NO. _____

In the
Supreme Court of the United States

JONATHAN MORGAN, by and through his parents and legal guardians, DOUG MORGAN and ROBIN MORGAN, AND STEPHANIE M. VERSHER, by and through her parent and legal guardian, SHERRIE VERSHER,

Petitioners,

v.

LYNN SWANSON, in her individual capacity and as Principal of Thomas Elementary School, AND JACKIE BOMCHILL, in her individual capacity and as Principal of Rasor Elementary School,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Although some aspects of the law governing student speech are uncertain, one lodestar has always been clear: private, non-curricular student speech may not be discriminated against solely on the basis of its religious viewpoint. The complaint here alleges just such explicit viewpoint discrimination. A student who wanted to distribute two pencils along with a birthday brownie was told that the pencil with the secular message was permissible, but the pencil with the religious message was verboten. Indeed, distribution of the latter was forbidden even outside the school and after school hours. In another incident, one of the Respondents allegedly allowed a student to include any gift in his holiday "goodie bag," as long as religious messages were excluded. A unanimous panel of the Fifth Circuit recognized that when such explicit viewpoint discrimination is alleged, qualified immunity provides no defense. A badly-splintered *en banc* court agreed that the conduct alleged violated the First Amendment, but nonetheless refused to recognize the relevant principles as clearly established. The questions presented are:

1. Whether it is clearly established that private non-curricular student speech may not be discriminated against solely on the basis of its religious viewpoint.

2. Whether, at a bare minimum, it is clearly established that private non-curricular student speech that takes place outside of the school and after school hours may not be discriminated against solely on the basis of its religious viewpoint.

PARTIES TO THE PROCEEDINGS

Petitioners, Jonathan Morgan, by and through his parents and legal guardians Doug Morgan and Robin Morgan, and Stephanie M. Versher, by and through her parent and legal guardian, Sherrie Versher, were plaintiffs-appellees in the court below. Respondents, Lynn Swanson, in her individual capacity and as Principal of Thomas Elementary School, and Jackie Bomchill, in her individual capacity and as Principal of Rasor Elementary School, were defendants-appellants in the court below.

The following parties also participated in the proceedings below as plaintiffs-appellees: Doug Morgan, individually; Robin Morgan, individually; Michael and Kevin Shell, by and through their parents and legal guardians, Jim Shell and Sunny Shell; and Michaela, Bailey, and Malcolm Wade, by and through their parent and legal guardian, Christine Wade.

The following parties were defendants in the proceedings before the district court: Plano Independent School District; Lisa Long, in her individual capacity and as Principal of Wells Elementary School; Suzie Snyder, individually; John Beasley, individually; Carole Greisdorf, in her individual capacity and as the Assistant Superintendent of the Plano Independent School District; and Doug Otto, in his individual capacity and as the Superintendent of the Plano Independent School District.

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PETITION FOR CERTIORARI

Petitioners Jonathan Morgan, by and through his parents and legal guardians Doug Morgan and Robin Morgan, and Stephanie Versher, by and through her parent and legal guardian, Sherrie Versher, respectfully petition this Court for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit to review the judgment in this case.

OPINIONS BELOW

The opinion of the *en banc* United States Court of Appeals for the Fifth Circuit is reported at 659 F.3d 359 and appears at App. 1. The opinion of the Fifth Circuit panel is reported at 627 F.3d 170 and appears at App. 130. That panel opinion makes slight changes to and supersedes the initial opinion of the panel, which is reported at 610 F.3d 877. The report and recommendation of the Magistrate Judge to deny Respondents' first motion to dismiss, together with the order of the District Court adopting it, is unreported but appears at App. 177. The report and recommendation of the Magistrate Judge to deny Respondents' second motion to dismiss, together with the order of the District Court adopting it, is reported at 612 F. Supp. 2d 750 and appears at App. 160.

JURISDICTION

The initial judgment of the Fifth Circuit was entered on June 30, 2010. The revised published opinion was entered on July 1, 2010. Respondents timely requested panel rehearing and rehearing *en banc* on July 13, 2010. On November 29, 2010, the Fifth Circuit withdrew the original panel opinion,

filed a substitute opinion, with minor changes, and entered judgment. App. 130. On December 17, 2010, the Fifth Circuit granted rehearing *en banc*. App. 156. The judgment of the *en banc* Fifth Circuit was entered on September 27, 2010. App. 1. The jurisdiction of the Fifth Circuit was based upon 28 U.S.C. § 1291. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in relevant part that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof, or abridging the freedom of speech." U.S. Const. amend. I.

42 U.S.C. § 1983 provides in relevant part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

INTRODUCTION

The badly-splintered *en banc* decision below casts doubt on the one clear principle that emerges

from this Court's student speech cases: that all students, including elementary school students, have at the very least the basic First Amendment right to be free from discrimination against their private, non-curricular speech based *solely* upon its religious viewpoint. This Petition provides the Court an opportunity to reaffirm that, whatever confusion may exist about student speech doctrine, there has not been and should be no confusion that discrimination that disfavors private, non-curricular student speech solely based on its religious viewpoint is clearly and flatly prohibited. Specifically, this Petition seeks review of the *en banc* Fifth Circuit's dismissal of a complaint that pleads four incidents of blatant viewpoint discrimination. The principals of two elementary schools in Plano, Texas, prevented Jonathan Morgan and Stephanie Versher from distributing small gifts and free play tickets to classmates during non-curricular activities and at other non-curricular times solely because they contained messages expressing religious viewpoints. One of the principals even went so far as to seize pencils from Stephanie as she tried to hand them to her friends after school, outside of the school building, again solely because they bore a religious message. While a majority of the *en banc* Fifth Circuit recognized that the conduct alleged was unconstitutional, a different majority granted the principals qualified immunity despite the stark nature of the viewpoint discrimination alleged. That decision cannot be reconciled with this Court's precedents and sows confusion where there had been clarity. This Court should restore the clarity.

During the more than four decades that have passed since *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), firmly recognized that First Amendment rights are not surrendered at the schoolhouse gate, this Court has recognized some limited exceptions to the basic prohibition on viewpoint discrimination. But this Court has never abandoned the principle that it is a blatant violation of the First Amendment when government officials target speech, especially religious speech, "based on its substantive content or the message it conveys." *See, e.g.*, *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828-31 (1995); *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106-07 (2001). This Court has repeatedly rejected the now-discredited notion that a desire to avoid Establishment Clause difficulties justifies discrimination against religious speech. Nor has this Court suggested that elementary school students do not qualify for the most basic protections of the First Amendment's Free Speech Clause simply by virtue of their age.

This Court should grant the Petition and reaffirm the one clear lodestar in this murky area of the law: private, non-curricular student speech may not be discriminated against solely based on its religious viewpoint. As Judge Elrod wrote in dissent in the court below, this case "concerns conduct that 'strikes at the very heart of the First Amendment'—discrimination against student speech solely on the basis of religious viewpoint." App. 74 (quoting *Morse v. Frederick*, 551 U.S. 393, 423 (2007) (Alito, J., concurring)).

STATEMENT OF THE CASE

A. Factual Allegations of Discrimination Against Petitioners' Religious Viewpoints.

Petitioners are young members of the Christian faith with sincerely held religious beliefs—including the belief that they should share their faith with friends and others with whom they associate. App. 232-233, 236-237 (Compl. ¶¶ 6.9-6.22, 6.52-6.64). At the time this case began, they were elementary school students in Plano, Texas. The complaint pleads that the Plano Independent School District (PISD) and Respondents "have in the past, and continue in the present, to ban the distribution of religious messages by [Petitioners] and other students while on school property." It also pleads that Respondents "banned" all references and symbols of the Christian religion," including references to the celebration of Christmas. App. 247 (¶ 6.116). Respondents, other school officials, and PISD imposed these restrictions not for any pedagogical or other legitimate purpose but solely because the speech is religious in nature. They did so not only pursuant to a written policy, but also pursuant to unwritten customs and practices through which they discriminated against religious viewpoints. *See, e.g.*, App. 215, 272-273, 319 (¶¶ 1.4, 6.220-6.222, 6.452).

This Petition involves four of the specific incidents pleaded in the Complaint of discrimination against religious viewpoints at the two Plano elementary schools where Respondents were principals.

1. "The Legend of the Candy Cane" during the 2003 Thomas Elementary School winter break party.

Each year, each PISD elementary school classroom hosts a "winter break" party just before the start of the district's winter break, which coincides with Christmas. App. 238 (Compl. ¶¶ 6.66-6.67). At these parties, school officials for many years allowed the children to give each other gift bags. *Id.* These bags included gifts "with, in many instances, messages or symbols on them." App. 280 (¶ 6.247).

In 2003, classrooms in Thomas Elementary School held winter break parties. App. 261 (¶ 6.179). In his gift bags, petitioner Jonathan Morgan wanted to give his classmates candy canes and include with them a message that described the Christian origins of the candy cane. App. 262 (¶ 6.186). Jonathan's message appeared on personalized, laminated bookmark cards entitled "The Legend of the Candy Cane," which were individually addressed, "TO: [Classmate's name], FROM: Jonathan Morgan." App. 262 (¶ 6.188).

Weeks before the party, Jonathan's parents corresponded with PISD officials and met with Swanson to discuss the school district's policies and past incidents when students were not allowed to write "Merry Christmas" on greeting cards being prepared and sent by the students to nursing home residents and U.S. soldiers fighting abroad and to ask whether gifts such as Jonathan's candy canes bearing a religious viewpoint, reference, or message

would be permitted at the 2003 winter break party. App. 265-267, 268 (¶¶6.198-6.203, 6.208). The Morgans made this inquiry because in 2001 and 2002 school officials had not allowed other students to give gifts bearing religious viewpoint messages. At that time, as was the custom and practice at Thomas Elementary and in PISD schools, officials allowed only gifts that "symbolized or contained a secular phrase, message or reference" and they in fact searched for and confiscated gifts bearing religious messages. App. 244-245, 250 (¶¶ 6.103-6.108, 6.127).[1] Swanson's answer to the Morgans was "no": Students could give gifts containing "secular messages or content" but not ones that contained "any religious viewpoint or religious message." App. 274-275 (¶¶ 6.226-228).

On the day of the party, and after further exchanges of letters between the Morgans and the school district, Jonathan and his father brought the candy canes to school. They attempted once more (and unsuccessfully) to meet with Swanson and went to the classroom. App. 287 (¶ 6.282). When they arrived, Jonathan's teacher met them at the door

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[1] For example, in 2001 Swanson prevented elementary school student Michaela Wade from giving pencils to her classmates bearing the message, "Jesus is the Reason for the Season." App. 237-240, 244-246 (Compl. ¶¶ 6.65-6.81; 6.103-6.112.) Like Jonathan's winter break party gift bags, Michaela's gift bags had a sticker affixed to the exterior addressing the bag to a specific student and identify Michaela as the gift giver. App. 238 (¶ 6.71). School officials searched Michaela's bags to determine whether they contained any "religious" material and, upon finding the pencils, confiscated and banned them from school property. The only reason given for this was that the pencils expressed a "'religious' viewpoint." App. 240 (¶ 6.81).

and would not allow the gifts in. Swanson eventually arrived on the scene and told Jonathan that he could give out his candy canes but not his message cards and that he could leave the cards on a table in the school library or hand them out to his classmates "on a public sidewalk that was off of school property." App. 287-289 (¶¶ 6.283-6.291).

Jonathan was the only student in his class prohibited from distributing his gifts to the other students during the party. App. 289 (¶ 6.291). No other student was required to leave his gifts at the library. App. 288 (¶ 6.290). The only reason given by Swanson for the prohibition on Jonathan was the religious viewpoint of his gifts. App. 289 (¶ 6.292).

2. Free tickets to a church play during non-curricular times.

Respondent Jackie Bomchill took an equally restrictive approach to religious viewpoint expression by students at Rasor Elementary School, another PISD school. In January 2004, petitioner Stephanie Versher, who was then a fifth-grader, wanted to give her friends free tickets to a church play. App. 304 (Compl. ¶ 6.369). At non-curricular times, Stephanie told her friends about the play and gave tickets to those who expressed interest in attending. App. 304 (¶ 6.371). When Bomchill discovered what Stephanie had done, Bomchill instructed Stephanie's teacher to stop Stephanie and ordered that the tickets she had already distributed be confiscated and discarded. App. 305 (¶¶ 6.373–6.374). The only justification for her actions that Bomchill later gave Stephanie's mother was that the play had a religious viewpoint and other students

might disagree with that viewpoint and complain to school officials. App. 310 (¶ 6.396).

3. Pencils during a birthday party in the cafeteria.

Also in January 2004, Stephanie wanted to hand out brownies and pencils at her "half birthday" party. PISD students whose birthdays fall during the summer are permitted to hold half-birthday parties during non-curricular times, such as during lunch periods or snack breaks. App. 306 (Compl. ¶ 6.375). At these non-curricular parties, students are allowed to bring their friends and classmates snacks and gifts. These gifts—such as bookmarks, key rings, bracelets, or pencils—sometimes include printed, secular messages. App. 306 (¶¶ 6.377-6.379).

Stephanie wanted to give her friends two pencils—one said "Moon," and the other said "Jesus loves me this I know for the Bible tells me so." App. 307 (¶ 6.386). Stephanie's mother tried but was unable to meet with Bomchill on the day before the party to get approval to hand out the brownies. She therefore arrived early on the day of the party and went to Bomchill's office with the tray of brownies, each individually wrapped with one of each pencil. App. 308 (¶¶ 6.389–6.390). Bomchill instructed that Stephanie could distribute the brownies and "Moon" pencils, but not the "Jesus loves me" pencils, which were "religious" and could only be distributed "outside of the school building." App. 310, 311 (¶¶ 6.398, 6.403).

4. Pencils with friends on a sidewalk after school.

After school, Stephanie began giving her friends the "Jesus loves me" pencils on the school sidewalk and lawn. App. 316 (Compl. ¶ 6.437). Bomchill grabbed her and took away one of the pencils from her friend. App. 317 (¶ 6.438). Bomchill and the head of security then approached Stephanie's mother, who had just arrived to pick up Stephanie, and accused her of intentional defiance. Even though Bomchill had previously said that Stephanie could give the pencils to her friends after school outside the school building, Bomchill now said that Stephanie could only distribute the pencils "across the street," off of PISD property, and threatened to expel Stephanie if she tried to distribute the religious tickets or pencils at any time on PISD property again. App. 317 (¶ 6.439).

5. Non-religious items and materials that do not express a religious viewpoint.

At the same time that Respondents prevented Petitioners from sharing the materials expressing their religious viewpoint, they permitted other children to distribute secular materials, including those containing non-religious messages, on school property. App. 274-275, 306-307 (Compl. ¶¶ 6.227-6.228, 6.379-6.380). Nor did the Plano school district prevent "the usual distribution of secular materials that occurs between students when they are on school property." App. 283 (¶ 6.263). Instead, "as a matter of custom, practice and tradition, students have in the past and continue in the present to

exchange with each other materials—cards, notes, tickets, pens, pads, gifts—and other materials during the school day and while on school property without application by the PISD of its 'information table' only policy." *Id.*

B. The Proceedings Below.

1. On December 15, 2004, Petitioners and their parents, together with two other families, filed this lawsuit alleging constitutional violations, including the violations of the Free Speech Clause at issue on this Petition. On December 16, 2004, the district court granted a temporary restraining order and enjoined PISD, Swanson, and Bomchill from "interfering with or prohibiting . . . students from distributing religious viewpoint gifts to classmates at the December 17, 2004 'winter break' parties" and from "committing any acts calculated to cause students to feel embarrassed, uncomfortable, or fearful because of a student's exercise of a legal right." R. 440–441 (Dkt. 7).[2]

After Petitioners amended the complaint, Swanson moved to dismiss based on qualified immunity grounds. R. 976 (Dkt. 30). In her motion, Swanson attempted to dispute the allegations in the complaint by submitting an affidavit describing her "knowledge" about and "understanding" of the allegations in the complaint and describing her "view and experience" concerning winter parties at Thomas Elementary School. R. 1000–1005.

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[2] "R." refers to the Fifth Circuit Record on Appeal and "Dkt." to the docket entry in the District Court.

On March 22, 2007, the District Court adopted the report and recommendation of the Magistrate Judge rejecting Swanson's claim to qualified immunity at the pleading stage based upon the allegations in the complaint, and not the proffered affidavits. App. 175. Accepting as true the allegations in the complaint that Swanson prevented Jonathan from distributing his "Legend of the Candy Cane" gift solely because of its religious viewpoint, the court concluded that Swanson had violated Jonathan's Free Speech rights. The court also rejected Swanson's argument that the right was not clearly established because Jonathan's distribution of the gift potentially causes school officials to violate the Establishment Clause. App.202, 208 (Report & Recommendation of the Magistrate Judge (Feb. 20, 2007)). Emphasizing the motion to dismiss posture, the court concluded that "[t]aking the facts as Plaintiffs have alleged them to be true, Establishment Clause concerns do not muddy the waters as to the clearly established law in this circuit prohibiting viewpoint discrimination." *Id.*

On August 18, 2005, Petitioners (with the other plaintiffs) amended the complaint a second time. Swanson moved again to dismiss on grounds of qualified immunity, and this time Bomchill did so as well.[3] Perhaps recognizing that the prohibition against viewpoint discrimination generally is clearly established, Respondents contended that "the First

[3] PISD, on Bomchill's behalf, had earlier moved to dismiss the complaint against her only on the ground that service upon her had been defective. The district court denied the motion. *See* R. 1104, 3243 (Dkts. 33, 107).

Amendment Free Speech protections either do not apply in elementary schools or else do not apply to viewpoint discrimination against religious speech in elementary schools." R. 3555 (Dkt. 173).

On March 30, 2009, the District Court once again rejected those arguments. The court found the Establishment Clause argument to be particularly specious with respect to Bomchill's confrontation with Stephanie outside of the school, concluding that "handing out pencils with a religious message, especially after school hours, does not rise to such speech as that should be proscribed through state interference or would raise a red flag for any reasonable administrator trying to walk the 'Establishment Clause tightrope.'" App. 170 (Report & Recommendation of the Magistrate Judge (Nov. 4, 2008)). Respondents appealed.

2. On June 30, 2010, a unanimous panel of the Fifth Circuit affirmed.[4] On appeal, Respondents' principal argument was that "the First Amendment does not apply to elementary school students" or at a minimum its application to elementary school students is not clearly established. App. 130. The panel emphatically rejected that extreme position, concluding that "it has been clear for over half a century that the First Amendment protects elementary school students from religious-viewpoint discrimination" and noting that Respondents could "point to no case stating that elementary school students are without protection under the First Amendment from religious-viewpoint discrimination,

[4] As noted, the panel opinion was slightly revised on November 29, 2010.

absent evidence of disruption to the classroom or subversion of educational mission." App. 84, 154.

The panel also rejected the argument that the scope of elementary school students' basic Free Speech rights is made unclear by confusion over this Court's decisions establishing exceptions to the *Tinker* rule or those applying the Establishment Clause in the school context. The Establishment Clause argument in particular, the panel concluded, "borders on the frivolous" and is a "red herring" because the complaint "provides no indication, whatsoever, that the student speech was anything other than non-disruptive, non-curricular student-to-student speech, and no facts pleaded suggest that the speech bears the imprimatur of the public schools or that any students were confused as to the source of the speech." App. 155 (n.15).

As the district court did, the panel emphasized that Respondents are asserting qualified immunity in this case on a motion to dismiss. The allegations in the complaint therefore must be accepted as true, and the court's analysis was necessarily limited to assessing whether "under the facts pleaded here" the right is clearly established. App. 142.

3. On July 13, 2010 Respondents sought and the Fifth Circuit later granted rehearing *en banc*. App. 156. On September 27, 2011, a badly-splintered *en banc* Fifth Circuit reversed, with one majority opinion holding that Respondents' alleged conduct violated Jonathan's and Stephanie's First Amendment rights, and a different majority concluding those First Amendment rights were not clearly established "because existing precedent failed

to place the constitutionality of [Respondents'] conduct 'beyond debate.'" App. 57. The appeal was decided with two majority opinions and multiple concurring opinions, and over a vigorous dissent by Judge Elrod on the qualified immunity issue.

On the issue of whether Respondents violated Jonathan's and Stephanie's First Amendment rights, Judge Elrod wrote for the majority. Invoking *Tinker*, and consistent with this Court's long-standing and clearly established proscription against religious-viewpoint discrimination, *see, e.g.*, *Rosenberger*, 515 U.S. at 828-31; *Good News*, 533 U.S. at 106-07, the court concluded that the First Amendment "protects all students from viewpoint discrimination against private, non-disruptive, student-to-student speech" and that Respondents' "alleged conduct—discriminating against student speech solely on the basis of religious viewpoint—is unconstitutional." App. 109. The court rejected Respondents' argument that the exception to *Tinker*'s rule for school-sponsored is applicable, *see Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988), concluding that the private student speech identified in the complaint "is neither actually nor 'arguably' school-sponsored." App. 100. The court below also rejected Respondents' alternative argument that viewpoint discrimination was necessary "in order to avoid an Establishment Clause violation" because the complaint alleges only private speech endorsing religion, not government speech. App. 99.

On the qualified immunity issue, however, the court concluded (with Judge Benavides writing for a different majority) that Respondents are entitled to

qualified immunity "because clearly established law did not put the constitutionality of their actions beyond debate." App. 17. According to the court below, neither this Court nor the Fifth Circuit has expressly extended "*Tinker*-based speech rights" into public elementary schools and at least two courts of appeals have "expressly doubted" whether those rights are available. App. 30 In addition, the court deemed it unclear under this Court's precedents when the *Hazelwood* exception for school sponsored-speech applies (the court described it as a separate "rule" rather than an exception to *Tinker*) and when viewpoint-based discrimination can be justified by the government's desire to avoid an Establishment Clause violation. App. 25-29, 36-40.

4. In her dissent from the court's qualified immunity decision, Judge Elrod, joined in full by four other Judges and in part by a fifth, reasoned that the qualified immunity was not available at the pleading stage in this case because "*Tinker* clearly established that viewpoint discrimination against non-disruptive student speech on school property violates the First Amendment rights of students" and the "idea that students have the right to be free from viewpoint discrimination at school is not subject to reasonable debate, and has not been for more than four decades." App. 111. Judge Elrod also rejected what she described as Respondents' "last ditch" arguments that they were "confused" by the decisions of other circuit courts of appeals applying the *Hazelwood* school-sponsored speech exception and the Establishment Clause. App. 113. Finally, Judge Elrod specifically addressed the four incidents alleged in the complaint and explained that Swanson

and Bomchill had "fair warning" that their conduct during each incident constituted impermissible viewpoint discrimination. App. 119-123.

REASONS FOR GRANTING THE PETITION

The *en banc* Fifth Circuit has sowed confusion as to the one aspect of this Court's student speech jurisprudence that is beyond debate: school officials cannot discriminate against private, non-curricular speech solely on the basis of its religious viewpoint. There may be difficult questions about disruptive speech, drug-related speech, or when the school's own speech implicates the Establishment Clause. But one thing is not difficult: when the only thing that causes speech to be treated differently—one pencil allowed, the other forbidden, even outside the school and after school hours—is its religious viewpoint, the Constitution is violated. Both the badly splintered nature of the decision and its bottom line suggest that this bedrock principle is not clearly established. That is wrong. Only this Court can restore clarity to this critical and recurring question.

I. THE *EN BANC* FIFTH CIRCUIT'S QUALIFIED IMMUNITY DECISION CONFLICTS WITH THIS COURT'S PRECEDENTS AND SOWS CONFUSION WHERE THERE WAS, AND AGAIN SHOULD BE, CLARITY.

This case warrants review because the qualified immunity decision below conflicts with the law clearly established by this Court and long-recognized by other courts of appeals and introduces intolerable

confusion into an area of Free Speech Clause jurisprudence where clarity once prevailed.

A. The Qualified Immunity Decision Below Conflicts With This Court's Precedents Clearly Establishing Elementary School Students' Right to be Free From Religious-Viewpoint Discrimination.

1. Last Term, this Court explained that "[a] Government official's conduct violates clearly established law when, at the time of the challenged conduct, '[t]he contours of [a] right [are] sufficiently clear' that every 'reasonable official would have understood that what he is doing violates that right.'" *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2083 (2011). A "case directly on point" is not required; rather, the "existing precedent must have placed the statutory or constitutional question beyond debate." *Id.*

The court below concluded that the law is unclear concerning whether and when elementary school officials permissibly may prohibit expressions of particular student viewpoints because neither the Supreme Court nor the Fifth Circuit "has expressly extended *Tinker*-based speech rights into the elementary-school setting" and two courts of appeals "have expressly doubted whether and to what extent *Tinker* applies to protect speech in public elementary schools." App. 30. The court concluded that this was not one of the "obvious" cases in which a "generalized rule" or general statement of the law is capable of giving "fair and clear warning" because of the "large body of oft-conflicting case law and the variety of

opinion among members of" the Fifth Circuit. App. 22. As Judge Elrod explained in her dissent, however, "it is well-settled law that elementary school students have First Amendment rights, private religious speech is fully protected, and viewpoint discrimination is prohibited in any forum." App. 110-111. This Court's precedents clearly establish each rule.

2. This Court has repeatedly made clear that "government may not regulate speech based on its substantive content or the message it conveys"; that "government regulation may not favor one speaker over another"; and that "[d]iscrimination against speech because of its message is presumed to be unconstitutional." *Rosenberger*, 515 U.S. at 828. It is also clearly established that the First Amendment violation is "all the more blatant" when "government targets not subject matter, but particular views taken by speakers on a subject." *Id.* at 829 (citing *R.A.V. v. St. Paul*, 505 U.S. 377, 391 (1992); *see also Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641–43 (1994); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983). As Judge Elrod pointed out, the Fifth Circuit itself—twice in cases involving the same school district at issue in this case, no less—has expressly recognized that "'viewpoint discrimination is a clearly established violation of the First Amendment in any forum.'" App. 111 (quoting *Chiu v. Plano Indep. Sch. Dist.*, 260 F.3d 330, 350 (5th Cir. 2001)); *see also Chiu v. Plano Indep. Sch. Dist.*, 339 F.3d 273, 280 (5th Cir. 2003).

Discrimination against religious viewpoints is no less clearly established. Indeed, this Court has

consistently denounced government discrimination against religious viewpoints, including in public schools. *See, e.g.*, *Good News Club*, 533 U.S. at 108-09 (holding that Milford's exclusion of the Good News Club based on its religious nature "is viewpoint discriminatory" and therefore violates the Free Speech Clause); *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995) ("Our precedent establishes that private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression.") (collecting cases); *Rosenberger*, 515 U.S. at 828; *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 393-94 (1993). And discrimination against religious viewpoints is if anything more powerfully felt by elementary school children. *Cf. W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 644 (1943) (Black, J., concurring) ("Neither our domestic tranquility in peace nor our martial effort in war depend on compelling little children to participate in a ceremony which ends in nothing for them but a fear of spiritual condemnation.")

3. It also has long been clearly established that students, including elementary school students, enjoy the protections of the First Amendment, including the right to be free from discrimination against their religious viewpoints. In *Barnette*, this Court recognized that the Free Speech Clause must "scrupulous[ly]" protect students in the school setting lest we "strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes" and concluded that the state could not compel elementary school

children to salute and pledge allegiance to the flag. *See Barnette*, 319 U.S. at 637, 640. The Barnett Sisters—still alive and still very much of the view that the First Amendment protects elementary school students—filed an *amicus* brief below confirming that they were in elementary school at the time of the events giving rise to this Court's landmark decision and that, as a result, the application of the First Amendment to elementary school students has been clearly established for 70 years. *See* Br. of *Amicus Curiae* Gathie Barnett Edmonds & Marie Barnett Snodgrass, at 2 (5th Cir. Sept. 4, 2009) (No. 09-40373).

And in *Tinker*, this Court declared it to have been its "unmistakable holding" "for almost 50 years" that students and teachers do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker*, 393 U.S. at 506; *see also A.M. ex rel. McAllum v. Cash*, 585 F.3d 214, 221 (5th Cir. 2009) (noting this "axiomatic" and "well-established" principle). The case, as Justice Black explained, was brought before the Court "on a petition for certiorari urging that the First and Fourteenth Amendments protect the right of school pupils to express their political views all the way 'from kindergarten through high school.'" *Tinker*, 393 U.S. at 516. Although the petitioners were high-school aged students, the students engaged in the speech at issue (*i.e.*, the wearing of arm band to protest the Vietnam war) included eight-year old Paul Tinker, an elementary school student. Nor was this Court's reasoning in *Tinker* age-specific: "In the absence of a *specific showing of constitutionally valid reasons* to regulate their

speech, students are entitled to freedom of expression of their views." *Id.* at 511 (emphasis added). Thus, this Court concluded that speech restrictions imposed solely on the basis of viewpoint (*i.e.*, opposition to the Vietnam war) would be an "obvious" violation of "the constitutional rights of students, at least if it could not be justified by a showing that the students' activities would materially and substantially disrupt the work and discipline of the school." *Id.* at 513.

This Court has since recognized that "valid reasons" for restricting student speech are present when the speech is "lewd" or "vulgar," *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 676 (1986); is "school-sponsored," *Hazelwood*, 484 U.S. at 273; or promotes drug use, *see Morse*, 551 U.S. at 410 . But these are exceptions to the generally applicable clearly established right of all students to be free from discrimination solely on the basis of viewpoint. Even if lower courts have questioned or expressed confusion over the precise scope of free speech rights for students of elementary school age, none has questioned the baseline clearly established right. As Justice Alito confirmed in his concurring opinion in *Morse*, this Court's cases "make clear that students do not 'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.'" *Morse,* 551 U.S. at 396 (quoting *Tinker,* 393 U.S. at 506); *see also Hedges v. Wauconda Cmty. Unit Sch. Dist. No. 118*, 9 F.3d 1295, 1298 (7th Cir. 1993) ("nothing in the first amendment postpones the right of religious speech until high school, or draws a line between daylight and evening hours").

Nor is there confusion from other courts of appeals in this regard. Although the court below emphasized that the Seventh and Third Circuits "have expressly doubted whether and to what extent *Tinker* applies to protect speech in public elementary schools," whatever doubt those courts harbor does not extend to the question of whether students have a clearly established right to be free from suppression of their speech solely because of its religious viewpoint. To the contrary, the Seventh Circuit stated explicitly in one of the cases relied upon by the court below that it had previously "held that religious speech cannot be suppressed *solely* because it is religious (as opposed to religious and disruptive or hurtful, etc.), a principle that makes sense in the elementary school environment." *Muller by Muller v. Jefferson Lighthouse Sch.*, 98 F.3d 1530, 1539 (1996) (emphasis added). With the decision below, the Fifth Circuit has actually diverged from these other courts.

4. Other sources available to school officials confirm that reasonable principals in Respondents' position would have understood that discrimination against the students' speech solely because it expresses a religious viewpoint is constitutionally impermissible. Beginning during the 1990s and continuing until at least 2003, the U.S. Department of Education published guidelines explaining that school officials "may not structure or administer such rules to discriminate against religious activity or speech," "schools . . . may not single out religious literature for special regulation," and "religious messages may not be singled out for suppression." *See* Religious Expression in Public Schools (May 30,

1998) http://www2.ed.gov/Speeches/08-1995/religion.html (last visited Dec. 21, 2011); Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools, 68 Fed. Reg. 9645 (Feb. 28, 2003). As Judge Elrod explained, those guidelines, together with the clear precedents of this Court and the Fifth Circuit, gave Respondents (and the PISD more generally) additional fair warning that their conduct was violating the clearly established Free Speech rights of their students. *See Hope v. Pelzer*, 536 U.S. 730, 741-42 (2002) (explaining that together with this Court's and binding circuit precedents Alabama Department of Corrections regulations and a DOJ report were capable of providing fair warning about the right to be free from the alleged cruel and unusual punishment).

B. This Court Should Clarify That Neither the *Hazelwood* Exception for School-Sponsored Speech Nor Establishment Clause Concerns Make Elementary School Students' Free Speech Rights Less Than Clearly Established.

Rather than recognize what has long been clearly established under this Court's precedents, the decision below affirmatively sows confusion where clarity had prevailed by improperly focusing upon this Court's cases involving "school-sponsored" speech and the Establishment Clause.

1. The court below first reasoned that free speech rights in the elementary school context are made unclear by "the difficult question of exactly

when *Hazelwood*'s more deferential standard" for school-sponsored speech applies and whether it applies to "students' dissemination of written religious materials in public elementary schools." App. 27. *See Hazelwood*, 484 U.S. at 271 (acknowledging "educators' authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school," all of which "may fairly be characterized as part of the school curriculum"). But that "difficult" question arises only in cases where the speech arguably is "school-sponsored" or "bear[s] the imprimatur of the school." *Id.* None of that applies here where gifts were marked as being from individual students and the viewpoint discrimination extended outside the school and outside school hours.

a. As alleged in the complaint, each of the four incidents occurred during "non-curricular" events or at other non-curricular times. Each restriction on Jonathan's and Stephanie's speech was imposed solely because of the religious viewpoint, not because the speech occurred during school sponsored activities. Accepting the allegations in the complaint as true, as must be done at this stage of the proceedings, the complaint pleads that Respondents violated the clearly established rule that school officials may not discriminate against speech solely on the basis of its religious viewpoint. The *Hazelwood* exception is not implicated by the allegations in the complaint.

As the court below concluded with Judge Elrod writing for the majority, the complaint in this case

more than adequately pleaded violations of Petitioners' right to be free from religious-viewpoint discrimination. The allegations of the complaint govern at this stage and clearly allege that every incident involved express viewpoint discrimination. Bomchill's physically stopping Stephanie from sharing pencils with her friends after school on a sidewalk is only the most egregious violation alleged. Indeed, even Judge Benavides ultimately would have held that Bomchill's actions there violated Stephanie's Free Speech rights, albeit not her clearly established Free Speech rights (since under the court's analysis, she has none). App. 52-54. And with respect to the other three incidents, this is not the proper stage for suggesting confusion as it is alleged that each occurred during "non-curricular" activities (*i.e.*, the half-birthday and winter break parties) or other non-curricular times. Based on the allegations of the complaint, *Hazelwood* cannot apply.

It is plausibly alleged in the complaint that Swanson and Bomchill discriminated against the students' speech solely on the basis of religious viewpoint, and for no other valid reason. By granting qualified immunity at the pleading stage, the Fifth Circuit both departed markedly from the other courts of appeals and ignored the allegations in the complaint.

b. Worse still, when the court below looked to the decisions of other courts of appeals to see how they "grapple with the complexities of applying *Tinker* and *Hazelwood*," App. 32, it ignored the fact that only one of those decisions resolved the applicability of *Hazelwood* on a motion to dismiss

(and it was one involving allegations nothing like the religious-viewpoint discrimination pleaded here).[5] In every other case, the court of appeals dismissed the First Amendment claim on *Hazelwood* grounds only after the development of a discovery record, and in some cases extensive injunction proceedings or bench trials.[6] Nothing in those decisions suggests that the courts were doing anything other than assessing whether the clearly established rule of *Tinker* or the clearly established rule of *Hazelwood* applied to the facts developed in those particular cases. Nothing in those decisions indicates that it is appropriate for a court of appeals to ignore, as the

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[5] *See Baxter by Baxter v. Vigo Cnty. Sch. Corp.*, 26 F.3d 728, 730 (7th Cir. 1994) (student and parent speech complaining "about grades, racism, and other unspecified policies at Lost Creek Elementary School" was not protected by the First Amendment).

[6] *See Zamecnik v. Indian Prairie Sch. Dist. No. 204*, 636 F.3d 874, 876 (7th Cir. 2011) (deciding issues on summary judgment); *Brandt v. Bd. of Educ. of City of Chi.*, 480 F.3d 460, 466 (7th Cir. 2007) (same); *Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 389 (6th Cir. 2005) (same); *Walz v. Egg Harbor Twp. Bd. of Educ.*, 342 F.3d 271, 279 (3d Cir. 2003) (same); *Bannon v. Sch. Dist. of Palm Beach Cnty.*, 387 F.3d 1208, 1214–15 (11th Cir. 2004) (same); *Walker-Serrano ex rel. Walker v. Leonard*, 325 F.3d 412, 418 (3d Cir. 2003) (same); *Peck v. Baldwinsville Cent. Sch. Dist.*, 426 F.3d 617, 628–29 (2d Cir. 2005) (same); *DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ.*, 196 F.3d 958, 968 (9th Cir. 1999) (same); *Fleming v. Jefferson Cnty. Sch. Dist.*, 298 F.3d 918, 925 (10th Cir. 2002) (deciding issues on the basis of district court findings made during injunction proceedings); *Muller*, 98 F.3d 1539 (same); *Lovell by Lovell v. Poway Unified Sch. Dist.*, 90 F.3d 367, 373 (9th Cir. 1996) (deciding issues on the basis of a bench trial record).

Fifth Circuit did here, *see* App. 25 n.52, allegations at the pleading stage that state a plausible claim of religious viewpoint discrimination pleaded in a complaint, grant qualified immunity, and short circuit the development of a factual record that might or might not permit school officials to justify or dispute the viewpoint discrimination alleged in the complaint.

2. Nor do Establishment Clause concerns diminish the clarity of elementary school students' free speech rights. The court below further reasoned that "Establishment Clause concerns add still another layer of complexity" to its analysis because this Court has left open the question of whether a state's "'interest in avoiding an Establishment Clause violation' can ever justify viewpoint discrimination" and one court of appeals has held that the Establishment Clause actually "requires educators to prohibit the distribution of religious materials in public elementary schools." App. 37. But as Judge Elrod wrote aptly on behalf of the initial panel below, Establishment Clause concerns are, in this case, a "red herring." App. 155 (n.15).

This Court has made it abundantly clear in student speech cases that the Establishment Clause demands "neutrality towards religion." *Rosenberger*, 515 U.S. at 839; *see also Lamb's Chapel*, 508 U.S. at 393–94; *Bd. of Educ. of Westside Comm. Sch. (Dist. 66) v. Mergens*, 496 U.S. 226, 248, 250 (1990) ("[T]here is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect."); *Widmar v. Vincent*, 454 U.S. 263,

274–75 (1981). *See generally* Douglas Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers,* 81 Nw. U. L. Rev. 1, 52 (1986) ("At whatever age the schools or the courts accord students freedom of secular speech, they must accord equal freedom of religious speech.") This Court has also made it clear that a (misplaced) fear that someone—even an elementary school-aged student—might misperceive that the school is endorsing religion by permitting private, student-to-student religious speech is no excuse for discriminating against that private speech *solely* because of its religious viewpoint. *See Good News Club*, 533 U.S. at 118 ("[W]e cannot say that the danger that children would misperceive the endorsement of religion is any greater than the danger that they would perceive a hostility toward the religious viewpoint if the Club were excluded from the public forum.")

The complaint in this case alleges clearly and plausibly that Swanson and Bomchill discriminated against Jonathan's and Stephanie's speech not for any pedagogical or otherwise valid reason but solely because of its religious viewpoint. *See, e.g.*, App. 240, 264, 297 (Compl. ¶¶ 6.80, 6.195, 6.337). That allegation is not conclusory. The complaint includes detail showing precisely what the content of the messages was and how it was private, student-to-student speech: Jonathan labeled his candy cane bookmarks as being from him; Stephanie's "Jesus loves me" pencils were tied to the brownies to be handed out during her half-birthday party; and, when Bomchill refused to allow Stephanie to hand out the pencils during the party, Stephanie handed

them directly to other students, after school, outside of the school building. The complaint also alleges that the only reason Swanson and Bomchill gave for excluding the speech was its religious viewpoint.

The allegation is further supported by specific factual allegations that Swanson and Bomchill singled-out religious speech and only religious speech for exclusion from school grounds—other speech was permitted—and by allegations placing each of the four incidents involving Jonathan and Stephanie into the broader context of similar actions against other students and PISD policies and practices more generally. *See, e.g.*, *id.* ¶ 6.219 ("Swanson said that students may distribute items . . . to another student while at school, but that materials that include a 'religious message' could not be distributed"); *id.* ¶ 6.227 ("'goodie' or gift bags … [are] not permitted to contain any religious viewpoint or religious message in them; but, only secular messages or content is allowed").[7]

There is thus a fundamental disconnect between the Fifth Circuit's Establishment Clause concerns and what is alleged in the complaint. No one would suggest that this Court's Establishment Clause jurisprudence is in all respects a model of clarity. But the inability of government actors to discriminate against private, non-curricular student speech based solely on its religious viewpoint is a Free Speech principle that dovetails perfectly with

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[7] *See also* App. 245, 250, 263, 269, 273, 275, 276, 283, 300, 301, 306, 312, 318, 319, 327, 331 (Compl. ¶¶ 6.103–6.105, 6.127, 6.130, 6.190, 6.211, 6.224, 6.228, 6.233, 6.263, 6.350, 6.354, 6.379, 6.410, 6.445, 6.447, 6.450, 6.452, 8.6, 10.4–10.5).

this Court's Establishment Clause jurisprudence. Many a Free Speech case has confronted a defense based on the need to avoid possible Establishment Clause violations. And each time, when the speech is private, and the discrimination is viewpoint-based, the Free Speech claim has prevailed, often by lop-sided majorities, *see, e.g.*, *Widmar*, 454 U.S. 263, 277-78, and in all events the resulting law is clearly established. Viewpoint discrimination against private, non-curricular student speech is not permitted. That much is clear. And that much is alleged in the complaint here. That should have ended this qualified immunity appeal, but unfortunately the majority below perceived ambiguity even as to this bedrock principle.

3. Finally, the Fifth Circuit's detour into the school-sponsored speech and Establishment Clause concerns pulls the court away from the purposes of the qualified immunity doctrine. Although this Court "'repeatedly [has] stressed the importance of resolving immunity questions at the earliest possible stage in litigation,'" *Pearson v. Callahan*, 555 U.S. 223, 232 (2009), it has also recognized that the "earliest possible" stage is not always the motion to dismiss stage. Qualified immunity is meant to "balance[] two important interests—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *Id.* at 231. And sometimes the need to hold public officials accountable might require that a case proceed at least to summary judgment. Indeed, precisely to protect defendants' ability to resolve qualified

immunity before trial even when claims cannot be dismissed at the pleading stage, this Court has held that a defendant may immediately appeal from a denial of qualified immunity after the denial of a motion to dismiss or after the denial of a motion for summary judgment. *See Behrens v. Pelletier*, 516 U.S. 299, 309-11 (1996); *cf. Crawford-El v. Britton*, 523 U.S. 574, 600 (1998) (stating that a "judge should give priority to discovery concerning issues that bear upon the qualified immunity defense, such as the actions that the official actually took, since that defense should be resolved as early as possible"); *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) ("Even if the plaintiff's complaint adequately alleges the commission of acts that violated clearly established law, the defendant is entitled to summary judgment if discovery fails to uncover evidence sufficient to create a genuine issue as to whether the defendant in fact committed those acts.").

Consistent with balancing the important interests at stake when an official asserts qualified immunity, the focus of a court's qualified immunity analysis necessarily differs depending upon the stage of the litigation when the defense is asserted. On a motion to dismiss, "it is the defendant's conduct *as alleged in the complaint* that is scrutinized for 'objective legal reasonableness.'" *Behrens*, 516 U.S. at 309. But on a motion for summary judgment, "the plaintiff can no longer rest on the pleadings and the court looks to the evidence before it (in the light most favorable to the plaintiff) when conducting the *Harlow* inquiry." *Id.* (citation omitted). In this case, Respondents suggested in the court below through

affidavits and argument that their discrimination was not as blatantly viewpoint-based as it appears from the complaint, and that they justifiably were confused or concerned that they would violate clearly established law concerning school-sponsored speech or endorsement of religion if they had permitted these students to hand out their gifts. But as this Court has long recognized, that sort of argument is one that must be supported by facts on summary judgment, not baldly asserted on a motion to dismiss. *See Anderson v. Creighton*, 483 U.S. 635, 646 n.6 (1987) (explaining that discovery may be necessary to resolve qualified immunity issue where no reasonable officer could have believed that the defendant's actions alleged in the complaint were lawful but the defendant contends that he engaged only in different, lawful acts).

A reasonable principal in Respondents' positions would not have believed that the discrimination alleged in the complaint against Jonathan's and Stephanie's speech solely on the basis of its religious viewpoint was lawful. It was objectively unreasonable. Indeed, Respondents implicitly acknowledged that the viewpoint discrimination alleged was a clearly established First Amendment violation by making the extreme argument that the First Amendment does not apply to elementary school students. That argument is clearly wrong, but it is the kind of argument that is at least consistent with the motion to dismiss stage. It takes the allegations as true and interjects a (wholly implausible) defense. But the arguments accepted by the Fifth Circuit are far more problematic. By granting Respondents qualified immunity based

upon ambiguities in the law concerning school-sponsored speech and the Establishment Clause that might or might not apply in this case once the facts are developed, the decision below fails to respect the procedural posture of this case and improperly tips the balance in favor of shielding school officials at the pleading stage.

II. IT IS CRITICALLY IMPORTANT FOR THIS COURT TO REAFFIRM THAT ELEMENTARY SCHOOL STUDENTS HAVE A CLEARLY ESTABLISHED RIGHT TO BE FREE FROM DISCRIMINATION AGAINST THEIR RELIGIOUS-VIEWPOINT SPEECH.

Because the *en banc* Fifth Circuit properly concluded that the religious-viewpoint discrimination alleged in the complaint violates Jonathan's and Stephanie's First Amendment rights, the prohibition against religious viewpoint discrimination will presumably be clearly established going forward for students within the Fifth Circuit. But at the very least other students nationwide—outside of Texas, Louisiana, and Mississippi—are not so fortunate. For them, the decision below will be exhibit A as to why the prohibition against viewpoint discrimination is not clearly established. This Court should not allow its own clear precedents to be undermined in this way, especially when it will affect tens of millions of students across the nation.

The erosion in the clarity of the law will be particularly pronounced in light of school administrators' understandable concerns about

being sued for alleged Establishment Clause violations. If discriminating against religious speech is the one safe harbor that avoids liability for either Free Speech or Establishment Clause violations, school officials will retreat to that safe harbor. This Court's cases teach a far different and far better lesson. The safe harbor is not viewpoint discrimination but neutrality. Avoiding discrimination in favor of religion when it comes to the school's own speech and avoiding discrimination against religious speech when it is comes to private, non-curricular speech is the clearly established path for complying with the Constitution. By suggesting that such a path is not clearly established, the decision below creates serious confusion that this Court should correct.

Indeed, long before the Fifth Circuit ruled in this case, school officials looking for an easy way out of having to explain why private religious speech is not school-sponsored-speech or violative of the Establishment Clause were already tempted simply to adopt outright prohibitions against religious speech and "throw up [their] hands, declaring that because misconceptions are possible [they] may silence [their] pupils, that the best defense against misunderstanding is censorship." *See Hedges*, 9 F.3d at 1299 (striking down a blanket prohibition on distributing religious materials on school grounds); *see also Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 214 (3d Cir. 2001) (Alito, J.). The temptation for school officials to throw up their hands or feign confusion will be even greater if this Court permits Respondents to maintain their immunity on the motion to dismiss.

It is of critical importance to students and school officials alike for this Court to reaffirm that the longstanding prohibition against religious viewpoint-based restrictions continues to apply in the nation's elementary schools. Only this Court can ensure, by reversing the judgment of the Fifth Circuit, that elementary school students' rights in at least this regard remain clearly established and capable of enforcement.

CONCLUSION

The Court should grant the Petition.

Respectfully submitted,

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