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; and JACKIE BOMCHILL,
Respondents.

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

BRIEF OF *AMICI CURIAE* UNITED STATES ATTORNEYS GENERAL AND SECRETARIES OF EDUCATION SUPPORTING PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

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INTEREST OF *AMICI CURIAE*

Amici are former Attorneys General of the United States and former United States Secretaries of Education.[1]

[1] Pursuant to this Court's Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, that no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other than *amici* and its counsel made such a monetary contribution. Pursuant to this Court's Rule 37.2, counsel of record for both petitioners and

Edwin Meese III served as Attorney General from 1985 to 1988. William P. Barr served as Attorney General from 1991 to 1993. Alberto R. Gonzales served as Attorney General from 2005 to 2007. Michael B. Mukasey served as Attorney General from 2007 to 2009. William J. Bennett served as Secretary of Education from 1985 to 1988. Lamar Alexander served as Secretary of Education from 1991 to 1993, and is currently a United States Senator from Tennessee. Rod Paige served as Secretary of Education from 2001 to 2005.

As former law enforcement and educational officials, *amici* firmly believe that qualified immunity should be commonly afforded to public servants who must make split-second judgment calls to protect public safety or ensure a controlled school environment. In virtually all cases, qualified immunity should protect the conscientious constable or principal from liability. At the same time, *amici* recognize that in rare instances government officers transgress bright lines drawn by our founding document and this Court's decisions. This was such a case. In the 1990s and early 2000s, the Department of Education, in consultation with the Department of Justice, issued guidelines to public school officials nationwide, reiterating the First Amendment rights of elementary schoolchildren to express religious viewpoints. *Amici* are concerned that granting qualified immunity to principals who engage in willful viewpoint discrimination against religious speech erodes respect for the Constitution. And it undermines the time-honored mission of public schools—preparing young Americans for citizen-

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respondents were timely notified of *amici*'s intent to file this brief, and the parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

ship in a Republic where divergent views about religion and politics compete in the free market of ideas.

SUMMARY OF ARGUMENT

This case asks whether clearly established law prohibits public school officials from suppressing private non-curricular speech by elementary school students solely because it expresses a religious viewpoint. A majority of the *en banc* Fifth Circuit concluded that no such clearly established law exists, thereby affording private religious speech by elementary school students less constitutional protection than depictions of graphic violence, images of wanton animal cruelty, and nude dancing.

The immediate effect of the court of appeals' decision is to sow confusion regarding the state of clearly established law with respect to the free speech rights of elementary school students. But its implications are far broader. Left unchecked, the decision will profoundly diminish the ability of public schools to fulfill one of their most vital missions—the education of our young for citizenship—which cannot be achieved without "scrupulous protection of Constitutional freedoms of the individual." *W. Va. State Bd. of Educ.* v. *Barnette,* 319 U.S. 624, 637 (1943).

Public schools serve as laboratories for citizenship by teaching students to exercise First Amendment rights responsibly, not by teaching that the government may suppress disfavored religious or political messages. Instead of safeguarding that vital educational function, the court of appeals' decision undermines it by casting doubt on whether this Court's robust prohibition of viewpoint-based discrimination protects private non-curricular religious speech by elementary school students. By opening the door to viewpoint discrimination, the court of appeals' decision threatens to turn public schools into "enclaves of totalitarianism"—precisely what this Court warned they

must not become. *Tinker* v. *Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969).

Pure viewpoint discrimination—especially against religious speech—is an odious affront to the First Amendment. Exceptions to the First Amendment's protection against viewpoint discrimination are exceedingly narrow and historically rooted, such as obscenity or speech that advocates imminent lawless conduct. Minors and young students do not present such a traditional exception—even in highly sensitive contexts. This Court has held that minors may not be prohibited from making political donations, or from purchasing explicitly sexual and violent video games. In the school context, this Court held in *Barnette* that elementary school students enjoy First Amendment free-speech rights. Given this clearly established legal backdrop, no reasonable official could believe that elementary school students lack the core First Amendment protection against viewpoint discrimination. Students expressing peaceful religious messages are not the constitutional equivalent of obscenity purveyors or Cold War-era Communists attempting to incite immediate insurrection.

The court of appeals sidestepped this body of clearly established law by committing a number of legal errors. It misapplied the *Tinker* line of cases, wrongly questioned the applicability of First Amendment protections to elementary school students, misconstrued this Court's qualified immunity analysis, and incorrectly invoked the Establishment Clause. Taken together, these mistakes led the *en banc* majority to erroneously conclude that no clearly established law prohibits viewpoint-based discrimination in the elementary school context. This Court should grant certiorari to eliminate the confusion sown by the court of appeals' decision, and to protect the abil-

ity of public schools to act as training grounds for citizenship.

ARGUMENT

I. Public Schools Perform The Vital Task Of Training Students To Become Citizens.

Public education is about more than book learning or preparing students for employment. It provides "the very foundation of good citizenship." *Brown* v. *Bd. of Educ.*, 347 U.S. 483, 493 (1954). Public schools are charged with "awakening the child" to the values underpinning our constitutional republic. *Ibid.* Thus, classroom teachers "influence the attitudes of students toward government, the political process, and a citizen's social responsibilities," *Ambach* v. *Norwick*, 441 U.S. 68, 79 (1979), and "inculcate the habits and manners of civility." *Bethel Sch. Dist. No. 403* v. *Fraser*, 478 U.S. 675, 681 (1986). The hallmarks of a free people include tolerance and consideration of a range of divergent political and religious views. *Ibid.*

Public schools must not merely teach abstract principles of good citizenship; they must serve as controlled laboratories for students to practice responsibly their constitutional freedoms. "[S]chools must teach by example the shared values of a civilized social order." *Id.* at 683. Thus, the "process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the . . . class"; it also includes noncurricular activities that foster the prudent exercise of free speech rights. *Ibid.* This preparation for citizenship is why students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker*, 393 U.S. at 506.

This Court has long recognized the importance of public schools as laboratories of citizenship. *See*, *e.g.*,

Barnette, 319 U.S. at 637; *Ambach*, 441 U.S. at 79; *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26* v. *Pico*, 457 U.S. 853, 866–868 (1982). Indeed, "[t]he vigilant protection of constitutional freedom is nowhere more vital than in the community of American schools." *Keyishian* v. *Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967) (citing *Shelton* v. *Tucker*, 364 U.S. 479, 487 (1960)). That schools "are educating the young for citizenship is reason for scrupulous protection" of students' liberties. *Barnette,* 319 U.S. at 637.

When schools teach constitutional freedoms in theory but ignore them in practice, they "strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." *Ibid.* The "Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, [rather] than through any kind of authoritative selection." *Keyishian*, 385 U.S. at 603 (quotation marks omitted).

Access to ideas and freedom "to inquire, to study and to evaluate, to gain new maturity and understanding" about those ideas, *Sweezy* v. *N.H.*, 354 U.S. 234, 250 (1957), prepare students for "active and effective participation in [a] pluralistic, often contentious society." *Pico*, 457 U.S. at 868. Policies that unduly restrict the core constitutional freedoms essential to the development of active citizenship defeat this critical purpose of public education.

II. Public Schools Cannot Prepare Students For Responsible Citizenship While Engaging In Religious-Viewpoint Discrimination.

If school officials censor student speech based solely upon its religious content, public schools cannot fulfill their mandate to prepare students for citizenship. This is true for at least two reasons.

First, viewpoint-based suppression of religious speech interferes needlessly with students' preparation for "active and effective participation in [a] pluralistic, often contentious society." *Pico*, 457 U.S. at 868. At school, students learn to engage responsibly in protected speech with their friends and fellow citizens. Students prohibited from expressing certain religious or political viewpoints are robbed of a central training ground for citizenship. "Consciously or otherwise, teachers . . . demonstrate the appropriate form of civil discourse and political expression by their conduct and deportment in and out of class." *Fraser*, 478 U.S. at 683. If schools teach that religious topics are off-limits, students may leave school with little practice in discussing those sensitive issues with the vigorous civility required in a free and pluralistic society.

Second, allowing schools to suppress religious viewpoints would teach students a distorted and dangerous lesson on the relationship between citizen and government. Students would learn that the government favors certain viewpoints over others and that religious viewpoints are disfavored above all. They would learn to stand mute in the face of government orthodoxy, on pain of punishment by school officials. These lessons hinder the training of responsible citizens who are willing to defend the First Amendment rights of minority religions and unpopular viewpoints. They promote subservience to the government—a posture ill-befitting a United States citizen.

III. Viewpoint-Based Suppression Of Religious Speech Is Clearly Unconstitutional.

This Court has not wavered in its condemnation of viewpoint-based discrimination—especially against religious speech. This monolithic body of clearly established law provides public school officials ample warning that

acts of blatant religious-viewpoint discrimination are impermissible.

A. An official who discriminates on the sole basis of viewpoint commits the quintessential First Amendment violation. "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion." *Barnette*, 319 U.S. at 642. Consistent with that well-established principle, "the government may not regulate speech based on its substantive content or the message it conveys." *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995).

Discrimination against religious viewpoints is especially dangerous and has never been permissible. This Court's decisions outlawing religious-viewpoint discrimination consistently reject officials' attempts to invoke the school context to defend their actions. *Good News Club* v. *Milford Cent. Sch.*, 533 U.S. 98, 106–107, 113–114, 118 (2001) (religious-viewpoint discrimination unjustified against religious club for "elementary school children" that wished to meet on school grounds); *Lamb's Chapel* v. *Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 393 (1993) (public school's exclusion of religious groups from its facilities during nonschool hours was unjustified viewpoint discrimination); *Rosenberger*, 515 U.S. at 831, 839 (selecting religious viewpoints "for disfavored treatment" in funding student publications is unconstitutional "viewpoint discrimination"). The Court has likewise rejected the suggestion that otherwise permissible speech may be suppressed merely because it has an "evangelical" or proselytizing component. *Good News Club*, 533 U.S. at 112 n.4 ("[W]e see no reason to treat the Club's use of religion as something other than a viewpoint merely because of any evangelical message it conveys.").

B. Exceptions to the First Amendment's viewpoint-discrimination ban are "well defined" and "narrowly limited." *United States* v. *Stevens*, 130 S. Ct. 1577, 1584 (2010). As this Court recently reiterated: "From 1791 to the present, . . . the First Amendment has permitted restrictions upon the content of speech in *a few limited* areas, and has *never* included a freedom to disregard these *traditional limitations*." *Ibid.* (internal quotation marks omitted) (emphases added). Those "historic and traditional" exceptions are well known in the law. *Ibid;* see also *Brown* v. *Entm't Merch. Ass'n,* 131 S. Ct. 2729, 2734 (2011). The speech of elementary school students is not one of these exceptions. Indeed, the peaceful, religious speech of elementary school students bears no resemblance to such recognized exceptions as "[o]bscenity, defamation, fraud, incitement, and speech integral to criminal conduct." *Stevens*, 130 S. Ct. at 1584 (citations omitted).

Time and again, this Court has rejected attempts to create additional exceptions to the First Amendment's viewpoint-discrimination ban. Just last year, the Court protected the outrageous speech of picketers near a military funeral because the jury's underlying verdict punished speech based upon the "viewpoint of the message conveyed." *Snyder* v. *Phelps*, 131 S. Ct. 1207, 1219 (2011). The Court explained that there is "no suggestion that the speech at issue falls within one of the categorical exceptions from First Amendment protection." *Id.* at 1215 n.3.

Similarly, in *Stevens*, the Court held that depictions of animal cruelty could not be banned based on their content. 130 S. Ct. at 1585–1586. The Court declined to create a "First Amendment Free Zone" for a new category of speech. *Id.* at 1584–1586. The Court decried as "startling and dangerous" the notion of a "freewheeling au-

thority to declare new categories of speech outside the scope of the First Amendment." *Id.* at 1585–1586.

C. Under this Court's decisions, even "low value" speech cannot be suppressed on the basis of viewpoint—even if it occurs in a sensitive location or context. In *City of Renton* v. *Playtime Theatres, Inc.*, 475 U.S. 41 (1986), the Court addressed an ordinance prohibiting pornographic theatres from operating within 1,000 feet of, *inter alia*, a church or school. *Id.* at 43. Declaring that "regulations enacted for the purpose of restraining speech on the basis of its content presumptively violate the First Amendment," *id.* at 46–47, the Court upheld the ordinance only because it was "aimed not at the content of the films shown at 'adult motion picture theatres,' but rather at the secondary effects of such theatres on the surrounding community." *Id.* at 47. The Court later reaffirmed this approach, holding that even nude dancing is protected expressive conduct that cannot be regulated solely on the basis of its content. *City of Erie* v. *Pap's A.M.*, 529 U.S. 277, 289 (2000).

Even in prisons, an inmate retains all "First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system." *Pell* v. *Procunier*, 417 U.S. 817, 822 (1974). Thus the government may not suppress the speech or religious exercise of a prisoner based solely on its content or viewpoint without some rational relation to legitimate penological objectives. *Turner* v. *Safley*, 482 U.S. 78, 89–90 (1987); *Bell* v. *Wolfish*, 441 U.S. 520, 551 (1979); *Ford* v. *McGinnis*, 352 F.3d 582, 588–598 (2d Cir. 2003) (Sotomayor, J.) (conditionally denying qualified immunity to officials who prohibited prisoner from partaking of religious feast).

It is even clearer that context or setting do not justify government suppression of religious speech based solely

upon its viewpoint. In *Board of Airport Commissioners of Los Angeles* v. *Jews for Jesus, Inc.*, 482 U.S. 569 (1987), for instance, the Court unanimously invalidated a ban on "First Amendment activities" at Los Angeles International Airport, ruling for a minister who wished to proselytize and distribute religious literature. *Id.* at 572–577. The Court rejected the attempt to create a "First Amendment Free Zone," *id.* at 574, and held the regulation facially invalid even if the airport was considered a "nonpublic forum." *Id.* at 575.

D. Nor does an individual's youth justify blanket bans on particular types of speech. The Court has stated flatly that "[m]inors enjoy the protection of the First Amendment." *McConnell* v. *F.E.C.*, 540 U.S. 93, 231 (2003) (citing *Tinker*, 393 U.S. at 511–513). Applying that principle, the Court unanimously invalidated the McCain-Feingold Act's ban on political contributions by minors. *Id.* at 231–232. Despite the anti-corruption interests served by regulating direct contributions to candidates, a complete ban on one form of core political speech by minors could not be justified. *Ibid.*

Just last Term, the Court reaffirmed that a state's power to protect children from harm "does not include a free-floating power to restrict the ideas to which children may be exposed." *Brown*, 131 S. Ct. at 2736. *Brown* dealt with both "low value" speech (explicitly sexual and violent video games) *and* speech directed at children. Even under those circumstances, the Court expressly refused to "create a wholly new category of content-based regulation that is permissible only for speech directed at children." *Id.* at 2735.

In words with direct application here, the Court observed that "[i]n the absence of any precedent for state control . . . over a child's speech and religion . . . and in the absence of any justification for such control that

would satisfy strict scrutiny, *those laws must be unconstitutional*." *Id.* at 2736 n.3 (emphasis added). The Court reiterated that "minors are entitled to a significant measure of First Amendment protection, and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them." *Id.* at 2735 (quoting *Erzoznik* v. *Jacksonville*, 422 U.S. 205, 212–213 (1975)).

In light of this pervasive legal backdrop, a reasonable official could not believe it permissible to create a new First Amendment Free Zone for religious speech in elementary schools. Religious speech is at the pinnacle of the First Amendment; it certainly is not the equivalent of historical speech exceptions such as obscenity or incitement to imminent violence. Nor is an elementary school self-evidently a setting where individuals are properly stripped of the First Amendment right against viewpoint-based suppression of speech. Minors in general are not deprived of that right; nor are minors and adults when they speak on school property during nonschool hours. Nude dancing establishments near schools may not be subjected to purely content-based regulations. Even prisoners may not. The First Amendment "has never included a freedom to disregard" the "few and limited" exceptions to the prohibition against viewpoint-based discrimination, *Stevens*, 130 S. Ct. at 1584—even for sexual and violent content aimed at children. *Brown*, 131 S. Ct. at 2736. Thus, it is no surprise that three years before the acts at issue in this case, the Fifth Circuit (in a case involving the Plano Independent School District, a defendant in this case) declared "viewpoint discrimination [to be] *a clearly established violation* of the First Amendment *in any forum*," even in arguably "nonpublic forum[s]" such as schools. *Chiu* v. *Plano Indep. Sch.*

Dist., 260 F.3d 330, 350–351 (5th Cir. 2001) (emphases added).

The decision below does not confront the clearly established teaching of this Court's speech jurisprudence. Religious viewpoint discrimination is always unconstitutional unless it falls within a traditionally rooted exception to that rule. By requiring factually similar cases where courts struck down viewpoint discrimination against elementary students' religious speech, the court of appeals turned the proper inquiry on its head.

IV. Viewpoint-Based Suppression Of Elementary School Students' Religious Speech Is Clearly Unconstitutional.

This Court's student-speech case law confirms that the clearly established prohibition against religious-viewpoint discrimination applies in public elementary schools. These precedents provide a clarion warning to school officials that they may not prohibit speech solely because of its religious content, while allowing similar non-religious speech in the same setting.

A. This Court spoke clearly in *Tinker*: students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." 393 U.S. at 506. If this statement is true, it is unthinkable that school officials may violate the most fundamental protection of the First Amendment by censoring speech based solely on religious viewpoint.

While *Tinker* apparently involved older students, *Barnette* vindicated the First Amendment rights of elementary school students. See *Morgan* v. *Swanson*, 659 F.3d 359, 385–386, 403 (5th Cir. 2011) (*en banc*). Nothing in *Barnette*, *Tinker*, or their progeny suggests that elementary school students are somehow exempt from the First Amendment's core protection against viewpoint discrimination. Indeed, *Tinker* relied upon *Barnette* as

authority for extending speech rights to all students. *Tinker*, 393 U.S. at 506–507.

B. To be sure, the First Amendment rights of students in public schools "are not automatically coextensive with the rights of adults in other settings." *Fraser*, 478 U.S. at 682. They may be circumscribed "'in light of the special characteristics of the school environment.'" *Morse* v. *Frederick*, 551 U.S. 393, 397 (2007) (quoting *Tinker*, 393 U.S. at 506). But only enumerated reasons relating to the school environment—not religious viewpoint—will justify regulation of student speech.

Accordingly, public school officials may regulate student speech occurring at school when (i) officials have reason to believe that the speech will interfere substantially with the work of the school or infringe the rights of other students, *Tinker*, 393 U.S. at 513; (ii) the speech is lewd or vulgar, *Fraser*, 478 U.S. at 685; (iii) the speech bears the imprimatur of the school and the regulation is "reasonably related to legitimate pedagogical concerns," *Hazelwood Sch. Dist.* v. *Kuhlmeier*, 484 U.S. 260, 273 (1988); or (iv) the speech advocates the use of illegal narcotics. *Morse*, 551 U.S. at 409–410. Student speech outside of these narrow categories, however, is presumptively protected against the fundamental First Amendment evil of viewpoint-based suppression. See *Muller* v. *Jefferson Lighthouse Sch.*, 98 F.3d 1530, 1538 (7th Cir. 1996) ("[R]eligious speech cannot be suppressed *solely because it is religious* . . . a principle that makes sense in the elementary school environment.").

This Court's recent pronouncement in *Morse* further affirms that viewpoint-based suppression of religious speech is unconstitutional. The Court allowed suppression of the drug-promoting speech only after emphasizing that it lacked "any sort of political or religious character." *Morse*, 551 U.S. at 402–403; *id.* at 406 n.2. And the

Court strongly rejected the proposal that schools could ban all "offensive" speech because, "[a]fter all, much political and religious speech might be perceived as offensive to some." *Id.* at 409.

Likewise, in his *Morse* concurrence, Justice Alito reaffirmed *Tinker*'s ban on viewpoint discrimination as the central test for student speech and joined the majority opinion on the understanding that the school setting's "special characteristics" do not "justify any other speech restrictions" beyond the four categories outlined above. 551 U.S. at 423.

C. The courts are not alone in declaring that viewpoint-based suppression of student speech is impermissible under the First Amendment. Since 1995 the Department of Education has issued guidelines protecting students from the type of viewpoint-based discrimination that occurred here. See *Morgan*, 659 F.3d at 413 (Elrod, J., dissenting); *Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools*, 68 Fed. Reg. 9645 (Feb. 28, 2003). According to those guidelines, "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.'" *Morgan*, 659 F.3d at 413 n.29 (quoting *Secretary's Statement on Religious Expression* (May 30, 1998) http://www2.ed.gov/Speeches/08-1995/religion.html).

The Secretary of Education formulated these guidelines "in consultation with the Attorney General" and sent them at President Clinton's behest to "every public school district in America," in order "to end much of the confusion regarding religious expression in our nation's public schools." *Secretary's Statement, supra* (last vis-

ited Jan. 16, 2012). The President's preface reflects the clearly established law:

> Schools do more than train children's minds. They also help to nurture their souls by reinforcing the values they learn at home and in their communities. I believe that one of the best ways we can help out schools to do this is by supporting students' rights to voluntarily practice their religious beliefs, including prayer in schools. . . . For more than 200 years, the First Amendment has protected our religious freedom and allowed many faiths to flourish in our homes, in our work place and in our schools. Clearly understood and sensibly applied, it works.

Ibid. Indeed, the guidelines were designed to "allow school districts to avoid contentious disputes by developing a common understanding . . . that the First Amendment does in fact provide ample room for religious expression by students." *Ibid.*

The updated 2003 guidelines were issued pursuant to the No Child Left Behind Act by Secretary of Education Rod Paige. They affirm that the First Amendment "protects religious activity that is initiated by private individuals such as students." 68 Fed. Reg. at 9645 (quotation marks omitted). The guidelines state that "[a]s a condition of receiving funds under the Elementary and Secondary Education Act, a [school district] must certify in writing to its [state educational agency] that it has no policy that prevents, or otherwise denies participation in, constitutionally protected" religious speech. *Ibid.* A reasonable public school official would not ignore a directive that summarizes the clearly established law, forbids sin-

gling out religious messages for suppression, and requires a certification of compliance.

V. The Court Of Appeals' Decision Regarding Qualified Immunity Introduces Intolerable Uncertainty Concerning Students' Right To Be Free From Viewpoint Discrimination.

Misapplying this Court's precedents, a sharply divided court of appeals determined that no clearly established law barred the suppression of non-disruptive and non-curricular speech by elementary school students based solely on its religious content. The majority perceived that the law regarding student religious speech in schools is "abstruse" and "complicated," *Morgan*, 659 F.3d at 382, and requires educators to "balance broad constitutional imperatives" from this Court's "school-speech precedents, the general prohibition on viewpoint discrimination, and the murky waters of the Establishment Clause," *id.* at 371.

Far from uncovering complexity, the majority's decision needlessly creates it. This Court's precedents speak with a clear and unified voice: Viewpoint discrimination is virtually always impermissible, regardless of the forum and regardless of the age of the speaker, absent some historically rooted exception. By finding confusion where none existed before, the court of appeals' decision undermines the protections necessary to preserve public schools as workshops in which the attributes of responsible citizenship are forged.

A. The court of appeals arrived at its qualified immunity decision through a progression of errors, all of which infected its conclusion that clearly established law did not prohibit the blatant viewpoint discrimination at issue.

First, the court found the law unclear as to whether the speech-protective *Tinker* standard or the *Hazelwood* standard for school-sponsored speech governs student

dissemination of religious materials in public elementary schools, "whether at official school parties, after school on the 'lawn or sidewalk,' or at unspecified times and in unspecified places during the school day." *Morgan*, 659 F.3d at 376. No reasonable school official would believe that *Hazelwood* applies so broadly. Unlike *Tinker*, which "addresses educators' ability to silence a student's personal expression that happens to occur on the school premises," *Hazelwood* concerns educators' authority to regulate speech that "students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school." *Hazelwood*, 484 U.S. at 271. Such imprimatur-bearing speech is considered part of the "school curriculum," provided that it is "supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences." *Ibid.*

The speech at issue here was that of individual grade-school students during non-curricular activities, without the guidance or direction of school officials. In particular, Stephanie Versher's distribution of free play tickets to a handful of friends during non-curricular times and her distribution of "Jesus loves me" pencils to friends while standing *outside* the school building *after* the school day are far afield from *Hazelwood*. If those activities were governed by *Hazelwood*, then that case's rule for school-sponsored speech would overwhelm the *Tinker* rule for pure student speech, and students' protection against viewpoint discrimination would be a nullity. That is clearly not the law, and no reasonable school official could believe otherwise.[2]

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[2] The court of appeals' holding that *Hazelwood* arguably applies was the linchpin of its qualified-immunity analysis. The court used that holding to conclude that there is "no categorical ban on viewpoint

B. Second, the court of appeals erred when it held that "*Tinker's* application in the elementary-school context has never been clearly established." *Morgan*, 659 F.3d at 377. The upshot of this statement is that a reasonable school official could conclude that public elementary schools—but not middle or high schools—constitute a First Amendment-free island on which school officials may engage in viewpoint-based discrimination with impunity. That result is absurd.

The court of appeals asked the wrong question. *Tinker* merely recognized that the constitutional ban on viewpoint discrimination applies in schools (unless it is overcome by the need to quell disruption). Thus, the right question is not whether *Tinker* is clearly established *in elementary schools*, but whether a reasonable official could believe that elementary schools are a unique exception to the powerful constitutional ban on viewpoint discrimination against religious speech. Given the strength and all-but-universal application of that rule, no reasonable official could conclude that elementary schools constitute an enclave where the rule does not apply. Religious speech in elementary school is not the type of historically-suppressed, always-valueless expression, such as obscenity or criminal incitement, that can be banned on the basis of viewpoint. It would likewise be unreasonable to conclude that elementary school students speaking from religious viewpoints enjoy *less* pro-

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discrimination in public schools," noting that "[a] split exists among the Circuits" on the question whether *Hazelwood* requires viewpoint neutrality with respect to speech that bears the imprimatur of the school. *Morgan*, 659 F.3d at 379 (quotation omitted). This Court need not consider whether *Hazelwood* permits schools to engage in viewpoint discrimination with respect to school-sponsored speech because no reasonable school official would believe that *Hazelwood* governs the non-curricular speech at issue here.

tection than prisoners, nude dancers, minors purchasing violent video games, and minors making political contributions. Nor is religious speech inherently inconsistent with the school environment, unlike the lewd speech in *Fraser* or the drug-promoting speech in *Morse*. Indeed, the court of appeals did not even attempt to justify the principals' actions on that basis.

"[T]he First Amendment has permitted restrictions upon the content of speech" only "in *a few limited areas*, and [it] has *never* included a freedom to disregard *these traditional limitations*." *Stevens*, 130 S. Ct. at 1584 (emphases added). A reasonable official would not "disregard these traditional limitations" by attempting to create a novel totalitarian enclave in elementary schools that has no basis in the text or history of the First Amendment. "In the absence of any precedent for state control . . . over a child's speech and religion . . . and in the absence of any justification for such control that would satisfy strict scrutiny, *those laws must be unconstitutional*." *Brown*, 131 S. Ct. at 2736 n.3 (emphasis added). Because no such precedent existed here, the law was clearly established that principals may not suppress the speech of elementary students on the basis of religious viewpoint.

C. Third, the court of appeals erroneously applied the qualified immunity test of *Ashcroft* v. *Al-Kidd*, 131 S. Ct. 2074 (2011), to conclude that the rule against viewpoint discrimination is couched at too general a level to set clearly established law. *Morgan*, 659 F.3d at 378. While conceding that "a case directly on point" is not required for law to be clearly established, *id.* at 372, the court of appeals' analysis proceeded as if a case on point was precisely what was required, by searching for cases specifically addressing religious viewpoint-based regulation of elementary-student speech. *Id.* at 379–380. In doing so, it invoked this Court's admonition in *Al-Kidd*

"not to define clearly established law at a high level of generality." *Id.* at 372.

But the "high level of generality" with which this Court took issue in *Al-Kidd* was the exceedingly general "Fourth Amendment reasonableness" standard. 131 S. Ct. at 2080. Compared to *Al-Kidd* and *Hope* v. *Pelzer*, 536 U.S. 730 (2002), the First Amendment's prohibition against suppressing speech based solely on viewpoint is far more concrete and straightforward. Yet in *Hope*, the Court found a clearly established Eighth Amendment violation where a prisoner was handcuffed to a restraining bar for several hours. *Id.* at 733–734, 745–746. Even though no court had previously found an Eighth Amendment violation on "materially similar facts," the Court reasoned that the prison guards had "fair warning" through cases holding that "unnecessary and wanton infliction of pain . . . constitutes cruel and unusual punishment." *Id.* at 737.

The violation of established law is more striking here, where the legal standard to be applied is well-defined, and the constitutional violation is not as dependent on specific facts. The rule against viewpoint discrimination has been applied in schools and to minors generally, with no suggestion that elementary schools are exempt. This is not a case where a public official must make a judgment call against blurry constitutional lines. Indeed, given this Court's ban on viewpoint discrimination unless a historical exception can be identified, a reasonable official would not discriminate against religious speech absent some strong basis in the law—which is plainly missing here. This, then, is the "obvious case" where a legal standard "can 'clearly establish' the answer, even without a body of relevant case law" directly on point. *Brousseau* v. *Haugen*, 543 U.S. 194, 199 (2004); accord *Hope*, 536 U.S. at 740; *Al-Kidd*, 131 S. Ct. at 2083 (stating that the

law is clearly established when it is "sufficiently clear that every 'reasonable official would have understood that what he is doing violates that right'").[3]

D. Fourth, the court of appeals incorrectly thought that Establishment Clause concerns "add still another layer of complexity" to the qualified immunity analysis. *Morgan*, 659 F.3d at 380. The Establishment Clause applies only to *government speech*. *Bd. of Educ. of Westside Cmty. Schs.* v. *Mergens*, 496 U.S. 226, 250 (1990). No reasonable official could have mistaken the speech in this case—distribution of religious materials by individual elementary school students during non-curricular time—as anything other than private speech.

The court of appeals concluded that Establishment Clause concerns were present because "elementary students may misperceive neutrality toward religious speech as endorsement." *Morgan*, 659 F.3d at 381. But this Court has firmly declared that it "cannot operate . . . under the assumption that any risk that small children would perceive endorsement should counsel in favor of excluding the [private] religious activity." *Good News Club*, 533 U.S. at 119. Given this clear guidance, no reasonable principal could have detected even the shadow of an Establishment Clause violation in the private, non-curricular student speech here.[4]

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[3] The court of appeals relied on *Curry* v. *Hensiner*, 513 F.3d 570 (6th Cir. 2008), which involved a candy cane, and *Walz* v. *Egg Harbor Township Board of Education*, 342 F.3d 271 (3d Cir. 2003), which involved "Jesus" inscribed pencils. *Morgan*, 659 F.3d at 382. Those granular factual similarities are irrelevant, however, because *Curry* and *Walz* involved school-sponsored speech governed by *Hazelwood*—something no reasonable official could believe here.

[4] Neither case cited by the court of appeals is applicable. In *Peck* v. *Upshur County Board of Education*, 155 F.3d 274, 287 n.* (4th Cir. 1998), the Fourth Circuit held that a policy allowing *outside groups*

CONCLUSION

The petition should be granted.

Respectfully submitted.

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to distribute Bibles in elementary schools during the school day violated the Establishment Clause. Unlike *Peck*, this case involves non-curricular *student-to-student* speech governed by the *Tinker* standard. Similarly, *Walz* involved the distribution of gifts during an "organized classroom activity" with the involvement of the school's PTO, and thus was governed by *Hazelwood*'s test for school-sponsored speech. *Walz*, 342 F.3d at 272, 279. The student speech at issue here occurred during non-curricular time, and at least one instance occurred outside the school building and after school hours.