* 177 F.3d at 798 ("A student's graduation moots claims for declaratory and injunctive relief, but it does not moot claims for monetary damages"). Therefore, the Court will review the merits of plaintiff's constitutional claims in light of the requested relief for damages.

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for relief in the Complaint as a request for declaratory relief. *See* Dkt. # 1 (Complaint) at 9, ¶ A (requesting "that judgment be entered finding and concluding that the Defendant's refusal to allow the Plaintiff and the other senior members of the high school wind ensemble to perform Biebl's 'Ave Maria' at the June 17, 2006 graduation ceremony for Henry M. Jackson High School deprived the Plaintiff of her rights under the First and Fourteenth Amendments to the United States Constitution[.]").

2. Qualified immunity for defendant as an individual[6]

Defendant claims she is immune from suit based on qualified immunity. *See* Motion at 11. The Supreme Court has repeatedly stressed the importance of resolving immunity questions at the earliest possible stage in litigation. *See Saucier v. Katz,* 533 U.S. 194, 200 (2001) ("Where the defendant seeks qualified immunity, a ruling on that issue should be made early in the proceedings[.]"). Although "[q]ualified immunity shields public officials from money damages only," defendant's qualified immunity defense may resolve all the remaining claims in this action given the Court's ruling above that plaintiff's request for declaratory relief is moot. *Morse v. Frederick,* 127 S.Ct. 2618, 2624 n. 1 (2007) ("In this case, Frederick asked not just for damages, but also for declaratory and injunctive relief. Justice Breyer's proposed decision on qualified immunity grounds would dispose of the damages claims, but Frederick's other claims would remain unaddressed.") (internal citation omitted). For these reasons, the Court turns first to defendant's qualified immunity defense.

In reviewing a qualified immunity defense on a motion for summary judgment, the Court is "required

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[6] The Court considers plaintiff's claims against the School District separately in Section II.B.3, below.

to view all facts and draw all reasonable inferences in favor of the nonmoving party." *Brosseau v. Haugen,* 543 U.S. 194, 195 n. 2 (2004) (per curiam); *see also Motley v. Parks,* 432 F.3d 1072, 1075 n. 1 (9th Cir. 2005) (en banc) (accepting plaintiffs' recitation of the facts because the case arose in the posture of a motion for summary judgment and involved issues of qualified immunity). The Supreme Court in *Saucier* established a two-part test to resolve claims of qualified immunity. *Saucier,* 533 U.S. at 201. In ruling on a qualified immunity defense, "the first inquiry must be whether a constitutional right would have been violated on the facts alleged; second, assuming the violation is established, the question whether the right was clearly established must be considered[.]" *Id.* at 200; *Cole,* 228 F.3d at 1101. The two parts of this test are discussed, in the order required by *Saucier,* below.[7]

a. Was a constitutional right violated?

In this case, plaintiff alleges violations of three distinct constitutional rights under: (1) the First Amendment's Free Speech Clause; (2) the First Amendment's Establishment Clause; and (3) the Fourteenth Amendment's Equal Protection Clause. *See* Dkt. # 1 at 6-9. For clarity, the Court separately

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[7] *See Brosseau,* 543 U.S. at 201 (Breyer, J., concurring) ("*Saucier* requires lower courts to decide (1) the constitutional question prior to deciding (2) the qualified immunity question."); *accord Scott v. Harris,* 127 S.Ct. 1769, 1774 n. 4 (2007).

considers defendant's qualified immunity defense as applied to these three constitutional claims.

(i). Free Speech

The threshold issue in determining whether plaintiff's free speech rights were violated by defendant's prohibition of the performance of Franz Biebl's "Ave Maria" is whether this piece of music is protected "speech" under the Free Speech Clause of the First Amendment, made applicable to the states by the Fourteenth Amendment. *See* U.S. Const. amend I ("Congress shall make no law ... abridging the freedom of speech[.]"); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.,* 508 U.S. 384, 387 (1993). Defendant contends that Franz Biebl's instrumental version of "Ave Maria" is not "speech" because plaintiff has not shown that " '[a]n intent to convey a particularized message was present, and [that] the likelihood was great that the message would be understood by those who viewed it.' " *See* Dkt. # 27 at 6 (quoting *Texas v. Johnson,* 491 U.S. 397, 404 (1989)).

In *Ward v. Rock Against Racism,* 491 U.S. 781, 790 (1989), the Supreme Court held that music is protected "speech" under the First Amendment:

> Music is one of the oldest forms of human expression. From Plato's discourse in the Republic to the totalitarian state in our own times, rulers have known its capacity to appeal to the intellect and to the emotions, and have censored musical

> compositions to serve the needs of the state.... The Constitution prohibits any like attempts in our own legal order. *Music, as a form of expression and communication, is protected under the First Amendment.* In the case before us the performances apparently consisted of remarks by speakers, as well as rock music, but the case has been presented as one in which the constitutional challenge is to the city's regulation of the musical aspects of the concert; and, based on the principle we have stated, the city's guideline must meet the demands of the First Amendment.

Id. at 790 (emphasis added, internal citation omitted). While neither the Supreme Court nor the Ninth Circuit has expressly held that instrumental music of the type involved [8]in this case is "speech," other courts have held that instrumental music falls within the First Amendment's purview.[9]

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[8] Plaintiff asserts that the title of the song, "Ave Maria," which would have been printed in the graduation program, is not the speech at issue. Instead, plaintiff contends that the speech at issue is only the "performance of Biebl's beautiful music." *See* Dkt. # 29 (Reply to Cross-Motion) at 4 ("The expression at issue here is not the words 'Ave Maria' printed in the program, but the performance of Biebl's beautiful music.").

[9] Legal scholarship appears to be silent on this specific issue. *See, e.g.,* Peter Meijes Tiersma, *Article: Nonverbal Communication and the Freedom of "Speech,"* 1993 Wis. L.Rev. 1525, 1531 (1993) ("The communicative value of painting, sculpture, dancing, or instrumental music raises issues of aesthetic theory that I leave to those more competent in this area.").

For example, Judge Posner, when analyzing the passage from *Ward* cited above, stated: "The rock music in question [from *Ward*] had lyrics. But the Court's reference in the second sentence to music's appeal to the emotions, and its citation (omitted from the quotation [above]) to an article about Soviet ambivalence toward Stravinsky-a composer primarily of nonvocal music-make it implausible to suppose that the Court thought it was speaking only of vocal music; and it did not say it was.... This court [the Seventh Circuit] has held that wordless music is speech with the meaning of the [First] [A]mendment." *Miller v. Civil City of S. Bend,* 904 F.2d 1081, 1096 (7th Cir.1990) (Posner, J., concurring) (citing *Reed v. Village of Shorewood,* 704 F.2d 943, 950 (7th Cir.1983)) ("[Defendants] would be infringing a First Amendment right ... even if the music had no political message- *even if it had no words*-and the defendants would have to produce a strong justification for thus repressing a form of 'speech.' ") (emphasis added); *see also Bernstein v. United States Dep't of State,* 922 F.Supp. 1426, 1435 (N.D.Cal.1996) ("Music ... is speech protected under the First Amendment."). The Fifth Circuit has also concluded that instrumental music is covered by the First Amendment: " 'Speech,' as we have come to understand that word when used in our First Amendment jurisprudence, extends to many activities that are by their very nature non-verbal: an artist's canvas, a *musician's instrumental composition,* and a protester's silent picket of an offending entity *are all examples of protected, non-*

verbal 'speech.' " Steadman v. Texas Rangers, 179 F.3d 360, 367 (5th Cir.1999) (emphasis added).

Finally, Supreme Court dictum indicates that instrumental compositions, like the dodecaphonic music of Arnold Schoenberg, qualify for First Amendment protection. *See Hurley v. Irish-Am. Gay, Lesbian and Bisexual Group of Boston,* 515 U.S. 557, 569 (1995) ("[A] narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a 'particularized message,' would never reach *the unquestionably shielded* painting of Jackson Pollock, *music of Arnold Schoenberg,* or Jabberwocky verse of Lewis Carroll.") (emphasis added, internal citation omitted).

Based on this persuasive authority, the Court concludes that the Wind Ensemble's instrumental performance of Franz Biebl's "Ave Maria," constitutes "speech" under the First Amendment. Accordingly, the Court turns next to the issue of whether defendant's prohibition of this music at the JHS graduation ceremony violated plaintiff's free speech rights.

Both parties assert that in determining the First Amendment's reach in this case, the Court should look to the forum where the speech is presented.[10] A

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[10] Although the Court considers the parties' forum analysis assertions, as the Court discusses in Section II.B.2.b below, based on Ninth Circuit authority, a forum analysis is not required to determine the viability of an Establishment

forum analysis is used as a "means of determining when the Government's interest in limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other purposes." *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.,* 473 U.S. 788, 800 (1985). In this case, the forum analysis is applicable even though the graduation ceremony was held "off campus" at the Everett Events Center. *See Summum v. Duchesne City,* 482 F.3d 1263, 1270 (10th Cir.2007) ("[A] First Amendment forum analysis may apply even when the government does not own the property at issue[.]"); Dkt. # 10 at ¶ 3 ("Though the Everett School District does not own the Everett Events Center, it rents the facility and does sponsor and fund the graduation ceremony [.]"); *id.* at Ex. 6 (2006 JHS graduation program).

Clause defense where the speech at issue bears the imprimatur of the school. *See Cole,* 228 F.3d at 1101 ("We conclude the District officials did not violate the students' freedom of speech. Even assuming the Oroville graduation ceremony was a public or limited public forum, the District's refusal to allow the students to deliver a sectarian speech or prayer as part of the graduation was necessary to avoid violating the Establishment Clause[.]"); *Lassonde v. Pleasanton Unified Sch. Dist.,* 167 F.Supp.2d 1108, 1112 n. 4 ("Plaintiff and Defendants both devoted a significant amount of briefing to whether the Amador Valley High School graduation was a nonpublic or limited public forum. However, because the Ninth Circuit's controlling decision in *Cole* did not depend on the type of forum, this Court need not decide that question."), *aff'd,* 320 F.3d 979 (9th Cir.2003).

The forum inquiry "divides government property into three categories: public fora, designated public fora, and nonpublic fora." *Children of the Rosary v. City of Phoenix,* 154 F.3d 972, 976 (9th Cir.1998). A "public forum" is a place, such as a sidewalk or a park, that has been traditionally open for public expression. *DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ.,* 196 F.3d 958, 964 (9th Cir.1999). A "designated public forum" is created when the government intentionally opens a nontraditional form to public discourse. *Id.* All remaining public property is characterized as nonpublic fora. *Id.* at 965. The Supreme Court has also "identified another category-the 'limited public forum'-to describe a nonpublic forum that the government intentionally has opened to certain groups or for the discussion of certain topics." *Faith Ctr. Church Evangelistic Ministries v. Glover,* 480 F.3d 891, 908 (9th Cir.2007), *petition for cert. filed* (U.S. Jun. 7, 2007) (No. 06-1633).

Where a forum is "public," such as a traditional or designated public forum, the ability of the government to limit speech is "sharply circumscribed." *Id.* at 907. "Content-based regulation is justified only when 'necessary to serve a compelling state interest and [when] it is narrowly drawn to achieve that end,' " and "[c]ontent-neutral restrictions that regulate the time, place, and manner of speech are permissible so long as they are 'narrowly tailored to serve a significant government interest, and [they] leave open ample alternative channels of communication.' " *Id.* (quoting *Perry*

Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983)). Speech in a nonpublic forum, however, is subject to less demanding scrutiny, "[t]he challenged regulation need only be reasonable, as long as the regulation is not an effort to suppress the speaker's activity due to disagreement with the speaker's view." *Int'l Soc. for Krishna Consciousness, Inc. v. Lee,* 505 U.S. 672, 679 (1992). Limitations on speech in a "limited-public forum" are subject to a separate test: "[r]estrictions governing access to a limited public forum are permitted so long as they are viewpoint neutral and reasonable in light of the purpose served by the forum." *Glover,* 480 F.3d at 908.

In this case, defendant asserts that JHS's graduation ceremony was a nonpublic forum because "parameters limited what music the wind ensemble could play." *See* Dkt. # 32 at 4; Motion at 17. In contrast, plaintiff asserts that the forum at issue is a "limited public forum." *See* Dkt. # 25 at 10. In making this assertion, plaintiff claims that the relevant forum for analysis is not the entirety of the graduation ceremony, but rather "the Wind Ensemble performance during the ceremony,"[11] and further contends that the forum question in this case involves a disputed factual issue because "[a]

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[11] Modern forum jurisprudence reaches the Wind Ensemble's temporal performance of "Ave Maria." *See Rosenberger v. Rector and Visitors of Univ. of Va.,* 515 U.S. 819, 830 (1995) ("The SAF [Student Activities Fund] is a forum more in a metaphysical than in a spatial or geographic sense, but the same principles are applicable.").

reasonable trier of fact could conclude that the School District opened the relevant forum for expression by a particular group, i.e., the Wind Ensemble seniors, and thereby created a limited public forum." *See id.* at 9-10. On defendant's motion for summary judgment based on qualified immunity, the Court is "required to view all facts and draw all reasonable inferences in favor of the nonmoving party." *Brosseau,* 543 U.S. at 195 n. 2. Under this standard, in drawing all reasonable inferences in plaintiff's favor, the Court concludes that for purposes of summary judgment there are sufficient facts showing that the School District created a limited public forum when it allowed the Wind Ensemble's seniors to choose the piece for performance at the JHS 2006 graduation.[12] *See* Dkt. # 9, Ex. 3 (Moffat Dep.) at 17:4-7 ("Q. Does the Jackson High School wind ensemble have a tradition of having the seniors choose a final piece for the graduation. A. Yes."); Dkt. # 18 (Nurre Decl.) at ¶ 11 ("Part of this traditional [graduation] performance by the Wind Ensemble included having the graduating seniors choose an instrumental piece to be performed at their graduation ceremonies.").

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[12] In any event, in the reply filed in support of her Motion, defendant acquiesces to the Court's determination of this dispute under the "limited public forum" standard. *See* Dkt. # 32 at 4 ("But regardless of whether this Court finds Jackson's graduation ceremony to be a nonpublic forum or a limited public forum, the distinction is without consequence.").

But, even if the Wind Ensemble's performance constitutes a "limited public forum," defendant's prohibition on the performance of "Ave Maria" is not a violation of plaintiff's free speech rights if the restriction is viewpoint neutral and reasonable in light of the purpose of the forum. *Glover,* 480 F.3d at 908. In determining whether the restriction is viewpoint neutral, the Court must identify whether exclusion of "Ave Maria" is "content discrimination, which may be permissible if it preserves the purpose of [the] limited forum, [or] viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum's limitations." *Id.* at 911 (quoting *Rosenberger,* 515 U.S. at 829-30).

"Content discrimination occurs when the government chooses the subjects that may be discussed, while viewpoint discrimination occurs when the government prohibits speech by particular speakers, thereby suppressing a particular view about a subject." *Giebel v. Sylvester,* 244 F.3d 1182, 1188 (9th Cir.2001) (internal quotation marks omitted). The Ninth Circuit has noted that the "distinction between regulation on the basis of subject matter or viewpoint, however, 'is not a precise one.' " *Glover,* 480 F.3d at 912 (quoting *Rosenberger,* 515 U.S. at 831). In drawing the distinction between content and viewpoint restrictions, the Ninth Circuit has held that the "test is whether the government has excluded *perspectives* on a subject matter otherwise permitted by the forum." *Id.* (emphasis added).

In this case, the Court finds that exclusion of "Ave Maria" was based on permissible content restriction, not impermissible viewpoint discrimination.[13] The prohibition of the performance of "Ave Maria" was based on a decision to keep religion out of graduation as a whole, not to discriminate against a specific religious sect or creed. Ms. Brandsma's e-mail sent to the School District's principals illustrates this point:

> I am requesting that music selections for graduation be entirely *secular* in nature. My rationale is based on the nature of the event. It is a commencement program in celebration of senior students earning their high school diploma. It is not a music concert. Musical selections should add to the celebration and should not be a separate event. Invited guests of graduates are a captive audience. I understand that attendance maybe [sic] voluntary, but I believe that few students (and their invited guests) would want to miss the culminating event of their academic career. And lastly there is insufficient time at graduation to balance comparable artistic works.

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[13] Even if the restriction was not viewpoint neutral, as explained below in Section II.B.2.b, it was not clearly established that defendant's interest in avoiding an Establishment Clause violation in the context of this case was a knowing violation of the law.

See Dkt. # 10 (Brandsma Decl.) Ex. 7 (emphasis in original).[14] As Ms. Brandsma explained in her declaration, the purpose of this June 2, 2006 e-mail was to "remind them [the District principals] that all pieces for graduation should be secular, providing additional information why religion had to [be] kept out of graduation." *Id.* (Brandsma Decl.) at ¶ 6. This understanding is further reinforced by defendant's deposition testimony, where she stated: "[W]e made the decision that because the title of the piece would be on the program and it's Ave Maria and that many people would see that as *religious in nature,* that we would ask the band to select something different." Dkt. # 9, Ex. 2 (Whitehead Dep.) at 76:23-77:2 (emphasis added).

The case would be different if the exclusion had been based on excluding a particular religious sect or creed. However, the Court finds that the blanket restriction on the exclusion of religious music that occurred in this case is one based on content, not viewpoint. *See Glover,* 480 F.3d at 915 ("If the County had, for example, excluded from its forum religious worship services by Mennonites, then we would conclude that the County had engaged in unlawful viewpoint discrimination against the Mennonite religion. But a blanket exclusion of religious worship services from the forum is one based on the content of speech."); *cf. Rosenberger,* 515 U.S. at 831 ("By the

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[14] Although the e-mail does not reference the performance of "Ave Maria," plaintiff concedes that this e-mail was in direct reference to the Wind Ensemble's selection of "Ave Maria." *See* Dkt. # 25 at 11 n. 3.

very terms of the SAF prohibition, the University does not exclude religion as a subject matter, but selects for disfavored treatment those student journalistic efforts with religious editorial viewpoints.").[15]

The Court also finds, as discussed below in the context of an "Establishment Clause defense," that the prohibition on the performance of "Ave Maria" was reasonable in light of the purposes of the 2006 JHS graduation ceremony.[16] *See* Section II.B.2.b, *infra.* As a result, under the forum analysis, the Court concludes that defendant's restriction was viewpoint neutral and reasonable. Accordingly, defendant did not violate plaintiff's rights under the Free Speech Clause of the First Amendment by prohibiting the performance of "Ave Maria" at the 2006 JHS graduation ceremony.[17]

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[15] Plaintiff's case is further weakened in this regard by the fact that she appears to have no religious viewpoint on the performance of "Ave Maria." *See* Section II.B.2.a.(ii), *infra.*

[16] Although the forum at issue is that portion of the 2006 graduation ceremony pertaining to the Wind Ensemble's performance, examining the graduation ceremony as a whole is relevant in evaluating the reasonableness of defendant's action in denying the performance of "Ave Maria." *See, e.g., Glover,* 480 F.3d at 910 ("Although the actual forum is a library meeting room, the nature and function of the County's public library as a whole is relevant in evaluating the reasonableness of the County's exclusions.").

[17] The Court finds that the policies and procedures adopted by the School District are not controlling in this matter because they do not expressly address the issue of permitted

(ii). Establishment Clause

In her Complaint, plaintiff claims that defendant's "decision to forbid the Plaintiff and other senior members of the high school wind ensemble from performing Biebl's 'Ave Maria' demonstrated a hostility to and bias against religion in violation of the Establishment Clause of the First Amendment to the United States Constitution." *See* Dkt. # 1 at ¶ 27.[18] "Notwithstanding its 'checkered career,' *Lemon v. Kurtzman,* 403 U.S. 602 (1971), continues to set forth the applicable constitutional standard for assessing the validity of governmental actions challenged under the Establishment Clause." *Vasquez v. Los Angeles County,* 487 F.3d 1246, 1254 (9th Cir.2007) (citing *Santa Fe Indep. Sch. Dist. v. Doe,* 530 U.S. 290, 319 (2000)) (Rehnquist, C.J., dissenting) (noting the *Lemon* test's "checkered

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musical performances at graduation. *See* Dkt. # 10, Exs. 1-4. Section I of Procedure 2340P, for example, refers to the use of "religious music or literature" at "choral or musical assemblies," not specifically at graduation. *Id.*, Ex. 2 at 2. The only policy or procedure expressly addressing graduation states: "Neither the District nor individual schools shall conduct or sanction invocations, benedictions or prayer at any school activities including graduation." *Id.* at 3.

[18] In a footnote, plaintiff suggests that defendant's alleged hostility toward the performance of "Ave Maria" was the result of defendant's religious beliefs. *See* Dkt. # 17 n. 5. Also in a footnote, defendant moves to strike this reference. *See* Dkt. # 27 at n. 9. The Court denies the motion to strike as moot because "deletion or retention of the material would in no way affect the outcome of this case." *In re Roosevelt,* 220 F.3d 1032, 1040 n. 15 (9th Cir.2000).

career in the decisional law of [the Supreme Court]"). The "*Lemon* test" is appropriate to apply to plaintiff's Establishment Clause claim because it "accommodates the analysis of a claim brought under a hostility to religion theory." *Am. Family Ass'n, Inc. v. City & County of San Francisco,* 277 F.3d 1114, 1121 (9th Cir.2002). Under the *Lemon* test, a government act is consistent with the Establishment Clause if it: (1) has a secular purpose; (2) has a principal or primary effect that neither advances nor disproves of religion; and (3) does not foster excessive governmental entanglement with religion. *See Lemon,* 403 U.S. at 612-13; *Vasquez,* 487 F.3d at 1255.

Under the first part of the *Lemon* test, the Court determines whether defendant's act of prohibiting "Ave Maria" was grounded in a secular purpose. "Governmental actions taken to avoid *potential* Establishment Clause violations have a valid secular purpose under *Lemon.*" *Vasquez,* 487 F.3d at 1255 (emphasis added). This rule makes sense because "Establishment Clause jurisprudence would be unworkable if it were any other way: 'For this court ... to hold that the removal of ... objects to cure an Establishment Clause violation would itself violate the Establishment Clause would ... result in an inability to cure an Establishment Clause violation and thus totally eviscerate the [E]stablishment Clause." *Id.* at 1256 n. 8 (quoting *McGinley v. Houston,* 282 F.Supp.2d 1304, 1307 (M.D.Ala.2003), *aff'd,* 361 F.3d 1328 (11th Cir.2004) (ellipsis and alterations in original)). The Court finds that

defendant's action was motivated by an effort to avoid a potential Establishment Clause violation. *See* Dkt. # 9, Ex. 2 (Whitehead Dep.) at 34:18-20 (Q. Where did you obtain your information that the commencement was required to be a neutral setting? A. From the Supreme Court decision about commencement [*Lee v. Weisman,* 505 U.S. 577 (1992)]."); Dkt. # 10 (Brandsma Decl.) at ¶ 6 (stating that the purpose of the June 2006 e-mail was to provide "information why religion had to [be] kept out of graduation."); *see also* section II.B.2.b, *infra.* Therefore, defendant's action satisfies the first part of *Lemon's* test.

The *Lemon* test's second part prohibits government action that has the "principal or primary effect" of advancing or disapproving religion. *See Lemon,* 403 U.S. at 612; *Am. Family Ass'n, Inc.,* 277 F.3d at 1122. The Ninth Circuit has "noted that 'because it is far more typical for an Establishment Clause case to challenge instances in which the government has done something that favors religion or a particular religious group, [there is] little guidance concerning what constitutes a primary effect of inhibiting religion.' " *Vasquez,* 487 F.3d at 1256 (quoting *Am. Family Ass'n, Inc.,* 277 F.3d at 1122). In *Vasquez,* the Ninth Circuit held that an action does not violate the second part of the *Lemon* test if the action "could not reasonably be construed to send as its *primary* message the disapproval of plaintiff's religious beliefs." *Id.* at 1257 (quoting *Vernon v. City of Los Angeles,* 27 F.3d 1385, 1399 (9th Cir.1994) (emphasis in original, alteration omitted)).

Like in *Vasquez,* the Court here finds that a "reasonable observer" familiar with the history and controversy surrounding religious speech at graduation exercises would not perceive the primary effect of defendant's action as one of hostility toward religion. "Rather, it would be viewed as an effort by Defendant[ ] to comply with the Establishment Clause and to avoid unwanted future litigation." *Id.* at 1257; *see* Dkt. # 10 (Brandsma Decl.) at ¶ 4 (describing the "complaints from those in attendance and letters to the editor [that] appeared in the Everett Herald (Snohomish County's largest newspaper) as a result of the religious music ["Up Above My Head"] that was performed at the 2005 graduation."); *id.* at Ex. 5 (JHS 2005 graduation program listing performance of "Up Above My Head"); Dkt. # 9, Ex. 4 (Everett Herald June 26, 2005 letter to the editor from a concerned citizen titled *Religious song had no place at event*).

Finally, the last part of the *Lemon* test prohibits government action that fosters "excessive government entanglement with religion." *See* Lemon, 403 U.S. at 613. In her response, plaintiff did not articulate how defendant's action caused excessive entanglement with religion. *See* Dkt. # 25. Additionally, given plaintiff's stance on the lack of religious content of "Ave Maria," the Court finds that plaintiff cannot show that excessive entanglement occurred. Plaintiff's Establishment Clause claim is premised on the fact that the government may not exhibit a hostility toward religion. The claim might be stronger if plaintiff believed that the performance

of Biebl's "Ave Maria" conveyed a religious message. But, she does not. In plaintiff's declaration in support of her Cross-Motion, she states: "The other seniors and *I did not choose the 'Ave Maria' piece because of any religious message it might convey.* Rather, the seniors chose it because of its beauty, we liked how it sounded and the performance would have made our graduation a memorable one." *See* Dkt. # 18 (Nurre Decl.) at ¶¶ 17-18. Based on this, plaintiff cannot take the position that defendant acted with hostility toward religion or the School District's action fostered "excessive entanglement with religion" when plaintiff does not assert that the speech that was excluded conveyed a religious message. Therefore, under *Lemon,* defendant is entitled to summary judgment on plaintiff's Establishment Clause claim.

(iii). Equal Protection

Finally, in her Complaint plaintiff alleges that "Defendant Whitehead's decision to forbid the Plaintiff and other senior members of the high school wind ensemble from performing Biebl's 'Ave Maria' at the high school graduation ceremony ... deprives the Plaintiff and the other senior wind ensemble members of equal protection of the law guaranteed by the Fourteenth Amendment to the United States [Constitution]." Dkt. # 1 at ¶ 32. In her Complaint, however, plaintiff does not articulate how or why defendant's action was a violation of plaintiff's equal protection rights.

In considering a challenge under the Equal Protection Clause, the Court must first determine what level of scrutiny to apply "depending upon the interest affected or the classification involved." *Dunn v. Blumstein,* 405 U.S. 330, 335 (1972). The Supreme Court has "repeatedly held that a classification neither involving fundamental rights nor proceeding along suspect lines cannot run afoul of the Equal Protection Clause if there is a rational relationship between disparity of treatment and some legitimate governmental purpose." *Central State Univ. v. Am. Ass'n of Univ. Professors,* 526 U.S. 124, 128, 119 S.Ct. 1162, 143 L.Ed.2d 227 (1999) (quotation marks, citation, and alteration omitted); *Nat'l Ass'n for the Advancement of Psychoanalysis v. Cal. Bd. of Psychology,* 228 F.3d 1043, 1049 (9th Cir. 2000) ("To withstand Fourteenth Amendment scrutiny, a statute is required to bear only a rational relationship to a legitimate state interest, unless it makes a suspect classification or implicates a fundamental right.") (citing *City of New Orleans v. Dukes,* 427 U.S. 297, 303 (1976)) (per curiam) (equal protection).

Plaintiff clarifies her equal protection theory in her response to defendant's motion for summary judgment where she states: "Nurre and her Wind Ensemble classmates were singled out for different treatment because, unlike previous senior classes, their choice of a performance piece at graduation was not allowed. This different treatment was not reasonable or rational[.]". Dkt. # 25 at 22-23. In support of this theory, plaintiff relies on the Supreme

Court's "class of one" equal protection jurisprudence, quoting *Village of Willowbrook v. Olech,* 528 U.S. 562 (2000), where the Supreme Court stated:

> Our cases have recognized successful equal protection claims brought by a 'class of one,' where the plaintiff alleges that she has been *intentionally treated differently* from others similarly situated *and that there is no rational basis for the difference in treatment,* In so doing, we have explained that the purpose of the equal protection clause of the Fourteenth Amendment is to secure every person within the State's jurisdiction against intentional and arbitrary discrimination, whether occasioned by express terms of a statute or by its improper execution through duly constituted agents.

Id. at 564-65, 120 S.Ct. 1073 (internal citations and quotation marks omitted, emphasis added); Dkt. # 25 at 22.

Accordingly, in assessing plaintiff's Equal Protection claim, the Court applies a rational basis standard of review because plaintiff has not shown that: (1) the defendant deprived plaintiff of a fundamental right,[19] or (2) the alleged classification proceeded "along suspect lines." Instead, plaintiff bases her Equal Protection claim on the "class of one" theory, which requires only rational basis review.

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[19] Plaintiff has not identified any authority where the right to play "beautiful music" has been held to be "fundamental."

As discussed above in Section II.B.2.a.(ii) and below in Section II.B.2.b, given the School District's Establishment Clause concerns over the performance of "Ave Maria" at the graduation ceremony, the Court finds that defendant had a rational basis for treating the 2006 Wind Ensemble's selection of "Ave Maria" differently from the 2003-2005 Wind Ensemble's selection of David Holsinger's "On a Hymnsong of Philip Bliss." *See* Dkt. # 10, Ex. 5 (2005 JHS graduation program); Dkt. # 9, Ex. 3 (Moffat Dep.) at 31:22-33:4. Therefore, the Court concludes that defendant did not violate plaintiff's equal protection rights and grants defendant's motion for summary judgment on this claim.

b. Whether the rights were clearly established

Although the Court's conclusion above that plaintiff's constitutional rights were not violated entitles Dr. Whitehead to qualified immunity as an individual defendant, for the record, the Court also grants defendant's motion for summary judgment on qualified immunity for the separate reason that it was not clearly established that defendant's actions were unlawful. *See Saucier,* 533 U.S. at 201, 121 S.Ct. 2151 ("If no constitutional right would have been violated were the allegations established, there is no necessity for further inquires concerning qualified immunity."). "The Supreme Court has provided little guidance as to where courts should look to determine whether a right was clearly established at the time of the injury." *Boyd v. Benton County,* 374 F.3d 773, 781 (9th Cir.2004). In the

Ninth Circuit, the Court first looks to binding precedent by the Supreme Court or this Circuit to determine whether a right was clearly established. *Id.* In the absence of binding precedent, the Court is instructed to " 'look to whatever decisional law is available to ascertain whether the law is clearly established' for qualified immunity purposes, 'including decisions of state courts, other circuits, and district courts.' " *Id.* (citing *Drummond v. City of Anaheim,* 343 F.3d 1052, 1060 (9th Cir.2003)).

Qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs,* 475 U.S. 335, 341 (1986). "A reasonable belief that the conduct was lawful is sufficient to secure qualified immunity." *McDade v. West,* 223 F.3d 1135, 1142 (9th Cir.2000) (citation omitted). This case implicates the difficult intersection of the First Amendment's Free Speech and Establishment Clauses. "That the Constitution requires toleration of speech over its suppression is no less true in our Nation's schools. But the Constitution also demands that the State not take action that has the primary effect of advancing religion. The introduction of religious speech into the public schools reveals the tension between these two constitutional commitments, because the failure of a school to stand apart from religious speech can convey a message that the school endorses rather than merely tolerates that speech." *Bd. of Educ. of the Westside Cmty. Sch. v. Mergens,* 496 U.S. 226, 263-64 (1990) (Marshall, J., concurring) (internal citations omitted). Recognizing this tension, the

Supreme Court "suggested in *Widmar v. Vincent,* 454 U.S. 263, 271 (1981), that the interest of the State in avoiding an Establishment Clause violation 'may be [a] compelling' one justifying an abridgment of free speech otherwise protected by the First Amendment." *Lamb's Chapel,* 508 U.S. at 394. Later, in *Good News Club v. Milford Central Sch.,* 533 U.S. 98, 113 (2001), the Supreme Court stated " *it is not clear* whether a State's interest in avoiding an Establishment Clause violation would justify viewpoint discrimination." *Id.* (emphasis added) (citing *Lamb's Chapel,* 508 U.S. at 394-95 (noting the suggestion in *Widmar* but ultimately not finding an Establishment Clause problem)). In both *Good News Club* and *Lamb's Chapel,* the Supreme Court did not reach the issue of the government's interest in avoiding an Establishment Clause violation because under the facts of these two cases, " 'there would have been no realistic danger that the community would think that the District was endorsing religion or any particular creed.' " *Good News Club,* 533 U.S. at 113 (quoting *Lamb's Chapel,* 508 U.S. at 395). In *Good News Club,* the Court reasoned that "[b]ecause Milford [the School District] has not raised a valid Establishment Clause claim, we do not address the question whether such a claim could excuse Milford's viewpoint discrimination.". *Id.* at 120.

As a result, "[t]he Supreme Court observe[d] in *Good News Club* that the question 'whether a State's interest in avoiding an Establishment Clause violation would justify viewpoint discrimination' is an open one." *Hills v. Scottsdale Unified Sch. Dist.,* 329

F.3d 1044, 1053 n. 7 (9th Cir.2003) (quoting *Good News Club,* 533 U.S. at 113). The question, however, is not an open one in the Ninth Circuit. *Id.* The Ninth Circuit has "recognized that Establishment Clause concerns can justify speech restrictions 'in order to avoid the appearance of government sponsorship of religion.' " *Hills,* 329 F.3d at 1053 (quoting *Lassonde,* 320 F.3d at 983-85; citing *Cole,* 228 F.3d at 1103-05, and *Prince v. Jacoby,* 303 F.3d 1074, 1082 (9th Cir.2002)). This line of jurisprudence has been loosely referred to as the "Establishment Clause defense." *See Hills,* 329 F.3d at 1053.[20]

In this case, given the graduation context, the Wind Ensemble's performance of "Ave Maria" would have appeared to be the School District's speech not the "private speech" of the plaintiff or the Wind

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[20] "Establishment Clause defense" jurisprudence in the Ninth Circuit suggests that the "defense" does not apply unless the school district proves that the Establishment Clause would have been violated had the activity at issue been allowed to proceed. *See Hills,* 329 F.3d at 1053 ("The District has not, however, demonstrated that the Establishment Clause would be violated if it permitted distribution of literature that advertised religious programs or events."); *Cole,* 228 F.3d at 1102 ("[I]t is clear the District's refusal to allow Cole to deliver a sectarian invocation as part of the graduation ceremony was necessary to avoid an Establishment Clause violation."). If the Establishment Clause "defense" is to provide any meaningful shelter for a school district, however, the defense should not depend on a hindsight determination by the court, but rather on the reasonableness of the school district's belief at the time that an activity would violate the Establishment Clause.

Ensemble. *See Hazelwood v. Kuhlmeier,* 484 U.S. 260, 271 (1988) (discussing in the free speech context the control over "expressive activities that students, parents, and members of the public might reasonably believe to bear the imprimatur of the school"). Although plaintiff asserts that graduation is not a "magic" setting, both the Supreme Court and the Ninth Circuit have underscored the significance of the graduation context. *See* Dkt. # 29 at 10 ("[T]here is nothing magic about graduation ceremonies [.]"). In *Lee v. Weisman,* 505 U.S. 577, 597 (1992), the Supreme Court noted that "[a]t a high school graduation, teachers and principals must and do 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." Given this control over graduation, the Ninth Circuit has concluded that: "the essence of graduation is to place the school's imprimatur on the ceremony-including the student speakers that the school selected." *Lassonde,* 320 F.3d at 985. In this unique context, the Ninth Circuit concluded in *Cole* that "the District's plenary control over the graduation ceremony, especially the student speech, makes it apparent [that the sectarian] speech would have borne the imprint of the District." *Cole,* 228 F.3d at 1103. Therefore, speech at graduation may be considered state-sponsored as opposed to "private speech." *See Mergens,* 496 U.S. at 250 ("[T]here is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.").

Where speech bears the imprimatur of the school, the school has an interest in avoiding a conflict with the Establishment Clause. In *Cole,* for example, the Ninth Circuit held that the "school district had to censor the [sectarian] speech in order to avoid the appearance of government sponsorship of religion," and because "allowing the speech would have had an impermissibly coercive effect on dissenters, requiring them to participate in a religious practice even by their silence." *Lassonde,* 320 F.3d at 983.

In this case, the Court finds that the Wind Ensemble's performance of "Ave Maria" would have borne the imprimatur of the school because the performance took place at graduation, the School District exercised control over the performance by placing restrictions on its content, and the performance was by the "Jackson Band" as listed in the 2006 JHS graduation program. *See* Dkt. # 10, Ex. 6 (2006 graduation program); Dkt. # 12 (Cheshire Decl.) at ¶ 2 ("After that graduation [in 2005], it was made clear to me that I was to review all music selections, especially in connection with commencement ceremony."). Given the graduation context in this case, the facts here are distinguishable in a "fair way" from the Supreme Court's "equal access" cases in *Widmar, Good News Club,* and *Lamb's Chapel* because in those cases the Court held that there was no realistic danger that the community would think that the district was endorsing the activity. *See Lamb's Chapel,* 508 U.S. at 395; *Saucier,* 533 U.S. at 202-03.

As the Court found above, defendant's purpose in restricting the speech was to avoid a conflict with the Establishment Clause. *See* Section II.B.2.a. (ii), *supra.* Given the Ninth Circuit's precedent in *Cole* and *Lassonde,* and in light of the district's Establishment Clause concerns, the Court cannot say that the contours of plaintiff's rights in the context of a graduation ceremony were "sufficiently clear" that defendant would understand that by prohibiting the performance of "Ave Maria" defendant was knowingly violating the law. *See Saucier,* 533 U.S. at 202 ("The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right."). To be sure, the Establishment Clause conflict was much greater with the proselytizing speeches in *Cole* and *Lassonde. See Lassonde,* 320 F.3d at 983. But, the Supreme Court has stated that ("[t]he Establishment Clause proscribes public schools from 'conveying or attempting to convey a message that religion or a particular religious belief is *favored* or *preferred* [.]' "). *Lee,* 505 U.S. at 604-05 (Blackmun, J., concurring) (emphasis in original) (quoting *County of Allegheny v. ACLU, Greater Pittsburgh Chapter,* 492 U.S. 573, 593 (1989)). Here, while plaintiff asserts "that there was no reasonable basis for forbidding the Wind Ensemble to perform 'Ave Maria' " the Court concludes that defendant's prohibition was not clearly unlawful given the hazy border between the Establishment Clause and Free Speech Clause in the

high school graduation context.[21] *See* Cross-Motion at 13. In cases like this one, school administrators run the risk of being whipsawed by the First Amendment's Free Speech and Establishment Clauses. *See, e.g.,* Dkt. # 10 (Brandsma Decl.) at ¶ 4 (describing the complaints from the performance of "Up Above My Head"). "School [superintendents] have a difficult job" and "the law should not demand that they fully understand the intricacies of [the Supreme Court's] First Amendment jurisprudence." *Morse,* 127 S.Ct. at 2629, 2639 (Breyer, J., concurring in the judgment in part and dissenting in part). Therefore, the Court cannot say that defendant was "plainly incompetent" or "knowingly violate[d] the law" by assuming that her actions restricting "Ave Maria" were proper under the Establishment Clause. *See Malley,* 475 U.S. at 341. For this reason, the Court concludes that defendant as an individual is entitled to qualified immunity on plaintiff's free speech claim. Similarly, the Court concludes that defendant is entitled to qualified immunity on

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[21] Under the forum analysis, restricting the religious subject matter on Establishment Clause grounds was reasonable in light of the graduation context. *See DiLoreto,* 196 F.3d at 967 ("In a nonpublic forum opened for a limited purpose, restrictions on access 'can be based on subject matter ... so long as the distinctions drawn are reasonable in light of the purpose served by [the] forum' and the surrounding circumstances.") (quoting *Cornelius,* 473 U.S. at 806, 809); *Glover,* 480 F.3d at 920 ("We see nothing wrong with the County excluding certain subject matter or activities that it deems inconsistent with the forum's purpose, so long as the County does not discriminate against a speaker's viewpoint.").

plaintiff's Establishment Clause claim because the Court has been unable to find authority clearly establishing that defendant was acting with hostility toward religion in violation of the Establishment Clause by prohibiting the performance of "Ave Maria" at a graduation ceremony. Plaintiff's reliance on the out-of-circuit authority of *Stratechuk v. Bd. of Educ. of S. Orange-Maplewood Sch. Dist.,* 200 Fed.Appx. 91 (3d Cir.2006), *Doe v. Duncanville Indep. Sch. Dist.,* 70 F.3d 402 (5th Cir.1995), and *Bauchman v. West High Sch.,* 132 F.3d 542 (10th Cir.1997) is unavailing. *See* Dkt. # 25 at 18-23. First, not only is *Stratechuk* unpublished, but it also addressed a motion to dismiss for failure to state a claim. *Stratechuk,* 200 Fed.Appx. at 94. In reversing the district court, the Third Circuit simply held that a claim alleging that "a categorical ban on exclusively religious music, enacted with the express purpose of sending a message of disapproval of religion," was not subject to dismissal on a Fed.R.Civ.P. 12(b)(6) motion. *Id. Duncanville* is also distinguishable here because, on a motion for an injunction, the case addressed the issue of whether vocal performances of the choral song "The Lord Bless You and Keep You" at choir performances constituted impermissible endorsement of religion. *Duncanville Indep. Sch. Dist.,* 70 F.3d at 407. The holding of *Duncanville* did not concern a "hostility to religion" claim like the one asserted by plaintiff in this case, and also *Duncanville* addressed the use of the music as a school chorus' "theme" song-it did not consider a performance of the song in the graduation context. *Id.* Notably, the Wind Ensemble here was allowed to

perform "Ave Maria" at a music concert. *See* Dkt. # 19, Ex. A (Moffat Dep.) at 36:14-23. The specific prohibition in this case occurred in the graduation context. Similarly, in *Bauchman,* the Tenth Circuit did not consider a hostility toward religion Establishment Clause claim or address the graduation context. *Bauchman,* 132 F.3d at 548, 550 (dismissing as moot appeal No. 95-4084 concerning the choir's performance at graduation). Significantly in *Bauchman,* the Tenth Circuit prohibited the choir's performance of "The Lord Bless You and Keep You" and "Friends" at the 1995 graduation ceremony pending appeal. *Id.* at 547 n. 4 ("Ms. Bauchman also requested an injunction pending appeal, which we granted, *thereby enjoining the singing of two songs,* 'The Lord Bless You and Keep You' and 'Friends,' by the Choir *at West High School's 1995 graduation ceremonies.*") (emphasis added).

Similarly, under rational basis scrutiny, the Court also concludes that plaintiff is entitled to qualified immunity on plaintiff's Equal Protection claim because there is no clearly established authority holding that the Supreme Court's "class of one" jurisprudence applies to the context of this case. To the contrary, the Ninth Circuit has previously suggested in its Equal Protection jurisprudence that "trying to avoid establishment clause problems" is a "legitimate purpose" so long as the action taken rationally furthers that purpose. *See Christian Science Reading Room Jointly Maintained v. City & County of San Francisco,* 784 F.2d 1010, 1013 (9th Cir.1986) (holding, however, that the action taken

did not rationally further the purpose of remedying an Establishment Clause violation), *rehearing en banc denied,* 807 F.2d 1466, 1468 n. 2 (9th Cir.1987) (stating that "[t]he panel conceded that trying to avoid establishment clause problems was a legitimate purpose.") (Norris, J., dissenting). In this case, the Court finds that defendant's action was rational and furthered the purpose of avoiding Establishment Clause problems where the performance of "Ave Maria" would have borne the School District's imprimatur at the 2006 JHS graduation ceremony. As the Supreme Court has emphasized, "[e]veryone knows that in our society and in our culture high school graduation is one of life's most significant occasions.... Graduation is a time for family and those closest to the student to celebrate success and express mutual wishes of gratitude and respect[.]" *Lee,* 505 U.S. at 595. In light of the significance of graduation, it is rational that school administrators would strive to avoid things that offend in order to structure a ceremony for *all* students and families.

3. Municipal liability

Plaintiff's complaint under 42 U.S.C. § 1983 is against defendant Dr. Carol Whitehead as both an "individual" and in her "official capacity as the Superintendent of Everett School District No. 2." *See* Dkt. # 1. Both parties agree that suing defendant in her "official capacity" is functionally equivalent to a claim against the Everett School District. *See* Dkt. # 25 at 5 ("The claim against the Defendant in her

official capacity is the functional equivalent of a claim against the School District[.]"); Dkt. # 32 at 2 ("Dr. Whitehead does not dispute that the suit against her in her official capacity is, in reality, a suit against the Everett School District."); *Larez v. City of Los Angeles,* 946 F.2d 630, 646 (9th Cir.1991) ("A suit against a governmental officer in his official capacity is equivalent to a suit against the governmental entity itself.").

In order for plaintiff to support a municipal liability claim against defendant under § 1983, however, plaintiff must establish that she was denied a constitutional right. *See Miller v. Cal. Dep't of Soc. Serv.,* 355 F.3d 1172, 1176-77 (9th Cir.2004) ("Because [plaintiffs] have failed to establish a constitutional right of which they were deprived, the district court properly determined that the [plaintiffs] established no claim against Yuba County.") (citing *Van Ort v. Estate of Stanewich,* 92 F.3d 831, 835 (9th Cir.1996)); *see also Oviatt v. Pearce,* 954 F.2d 1470, 1474 (9th Cir.1991) ("To impose liability on a local governmental entity for failing to act to preserve constitutional rights, a section 1983 plaintiff must establish: (1) that he possessed a constitutional right of which he was deprived [.]") (citing *City of Canton v. Harris,* 489 U.S. 378, 389-91 (1989)). Given the Court's conclusion above in Section II.B.2.a that plaintiff was not deprived of a constitutional right, the Court

grants defendant's motion for summary judgment on all claims against the Everett School District.[22]

III. CONCLUSION

For all of the foregoing reasons, "Defendant's Motion for Summary Judgment" (Dkt.# 8) is GRANTED and "Plaintiff Nurre's Motion for Summary Judgment Under CR 56(A)" (Dkt.# 17) is DENIED.

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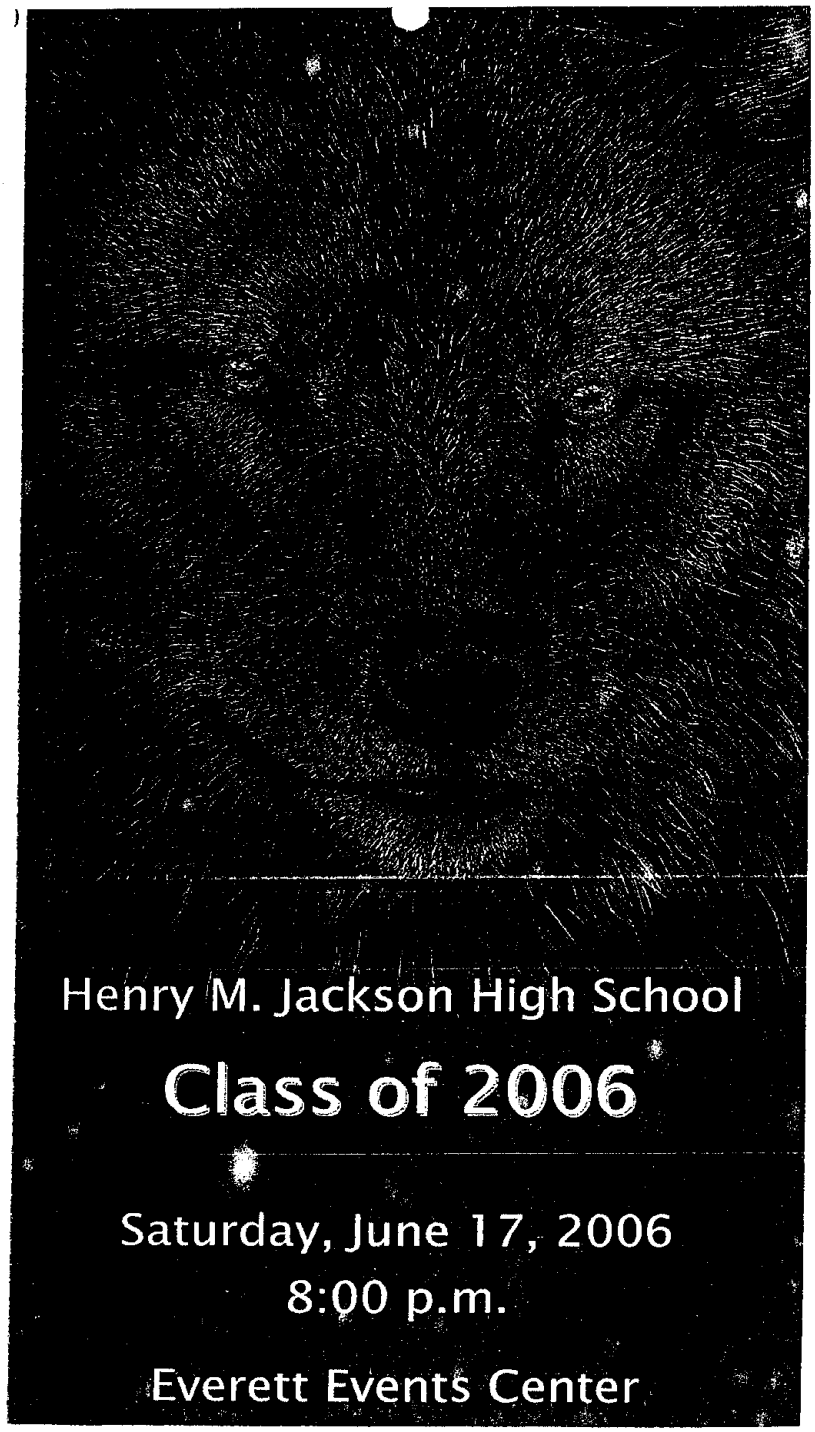
[22] For this reason, the Court does not need to reach the issue of whether defendant had the "final policy making authority" necessary to subject the School District to liability under 42 U.S.C. § 1983. *See City of St. Louis v. Praprotnik,* 485 U.S. 112, 123 (1988) (plurality opinion) ("[O]nly those municipal officials who have 'final policymaking authority' may by their actions subject the government to § 1983 liability."); Dkt. # 34 (Order Requesting Supplemental Briefing).


Henry M. Jackson High School
Class of 2006
Saturday, June 17, 2006
8:00 p.m.
Everett Events Center

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Kajsa Swenson ..... Vice President
Lindseylee Wheadon ..... Secretary
Garret Miller Graaf ..... Treasurer
Kristine Alvarez ..... Activities Coordinator
Heidi Reichelt ..... Class Advisor

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Andrew Choi ..... Vice President
Meredith Ramilo ..... Secretary
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Sophomore Year Officers

Roy Sim ..... President
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Nina Park ..... Vice President
Jaclyn Tomaras ..... Secretary
Mark Serafini ..... Treasurer
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Kristie Dutton, Vice President
Sue Cooper ~ Karen Madsen ~ Ed Petersen

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Karst Brandsma ..... Associate Superintendent, Instruction
Bob Collard ..... Associate Superintendent, Finance & Operations
Lynn Evans ..... Executive Director, Area 2
Jim McNally ..... Executive Director, Area 1

JHS Administration

Terry Cheshire ..... Principal
Lawrence Fritts ..... Assistant Principal
Donald Lichty ..... Assistant Principal
David Peters ..... Assistant Principal

Counselors

Leslie Tucker ~ Sarah Hatfield
Paul Turner ~ Birgitte McIntosh ~ Connie Sperry

Special Thanks to:

Senior Class Parents ~ Junior Class Officers
Henry M. Jackson High School Secretaries

Program cover art by Shelley Rappleye, JHS Class of 2006

The Class of 2006

"No matter how invisible we may appear some days, no matter how far we may be from one another, we shall always remain as one by the moments we shared in our hope of creating our dream for tomorrow."

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Raymond Aftakian
Sonia Aguilar
Christine Allen
Jacob Alley ♦
Kristina Alvarez
Jessica Amaya
Elisabeth Anderson
Thomas Anderson
Holly Angelo
Jessalca Argenco
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Jennifer Delco
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Chris Walters
Jeff Weiss
Rick Wigre
DeeAnn Williamson
Debra Wilson
Sherri Wright

Program

Prelude Concert ..... Jackson Jazz Combo
Lesley Moffat, Director

Processional: "Pomp and Circumstance" ..... Jackson Band
(By Sir Edward Elgar) Lesley Moffat, Director

Audience should remain seated for processional,
but please stand for the National Anthem.

National Anthem ..... Aubrey Logan,
Class of 2006

Welcoming Remarks ..... Terry Cheshire
Principal, Henry M. Jackson High School

Superintendent's Scholar ..... Dr. Carol Whitehead
Superintendent, Everett Public Schools

Class Speaker: "New Beginnings" ..... Carly Clement

"Mother Africa" ..... JHS Choir Members
(Composed by Hans Zimmer; Stuart Hunt, Director
Lyrics by Lebo M.)

Class Speaker: "Echos" ..... David Coulter

"Second Suite for Military Band" ..... Jackson Band
(by Gustav Holst) Directed by David Thomas, Class of 2006

Class Speaker: "Joy, Peace, Love, Happiness" ..... Laura Shelly

Presentation of the Class of 2006 ..... Terry Cheshire

Presentation of Diplomas

Dr. Carol Whitehead, Superintendent
Karst Brandsma, Associate Superintendent for Instruction
Kristie Dutton, School Board Vice President
Karen Madsen, School Board Member
Ed Petersen, School Board Member

Changing of the Tassels

Laura Shelly, Senior Class President

Recessional: "Pomp and Circumstance" ..... Jackson Band
(By Sir Edward Elgar) Lesley Moffat, Director

The audience should remain seated.

2340P

INSTRUCTION

Religious-Related Activities and Practices

The Everett School District shall remain neutral in matters involving religion. The District will adhere to the following guidelines:

A. Instruction about religious matters and/or using religious materials shall be conducted in an objective, neutral, non-devotional manner and shall serve a secular educational purpose. History, sociology, literature, the arts and other disciplines taught in school may have a religious dimension. Study of these disciplines, including the religious dimension, shall give neither preferential nor disparaging treatment to any single religion in general and must not be introduced or utilized for devotional purposes.

Criteria used to guide academic inquiry in the study of religion shall seek the same neutrality, objectivity and educational effectiveness expected in other areas of the curriculum. In addition, materials and activities should be sensitive to America's pluralistic society and should educate rather than indoctrinate. Instructional activities should meet the three-part test established

and used by the U.S. Supreme Court to determine constitutionality:

1 the activity must have a secular purpose;
2 the activity's principal or primary effect must be one that neither advances nor inhibits religion; and
3 the activity must not impose excessive involvement on the part of the school in order to maintain a neutral position towards the advancement of religion. This constitutional restriction shall not preclude a student from xpressing his/her views relative to belief or on-belief about a religious-related issue in ompositions, reports, music, art, debate and lassroom discussion, when consistent with the ssignment.

All religious-related instructional materials and/or activities must relate to secular student learning goals or standards.

Staff shall avoid assigning work that emphasizes the religious aspects of a holiday. Individual students should be allowed, at their own direction, to use religious personages, events or symbols as a vehicle for artistic expression, if consistent with the assignment.

State law prohibits staff from requiring that students reveal, analyze or critique their religious beliefs, from grading academic work on its religious expression if any, from censoring or imposing consequences on students who engage in

religious expression in accordance with the law, or from imposing the religious beliefs of the staff member on students.

B. A student may decline to participate in a school activity that is contrary to his/her religious convictions.

C. School resources, including facilities, real property, bulletin boards and communication systems may be used by religious groups or for religious purposes only in accordance with procedures developed by the Superintendent or designee. Such use must be outside of school hours or when allowable use will not interfere with the school program in compliance with Board Policy 4333 – Non-School Use of Buildings, Grounds and Equipment.

D. If non-curriculum-related student groups are permitted to meet on school premises immediately before or after school hours, students shall be permitted to meet to discuss religious, political, philosophical or other issues provided such group meetings are student-initiated and student-managed in compliance with Board Policy 2153 – Student Group Meetings (Limited Open Forum).

E. A student, upon the request of a parent/guardian, may be excused to participate in religious instruction for a portion of a school day provided the activity is not conducted on school property and provided

that the student's regular educational program is not disrupted. Credit shall not be granted for such instruction.

F. When scheduling important school activities and testing, the District and its schools shall attempt to avoid dates which conflict with religious holidays that may be observed by some students.

G. Material and/or announcements promoting religion may not be distributed by non-students or on behalf of groups or individuals who are not students.

A student may distribute religious literature under the same conditions that other literature may be distributed on the campus provided that such distribution does not intrude on the operation of the school in compliance with Board Policy 3222 – Distribution of Materials.

H. Students may wear religious attire or symbols provided they are not materially and substantially disruptive to the educational process.

I. Religious services, programs or assemblies shall not be conducted in school facilities during school hours or in connection with any school sponsored or school related activity. Speakers and/or programs that convey a religious or devotional message are prohibited. This restriction does not

preclude the presentation of choral or musical assemblies, which may use religious music or literature as a part of the program or assembly.

Musical, artistic and dramatic presentations, which have a religious theme may be included in course work and programs on the basis of their particular artistic and educational value or traditional secular usage. They shall be presented in a neutral, non-devotional manner, be related to the objective of the instructional program, and be accompanied by comparable artistic works of a non-religious nature.

Since a variety of activities are included as part of a holiday theme, care must be exercised to focus on the historical and secular aspects of the holiday rather than its devotional meanings. Music programs shall not use the religious aspect of a holiday as the underlying message or theme. Pageants, plays and other dramatic activities shall not be used to convey religious messages. Religious symbols such as nativity scenes, if used, shall be displayed in conjunction with a variety of secular holiday symbols so that the total presentation emphasizes the cultural rather than religious significance if the holiday.

J. There shall be no school sponsorship of baccalaureate services. Interested parents and students may plan and organize baccalaureate exercises provided that the

service is not promoted through the school. Staff and student participation in baccalaureate services is voluntary.

Neither the District nor individual schools shall conduct or sanction invocations, benedictions or prayer at any school activities including graduation.

K. As a matter of individual liberty, a student may of his/her own volition engage in private, non-disruptive prayer at any time not in conflict with learning activities. School staff shall neither encourage, nor discourage a student from engaging in non-disruptive oral or silent prayer or any other form of devotional activity.

Students, parents and staff who are aggrieved by practices or activities conducted in the school or District may register their concern with the building principal or District Superintendent.

Adopted: January 2000

Friday, June 02, 2006 5:37:55 PM
Urgent Message

From: Karst Brandsma

Subject: Graduation

To: High School Principals

Cc: Jim McNally
Lynn Evans
Carol A. Whitehead

Dear High School Principals,

I know that Jim McNally and Lynn Evans have been working with each of you regarding the music selections that will be played by student groups at graduation on June 17th. I am requesting from each of you a copy of the selections that will be played and sung, along with their lyrics.

Board Policy 2340 and Procedure 2340P state that musical presentations with a religious theme may be included in a program if they have been selected based on their particular artistic and educational value or traditional secular usage. Even then, they must be accompanied by comparable artistic works of a non-religious nature.

I am requesting that music selections for graduation be entirely **secular** in nature. My rationale is based on the nature of the event. It is a commencement program in celebration of senior students earning their high school diploma. It is not a music concert. Musical selections should add to the celebration and should not be a separate event. Invited guests of graduates are a captive audience. I understand that attendance maybe voluntary, but I believe that few students (and their invited guests) would want to miss the culminating event of their academic career. And lastly there is insufficient time at graduation to balance comparable artistic works.

Your immediate attention to this request is appreciated.

Karst Brandsma
Associate Superintendent for Instruction

c: Jim McNally, Executive Director for Area 1

7 June, 2006

From: Stuart Hunt
To: Lynn Evans
Re: Graduation / situational ethics and other constitutional issues
Cc: Terry Cheshire, Lesley Moffat, Carole Whitehead

Dear Lynn –
I happened to being talking with Lesley today about the problems created by last-minute decisions regarding changing graduation music and the possibility of having to learn and rehearse other music with seniors leaving next Monday. She showed me the status of things today in your email:

Lesley--

I agree with Terry that changing the title is not ethical.
Terry has received a message from Karst Brandsma, Associate Superintendent, explaining that due to the nature of the event (a celebration for all attending as opposed to a music concert) that selections of a secular nature are the appropriate ones. I would urge the students to chose from pieces that are upbeat and celebratory in tone yet appropriate for a formal occassion.

Thanks for understanding, Lesley, and working with your students to understand.

Lynn

My eyes were first drawn to the idea that changing the title is "not ethical", and I'd like to pull that thread a little. Indeed there **is** an unethical thread in the fabric: *what is ethical about a priori decisions and posteriori information that contravenes stated board policy* (from Karst: "Board Policy 2340 and Procedure 2340P state that musical presentations with a religious theme **may** be included in a program if they have been selected based on their particular artistic and educational value or traditional secular usage. Even then, they must be accompanied by comparable artistic works of a non-religious nature.") *whose basis is not that which puts student education first but instead is driven by the fear of what just one person might find objectionable ?* Not everyone says the pledge of allegiance (which, need I remind anyone, mentions God BY NAME !) and is recited daily in public schools and at public school events.

The Everett S.D. board policy speaks of balance and, in this case, that balance is about 95% secular at graduation. The one person apparently being feared has no **more** constitutional weight than the 99/100. But, our constitution forbids the tyranny of BOTH the majority and the minority. By unchallenged ALTERING stated board policy for this event, it sets the Everett or ANY school district on the path to more adventurism.

We see this clearly just now as congressional hearings are vetting President Bush's assertion that circumventing an 11 member, congressionally created and instituted judiciary panel to cross-check potential constitutionally guaranteed rights and violations by the executive branch, is within his right, for, he asserts, his are noble and necessary goals. His claim that "limited" wire taps were just that – limited: there was no large scale "mining". Now, the 4th estate informs us that over 10 million phone records were vetted. *It is certainly easier to go further astray when policy mistakes are not questioned and corrected early on.*

Ethical behavior in the public sector (in which public schools fall) does **not** mean situational ethics – which is what is being served up here by circumventing stated board guidelines and policy. I am at Jackson because of an ethical violation from an administrator directed toward Janet Hitt. As we discussed, and, as I recall, AGREED upon in our meeting with Janet in late January of this year, an administrator came to Janet and asked harmlessly about her choice of music at last year's graduation ....only later to give her a written notice (reprimand ?) which was, I believe, placed in her file. Unethical behavior of the first water ! No apology has been offered nor an explanation of why this was done since. It caused such egregious stress that, on top of her cancer, she was unable to continue her responsibilities. That wrong has yet to be made right. Ethical behavior is caught, not taught. We expect that from our educators and administrators.

Today, Lesley and I were handed a copy of the words to "Pomp and Circumstance", which EVERY public high school and publicly supported college and university in America, and abroad, will play for their graduation processional. The words to this Edward Elgar coronation march are quite sacred:

Land of Hope and Glory,
Mother of the Free,
How shall we extol thee,
Who are born of thee?
Wider still and wider
Shall thy bounds be set,
God who made thee mighty,
Make thee mightier yet.

This now, obviously becomes ***quite*** problematic to forbid one and, in essence, demand the other. Furthermore, the bands are running out of calendar....seniors' last day is June 11.

Let's be clear about the subject: this is not about the presentation of sacred literature at ANY event: the subject is **censorship** – plain for all to see – and how far that is allowed to proceed. That was the topic with Janet's program and

that was the attempt to prevent the Cascade HS Band from performing "White Christmas" last December (a cultural holiday song written by a 2nd generation **European Jew** ! Wanna go there in court ?), and an attempt to infringe on constitutional and Supreme Court decisions guaranteeing educators the freedom from censorship in the presentation of – yes, even controversial – material relevant to course subjects. An audience need not be "protected" or insulated from exposure (they are not "captured" any more than they are at a concert, public event, court hearing, church service, basketball game, a wedding, or 4th of July celebration) that is part, parcel, traditional and institutionalized (the Pledge) in our culture.

What is so puzzling is:

1 – the ***situational ethics*** masking as the proper course of action – holding administrators and educators to different standards

2 – the growing policy of veiled censorship of music programs CLEARLY in balance with district guidelines to begin with. What the heck for ?

This is exactly the same path chosen by the Marysville administration in 1999. As a staff member, we all recognized it as a flawed policy at that time, and, were subsequently affirmed as ALL of those involved in the policy creation (Whitehead, Parker, and Hodgson) and those on the school board (5) were either fired or voted out. They did not just leave.

The decision to remove 1 song and not another because someone might find offense is to abrogate the spirit of constitutional law – which provides for healthy and vigorous presentation and study of great art.... or virtually ANY art. By tackling this, clearly, internal struggle so late, it causes great strain. Your decisions must be based upon established, defendable, constitutional and case law. This decision violates both, and stated district board policy as well.

This is an indefensible position.....why stick with it ?

Respectfully,
Stuart Hunt, choirs
JHS