ARTICLES

JUSTICIABILITY AND JUDICIAL FIAT IN ESTABLISHMENT CLAUSE CASES INVOLVING RELIGIOUS SPEECH OF STUDENTS

*Amanda Harmon Cooley**

ABSTRACT

Since the seminal Santa Fe Independent School District v. Doe school prayer case, courts have been inundated with constitutional claims involving student religious speech at public schools. Courts have struggled mightily with the question of whether this speech is private speech, which is free of Establishment Clause constraints, or government speech, which is subject to the bounds of that clause. In this struggle, some courts have gotten lost in the maze of Establishment Clause jurisprudence and forgotten the core principles of justiciability and hierarchical precedent. Instead, they have resorted to advisory opinions, ipse dixit, or judicial fiat, which has only served to make the fundamental Establishment Clause government speech and private speech dichotomy less clear. This Article provides a close examination of two of the most egregious recent examples as a vehicle to advocate against the use of advisory opinions and judicial fiat in this area of jurisprudence. It then provides a clear foundational framework, which consists of a justiciability requirement and a precedential requirement, for the judicial evaluation of religious student-speech classification claims in school law establishment cases. This framework is offered to counteract extant harmful judicial practices. These harmful approaches contribute to the continued confusion of school law Establishment Clause jurisprudence; delegitimize constitutional interpretation in this area; allow possible end runs around the Establishment Clause; harm religious liberty and sanctity; hurt the administration of the judicial system; and teach anti-democratic principles to citizens and schoolchildren. To safeguard both sides of Jefferson's wall, courts must ensure that they comply with justiciability requirements and the doctrine of hierarchical precedent when asked to classify religious student speech as school-sponsored government speech or as pure private speech in Establishment Clause cases. This Article's framework will allow them to do so.

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* Wayne Fisher Research Professor of Law, South Texas College of Law Houston. The author would like to thank her school for its research support, her colleagues for their helpful feedback, and her family for its gracious understanding.

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“A Court of Justice acting as such . . . does not declare the law *eo nomine* and in the abstract, but waits until a case . . . is brought before it judicially involving the point in dispute: . . . [it] decides only as much of the question at a time as is required by the case before it, and its decision . . . is drawn from it by the duty which it cannot refuse to fulfil, of dispensing justice impartially between adverse litigants.”

—John Stuart Mill¹

“It is in fact comforting to witness the reality that he who lives by the *ipse dixit* dies by the *ipse dixit*. But one must grieve for the Constitution.”

—Justice Antonin Scalia²

INTRODUCTION

At the start of the public Kountze High School football games, the players run through large, school-colored banners made by the school’s cheerleaders with Christian biblical scripture emblazoned upon them.³ The school district superintendent had once banned these banners due to Establishment Clause concerns, and the cheerleaders sued claiming violations of their free speech and free exercise of religion rights notwithstanding the district’s rescission of the ban.⁴ In a 2013, nine-sentence order, a Texas trial court found that the Establishment Clause did not prohibit the display of the religious banners without identifying the justiciability of this issue, without making any explicit reference to the First Amendment of the United States Constitution, and without referencing any case law.⁵ What followed was five years of confusing, protracted, and contentious litigation, centering around core disputes as to whether the banners were private speech or government speech and to what extent the Establishment Clause might apply.⁶

¹ JOHN STUART MILL, UTILITARIANISM, ON LIBERTY, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 403 (H.B. Acton ed., 1972).

² *Morrison v. Olson*, 487 U.S. 654, 726 (1988) (Scalia, J., dissenting).

³ See Samuel Smith, *School District Appeals Texas Cheerleaders’ Bible Verse Case to State Supreme Court*, CHRISTIAN POST (Jan. 18, 2018), <https://www.christianpost.com/news/school-district-appeals-texas-cheerleaders-bible-verse-case-to-state-supreme-court.html> (showing one banner).

⁴ Jim Forsyth, *Texas Judge Rules That Cheerleaders May Display Bible Banners*, REUTERS (May 8, 2013, 6:55 PM), <https://www.reuters.com/article/us-usa-texas-cheerleaders/texas-judge-rules-that-cheerleaders-may-display-bible-banners-idUSBRE94718W20130508>.

⁵ *Matthews v. Kountze Indep. Sch. Dist.*, No. 53526, 2013 WL 1914796 (Tex. Dist. Ct. May 8, 2013) (order granting summary judgment).

⁶ See *Matthews v. Kountze Indep. Sch. Dist.*, 484 S.W.3d 416, 418 (Tex. 2016) (labeling this speech classification issue a central case dispute).

In Castroville, Texas, a public high school valedictorian gave a graduation speech on the school football field in which she prayed in Jesus's name and thanked God for his blessings and for the support of the entire community throughout the week.⁷ In that week in 2011, a federal district judge had granted a motion filed by another graduating senior based on the Establishment Clause—a motion for a temporary restraining order (“TRO”) and preliminary injunction directing the school district to instruct all student graduation speakers “not to present a prayer” that would “encourage[] others who may not believe in the concept of prayer to join in and believe the same concept.”⁸ In an emergency appeal of the order, the Fifth Circuit dissolved the TRO and injunction with an eight-sentence opinion that stated the court was “not persuaded that plaintiffs have shown that they are substantially likely to prevail on the merits, particularly on the issue that the individual prayers or other remarks to be given by students at graduation are, in fact, school-sponsored” speech,⁹ rather than private speech that is not governed by the Establishment Clause.¹⁰ The Fifth Circuit's order cited neither the Constitution nor any case law,¹¹ despite the inherent difficulty of this area of constitutional law.¹² During the demagogued and heated litigation that followed,¹³ death threats were made against the federal district judge and his staff.¹⁴

Close scrutiny of these two cases yields at least one inarguable precept: Establishment Clause school law, like all Establishment Clause law, is

⁷ Sonja Harris, *Medina Valley HS Class of 2011 and Angela Hildenbrand a Fighting Valedictorian!*, TEXAS GOP VOTE (June 6, 2011, 10:00 AM), <https://www.texasgopvote.com/angela-hildenbrand/medina-valley-hs-class-2011-and-angela-hildenbrand-fighting-valedictorian-002939>.

⁸ *Schultz v. Medina Valley Indep. Sch. Dist.*, No. SA-11-CA-422-FB, 2011 WL 13234770, at *2 (W.D. Tex. June 1, 2011).

⁹ *Schultz v. Medina Valley Indep. Sch. Dist.*, No. 11-50486 (5th Cir. June 3, 2011), *available at* <https://www.clearinghouse.net/chDocs/public/FA-TX-0001-0005.pdf>.

¹⁰ *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 302 (2000) (noting that the Establishment Clause applies only to government speech and not private speech).

¹¹ *Schultz*, No. 11-50486, at *1–2.

¹² *See* Richard H. Fallon Jr., *Tiers for the Establishment Clause*, 166 U. PA. L. REV. 59, 72 (2017) (discussing the complexity of the Establishment Clause doctrine).

¹³ *See* Andrew Cohen, *The Misplaced Indignation of the Judge Who Criticized Obama*, ATLANTIC (Apr. 5, 2012), <https://www.theatlantic.com/politics/archive/2012/04/the-misplaced-indignation-of-the-judge-who-criticized-obama/255474/> (describing the litigation).

¹⁴ *See Schultz v. Medina Valley Indep. Sch. Dist.*, No. SA-11-CA-422-FB, at *3 (W.D. Tex. Feb. 9, 2012), *available at* <https://www.clearinghouse.net/chDocs/public/FA-TX-0001-0001.pdf> (discussing threats).

complex.¹⁵ Establishment Clause jurisprudence is thicket theory at its very essence.¹⁶ And we should not be surprised by this.¹⁷ Establishment Clause cases are difficult,¹⁸ because they involve the core question of the role of religion in American public life and the essential “meaning of America.”¹⁹

The Supreme Court has always acknowledged the close relationship between religion and American history.²⁰ Yet, it has also established “that governmental intervention in religious matters can itself endanger religious freedom.”²¹ The Court has framed these acknowledgments with a Janusian discourse, stating in *Van Orden v. Perry*, that “[o]ne face looks to the past in acknowledgment of our Nation’s heritage, while the other looks to the present in demanding a separation between church and state.”²² The dualities that are inherent in the constitutional religion clauses have led the Court to develop an Establishment Clause doctrine of twists, turns, and so many tests.²³

Despite the division and confusion within Establishment Clause jurisprudence, three foundational premises are clear. First, justiciability

¹⁵ See *Lynch v. Donnelly*, 465 U.S. 668, 677–78 (1984) (emphasizing the complexity of Establishment Clause interpretation); Yaseen Eldik & Monica C. Bell, *The Establishment Clause and Public Education in an Islamophobic Era*, 8 STAN. J. C.R. & C.L. 245, 257 (2012) (discussing the difficulties of school law Establishment Clause analysis).

¹⁶ See MARTHA C. NUSSBAUM, LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA’S TRADITION OF RELIGIOUS EQUALITY 227–28 (2008) (describing Establishment Clause jurisprudence as almost incomprehensible); Thomas C. Berg, *Religion Clause Anti-Theories*, 72 NOTRE DAME L. REV. 693, 693–94 (1997) (highlighting the divisions among scholars and jurists regarding the proper approach to Establishment Clause analysis).

¹⁷ See, e.g., *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971) (“The language of the Religion Clauses of the First Amendment is at best opaque . . .”); Aaron R. Petty, *Accommodating “Religion,”* 83 TENN. L. REV. 529 (2016) (discussing the complexity of religion).

¹⁸ See Gregory C. Sisk & Michael Heise, *Ideology “All the Way Down”? An Empirical Study of Establishment Clause Decisions in the Federal Courts*, 110 MICH. L. REV. 1201, 1230 (2012) (discussing the persistent tensions that result from Establishment Clause litigation).

¹⁹ Carl H. Esbeck, *The Establishment Clause as Structural Restraint on Governmental Power*, 84 IOWA L. REV. 1, 32 (1998).

²⁰ See *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 212 (1963) (noting the close identifications between religion and American history); *Engel v. Vitale*, 370 U.S. 421, 434 (1962) (“The history of man is inseparable from the history of religion.”).

²¹ *Van Orden v. Perry*, 545 U.S. 677, 683 (2005).

²² *Id.*

²³ See *Comm. for Pub. Educ. & Religious Liberty v. Regan*, 444 U.S. 646, 662 (1980) (admitting that the difficulty of Establishment Clause cases has resulted in a “course [that] sacrifices clarity and predictability for flexibility”).

requirements prohibit advisory opinions.²⁴ So, to make an Establishment Clause decision, a court must have a live Establishment Clause case or controversy between adverse parties with genuinely adverse legal interests. Second, lower courts are bound by relevant higher-court precedent.²⁵ So, in Establishment Clause cases, federal circuit courts, federal district courts, and all state courts are bound by controlling Supreme Court case law. Third, the Establishment Clause does not apply to private speech; it only applies to government speech.²⁶ So, if the challenged conduct is private speech, the Establishment Clause analysis must end.

The question of what has been considered private speech as opposed to government speech has found significant resonance in school law cases.²⁷ In the 2000 *Santa Fe Independent School District v. Doe* decision, the Court determined that a pre-football game prayer by a student, which resulted from mechanisms initiated by the school and was delivered with extensive indicia of state support, was subject to Establishment Clause analysis as it was school-sponsored speech, making it government speech and not private speech.²⁸ In the twenty years since *Santa Fe*, this pivotal question of how to define allegedly unconstitutional religious speech as a matter of Establishment Clause jurisprudence has figured prominently in other areas in the school law milieu, as courts have been tasked with determining potential establishment violations that attend the display of student-created religious messages on run-through banners at school sporting events and student-led graduation invocations.²⁹

²⁴ See *Flast v. Cohen*, 392 U.S. 83, 96 (1968) (labeling the prohibition on advisory opinions as fundamental to justiciability requirements). But see *infra* note 103 and accompanying text (explaining that certain states continue to allow advisory opinions).

²⁵ See *Hubbard v. United States*, 514 U.S. 695, 713 n.13 (1995) (articulating this binding-precedent rule).

²⁶ See *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 302 (2000) (quoting *Bd. of Educ. v. Mergens*, 496 U.S. 226, 250 (1990) (plurality opinion)) (establishing this fundamental speech dichotomy for school law Establishment Clause jurisprudence).

²⁷ See Luke Meier, *Using Agency Law to Determine the Boundaries of the Free Speech and Establishment Clauses*, 40 IND. L. REV. 519, 526–27 (2007) (discussing how school law has focused on the perplexing constitutionality of the religious speech of students under the Free Speech Clause and the Establishment Clause); Anton Sorkin, *Graduation Ceremonies: A Prayer for Balancing Sponsorship and Censorship*, 41 S. ILL. U. L.J. 345, 348–49 (2017) (discussing the continued constitutional debate between “school sponsorship of religion and school censorship of private speech”).

²⁸ *Santa Fe Indep. Sch. Dist.*, 530 U.S. at 309–10.

²⁹ See, e.g., *supra* text accompanying notes 3–14.

These recent school law cases present cautionary tales regarding the particular and pernicious jurisprudential problems that can occur in the evaluation of claims that students' religious speech is private speech, which takes the dispute out of the ambit of Establishment Clause analysis. Courts have struggled mightily with these classification issues.³⁰ In this struggle, some courts have gotten lost in the maze of Establishment Clause jurisprudence and forgotten the core principles of justiciability and binding precedent.³¹ Instead, they have resorted to advisory opinions or *ipse dixit*, which has only served to make the fundamental Establishment Clause private speech/government speech dichotomy less clear.³²

This Article provides an extended discussion of two of the most egregious recent examples of these judicial approaches as a vehicle to advocate against the use of advisory opinions and judicial fiat in student religious-speech jurisprudence. It then offers a clear foundational framework for the judicial evaluation of private religious-speech classification claims in school law establishment cases. This dual-pronged framework consists of a justiciability requirement and a precedential requirement. First, it requires courts to ensure the Establishment Clause issue is properly justiciable, which requires an actual Establishment Clause case or controversy between actually adverse parties. If the justiciability prerequisite is met, the framework next requires courts to issue decisions regarding the classification of religious student speech as private speech or government speech through an express, reasoned application of the United States Constitution and binding precedent rather than through mere *ipse dixit*. A proper application of this framework will preserve the clarity of the uncontroverted student speech dichotomy in Establishment Clause jurisprudence. And the preservation of *any* clarity in Establishment Clause jurisprudence is beneficial.

³⁰ See generally Michael Coenen, *Rules Against Rulification*, 124 YALE L.J. 644, 657–58 (2014) (discussing the environment that might contribute to the lower courts' struggles in applying the Supreme Court's constitutional precedents).

³¹ See *Edwards v. Aguillard*, 482 U.S. 578, 636 (1987) (Scalia, J., dissenting) (deeming the Establishment Clause "a maze").

³² See Caroline Mala Corbin, *Mixed Speech: When Speech Is Both Private and Governmental*, 83 N.Y.U. L. REV. 605, 607 (2008) ("When a private person speaks, the establishment clause plays no role, but the free speech clause does. When the government speaks, it is just the reverse: The establishment clause, but not the free speech clause, applies."); Richard F. Duncan, *Public Schools and the Inevitability of Religious Inequality*, 1996 B.Y.U. L. REV. 569, 573 (1996) (discussing judicial confusion as to what constitutes private student speech versus school-sponsored government speech).

I. THE COMPLEXITY OF ESTABLISHMENT CLAUSE JURISPRUDENCE

The First Amendment of the Constitution provides that “Congress shall make no law respecting an establishment of religion.”³³ The Supreme Court has incorporated the Establishment Clause as operative against the states through the Fourteenth Amendment’s Due Process Clause.³⁴ The Establishment Clause is not limited to legislation; it extends to all governmental action.³⁵ Consequently, all forms of federal or state governmental conduct,³⁶ including prayer and other religious speech,³⁷ have the potential to give rise to an Establishment Clause violation.³⁸

Due in part to claims of a deficient rationale for incorporation,³⁹ and in part to the Supreme Court’s disordered development of this area of First

³³ U.S. CONST. amend. I.

³⁴ See *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 215 (1963) (reaffirming the incorporation established in *Everson v. Bd. of Educ.*); *Everson v. Bd. of Educ.*, 330 U.S. 1, 15–16 (1947) (incorporating the Establishment Clause against the states via the Fourteenth Amendment’s Due Process Clause); Carl H. Esbeck, *Uses and Abuses of Textualism and Originalism in Establishment Clause Interpretation*, 2011 UTAH L. REV. 489, 596 (2011) (“[T]here is no chance that *Everson*’s incorporation of the clause will be reversed.”); Frederick Mark Gedicks, *Incorporation of the Establishment Clause Against the States: A Logical, Textual, and Historical Account*, 88 IND. L.J. 669, 670 (2013) (discussing the Due Process Clause’s personal liberty protections as the basis for *Everson*’s incorporation).

³⁵ See *Pleasant Grove City v. Summum*, 555 U.S. 460, 468 (2009) (“[G]overnment speech must comport with the Establishment Clause.”); *Lynch v. Donnelly*, 465 U.S. 668, 678 (1984) (noting the Establishment Clause’s application to “legislation or official conduct to determine whether . . . it establishes a religion or religious faith, or tends to do so”).

³⁶ See Kent Greenawalt, *Common Sense About Original and Subsequent Understandings of the Religion Clauses*, 8 U. PA. J. CONST. L. 479, 507 (2006) (identifying how both federal and state governmental action can implicate the Establishment Clause).

³⁷ See *McCreary Cty. v. ACLU of Ky.*, 545 U.S. 844, 875 (2005) (“The prohibition on establishment covers a variety of issues from prayer in widely varying government settings, to financial aid for religious individuals and institutions, to comment on religious questions.”).

³⁸ See B. Jessie Hill, *(Dis)owning Religious Speech*, 20 GEO. MASON L. REV. 361, 376 (2013) (detailing how government speech can violate the Establishment Clause); Andy G. Olree, *Identifying Government Speech*, 42 CONN. L. REV. 365, 368–69 (2009) (stating government speech that approves or disapproves of religion can violate the Establishment Clause).

³⁹ See, e.g., *Zelman v. Simmons-Harris*, 536 U.S. 639, 678–80 (2002) (Thomas, J., concurring) (criticizing the incorporation of the Establishment Clause); EDWARD S. CORWIN, A CONSTITUTION OF POWERS IN A SECULAR STATE 114 (1951) (arguing states actually “are entirely free to establish religions, provided they do not deprive anybody of religious liberty”); William P. Gray, Jr., *The Ten Commandments and the Ten Amendments: A Case Study in Religious Freedom in Alabama*, 49 ALA. L. REV. 509, 530 (1998) (arguing that incorporation contravenes the federalist purpose of the Establishment Clause).

Amendment jurisprudence,⁴⁰ Establishment Clause doctrine is “under perpetual clouds of instability, illegitimacy, and controversy.”⁴¹ The Court has acknowledged the complexity of this area of constitutional interpretation, emphasizing that the Establishment Clause “is not a precise, detailed provision in a legal code capable of ready application.”⁴² Consequently, the Court has justified its divergent Establishment Clause doctrine by noting that this analysis cannot be reduced “to a single verbal formulation.”⁴³ The result of these variances has been that the Court’s approach to analyzing the Establishment Clause is consistently inconsistent.⁴⁴

So many tests have been applied when making Establishment Clause decisions.⁴⁵ In addition to the infamous *Lemon v. Kurtzman* test,⁴⁶ the Supreme Court, or a portion of it, has applied or called for “almost every plausible textual, historical, and policy argument” in these cases.⁴⁷ Adding to the confusion of this divergent doctrine has been “the bog of concurring and dissenting opinions, and the opinions that concur in the judgment only, that

⁴⁰ See Fallon, *supra* note 12, at 60 (“Establishment Clause doctrine is notoriously confused and disarrayed . . .”).

⁴¹ Gedicks, *supra* note 34, at 676; see also *Am. Legion v. Am. Humanist Ass’n*, 139 S. Ct. 2067, 2080 (2019) (plurality opinion) (describing the interpretation of the Establishment Clause as a “vexing problem”).

⁴² *Lynch v. Donnelly*, 465 U.S. 668, 678 (1984).

⁴³ *Cty. of Allegheny v. ACLU, Greater Pittsburgh Chapter*, 492 U.S. 573, 591 (1989).

⁴⁴ See John H. Mansfield, *Peremptory Challenges to Jurors Based Upon or Affecting Religion*, 34 SETON HALL L. REV. 435, 460 (2004) (arguing it is difficult to find consistency in the Court’s Establishment Clause jurisprudence); William P. Marshall, “*We Know It When We See It*” *The Supreme Court And Establishment*, 59 S. CAL. L. REV. 495, 495 (1986) (“[S]ince *Everson*, the Court has reached results in establishment cases that are legendary in their inconsistencies.”); Thomas R. McCoy, *A Coherent Methodology for First Amendment Speech and Religion Clause Cases*, 48 VAND. L. REV. 1335, 1336 (1995) (arguing that the Court has failed to articulate a “discernible distinction” between government actions that do and do not violate the Establishment Clause); Paul E. McGreal, *Social Capital in Constitutional Law: The Case of Religious Norm Enforcement Through Prayer at Public Occasions*, 40 ARIZ. ST. L.J. 585, 587 (2008) (labeling the “Court’s Establishment Clause holdings . . . ‘inconsistent’”).

⁴⁵ See Khaled A. Beydoun, *Bisecting American Islam? Divide, Conquer, and Counter-Radicalization*, 69 HASTINGS L.J. 429, 486–88 (2018) (discussing the variety of Establishment Clause tests applied by federal courts).

⁴⁶ *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971) (citations omitted) (quoting *Walz v. Tax Comm’n*, 397 U.S. 664, 674 (1970)) (“First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; and] finally, the statute must not foster ‘an excessive government entanglement with religion.’”); see also Michael J. Frank, *The Evolving Establishment Clause Jurisprudence and School Vouchers*, 51 DEPAUL L. REV. 997, 1009 (2002) (labeling the *Lemon* test as “infamous”).

⁴⁷ Comment, *The Supreme Court, the First Amendment, and Religion in the Public Schools*, 63 COLUM. L. REV. 73, 88 (1963).

leave[s one] with the sense [of] walking on unsettled earth.”⁴⁸ These analyses and arguments have included the coercion test, the historical approach, the separation approach, the accommodation perspective, the endorsement test, the reasonable observer test, the neutrality principle, the non-preferentialist approach, the non-incorporation approach, a divisiveness analysis, and an ad hoc approach.⁴⁹ As a result, Establishment Clause jurisprudence has unfolded in a scattershot and prolonged way.⁵⁰

Part of the reason for this uneven development is the divergency of Establishment Clause cases the Court has reviewed.⁵¹ The Court has decided cases involving religious expression in public schools and other public environments;⁵² cases involving the provision of public financial aid to religious entities;⁵³ and “‘accommodation’ cases in which the government exempts religious institutions or religiously motivated actors from legal regulations that otherwise would forbid religiously required or compel religiously forbidden action.”⁵⁴ In creating a taxonomy of these cases, Professor Douglas Laycock has concluded there are “three major lines of religious liberty cases: funding of religious organizations, regulation of religious practice, and sponsorship and regulation of religious speech.”⁵⁵

⁴⁸ *Kondrat'yev v. City of Pensacola*, 903 F.3d 1169, 1184 (11th Cir. 2018) (Royal, J., concurring).

⁴⁹ See John M. Bickers, *False Facts and Holy War: How the Supreme Court's Establishment Clause Cases Fuel Religious Conflict*, 51 IND. L. REV. 305, 307 (2018) (discussing the “troublesome tests” the Court has employed in developing its Establishment Clause doctrine); William J. Dobosh, Jr., *Coercion in the Ranks: The Establishment Clause Implications of Chaplain-Led Prayers at Mandatory Army Events*, 2006 WIS. L. REV. 1493, 1499 (2006) (highlighting the Court’s “convoluted” approach in analyzing the Establishment Clause); Steven G. Gey, *Reconciling the Supreme Court's Four Establishment Clauses*, 8 U. PA. J. CONST. L. 725, 761 (2006) (discussing the nonpreferentialist, nonincorporation, divisiveness, and ad hoc analyses); Kent Greenawalt, *Quo Vadis: The Status and Prospects of “Tests” Under the Religion Clauses*, 1995 SUP. CT. REV. 323, 361 (1995) (listing the various Establishment Clause tests).

⁵⁰ See *Van Orden v. Perry*, 545 U.S. 677, 685 (2005) (discussing the varied approaches in the Court’s Establishment Clause jurisprudence); *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 222 (1963) (noting that the Court had only directly considered the extent of the Establishment Clause eight times prior to 1963).

⁵¹ See *Bd. of Educ. v. Grumet*, 512 U.S. 687, 720 (1994) (O’Connor, J., concurring) (highlighting how different types of Establishment Clause cases require different approaches); Fallon, *supra* note 12, at 72 (discussing “the existence of distinctive rights or interests to which the Establishment Clause affords protection, or at least solicitude, of varying degrees”).

⁵² DANIEL O. CONKLE, *RELIGION, LAW, AND THE CONSTITUTION* 191 (2016).

⁵³ *Id.*

⁵⁴ Fallon, *supra* note 12, at 71.

⁵⁵ Douglas Laycock, *Theology Scholarships, the Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes but Missing the Liberty*, 118 HARV. L. REV. 155, 156 (2004).

School law has been a fulcrum point within each of these lines of the Supreme Court's Establishment Clause jurisprudence.⁵⁶ The Court provided its first extended examination of the Establishment Clause in the 1947 school law case of *Everson v. Board of Education*,⁵⁷ which first incorporated the clause against the states.⁵⁸ A year later, the first invalidation of a state governmental practice took place in another school law case, *Illinois ex rel. McCollum v. Board of Education*.⁵⁹ Both of these cases cemented their establishment analysis in Thomas Jefferson's interpretation that "the clause against establishment of religion by law was intended to erect 'a wall of separation between church and State.'"⁶⁰

Despite this initial uniform application of the Jeffersonian separationist principle,⁶¹ the Court's subsequent school law Establishment Clause doctrine has become a legal leviathan in terms of its complexity and its varied analyses to the multitude of contexts in the special school environment.⁶² Within all of this variety, the Court has stated that school law Establishment Clause jurisprudence consists of "line-drawing, of determining at what point a dissenter's rights of religious freedom are infringed by the State."⁶³ Yet, the Court has candidly acknowledged that it "can only dimly perceive the lines

⁵⁶ See Martha McCarthy, *Religion and Education: Whither the Establishment Clause?*, 75 IND. L.J. 123, 125 (2000) ("Schools have provided the battleground for some of the most notable Establishment Clause disputes, which is not surprising, given the special concern for protecting children from religious establishments.").

⁵⁷ *Everson v. Bd. of Educ.*, 330 U.S. 1, 3 (1947); see also Daniel O. Conkle, *Toward A General Theory of the Establishment Clause*, 82 NW. U. L. REV. 1113, 1124 (1988) (discussing the Court's first extended examination of the Establishment Clause in *Everson*).

⁵⁸ *Everson*, 330 U.S. at 15–16.

⁵⁹ *Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203 (1948).

⁶⁰ *Everson*, 330 U.S. at 16 (citing *Reynolds v. United States*, 98 U.S. 145, 164 (1878) (quoting 8 THOMAS JEFFERSON, THE WORKS OF THOMAS JEFFERSON 113 (Ford ed. 1904–1905))); see also *McCollum*, 333 U.S. at 211 (finding an Establishment Clause violation based on an impermissible intertwining of state and religion that did not comply with the "wall of separation between church and State").

⁶¹ See *McCollum*, 333 U.S. at 212 ("[A]s we said in . . . *Everson* . . . the First Amendment has erected a wall between church and State which must be kept high and impregnable.").

⁶² See Jonathan C. Drimmer, *Hear No Evil, Speak No Evil: The Duty of Public Schools to Limit Student-Proposed Graduation Prayers*, 74 NEB. L. REV. 411, 418 (1995) (discussing numerous Establishment Clause controversies the Court has examined "in myriad educational settings"); Preston C. Green III et al., *Parents Involved, School Assignment Plans, and the Equal Protection Clause: The Case for Special Constitutional Rules*, 76 BROOK. L. REV. 503, 538 (2011) (discussing the intricacies of school law Establishment Clause doctrine).

⁶³ *Lee v. Weisman*, 505 U.S. 577, 598 (1992).

of demarcation in this extraordinarily sensitive area of constitutional law.”⁶⁴ And so, most school law Establishment Clause cases exist within a space of controversy as to their proper mode and method of analysis.⁶⁵

II. CLARITY IN ESTABLISHMENT CLAUSE JURISPRUDENCE: JUSTICIABILITY REQUIREMENTS, THE HIERARCHICAL PRECEDENT DOCTRINE, AND THE GOVERNMENT SPEECH/PRIVATE SPEECH DICHOTOMY

A. Justiciability Requirements

What is not at controversy in federal Establishment Clause jurisprudence is the requirement of justiciability.⁶⁶ The Supreme Court has stated that “[c]oncerns of justiciability go to the power of the federal courts to entertain disputes, and to the wisdom of their doing so.”⁶⁷ It is well-settled constitutional law that federal trial and appellate courts only have the power to act on justiciable cases or controversies.⁶⁸

Although they are easy to conflate,⁶⁹ federal jurisdiction and justiciability are distinct,⁷⁰ “in that a court can have jurisdiction to decide a case that turns

⁶⁴ *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971).

⁶⁵ *See Doe ex rel. Doe v. Elmbrook Sch. Dist.*, 687 F.3d 840, 872 (7th Cir. 2012) (Posner, J., dissenting) (“The case law that the Supreme Court has heaped on the defenseless text of the establishment clause is widely acknowledged, even by some Supreme Court Justices, to be formless, unanchored, subjective and provide no guidance.”); Mark W. Cordes, *Prayer in Public Schools After Santa Fe Independent School District*, 90 KY. L.J. 1, 1 (2002) (“Religion in public schools has long been a subject of intense controversy in our country and from all appearances will remain so for a long time to come.”); Mary Ann Glendon & Raul F. Yanes, *Structural Free Exercise*, 90 MICH. L. REV. 477, 478 (1991) (characterizing the Court’s Establishment Clause jurisprudence as “unprincipled, incoherent, and unworkable”).

⁶⁶ *See Massachusetts v. EPA*, 549 U.S. 497, 516 (2007) (explaining the basic requirements of a justiciable controversy); *Flast v. Cohen*, 392 U.S. 83, 95–97 (1968) (discussing justiciability requirements in an Establishment Clause school law case).

⁶⁷ *Renne v. Geary*, 501 U.S. 312, 316 (1991).

⁶⁸ *See Benton v. Maryland*, 395 U.S. 784, 788 (1969); *see also Chafin v. Chafin*, 568 U.S. 165, 172 (2013) (discussing the applicability of the case or controversy requirement to federal trial and appellate courts).

⁶⁹ *See Katherine Mims Crocker, Justifying A Prudential Solution to the Williamson County Ripeness Puzzle*, 49 GA. L. REV. 163, 201 (2014) (“Courts often treat justiciability as part and parcel of subject-matter jurisdiction . . .”).

⁷⁰ *See Eric Berger, The Collision of the Takings and State Sovereign Immunity Doctrines*, 63 WASH. & LEE L. REV. 493, 529 (2006) (noting the judiciary considers jurisdiction and justiciability as distinct concepts).

on nonjusticiability.”⁷¹ Article III of the Constitution limits federal court subject matter jurisdiction to particular types of cases and controversies.⁷² Because causes are presumed to be outside this limited jurisdiction,⁷³ it is the role of the complainant to clearly and affirmatively allege facts that properly invoke federal court jurisdiction.⁷⁴ Subject matter jurisdiction “can never be forfeited or waived.”⁷⁵ Federal appellate courts must consider the question of proper subject matter jurisdiction *sua sponte* even if the lower court did not address it or the parties do not raise it on appeal.⁷⁶

Justiciability is a “threshold question in every federal case, determining the power of the court to entertain the suit.”⁷⁷ Justiciability doctrines are derived from both the Article III case-or-controversy requirement and from prudential considerations of judicial administration.⁷⁸ These doctrines include standing, prohibition against advisory opinions, mootness, ripeness, and the political question doctrine.⁷⁹

With respect to the constitutionally derived limits of justiciability, Article III requires a live case or controversy between adverse parties that is extant

⁷¹ John Harrison, *The Political Question Doctrines*, 67 AM. U. L. REV. 457, 496 (2017).

⁷² See U.S. CONST. art. III, § 2, cl. 1 (“The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; —to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State,—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.”).

⁷³ *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994); William M. Janssen, *Remands by Deception*, 81 MO. L. REV. 75, 87 (2016) (discussing limited federal subject matter jurisdiction).

⁷⁴ See *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 546 n.8 (1986) (stating federal courts will presume they lack jurisdiction unless the complainant alleges facts that affirmatively show that jurisdiction).

⁷⁵ *United States v. Cotton*, 535 U.S. 625, 630 (2002).

⁷⁶ See *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583 (1999) (“Subject-matter limitations on federal jurisdiction serve institutional interests. They keep the federal courts within the bounds the Constitution and Congress have prescribed. Accordingly, subject-matter delineations must be policed by the courts on their own initiative even at the highest level.”).

⁷⁷ *Warth v. Seldin*, 422 U.S. 490, 498 (1975).

⁷⁸ See Tommy Tobin, *Deciding Not to Decide: Federal Courts’ Discretion to Decline Review* and *Miller v. City of Wickliffe*, 46 HOFSTRA L. REV. 709, 713 (2017) (discussing the constitutional and prudential sources for justiciability).

⁷⁹ Lisa A. Kloppenberg, *Measured Constitutional Steps*, 71 IND. L.J. 297, 304 (1996) (listing the justiciability requirements).

at the time of the federal judicial decision.⁸⁰ A live case or controversy is an actual one.⁸¹ The adverse party requirement requires parties with adverse legal interests, and not necessarily adverse legal arguments.⁸² These adverse legal interests must be genuinely adverse.⁸³ An absence of a live controversy between adverse parties with adverse legal interests should result in a finding of nonjusticiability, and the court should not make a judicial determination on, and, instead, should dismiss, that issue.⁸⁴

Appellate courts should vacate and remand for dismissal any trial court decisions on nonjusticiable issues.⁸⁵ “No matter how vehemently the parties continue to dispute the lawfulness of the conduct that precipitated the lawsuit,” these judicial actions are required when the dispute “‘is no longer embedded in any actual controversy about the plaintiffs’ particular legal rights.’”⁸⁶ Justiciability cannot be based merely on the parties’ agreement.⁸⁷

⁸⁰ See *Burke v. Barnes*, 479 U.S. 361, 363 (1987) (“Article III of the Constitution requires that there be a live case or controversy at the time that a federal court decides the case . . .”); James E. Pfander & Daniel D. Birk, *Article III Judicial Power, the Adverse-Party Requirement, and Non-Contentious Jurisdiction*, 124 YALE L.J. 1346, 1359 (2015) (“Scholars and jurists widely accept the proposition that the federal judicial power can be exercised only when a court is presented with a concrete dispute between parties possessed of adverse legal interests.”).

⁸¹ See *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997) (quoting *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975)) (“To qualify as a case fit for federal-court adjudication, ‘an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed.’”); *United States v. Salerno*, 481 U.S. 739, 758 (1987) (Marshall, J., dissenting) (explaining the live controversy requirement is an actual controversy requirement).

⁸² See Ann Woolhandler, *Adverse Interests and Article III*, 111 NW. U. L. REV. 1025, 1032–33 (2017) (discussing this justiciability requirement).

⁸³ See *United States v. Johnson*, 319 U.S. 302, 304 (1943) (per curiam) (finding “the absence of a genuine adversary issue between the parties” makes an issue nonjusticiable and “a court may not safely proceed to judgment” when there is a lack of genuine adversity); Martin H. Redish & Andrianna D. Kastanek, *Settlement Class Actions, the Case-or-Controversy Requirement, and the Nature of the Adjudicatory Process*, 73 U. CHI. L. REV. 545, 548 (2006) (“Supreme Court decisions could not be more certain that Article III is satisfied only when the parties are truly ‘adverse’ to one another . . .”).

⁸⁴ See *Renne v. Geary*, 501 U.S. 312, 315 (1991) (stating there is no justiciability when there is an absence of a live controversy).

⁸⁵ *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 594 (1984) (Blackmun, J., dissenting) (providing the appropriate appellate remedy for trial court decisions on nonjusticiable issues); see also *Renne*, 501 U.S. at 315 (vacating an appellate court’s judgment and remanding with instructions to dismiss a nonjusticiable cause of action filed in the trial court).

⁸⁶ *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013) (quoting *Alvarez v. Smith*, 558 U.S. 87, 93 (2009)).

⁸⁷ *Int’l Ass’n of Machinists & Aerospace Workers, Local Lodge 964 v. BF Goodrich Aerospace Aerostructures Grp.*, 387 F.3d 1046, 1049 (9th Cir. 2004).

If there is no justiciable case or controversy, which means an actual controversy between actually adverse parties, “the courts have no business deciding [a dispute], or expounding the law in the course of doing so.”⁸⁸

This principle reflects Article III limits imposed upon the federal courts⁸⁹ and the “oldest and most consistent thread in the federal law of justiciability . . . that the federal courts will not give advisory opinions.”⁹⁰ An advisory opinion is an opinion on a matter that does not involve “an actual dispute between adverse litigants” or an opinion that does not have “a substantial likelihood that [it] will bring about some change or have some effect.”⁹¹ Consequently, a request for an advisory opinion is a request for a judicial ruling on a nonjusticiable issue.⁹² Federal cases must retain their “character as a present, live controversy” between adverse parties in order for courts “to avoid [improper] advisory opinions on abstract questions of law.”⁹³

The prohibitions on advisory opinions apply to declaratory judgment actions in constitutional adjudication as well, in that they require “concrete legal issues, presented in actual cases, not abstractions.”⁹⁴ For declaratory judgment actions, this requires that the alleged facts “show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy.”⁹⁵ The justiciability rules that prohibit advisory opinions reflect that such claims “are not pressed before the Court with that clear concreteness provided when a question emerges precisely framed and necessary for decision from a clash of adversary argument exploring every aspect of a multifaceted situation embracing conflicting and demanding interests.”⁹⁶ Therefore, there is no justiciable controversy when parties

⁸⁸ DaimlerChrysler Corp. v. Cuno, 547 U.S. 332, 341 (2006).

⁸⁹ See Jeffrey L. Rensberger, *Of Hats and Robes: Judicial Review of Nonadjudicative Article III Functions*, 53 U. RICH. L. REV. 623, 628 (2019) (placing the prohibition on advisory opinions within the justiciability requirements that reflect the limitations of Article III).

⁹⁰ Flast v. Cohen, 392 U.S. 83, 96 (1968) (quoting CHARLES ALAN WRIGHT, HANDBOOK OF THE LAW OF FEDERAL COURTS 34 (1963)).

⁹¹ ERWIN CHEMERINSKY, FEDERAL JURISDICTION § 2.2 (7th ed. 2016).

⁹² See *Flast*, 392 U.S. at 95 (stating “no justiciable controversy is presented . . . when the parties are asking for an advisory opinion”).

⁹³ Princeton Univ. v. Schmid, 455 U.S. 100, 103 (1982) (per curiam) (quoting *Hall v. Beals*, 396 U.S. 45, 48 (1969) (per curiam)).

⁹⁴ *Golden v. Zwickler*, 394 U.S. 103, 108 (1969) (quoting *United Pub. Workers of Am. (C.I.O.) v. Mitchell*, 330 U.S. 75, 89 (1947)).

⁹⁵ *Md. Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 273 (1941).

⁹⁶ *Flast*, 392 U.S. at 96–97 (quoting *United States v. Fruehauf*, 365 U.S. 146, 157 (1961)).

request an advisory opinion.⁹⁷ Because courts are duty bound to not make decisions on nonjusticiable matters, appellate courts must consider the question of whether a lower court issued an impermissible advisory opinion, like all justiciability questions, *sua sponte*.⁹⁸

State courts are not bound by the federal Constitution's jurisdictional or Article III case-or-controversy requirements; they are bound by their own state's jurisdictional or justiciability requirements,⁹⁹ "even when they address issues of federal law."¹⁰⁰ For example, the Texas Supreme Court has expressly affirmed this for its state courts, finding that Texas law should determine justiciability issues "as long as applying state law does not defeat . . . 'the uncertainly defined obligation of state courts to provide a remedy for federal wrongs.'"¹⁰¹ In Texas, the state constitution's Separation of Power and Open Courts provisions are the bases for the state's justiciability doctrine.¹⁰² Some states, like Texas, have a prohibition on advisory opinions, which parallels the federal justiciability doctrine; other states do not have those prohibitions.¹⁰³

⁹⁷ *Id.* at 95 ("[N]o justiciable controversy is presented when the parties . . . are asking for an advisory opinion . . .").

⁹⁸ See *United States v. Ramos*, 695 F.3d 1035, 1046 (10th Cir. 2012) (stating courts have an independent duty to examine questions of justiciability "(*sua sponte* if necessary)"); *Canez v. Guerrero*, 707 F.2d 443, 446 (9th Cir. 1983) (stating courts have "a duty to consider [justiciability] *sua sponte*"); Sarah Helene Duggin & Mary Beth Collins, 'Natural Born' in the USA: The Striking Unfairness and Dangerous Ambiguity of the Constitution's Presidential Qualifications Clause and Why We Need to Fix It, 85 B.U. L. REV. 53, 110 (2005) ("Courts are required to address justiciability questions *sua sponte* regardless of whether the parties do so, and the importance of these issues increases dramatically when major constitutional issues arise."); Madeline Fleisher, *Judicial Decision Making Under the Microscope: Moving Beyond Politics Versus Precedent*, 60 RUTGERS U. L. REV. 919, 943 (2008) ("[J]usticiability issues . . . can be brought up *sua sponte* by judges themselves even if they are not raised by the parties.").

⁹⁹ See *Doremus v. Bd. of Educ.*, 342 U.S. 429, 434 (1952) ("We do not undertake to say that a state court may not render an opinion on a federal constitutional question even under such circumstances that it can be regarded only as advisory.").

¹⁰⁰ *ASARCO Inc. v. Kadish*, 490 U.S. 605, 617 (1989).

¹⁰¹ *Perry v. Del Rio*, 66 S.W.3d 239, 249 (Tex. 2001) (quoting 16B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 4023, at 353 (2d ed. 1996)). Texas's justiciability requirements must be discussed to establish the foundations for this Article's *Matthews v. Kountze Independent School District* discussion. See *infra* Part III.A.

¹⁰² See *Heckman v. Williamson Cty.*, 369 S.W.3d 137, 147 (Tex. 2012) (citations omitted) (describing justiciability as "a doctrine rooted in the Separation of Powers provision and the Open Courts provision of the Texas Constitution").

¹⁰³ See Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1844–46 (2001) (discussing different provisions on state courts and advisory opinions); Robert M. O'Neil, *The Separation of Powers in a Federal System*, 37 EMORY L.J. 539, 540 (1988) ("States

In Texas state courts, like federal courts, “[s]ubject matter jurisdiction is essential to the authority of a court to decide a case.”¹⁰⁴ Unlike the federal judicial system, Texas subject matter jurisdiction requires that the case be justiciable.¹⁰⁵ Texas courts must have proper subject matter jurisdiction to make an adjudication on a matter, and such “jurisdiction is never presumed and cannot be waived.”¹⁰⁶ Also, the question of proper subject matter jurisdiction must be considered by Texas courts *sua sponte*.¹⁰⁷

Like federal justiciability, Texas justiciability requires that there be a live controversy between genuinely adverse parties.¹⁰⁸ A live controversy is an actual and real controversy.¹⁰⁹ Adverse parties are parties with adverse legal interests.¹¹⁰ Like federal justiciability doctrine, it is well-settled Texas justiciability doctrine that there “be a justiciable controversy between the parties before a declaratory judgment action will lie.”¹¹¹ So, for a declaratory judgment action to be justiciable, there must be a “substantial controversy involving [a] genuine conflict of tangible interests.”¹¹² Consequently, the Texas Supreme Court has stated that the state Declaratory Judgments Act

such as Alabama, Massachusetts, and New Hampshire empower their courts to render advisory opinions to the other two branches in circumstances where federal judges clearly would lack a justiciable case or controversy.”).

¹⁰⁴ Tex. Ass’n of Bus. v. Tex. Air Control Bd., 852 S.W.2d 440, 443 (Tex. 1993).

¹⁰⁵ State Bar of Tex. v. Gomez, 891 S.W.2d 243, 245 (Tex. 1994) (citation omitted) (“Subject matter jurisdiction requires . . . that the case be justiciable.”).

¹⁰⁶ Tex. Ass’n of Bus., 852 S.W.2d at 443–44.

¹⁰⁷ See State v. Naylor, 466 S.W.3d 783, 805 (Tex. 2015) (Willett, J., dissenting) (acknowledging “the judiciary’s *sua sponte* duty to ensure subject-matter jurisdiction”); Reata Constr. Corp. v. City of Dallas, 197 S.W.3d 371, 379 (Tex. 2006) (Brister, J., concurring) (“Subject-matter jurisdiction . . . must be considered by a court *sua sponte*[.]”); Tex. Workers’ Comp. Comm’n v. Garcia, 893 S.W.2d 504, 517 n.15 (Tex. 1995) (stating issues related to subject matter jurisdiction “may be raised by an appellate court *sua sponte*”).

¹⁰⁸ See Gomez, 891 S.W.2d at 245 (citations omitted) (“Subject matter jurisdiction requires that the party bringing the suit have standing, that there be a live controversy between the parties, and that the case be justiciable.”).

¹⁰⁹ See Neeley v. W. Orange-Cove Consol. Indep. Sch. Dist., 176 S.W.3d 746, 774 (Tex. 2005) (“Standing to assert a constitutional violation depends on whether the claimant asserts a particularized, concrete injury.”).

¹¹⁰ *In re Guardianship of DeLuna*, 286 S.W.3d 379, 383 (Tex. App. 2008) (citations omitted) (“A justiciable controversy is one that is definite and concrete and impacts the legal relations of parties having adverse legal interests.”).

¹¹¹ Cal. Prods., Inc. v. Puretex Lemon Juice, Inc., 334 S.W.2d 780, 781 (Tex. 1960).

¹¹² Bonham State Bank v. Beadle, 907 S.W.2d 465, 467 (Tex. 1995) (quoting Bexar-Medina-Atascosa Counties Water Control & Improvement Dist. No. 1 v. Medina Lake Prot. Ass’n, 640 S.W.2d 778, 779–80 (Tex. App. 1982)).

“does not license litigants to fish in judicial ponds for legal advice.”¹¹³ Nonjusticiable issues should be dismissed by Texas trial courts.¹¹⁴ When an appellate court finds that there was a decision made on a nonjusticiable issue in the trial court, the remedy is to vacate any previously issued orders or judgments and dismiss the case.¹¹⁵

If a Texas district court decides a matter without the justiciable requirement of a live controversy, “then its decision would not bind the parties.”¹¹⁶ Such a decision is a prohibited advisory opinion that violates the state’s constitutional separation of powers doctrine that allocates the issuance of advisory opinions to “the executive rather than the judicial department.”¹¹⁷ Like in federal jurisprudence, Texas courts are barred from issuing advisory opinions in all cases, including in response to requests for declaratory judgment.¹¹⁸ Finally, like federal courts, because Texas courts are duty bound to not make decisions on nonjusticiable matters, state appellate courts must consider the question of whether a lower court issued an impermissible advisory opinion, like all justiciability questions, *sua sponte*.¹¹⁹

B. The Hierarchical Precedent Doctrine

What is not at controversy in Establishment Clause jurisprudence is that lower courts are bound by relevant precedent from controlling higher

¹¹³ *Cal. Prods., Inc.*, 334 S.W.2d at 781 (quoting WALTER H. ANDERSON, 1 DECLARATORY JUDGMENTS 47 (2d ed. 1951)).

¹¹⁴ *See Am. K-9 Detection Servs., LLC v. Freeman*, 556 S.W.3d 246, 250 (Tex. 2018) (holding that the trial court properly dismissed a nonjusticiable claim), *cert. denied*, 139 S. Ct. 1344 (2019).

¹¹⁵ *See Heckman v. Williamson Cty.*, 369 S.W.3d 137, 162 (Tex. 2012) (“If a case is or becomes moot, the court must vacate any order or judgment previously issued and dismiss the case for want of jurisdiction.”).

¹¹⁶ *State Bar of Tex. v. Gomez*, 891 S.W.2d 243, 245 (Tex. 1994) (citation omitted).

¹¹⁷ *Tex. Ass’n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 444 (Tex. 1993) (citing TEX. CONST. art. II, § 1).

¹¹⁸ *See id.* (citations omitted) (interpreting the state Declaratory Judgment Act “to be merely a procedural device for deciding cases already within a court’s jurisdiction rather than a legislative enlargement of a court’s power, permitting the rendition of advisory opinions”).

¹¹⁹ *See Am. K-9 Detection Servs., LLC*, 556 S.W.3d at 260 (“[J]usticiability [is] a jurisdictional matter. Thus, it may be raised at any time or by the court *sua sponte*.”); *see also Farmers Tex. Cty. Mut. Ins. Co. v. Griffin*, 955 S.W.2d 81, 82 (Tex. 1997) (per curiam) (stating that justiciability issues must be raised *sua sponte*); *Craig v. Tejas Promotions, LLC*, 550 S.W.3d 287, 302 n.63 (Tex. App. 2018) (discussing an “obligat[ion] to consider these justiciability issues *sua sponte*”).

courts.¹²⁰ Consequently, when a higher court has already decided an issue, a lower court has no discretion to ignore that precedent.¹²¹ This has been deemed the “the doctrine of hierarchical precedent,” “the binding precedent rule,” or “vertical stare decisis.”¹²² This is a foundational principle of the American judicial system.¹²³

Under the rule of hierarchical precedent and the Supremacy Clause’s provision that the “Constitution . . . shall be the supreme Law of the Land,”¹²⁴ all lower federal courts and all state courts are bound by the Supreme Court’s constitutional decisions.¹²⁵ Although state courts are not bound by federal rules of justiciability, they are bound by the Supreme Court’s constitutional precedent when they adjudicate federal constitutional issues.¹²⁶ Consequently, all courts must follow the constitutional precedents established by the Supreme Court “until [the Court] sees fit to reexamine

¹²⁰ See *Johnson v. DeSoto Cty. Bd. of Comm’rs*, 72 F.3d 1556, 1559 n.2 (11th Cir. 1996) (discussing the requirements of the binding precedent rule); see also Ashutosh Bhagwat, *Separate but Equal?: The Supreme Court, the Lower Federal Courts, and the Nature of the “Judicial Power,”* 80 B.U. L. REV. 967, 969 (2000) (discussing the Court’s insistence that lower courts apply direct precedent even where it seems like it may be overruled); Mark Alan Thurmon, *When the Court Divides: Reconsidering the Precedential Value of Supreme Court Plurality Decisions*, 42 DUKE L.J. 419, 422 (1992) (“Few would dispute that lower courts must follow the decisions of the Supreme Court.”).

¹²¹ See *Johnson*, 72 F.3d at 1559 n.2 (“The binding precedent rule affords a court no such discretion where a higher court has already decided the issue before it.”).

¹²² See *id.* (using the term “binding precedent rule”); see also Evan H. Caminker, *Why Must Inferior Courts Obey Superior Court Precedents?*, 46 STAN. L. REV. 817, 819 (1994) (using the label “the doctrine of hierarchical precedent”); Lewis A. Kornhauser, *Adjudication by a Resource-Constrained Team: Hierarchy and Precedent in a Judicial System*, 68 S. CAL. L. REV. 1605, 1609 (1995) (footnote omitted) (stating federal courts “adhere to . . . strict vertical precedent”); Kurt T. Lash, *Originalism, Popular Sovereignty, and Reverse Stare Decisis*, 93 VA. L. REV. 1437, 1454 (2007) (“Vertical stare decisis refers to the binding effect of precedent on lower courts.”); Joseph W. Mead, *Stare Decisis in the Inferior Courts of the United States*, 12 NEV. L.J. 787, 790 (2012) (using the term “vertical stare decisis”); Frederick Schauer, *Has Precedent Ever Really Mattered in the Supreme Court?*, 24 GA. ST. U. L. REV. 381, 385 (2007) (employing the term “vertical precedent”).

¹²³ See Caminker, *supra* note 122, at 818 (discussing the “longstanding doctrine” of hierarchical precedent in the American judicial system); see also Amy J. Griffin, *Dethroning the Hierarchy of Authority*, 97 OR. L. REV. 51, 59–60 (2018) (labeling vertical precedent as “the strongest form of judicial authority”).

¹²⁴ U.S. CONST. art. VI, cl. 2.

¹²⁵ See *Hubbard v. United States*, 514 U.S. 695, 713 n.13 (1995) (stating all lower courts must adhere to Supreme Court precedent).

¹²⁶ See *ASARCO Inc. v. Kadish*, 490 U.S. 605, 617 (1989) (“We have recognized often that the constraints of Article III do not apply to state courts, and accordingly the state courts are not bound by the limitations of a case or controversy or other federal rules of justiciability even when they address issues of federal law, as when they are called upon to interpret the Constitution[.]”).

[them].”¹²⁷ This hierarchical precedent rule of American constitutional law “is indefeasible and absolute.”¹²⁸

C. *The Establishment Clause Government Speech/Private Speech Dichotomy*

Finally, what is not at controversy in Establishment Clause jurisprudence is that the clause only applies to government speech;¹²⁹ it does not apply to private speech.¹³⁰ In *Santa Fe Independent School District v. Doe*, the Supreme Court cemented this fundamental dichotomy into its school law doctrine.¹³¹ Here, the Court determined at the outset of the opinion that “there 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.”¹³² All of the Justices, even the dissenters, agreed with this principle.¹³³ Because this *Santa Fe* crucial-difference principle is a core “remarkable consistency” in case law regarding religious speech in public schools, it merits close discussion.¹³⁴

The Supreme Court examined the Establishment Clause and student prayers at public high school football games in *Santa Fe*.¹³⁵ In this case, a

¹²⁷ 1B JAMES WM. MOORE, MOORE’S FEDERAL PRACTICE ¶ 0.402[1], at I–10 (2d ed. 1996).

¹²⁸ Randy J. Kozel, *Settled Versus Right: Constitutional Method and the Path of Precedent*, 91 TEX. L. REV. 1843, 1850 (2013).

¹²⁹ See *Pleasant Grove City v. Summum*, 555 U.S. 460, 468 (2009) (providing that a key restraint on government speech, but not private speech, is that it “must comport with the Establishment Clause”).

¹³⁰ See Perry O. Chrisman, *Confessions of a Baptist Lawyer*, 27 TEX. TECH L. REV. 1041, 1045 (1996) (stating there is no Establishment Clause application to “purely private speech”); see also Steven G. Gey, *When is Religious Speech not “Free Speech”?*, 2000 U. ILL. L. REV. 379, 383 (2000) (discussing the Supreme Court’s repeated acknowledgments that the Establishment Clause does not apply to private speech); Claudia E. Haupt, *Mixed Public-Private Speech and the Establishment Clause*, 85 TUL. L. REV. 571, 577 (2011) (“[P]rivate speech by itself does not present any Establishment Clause concerns.”).

¹³¹ See *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 317 (2000) (invalidating a public school’s policy of allowing a student-led prayer over the public address system on the grounds that it “establishes an improper majoritarian election on religion”).

¹³² *Id.* at 302 (emphasis in original) (quoting *Bd. of Educ. v. Mergens*, 496 U.S. 226, 250 (1990) (plurality opinion)).

¹³³ See *id.* at 324 (Rehnquist, C.J., dissenting) (emphasizing the difference between how the Constitution treats government speech and private speech endorsing religion).

¹³⁴ Laycock, *supra* note 55, at 218.

¹³⁵ *Santa Fe*, 530 U.S. at 317 (reasoning that by incorporating prayer into a “school-related procedure, which entrusts the inherently nongovernmental subject of religion to a majoritarian vote, a constitutional violation has occurred”).

Mormon student and a Catholic student, with their mothers, claimed their public school district violated the Establishment Clause by “allow[ing] students to read Christian invocations and benedictions from the stage at graduation ceremonies, and to deliver overtly Christian prayers over the public address system at home football games.”¹³⁶ The Court granted review only as to the football game prayer policy.¹³⁷ This left the question of whether state policies and practices regarding student invocations at public school graduations were violative of the Establishment Clause open for future judicial resolution.¹³⁸

In *Santa Fe*, the Court determined the school’s pre-game invocation policy violated the Establishment Clause.¹³⁹ In doing so, the Court first highlighted the important role of public worship and prayer in many American communities.¹⁴⁰ The Court stressed that the religion clauses of the First Amendment do not prohibit all religious activities in American public schools as the clauses’ purposes were the security of religious liberty.¹⁴¹ However, the Court emphasized that “religious activity in public schools, as elsewhere, must comport with the First Amendment”¹⁴² and that this policy did not do so.¹⁴³

The policy at issue provided:

The board has chosen to permit students to deliver a brief invocation and/or message to be delivered during the pre-game ceremonies of home

¹³⁶ *Id.* at 295.

¹³⁷ *See id.* at 301 (limiting the grant of certiorari to the question of student-led and student-initiated prayer at football games).

¹³⁸ This has not been resolved. *See* Steven K. Green, *All Things Not Being Equal: Reconciling Student Religious Expression in the Public Schools*, 42 U.C. DAVIS L. REV. 843, 873 (2009) (discussing the inconsistencies in the federal courts’ treatment of student prayers at school graduations); *see also* Bruce Ledewitz, *Toward a Meaning-Full Establishment Clause Neutrality*, 87 CHI.-KENT L. REV. 725, 764 (2012) (discussing multiple controversies regarding student prayers at public school graduations); Myron Schreck, *Balancing the Right to Pray at Graduation and the Responsibility of Disestablishment*, 68 TEMP. L. REV. 1869, 1869 (1995) (discussing “the battle over [student] prayer at public school graduation ceremonies”).

¹³⁹ *See Santa Fe*, 530 U.S. at 316 (reasoning that the policy created the perception of school endorsement of a religious practice).

¹⁴⁰ *See id.* at 307 (“We recognize the important role that public worship plays in many communities, as well as the sincere desire to include public prayer as a part of various occasions so as to mark those occasions’ significance.”).

¹⁴¹ *See id.* at 313 (quoting *Engel v. Vitale*, 370 U.S. 421, 430 (1962) (stating that “the common purpose of the Religion Clauses ‘is to secure religious liberty.’”).

¹⁴² *Id.* at 307.

¹⁴³ *See id.* at 316 (explaining that the school’s policy was unconstitutional because “it impermissibly impose[d] upon the student body a majoritarian election on the issue of prayer”).

varsity football games to solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition. Upon advice and direction of the high school principal, each spring, the high school student council shall conduct an election, by the high school student body, by secret ballot, to determine whether such a statement or invocation will be a part of the pre-game ceremonies and if so, shall elect a student, from a list of student volunteers, to deliver the statement or invocation. The student volunteer who is selected by his or her classmates may decide what message and/or invocation to deliver, consistent with the goals and purposes of this policy. If the District is enjoined by a court order from the enforcement of this policy, then and only then will the following policy automatically become the applicable policy of the school district. The board has chosen to permit students to deliver a brief invocation and/or message to be delivered during the pre-game ceremonies of home varsity football games to solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition. Upon advice and direction of the high school principal, each spring, the high school student council shall conduct an election, by the high school student body, by secret ballot, to determine whether such a message or invocation will be a part of the pre-game ceremonies and if so, shall elect a student, from a list of student volunteers, to deliver the statement or invocation. The student volunteer who is selected by his or her classmates may decide what statement or invocation to deliver, consistent with the goals and purposes of this policy. Any message and/or invocation delivered by a student must be nonsectarian and nonproselytizing.¹⁴⁴

This final reviewed policy was a slight modification of a previous school district policy that was “titled ‘Prayer at Football Games’” and that originally used only the term “invocations,” rather than the terms “invocation,” “messages,” and “statements.”¹⁴⁵

In conducting its review of this policy, the Court first dismissed the state’s claims that the invocations were “private student speech” that was not subject to the constraints of the Establishment Clause.¹⁴⁶ Here, the Court rejected the state’s argument that the dual student elections for approval of the invocations at the games and for the invocation student speaker turned the public speech into private speech, which would insulate the school from a finding of unconstitutional coercion.¹⁴⁷ In doing so, the Court made clear

¹⁴⁴ *Id.* at 298–99 n.6 (citation omitted).

¹⁴⁵ *Id.* at 298, 309.

¹⁴⁶ *Id.* at 302.

¹⁴⁷ *See id.* at 305, 310 (reasoning that despite the school’s assertion that it employed a “hands-off” approach to the pregame prayer, the policy reveals both perceived and actual endorsement of religion).

that the Establishment Clause does not apply to private student speech, explicitly agreeing with a previous equal access decision that only government speech is constrained by the Establishment Clause.¹⁴⁸

The clarity of the *Santa Fe* crucial distinction between government speech and private speech in school law jurisprudence was mere prologue to a rather complex framework for the constitutional classification of the students' religious speech, as being subject to the Establishment Clause. The jumping-off point in this analysis was the finding that the invocations were "authorized by a government policy"¹⁴⁹ The students' prayers were delivered "on government property at government-sponsored school-related events . . . over the school's public address system, by a speaker representing the student body, under the supervision of school faculty"¹⁵⁰ These factors all supported the Court's conclusion these invocations could not be classified as private speech.

Additionally, the Court found these prayers did not take place within a government-created limited public forum that would allow them to be considered private speech, as there was no policy or practice evidence that the school officials had "any intent to open the [pregame ceremony] to 'indiscriminate use,' . . . by the student body generally."¹⁵¹ Instead, the school engaged in a selective access process, where the same student each football season delivered the invocation.¹⁵² The resulting invocation was "subject to particular regulations that confine[d] the content and topic of the student's message."¹⁵³ The Court determined this selective access approach and regulated student messaging countervailed the governmental claims of the creation of a protected public forum that would create a private speech zone for the student's invocation.¹⁵⁴

Also determinative to the Court's conclusion that the pre-game student prayer was not private speech was the finding that the selection of the student invocation giver was the result of a state-initiated process.¹⁵⁵ Here, the Court

¹⁴⁸ See *id.* at 302 (citing *Bd. of Educ. v. Mergens*, 496 U.S. 226, 250 (1990) (plurality opinion)).

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 302, 310.

¹⁵¹ *Id.* at 303 (alterations in original) (quoting *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 270 (1988)).

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.* (citing *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 47 (1983)).

¹⁵⁵ See *id.* at 303–04 (referring to *Santa Fe*'s student election system).

rejected the state's arguments that it had taken a "hands-off" approach to the pregame invocation" and that the "individual student [was] the 'circuit-breaker' in the process," which transformed the invocation into private speech.¹⁵⁶ Essentially, the Court found that the state created the circuit; it created the invocation and student selection process by initiating the dual elections with its policy.¹⁵⁷ The school's initiation of and extensive entanglement in this process revealed "the 'degree of school involvement' [that made] it clear that the pregame prayers [bore] 'the imprint of the State and thus put school-age children who objected in an untenable position.'"¹⁵⁸

Another basis for the Court's determination that the invocations were not private speech was that the state-initiated selection mechanism was a majoritarian one, which "ensure[d] that only those messages deemed 'appropriate' under the District's policy may be delivered."¹⁵⁹ Consequently, the state could no longer claim that these invocations were pure private speech. Further, the state-initiated majoritarian mechanisms made access to the forum dependent upon majoritarian consent.¹⁶⁰ Because "[a]ccess to a public forum . . . does not depend upon majoritarian consent,"¹⁶¹ there was no such public forum for private speech during this pregame ceremony.¹⁶²

These majoritarian-controlled systems were constitutionally problematic because they provided insufficient safeguards for minority speakers and for diversity of speech.¹⁶³ The Court found that "the majoritarian process implemented by the District guarantees, by definition, that minority candidates will never prevail and that their views will be effectively silenced."¹⁶⁴ These student elections did "nothing to protect minority views but rather place[d] the students who hold such views at the mercy of the

¹⁵⁶ *Id.* at 305 (footnote omitted).

¹⁵⁷ *See id.* at 305–06 (supporting the conclusion that the student prayer was not private speech).

¹⁵⁸ *Id.* at 305 (quoting *Lee v. Weisman*, 505 U.S. 577, 590 (1992)).

¹⁵⁹ *Id.* at 304.

¹⁶⁰ *See id.* ("[T]his student election does nothing to protect minority views but rather places the students who hold such views at the mercy of the majority.").

¹⁶¹ *Id.* (quoting *Bd. of Regents v. Southworth*, 529 U.S. 217, 235 (2000)).

¹⁶² *Id.* at 304–05.

¹⁶³ *Id.* Protection of the minority was especially relevant to the case. One month into these constitutional proceedings, the district court had to enter an all-caps-inclusive protective order allowing the student plaintiffs to proceed anonymously as a measure to keep them safe "from intimidation or harassment." *Id.* at 294, 294 n.1.

¹⁶⁴ *Id.* at 304.

majority.”¹⁶⁵ All of these findings regarding the majoritarian-controlled aspects of the state-initiated student invocation supported the Court’s conclusion that the invocations were not subject to protection from the requirements of the Establishment Clause as private speech.¹⁶⁶

In addition to the school’s involvement in the speaker selection process, the Court also found the express and implied terms of the school district policy, its history, and its actual purpose “invite[d] and encourage[d] religious messages” of the students in order to classify these invocations as non-private speech.¹⁶⁷ The Court emphasized the only expressly endorsed message in the policy was “an ‘invocation’—a term that primarily describes an appeal for divine assistance.”¹⁶⁸ In the history of the high school, an invocation had always been “a focused religious message.”¹⁶⁹ As a result, the Court concluded that “the expressed purposes of the policy encourage[d] the selection of a religious message [specifically prayer], and that is precisely how the students underst[ood] the policy.”¹⁷⁰ It also found that the express policy purpose, “to solemnize the event,” was most obviously accomplished through a religious message.¹⁷¹ Therefore, the express and implied terms, the history, and the purpose of the policy indicated state support of the student invocations, which contributed to the Court’s rejection of the state’s claim that these invocations were private speech.

Beyond the student speaker selection process and the policy’s text, additional factual factors established “[t]he actual or perceived endorsement of the message” by the school, which supported the Court’s conclusion that the invocations were not private speech.¹⁷² These factors included:

Once the student speaker is selected and the message composed, the invocation is then delivered to a large audience assembled as part of a regularly scheduled, school-sponsored function conducted on school property. The message is broadcast over the school’s public address system, which remains subject to the control of school officials. It is fair to assume that the pregame ceremony is clothed in the traditional indicia of school sporting events, which generally include not just the team, but also

¹⁶⁵ *Id.*

¹⁶⁶ *See id.* at 304–06.

¹⁶⁷ *Id.* at 306.

¹⁶⁸ *Id.* at 306–07.

¹⁶⁹ *Id.* at 307.

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 306.

¹⁷² *Id.* at 307.

cheerleaders and band members dressed in uniforms sporting the school name and mascot. The school's name is likely written in large print across the field and on banners and flags. The crowd will certainly include many who display the school colors and insignia on their school T-shirts, jackets, or hats and who may also be waving signs displaying the school name.¹⁷³

The Court found the combination of these factors would lead an objective high school student to "unquestionably perceive the inevitable pregame prayer as stamped with [the] school's seal of approval."¹⁷⁴

This objective student's perception that the school encouraged the prayer was reinforced by the history, text, and actual purposes of the policy.¹⁷⁵ The Court found that, while there is some judicial deference owed to a state's characterization of the purpose for a religious policy, "it is nonetheless the duty of the courts to 'distinguish[] a sham secular purpose from a sincere one.'"¹⁷⁶ Here, the Court refused to give deference to the state's asserted secular purposes of the policy—to "fost[e] free expression of private persons[,] . . . to solemniz[e] the event, to promot[e] good sportsmanship and student safety, and to establis[h] the appropriate environment for the competition,"¹⁷⁷ because these purposes were not furthered when only one student was "permitted to give a content-limited message" and the message was "prayer sponsored by the school."¹⁷⁸ The Court also emphasized that the name of the original policy, "Prayer at Football Games," demonstrated that the specific purpose of the policy was not a secular purpose; it "was to preserve a popular 'state-sponsored religious practice.'"¹⁷⁹ This school-sponsored religious speech was not permissible under the Establishment Clause because it created a schism between schoolchildren, "send[ing] the ancillary message to members of the audience who are non-adherents 'that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community.'"¹⁸⁰

¹⁷³ *Id.* at 307–08.

¹⁷⁴ *Id.* at 308.

¹⁷⁵ *See id.* ("In this context the members of the listening audience must perceive the pregame message as a public expression of the views of the majority of the student body delivered with the approval of the school administration.").

¹⁷⁶ *Id.* (alteration in original) (quoting *Wallace v. Jaffree*, 472 U.S. 38, 75 (1985) (O'Connor, J. concurring)).

¹⁷⁷ *Id.* at 306, 309 (alterations in original) (citation omitted).

¹⁷⁸ *Id.* at 309.

¹⁷⁹ *Id.* (quoting *Lee v. Weisman*, 505 U.S. 577, 596 (1992)).

¹⁸⁰ *Id.* at 309–10 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O'Connor, J. concurring)).

As a result of these extensive findings, the Court concluded the student invocations under the policy were not private speech.¹⁸¹ In summarizing this conclusion, the Court stated that “[t]he delivery of such a message—over the school’s public address system, by a speaker representing the student body, under the supervision of school faculty, and pursuant to a school policy that explicitly and implicitly encourages public prayer—is not properly characterized as ‘private’ speech.”¹⁸²

The dissent disagreed with this private-speech conclusion.¹⁸³ Its analysis was brief.¹⁸⁴ It consisted of two sentences: “Here, by contrast, the potential speech at issue, if the policy had been allowed to proceed, would be a message or invocation selected or created by a student. That is, if there were speech at issue here, it would be *private* speech.”¹⁸⁵

After determining the student prayer was not private speech, the Court’s majority opinion applied a substantive coercion analysis to determine the invocation policy violated the Establishment Clause.¹⁸⁶ The Court first found unconstitutional governmental coercion because the district policy created elections to determine if the pre-football game ceremony would feature religious messages, which “encourage[d] divisiveness along religious lines in a public school setting.”¹⁸⁷ Next, the Court dismissed the state’s argument of the absence of coercion because attendance at an extracurricular football game is voluntary based on the compulsory football game attendance requirements for certain students and the social conformity pressures on all high school students.¹⁸⁸ Here, the Court stated that “the State cannot [constitutionally] require one of its citizens to forfeit his or her rights and benefits as the price of resisting conformance to state-sponsored religious practice.”¹⁸⁹ Based on these findings, the Court concluded “that the delivery of a pregame prayer has the improper effect of coercing those

¹⁸¹ *Id.* at 310.

¹⁸² *Id.*

¹⁸³ *See id.* at 324 (Rehnquist, C.J., dissenting) (arguing that the speech at issue would have been private speech rather than government speech).

¹⁸⁴ *See id.* (disposing of whether the potential speech was private in a short paragraph).

¹⁸⁵ *Id.* (emphasis in original).

¹⁸⁶ *Id.* at 310 (majority opinion).

¹⁸⁷ *Id.* at 311.

¹⁸⁸ *See id.* at 311–12 (“For many . . . the choice between attending these games and avoiding personally offensive religious rituals is in no practical sense an easy one.”)

¹⁸⁹ *Id.* at 312 (quoting *Lee v. Weisman*, 505 U.S. 577, 596 (1992)).

present to participate in an act of religious worship,”¹⁹⁰ especially in a community that included non-adherent children who merit vigilant constitutional protection.¹⁹¹ Therefore, the Court found an Establishment Clause violation by this policy and the coercion that resulted from it because “the religious liberty protected by the Constitution is abridged when the State affirmatively sponsors the particular religious practice of prayer.”¹⁹²

The final portion of the opinion dealt with the school district’s claim that the plaintiffs had made a premature facial challenge to the policy that must fail, because no student had delivered an invocation under that policy and there was “no certainty that any of the statements or invocations [under the policy] will be religious.”¹⁹³ The Court dismissed this argument, stating that it was not just concerned with the constitutional injury that would result from “a student [being] forced to participate in an act of religious worship because she chooses to attend a school event.”¹⁹⁴ It was also concerned with the two constitutional injuries that were presented in this facial challenge: 1) “the mere passage by the District of a policy that has the purpose and perception of government establishment of religion” and 2) “the implementation of a governmental electoral process that subjects the issue of prayer to a majoritarian vote.”¹⁹⁵ With respect to this first issue, the Court reiterated that the text of the policy revealed its “unconstitutional purpose,” which required its invalidation under the “secular legislative purpose” requirement of the first prong of the *Lemon* test.¹⁹⁶ Beyond the text of the policy, the Court found the context in which that policy was implemented clearly demonstrated “the purpose of endorsing school prayer.”¹⁹⁷ As a result, the Court concluded that “the simple enactment of this policy, with the purpose and perception of school endorsement of student prayer, was a constitutional violation.”¹⁹⁸

With respect to the second issue, the Court found “[t]his policy likewise [did] not survive a facial challenge because it impermissibly impose[d] upon

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.* at 313.

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 313–14.

¹⁹⁵ *Id.* at 314.

¹⁹⁶ *Id.* at 315 (quoting *Lemon v. Kurtzman*, 403 U.S. 602, 612 (1971)).

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 316.

the student body a majoritarian election on the issue of prayer.”¹⁹⁹ The policy’s empowerment of the “student body majority with the authority to subject students of minority views to constitutionally improper messages” in the form of school-sponsored prayer was a violation of the Establishment Clause.²⁰⁰ Therefore, being mindful of “the myriad, subtle ways in which Establishment Clause values can be eroded,” the Supreme Court concluded that the policy was an impermissible violation of that clause.²⁰¹

Santa Fe is the seminal case on the classification of student religious speech within Establishment Clause jurisprudence.²⁰² It makes clear the crucial difference in school law between private speech, which is not governed by the Establishment Clause, and government speech, which is constrained by that clause.²⁰³ Yet, in its extended analysis of this principle, the Court does not provide a complete, concise articulation of the precise method for this type of religious-speech classification.

Courts have struggled to accomplish this classification task in Establishment Clause cases that have been litigated since *Santa Fe*,²⁰⁴ demonstrating that “[n]o matter how clearly stated a distinction is in theory, it will become complex and tangled in practice.”²⁰⁵ This area has become a particular point of contention in litigation involving student religious speech.²⁰⁶ Therefore, despite the clarity of the *Santa Fe* speech dichotomy, confusion persists within school law Establishment Clause jurisprudence

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Id.* at 314, 316 (quoting *Lynch v. Donnelly*, 465 U.S. 668, 694 (1984) (O’Connor, J., concurring)).

²⁰² See Meier, *supra* note 27, at 521 (identifying *Santa Fe* as the key case for distinguishing private speech versus government speech for religious student speech).

²⁰³ See Kathleen A. Brady, *The Push to Private Religious Expression: Are We Missing Something?*, 70 FORDHAM L. REV. 1147, 1148 (2002) (characterizing the *Santa Fe* private speech/government speech dichotomy as an uncontroverted principle at the core of the Court’s school law jurisprudence).

²⁰⁴ See generally Hillel Y. Levin et al., *To Accommodate or Not to Accommodate: (When) Should the State Regulate Religion to Protect the Rights of Children and Third Parties?*, 73 WASH. & LEE L. REV. 915, 992 (2016) (discussing how courts and the country are still trying to resolve “a difficult question: When a religious practice imposes costs and risks on third parties, how can we tell whether tolerance of that practice violates the Establishment Clause?”).

²⁰⁵ Edward L. Rubin, *Sex, Politics, and Morality*, 47 WM. & MARY L. REV. 1, 38 (2005).

²⁰⁶ See Patrick M. Garry, *Inequality Among Equals: Disparities in the Judicial Treatment of Free Speech and Religious Exercise Claims*, 39 WAKE FOREST L. REV. 361, 386–87 (2004) (discussing divergent judicial approaches to the classification of religious student speech in Establishment Clause and free exercise cases).

regarding the proper way to classify student religious speech as either government speech or private speech.²⁰⁷

III. CONTINUED CONFUSION IN SCHOOL LAW ESTABLISHMENT CLAUSE JURISPRUDENCE

In the twenty years since the *Santa Fe* decision, the classification of student religious speech has become an analytical battlefield in school law Establishment Clause cases. When addressed with this precise issue, courts have been inconsistent in their modes and methods of analysis.²⁰⁸ This continued confusion has been particularly apparent in constitutional litigation involving the display of students' religious messages at school sporting events and student-led graduation invocations. Two of these cases, *Matthews v. Kountze Independent School District* and *Schultz v. Medina Valley Independent School District*, are paradigmatic examples of the problems of nonjusticiability and judicial fiat in this area of First Amendment school law. Like *Santa Fe*, both cases centered around students' religious speech on Texas high school football fields.²⁰⁹

²⁰⁷ See Steven G. Gey, *The Procedural Annihilation of Structural Rights*, 61 HASTINGS L.J. 1, 30 (2009) (discussing the confusion in school law in classifying religious student speech); see also Brady, *supra* note 203, at 1152 (stating that most disputed Establishment Clause school law cases involve the "grey area" of student religious speech).

²⁰⁸ This tracks with other areas of Establishment Clause jurisprudence. See Michael J. Gerhardt, *The Role of Precedent in Constitutional Decisionmaking and Theory*, 60 GEO. WASH. L. REV. 68, 104 n.151 (1991) (referencing the inconsistencies of the Supreme Court's Establishment Clause jurisprudence); Martha Minow, *Should Religious Groups Be Exempt from Civil Rights Laws?*, 48 B.C. L. REV. 781, 790 n.55 (2007) (mentioning the inconsistency of the Supreme Court's Establishment Clause jurisprudence); David M. Smolin, *The Religious Root and Branch of Anti-Abortion Lawlessness*, 47 BAYLOR L. REV. 119, 142 (1995) ("The specific holdings of the Court interpreting the Establishment Clause have been so inconsistent that most commentators long ago stopped trying to reconcile the cases.").

²⁰⁹ See Joe Dryden, *The Religious Viewpoint Antidiscrimination Act: Using Students as Surrogates to Subjugate the Establishment Clause*, 82 MISS. L.J. 127, 135 (2013) ("Texas . . . is no stranger to Establishment Clause litigation . . ."). Indeed, "[e]verything is bigger in Texas," including, apparently, litigation involving the application of the Establishment Clause to student religious speech. *Hall v. McRaven*, 508 S.W.3d 232, 245 (Tex. 2017) (Willett, J., concurring).

A. The Establishment Clause and Student-Created Religious Messages at School Sporting Events: The Justiciability Saga of Matthews v. Kountze Independent School District

Although the Supreme Court's *Santa Fe* decision established a strong precedent regarding the classification of school-sponsored student invocations at high school football games as government speech that violates the Establishment Clause,²¹⁰ an ancillary issue has arisen regarding the display of student-created religious messages at public school sporting events. One such dispute originated at a public high school in Kountze, Texas, which is about 100 miles away from Santa Fe, Texas.²¹¹ However, unlike *Santa Fe*, this case was litigated in the state courts; it involved cheerleader-created religious displays on the run-through banners at football games; it was brought by students against the school district not for sponsoring the religious speech, but for restricting it; and its petition alleged violations of the cheerleaders' First Amendment rights of free speech and free exercise of religion, rather than a claimed Establishment Clause violation.²¹² And yet, the trial court's impermissible advisory opinion—that the Establishment Clause did not prohibit the display of the religious banners without making any express determination as to whether the banners constituted government speech or private speech—initiated six years of intense and protracted litigation.²¹³

1. The Trial Court Proceedings

In *Matthews v. Kountze Independent School District*, the parents of student cheerleaders brought suit on behalf of their children against the school district and its superintendent after the superintendent “prohibited the Cheerleaders from including religious messages on run-through banners used at the beginning of high school football games” during the 2012 football

²¹⁰ *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 302, 316 (2000).

²¹¹ Emma Green, *Cheerleaders for Christ*, ATLANTIC (Apr. 5, 2016), <https://www.theatlantic.com/politics/archive/2016/04/kountze-cheerleaders-free-speech-religion-banners-football/476892/> (discussing the *Matthews* litigation); Driving Directions from Santa Fe, TX to Kountze, TX, GOOGLE MAPS, <http://maps.google.com> (follow “Directions” hyperlink; then search starting point field for “Santa Fe, TX” and search destination field for “Kountze, TX”).

²¹² *Kountze Indep. Sch. Dist. v. Matthews ex. rel. Matthews*, 482 S.W.3d 120, 124–26 (Tex. App. 2014).

²¹³ *Matthews v. Kountze Indep. Sch. Dist.*, No. 53526, 2013 WL 1914796, at 2 (Tex. Dist. Ct. May 8, 2013).

season.²¹⁴ These run-through banners had been made for a number of years by the high school cheerleading squad for varsity football games.²¹⁵ The large banners were displayed by the squad on the school field for the football team to charge through at the start of each game.²¹⁶ The content of the banners was decided by the entire squad.²¹⁷ To make sure the banners were appropriate for the game and did not have poor sportsmanship, they were reviewed and approved by the squad's school sponsors.²¹⁸ For the 2012 football season, the cheerleading squad used biblical scripture and Christian symbols on the run-through banners.²¹⁹

On September 18, 2012, one day after receiving complaints from the Freedom From Religion Foundation ("FFRF") that the banners violated the Establishment Clause and then seeking legal advice, the district superintendent informed the district principals that the banners could no longer include religious messages.²²⁰ On that same day, the new policy was announced on the high school's intercom by a campus administrator.²²¹ The superintendent instituted this new policy without first consulting the district's Board of Trustees.²²²

On September 20, 2012, some of the high school cheerleaders, some middle school cheerleaders, and their families filed suit in Texas state court, alleging this policy violated the students' constitutional rights to free speech and free exercise.²²³ The plaintiffs filed an application for a TRO and a request for injunctive relief with their petition.²²⁴ The state trial court granted the plaintiffs' TRO request and ordered the school district and

²¹⁴ Kountze Indep. Sch. Dist. v. Matthews *ex rel.* Matthews, No. 09-13-00251-CV, 2017 WL 4319908, at *1, *1 n.1 (Tex. App. Sept. 28, 2017). Hereinafter, the plaintiffs in this action will be referred to as "the cheerleaders" for the sake of brevity.

²¹⁵ *Matthews*, 482 S.W.3d at 124.

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ *Id.*

²¹⁹ *Id.*

²²⁰ *Id.* at 125. The court explained that "FFRF identifies itself as a 'watchdog organization' and appears to regularly send letters to federal, state, and local government officials objecting to activities that they believe violate the Establishment Clause." *Id.* at 125 n.3.

²²¹ *Id.* at 125.

²²² *Id.*

²²³ *Id.* at 123, 124 n.2, 125 (describing the high school litigants and discussing the similar middle school run-through banners practice); *Matthews ex rel. M.M. v. Kountze Indep. Sch. Dist.*, 484 S.W.3d 416, 417 (Tex. 2016) (referencing the middle school litigants).

²²⁴ *Matthews*, 482 S.W.3d at 125.

superintendent “to cease and desist from preventing the cheerleaders of Kountze Independent School District (“KISD”) from displaying banners or run throughs at sporting events and/or censoring the sentiments expressed thereon.”²²⁵

Thereafter, the school district filed a plea to the district court’s jurisdiction based on governmental immunity and lack of standing.²²⁶ A plea to the jurisdiction in Texas is a challenge to the trial court’s “authority to decide a case on the merits.”²²⁷ For a court to have authority to decide a case against a government entity on the merits, the plaintiff must prove a valid waiver of immunity from suit because governmental immunity deprives trial courts of subject matter jurisdiction over the lawsuit.²²⁸

On October 16, 2012, Texas Attorney General Greg Abbott filed a petition to intervene in the case in support of the cheerleaders.²²⁹ On that same day, the school district conducted community legislative proceedings regarding the superintendent’s banners policy.²³⁰ The next day, Abbott and Governor Rick Perry gave a press conference expressing their complete support for the cheerleaders.²³¹ In this press conference, Abbott characterized the banners as “student-led expression . . . that’s perfectly constitutional.”²³² He continued, “We will not allow atheist groups from outside the state of Texas to come into the state to use menacing and misleading and intimidating tactics to try to bully schools to bow down to the altar of secular beliefs.”²³³ Governor Perry stated, “We’re a nation built on the concept of free expression of ideas. We’re also a culture built on the

²²⁵ *Matthews ex rel. Matthews v. Kountze Indep. Sch. Dist.*, No. 53526, 2012 WL 5269957, at 3 (Tex. Dist. Ct. Oct. 18, 2012).

²²⁶ *Matthews*, 484 S.W.3d at 417.

²²⁷ *Kountze Indep. Sch. Dist. v. Matthews ex rel. Matthews*, No. 09-13-00251-CV, 2017 WL 4319908, at *2 (Tex. App. Sept. 28, 2017) (citation omitted).

²²⁸ *Id.*

²²⁹ Amy Moore, *Cheerleaders Have Texas AG, Governor in Their Corner for Today’s Hearing*, BEAUMONT ENTER. (Oct. 18, 2012, 8:21 AM), <https://www.beaumontenterprise.com/news/article/Cheerleaders-have-Texas-AG-Governor-in-their-3956566.php>.

²³⁰ *Kountze Indep. Sch. Dist. v. Matthews ex rel. Matthews*, 482 S.W.3d 120, 127 (Tex. App. 2014).

²³¹ Chris Tomlinson, *Texas AG Intervenes in Cheerleader Banner Dispute*, SPOKESMAN-REVIEW (Oct. 17, 2012, 5:34 PM), <http://www.spokesman.com/stories/2012/oct/17/texas-ag-intervenes-in-cheerleader-banner-dispute/>.

²³² *Id.*

²³³ *Id.*

concept that the original law is God's law, outlined in the Ten Commandments."²³⁴

One day after the press conference, on October 18, 2012, the trial court determined that the plaintiffs were entitled to a temporary injunction.²³⁵ In this order, the court found the constitutional claims presented a substantial threat of irreparable injury in the absence of injunctive relief.²³⁶ Specifically, the court found that, without injunctive relief, "the Defendants' unlawful policy prohibiting private religious expression will remain in effect and the Plaintiffs will be prohibited from exercising their constitutional . . . rights at football games and other school sporting events."²³⁷ This language, with the express inclusion of the terms "*private religious expression*," would later be claimed by the cheerleaders to be the trial court's classification of the student speech as "private speech, not government speech."²³⁸ The injunction permitted the cheerleaders to display their religious run-through banners at the school football games for the remainder of the 2012 season.²³⁹

On April 8, 2013, the school district's Board of Trustees adopted a new policy that allowed the cheerleaders to display the religious run-through banners.²⁴⁰ This new formal district policy provided "that school personnel are not required to prohibit messages on school banners, including run-through banners, that display fleeting expressions of community sentiment solely because the source or origin of such messages is religious."²⁴¹ Thereafter, the school district supplemented its plea to the trial court's jurisdiction to assert mootness based on the adoption of the new policy.²⁴²

After this supplemented plea and throughout the cheerleaders' free speech and free exercise litigation, the school district urged the court for a determination as to the applicability of the Establishment Clause on the school district's policy. The school district made multiple judicial admissions

²³⁴ *Id.*

²³⁵ *Matthews ex rel. Matthews v. Kountze Indep. Sch. Dist.*, No. 53526, 2012 WL 5269957, at 3 (Tex. Dist. Ct. Oct. 18, 2012).

²³⁶ *Id.* at 4.

²³⁷ *Id.*

²³⁸ Reply Brief of Petitioners at 20, *Matthews ex rel. M.M. v. Kountze Indep. Sch. Dist.*, 484 S.W.3d 416 (Tex. 2016) (No. 14-0453), 2015 WL 10321932, at *20.

²³⁹ *Matthews v. Kountze Indep. Sch. Dist.*, No. 53526, 2013 WL 1914796, at 1 (Tex. Dist. Ct. May 8, 2013).

²⁴⁰ *Kountze Indep. Sch. Dist. v. Matthews ex rel. Matthews*, 482 S.W.3d 120, 127 (Tex. App. 2014).

²⁴¹ *Id.* (quoting the resolution adopted by the Kountze ISD Board of Trustees).

²⁴² *Matthews ex rel. M.M. v. Kountze Indep. Sch. Dist.*, 484 S.W.3d 416, 417 (Tex. 2016).

that it affirmed the April 8 policy and that it had no current or future intentions to ban religious messages on the run-through banners,²⁴³ so long as the Establishment Clause did not prohibit the school district from doing so.²⁴⁴ From the time of the filing of its first amended answer and through its filings in support of its request for declaratory relief, the school district repeatedly requested the court issue a ruling that the district's allowance of the cheerleaders' religiously themed run-through banners at the football games did not violate the Establishment Clause.²⁴⁵

For example, in its October 12, 2012, motion for preliminary declaratory relief, the school district sought a judicial determination "that the Establishment Clause should not be interpreted so as to require Defendants to bar the religious banners at issue in this case."²⁴⁶ It offered three arguments in support of this requested relief:

1. There is evidence in the record that the application of *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000), to the religiously themed run-through banners at Kountze High School has created the impression that Defendants are hostile to religion;
2. Establishment Clause decisions requiring the exclusion of religion from public life should be narrowly construed or reconsidered because they originated in anti-religious sentiment and depart from the original understanding of the Establishment Clause; and
3. The Kountze High School run-through banners, including those with religiously themed messages, serve legitimate, nonreligious, secular purposes.²⁴⁷

Under the first heading of this request for declaratory relief, the school district asked the court for a classification of the cheerleaders' banner as

²⁴³ *Matthews*, 482 S.W.3d at 127–28.

²⁴⁴ See Kountze ISD's Reply to Plaintiffs' Response to Traditional Motion for Summary Judgment of Kountze ISD Regarding Its Request for Declaratory Relief at 1–3, *Matthews ex rel. Matthews v. Kountze Indep. Sch. Dist.*, No. 53526 (Tex. Dist. Ct. May 8, 2013), 2013 WL 2299644, at *1–3 (requesting the Court to clearly state that the cheerleading squad could display religious banners without violating the Establishment Clause).

²⁴⁵ *Id.* at 1–2.

²⁴⁶ Defendants' Motion for Preliminary Declaratory Relief at 1, *Matthews v. Kountze Indep. Sch. Dist.*, No. 53526 (Tex. Dist. Ct. May 8, 2013), 2012 WL 8203195, at *1.

²⁴⁷ *Id.* at 1–2.

government speech for Establishment Clause purposes.²⁴⁸ The net result of this motion was a request for an impermissible advisory opinion.²⁴⁹

Because the cheerleaders wanted the same judicial finding on the Establishment Clause issue, they were not adverse parties to the school district on that issue. In their motion for partial summary judgment, the cheerleaders sought a similar determination by the trial court that the school district “violates no law by allowing the Cheerleaders to display religious messages on their run-through banners.”²⁵⁰ A judicial determination of “no law” violation would indicate this type of allowance does not violate the Establishment Clause.²⁵¹

In their April 29, 2013, reply to the school district’s motion for summary judgment for declaratory relief, the cheerleaders expressly acknowledged a lack of live controversy and a lack of adversity on this issue: “KISD’s sudden adoption of the Plaintiffs’ position that religious messages on the Cheerleaders’ run-through banners are constitutionally permissible vindicates the Cheerleaders’ rights and brings this case to an end.”²⁵² The cheerleaders stated that the school district’s request for declaratory relief was “*the SAME position the Plaintiffs (and the Texas Attorney General) have advocated from day one. . . . [and] the SAME relief the Plaintiffs have requested in their Motion for Partial Summary Judgment.*”²⁵³

The only point of disagreement between the parties was the classification of the speech as private or government speech. Speech classification would have been necessary for the question of waiver of governmental immunity to the free speech and free exercise claims asserted in the cheerleaders’ petition. The cheerleaders, though, specifically stated that “no additional ruling regarding the nature of the speech is necessary at this time” because the

²⁴⁸ *Id.* at 5.

²⁴⁹ *Id.* at 7; see *State Bar of Tex. v. Gomez*, 891 S.W.2d 243, 245 (Tex. 1994) (barring advisory opinions based on their non-justiciability). The second argument also implies that the school district requested the trial court not adhere to the hierarchical precedent doctrine.

²⁵⁰ Brief of Amicus Curiae American Jewish Committee at 15, *Matthews ex rel. M.M. v. Kountze Indep. Sch. Dist.*, 484 S.W.3d 416 (Tex. 2016) (No. 14-0453), 2015 WL 12911362, at *15.

²⁵¹ See *id.* (discussing the logical result of the cheerleaders’ request).

²⁵² Plaintiffs’ Reply to Defendant’s Response to Plaintiffs’ Motion for Partial Summary Judgment and Response to Traditional Motion for Summary Judgment of Kountze ISD Regarding its Request for Declaratory Relief at 1, *Matthews ex rel. Matthews v. Kountze Indep. Sch. Dist.*, No. 53526 (Tex. Dist. Ct. May 8, 2013), 2013 WL 2299634, at *1.

²⁵³ *Id.* at 2–3 (emphasis in original).

“Court has already determined that the messages on the Cheerleaders’ banners is private speech” in its temporary injunction order.²⁵⁴

Regardless, that point of disagreement on the student speech classification did not create a justiciable controversy as to the Establishment Clause issue, because there was no controversy on that issue between actually adverse parties. Every party in the lawsuit wanted the same resolution of the question of whether the district’s allowance of the banners violated the Establishment Clause.²⁵⁵ And that sought-after shared answer was “no.” The cheerleaders’ April 29, 2013, filing solidified that the parties were not adverse as to an Establishment Clause determination and that there was no live, actual controversy or adversity on that issue. It does not matter that the parties differed on the reasoning for that joint determination, because, as Professor Ann Woolhandler has explained, the adverse party requirement for justiciability is one of adverse legal interests and not adverse legal arguments.²⁵⁶ Consequently, any Establishment Clause decision by the court would be an improper advisory opinion on a nonjusticiable issue.

That impermissible advisory opinion is exactly what the court gave the parties. Five days after this filing, and one month after the adoption of the revised banners policy, on May 8, 2013, the trial court issued an order on the parties’ multiple cross-motions for summary judgment, including the defendants’ motion for summary judgment regarding declaratory judgment and the defendants’ plea to the jurisdiction.²⁵⁷ Despite the vast complexity of Establishment Clause doctrine,²⁵⁸ the court made a cursory decision on the nonjusticiable issue of the application of that clause to the display of the

²⁵⁴ *Id.* at 3 n.12.

²⁵⁵ Although the FFRF had attempted to find someone in the Kountze High School community “to bring a countersuit” that claimed a violation of the Establishment Clause, it “[was] unable to find a person in the community who [was] willing to” do so. Green, *supra* note 211.

²⁵⁶ See Woolhandler, *supra* note 82, at 1032–33 (“Adverse legal arguments . . . are clearly not sufficient for a case, nor are they always necessary. By contrast, adverse legal interests are necessary and often sufficient. The most plausible version of the adverseness requirement is that a case requires a clash of legal interests but does not always require a clash of argument.”).

²⁵⁷ *Matthews v. Kountze Indep. Sch. Dist.*, No. 53526, 2013 WL 1914796 (Tex. Dist. Ct. May 8, 2013).

²⁵⁸ See Joseph O. Oluwole & Preston C. Green III, *School Vouchers and Tax Benefits in Federal and State Judicial Constitutional Analysis*, 65 AM. U. L. REV. 1335, 1357 (2016) (emphasizing the difficulty of judicial interpretation of the Establishment Clause); Anastasia P. Winslow, *Sacred Standards: Honoring the Establishment Clause in Protecting Native American Sacred Sites*, 38 ARIZ. L. REV. 1291, 1307–08 (1996) (discussing the persistent, inherent difficulties of Establishment Clause jurisprudence).

cheerleaders' banners.²⁵⁹ It did so in a nine-sentence, two-page order that did not cite any case law; that incorporated only two references to the "Establishment Clause" and one vague reference to the banners being "constitutionally permissible"; and that made two opaque references to "any other law."²⁶⁰ There were no citations in the order.²⁶¹

In this short opinion, the court granted the cheerleaders' motion for partial summary judgment in part and the school district's motion for summary judgment regarding its request for declaratory judgment.²⁶² Although the plaintiffs had not asserted an Establishment Clause violation in their petition, the court granted the district's request for a declaratory judgment about the Establishment Clause and made several conclusions of law about that clause.²⁶³

First, the court found that the "religious messages expressed on run-through banners have not created, and will not create, an establishment of religion in the Kountze community."²⁶⁴ Next, it concluded that "[t]he Kountze cheerleaders' banners that included religious messages and were displayed during the 2012 football season were constitutionally permissible."²⁶⁵ Finally, it concluded that "[n]either the Establishment Clause nor any other law prohibits the cheerleaders from using religious-themed banners at school sporting events. Neither the Establishment Clause nor any other law requires Kountze I.S.D. to prohibit the inclusion of religious-themed banners at school sporting events."²⁶⁶ The trial court did not make an express classification of the cheerleaders' speech as being either private speech or government speech,²⁶⁷ which demonstrates that this order was an impermissible advisory opinion as its scope was limited to an issue to which the parties both agreed. By granting the cheerleaders' motion for partial summary judgment in part, this order implicitly denied the school

²⁵⁹ *Matthews v. Kountze Indep. Sch. Dist.*, No. 53526, 2013 WL 1914796 (Tex. Dist. Ct. May 8, 2013).

²⁶⁰ *Id.*

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ *Id.* at 1.

²⁶⁵ *Id.* at 2.

²⁶⁶ *Id.*

²⁶⁷ *Id.*

district's plea to jurisdiction.²⁶⁸ The school district appealed this denial of its plea.²⁶⁹

2. *The First Texas Court of Appeals Decision*

On appeal, the Court of Appeals of Texas in Beaumont determined that the plaintiffs' claims were made moot by the school district's April 8, 2013, policy that allowed the religiously themed run-through banners and the district's judicial admissions regarding no intentions to prohibit these banners in the future.²⁷⁰ The court found there was no live controversy between the parties because the district's "allegedly wrongful behavior [had] passed and [could not] reasonably be expected to recur."²⁷¹

With respect to the cheerleaders' counterargument to mootness—that a controversy still existed based on the disagreement between the parties as to whether the students' speech was "governmental speech, student-sponsored speech, or private speech," the court stated it had "no authority to resolve a theoretical or contingent dispute."²⁷² Without any evidence in the record that the district had prohibited the speech of the cheerleaders in light of the April 8 policy, the court was not required to decide if there was a free speech violation.²⁷³ The court emphasized that "[a]ny future policy regarding the cheerleaders' speech can be challenged at a later date" as the court was "not empowered to decide cases on future contingencies or hypotheticals."²⁷⁴ Consequently, the court did not classify the cheerleaders' speech as being either private speech or government speech,²⁷⁵ and the only mention of the Establishment Clause in the opinion was a reference to the FFRF complaint about the banners that led to the district superintendent's initial restriction policy.²⁷⁶ The question of whether the trial court had the power under

²⁶⁸ Kountze Indep. Sch. Dist. v. Matthews *ex rel.* Matthews, No. 09-13-00251-CV, 2017 WL 4319908, at *1 (Tex. App. Sept. 28, 2017).

²⁶⁹ Kountze Indep. Sch. Dist. v. Matthews *ex rel.* Matthews, 482 S.W.3d 120, 123 (Tex. App. 2014).

²⁷⁰ *Id.* at 127–28, 134.

²⁷¹ *Id.* at 127, 132.

²⁷² *Id.* at 131.

²⁷³ *See id.* at 131–32 (holding that the school's adoption of the new policy indicated that "the allegedly wrongful behavior has passed and cannot reasonably be expected to recur").

²⁷⁴ *Id.* at 132.

²⁷⁵ *Id.*

²⁷⁶ *See id.* at 125 (noting that a staff attorney with the FFRF wrote a letter to the superintendent contending that the school district would violate the Establishment Clause by continuing to allow the cheerleaders to put religious language on the banners).

justiciability requirements to make a determination on the Establishment Clause issue and whether it had issued an advisory opinion on a nonjusticiable issue was not taken up by the court of appeals, despite its apparent *sua sponte* duty to do so.²⁷⁷

Instead, the court found the trial court erred in its denial of the school district's plea to jurisdiction due to mootness, reversed the trial court's order in part based on the mootness finding for the plaintiffs' substantive claims, and rendered judgment that the school district's plea to jurisdiction was granted.²⁷⁸ The court also vacated the October 18, 2012, temporary injunction.²⁷⁹ Importantly, the appellate court's reversal of the trial court's decision was only a reversal of the portion of the trial court's order that granted the cheerleaders' motion for partial summary judgment and implicitly denied the district's plea to jurisdiction.²⁸⁰ It did not reverse the trial court's order, granting in part the district's motion for summary judgment on its request for declaratory relief on the Establishment Clause's application to the case, because the appellate court stated that the school district's "request for declaratory relief is not a claim against [the cheerleaders] and the grant of summary judgment to Kountze ISD on the declaratory relief claim is not challenged on appeal by any party."²⁸¹ This appellate decision was made on May 8, 2014.²⁸² The cheerleaders petitioned the Texas Supreme Court for review,²⁸³ and the petition for review was granted by the state's civil court of last resort.²⁸⁴

3. *The Texas Supreme Court Decision*

In the first sentence of its January 29, 2016, opinion, the Texas Supreme Court noted that the sole issue on appeal was "whether the [school district's] voluntary cessation of challenged conduct rendered the plaintiffs' claims for prospective relief moot."²⁸⁵ However, before proceeding to the mootness analysis, the court recognized the parties' dispute over the scope of the

²⁷⁷ See *supra* text accompanying note 119.

²⁷⁸ *Matthews*, 482 S.W.3d at 134.

²⁷⁹ *Id.*

²⁸⁰ *Id.* at 123–24, 134.

²⁸¹ *Id.* at 124 n.1, 134.

²⁸² *Id.* at 120.

²⁸³ *Matthews ex rel. M.M. v. Kountze Indep. Sch. Dist.*, 484 S.W.3d 416, 417 (Tex. 2016).

²⁸⁴ *Id.* at 420.

²⁸⁵ *Id.* at 417.

challenged conduct as a threshold matter.²⁸⁶ The court stated that “[t]he cheerleaders contend that they are challenging the District’s ongoing policy of treating their banners as ‘government’ speech[,]” while the school district contends that the cheerleaders only challenged the discrete action of the superintendent’s religious-message banners ban.²⁸⁷ The court noted the district’s contention was that “the cheerleaders are attempting to reframe the controversy as broader than they state in their petition.”²⁸⁸ However, the state high court did not resolve this dispute or make any classification decisions on whether the cheerleaders’ speech was private speech or government speech, due to its resolution of the case only through a mootness analysis.²⁸⁹ Consequently, the Court’s majority opinion contained no references to the Establishment Clause.²⁹⁰ The question of whether the trial court had issued an advisory opinion on a nonjusticiable Establishment Clause issue was not taken up by the court, despite its apparent *sua sponte* duty to do so.²⁹¹

In its analysis, the court instead found that the case was not moot.²⁹² This determination was premised on the potential of a district policy reversal, the district’s stance in the litigation, and the nature of the challenged conduct being easily undone.²⁹³ Although the court acknowledged that “[t]he District no longer prohibit[ed] the cheerleaders from displaying religious signs or messages on banners at school-sponsored events[,] . . . that change hardly [made] ‘absolutely clear’ that the District [would] not reverse itself after this litigation [was] concluded.”²⁹⁴ The court found that the district’s continual defense of the constitutionality of the prohibition and its claimed “unfettered authority” to govern the content of the banners, as well as the absence of an unconditional statement by the district that it would not reinstate the prohibition, were significant factors that weighed against a mootness

²⁸⁶ *Id.* at 418.

²⁸⁷ *Id.*

²⁸⁸ *Id.*

²⁸⁹ *Id.*

²⁹⁰ *See id.* at 417–20.

²⁹¹ *See supra* text accompanying note 119.

²⁹² *See Matthews*, 484 S.W.3d at 418 (finding the case was not moot and, therefore, the court did not have to address the issue of how the cheerleaders framed the controversy).

²⁹³ *Id.* at 418–19.

²⁹⁴ *Id.*

finding.²⁹⁵ Finally, the court found that the easy potential reinstatement of the prohibition policy contraindicated mootness.²⁹⁶

In its conclusion, the court determined that the district's voluntary cessation of the prohibition policy "provide[d] no assurance that the District will not prohibit the cheerleaders from displaying banners with religious signs or messages at school-sponsored events in the future."²⁹⁷ The court also found that the new district policy "only state[d] the District is not *required* to prohibit the cheerleaders from displaying such banners, and reserves to the District unfettered discretion in regulating those banners—including the apparent authority to do so based solely on their religious content."²⁹⁸ As a result, the Texas Supreme Court determined the case was not moot.²⁹⁹ It reversed the judgment of the court of appeals and remanded the case to that court for further proceedings.³⁰⁰

In Justice Willett's concurrence, the Establishment Clause and its government speech/private speech dichotomy are referenced multiple times.³⁰¹ Justice Willett praised the court for its narrow decision on mootness and its lack of classification of the student speech as government speech and private speech.³⁰² However, this concurrence also articulated concern over the vigorous debate throughout the litigation regarding the applicability of the Establishment Clause to the student speech and regarding whether the speech was governmental or private.³⁰³ Justice Willett was troubled about the parties' conflicting conclusions regarding the trial court's May 8, 2013, order.³⁰⁴ Here, the school district interpreted that order to mean that the students' banners were the school's (government) speech, while the cheerleaders attested that "the order affirmed that the banners contain the cheerleaders' private speech."³⁰⁵ The concurrence surmised that the cheerleaders' view was based on the inapplicability of the Establishment Clause to private speech and the language of the temporary injunction

²⁹⁵ *Id.* at 419.

²⁹⁶ *Id.*

²⁹⁷ *Id.* at 420.

²⁹⁸ *Id.* (emphasis in original).

²⁹⁹ *Id.*

³⁰⁰ *Id.*

³⁰¹ *See id.* at 420–23 (Willett, J., concurring) (referencing the Establishment Clause six times).

³⁰² *See id.* at 420 (lauding the court's decision as "rightfully . . . within the borders of its authority").

³⁰³ *Id.* at 421.

³⁰⁴ *Id.* at 421–22.

³⁰⁵ *Id.* at 422.

order.³⁰⁶ The concurrence then emphasized that “[t]he record [did] not yield a conclusive answer” on the classification of the religious speech, and that “[w]e don’t know” the answer to that question.³⁰⁷ As a result, Justice Willett called for clarity:

My concern is that this case may return to the trial court for a final decision only to reappear on our docket with no clarity as to what this order achieves and what claims are actually live. If that situation arises, the parties and trial court would do well to confront the shadowy place in this litigation and clarify with precision the status of this order and the cheerleaders’ claims.³⁰⁸

Given the incredible complexity of this litigation—and the lingering questions as to whether the Establishment Clause prohibited the cheerleaders’ religious run-through banners, whether the student speech is government speech or private speech, and whether any of the state courts should have decided these questions—the one thing that was uncontrovertibly clear after the Texas Supreme Court’s decision was the need for some clarity.

4. *The Second Texas Court of Appeals Decision*

That clarity, at least for Establishment Clause purposes, was not achieved by the court of appeals’ September 28, 2017, unpublished decision.³⁰⁹ On remand, and unlike the district court litigation, “[n]either party . . . raised any issue concerning the Establishment Clause,” which the court expressly acknowledged.³¹⁰ Although the court stated that Establishment Clause jurisprudence is “murky” and “complicated” when applied to student religious speech,³¹¹ it specifically limited its discussion “to categorizing the student speech at issue,” and not to any Establishment Clause determinations given the absence of these issues raised by either party.³¹² So, once again,

³⁰⁶ *Id.* (“[T]he cheerleaders contended that ‘the Establishment Clause . . . is inapplicable to private speech[.]’ which, taken together with the text of the temporary injunction order, could explain the cheerleaders’ understanding . . .”).

³⁰⁷ *Id.*

³⁰⁸ *Id.* at 423.

³⁰⁹ *Kountze Indep. Sch. Dist. v. Matthews ex rel. Matthews*, No. 09-13-00251-CV, 2017 WL 4319908 (Tex. App. Sept. 28, 2017); *see also* *Collins v. Ison-Newsome*, 73 S.W.3d 178, 180 (Tex. 2001) (citing TEX. R. APP. P. 47.7) (“[U]npublished opinions ‘have no precedential value and must not be cited as authority by counsel or by a court . . .’”).

³¹⁰ *Matthews*, 2017 WL 4319908, at *3 n.3.

³¹¹ *Id.* at *3 (quoting *Morgan v. Swanson*, 659 F.3d 359, 371, 382 (5th Cir. 2011)).

³¹² *Id.* at *3 & n.3.

the question of whether the Establishment Clause issue was a justiciable one for resolution by the trial court was not taken up by the court of appeals, despite its apparent *sua sponte* duty to do so.³¹³

Instead, the remand centered on whether the trial court had properly denied the school district's original plea to the court's jurisdiction based on issues of governmental immunity and standing.³¹⁴ This discussion was limited to the school district's original plea to the district court's jurisdiction,³¹⁵ because the school district's supplemental plea to the court's jurisdiction based on mootness had been disposed of by the Texas Supreme Court.³¹⁶ In order for the trial court to have had proper subject matter jurisdiction over the lawsuit, the cheerleaders must have alleged facts to prove a valid waiver of governmental immunity and proper standing.³¹⁷ The court of appeals highlighted that the trial court's May 8, 2013, order was an "implicit" denial of the school district's plea to the jurisdiction because the cheerleaders' motion for partial summary judgment was granted in part by the trial court.³¹⁸

The key determination for the court of appeals regarding this question of waiver of governmental immunity was whether the cheerleaders' religious speech on the banners constituted private speech, as claimed by the cheerleaders, or government speech, as claimed by the school district.³¹⁹ The court recognized that this classification dispute had been the "central disagreement" between the parties in the litigation,³²⁰ and it stated that it must engage in an extended classification analysis to resolve it.³²¹

The government speech/private speech classification was premised only upon an analysis of the question of waiver of governmental immunity to the free speech and free exercise claims in the cheerleaders' original petition.³²² The court began its analysis by stating that under the government speech

³¹³ See *supra* text accompanying note 119.

³¹⁴ *Matthews*, 2017 WL 4319908, at *1, *2.

³¹⁵ *Matthews v. Kountze Indep. Sch. Dist.*, 484 S.W.3d 416, 417 (Tex. 2016).

³¹⁶ See *id.* at 418.

³¹⁷ *Matthews*, 2017 WL 4319908, at *2, *14.

³¹⁸ *Id.* at *1.

³¹⁹ *Id.* at *2.

³²⁰ *Id.*

³²¹ *Id.*

³²² See *id.* at *2 (noting that the issue of whether the speech is government speech or private speech controls the questions of governmental immunity).

doctrine, “[g]overnment speech is ‘not subject to scrutiny under the Free Speech Clause,’” which allows the government to restrict its own speech without implicating First Amendment speech provisions.³²³ Pursuant to that doctrine, if the banners were pure government speech, then that would be an “absolute defense” to the cheerleaders’ free speech claims and “the Cheerleaders could not prove a valid waiver of immunity from suit in order to invoke the court’s subject matter jurisdiction over their claim.”³²⁴ If the speech was private speech, then “governmental immunity has been waived for” the cheerleaders’ free speech claims.³²⁵

Ultimately, the court found that the cheerleaders’ speech was “the pure private speech of the students” for the purposes of finding the trial court had proper subject matter jurisdiction over the free speech claims.³²⁶ In this analysis, the court invoked *Santa Fe*’s government speech/private speech dichotomy.³²⁷ Here, the court distinguished the cheerleaders’ religious banners from the football game student invocations that had been held to be government speech for Establishment Clause analysis in *Santa Fe*:³²⁸

In contrast, Kountze ISD makes no claim in this case that the Cheerleaders were required or encouraged in any way to include religious messages on the banners. Likewise, there is no school policy or rule that, in actuality or effect, even suggested, much less required, the placement of religious messages on the banners. Indeed, until the school year in question, the messages painted on the banners had been entirely non-religious in nature. The extent of the school’s policy concerning banners was that the cheerleaders should make banners to promote school spirit at football games. The text and content of the message, aside from the prohibition on obscene material, is, was, and always had been, left up to the discretion of the cheerleaders. Thus, we find the reasoning in *Santa Fe* to be inapposite.³²⁹

The court instead found that the cheerleaders’ speech was “genuinely student-initiated” per an application of reasoning from other Establishment Clause case law and was, therefore, protected private speech.³³⁰ Consequently, the court held that “the Cheerleaders pleaded sufficient facts

³²³ *Id.* at *2 (quoting *Pleasant Grove City v. Summum*, 555 U.S. 460, 464 (2009)).

³²⁴ *Id.*

³²⁵ *Id.*

³²⁶ *Id.* at *13.

³²⁷ *See id.* at *7 (citing *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 302 (2000)).

³²⁸ *See id.* at *8 (contrasting the student election system in *Santa Fe* with the lack of a school policy suggesting or requiring the placement of religious messages on the banners in *Matthews*).

³²⁹ *Id.*

³³⁰ *Id.* (quoting *Chandler v. James*, 180 F.3d 1254, 1261 (11th Cir. 1999)).

to show both a waiver of immunity and to affirmatively demonstrate that the trial court possessed jurisdiction over the dispute.”³³¹

There was no judicial discussion as to whether the trial court rendered an advisory opinion on the Establishment Clause in its May 8, 2013, order. Aside from one reference, the school district’s motion for summary judgment on its request for declaratory relief was not discussed.³³² There was no discussion of the school district’s uncontested request for a judicial declaration that there was no Establishment Clause violation. There was no discussion of the result of the court of appeals’ previous failure to reverse the trial court’s granting in part of the district’s motion for summary judgment on its request for declaratory relief on the Establishment Clause declaration. Instead, after the government immunity analysis, the court simply overruled “the school district’s issue on appeal and affirm[ed] the trial court’s ruling to deny Kountze ISD’s plea to the jurisdiction.”³³³

With respect to the standing issue, the court rejected the school district’s claim that the individual cheerleader plaintiffs lacked standing to sue on behalf of the entire squad, which made group decisions on the content of the banners.³³⁴ Specifically, the court found that the cheerleader litigants did not “lose their individual rights to free speech by speaking as a group.”³³⁵ The propriety of the cheerleaders’ parents bringing suit on behalf of their children was not disputed.³³⁶ Therefore, the court also overruled the lack of standing issue based on each minor cheerleader having “a justiciable interest in the controversy” through an allegation of a “breach of her constitutional right to freedom of speech,” which gave each of them standing to sue.³³⁷ The final sentence of the opinion stated: “Having overruled all of the issues of Kountze ISD on appeal, we affirm the trial court’s denial of the plea to the jurisdiction.”³³⁸ However, the question of whether the trial court issued an impermissible advisory opinion on the Establishment Clause, which goes to

³³¹ *Id.* at *13.

³³² *See id.* at *1 (discussing the procedural history of the case).

³³³ *Id.* at *13.

³³⁴ *See id.* at *14.

³³⁵ *Id.*

³³⁶ *See id.* (“It is undisputed that each of the individual cheerleaders who sued was represented by their parents as that respective minor’s next friend . . .”).

³³⁷ *See id.*

³³⁸ *Id.*

the heart of justiciability and was an issue that the court should have examined *sua sponte*, was never addressed.³³⁹

5. *Subsequent Requests for Review to the Texas Supreme Court*

The school district filed a petition for review of the appellate court's decision with the Texas Supreme Court on January 15, 2018.³⁴⁰ This petition for review explicitly stated that “[n]either party has raised any issue concerning the Establishment Clause.”³⁴¹ The Texas Supreme Court denied the petition on August 31, 2018, without an opinion.³⁴² In Texas, the denial of a petition for review indicates that the “Texas Supreme Court is not satisfied that the opinion of the court of appeals has correctly declared the law in all respects but determines that the petition presents no error that requires reversal or that is of such importance to the jurisprudence of the State as to require correction.”³⁴³

After the denial of the petition, Texas Attorney General Ken Paxton made a public announcement supporting the Texas Supreme Court's denial of review.³⁴⁴ In a news release, he championed the Texas Court of Appeals' private-speech classification decision, claiming that “[t]he Kountze cheerleaders case involved personal expressions of faith and an ill-advised school district change of policy that mislabeled their expressions as government speech.”³⁴⁵ He framed the case as a win for “[r]eligious liberty[, which] is the foundation upon which our society has been built.”³⁴⁶ He concluded with his endorsement of the “precedent” set by this case: “The Texas Supreme Court's decision ensures that the Kountze cheerleaders and

³³⁹ See *supra* text accompanying note 119.

³⁴⁰ See Petition for Review, *Kountze Indep. Sch. Dist. v. Matthews ex rel. Matthews*, 484 S.W.3d 416 (Tex. Jan. 15, 2018) (No. 17-0988).

³⁴¹ *Id.* at 10 n.3.

³⁴² See Denial of Petition for Review, *Kountze Indep. Sch. Dist. v. Matthews ex rel. Matthews*, 484 S.W.3d 416 (Tex. Aug. 31, 2018) (No. 17-0988), <http://www.search.txcourts.gov/SearchMedia.aspx?MediaVersionID=5348b981-5cec-4a21-bd15-b3291308d3d4&coa=cossup&DT=PE T%20FOR%20REVIEW%20DISP&MediaID=8d6afa52-d0b8-4f77-bf4e-2a57637165e5>.

³⁴³ TEXAS LAW REVIEW ASS'N, TEXAS RULES OF FORM: THE GREENBOOK app. D (14th ed. 2018).

³⁴⁴ Press Release, Tex. Office of the Att'y Gen., AG Paxton: Texas Supreme Court's Decision in Kountze Cheerleaders' Case is a Win for Religious Liberty (Aug. 31, 2018), *available at* <https://www.texasattorneygeneral.gov/news/releases/ag-paxton-texas-supreme-courts-decision-kountze-cheerleaders-case-win-religious-liberty>.

³⁴⁵ *Id.*

³⁴⁶ *Id.*

other cheerleaders across the state will be able to display their expressions of faith on banners at football games.”³⁴⁷

The school district filed a motion for rehearing with the Texas Supreme Court on October 2, 2018, in which it asked for a declaration that the case was moot and a vacatur of all of the prior decisions in the case.³⁴⁸ Here, the school district argued the case became moot on March 24, 2017, when all of the original plaintiff cheerleaders no longer were eligible to be school cheerleaders due to graduating or not qualifying for the squad, which was six months prior to the state court of appeals decision that classified the banners as private speech.³⁴⁹ The school district argued that, with the case becoming moot, the appellate court lacked jurisdiction to make this decision, and, instead, should have dismissed the case.³⁵⁰

The school district next argued that the “cheerleaders abandoned” the controversy regarding whether the banners constitute private speech “by agreeing in *substance* and form to the trial court’s [May 8, 2013] order which disposed of their motion for summary judgment without characterizing the banners as their private speech.”³⁵¹ Without a live controversy between the parties as to whether the banners were the students’ private speech, the court of appeals lacked jurisdiction to classify the banners as private speech.³⁵² Consequently, the school district argued that the September 28, 2017, opinion of the court of appeals was a prohibited advisory opinion.³⁵³ It did not argue the same as to the original trial court’s order, which makes sense as the school district wanted that judicial declaration that the district was not violating the Establishment Clause.

In the alternative to these mootness arguments, the school district argued the high court should grant the petition for review because the appellate court’s determination that the banners were private speech conflicted with the First Amendment.³⁵⁴ Here, the district argued the banners were school-sponsored government speech under the Supreme Court’s First Amendment

³⁴⁷ *Id.*

³⁴⁸ See Petitioner’s Motion for Rehearing of the Denial of Its Petition for Review at 24, *Kountze Indep. Sch. Dist. v. Matthews ex rel. Matthews*, 484 S.W.3d 416 (Tex. Oct. 2, 2018) (No. 17-0988).

³⁴⁹ *Id.* at 8–9.

³⁵⁰ *Id.* at 9.

³⁵¹ *Id.* at 13.

³⁵² *Id.* at 14.

³⁵³ See *id.* (arguing that “[s]uch an opinion is prohibited under Texas law”).

³⁵⁴ *Id.* at 15.

free-speech jurisprudence,³⁵⁵ and, as such, the district's government immunity had not been waived.³⁵⁶ Therefore, the district argued that the Texas Supreme Court should grant the petition for review and reverse the appellate court's order that affirmed the denial of the school district's plea to the jurisdiction.³⁵⁷

The school district's final argument for the grant of its petition for review was an Establishment Clause argument.³⁵⁸ Specifically, the school district argued that "[t]he petition for review should be granted because the lower court's decision could lead to the violation of the Establishment Clause of the First Amendment."³⁵⁹ Here, the school district said that *Santa Fe* made clear the cheerleaders' run-through banners were government speech under Establishment Clause jurisprudence because of the perception of school endorsement they created and because they were the result of a majoritarian selection process among the squad.³⁶⁰ If the school district was "unable to maintain reasonable control over the school-sponsored speech on run-through banners, it [would be] likely that the expression contained on the banners would be attributed to the school and that such attribution of the content of the unregulated banners could potentially subject the school to liability for violations of the Establishment Clause" under *Santa Fe* in the future.³⁶¹ Therefore, the school district urged the Texas Supreme Court to "grant this motion and the petition for review, recognize that the banners are school-sponsored speech, and assist [the school district] in avoiding future lawsuits based on the Establishment Clause."³⁶² The Texas Supreme Court denied the school district's motion for rehearing of the denial of its petition for review on November 9, 2018, without opinion.³⁶³

³⁵⁵ See *id.* at 15–20 ("Pursuant to *Hazelwood* and its progeny, the banners are school-sponsored speech and may be regulated.").

³⁵⁶ *Id.* at 21–22.

³⁵⁷ *Id.*

³⁵⁸ See *id.* at 22–24 (using the interpretation of the Establishment Clause from *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000)).

³⁵⁹ *Id.* at 22.

³⁶⁰ See *id.* at 23–24 (citing *Santa Fe*, 530 U.S. at 307–08, 314, 316–17).

³⁶¹ *Id.* at 22 (citing *Santa Fe*, 530 U.S. 290).

³⁶² *Id.* at 24.

³⁶³ Denial of Petitioner's Motion for Rehearing of the Denial of its Petition for Review, Kountze Indep. Sch. Dist. v. Matthews *ex rel.* Matthews, 484 S.W.3d 416 (Tex. Nov. 9, 2018) (No. 17-0988), <http://www.search.txcourts.gov/SearchMedia.aspx?MediaVersionID=fc350abd-391b-483e-a302-66b58a2c2d63&coa=cossup&DT=REHEARING%20DISP&MediaID=f031814b-daa2-4d8c-8edd-9df35369bc70>.

6. *Lessons to be Learned from the Confusion of this Case*

This convoluted case is paradigmatic of the confusion and lack of clarity regarding the Establishment Clause and the classification of student religious speech as government speech or private speech. The trial court made an error in issuing its order on May 8, 2013, that declared as a conclusion of law that the Establishment Clause did not prohibit “the cheerleaders from using religious-themed banners at school sporting events,” given the absence of a justiciable controversy for that issue.³⁶⁴ Without a live controversy between adverse parties, the court should not have rendered a prohibited advisory opinion on any Establishment Clause issues.³⁶⁵ This was the very definition of a nonjusticiable issue, but the trial court proceeded regardless in violation of the fundamental justiciability requirements and constitutional provisions of the state—requirements that parallel the justiciability requirements of the federal courts.

In their original petition, the cheerleaders alleged that their free-speech and free-exercise rights were violated.³⁶⁶ They did not assert an Establishment Clause violation, because they wanted their banners classified as protected private speech for free speech and free exercise purposes.³⁶⁷ And it is clear that private speech is not subject to Establishment Clause constraints.³⁶⁸ The school district’s motion for summary judgment regarding its request for declaratory relief, in which it sought a judicial declaration that the district’s allowance of the cheerleaders’ display of religiously themed

³⁶⁴ *Matthews v. Kountze Indep. Sch. Dist.*, No. 53526, 2013 WL 1914796, at *2 (Tex. D. Ct. May 8, 2013).

³⁶⁵ *See Heckman v. Williamson Cty.*, 369 S.W.3d 137, 147 (Tex. 2012) (“The Texas Constitution—the source of the requirements of justiciability in Texas—bars our courts from rendering advisory opinions and limits access to the courts to those individuals who have suffered an actual, concrete injury.”).

³⁶⁶ *Kountze Indep. Sch. Dist. v. Matthews ex rel. Matthews*, 482 S.W.3d 120, 125 (Tex. App. 2014).

³⁶⁷ *See Reply Brief of Petitioners* at 20–21, *Matthews ex rel. Matthews v. Kountze Indep. Sch. Dist.*, 484 S.W.3d 416 (Tex. Aug. 27, 2015) (No. 14-0453), 2015 WL 10321932 (stating that a necessary component of the district court’s order was that the banners were private, and not government, speech, which was in accord with the cheerleaders’ position).

³⁶⁸ *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 302 (2000) (quoting *Bd. of Educ. v. Mergens*, 496 U.S. 226, 250 (1990) (plurality opinion)) (providing the private speech and government speech dichotomy for Establishment Clause jurisprudence).

banners at football games was not a violation of the Establishment Clause, did not convert the action to a live Establishment Clause controversy.³⁶⁹

This is so because there was not an actual controversy between actually adverse parties as to the Establishment Clause determination, and an actual controversy between adverse parties with adverse legal interests is required in order for a Texas court to have the authority to make an adjudication on a justiciable matter,³⁷⁰ including when a party is requesting a declaratory judgment.³⁷¹ The state's provisions on declaratory relief do not give the courts *carte blanche* to decide all controversies, regardless of their justiciability.³⁷² The cheerleaders' response to this motion clearly indicated that there was no live controversy or adversity as to the Establishment Clause issue, because the parties sought the exact same relief on that issue.³⁷³

The only remaining potentially justiciable issues at the time of the May 8, 2013, order were 1) the question of waiver of governmental immunity to the free-speech and free-exercise claims, which would require the classification of the banners as government speech or private speech, and 2) the standing of the individual plaintiffs to bring suit when the squad made decisions on the banners' content as a group. These issues were only potentially justiciable given that the initial banners restriction had been amended prior to the court's order, which raised the question of mootness of the cheerleaders' original claims. The court order failed to make any determination on either of those potentially justiciable issues and made a decision instead on a nonjusticiable issue in the endemically complex Establishment Clause arena.³⁷⁴

³⁶⁹ See Kountze ISD's Reply to Plaintiffs' Response to Traditional Motion for Summary Judgment of Kountze ISD Regarding Its Request for Declaratory Relief at 1–3, *Matthews v. Kountze Indep. Sch. Dist.*, No. 53526 (Tex. D. Ct. May 3, 2013), 2013 WL 2299644, at *1–3 (requesting court to issue a declaration that the Establishment Clause does not prohibit the school district from allowing the cheerleader squad to utilize religious messages on run-through banners).

³⁷⁰ See *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 444 (Tex. 1993) (providing justiciability requirements under the Texas Constitution).

³⁷¹ See *Dallas v. VSC, LLC*, 347 S.W.3d 231, 240 (Tex. 2011) (requiring an actual controversy to have a justiciable declaratory judgment proceeding).

³⁷² See *Denver City Indep. Sch. Dist. v. Moses*, 51 S.W.3d 386, 391 (Tex. App. 2001) (stating that the Declaratory Judgments Act is a procedural vehicle to decide controversies that already exist within the court's jurisdiction).

³⁷³ See *supra* text accompanying notes 250–51.

³⁷⁴ See *Mueller v. Allen*, 463 U.S. 387, 392 (1983) (stating the Supreme Court has “oft-repeated [that the Establishment Clause] . . . presents especially difficult questions of interpretation and application.”).

In doing so, the trial court issued an order and opinion that stated these banners did not violate the Establishment Clause, without an express classification of the student speech as either government speech or private speech.³⁷⁵ It did so summarily in nine sentences with no references to any case law, with two mentions of the term “the Establishment Clause,” and with no legal citations.³⁷⁶ Essentially, the trial court found that there was no Establishment Clause violation because the court said so. *Ipse dixit*, there you go.³⁷⁷ While the summary nature of this opinion should not be too harshly criticized, given the overwhelming dockets that Texas trial courts, like all courts, face,³⁷⁸ basic rules of hierarchical precedent still must apply when lower courts issue decisions. A just application of the law requires more than a conclusory, unsupported statement.³⁷⁹ Such criticism of the cursory nature of the opinion could easily have been avoided, though, had the court declined to decide the nonjusticiable issue, as it was legally bound to do.

The trial court failed to comply with justiciability limits when it issued such an impermissible advisory opinion by judicial fiat,³⁸⁰ and all of the reviewing appellate courts should have reversed and vacated this Establishment Clause aspect of the trial court’s judgment as a matter of law.³⁸¹ This was cogently argued by the American Jewish Committee in its

³⁷⁵ See *Matthews v. Kountze Indep. Sch. Dist.*, No. 53526, 2013 WL 1914796, at *1–2 (Tex. D. Ct. May 8, 2013) (concluding that the banners were constitutionally permissible but not stating why).

³⁷⁶ *Id.*; see Brett A. Geier & Annie Blankenship, *Praying for Touchdowns: Contemporary Law and Legislation for Prayer in Public School Athletics*, 15 FIRST AMEND. L. REV. 381, 405 (2017) (critically deeming this district court order “very succinct”).

³⁷⁷ See *Ipse Dixit*, BLACK’S LAW DICTIONARY (7th ed. 1999) (translating “ipse dixit” to “he himself said it” and defining it as “[s]omething asserted but not proved”); Richard C. Wydick, *The Attorney-Client Privilege: Does It Really Have Life Everlasting?*, 87 KY. L.J. 1165, 1172 n.41 (1998) (“*Ipse dixit* means roughly: it’s so because I say so.”).

³⁷⁸ See OFFICE OF COURT ADMIN., ANNUAL STATISTICAL REPORT FOR THE TEXAS JUDICIARY: FISCAL YEAR 2018, at 2–9 (2018), available at <https://www.txcourts.gov/media/1443455/2018-ar-statistical-final.pdf> (showing statewide trend of increasingly heavy caseloads for all Texas civil courts).

³⁷⁹ See Mary B. Trevor, *From Ostriches to Sci-Fi: A Social Science Analysis of the Impact of Humor in Judicial Opinions*, 45 U. TOL. L. REV. 291, 302 (2014) (arguing judges must provide clear and credible explanations in their opinions).

³⁸⁰ See *Tex. Ass’n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 444 (Tex. 1993) (discussing how neither Texas nor federal courts can render advisory opinions).

³⁸¹ See *Renne v. Geary*, 501 U.S. 312, 315 (1991) (vacating an appellate court’s judgment and remanding with instructions to dismiss a nonjusticiable cause of action when there was an absence of a live controversy filed and decided upon in the trial court); *State Bar of Tex. v. Gomez*, 891 S.W.2d 243, 245 (Tex. 1994) (providing that a decision that does not bind the parties is by definition an impermissible advisory opinion).

brief as an amicus curiae to the Texas Supreme Court.³⁸² Each of the reviewing courts should have examined this core justiciability issue *sua sponte*. None of the state's appellate courts did so.³⁸³ As a prudential matter, the courts should also have avoided this improper course to not contribute to the jurisprudential confusion that surrounds the Establishment Clause. This was a fundamental error that contravened all of the requirements of justiciability and a missed opportunity by all of these courts to provide much needed clarity in this area of school law Establishment Clause jurisprudence. It also set up state officials to endorse the continued practice of school districts' allowance of the display of these types of student religious messages as per se constitutional,³⁸⁴ which creates a public perception that this practice will never be an Establishment Clause violation.³⁸⁵ And this is all based on a nine-sentence order on a nonjusticiable issue. If faced with similar cases in the future, courts should avoid the costly mistakes of the *Matthews* case.³⁸⁶

B. The Establishment Clause and Student-Led Graduation Invocations: The Judicial Fiat Dilemma of Schultz v. Medina Valley Independent School District

When the Supreme Court limited its review in *Santa Fe* only to the establishment question of the football game prayer policy and did not review the constitutionality of the school district's "allow[ing] students to read Christian invocations and benedictions from the stage at graduation ceremonies,"³⁸⁷ it left the question of whether state policies and practices regarding student invocations at public school graduations were violative of the Establishment Clause open for future judicial resolution and public

³⁸² See Brief of Amicus Curiae American Jewish Committee at 2–3, *Matthews ex rel. M.M. v. Kountze Indep. Sch. Dist.*, No. 14-0453, 2015 WL 12911362, at *2–3 (Tex. Aug. 20, 2015) (arguing the trial court's advisory opinion on a nonjusticiable matter was error).

³⁸³ See *Kountze Indep. Sch. Dist. v. Matthews ex rel. Matthews*, 482 S.W.3d 120 (Tex. App. 2014).

³⁸⁴ See Paxton, *supra* note 344 (describing the Texas Attorney General's support of the Kountze cheerleaders' "personal expressions of faith").

³⁸⁵ See, e.g., Bob Cook, *US Supreme Court is Hinting Public School Coaches Won't Have to Leave Religion on the Sidelines*, FORBES (Feb. 22, 2019), <https://www.forbes.com/sites/bobcook/2019/02/22/us-supreme-court-is-hinting-public-school-coaches-wont-have-to-leave-religion-on-the-sidelines/#1123e38818ff> (characterizing the Texas Supreme Court's *Kountze* decision as "a curious decision, to say that public school cheerleaders writing religious messages in their school-issued uniforms with school-issued pens on school-issued banners to have players run through in front of God and everybody is constitutionally okie-dokie").

³⁸⁶ This case example is relevant to all courts given the symmetry between the federal and Texas justiciability requirements. See *supra* Part II.A. (discussing Texas justiciability requirements).

³⁸⁷ *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 295 (2000).

debate.³⁸⁸ Although there have been many cases that have touched on the issue of student prayer at school graduations,³⁸⁹ there have been relatively few federal cases that have been litigated since *Santa Fe* that have involved the constitutionality of an express student “invocation” policy for school graduations.

1. *The Trial Court Proceedings*

One prominent example of such a case is *Schultz v. Medina Valley Independent School District*, which was filed in the United States District Court for the Western District of Texas on May 26, 2011.³⁹⁰ In the complaint, a graduating agnostic senior of Medina Valley High School, Corwyn Schultz, his agnostic parents, and his agnostic brother, a graduate of the high school,³⁹¹ claimed that the school district violated the Establishment Clause through its “longstanding custom, practice, and policy of sponsoring graduation prayers” as evidenced by its express, formal inclusion of an “‘invocation’ and ‘benediction’” in its “official graduation-ceremony program.”³⁹² The Schultz family first contacted the school district on October 10, 2010, raising constitutional concerns with this policy and asking whether the upcoming graduation would include prayer.³⁹³ Because the school district did not notify the Schultz family until May 25, 2011,³⁹⁴ that the June 4, 2011, graduation ceremony would include an invocation and

³⁸⁸ See Kent Greenawalt, *Fundamental Questions About the Religion Clauses: Reflections on Some Critiques*, 47 SAN DIEGO L. REV. 1131, 1144 (2010) (discussing the different perspectives on the constitutionality of graduation prayers at public schools); Frederick B. Jonassen, *Free Speech and Establishment Clause Rights at Public School Graduation Ceremonies: A Disclaimer: The Preceding Speech Was Government Censored and Does Not Represent the Views of the Valedictorian*, 55 WAYNE L. REV. 683, 730 (2009) (discussing the lack of resolution on this issue by *Santa Fe*).

³⁸⁹ See Sorkin, *supra* note 27, at 357–95 (providing a comprehensive account of the federal court cases that have addressed the constitutionality of public school graduation prayer).

³⁹⁰ Complaint, *Schultz v. Medina Valley Indep. Sch. Dist.*, No. 5:11-cv-422, 2011 WL 7561368 (W.D. Tex. May 26, 2011).

³⁹¹ See *id.* at 5 (describing the Schultz family’s religious background).

³⁹² *Id.* at 5–6.

³⁹³ Plaintiff-Appellees’ Opposition to Defendant-Appellant’s Emergency Motion to Dissolve Temporary Restraining Order and Preliminary Injunction at 12, *Schultz*, No. 11-50486 (5th Cir. June 3, 2011).

³⁹⁴ Plaintiffs’ Motion for a Temporary Restraining Order and a Preliminary Injunction at 4, *Schultz v. Medina Valley Indep. Sch. Dist.*, No. 5:11-cv-422 (W.D. Tex. May 26, 2011), 2011 WL 7561377, at *4.

benediction,³⁹⁵ the plaintiffs filed a motion for a TRO and a preliminary injunction on the same day as the complaint, asking the court to enjoin prayer at the graduation ceremony.³⁹⁶ On May 27, 2011, the presiding judge, Chief Judge Fred Biery, entered an order that set the motion for TRO and preliminary injunction for hearing on May 31, 2011.³⁹⁷

After that hearing, on June 1, 2011, the federal district court entered an amended order that granted the plaintiffs' injunctive relief motion, based on a finding of a likelihood of plaintiffs' success on the merits that the inclusion of the graduation prayers violated the Establishment Clause and stating that the court was bound to follow *Santa Fe* and other controlling Establishment Clause precedent.³⁹⁸ It cited to eleven cases in support of its decision.³⁹⁹ The court ordered the school district to "remove the terms 'invocation' and 'benediction' from the graduation ceremony programs and to replace them 'with 'opening remarks' and 'closing remarks.'"⁴⁰⁰ It also ordered the school district to tell the students who had been "selected to deliver the 'invocation' and 'benediction' to modify their remarks to be statements of their own beliefs as opposed to leading the audience in prayer."⁴⁰¹

Further, all graduation speakers were to:

be instructed that they may not ask audience members to "stand," "join in prayer," or "bow their heads," they may not end their remarks with "amen" or "in [a deity's name] we pray," and they shall not otherwise deliver a message that would commonly be understood to be a prayer, nor use the word "prayer" unless it is used in the student's expression of the student's personal belief, as opposed to encouraging others who may not believe in the concept of prayer to join in and believe the same concept. The students may in stating their own personal beliefs speak through conduct such as kneeling to face Mecca, the wearing of a yarmulke or hijab or making the sign of the cross.⁴⁰²

³⁹⁵ *Id.* at 2–5.

³⁹⁶ *See id.* at 1, 11.

³⁹⁷ Order Setting Hearing on Motion for Temporary Restraining Order and Preliminary Injunction, *Schultz*, No. 5:11-cv-422-FB, *available at* <https://www.clearinghouse.net/chDocs/public/FA-TX-0001-9000.pdf> (Docket Entry No. 10).

³⁹⁸ *Schultz v. Medina Valley Indep. Sch. Dist.*, No. SA-11-CA-422-FB, 2011 WL 13234770, at *1 (W.D. Tex. June 1, 2011).

³⁹⁹ *See id.* at *1 (citing eleven cases).

⁴⁰⁰ *Id.* at *2.

⁴⁰¹ *Id.*

⁴⁰² *Id.*

Finally, the school district was ordered to review the students' remarks to ensure compliance with the order and to instruct the students not to deviate from their district-approved remarks at the graduation ceremony.⁴⁰³

2. *The Interlocutory Appeal to the Fifth Circuit*

On June 2, 2011, the school district filed an emergency amended appeal in the Fifth Circuit to dissolve the trial court's order.⁴⁰⁴ This twenty-page emergency motion had extensive citations to the Constitution and Supreme Court authority.⁴⁰⁵ On the same day, the school's valedictorian, Angelina Hildenbrand, who wanted to pray during her speech, sought to intervene in the appeal in opposition to the district court's order.⁴⁰⁶ The State of Texas also filed a twenty-three page amicus brief with citations to hierarchical precedent in the matter.⁴⁰⁷ In a statement to the public about the case, Texas Attorney General Abbott stated, "This is part of an ongoing attempt to purge God from the public setting, while at the same time demanding from the court increased yielding to all things agnostic and atheistic[.]"⁴⁰⁸ Abbott also stated that "[Judge] Biery's ruling would allow a student to 'bend over in honor of Mecca,' but not lead a prayer to the Christian God."⁴⁰⁹ The Schultz family filed their response in opposition to the appeal on June 3, 2011, in a forty-eight page brief with extensive citations to the Constitution and Supreme Court precedent.⁴¹⁰

⁴⁰³ *Id.*

⁴⁰⁴ Amended Appeal of Order, *Schultz v. Medina Valley Indep. Sch. Dist.*, No. 5:11-cv-00422-FB, available at <https://www.clearinghouse.net/chDocs/public/FA-TX-0001-9000.pdf> (Docket Entry No. 19). The school district had filed an appeal with the Fifth Circuit of the first order of the court on June 1, 2011. Appeal of Order, *Schultz*, No. 5:11-cv-00422-FB, available at <https://www.clearinghouse.net/chDocs/public/FA-TX-0001-9000.pdf> (Docket Entry No. 17).

⁴⁰⁵ See Medina Valley Independent School District's Opposed Emergency Motion to Dissolve Temporary Restraining Order and Preliminary Injunction, *Schultz v. Medina Valley Indep. Sch. Dist.*, No. 11-50486 (5th Cir. June 3, 2011).

⁴⁰⁶ Jim Forsyth, *Valedictorian Fights Judge's Ban on Graduation Prayer*, REUTERS (June 2, 2011), <https://www.reuters.com/article/us-prayer-graduation-texas/valedictorian-fights-judges-ban-on-graduation-prayer-idUSTRE75177D20110602>.

⁴⁰⁷ See Brief of the State of Texas as Amicus Curiae, *Schultz v. Medina Valley Indep. Sch. Dist.*, No. 11-50486 (5th Cir. June 3, 2011).

⁴⁰⁸ Forsyth, *supra* note 406.

⁴⁰⁹ *Id.*

⁴¹⁰ See Plaintiff-Appellees' Opposition to Defendant-Appellant's Emergency Motion to Dissolve Temporary Restraining Order and Preliminary Injunction, *Schultz*, No. 11-50486 (5th Cir. June 3, 2011).

In the appeal, the school district argued that the plaintiffs could not meet their burden of a strong showing that they were entitled to injunctive relief.⁴¹¹ The school district argued that the district court had abused its discretion with its injunctive order, because “[t]he District clearly ha[d] not violated the Establishment Clause” and the graduation policies were consistent with the Establishment Clause.⁴¹² The school district cited to the government speech/private speech dichotomy in Establishment Clause jurisprudence.⁴¹³ It distinguished *Santa Fe*, as that case dealt with “prayer at *football games*” and not prayer at “*graduation ceremonies*.”⁴¹⁴ It asserted that the speaker selection process, based on a random drawing from student volunteers from a pool of “the top three academically ranked graduates, the class president, and student council officers,” created a limited public forum for the graduation ceremony.⁴¹⁵ Consequently, the central argument of the school district revolved around how to classify the religious speech of the students within the dichotomy of government speech and private speech in Establishment Clause jurisprudence.⁴¹⁶ Specifically, the school district asserted that the “student speakers at graduation unquestionably are engaging in private speech that is altogether distinctive from government speech and does not run afoul of the Establishment Clause.”⁴¹⁷ The school district also argued that the court’s injunctive relief order failed to make the requisite findings of fact and conclusions of law under the Federal Rules of Civil Procedure.⁴¹⁸

In their opposition to the appeal, the Schultz family argued that the school district lacked standing to assert the constitutional rights of its students, that the district was not entitled to expedited relief given its six-month delay in responding to their inquiry as to whether the graduation ceremony would include prayer and its lack of cooperation in the trial court proceedings, and that the school district had “not met the procedural

⁴¹¹ See Medina Valley Independent School District’s Opposed Emergency Motion to Stay Enforcement of Temporary Restraining Order and Preliminary Injunction at 14, *Schultz*, No. 11-50486 (5th Cir. June 3, 2011).

⁴¹² See *id.* at 4, 14.

⁴¹³ See *id.* at 7.

⁴¹⁴ *Id.* at 9 (emphasis in original) (citing *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000)).

⁴¹⁵ *Id.* at 10–11.

⁴¹⁶ See *id.* at 11–12.

⁴¹⁷ Medina Valley Independent School District’s Opposed Emergency Motion to Stay Enforcement of Temporary Restraining Order and Preliminary Injunction at 11, *Schultz*, No. 11-50486 (5th Cir. June 3, 2011).

⁴¹⁸ See *id.* at 13–14.

requirements for a stay of the preliminary injunction.”⁴¹⁹ The Schultz family also argued the district court correctly found that the plaintiffs were likely to prevail on the merits of the case.⁴²⁰ They asserted that the Supreme Court’s emphasis in *Lee v. Weisman* on the unconstitutional coercion of prayers at graduation ceremonies applied to the graduation at hand.⁴²¹ In opposition to the school district, the Schultz family argued that *Santa Fe* did apply to the graduation invocation and benediction “prayers delivered by *students*”⁴²² and that *Santa Fe* applied to prayer at graduation ceremonies, not just football games.⁴²³ They argued that graduation ceremonies are not limited public forums.⁴²⁴

Finally, they argued against the private speech classification, stating that “[t]he reasonable observer could hardly be expected to appreciate that the graduation speeches are private when they arise in a context of pervasive religiosity that is plainly government-sponsored.”⁴²⁵ Therefore, these speeches “would reasonably be perceived to be government-sponsored,” which meant that the Establishment Clause regulated this type of religious student speech.⁴²⁶ Consequently, the plaintiff-appellees urged the court to not grant the school district’s emergency motion to dissolve the trial court’s order because:

Only by distorting and ignoring the relevant case law can the District build support for the unprecedented rule of law that it invites the Court to adopt, namely, that Medina High School’s graduation prayer-givers are purely private actors — and can thus present even sectarian and proselytizing messages — even though the students have been asked by the school to present their messages, the messages have been denominated in the program of ceremonies as an “invocation” and “benediction” and have been pre-screened by government officials, and the messages comprise a formal portion of a government-controlled ceremony presented to a captive audience whose attendance is not “in any real sense of the term[,] ‘voluntary.’”⁴²⁷

⁴¹⁹ See Plaintiff-Appellees’ Opposition to Defendant-Appellant’s Emergency Motion to Dissolve Temporary Restraining Order and Preliminary Injunction at 11–15, *Schultz*, No. 11-50486 (5th Cir. June 3, 2011).

⁴²⁰ See *id.* at 16.

⁴²¹ See *id.* (citing *Lee v. Weisman*, 505 U.S. 577, 587, 592 (1992)).

⁴²² *Id.* at 18–19.

⁴²³ *Id.* at 21–22.

⁴²⁴ See *id.* at 28.

⁴²⁵ *Id.* at 34.

⁴²⁶ *Id.* at 35.

⁴²⁷ *Id.* at 1–2.

The next day, during the afternoon of June 3, 2011,⁴²⁸ the Fifth Circuit dissolved the TRO and injunction in a per curiam decision, based on a four-sentence determination:

On this incomplete record at this preliminary injunction stage of the case, we are not persuaded that plaintiffs have shown that they are substantially likely to prevail on the merits, particularly on the issue that the individual prayers or other remarks to be given by students at graduation are, in fact, school-sponsored. We also observe in particular that the plaintiffs' motion may be rooted at least in part in circumstances that no longer exist. For example, the school has apparently abandoned including the words "invocation" and "benediction" on the program. The motion also did not expressly address the involvement of the valedictorian in the graduation ceremony.⁴²⁹

There was no mention of the Constitution, the Establishment Clause, or any case law in the entire opinion,⁴³⁰ although the reference to whether the graduation prayers were "school-sponsored" presumably reflected the core Establishment Clause government speech/private speech dichotomy.⁴³¹ The court also denied Ms. Hildenbrand's motion to intervene and permitted her to proceed as *amicus curiae*.⁴³² The court remanded the case to the trial court "for possible further proceedings."⁴³³ In support of the Fifth Circuit's decision, Attorney General Abbott stated, "It should not be illegal for students to say a prayer at a graduation ceremony. Now, the federal court of appeals agrees."⁴³⁴

⁴²⁸ See Ethan Cole, *Texas Graduation Takes Advantage of Prayer Ruling, Goes All Out*, CHRISTIAN POST REP. (June 5, 2011), <https://www.christianpost.com/news/texas-graduation-takes-advantage-of-prayer-ruling-goes-all-out.html> (stating the Fifth Circuit's decision came down "late Friday").

⁴²⁹ *Schultz v. Medina Valley Indep. Sch. Dist.*, No. 11-50486, 1–2 (5th Cir. June 3, 2011), available at <https://www.clearinghouse.net/chDocs/public/FA-TX-0001-0005.pdf>.

⁴³⁰ See generally *id.*

⁴³¹ See *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 302 (2000) (discussing the differences between government speech endorsing religion and private speech endorsing religion).

⁴³² *Schultz*, No. 11-50486, at 2.

⁴³³ *Id.*

⁴³⁴ Raven Clabough, *Fed Appeals Court Overturns Prayer Ban at Medina Valley, TX Graduation*, NEW AM. (June 6, 2011), <https://www.thenewamerican.com/culture/faith-and-morals/item/933-fed-appeals-court-overturns-prayer-ban-at-medina-valley-tx-graduation>.

3. *The Aftermath of the Fifth Circuit Decision*

The Medina Valley High School graduation took place the next day, on Saturday, June 4, 2011,⁴³⁵ with increased security based in part on threats against Hildenbrand.⁴³⁶ The school district superintendent provided a disclaimer at the start of the graduation ceremony that the “speakers’ views were their own.”⁴³⁷ The graduation programs did not contain the terms “invocation” and “benediction” as the school district had determined, after scrutinizing this policy, that those terms “could be misinterpreted.”⁴³⁸ Those terms were changed to “opening remarks” and “closing remarks.”⁴³⁹ The student who delivered these opening remarks began by saying, “Those who wish, would you please pray with me?”⁴⁴⁰ There were many prayers and invocations to God during the ceremony, including in the valedictory speech and the speech by Texas State Representative John V. Garza.⁴⁴¹ The graduation ceremony “was likened to a revival meeting.”⁴⁴² Corwyn Schultz, the student who had brought the original action, and his family did not attend the graduation.⁴⁴³

By that Saturday, multiple critiques and threats had been made against Judge Biery and the courthouse staff.⁴⁴⁴ Anonymous sources within the courthouse reported to the media that “Biery and the court got more than 500 calls from people all over the country, demanding he change his ruling.”⁴⁴⁵ Senator John Cornyn, one of the United States senators from Texas, “blasted Biery’s order, saying it was hostile to ‘all things religious in public life.’”⁴⁴⁶ Regarding the trial court’s order, Governor Perry stated,

⁴³⁵ See Craig Kapitan, *Medina Valley Graduates Hear Prayers Aplenty*, MY SAN ANTONIO (June 4, 2011, 11:54 PM), https://www.mysanantonio.com/news/local_news/article/Medina-Valley-graduates-hear-prayers-aplenty-1410195.php (describing the aftermath of the litigation).

⁴³⁶ See Guillermo Contreras, *Appeals Panel Overturns Medina Valley Graduation Prayer Ban*, MY SAN ANTONIO (June 4, 2011, 7:33 PM), https://www.mysanantonio.com/news/local_news/article/Appeals-panel-overturns-Medina-Valley-graduation-1408548.php (describing the aftermath of the litigation).

⁴³⁷ Kapitan, *supra* note 435.

⁴³⁸ Contreras, *supra* note 436.

⁴³⁹ *Id.*

⁴⁴⁰ Kapitan, *supra* note 435.

⁴⁴¹ See *id.* (describing the commencement ceremony).

⁴⁴² Cole, *supra* note 428.

⁴⁴³ See Kapitan, *supra* note 435 (detailing the commencement ceremony).

⁴⁴⁴ See Contreras, *supra* note 436 (describing the physical dangers caused by the prayer controversy).

⁴⁴⁵ *Id.*

⁴⁴⁶ *Id.*

“The reprehensible action taken by a federal judge underscores the increasingly inappropriate federal encroachment into the lives of Americans by unconstitutionally banning prayer at a Texas high school graduation[.]”⁴⁴⁷

The trial court proceedings continued after the graduation, and so did the vitriol.⁴⁴⁸ Judge Biery was given “a nearly round-the-clock security detail” by the federal marshals in response to the threats he received after his ruling.⁴⁴⁹ Groups called for the judge’s resignation.⁴⁵⁰ Presidential hopeful Newt Gingrich advocated for the elimination of “dictatorial religious bigots such as Judge Biery” at campaign stops.⁴⁵¹ On national television, Gingrich stated that Judge Biery should be subpoenaed by Congress to explain his ruling.⁴⁵² Gingrich went on to say that “he would send the U.S. Capitol Police or U.S. Marshals to arrest [judges] and force them to testify” as a way to make federal judges, like Judge Biery, “comply with [these types of] congressional subpoenas.”⁴⁵³ He also called for Judge Biery’s impeachment.⁴⁵⁴

On July 11, 2011, the trial court entered an Advisory and Order Concerning Procedures to Reach Resolution of the Merits of the Case, in

⁴⁴⁷ Jennifer Riley, *Texas Valedictorian Can Pray at Graduation, Appeals Court Rules*, CHRISTIAN POST (June 4, 2011), <https://www.christianpost.com/news/texas-valedictorian-can-pray-at-graduation-appeals-court-rules.html>.

⁴⁴⁸ See Guillermo Contreras, *Colorful Judge Biery at Eye of Legal Storm*, MY SAN ANTONIO (July 3, 2011, 2:18 AM), https://www.mysanantonio.com/news/local_news/article/Colorful-Judge-Biery-at-eye-of-legal-storm-1450798.php (“Some writers or callers [to the federal courthouse] identified themselves as Christians—then proceeded to say that Biery should ‘die from cancer’ or drink human waste, or that they will ‘kick his ass.’”).

⁴⁴⁹ *Id.*

⁴⁵⁰ See *id.* (explaining the backlash experienced by Judge Biery).

⁴⁵¹ *Id.*; Tracy Idell Hamilton, *Biery’s the Man Gingrich Just Loves to Hate*, MY SAN ANTONIO (Jan. 28, 2012, 12:22 AM), https://www.mysanantonio.com/news/local_news/article/Biery-s-the-man-Gingrich-just-loves-to-hate-2764583.php.

⁴⁵² See Andrew Cohen, *Gingrich: Time to Subpoena Federal Judges*, ATLANTIC (Oct. 9, 2011), <https://www.theatlantic.com/politics/archive/2011/10/gingrich-time-to-subpoena-federal-judges/246407/> (discussing Speaker Gingrich’s critique of Judge Biery).

⁴⁵³ Matt DeLong, *Gingrich: Send U.S. Marshals to Compel ‘Radical’ Judges to Explain Rulings*, WASH. POST (Dec. 19, 2011), https://www.washingtonpost.com/blogs/election-2012/post/gingrich-send-us-marshals-to-arrest-uncooperative-judges/2011/12/18/gIQAIYUg2O_blog.html?utm_term=.f38c2af38b12.

⁴⁵⁴ See Johnathan Turley, *Gingrich: I Will Arrest Federal Judges*, JONATHAN TURLEY BLOG (Dec. 19, 2011), <https://jonathanturley.org/2011/12/19/gingrich-i-will-arrest-federal-judges/> (criticizing Speaker Gingrich’s call for judges to be subpoenaed before Congress as an “attack on the judiciary”).

which the court ordered each party to provide “a statement of which judicial process road that particular party chooses: to attempt sooner and less expensive resolution or proceed immediately to longer and more expensive litigation.”⁴⁵⁵ In this order, the court provided examples of protracted litigation that “caused considerable divisiveness within the community” and examples of cases that reached early resolution that saved considerable time and money.⁴⁵⁶ The court encouraged the parties to choose the latter path as a way to safeguard the parties’ time and finite funds.⁴⁵⁷ The court also reminded the “adults on both sides [that they] not only have a responsibility to teach, but also are stewards of financial resources best used for education of children, as opposed to litigation among adults.”⁴⁵⁸ Consequently, the Court encouraged the parties to “conclude the matter, not only sooner and less expensively, but as a teachable moment and example for the district’s children of how people of opposing views can listen to one another and resolve disagreements peaceably.”⁴⁵⁹

Although the parties entered into alternative dispute resolution (“ADR”), the court was notified that they did not settle on August 23, 2011.⁴⁶⁰ Additional ADR did not resolve the case in September of that year.⁴⁶¹ The case proceeded towards trial. On November 7, 2011, Judge Biery entered an order on the school district’s motion to dismiss for lack of jurisdiction, the plaintiffs’ motion to amend complaint, and the motion for leave to permit an anonymous plaintiff.⁴⁶² In this order, the court stated that it had “738 pages” before it on the pending motions and glibly noted that “there [was] not much [else] for [the court] to do.”⁴⁶³

⁴⁵⁵ *Schultz v. Medina Valley Indep. Sch. Dist.*, No. 5-11-CA-422, at 5 (W.D. Tex. July 11, 2011), available at <https://www.clearinghouse.net/chDocs/public/FA-TX-0001-0006.pdf>.

⁴⁵⁶ *Id.* at 2.

⁴⁵⁷ *See id.* at 3 (encouraging the use of a more efficient procedure).

⁴⁵⁸ *Id.*

⁴⁵⁹ *Id.* at 4.

⁴⁶⁰ Notice of Alternative Dispute Resolution Outcome, *Schultz*, No. 5:11-cv-00422-FB, available at <https://www.clearinghouse.net/chDocs/public/FA-TX-0001-9000.pdf> (Docket Entry No. 40).

⁴⁶¹ Notice of Alternative Dispute Resolution Outcome, *Schultz*, No. 5:11-cv-00422-FB, available at <https://www.clearinghouse.net/chDocs/public/FA-TX-0001-9000.pdf> (Docket Entry No. 42).

⁴⁶² *See Schultz v. Medina Valley Indep. Sch. Dist.*, No. 5-11-CA-422, 2011 WL 13234771, at *1 (W.D. Tex. Nov. 7, 2011).

⁴⁶³ *Id.* (noting that there are “about 250 felony defendants to whom the Court is required to give precedence and about 200 pending civil cases, most of which are older than this matter” and that “[a]dministrative duties over seven divisions spread over 90,000 square miles and about 800 Court employees also take considerable time”).

The Court also emphasized that “the parties are spending what appears to be inordinate amounts of money and time which could be better spent on educating students.”⁴⁶⁴ Thereafter, the court granted the motion to amend the complaint, denied the motion for lack of jurisdiction due to mootness based on the claims of the amended complaint, and allowed the anonymous plaintiff to proceed as such for a time until disclosure was required for discovery.⁴⁶⁵ Echoing the court in *Santa Fe*, which allowed anonymous student plaintiffs,⁴⁶⁶ the court expressed its sadness “that youngsters fear the people within their own community and some of the adults responsible for their education” because the “pleadings on the issue . . . document[ed] a pattern of harassment, threats and intimidation of those who disagree with the majority view in the school district community.”⁴⁶⁷

The trial court never determined whether the student graduation prayers were government speech or private speech for the purposes of Establishment Clause analysis, because, ultimately, the parties settled.⁴⁶⁸ The parties’ settlement agreement was approved by the court on February 9, 2012.⁴⁶⁹ In reviewing the settlement agreement, the court found that “it achieve[d] reasonable balance between competing First Amendment rights of free speech for student speakers and freedom from government endorsement of a particular religious belief.”⁴⁷⁰

In this settlement agreement, the parties agreed that “The School District [would] not include a prayer—whether referred to as a prayer, blessing, invocation, benediction, or otherwise—as part of the official program of any graduation ceremony”; that the student remarks would be labeled with a non-religious term in the program; and that the school district would not invite graduation speakers who it had “reason to believe will proselytize, promote religion, or disparage the religious beliefs (or lack thereof) of students or members of the community during their remarks.”⁴⁷¹ With

⁴⁶⁴ *Id.*

⁴⁶⁵ *See id.* at *1–2 (stating the holdings on the motions).

⁴⁶⁶ *See supra* text accompanying note 163 (explaining that the *Santa Fe* court allowed student plaintiffs to proceed anonymously).

⁴⁶⁷ *Schultz*, 2011 WL 13234771, at *2.

⁴⁶⁸ *See Schultz v. Medina Valley Indep. Sch. Dist.*, No. SA-11-CA-422-FB, 2012 WL 517518, at *1 (W.D. Tex. Feb. 9, 2012) (approving settlement), *available at* <https://www.clearinghouse.net/chDocs/public/FA-TX-0001-0001.pdf>.

⁴⁶⁹ *See id.* (approving settlement).

⁴⁷⁰ *Id.*

⁴⁷¹ *Id.* at *2.

respect to student graduation remarks, the parties agreed that the school district would “not restrict, revise, edit, alter, or otherwise influence [or pre-screen] the content of Student Remarks”; that the district “may permit student graduation speakers to pray as part of Student Remarks”; and that a disclaimer, akin to the following, would be printed in the graduation program and announced at the ceremony:

The students who shall be speaking at graduation were selected based on neutral criteria to deliver messages of the students’ own choices. The content of each student speaker’s message is the private expression of the individual student and does not reflect the endorsement, sponsorship, position, or expression of the District. We ask that the audience sit and remain seated during the Student Remarks.⁴⁷²

This Establishment Clause litigation was long, costly, and contentious, like most of these First Amendment religion and school cases.⁴⁷³ Judge Biery’s Personal Statement in the court’s opinion approving the settlement provided a clear coda to another cautionary tale within Establishment Clause jurisprudence:

During the course of this litigation, many have played a part: To the United States Marshal Service and local police who have provided heightened security: Thank you. To those Christians who have venomously and vomitously cursed the Court family and threatened bodily harm and assassination: In His name, I forgive you. To those who have prayed for my death: Your prayers will someday be answered, as inevitably trumps probability. To those in the executive and legislative branches of government who have demagogued this case for their own political goals: You should be ashamed of yourselves. To the lawyers who have advocated professionally and respectfully for their clients’ respective positions: Bless you.⁴⁷⁴

4. *Lessons to be Learned from the Lack of Clarity of this Case*

This case is also paradigmatic of the lack of clarity and continued confusion regarding the Establishment Clause and the classification of student religious speech as government speech or private speech. Although

⁴⁷² *Id.* at *2–3.

⁴⁷³ See Ira C. Lupu, *Which Old Witch?: A Comment on Professor Paulsen’s Lemon Is Dead*, 43 CASE W. RES. L. REV. 883, 898 (1993) (noting that Establishment Clause litigation is expensive and that “within small communities, [it] is unusually divisive and difficult for families who have the courage to pursue it”); William Marshall, *The Limits of an Establishment Clause “Restatement”: A Response to Professor Sedler*, 43 WAYNE L. REV. 1465, 1471 (1997) (“Establishment Clause litigation is often as divisive as it is contentious.”).

⁴⁷⁴ Schultz, No. SA-11-CA-422-FB, at 3 (W.D. Tex. Feb. 9, 2012), available at <https://www.clearinghouse.net/chDocs/public/FA-TX-0001-0001.pdf>.

the Fifth Circuit had jurisdiction over the justiciable issue raised on appeal, the appellate court failed to provide an opinion reflective of the fundamental jurisprudential principles of hierarchical precedent.

Despite the court's signal that the litigation hinged on the classification of the student graduation prayer as either government speech or private speech, it provided no discussion of this issue beyond its finding that the plaintiffs had not "shown that they are substantially likely to prevail on the merits, particularly on the issue that the individual prayers or other remarks to be given by students at graduation are, in fact, school-sponsored."⁴⁷⁵ While the appellate court was not charged with making a final substantive determination on the classification of the student religious speech, it still had a judicial obligation to provide reasoned support for its finding the plaintiffs had not demonstrated a substantial likelihood they would prevail on the merits that this student prayer was school-sponsored speech, not private speech. Instead, the Fifth Circuit opted to issue an eight-sentence judicial fiat that lacked a single reference to the Constitution, the Establishment Clause, or any case law.⁴⁷⁶

This failure to provide any legal analysis to support its conclusion on the speech classification was jurisprudential error. Even during exigent circumstances,⁴⁷⁷ the judiciary needs to provide reasoned judgments for parties in dispute.⁴⁷⁸ Reasoned legal judgment, by its very nature, encompasses reasoning and an express application of precedent.⁴⁷⁹ Between the parties and the amicus brief, ninety-one pages of briefing, replete with binding, relevant Supreme Court precedent and constitutional citations, had

⁴⁷⁵ *Schultz v. Medina Valley Indep. Sch. Dist.*, No. 11-50486, at 1 (5th Cir. June 3, 2011).

⁴⁷⁶ *See id.* at 1–2 (finding that plaintiffs had not shown that they were substantially likely to prevail on the merits).

⁴⁷⁷ Although it does take some time to reach a reasoned response, interlocutory appeals, like this one, do not require an *ex tempore* decision. *See* Deborah J. Merritt, *Bias, the Brain, and Student Evaluations of Teaching*, 82 ST. JOHN'S L. REV. 235, 278 (2008) ("To make thoughtful evaluations, the brain needs time to recall diverse bits of data, compare them, group pieces of information into larger chunks of partial judgments, and ultimately yield a reasoned response.").

⁴⁷⁸ *See* Frederick Schauer, *Authority and Authorities*, 94 VA. L. REV. 1931, 1936 (2008) (describing how judicial authority is derived through the provision of "reasons for . . . rules, commands, orders, or instructions").

⁴⁷⁹ *See* Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710, 712–13 (1917) (stating that an understanding and application of legal precedent is the "formal foundation of judicial reasoning and decision"); Gerald J. Postema, *Jurisprudence, the Sociable Science*, 101 VA. L. REV. 869, 885 (2015) (arguing that effective jurisprudence relies upon the application of past precedents).

been filed to assist in such reasoning.⁴⁸⁰ However, the Fifth Circuit chose another option that is not reflective of the core ideals of the application of hierarchical precedent in the American judicial system of rules and constitutional standards.⁴⁸¹ Like *Matthews*, this is another example of harmful *ipse dixit* in action.⁴⁸²

Issuing such an opinion in such a contentious and divisive case was insufficient for several reasons. First, this was a missed opportunity by the circuit court to provide much needed clarity in this area of classification of student religious speech in Establishment Clause jurisprudence. Under 28 U.S.C. § 1292,⁴⁸³ interlocutory appeals are designed to “simplify . . . the future course of litigation” and to “reduce the burdens of future proceedings.”⁴⁸⁴ The eight-sentence order, with no reference to case law or the Constitution, achieved neither of these goals. The Fifth Circuit could have positively contributed to the cloudy area of Establishment Clause jurisprudence involving the religious speech of students, but it failed to do so.

Opinions via judicial fiat, like this one, also degrade and delegitimize constitutional interpretation in this important area of school law. The Fifth Circuit’s opinion contributed to a public perception of results-based jurisprudence.⁴⁸⁵ Its absence of reasoning lent itself to capitalization by elected politicians who asserted that the appellate opinion set a precedent that it did not set.⁴⁸⁶ Its lack of analytical support and citation to hierarchical precedent certainly did nothing to quell the extant political demagoguery of the case, and it likely allowed for the continued inflammatory rhetoric about

⁴⁸⁰ See *supra* text accompanying note 400.

⁴⁸¹ See Jess M. Krannich et al., *Beyond “Thinking Like A Lawyer” and the Traditional Legal Paradigm: Toward A Comprehensive View of Legal Education*, 86 DENV. U. L. REV. 381, 389 (2009) (describing the American judicial system as a rules-based system).

⁴⁸² See *supra* text accompanying notes 375–77 (discussing the *Matthews* opinion).

⁴⁸³ 28 U.S.C. § 1292(a)(1) (2018) (giving the courts of appeals jurisdiction to review district court’s injunctive relief orders prior to the district court’s final decision).

⁴⁸⁴ *Johnson v. Jones*, 515 U.S. 304, 309 (1995).

⁴⁸⁵ See Andrew Cohen, *Judge-Bashing Comes to the 2012 GOP Race*, ATLANTIC (Dec. 27, 2011), <https://www.theatlantic.com/politics/archive/2011/12/judge-bashing-comes-to-the-2012-gop-race/250385/> (characterizing the Fifth Circuit’s decision as “a convenient cop-out by a federal court unwilling to address the merits of the Supreme Court’s school prayer precedent”).

⁴⁸⁶ See, e.g., *supra* text accompanying note 434 (discussing Texas Attorney General Greg Abbott’s characterization of *Schultz*).

the trial court's decision within the political arena.⁴⁸⁷ This led to real harms in the form of overwhelming threats to the bodily and reputational integrity of Judge Biery, his family, and the courthouse staff.⁴⁸⁸

The Fifth Circuit's judicial fiat also harmed both religion and the state. It hurt religious liberty and sanctity, as it sent negative messaging to both adherents and non-adherents of religion through the court "blithely dispatch[ing] with the case," and not affording this complex and important constitutional issue sufficient analysis.⁴⁸⁹ In terms of state harms, the Fifth Circuit's judicial fiat on interlocutory appeal did not provide any simplification or clarification for the proceedings once they returned to the trial court, as beneficial interlocutory opinions should do.⁴⁹⁰ The result was contentious and expensive litigation, as well as an exponential strain on the already limited resources of the district court. Finally, this cursory circuit opinion conveyed an anti-democratic principle to the Medina Valley ISD schoolchildren—that a judicial edict can be based just on a rationale of because the court said so and not on the application of the Constitution and hierarchical precedent. If faced with similar cases in the future, all courts should avoid the harmful jurisprudential approach of the Fifth Circuit in the *Schultz* case.

IV. A JURISPRUDENTIAL FRAMEWORK THAT REQUIRES JUSTICIABILITY AND AVOIDS JUDICIAL FIAT IN ESTABLISHMENT CLAUSE CASES INVOLVING RELIGIOUS SPEECH OF STUDENTS

Requiring justiciability and avoiding ruling by judicial fiat are both matters of judicial restraint.⁴⁹¹ The need for judicial restraint, broadly, has

⁴⁸⁷ See Benjamin P. Edwards, *When Fear Rules in Law's Place: Pseudonymous Litigation as a Response to Systematic Intimidation*, 20 VA. J. SOC. POL'Y & L. 437, 462 (2013) (discussing the threats and backlash against Judge Biery after the Fifth Circuit's intervention in the case).

⁴⁸⁸ See Cohen, *supra* note 13 (discussing the threats that were directed toward the judge, his family, and his staff after the trial court order and the Fifth Circuit decision); Hamilton, *supra* note 451 (discussing the intimidation that resulted from the criticism of the trial court's order after the Fifth Circuit's decision).

⁴⁸⁹ Cohen, *supra* note 485; see also Bonnie Barron, *5th Circuit Lets Texans Pray at H.S. Graduation*, COURTHOUSE NEWS (June 8, 2011), <https://www.courthousenews.com/5th-circuit-lets-texans-pray-at-h-s-graduation/> (noting that the court admitted the opinion was "hastily issued").

⁴⁹⁰ See *Johnson v. Jones*, 515 U.S. 304, 309–10 (1995) (discussing the benefits that interlocutory review should provide).

⁴⁹¹ See Ronald K.L. Collins, *Foreword: The Once "New Judicial Federalism" and Its Critics*, 64 WASH. L. REV. 5, 7 (1989) (identifying criticism of "rule by judicial fiat" as a call for "judicial restraint"); Philip A.

been a consensus point throughout the jurisprudential ideological spectrum,⁴⁹² as it has been called for by proponents of classical and modern liberalism,⁴⁹³ advocates for conservatism,⁴⁹⁴ and centrist process theorists who disavow the espousal of any of these views and who are “merely seeking to preserve ‘public faith in the objectivity and detachment of the [courts].’”⁴⁹⁵

Like so many aspects of Establishment Clause jurisprudence, though, the concept of “judicial restraint” lacks a unified definition.⁴⁹⁶ It means many things to many people, and that construct can shift with the sands.⁴⁹⁷ For example, judicial restraint has been used as the antithesis of “judicial activism.”⁴⁹⁸ Judicial activism in this context is typically framed to mean decision-making with which the source does not agree or decision-making that is extolled if it fits within the preferred jurisprudential approach of the source.⁴⁹⁹ Sadly, the notion of judicial restraint has become a highly

Talmadge, *Understanding the Limits of Power: Judicial Restraint in General Jurisdiction Court Systems*, 22 SEATTLE U. L. REV. 695, 707 (1999) (“Justiciability constraints constitute the essence of judicial restraint[.]”).

⁴⁹² See Mark C. Modak-Truran, *Corrective Justice and the Revival of Judicial Virtue*, 12 YALE J.L. & HUMAN. 249, 249 (2000) (noting that many advocate judicial restraint); Zachary Baron Shemtob, *Following Thayer: The Many Faces of Judicial Restraint*, 21 B.U. PUB. INT. L.J. 61, 62 (2011) (discussing how liberals and conservatives have both championed judicial restraint).

⁴⁹³ See, e.g., MILL, *supra* note 1, at 403 (advocating for judicial restraint in the forms of justiciability and application of precedent); Linda Greenhouse, *The Supreme Court: A Sense of Judicial Limits*, N.Y. TIMES (July 22, 1993), <http://www.nytimes.com/1993/07/22/us/the-supreme-court-a-sense-of-judicial-limits.html> (characterizing Justice Ruth Bader Ginsburg as “a judicial-restraint liberal”).

⁴⁹⁴ See Scott L. Cummings, *Movement Lawyering*, 2017 U. ILL. L. REV. 1645, 1678 (2017) (discussing traditional conservative reliance on judicial restraint).

⁴⁹⁵ G. Edward White, *Unpacking the Idea of the Judicial Center*, 83 N.C. L. REV. 1089, 1125 (2005) (quoting Philip B. Kurland, *The Supreme Court and its Judicial Critics*, 6 UTAH L. REV. 457, 466 (1959)).

⁴⁹⁶ See David A. Strauss, *Originalism, Conservatism, and Judicial Restraint*, 34 HARV. J.L. & PUB. POL’Y 137, 137 (2011) (“‘Judicial restraint’ is not a well-defined term.”).

⁴⁹⁷ See Rebecca E. Zietlow, *Popular Originalism? The Tea Party Movement and Constitutional Theory*, 64 FLA. L. REV. 483, 502 (2012) (discussing the evolving and changing embraces of notions of judicial restraint by conservative and liberal jurists and legal theorists).

⁴⁹⁸ See J. Clifford Wallace, *The Jurisprudence of Judicial Restraint: A Return to the Moorings*, 50 GEO. WASH. L. REV. 1, 1 (1981) (“The opposite of juridical activism [is] judicial restraint”); Corey Rayburn Yung, *Flexing Judicial Muscle: An Empirical Study of Judicial Activism in the Federal Courts*, 105 NW. U. L. REV. 1, 5 (2011) (deeming judicial activism’s antithesis to be restraint).

⁴⁹⁹ See Joseph Isenbergh, *Activists Vote Twice*, 70 U. CHI. L. REV. 159, 159 (2003) (“Judicial activism has a bipolar press . . . [W]hen a high-profile decision cuts against [scholars’] preferential grain, they denounce it; and when it promises to advance their favored vision of the future, they wax rhapsodic.”).

politicized one, and, in a meta way, critiques of highly politicized judicial restraint have become highly politicized.⁵⁰⁰

Yet, this politicization of judicial restraint need not be the norm. Ideal judicial restraint can be articulated in a non-polemical and ideologically inclusive way. Judicial restraint can mean advocacy for basic justiciability requirements and a common recognition that lower courts in interpreting the Constitution should follow hierarchical precedent, should apply that precedent, and should provide a reasoned, articulated, and explicit application of that precedent in their judicial decision-making processes.⁵⁰¹ This should be uncontroversial.⁵⁰² However, despite the clarity of this proposed foundation for ideal jurisprudence, this type of “judicial restraint has frequently gone unrealized in practice.”⁵⁰³ This has certainly become an issue within the growing body of Establishment Clause jurisprudence involving the religious speech of students.⁵⁰⁴

Given the clarity of the requirement of justiciability for judicial decision-making, hierarchical precedent, and the fundamental government speech/private speech dichotomy, continued controversies regarding how to classify students’ religious speech must indicate a gap in school law

⁵⁰⁰ See, e.g., Frank Michelman, *The Common Law Baseline and Restitution for the Lost Commons: A Reply to Professor Epstein*, 64 U. CHI. L. REV. 57, 59 (1997) (discussing the viability of a perspective that calls for “judicial restraint of majoritarian excess without undue politicization of the judiciary”); Roger Pilon, *A Court Without a Compass*, N.Y. L. SCH. L. REV. 999, 1010 (arguing that “both sides [of the conservative and liberal judiciary] play the ‘judicial restraint’ card”); Ilya Shapiro, *Introduction*, 2016–2017 CATO SUP. CT. REV. 1, 3 (2017) (“Living constitutionalists and their judicial-restraint handmaidens have politicized the law such that judges quail at enforcing the Constitution’s structural limits and face attacks for not seeing statutes in a way that favors ‘the little guy.’”); Conor Fierdersdorf, *Movement Liberals Cannot Credibly Demand Judicial Restraint*, ATLANTIC (Apr. 3, 2012), <https://www.theatlantic.com/politics/archive/2012/04/movement-liberals-cannot-credibly-dem-and-judicial-restraint/255375/> (discussing the politicization of judicial restraint by both conservatives and liberals).

⁵⁰¹ See Debra Lyn Bassett & Rex R. Perschbacher, *Realigning Parties*, 2014 UTAH L. REV. 109, 129 (2014) (discussing the consensus on the core live case or controversy and adverse party justiciability requirements).

⁵⁰² But see Pfander & Birk, *supra* note 80, at 1360 (stating the adverse party requirement of justiciability “sits uneasily with the reality of federal judicial practice”); James E. Pfander, *Standing, Litigable Interests, and Article III’s Case-or-Controversy Requirement*, 65 UCLA L. REV. 170, 189 (2018) (“Noncontentious jurisdiction . . . casts doubt upon three core elements of modern ‘case-or-controversy’ jurisprudence.”); Jonathan R. Siegel, *A Theory of Justiciability*, 86 TEX. L. REV. 73, 134 (2007) (arguing that “advisory opinions should not be viewed as constitutionally forbidden”).

⁵⁰³ Shemtob, *supra* note 492, at 62.

⁵⁰⁴ See Russell W. Galloway Jr., *Basic Establishment Clause Analysis*, 29 SANTA CLARA L. REV. 845, 848 (1989) (noting repeated “justiciability problems . . . in Establishment Clause cases”).

Establishment Clause jurisprudence.⁵⁰⁵ The *Matthews* and *Schultz* cases demonstrate the practical and jurisprudential harms that can result from an undisciplined judicial approach via advisory opinions or summary opinions based on judicial fiat, rather than express applications of binding precedent to justiciable issues, to these classifications. In response to this problem, this Article offers a clear framework for courts to use in their evaluation of students' religious speech in school law Establishment Clause cases.

This dual-pronged framework consists of a justiciability requirement and a precedential requirement. First, it requires justiciability in order for a court to make any Establishment Clause determination, which requires a live Establishment Clause case or controversy between parties with adverse legal interests on that issue. If this justiciability requirement is not met, courts cannot and should not issue an impermissible advisory opinion. Instead, a lack of justiciability necessitates the cessation of any judicial Establishment Clause analysis and decision-making. If and only if the justiciability prerequisite is met, the framework next requires courts to make a proper and fully supported classification of the religious student speech as government speech or private speech through an application of the United States Constitution and binding precedent rather than through mere *ipse dixit*.⁵⁰⁶ To properly apply the Establishment Clause in cases involving students' religious speech, courts cannot simply ignore existing precedent in this area of jurisprudence or issue summary opinions of judicial fiat. Overall, this framework will help courts to make the government speech/private speech determination accurately at the outset of Establishment Clause litigation if they have the requisite justiciability to do so and in a way that will bring much needed clarity to establishment doctrine in school law, rather than further complicating this area of jurisprudence.

A. The Requirements of Justiciability in Establishment Clause Cases Involving Religious Speech of Students

At the center of American jurisprudence is the fundamental principle of justiciability. This is a particularly important aspect of constitutional

⁵⁰⁵ See Bassett & Perschbacher, *supra* note 501, at 127 (discussing how legal commentary has sometimes overlooked "the necessity for an adversarial context" in justiciability scholarship).

⁵⁰⁶ See Kirt Shuldberg, Comment, *Digital Influence: Technology and Unpublished Opinions in the Federal Courts of Appeals*, 85 CALIF. L. REV. 541, 568 (1997) ("[J]udges are required to provide reasons for the decisions they reach.").

jurisprudence as it respects “the proper—and properly limited—role of the courts in a democratic society.”⁵⁰⁷ Like Establishment Clause jurisprudence, questions of justiciability can be confusing and conceptually unclear.⁵⁰⁸ In *Flast v. Cohen*, the Supreme Court recognized that “justiciability is itself a concept of uncertain meaning and scope” and is not “susceptible of [sic] scientific verification.”⁵⁰⁹

Still, certain aspects of justiciability, just like certain aspects of Establishment Clause doctrine, are clear. Justiciability requires an actual case or controversy between actually adverse parties in order for federal courts to make a determination on that issue.⁵¹⁰ Some state courts, like those in Texas, are constitutionally bound to commensurate case-or-controversy requirements for justiciability.⁵¹¹ Requests for advisory opinions are requests for courts to rule on nonjusticiable matters without a live case or controversy and without an actual dispute between adverse parties. There is no justiciable controversy when parties seek an advisory opinion.⁵¹²

The first hurdle in clarifying school law Establishment Clause jurisprudence is satisfying the requirement of a justiciable issue for any Establishment Clause determinations, which entails a live case or controversy between parties with adverse interests on that issue. These cases, like others, can and should be litigated amicably, but for a court to proceed, there still “must be an actual controversy[] and adverse interests.”⁵¹³ Courts have an

⁵⁰⁷ *Allen v. Wright*, 468 U.S. 737, 750 (1984).

⁵⁰⁸ *See Flast v. Cohen*, 392 U.S. 83, 94 (1968) (describing the case-or-controversy justiciability requirements as having “an iceberg quality, containing beneath their surface simplicity submerged complexities which go to the very heart of our constitutional form of government”); Caprice L. Roberts, *Asymmetric World Jurisprudence*, 32 SEATTLE U. L. REV. 569, 584 (2009) (stating most justiciability “doctrines are not absolute conceptually”).

⁵⁰⁹ *Flast*, 392 U.S. at 95.

⁵¹⁰ *See United States v. Johnson*, 319 U.S. 302, 304 (1943) (holding “the absence of a genuine adversary issue between the parties” made the case not justiciable); *Muskrat v. United States*, 219 U.S. 346, 361 (1911) (providing federal courts may only decide “actual controversies arising between adverse litigants”).

⁵¹¹ *See Heckman v. Williamson Cty.*, 369 S.W.3d 137, 147 (Tex. 2012) (identifying the Texas Constitution as the source of justiciability requirements for Texas courts).

⁵¹² *See Flast*, 392 U.S. at 95 (explicitly stating there is “no justiciable controversy . . . when the parties are asking for an advisory opinion”); *Heckman*, 369 S.W.3d at 147 (stating that Texas requests for advisory opinions are nonjusticiable).

⁵¹³ *Lord v. Veazie*, 49 U.S. 251, 255 (1850).

affirmative duty to examine the record to determine if there is a lack of the required actual case or controversy between actually adverse parties.⁵¹⁴

If this justiciability requirement is not met, courts cannot and should not issue an impermissible advisory opinion. Instead, a lack of justiciability necessitates the cessation of any judicial Establishment Clause analysis and decision-making. Seeking an impermissible advisory opinion is an attempt to circumvent the requirements of justiciability, and trial courts should reject such requests in no uncertain terms as advisory opinions are “nullit[ies].”⁵¹⁵

All of these justiciability requirements were met in the *Santa Fe* case, as there was an actual controversy regarding whether the football game invocation policy was a violation of the Establishment Clause between the school district and the Doe plaintiffs, who had adverse legal interests in the matter.⁵¹⁶ The court limited its decision-making to that actual Establishment Clause controversy, it “made no sweeping pronouncements barring religious speech from public settings,”⁵¹⁷ and it did not venture into the territory of nonjusticiability.

Conversely, when courts in systems that prohibit advisory opinions make determinations on nonjusticiable issues,⁵¹⁸ they act outside of their powers and err as a matter of law. This was the case in *Matthews*, when the trial court made its determination that “[n]either the Establishment Clause nor any other law prohibits the cheerleaders from using religious-themed banners at school sporting events. Neither the Establishment Clause nor any other law requires Kountze I.S.D. to prohibit the inclusion of religious-themed banners at school sporting events.”⁵¹⁹ Federal and state courts should learn a lesson from this nonjusticiable advisory opinion in *Matthews* that led to years of protracted litigation and a continued state of confusion for Texas school districts. Avoiding impermissible advisory opinions in these cases is imperative to not exacerbate the confusion in this area of constitutional law. Alternative approaches create significant harms, which include the

⁵¹⁴ See *supra* text accompanying notes 85–93.

⁵¹⁵ *Lord*, 49 U.S. at 256.

⁵¹⁶ See *supra* Part II.A.

⁵¹⁷ Michael W. McConnell, *State Action and the Supreme Court's Emerging Consensus on the Line Between Establishment and Private Religious Expression*, 28 PEPP. L. REV. 681, 706–07 (2001).

⁵¹⁸ The arguments regarding prohibited advisory opinions in this Article are geared toward those judicial systems that have this prohibition.

⁵¹⁹ See *Matthews v. Kountze Indep. Sch. Dist.*, No. 53526, 2013 WL 1914796 (Tex. Dist. Ct. May 8, 2013).

delegitimization of this area of constitutional interpretation, as well as corresponding harms to the state and religion.

Issuing advisory opinions in school law Establishment Clause cases contributes to the already confused state of this area of jurisprudence. Establishment Clause jurisprudence is notoriously confusing, as are justiciability requirements.⁵²⁰ When courts act outside of the constraints of justiciability requirements when construing the religion clauses of the First Amendment, this confusion is only magnified.⁵²¹ Distortions of the law naturally occur when there is a lack of adversity between the parties with respect to the sought-after judicial declaration on that issue. Departures from justiciability in this area of school law will result in case dispositions that “lack the clarity and force which ought to inform the exercise of judicial authority.”⁵²²

Issuing advisory opinions in school law Establishment Clause cases also delegitimizes constitutional interpretation in this area. As the Supreme Court stated in its 1850 *Lord v. Veazie* decision, attempts to obtain judicial resolutions of issues “when there is no real and substantial controversy between those who appear as adverse parties to the suit, is an abuse which courts of justice have always reprehended, and treated as a punishable contempt of court.”⁵²³ The aim of justiciability is the protection of the law and the adjudicatory process.⁵²⁴ By issuing Establishment Clause decisions in school law cases only when justiciability requirements are met, courts will provide the necessary safeguards to achieve this aim. When courts stray from these requirements, public perceptions about the judicial process diminish, especially in cases involving schoolchildren.

Issuing advisory opinions in school law Establishment Clause cases also contributes to the continued delegitimization of constitutional interpretation

⁵²⁰ See Fallon, *supra* note 12, at 60 (“Establishment Clause doctrine is notoriously confused and disarrayed.”); Michael L. Wells, *A Litigation-Oriented Approach to Teaching Federal Courts*, 53 ST. LOUIS U. L.J. 857, 870 (2009) (likening the doctrines of justiciability to an “opaque, confusing, and intricate set of obstacles”).

⁵²¹ See Mark C. Rahdert, *Forks Taken and Roads Not Taken: Standing to Challenge Faith-Based Spending*, 32 CARDOZO L. REV. 1009, 1025–26 (2011) (discussing the confusion the Court has engendered by its justiciability decisions in Establishment Clause litigation).

⁵²² *Renne v. Geary*, 501 U.S. 312, 324 (1991).

⁵²³ *Lord v. Veazie*, 49 U.S. 251, 255 (1850).

⁵²⁴ See *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1, 16 (1993) (Blackmun, J., dissenting) (“It is a rule whose aim is to protect not parties but the law and the adjudicatory process.”).

in this area by allowing possible end runs around the Establishment Clause.⁵²⁵ When a state requests an advisory opinion that a practice involving religious student speech is not a violation of the Establishment Clause, when that matter is not the live controversy at issue and there is no adversity of legal interests, this should indicate a potential red flag to the judiciary.⁵²⁶ Here, a governmental entity may be trying to maneuver around the Establishment Clause's restraints on what was deemed unconstitutional school-sponsored prayer in *Santa Fe* to continue this type of unconstitutional practice. This might be the case "especially in religiously homogeneous areas where a lack of opposition to the practice may prevent a justiciable case or controversy from arising."⁵²⁷

Despite all of the division within this area of jurisprudence, "it seems clear that the state should not compel people [especially children] to follow the dictates of any given religion or impose burdens on them for failing to do so."⁵²⁸ Claims of free exercise of religion cannot be used as a zero-sum game to circumscribe the limits of the Establishment Clause. As the Court stated in *Lee*, "[t]he principle that government may accommodate the free exercise of religion does not supersede the fundamental limitations imposed by the Establishment Clause."⁵²⁹ Courts certainly should not allow this practice to

⁵²⁵ The term "end run" here means "an evasive trick or maneuver." *End run*, MERRIAM-WEBSTER ONLINE DICTIONARY, <https://www.merriam-webster.com/dictionary/end%20run> (last visited June 15, 2020). Appropriately, based on the cases scrutinized in this article, the term's etymology is from football, meaning "a football play in which the ballcarrier attempts to run wide around the end of the line" of players. *Id.* The incorporation of this sports-derived term, with the inclusion of its specific definition, is intended to be helpful to understand the difficult concepts of justiciability and the Establishment Clause, and not as a way to accede to a gendered orthodoxy. See Adam Benforado, *Color Commentators of the Bench*, 38 FLA. ST. U. L. REV. 451, 457 (2011) (arguing sports analogies "present the best opportunity to demystify the world of law for the widest possible cross-section of the public at a time when distrust of the judicial branch of government is high and when myths about the work of judges proliferate"); Geraldine Szott Moohr, *Opting in or Opting Out: The New Legal Process or Arbitration*, 77 WASH. U. L.Q. 1087, 1087 n.4 (1999) (stating that sports analogies are not helpful when provided without clear definition); Jeanne L. Schroeder, *Subject: Object*, 47 U. MIAMI L. REV. 1, 110 (1992) (describing sports metaphors as "masculinist"); Catherine Weiss & Louise Melling, *The Legal Education of Twenty Women*, 40 STAN. L. REV. 1299, 1337 (1988) (framing a critique of the use of sports analogy in law schools as a gender issue).

⁵²⁶ Of course, parties may seek to capitalize on litigation in states that allow for advisory opinions to pursue free exercise and free speech claims as a mechanism for judicial decisions on Establishment Clause applicability.

⁵²⁷ Kenneth Katkin & Laurie Lamb, *The Establishment Clause: A Survey of Recent Religion Cases Decided Within the Sixth Circuit*, 29 N. KY. L. REV. 73, 112 (2002).

⁵²⁸ Rubin, *supra* note 205, at 38–39.

⁵²⁹ *Lee v. Weisman*, 505 U.S. 577, 587 (1992).

occur via an end run around the Establishment Clause in the form of an advisory opinion.

Finally, issuing advisory opinions in school law Establishment Clause cases harms both religion and the state. It harms religious liberty, in that a decision on a nonjusticiable issue involving religious practices or nonreligious practices that many schoolchildren⁵³⁰ (and their families)⁵³¹ may hold dear is made in a context that lacks the full presentation of all relevant information, as there are no “adverse parties, with a stake in the outcome of the litigation, [who would] perform this task best.”⁵³² Requesting advisory opinions and granting those requests also sacrifices judicial efficiency by taking up precious time and resources in a matter that should not be addressed by the courts.⁵³³ Conversely, the early resolution of justiciability issues aims to serve judicial efficiency, because resolving problems with justiciability concludes litigation at the appropriate time and in earlier stages.⁵³⁴ For courts that are evaluating the application of the Establishment Clause to student religious speech, this justiciability determination should be the first item on the judicial agenda. Following a justiciability and rules-based jurisprudential approach in this area of educational constitutional law will “make the judicial process a principled one.”⁵³⁵

When courts are presented with nonjusticiable requests for prohibited advisory opinions in Establishment Clause cases, the only correct response is a denial of such a request based on a lack of justiciability. Courts have the affirmative duty to inquire as to the justiciability of a case, which means that they must ensure there is a live controversy with truly adverse parties in order to proceed.⁵³⁶ Without an actual controversy between actually adverse

⁵³⁰ See Emily Buss, *The Adolescent's Stake in the Allocation of Educational Control Between Parent and State*, 67 U. CHI. L. REV. 1233, 1264 (2000) (“The development of a sense of religious identity is an important piece of the adolescent’s larger identity formation process[, g]oing as it does to the core of one’s beliefs, values, practices, and affiliations.”).

⁵³¹ See *id.* (discussing the importance parents often place in the reproduction of their own religious identities in their children).

⁵³² ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* 44 (6th ed. 2012).

⁵³³ See Siegel, *supra* note 502, at 87 (“Judges are busy with a multitude of cases.”).

⁵³⁴ See *Renne v. Geary*, 501 U.S. 312, 324 (1991) (“If the as-applied challenge had been resolved first in this case, the problems of justiciability that determine our disposition might well have concluded the litigation at an earlier stage.”).

⁵³⁵ *Id.*

⁵³⁶ See *Hatfield v. King*, 184 U.S. 162, 164–65 (1902) (stating that it is well settled that a court has the duty to make justiciability inquiries “in order that it may not be imposed on by an apparent controversy to which there are really no adverse parties”).

parties on the issue, courts lack the authority to decide the matter. The Texas trial court in *Matthews* failed to take this correct jurisprudential course, and the effect was years of costly and unnecessary litigation that only served to complicate the area of Establishment Clause applicability to religious student speech even more and to create perceptions of distortion of the legal process and religious values.⁵³⁷ Consequently, courts must not render advisory opinions in cases dealing with religious student speech that do not have a live Establishment Clause controversy between truly adverse parties. If trial courts incorrectly do so, appellate courts have the *sua sponte* responsibility to vacate the nonjusticiable issue determination. This is a necessary way to ameliorate the current state of confusion within school law Establishment Clause jurisprudence when courts are tasked with the classification of religious student speech as being government speech or private speech.

B. The Avoidance of Judicial Fiat in Establishment Clause Cases Involving Religious Student Speech

If and only if the prerequisites of justiciability are met, should courts proceed to classify religious student speech as government speech or private speech for a determination of an alleged Establishment Clause violation.⁵³⁸ When doing so, courts must make this classification through an application of the United States Constitution and binding precedent rather than through mere *ipse dixit*. To properly apply the Establishment Clause in cases involving religious speech of students, courts cannot simply issue summary opinions of judicial fiat with no references to precedent. Unfortunately, unlike the careful, supported reasoning of the *Santa Fe* decision, the *Matthews* and *Schultz* cases featured two examples of this type of deleterious judicial fiat. To disregard a careful and measured approach to Establishment Clause cases involving the religious speech of students, like these courts did, is to perpetuate the confusion in and delegitimize this area of jurisprudence, which harms both religion and the state. Other courts should take care to avoid judicial fiat in the arena of Establishment Clause jurisprudence and should instead employ an express application of hierarchical precedent as the basis for their decisions.

⁵³⁷ See *supra* Part III.A.

⁵³⁸ This applies to all courts, as “American judges have the unique privilege—the privilege of interpreting constitutional law—at all levels of the American judicial system.” Nancy Gertner, *The Globalized District Court*, 26 U. HAW. L. REV. 351, 353 (2004).

The hierarchical precedent doctrine is an axiomatic aspect of the American judicial system.⁵³⁹ In *Hubbard v. United States*, the Court stated that, “We would have thought it self-evident that the lower courts must adhere to our precedents.”⁵⁴⁰ When lower federal and state courts are making federal constitutional decisions, they must follow the Supreme Court’s case law.⁵⁴¹ This fundamental component of jurisprudence is “a consideration grounded in formalism, or the notion that judicial decision making must adhere to formal legal rules.”⁵⁴² The alternative to this notion of hierarchical precedent would be chaos.⁵⁴³ Indeed, in countries without a hierarchical precedent doctrine, “courts may and often do change their view on the application of one law or another, and therefore jurisprudence may serve only as a guide, never as a rule.”⁵⁴⁴ Unlike these judicial systems, the American judicial system follows this doctrine, because it is “[a] government of laws[, which] means a government of rules.”⁵⁴⁵

When courts work within this system, they derive their judicial power from reasoned decision-making and not fiat.⁵⁴⁶ Reasoned judgment relies on hierarchical precedent and provides an express articulation of the application

⁵³⁹ See Caminker, *supra* note 122, at 820 (stating that “the doctrine of hierarchical precedent . . . constitutes a virtually undiscussed axiom of adjudication”); Joshua A. Douglas & Michael E. Solimine, *Precedent, Three-Judge District Courts, and the Law of Democracy*, 107 GEO. L.J. 413, 417 (2019) (“Of course, all courts must follow precedent from the Supreme Court[.]”).

⁵⁴⁰ *Hubbard v. United States*, 514 U.S. 695, 713 n.13 (1995).

⁵⁴¹ See *ASARCO Inc. v. Kadish*, 490 U.S. 605, 617 (1989) (reaffirming the requirement that state courts must follow Supreme Court precedent in interpreting the federal constitution); *Wallace v. Jaffree*, 472 U.S. 38, 47 n.26 (1985) (quoting *Hutto v. Davis*, 454 U.S. 370, 375 (1982)) (“Federal district courts and circuit courts are bound to adhere to the controlling decisions of the Supreme Court.”).

⁵⁴² Douglas & Solimine, *supra* note 539, at 441.

⁵⁴³ See Charles J. Cooper, *Stare Decisis: Precedent and Principle in Constitutional Adjudication*, 73 CORNELL L. REV. 401, 402 n.6 (1988) (stating the alternative to vertical stare decisis is “so obviously chaos”).

⁵⁴⁴ Ioan-Luca Vlad, *General Introduction, Romania*, in 6 INTERNATIONAL ENCYCLOPEDIA LAWS: FAMILY AND SUCCESSION LAW 27 (Aspen ed., 2019).

⁵⁴⁵ *Morrison v. Olson*, 487 U.S. 654, 733 (1988) (Scalia, J., dissenting).

⁵⁴⁶ See Colin Starger & Michael Bullock, *Legitimacy, Authority, and the Right to Affordable Bail*, 26 WM. & MARY BILL RTS. J. 589, 593 n.17 (2018) (“[P]ropositions that do require justification by authority are fallacious if supported only by *ipse dixit* argument.”).

of that precedent.⁵⁴⁷ Judicial fiat, or judgment that lacks reasoning, runs contrary to the core values of the hierarchical binding precedent doctrine.⁵⁴⁸

The basic translation of fiat is “let it be done.”⁵⁴⁹ Broadly defined, it is a “governmental decree or order,”⁵⁵⁰ but it has acquired a negative connotation when used in the term “judicial fiat.”⁵⁵¹ Judicial fiat has been defined in several different ways. For some, judicial fiat indicates when “courts make law by broad pronouncement rather than by narrowly deciding the cases before them.”⁵⁵² For others, judicial fiat is a criticism of courts when they “say[] too little.”⁵⁵³ Other perceptions of judicial fiat deem it to be decision-making “without definition.”⁵⁵⁴ A common understanding of judicial fiat is when a court makes a decision based on a rationale of “because the court said so,” without adequate or even “an iota of . . . interpretation or citation to legal precedent,”⁵⁵⁵ rather than based on a reasoned, articulated judgment derived from the application of binding hierarchical precedent.⁵⁵⁶

This common understanding is reflected in the criticism of judicial fiat through the “pejorative use of the phrase *ipse dixit*.”⁵⁵⁷ The basic (and

⁵⁴⁷ See Andrew C. Spiropoulos, *Just Not Who We Are: A Critique of Common Law Constitutionalism*, 54 VILL. L. REV. 181, 205–06 (2009) (stating “reliance on evolving precedent” is what makes “reasoned judgment [reasoned]—and what makes it reasoned rather than judicial fiat”).

⁵⁴⁸ See Tracey E. George, *Developing A Positive Theory of Decisionmaking of U.S. Courts of Appeals*, 58 OHIO ST. L.J. 1635, 1642–43 (1998) (discussing how the cornerstones of classical legal theory are the premise “that judicial decisions were based on logical reasoning” and an emphasis on “the primacy of rules”); Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 633–34 (1995) (“Results unaccompanied by reasons are typically castigated as deficient on precisely those grounds. In law, and often elsewhere, giving reasons is seen as a necessary condition of rationality.”).

⁵⁴⁹ *Fiat*, WEBSTER’S II NEW COLLEGE DICTIONARY 423 (3d ed. 2005) (defining fiat as “Lat., let it be done. 1. An arbitrary decree. 2. Authorization or sanction”).

⁵⁵⁰ Fiammetta Piazza, *Bitcoin in the Dark Web: A Shadow over Banking Secrecy and A Call for Global Response*, 26 S. CAL. INTERDISC. L.J. 521, 527 (2017).

⁵⁵¹ See William N. Drake, Jr., *The Common Law and the Rule of Law: An “Uncomfortable Relationship,”* 45 STETSON L. REV. 439, 448 (2016) (“[Fiat] is a term with a negative connotation of authoritarianism that long had been eschewed by our courts as inapplicable to their function in our system.”).

⁵⁵² Michael C. Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 2022 (1994).

⁵⁵³ *Id.* (emphasis omitted) (describing Justice Scalia’s perceptions of judicial fiat).

⁵⁵⁴ Malcolm J. Harkins III, *The Uneasy Relationship of Hobby Lobby, Conestoga Wood, the Affordable Care Act, and the Corporate Person: How A Historical Myth Continues to Bedevil the Legal System*, 7 ST. LOUIS U. J. HEALTH L. & POL’Y 201, 203–04 (2014).

⁵⁵⁵ *Ceausu v. Progressive Cas. Ins. Co.*, No. CV12-6254PSG(VBKx), 2013 WL 12131280, at *8 (C.D. Cal. Oct. 10, 2013).

⁵⁵⁶ See Bernard Schwartz, *“Brennan vs. Rehnquist”—Mirror Images in Constitutional Construction*, 19 OKLA. CITY U. L. REV. 213, 222 (1994) (discussing how judicial fiat disregards precedent).

⁵⁵⁷ Dorf, *supra* note 552, at 2022; see also Schauer, *supra* note 548, at 634 (“To characterize a conclusion as an *ipse dixit*—a bare assertion unsupported by reasons—is no compliment.”).

gendered) translation of *ipse dixit* is “he himself said it,”⁵⁵⁸ or in a non-gendered way, “it’s so because I say so.”⁵⁵⁹ So, *ipse dixit* is “something said but not proved.”⁵⁶⁰ It is a stated, but unproven bare, dogmatic assertion.⁵⁶¹ In its application to jurisprudence, the term “is a statement that lacks reasoning to support its conclusion but, nevertheless, must be taken as true simply because the court says so.”⁵⁶²

Criticism of judicial fiat has united people from all over the ideological spectrum. Justice Antonin Scalia argued that jurisprudence based on *ipse dixit* is dangerous and “ill-considered,”⁵⁶³ and it results in grievous harm to the Constitution.⁵⁶⁴ In *Morrison v. Olson*, he criticized such a jurisprudential example that “gutt[ed] in six quick pages devoid of textual or historical precedent for the novel principle it set forth, a carefully researched and reasoned 70-page opinion.”⁵⁶⁵ Justice John Paul Stevens criticized a plurality opinion in an Establishment Law case as judicial fiat that was “divorced from the methodology prescribed by [the Court’s] doctrine.”⁵⁶⁶ Professor Michael McConnell has argued the Framers themselves had an expectation that the evolution of their rights would not be the result of judicial fiat.⁵⁶⁷

The *Santa Fe* decision was not a decision of judicial fiat. It was the product of careful reasoning and supported analysis. It certainly did not resort to *ipse dixit*. Instead, the Court displayed a devotion to the facts of the disputed invocation policy and its limited analysis to the establishment dispute at issue.⁵⁶⁸ It “engaged in a careful, context-sensitive analysis of why, under the circumstances of this case, the school district’s argument that the football game prayers were ‘private speech’ should not be accepted.”⁵⁶⁹

⁵⁵⁸ *Ipse dixit*, BLACK’S LAW DICTIONARY 833 (7th ed. 1999).

⁵⁵⁹ Richard C. Wydick, *The Attorney-Client Privilege: Does It Really Have Life Everlasting?*, 87 KY. L.J. 1165, 1172 (1999) (providing this translation).

⁵⁶⁰ Bryan A. Garner, GARNER’S DICTIONARY OF LEGAL USAGE 482 (3d ed. 2011).

⁵⁶¹ *See id.*; *Ipse dixit*, BLACK’S LAW DICTIONARY (7th ed. 1999).

⁵⁶² Dorf, *supra* note 552, at 2022.

⁵⁶³ *Bond v. United States*, 572 U.S. 844, 881, 882 (2014) (Scalia, J., concurring).

⁵⁶⁴ *Morrison v. Olson*, 487 U.S. 654, 725–26 (1988) (Scalia, J., dissenting).

⁵⁶⁵ *Id.* at 726.

⁵⁶⁶ *Salazar v. Buono*, 559 U.S. 700, 755 (2010) (Stevens, J., dissenting).

⁵⁶⁷ *See* Michael W. McConnell, *The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin’s “Moral Reading” of the Constitution*, 65 FORDHAM L. REV. 1269, 1292 (1997) (“[T]he people who instituted the Constitution expected that their traditional rights and privileges would continue to evolve—not by judicial fiat, but by decentralized processes of legal and cultural change.”).

⁵⁶⁸ McConnell, *supra* note 517, at 706.

⁵⁶⁹ *Id.* at 707.

Conversely, there have been instances in school law when courts have issued determinations on Establishment Clause violations or on the classification question of religious student speech in a cursory, unsupported way. The *Matthews* and *Schultz* cases' sub-ten-sentence orders and opinions on core Establishment Clause issues present two prominent examples of this type of *ipse dixit* approach to school law decisions. Because Establishment Clause cases are difficult,⁵⁷⁰ future courts should avoid this approach to decision-making regarding the classification of religious student speech and the extent of the Establishment Clause's constraints on that speech. Avoiding judicial fiat in these cases is imperative to not further contribute to the confusion of this area of constitutional law. Alternative approaches create significant harms, which include the delegitimization of this area of constitutional interpretation and harms to religion and to the state.

Issuing cursory opinions by judicial fiat in school law Establishment Clause cases contributes to continued confusion in an already-confused area of law. Although "[d]istinguishing between government speech and private speech is famously difficult," when tasked to do so on a justiciable issue, courts need to engage in this endeavor through an application of precedent and reasoned judgment.⁵⁷¹ Here, the issue is not so much the endorsement of only one bright-line rule of Establishment Clause interpretation in all cases in the school law setting,⁵⁷² as that is not consistent with the pluralistic American society in which these cases arise.⁵⁷³ Instead, this argument calls on courts to provide *some* explanation when making these difficult decisions.⁵⁷⁴ "Unexplained decisions . . . encourage appeals and make it

⁵⁷⁰ See John T. Valauri, *The Concept of Neutrality in Establishment Clause Doctrine*, 48 U. PITT. L. REV. 83, 144 (1986) (discussing the difficulty in "reach[ing] principled decisions" in Establishment Clause cases).

⁵⁷¹ Christopher C. Lund, *Legislative Prayer and the Secret Costs of Religious Endorsements*, 94 MINN. L. REV. 972, 1015 (2010).

⁵⁷² See Glenn A. Phelps & John B. Gates, *The Myth of Jurisprudence: Interpretive Theory in the Constitutional Opinions of Justices Rehnquist and Brennan*, 31 SANTA CLARA L. REV. 567, 570 (1991) (arguing proper jurisprudential approaches are premised on "principled[] constitutional theories," even if they are different approaches).

⁵⁷³ See Iddo Porat, *The Dual Model of Balancing: A Model for the Proper Scope of Balancing in Constitutional Law*, 27 CARDOZO L. REV. 1393, 1402 (2006) (stating the varieties of Establishment Clause analyses exemplify a "pluralistic society[s] . . . idea that different and conflicting world-views can co-exist within it").

⁵⁷⁴ See Ronald Turner, *On Substantive Due Process and Discretionary Traditionalism*, 66 SMU L. REV. 841, 877–78 (2013) (discussing the Supreme Court's emphasis on the need for constitutional reasoning in order to have reasoned judgment).

difficult, even impossible, for the appellate court to determine whether the lower court erred.”⁵⁷⁵ Judges need to provide legal rationales for their decisions in compliance with the doctrine of hierarchical precedent to preserve basic clarity and core stability in this area of law.⁵⁷⁶

This becomes especially important when an appellate court takes up an interlocutory appeal, like the Fifth Circuit did in *Schultz*.⁵⁷⁷ This type of appellate review is “the exception, not the rule”⁵⁷⁸ and can create confusion akin to the confusion generated by Establishment Clause jurisprudence and justiciability requirements.⁵⁷⁹ Under 28 U.S.C. § 1291, federal circuit courts have jurisdiction to review “all final decisions of the district courts.”⁵⁸⁰ The courts of appeals also have jurisdiction to review trial court injunctive interlocutory orders under 28 U.S.C. § 1292(a).⁵⁸¹ Although interlocutory appeals can have beneficial effects for litigants,⁵⁸² they also “can make it more difficult for trial judges to do their basic job—supervising trial proceedings . . . [and] can threaten those proceedings with delay, adding costs and diminishing coherence.”⁵⁸³ Interlocutory review also “risks additional, and unnecessary, appellate court work.”⁵⁸⁴ Consequently, appellate courts need to take care that they are not acting in an unsupported

⁵⁷⁵ David Dyzenhaus & Michael Taggart, *Reasoned Decisions and Legal Theory*, in COMMON LAW THEORY 134, 148 (Douglas E. Edlin ed., 2007).

⁵⁷⁶ See James Bopp, Jr. & Anita Y. Woudenberg, *An Announce Clause by Any Other Name: The Unconstitutionality of Disciplining Judges Who Fail to Disqualify Themselves for Exercising Their Freedom to Speak*, 55 DRAKE L. REV. 723, 727 (2007) (discussing the need for judges to provide legal rationales in their decisions); Randy J. Kozel, *Stare Decisis in the Second-Best World*, 103 CALIF. L. REV. 1139, 1159 (2015) (linking adherence to precedent to stability within the law).

⁵⁷⁷ See *Schultz v. Medina Valley Indep. Sch. Dist.*, No. 11-50486 (5th Cir. June 3, 2011) (order granting emergency motion to the dissolve temporary restraining order and preliminary injunction).

⁵⁷⁸ *Johnson v. Jones*, 515 U.S. 304, 309 (1995).

⁵⁷⁹ Bryan Lammon, *Rules, Standards, and Experimentation in Appellate Jurisdiction*, 74 OHIO ST. L.J. 423, 423 (2013) (“This system of interlocutory appellate review is a mess; the exceptions are so many, the requirements so vague, and the judicial treatment so inconsistent that the regime is too complicated and too unpredictable.”).

⁵⁸⁰ 28 U.S.C. § 1291 (2018).

⁵⁸¹ *Id.* § 1292(a)(1) (2018) (giving federal circuit courts jurisdictional review of trial court orders “granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions” and excepting jurisdiction “where a direct review may be had in the Supreme Court”).

⁵⁸² *Johnson*, 515 U.S. at 309 (stating that interlocutory appeals “may avoid injustice by quickly correcting a trial court’s error[;] . . . can simplify, or more appropriately direct, the future course of litigation[; and] . . . can thereby reduce the burdens of future proceedings”).

⁵⁸³ *Id.*

⁵⁸⁴ *Id.*

dictatorial way in these interlocutory appeals to avoid these harms to themselves and the underlying trial courts.

Issuing cursory opinions by judicial fiat in school law Establishment Clause cases also delegitimizes constitutional interpretation in this area. Jurisprudence matters. This principle is at the core of constitutional theory.⁵⁸⁵ “[I]t is, by adhering to rules and principles in the positive law, within the constraints of practical reason as incorporated into the law and the methodology by which it is applied that judges fulfill their constitutional function of preserving and protecting the boundaries of the laws made by the people”⁵⁸⁶ The judiciary requires those who practice before it to provide reasoning based on precedent; the courts should require no less of themselves to ensure the continued legitimacy of the judicial system.⁵⁸⁷

When judges issue edicts that are not reflective of principled reasoning, it creates a subversion that implies to the American public, and in school law, to schoolchildren, that decision-making is premised on desired outcomes, rather than a reasoned application of the law. That is a perilous position for Establishment Clause jurisprudence involving the religious speech of students, as it threatens “the very authority and stability of [our] constitutional system.”⁵⁸⁸ The rule of law is constrained, in a positive way, by the requirements of consistency and transparency.⁵⁸⁹ “[T]he integrity and functionality of the [judicial] system depend[] upon the shared expectation that lawmakers and judges will play by the rules of the game, i.e., that they will follow the rules and precedents produced by the system itself”⁵⁹⁰ Things fall apart with the dissolution of these twin aims in judicial decision-making, and the avoidance of such dissolution is paramount in the area of constitutional school law. In essence, when courts issue a judicial fiat without

⁵⁸⁵ See Phelps & Gates, *supra* note 572, at 570 (“Much of the energy and passion expended on the pursuit of *the* constitutional theory is predicated on the notion that jurisprudence matters”).

⁵⁸⁶ Evelyn Keyes, *Judicial Strategy and Legal Reason*, 44 IND. L. REV. 357, 382 (2011).

⁵⁸⁷ See Michael J. Higdon, *The Legal Reader: An Exposé*, 43 N.M. L. REV. 77, 107 (2013) (“[L]egal readers expect legal support”).

⁵⁸⁸ Phelps & Gates, *supra* note 572, at 570.

⁵⁸⁹ See A. Christopher Bryant & Kimberly Breedon, *How the Prohibition on “Under-Ruling” Distorts the Judicial Function (and What to Do About It)*, 45 PEPP. L. REV. 505, 522 (2018) (discussing the problems that result from the dissolution of the “requirements of consistency and transparency” in judicial decision-making).

⁵⁹⁰ Keyes, *supra* note 586, at 382.

any supporting case law, they “sacrifice [their] legitimacy.”⁵⁹¹ As Justice Thurgood Marshall stated, it is “fidelity to precedent” that will create a public “conception of ‘the judiciary as a source of impersonal and reasoned judgments.’”⁵⁹²

Rulings by judicial fiat in this area also can suggest subjectivity in jurisprudence as a way “to secure a political, Machiavellian end.”⁵⁹³ This is dangerous decision-making, especially in the area of Establishment Clause cases involving the religious speech of students.⁵⁹⁴ Conversely, providing decisions based on articulated reasons through an application of binding precedent respects the dignitary values of the parties, “reassur[ing] the litigants that the case has been thoroughly considered by the judge and satisfies the basic human demand of those affected by judicial action to be told why.”⁵⁹⁵

It also communicates to the public positive messaging about the judicial process.⁵⁹⁶ Essentially, it “enhance[s] public confidence that a judge is not simply acting by virtue of his or her power through judicial fiat but rather through a reasoned process whereby the conclusion leading to his or her decision is transparent, logical, and reasonable.”⁵⁹⁷ Such supported reason-giving is at the core of Deweyan ideal educative philosophy, which is an appropriate ideal for courts to follow in school law jurisprudence.⁵⁹⁸ Although this requires more work and is more time-intensive, the provision of such a legal rationale in school law establishment cases is the best way for

⁵⁹¹ Adam M. Smith, *Making Itself at Home: Understanding Foreign Law in Domestic Jurisprudence: The Indian Case*, 24 BERKELEY J. INT’L L. 218, 264 (2006).

⁵⁹² *Payne v. Tennessee*, 501 U.S. 808, 852 (1991) (Marshall, J., dissenting) (quoting *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 403 (1970)).

⁵⁹³ Ellis Washington, *Natural Law Considerations of Juvenile Law*, 32 WHITTIER L. REV. 57, 102 (2010).

⁵⁹⁴ See Edwards, *supra* note 487, at 463 (describing the *Schultz* case as making the unmistakably clear point that “church-state cases are dangerous”); Christopher J. Peters, *Adjudication as Representation*, 97 COLUM. L. REV. 312, 420 (1997) (discussing the dangers of rule by judicial fiat).

⁵⁹⁵ Dyzenhaus & Taggart, *supra* note 575, at 148.

⁵⁹⁶ See Donald J. Kochan, *The “Reason-Giving” Lawyer: An Ethical, Practical, and Pedagogical Perspective*, 26 GEO. J. LEGAL ETHICS 261, 264 (2013) (stating that when people’s desire for reasons is “[u]nquenched, that thirst also leaves us unsatisfied and generally less accepting in the face of events or circumstances that are not or cannot be explained”).

⁵⁹⁷ Rosemary Barkett, *Judicial Discretion and Judicious Deliberation*, 59 FLA. L. REV. 905, 911 (2007).

⁵⁹⁸ See JOHN DEWEY, *HOW WE THINK* 27–28 (1910) (arguing the best practices of education “cultivate deep-seated and effective habits of discriminating tested beliefs from mere assertions, guesses, and opinions; . . . develop a lively, sincere, and open-minded preference for conclusions that are properly grounded, and . . . ingrain into the individual’s working habits [appropriate] methods of inquiry and reasoning”).

courts to have these rules make sense to the schoolchildren who are affected by these decisions.⁵⁹⁹

Finally, issuing cursory opinions by judicial fiat and without adequate support in school law Establishment Clause cases harms both church and state. The Establishment Clause “is primarily an equal liberty provision,”⁶⁰⁰ designed to provide protections for free exercise and against establishment. One might say that “[t]he defining paradox of the Establishment Clause is that it exists to protect the government from religion in order to protect religion from the government.”⁶⁰¹ When courts use *ipse dixit* to make determinations in cases involving the religious speech of students, they are harming both sides of Jefferson’s wall. This jurisprudential approach harms religious liberty. It harms the judiciary. It harms schoolchildren by teaching them anti-democratic principles.⁶⁰² Consequently, this type of unreasoned decision-making should be avoided in the milieu of school law.

Proper analysis of the Establishment Clause is necessary for both adherents and non-adherents to religion, especially for minors in schools.⁶⁰³ The religion clauses of the First Amendment are meant “to define the protection granted to an objector or a dissenting nonbeliever,” as well as to “protect religion from government interference.”⁶⁰⁴ James Madison was opposed to religious establishment not just because of “its effect on the minority,” but also because of a concern with “maintaining the purity and efficacy of Religion.”⁶⁰⁵ So, a failure to engage in reasoned analysis that incorporates hierarchical precedent in cases involving the religious speech of

⁵⁹⁹ See Marleen O’Connor-Felman, *American Corporate Governance and Children: Investing in Our Future Human Capital During Turbulent Times*, 77 S. CAL. L. REV. 1255, 1299 (2004) (discussing how child development theorists state the best approach for children to understand “prosocial behavior” is through a “purposive and calculated” reasoned explanation, even though this method is “more hands on, emotionally draining, and time-intensive”).

⁶⁰⁰ Ira C. Lupu, *Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion*, 140 U. PA. L. REV. 555, 568 (1991).

⁶⁰¹ Gey, *supra* note 207, at 28.

⁶⁰² See Jerry L. Mashaw, *Reasoned Administration: The European Union, the United States, and the Project of Democratic Governance*, 76 GEO. WASH. L. REV. 99, 101 (2007) (“[R]eason-giving’s most fundamental function [is] the creation of authentic democratic governance.”).

⁶⁰³ See Stanley Ingber, *Religious Children and the Inevitable Compulsion of Public Schools*, 43 CASE W. RES. L. REV. 773, 792 (1993) (stating that “[s]chools cannot avoid instilling values” in schoolchildren).

⁶⁰⁴ *Lee v. Weisman*, 505 U.S. 577, 589–90 (1992).

⁶⁰⁵ *Id.* at 590 (quoting JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS (June 20, 1785), reprinted in 8 THE PAPERS OF JAMES MADISON 1784–1786, at 301 (Robert A. Rutland et al. eds., 1973)).

students harms religious liberty, as it can signify to both religious and nonreligious children that legal matters dealing with students' religious practices or conscientious practices do not merit extended treatment and careful consideration by the judiciary.

Specifically, issuing unsupported decisions that imply that student religious exercises are of a *de minimis* character, which will receive only the court's abbreviated attention, are affronts to religion and its adherents.⁶⁰⁶ These opinions communicate a message that cases involving "[r]eligious faith, [which] is a significant component in the lives of many children, forming their identity, values, and sense of self-worth in their developing years," are cases that merit only cursory review.⁶⁰⁷ When courts issue summary dictates regarding Establishment Clause claims, that implies a potential lack of careful consideration of the matter, which can be perceived as the judiciary's lack of respect for such religious faith.

The messaging of the insignificance of minor encroachments through an *ipse dixit* opinion also harms non-adherents to religion, especially impressionable schoolchildren. Courts must ever be mindful of "both the fundamental place held by the Establishment Clause in our constitutional scheme and the myriad, subtle ways in which Establishment Clause values can be eroded."⁶⁰⁸ Claimed *de minimis* Establishment Clause violations or "minor encroachments" of that clause, if proven, are still Establishment Clause violations.⁶⁰⁹ Therefore, they require carefully reasoned judgments by courts that expressly apply hierarchical precedent. A failure to provide judgments that reflect the doctrine of hierarchical precedent can create schisms among students of different religious faiths or no religious faith, which contradicts the "vital need" that Justice Felix Frankfurter articulated in the *McColum* opinion, "to keep out divisive forces" in American schools when evaluating Establishment Clause cases.⁶¹⁰

⁶⁰⁶ See *id.* at 594 (stating the characterization of a claimed constitutional "intrusion of the religious exercise" as being "of a *de minimis* character . . . would be an affront to the rabbi who offered them and to all those for whom the prayers were an essential and profound recognition of divine authority").

⁶⁰⁷ Green, *supra* note 138, at 848.

⁶⁰⁸ *Lynch v. Donnelly*, 465 U.S. 668, 694 (1984) (O'Connor, J., concurring).

⁶⁰⁹ *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 225 (1963) ("[I]t is no defense to urge that the religious practices [at issue in Establishment Clause cases] may be relatively minor encroachments on the First Amendment.").

⁶¹⁰ *Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 231 (1948).

Issuing decisions via judicial fiat in school law cases can also harm the structures in which constitutional judicial decision-making is seated. The practical and legal harms that can occur because of such a jurisprudential approach are typified by the events that transpired in the *Schultz* case after the issuance of the Fifth Circuit's eight-sentence opinion.⁶¹¹ After that opinion, the federal district judge who entered the initial TRO and his staff were threatened with death and bodily assault.⁶¹² It does not seem like a stretch beyond reason that the Fifth Circuit's cursory opinion contributed to a public perception of a lack of legitimacy of the trial court's initial order granting the request for injunctive relief at the high school graduation. A perception of a lack of legitimacy in judicial decision-making can lead to public resistance to that judicial act.⁶¹³

Issuing decisions via judicial fiat in school law cases also teaches anti-democratic principles to children and runs contrary to the Supreme Court's ideology in the area of school law Establishment Clause cases.⁶¹⁴ The Court has emphasized how vital its school law Establishment Clause jurisprudence is because "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."⁶¹⁵ In order for children "to become self-fulfilling, self-sustaining adults who can contribute to the civic community,"⁶¹⁶ state institutions, like the courts, need to model the ways to best achieve this maturation. Consequently, courts need to function in a way that best represents the core ideals of our civic democracy through supported judicial reasoning and not *ipse dixit*. As Professor Glen Staszewski has stated, "[i]n a true democracy, citizens are ordinarily entitled to a more meaningful explanation for the official exercise of coercive

⁶¹¹ See *supra* Part III.B.

⁶¹² See *supra* Part III.B.

⁶¹³ See Kochan, *supra* note 596, at 267–68 (“[R]eason-giving demands a check of power and helps the governed determine whether those in power are acting within their constraints [T]his helps to engender a more democratic relationship with the giver and receiver. Reasons add legitimacy and deviations from given reasons tend to call action into question.”).

⁶¹⁴ See David Schimmel, *Studying the Massachusetts Goodridge Decision on Same-Sex Marriage as an Antidote to Mutual Misunderstanding and a Lesson in Civics and Law*, 2011 BYU EDUC. & L.J. 495, 512 (2011) (arguing that “thoughtful and wise decision-making” is necessary “in our pluralistic constitutional democracy”).

⁶¹⁵ *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) (quoting *Shelton v. Tucker*, 364 U.S. 479, 487 (1960)).

⁶¹⁶ Rodney J. Blackman, *Showing the Fly the Way Out of the Fly-Bottle: Making Sense of the First Amendment Religion Clauses*, 42 U. KAN. L. REV. 285, 350 (1994).

authority.”⁶¹⁷ This applies with equal if not more resonant force for the requisite judicial reason-giving to schoolchildren when a court is making a decision regarding the religious speech of students and the Establishment Clause, given that “[t]he public school is at once the symbol of our democracy and the most pervasive means for promoting our common destiny.”⁶¹⁸ Consequently, religious student speech in the public school context presents “unique circumstances” that require cautious and careful judicial scrutiny in the area of Establishment Clause jurisprudence.⁶¹⁹ If courts are to teach democratic principles to impressionable schoolchildren in this area of law,⁶²⁰ courts must avoid a judicial fiat approach.

A legal judgment regarding a case that alleges a violation of the Establishment Clause based on the religious speech of students requires adherence to the hierarchical precedent doctrine and express articulation of the same. The application of the Establishment Clause “requires interpretation of a delicate sort.”⁶²¹ When courts are making determinations on Establishment Clause claims in the context of religious student speech, they need to provide that delicate and careful interpretation through an express and supported application of Supreme Court precedent. This is the only way for this area of jurisprudence to begin to find some much needed clarity, to retain its legitimacy, to protect against state and religious harms, and to ensure American schoolchildren have sufficient safeguards through more than “mere platitudes.”⁶²² Although “Establishment Clause cases . . . stir deep feelings[] and we are divided among ourselves,” courts must take these cases head-on when there is justiciability to do so and accord them the proper reasoned analysis that our nation and our schoolchildren deserve.⁶²³

⁶¹⁷ Glen Staszewski, *Reason-Giving and Accountability*, 93 MINN. L. REV. 1253, 1286 (2009).

⁶¹⁸ *Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 231 (1948).

⁶¹⁹ See *Lee v. Weisman*, 505 U.S. 577, 596–97 (1992) (highlighting the differences of Establishment Clause cases that arise in “the public school context” versus other environments); *Lynch v. Donnelly*, 465 U.S. 668, 694 (1984) (O’Connor, J., concurring) (“Every government practice must be judged in its unique circumstances to determine whether it constitutes an endorsement or disapproval of religion.”).

⁶²⁰ See *Edwards v. Aguillard*, 482 U.S. 578, 583–84 (1987) (discussing students’ impressionability); *Lemon v. Kurtzman*, 403 U.S. 602, 616 (1971) (emphasizing “the impressionable age of the pupils, in primary schools particularly”).

⁶²¹ *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 226 (1963).

⁶²² *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943).

⁶²³ *Comm. for Pub. Educ. & Religious Liberty v. Regan*, 444 U.S. 646, 662 (1980).

CONCLUSION

The Establishment Clause seeks to prevent division along religious lines.⁶²⁴ Yet, the interpretation of this clause has created expansive divisiveness.⁶²⁵ Arguably, this jurisprudence is fractured to the point where “diversity and multiplicity in Establishment Clause doctrine are endemic and ineradicable.”⁶²⁶ It is possible that no other area of constitutional jurisprudence is quite as complex.⁶²⁷ Given the fluidity of Establishment Clause jurisprudence,⁶²⁸ it is hard to find a coherent theory within this doctrine.⁶²⁹ This has created rampant controversy among scholars and jurists as to how courts should approach these cases. Although some of this discussion has been polemical,⁶³⁰ most of this division is simply a reflection of the seemingly inconsistent nature of First Amendment jurisprudence.⁶³¹ Indeed, it almost seems that every Establishment Clause case should begin with the Walrus’s speech in Lewis Carroll’s *Through the Looking Glass and What*

⁶²⁴ *Town of Greece v. Galloway*, 572 U.S. 565, 577 (2014) (articulating this core purpose of the Establishment Clause).

⁶²⁵ See NUSSBAUM, *supra* note 16, at 227 (“Recent Establishment Clause cases look like a mess. The proliferation of standards and distinctions is perplexing even to scholars.”); Shari Seidman Diamond & Andrew Koppelman, *Measured Endorsement*, 60 MD. L. REV. 713, 713 (2001) (discussing the lack of “unified Establishment Clause doctrine”).

⁶²⁶ Fallon, *supra* note 12, at 72.

⁶²⁷ See Gary C. Leedes, *Rediscovering the Link Between the Establishment Clause and the Fourteenth Amendment: The Citizenship Declaration*, 26 IND. L. REV. 469, 471–72 (1993) (citing Rex Lee, *The Religion Clauses: Problems and Prospects*, 1986 BYU L. REV. 337, 338 (1986)) (“A former United States Solicitor General rates the doctrinal coherence of the Supreme Court’s Establishment Clause cases on a scale of one to ten as between ‘zero’ and ‘less than zero.’”).

⁶²⁸ See *Lemon v. Kurtzman*, 403 U.S. 602, 614 (1971) (stating the Establishment Clause creates “a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship”).

⁶²⁹ See Samuel D. Brunson, *Dear IRS, It Is Time to Enforce the Campaigning Prohibition. Even Against Churches*, 87 U. COLO. L. REV. 143, 189 (2016) (deeming the “Supreme Court’s Establishment Clause jurisprudence . . . largely incoherent”).

⁶³⁰ See Nelson Tebbe, *Religion and Social Coherency*, 91 NOTRE DAME L. REV. 363, 372 (2015) (discussing harsh cross-critiques of Establishment Clause scholarship).

⁶³¹ See, e.g., Richard Albert, *Religion in the New Republic*, 67 LA. L. REV. 1, 4 (2006) (arguing that Establishment Clause doctrine “is more properly viewed as an evolving product of the continuing public constitutional discourse among Americans and between public and private forces about the proper role of religion in the American polity”); Steven D. Smith, *Discourse in the Dusk: The Twilight of Religious Freedom?*, 122 HARV. L. REV. 1869, 1870–72, 1893, 1905–06 (2009) (reviewing 2 KENT GREENAWALT, *RELIGION AND THE CONSTITUTION: ESTABLISHMENT AND FAIRNESS* (2008)) (criticizing an alternate interpretation of the Establishment Clause, but then excusing it, “not so much [as] an individual failure[, but rather as] a reflection of the current condition of the tradition”).

Alice Found There: “‘The time has come,’ the Walrus said, ‘To talk of many things: Of shoes—and ships—and sealing-wax—Of cabbages—and kings—And why the sea is boiling hot—And whether pigs have wings.’”⁶³² Yet, there is at least one point of consensus in this confusion and division,⁶³³ which even the Supreme Court admitted in a school law case: “Establishment Clause cases are not easy.”⁶³⁴

Much of the Court’s establishment doctrine in the area of education remains inconsistent, unclear, and disputed.⁶³⁵ Despite this division and confusion, courts have an obligation to attempt to decipher that doctrine when evaluating student religious speech constitutional claims when there is justiciability to do so and, if so, through the application of the rule of law and pursuant to binding precedent. This is the only way to clarify the muddy waters of this area of school law.⁶³⁶

A failure to do so constitutes judicial error, and it results in exponential jurisprudential and practical harms. One needs to look only to the *Matthews* and *Schultz* cases’ judicial approaches to the Establishment Clause’s applicability to student religious speech to see the harms of advisory opinions and opinions by judicial fiat. An advisory opinion or *ipse dixit* approach to these cases contributes to the continued confusion of school law Establishment Clause jurisprudence; delegitimizes constitutional interpretation in this area; allows possible end runs around the Establishment Clause; harms religious liberty; harms the administration of the judicial system; and teaches anti-democratic principles to citizens and

⁶³² LEWIS CARROLL, THROUGH THE LOOKING-GLASS AND WHAT ALICE FOUND THERE, in THE ANNOTATED ALICE: THE DEFINITIVE EDITION 129, 185 (Martin Gardner ed., W.W. Norton & Co. 2000) (1872).

⁶³³ See Steven G. Gey, *Life After the Establishment Clause*, 110 W. VA. L. REV. 1, 35 (2007) (“Commentators and jurists on all sides of the debate about the proper scope of the Establishment Clause have long agreed that Establishment Clause doctrine is a chaotic and contradictory mess.”); Mary Ann Glendon, *Law, Communities, and the Religious Freedom Language of the Constitution*, 60 GEO. WASH. L. REV. 672, 674 (1992) (stating “the Supreme Court’s Religion Clause case law has reached the point where it is described on all sides as confused, inconsistent, and incoherent.”).

⁶³⁴ Comm. for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646, 662 (1980).

⁶³⁵ See Kevin T. Baine, *Education Litigation: Prospects for Change*, 35 CATH. LAW. 283, 287 (1994) (concluding “the Supreme Court has decided a series of [Establishment Clause] education cases that, read together, simply defy comprehension”); Thomas C. Berg, *Vouchers and Religious Schools: The New Constitutional Questions*, 72 U. CIN. L. REV. 151, 193 (2003) (“[D]isputes over religion in the public schools . . . at graduation and other school events . . . are highly divisive and emotional. . .”).

⁶³⁶ See Lund, *supra* note 571, at 1020 (“The problem, however, is that the distinction between governmental and private speech gets muddy in the middle. . .”).

schoolchildren. Courts that have disregarded the core principles of justiciability and hierarchical precedent have confusingly converted school law Establishment Clause jurisprudence into a sword that harms religion and the state, rather than preserving it as the shield that it was meant to be for both parts of the axiomatic Jeffersonian principle.⁶³⁷ These injurious jurisprudential practices must stop. Ensuring justiciability and avoiding judicial fiat are the mechanisms to do so.

⁶³⁷ See JEFFERSON, *supra* note 60, at 113 (“Believing with you that religion is a matter which lies solely between man and his God; that he owes account to none other for his faith or his worship; that the legislative powers of the government reach actions only, and not opinions,—I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should ‘make no law respecting an establishment of religion or prohibiting the free exercise thereof,’ thus building a wall of separation between church and State.”).