No. 11-804

# 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**

## BRIEF OF THE ARC OF DALLAS AS *AMICUS CURIAE* SUPPORTING PETITIONER

J. BRETT BUSBY
*Counsel of Record*
Bracewell & Giuliani LLP
711 Louisiana, Ste. 2300
Houston, TX 77002
(713) 223-2300
Brett.Busby@bgllp.com
*Counsel for Amicus Curiae*

## TABLE OF CONTENTS

**Page**

## TABLE OF AUTHORITIES

**Page(s)**

**CASES**

## INTEREST OF *AMICUS CURIAE*[1]

This brief is filed on behalf of The Arc of Dallas ("The Arc"), a nonprofit organization whose mission is to improve the quality of life of people with intellectual and related developmental disabilities. The Arc, formerly known as the Association for Retarded Citizens, advocates for a society and government that values, supports, and provides opportunities for individuals with intellectual disabilities. The Arc also recognizes that religious or spiritual activities can be an important aspect of life for people with intellectual disabilities. It believes that their rights to choose and practice their own expressions of spirituality, and to participate in a faith community if they choose to do so, must be honored by government and private service systems.

The Arc places particular importance on encouraging people with intellectual disabilities to engage in self-advocacy and to play a role in public policy decisions affecting them. For example, The Arc's Leadership Institute helps increase the ability of teens and young adults with intellectual disabilities to speak publicly, form their own opinions, and participate in government.

Because self-advocacy is essential to The Arc's mission, it disagrees strongly with the respondent principals' position below that the First Amendment does not give elementary school students any affirm-

---

[1] Pursuant to Rule 37.6, *amicus* certifies that no counsel for a party authored this brief in whole or in part, and that no person or party, other than *amicus* or its counsel, made a monetary contribution to the preparation or submission of this brief. Letters from the parties consenting to the filing of all *amicus* briefs are on file with the Clerk.

ative right of free speech. *See* Appellants' En Banc Br. 35. To support their position, the principals used dicta from lower court decisions to suggest that school officials may censor speech based on its viewpoint if (1) the children speaking are "very young," or (2) the children hearing the speech are "impressionable" and "unlikely to distinguish" between school-sponsored and private speech. *Id.* at 35-36, 40-41. A majority of the *en banc* Fifth Circuit relied on this dicta to conclude that the First Amendment rights of elementary school students are not clearly established. Pet. App. 29-32.

This suggestion that elementary school-age children have no free speech rights because of their young age and limited mental capacity is not only contrary to clearly established Supreme Court precedent, it sweeps far too broadly. People with intellectual disabilities are often tested to determine their "mental age," and the principals' rationale would also render the First Amendment inapplicable to speech by or directed to those of young mental age. Allowing the government to ban such speech would be a serious setback to decades of work fighting "irrational prejudice against the mentally retarded." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 450 (1985).

Moreover, there is no reason to take the radical step of depriving young citizens of First Amendment free speech rights altogether. Existing First Amendment jurisprudence already accommodates the principals' concerns by offering multiple avenues for balancing First Amendment rights against the special characteristics of the school environment. In a summary judgment motion filed after discovery, it may be that the principals could prove that they are

entitled to qualified immunity under one of those avenues. The Court should reject the Fifth Circuit's decision to sow confusion in First Amendment doctrine in order to reach that result on the pleadings.

For these reasons, The Arc urges this Court to reaffirm that the First Amendment clearly does apply to young children, and that government may not discriminate against a particular viewpoint because the speaker or the audience are young—either chronologically or intellectually.

## ARGUMENT

Because this case comes to the Court on a motion to dismiss, it must take as true the allegations that the principals banned speech by elementary school students based solely on its religious viewpoint. Pet. 5-10, 25. Viewpoint discrimination is an "egregious form" of government discrimination against speech because of "the message it conveys," and it is "presumptively unconstitutional" under the First Amendment. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828-29 (1995). It is thus beyond dispute that "viewpoint discrimination is a clearly established violation of the First Amendment in any forum." *Chiu v. Plano Indep. Sch. Dist.*, 260 F.3d 330, 350-51 (5th Cir. 2001). In the school context, for example, this Court has held that government may not engage in viewpoint discrimination against adult religious speech in an effort to avoid giving elementary school students the impression that the school endorses that speech. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001).

Given this clear constitutional prohibition, the principals and the majority below resorted to casting doubt on whether some children are "so young as not

to have affirmative speech rights" under the First Amendment at all. Appellants' En Banc Br. 35; Pet. App. 29-31. They also argue that such rights should not exist because an audience of young children is "less likely to perceive the difference between" distribution of religious material by a classmate and distribution by a school official, raising the specter of an Establishment Clause violation. Appellants' En Banc Br. 40-42; Pet. App. 32.

The Court should reject these arguments because they are contrary to clearly established law recognizing that elementary school students have First Amendment rights. This Court has never authorized the government to engage in viewpoint discrimination at all under any circumstances. Moreover, making the existence of citizens' First Amendment rights dependent on their intellectual capacity unnecessarily creates difficult line-drawing problems. It is chilling to adults with disabilities that the age and maturity of these plaintiffs informed the Fifth Circuit's conclusion that the First Amendment does not clearly forbid discrimination against their viewpoint. This Court should grant certiorari to ensure that the law remains clear that discriminating against speech solely because of its viewpoint is unconstitutional.

## I. First Amendment Free Speech Rights Are Not Age-Dependent.

The principals and the court below began their argument against the First Amendment by citing court of appeals cases recognizing that "age is a relevant factor in assessing the extent of a student's free speech rights in school." *Baxter v. Vigo County Sch. Corp.*, 26 F.3d 728, 738 (7th Cir. 1994). Yet those cases do not take the further step of holding that

young students have no such rights at all. *Id.* ("This does not mean that elementary school students are entitled to no First Amendment protection.").[2] To advance that proposition, the principals and the court below resorted to dicta, such as one judge's view that "it is unlikely that *Tinker* and its progeny apply to public elementary (or preschool) students." *Muller v. Jefferson Lighthouse Sch.*, 98 F.3d 1530, 1538 (7th Cir. 1996) (opinion of Manion, J.).[3]

The position that young children do not have First Amendment rights is contrary to this Court's precedent. During World War II, the Court made clear that the First Amendment applies to elementary school students, and it held that school authorities violated the Amendment by compelling students to salute the American flag and speak the pledge of allegiance. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). The Court reasoned that

> [t]he Fourteenth Amendment, as now applied to the States, protects the Citizen against the State itself and all of its creatures—Boards of Education not excepted. . . . That they are educating the young for citizenship is reason

---

[2] *See also Brandt v. Board of Educ.*, 480 F.3d 460, 466 (7th Cir. 2007) (declining to "go so far as to deny that eighth graders have any First Amendment rights"); *Walker-Serrano v. Leonard*, 325 F.3d 412, 417 (3d Cir. 2003) (refraining from holding "that third graders do not have First Amendment rights under *Tinker*").

[3] Even Judge Manion recognized that "we have 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*, 98 F.3d at 1538.

> for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes. (*Id.* at 637)

Then, in 1969, the Court declared it to be "the unmistakable holding of this Court for almost 50 years" that children do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Indep. Com. Sch. Dist.*, 393 U.S. 503, 506 (1969). Starting from that premise, the Court concluded that school officials violated the First Amendment by disciplining students aged 13, 15, and 16 for wearing black armbands to express disapproval of the Vietnam War. As the Court explained,

> Students in school . . . are 'persons' under our Constitution. . . . They may not be confined to expression of those sentiments that are officially approved. 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)

The Court continues to adhere to *Tinker* and to recognize that the First Amendment limits the grounds "on which in-school student speech may be regulated by state actors." *Morse v. Frederick*, 551 U.S. 393, 422 (2007) (Alito, J., concurring).[4]

---

[4] *See Ponce v. Socorro Indep. Sch. Dist.*, 508 F.3d 765, 768 (5th Cir. 2007) (recognizing Justice Alito's *Morse* concurrence as controlling).

Given this clearly established law, it is telling that the principals and the court below never attempted to explain *why* young children should have no First Amendment free speech rights. Indeed, any such attempt would likely run afoul of this Court's teaching that "[c]onstitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights." *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 74 (1976).

The principals and the court below appear to believe that some children are "so young" that they lack the mental capacity to exercise First Amendment free speech rights in a manner worthy of protection, and that the first-, third-, and fifth-graders in this case—indeed, all children ages 5 through 10—fall on the unprotected side of that line. Appellants' En Banc Br. 35; *see also* Pet. App. 30-32. For people who have experience with children of those ages, it is difficult to take seriously the notion that they lack the capacity to speak meaningfully to their friends about issues important to them, or that religion could not be one of those important issues. To the contrary, the facts alleged here—and the principals' Establishment Clause concerns (addressed below)—show that these children wanted to speak about their beliefs in non-disruptive ways despite an official atmosphere hostile to such speech. *See* Pet. 5-10. At minimum, a judgment that these students were unable to speak in a manner worthy of constitutional protection cannot be made on the pleadings.

More fundamentally, drawing lines that classify citizens according to someone's subjective judgment about whether they are sufficiently enlightened for

their speech to be protected offends our most basic constitutional sensibilities. As even the principals recognized below, such line drawing is inherently imprecise. Appellants' En Banc Br. 35-36. Moreover, it can all too easily become a stalking horse for majoritarian judgments about whether the speech in question is worthy of protection or can be freely banned—judgments that the First Amendment was intended to rule out.

Tinkering with the boundaries of the First Amendment in this way would have ramifications far beyond the school context. For example, many citizens whose intellectual capacity is limited by disability could fall on the wrong side of the principals' constitutional line, leaving them vulnerable to limits on their speech—or at minimum unsettling the law so that government actors who wish to suppress their views can claim qualified immunity. As this Court has noted, the intellectually disabled "have been subjected to a history of unfair and often grotesque mistreatment" as well as "irrational prejudice." *City of Cleburne*, 473 U.S. at 438, 450. The Arc's viewpoint that children with intellectual disabilities can lead fulfilling lives in the community instead of being shuttered away was not popular in the early twentieth century and remains unpopular in some quarters today. In addition, its viewpoint that the intellectually disabled should be able to express their spirituality may not be popular among some government workers who provide services to them.

The Arc's experience has been that free speech by the intellectually disabled has a vital role to play in fighting these conditions. This Court has agreed, reasoning that the disabled "retain their substantive constitutional rights" and can use them to combat

discrimination, thus making it unnecessary to subject governmental classifications involving intellectual disabilities to heightened scrutiny. *Id.* at 446-47.[5] This Court should not deprive the intellectually disabled of their free speech rights by adopting the principals' narrow view of the First Amendment.

Fortunately, the line drawing that the court below engaged in is not necessary. As petitioners have explained, existing First Amendment jurisprudence already accommodates the principals' concerns by giving them broad leeway to restrict certain categories of student speech, including speech that is school-sponsored or substantially disruptive. *See* Pet. 22; Appellees' En Banc Br. 24. In addition, there is no dispute that school officials may exercise greater control over the speech of younger students given the special characteristics of the elementary school environment. Appellees' En Banc Br. 30, 51. For these reasons, the Court should not hesitate to reaffirm that young citizens clearly have First Amendment free speech rights

## II. First Amendment Free Speech Rights Are Not Limited By The Capacity Of The Audience.

The second argument that the principals and the court below used against the free speech rights of elementary school children focuses not on the speaker

---

[5] *See also, e.g., Youngberg v. Romeo*, 457 U.S. 307 (1982) (holding that mentally retarded individuals had constitutionally protected liberty interests under the Due Process Clause); *Assoc. for Retarded Citizens of N.D. v. Olson*, 561 F. Supp. 473, 492 (D.N.D. 1982), *aff'd*, 713 F.2d 1384 (8th Cir 1983) ("[M]entally retarded residents possess a right to free association guaranteed under the First Amendment.").

but the audience. They contend that such rights should not exist because an audience of young children is "impressionable" and "less likely to perceive the difference between" distribution of religious material by a classmate and distribution by a school official in violation of the Establishment Clause. Appellants' En Banc Br. 40; *see also* Pet. App. 32.

Unsurprisingly, neither the principals nor the court below pointed to any Supreme Court authority for denying a speaker the protection of the First Amendment based on the capacity of the audience. On the contrary, this Court has held clearly that the Establishment Clause is not "a modified heckler's veto, in which a group's religious activity can be proscribed on the basis of what the youngest members of the audience might misperceive." *Good News Club*, 533 U.S. at 119.

Furthermore, the argument that the distribution of religious material to elementary school students is likely to make an impression on them also shows that the official hostility to religion alleged in this case is likely to make an impression. Because the pleadings do not show 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," *id.* at 118, there is no Establishment Clause violation and no reason to limit the speakers' First Amendment rights.

## CONCLUSION

For these reasons, the Court should grant the petition and hold that it is clearly established that the First Amendment guarantee of freedom of speech does apply to young children, and that government

may not discriminate against a particular viewpoint because the speaker or the audience are young.

Respectfully submitted.

J. BRETT BUSBY
*Counsel of Record*
Bracewell & Giuliani LLP
711 Louisiana, Ste. 2300
Houston, TX 77002
(713) 223-2300
Brett.Busby@bgllp.com
*Counsel for Amicus Curiae*

JANUARY 2012