No. 11-804

In The
Supreme Court of the United States

JONATHAN MORGAN, et al.,

Petitioners,

v.

LYNN SWANSON, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In line with every other federal appellate court to consider the issue, a clear majority of the *en banc* Fifth Circuit held that, at the time of the events in this lawsuit, public school educators would not have violated clearly established law if they restricted the distribution of religious materials to their elementary-school students at school. The questions presented are:

1. Whether the *en banc* Fifth Circuit correctly granted qualified immunity to elementary-school principals Swanson and Bomchill when no federal court of appeals has ever denied qualified immunity to an educator in this area.

2. Whether the numerous similar and, at times, virtually identical cases from various circuits supporting qualified immunity confirm that prior precedents of this Court did not clearly establish that Swanson's and Bomchill's alleged conduct would violate the First Amendment.

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RESPONSE TO STATEMENT OF THE CASE

Petitioners allege that, in accordance with school district policy, the advice of lawyers, and the instructions of their supervisors, Swanson and Bomchill restricted the distribution of religious materials to elementary-school students on their campuses out of a concern that the distribution might result in a violation of the Establishment Clause.[1] This concern, regardless of its ultimate merit, was not accompanied by any hostility toward religion in general, or Christianity in particular. Nowhere in the complaint is there a single, fact-specific allegation which indicates that Swanson or Bomchill were hostile toward religion, toward Christians, or toward Christmas. Petitioners' complaint does not allege that Swanson or Bomchill acted out of a personal animosity toward religion. Rather, Petitioners' complaint alleges that Swanson or Bomchill were simply trying to do their job. As the district court judge in this case pointed out, "I've had several 1st Amendment cases involving the Plano School District in the past. And I know they

[1] In at least thirty-three separate paragraphs of their complaint, Petitioners allege that Swanson and Bomchill were acting pursuant to school district policy or the instructions of their supervisors. App. 225 [¶¶3.10-3.11]; 228 [¶5.9-.10]; 239 [¶6.75]; 243-46 [¶¶6.100-.102, 6.107, 6.112]; 268 [¶6.208]; 272 [¶6.217-.220]; 275-77 [¶¶6.229, 6.231, 6.234]; 290-92 [¶¶6.300-.305, 6.309]; 295-97 [¶¶6.325, 6.330, 6.337]; 311 [¶6.403]; 317-20 [¶¶6.438, 6.446, 6.452-.453]. Nowhere in Petitioners' complaint is there a single, fact-specific allegation which indicates any anti-religious animus on the part of Swanson and Bomchill.

try to follow the law, but that's not always easy." *See* Temporary Restraining Order Hearing Transcript, pp. 22 and 41.[2]

Recognizing, as they must, that their complaint contains no fact-specific allegations to indicate that either Swanson or Bomchill acted out of any personal animosity toward religion, Petitioners depart from their complaint and raise, for the first time on appeal, a new claim that Swanson and Bomchill "imposed these restrictions not for any pedagogical or other legitimate purpose but solely because the speech is religious in nature." This new factual allegation is not supported by their complaint. It was only first raised in response to Swanson's and Bomchill's request for reconsideration *en banc* before the Fifth Circuit. Petitioners cannot add new factual allegations on appeal, either before the Fifth Circuit or before this Court.

REASONS FOR DENYING THE WRIT

The only reason to grant review of this case is, as respondents explained in their conditional cross-petition, to vacate the separate majority's advisory

[2] Petitioners have also admitted that there has been a longstanding history of Plano Independent School District accommodating religion. *See* Affidavits of Plaintiffs Christine Wade ¶63 and of Sunny Shell ¶18, submitted in support of Plaintiffs' request for a temporary restraining order. R.259; R.382.

opinion on the underlying constitutional question at issue in this litigation. *See* Brief of Conditional Cross-Petitioner, *Swanson v. Morgan*, No. 11-941 (Jan. 26, 2012).[3] As Judge Benavides explained, Swanson and Bomchill are entitled to qualified immunity "because the general state of the law in this area is abstruse, complicated, and subject to great debate among jurists." App. 40. Neither a single "controlling authority" nor a "robust consensus of persuasive authority" had held that the First Amendment prohibits school principals from restricting the distribution of written religious materials in public elementary schools. *Id.* Nor had a single federal court of appeals definitively held that *Tinker*-based speech rights inhere in public elementary schools, let alone defined the scope of those rights with a high degree of particularity. *Id.*

"The many cases and the large body of literature on this set of issues demonstrate a lack of adequate guidance, which is why no federal court of appeals has ever denied qualified immunity to an educator in this area." App. 17 (quotation marks removed). The *en banc* Fifth Circuit correctly held to the uncontroversial opinion that educators such as Swanson and Bomchill are entitled to qualified immunity because the constitutional issue is not "beyond debate." *Ashcroft v. al-Kidd*, No. 10-98, 131 S. Ct. 2074, 2083 (2011).

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[3] Because the violation of *Camreta v. Greene*, No. 09-1454, 131 S. Ct. 2020 (2011), is so clear, it is likely that there would be no need for oral argument prior to vacatur.

I. Before this case, no federal appellate court had ever refused qualified immunity to an educator in these circumstances.

As the majority of the Fifth Circuit noted, when, as in this case, "educators encounter student religious speech in schools, they must balance broad constitutional imperatives from three areas of First Amendment jurisprudence: the Supreme Court's school-speech precedents, the general prohibition on viewpoint discrimination, and the murky waters of the Establishment Clause. They must maintain the delicate constitutional balance between students' free-speech rights and the Establishment Clause imperative to avoid endorsing religion." App. 57. Sympathetic to these challenges, "[n]o federal court of appeals has ever denied qualified immunity to an educator in this area. We decline the plaintiffs' request to become the first." *Id.*

Like the Fifth Circuit, the other federal circuits have regularly expressed sympathy for educators who must "navigate successfully through the poorly marked, and rapidly changing, channel between the Scylla of viewpoint discrimination and the Charybdis of violation of the Establishment Clause." *Bronx Household of Faith v. Bd. of Educ.*, 650 F.3d 30, 46 (2d Cir. 2011); *see also Wigg v. Sioux Falls Sch. Dist. 49-5*, 382 F.3d 807, 815 (8th Cir. 2004) (explaining that "we are aware that school districts . . . must tread carefully in a constitutional mine field of Establishment Clause, Free Speech Clause and Free Exercise Clause concerns"); *Nurre v. Whitehead*, 580 F.3d

1087, 1090 (9th Cir. 2009) (describing the "delicate balance between protecting a student's right to speak freely and necessary actions taken by school administrators to avoid collision with the Establishment Clause); *cf. Morse v. Frederick*, 551 U.S. 393, 427 (2007) (Breyer, J., concurring) (affirming that "[t]eachers are neither lawyers nor police officers; and the law should not demand that they fully understand the intricacies of our First Amendment jurisprudence").

The Fifth Circuit's grant of immunity in this case reflected not only this general sympathy but also the broad consensus that educators should not suffer personal monetary liability for making a mistake in this area of the law. No other federal court of appeals has ever refused immunity to educators in like circumstances. Even when finding that educators had, according to the stipulated facts, engaged in impermissible discrimination against religious viewpoints, judges have nonetheless acknowledged that educators should enjoy qualified immunity. *See, e.g.*, *Nurre v. Whitehead*, 580 F.3d 1087, 1099, 1102 (9th Cir. 2009) (Smith, J., concurring) (concluding that an educator had unconstitutionally prohibited student speech on the basis of religious content, and "deplor[ing] what was done in this case," but concurring that the educator should enjoy qualified immunity, for "no bright lines exist in this complex field of First Amendment law, and I sympathize with school officials, who often find themselves . . . subject to criticism and potential law suits regardless of the position they take").

Federal district judges have regularly reached the same common conclusion. For example, in *Seidman v. Paradise Valley Unified School District No. 69*, 327 F. Supp. 2d 1098 (D. Ariz. 2004), the court found that educators had practiced unconstitutional viewpoint discrimination against private religious speech in an elementary school, but granted the educators immunity because "this particular case could not fall within a murkier area of First Amendment jurisprudence," where a balance must be found between the school's authority "to protect and maintain an educational environment suitable for elementary-school children and the speaker's right to speak once the school had opened up the forum to certain forms of expression." *Id.* at 1120. *See also Curry v. Sch. Dist. of the City of Saginaw*, 452 F. Supp. 2d 723, 743 (E.D. Mich. 2006), *aff'd on other grounds, sub nom. Curry v. Hensiner*, 513 F.3d 570 (6th Cir. 2008) (finding that a school principal had engaged in impermissible viewpoint discrimination in prohibiting students' distribution of candy canes with a religious message, but granting the principal qualified immunity, because "[b]alancing obligations under the Establishment Clause and the free speech provisions of the First Amendment in this case placed the [principal] squarely upon the 'hazy border' that divides acceptable from unreasonable conduct" and that this context presents "precisely the type of case for which the qualified immunity defense was intended"); *Nurre v. Whitehead*, 520 F. Supp. 2d 1222, 1236 (W.D. Wash. 2007), *aff'd on other grounds*, 580 F.3d 1087 (9th Cir. 2009) (granting qualified immunity because "[t]his

case implicates the difficult intersection of the First Amendment's Free Speech and Establishment Clauses").

With seeming uniformity, in cases of alleged viewpoint discrimination, the federal circuits have denied educators this immunity only where the restriction was motivated not by an arguably mistaken view of the Establishment Clause, but by *official hostility* toward the disfavored viewpoint. *See, e.g.*, *Ward v. Polite*, 667 F.3d 727, 742 (6th Cir. 2012) (holding that "if the university dismissed [a graduate student] from the counseling program because of hostility to her religious speech and beliefs, that violates clearly established free-exercise and free-speech rights"); *Holloman v. Harland*, 370 F.3d 1252, 1280 (11th Cir. 2004) (holding that a teacher violated clearly established law if the teacher punished a high school student because the teacher "disagreed or was offended by what [the student] said").

In the case before this Court, according to Petitioners' own allegations, Swanson's and Bomchill's alleged conduct was motivated not by any animosity toward or disagreement with the religious message, but by obedience to school-district policy, a policy both approved by the schools' attorney and adopted to avoid conflict with the rights of other students and their parents, including their rights under the Establishment Clause. *See supra* note 1. Petitioners cite *no* case where *any* court, state or federal, has denied educators qualified immunity under such circumstances.

Therefore, in reversing the district court's decision, and granting immunity to the principals in this case, the full Fifth Circuit did not create any circuit split or cross-jurisdictional confusion. Rather, the Fifth Circuit merely corrected the district court's and panel's departure from the consensus of the federal judiciary. The consensus is that educators should not risk personal monetary liability in attempting to negotiate the difficult terrain between the Establishment and Free-Speech Clauses.

II. This consensus of the federal judiciary as to educators' qualified immunity is correct given the deep disagreement among federal judges as to three critical and relevant points of law.

In order to overcome a public official's qualified immunity, the asserted constitutional right must be so "clearly established" that a public official's violation of it shows that he or she either is "plainly incompetent" or has "knowingly violate[d] the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). The relevant law, in at least three critical respects, was simply not clearly established.

A. The law was and is unclear as to the relative scope of Establishment-Clause and free-speech rights of elementary-school children.

First, in the context of public elementary schools, it remains unclear to what extent educators either

may *or must* place special restrictions on religious speech – even religious speech by students, parents, or other private citizens. To be sure, it is "axiomatic" that the First Amendment prohibits viewpoint discrimination, including discrimination against religious viewpoints. *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819, 828 (1995). Yet as the Fifth Circuit noted below, in several cases, federal appellate courts have concluded that the Constitution permits, and sometimes even *requires*, schools to place special restrictions on private religious speech on the basis of its religious content. App. 36-38.

For example, the Third Circuit held, in *Walz v. Egg Harbor Township Schools*, 342 F.3d 271 (3d Cir. 2003), *cert. denied*, 541 U.S. 936 (2004), that an elementary-school principal could constitutionally prohibit a student from distributing religious messages via pencils and candy canes during a winter-break party. *Id.* at 280-81. The court concluded that the religious nature of the speech justified the exclusion. *Id.* at 278-79. *Walz* was decided contemporaneously with the alleged conduct in this case; indeed, according to Petitioners' own allegations, *Walz* was relied upon by the school district's attorney as legal authority supporting the school policy that the principals, in turn, faithfully implemented. App. 8-9.

A few years later, the Sixth Circuit made a comparable holding in *Curry v. Hensiner*, 513 F.3d 570 (6th Cir.), *cert. denied*, 555 U.S. 1069 (2008). In *Curry*, the court there upheld a campus principal's

decision to prohibit a fifth grade elementary-school student from distributing candy canes with an attached religious message in order to avoid offending other students and their parents. The court held that the restrictions were permissible even if there was no danger that the religious message might be perceived as school sponsored. *Id.* at 576-77 & 579.

According to the Ninth Circuit, even high school students may have their speech subject to restrictions on the basis of its religious content. In a recent case, the Ninth Circuit concluded that a school could legitimately create a limited public forum by allowing student musicians to select the music they would perform at a graduation ceremony, but prohibit the students from selecting Schubert's "Ave Maria" or any other religious piece. *Nurre v. Whitehead*, 580 F.3d 1087, 1095 (9th Cir. 2009); *but see* No. 09-671, 130 S. Ct. 1937, 1937-40 (2010) (Alito, J., dissenting from the Court's denial of cert.) (concluding that the school's restrictions amounted to impermissible "viewpoint discrimination").

A few years prior to the events (or conduct) at issue here, the Fourth Circuit held that the First Amendment *required* elementary schools to discriminate against private religious speech on the basis of its religious content. In *Peck v. Upshur County Board of Education*, 155 F.3d 274 (4th Cir. 1998), a divided panel affirmed that high schools could, consistent with the Establishment Clause, permit private groups to distribute Bibles and other religious materials to high school students in hallway displays,

because this permission was pursuant to "a neutral policy of allowing religious and nonreligious groups alike to set up such displays in the schools." *Id.* at 275. But the panel in *Peck* unanimously agreed to enjoin this type of distribution in elementary schools. *Id.* at 278 n.*. Writing for the majority, Judge Michael Luttig explained that the majority of the Supreme Court might find such distribution unconstitutional; because of "the impressionability of young elementary-age children" and their possible inability "to fully recognize and appreciate the difference between government and private speech," to permit the distribution of religious literature "could more easily be (mis)perceived as endorsement rather than as neutrality." *Id.*

Like the Fourth Circuit in *Peck*, several district courts have concluded that the Establishment Clause might require restrictions on private religious speech, on the basis of its religious content, especially in elementary schools. From 1970 to at least 2008, a Texas federal court prohibited all employees of the Houston school district – one of the largest school districts in the nation – from "permitting or allowing" anyone to distribute "religious materials in, by or through the schools of the Houston Independent School District." Order at 3-4, *Guild v. Houston Indep. Sch. Dist.*, No. 70-H-1102 (S.D. Tex. Dec. 28, 1970). In a more recent Establishment-Clause case, a Louisiana federal district court issued a similarly comprehensive injunction; the court prohibited all school personnel "from *allowing*, participating in

and/or encouraging the distribution of Bibles, *or other religious materials*, to elementary-school children [anywhere] on school property." Consent Judgment at 2, *Roe v. Tangipahoa Parish Sch. Bd.*, No. 07-2908 (E.D. La. May 28, 2008) (emphasis added).

In the case before this Court, the Petitioners attempt to discount the significance of these precedents by announcing the existence of a singular, bright "lodestar" – "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." Pet. at 4. This careful definition relies on two modifiers, "non-curricular" and "student," and thus attempts two distinctions: first, between student speech and non-student private speech (and thus distinguishing *Peck*, where the private speakers were adults) and second, between curricular and non-curricular student speech (and thus distinguishing *Walz* and *Curry*, where the student speech was arguably curricular).

The trouble with this solitary "star," even if it exists, is that it is not as bright as Petitioners suggest. Seemingly no court has identified the star. Petitioners repeat the rule over and over again in their pleading, Pet. at i, 3, 4, 17, 30, 31, but provide no citation to any judge who has defined any rule in these precise terms. This lodestar shines magnificently in Petitioners' pleading, but not in the law.

Indeed, the cases cited above simply do not support the distinctions that Petitioners so carefully

draw. In *Peck*, the court's decision to enjoin adult religious speech did not turn on the age of the speaker but on the (impressionable) age of the audience. And in *Nurre*, the student speech involved was not curricular but post-curricular – a graduation ceremony. And as indicated above, the comprehensive injunctions imposed by at least two district courts (in *Guild* and *Tangipahoa*) made neither of these distinctions.

Furthermore, these two distinctions – *student* and *non-curricular* – are particularly unclear where the speakers and audience are elementary-school students at school. The entire school day in elementary schools is arguably "curricular," given the comprehensive regulation and education of the children (e.g., in socialization). *See, e.g.*, *Walker-Serrano v. Leonard*, 325 F.3d 412, 417-18 (3d Cir. 2003) (upholding a school policy prohibiting elementary-school students from circulating a petition on the playground during recess and noting that "[e]lementary school officials will undoubtedly be able to regulate much – perhaps most – of the speech that is protected in higher grades [in order] to preserve order, to facilitate learning or social development, or to protect the interests of other students"). Indeed, in a previous ruling in this protracted litigation, a panel of the Fifth Circuit implicitly held that the term "curricular" should be given a broad meaning in the elementary-school context. *See Morgan v. Plano Indep. Sch. Dist.*, 589 F.3d 740, 747 (5th Cir. 2009) (affirming that restrictions on student speech in elementary-school

hallways and cafeterias serves a legitimate educational purpose). Moreover, the *en banc* majority opinion also noted that allegations regarding "non-curricular times" were conclusory allegations that are not entitled to the presumption of truth. App. 55 n.127.

Given the young age of both speaker and audience, it may also be unclear as to whether a student's speech is genuinely his or her own. The young speakers themselves may, as a practical matter, be serving as spokespersons for their parents or other adults. In this case, according to Petitioners' allegations, the children's parents assisted and encouraged the children's speech throughout the entire course of events. *Cf.* App. 61. Further, a young audience might tend to confuse the distinction between what is permitted and what is endorsed at school, and thus perceive (or misperceive) the student's religious speech as actually the school's.

B. The law was and is unclear as to the extent elementary-school children have a constitutionally protected affirmative right to speak in school.

Second, it remains unclear whether elementary-school children have a constitutionally protected freedom of affirmative speech at school. Forty years ago, this Court famously announced that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker*

v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969). Yet as the Fifth Circuit noted below, many courts have expressed doubts as to whether the rights of affirmative speech asserted in *Tinker* apply to elementary-school children.

The Fifth Circuit noted that "*Tinker*'s application in the elementary-school context has never been clearly established." App. 29-30. Besides the absence of any Supreme Court case on point, at least two circuit courts [the Third and Seventh Circuits] "have expressly doubted whether and to what extent *Tinker* applies" in elementary schools. *Id.* Notably, the Third Circuit has remarked that "at a certain point, a school child is so young that it might reasonably be presumed the First Amendment does not protect the kind of speech at issue here." *Walker-Serrano*, 325 F.3d at 417. Likewise, the Seventh Circuit granted qualified immunity to a principal for disciplining an elementary-school student based on the non-disruptive messages on her t-shirt, because it was not clearly established whether, and to what extent, the First Amendment protects the speech of elementary-school students. *Baxter v. Vigo County Sch. Corp.*, 26 F.3d 728, 738 (7th Cir. 1994). *See also* the authorities cited in App. 30-31 n.72.

The difficulties of applying *Tinker* beyond the facts of that decision were highlighted in this Court's most recent consideration of student speech rights, *Morse v. Frederick*. The United States, through then-Solicitor General Paul Clement, pointed out that *Tinker* does not provide sufficient guidance so as to

deny qualified immunity. In particular, *Tinker* does not provide guidance as to its application "on a more specific level," nor does it provide clear notice that the public official's "'conduct was unlawful *in the situation he confronted*.'" Brief of the United States as Amici Curiae Supporting Petitioners at 29, 551 U.S. 393 (2007) (quoting *Saucier v. Katz*, 533 U.S. 194, 200 and 202 (2001)) (emphasis added by Mr. Clement).[4] Not surprisingly, therefore, this Court would have unanimously granted qualified immunity to Principal Morse, despite the fact that she punished Frederick because of the content of his speech. *See Morse v. Frederick*, 551 U.S. 393, 431 (2007) (Breyer, J.) (Court would have unanimously granted qualified immunity). Even in the arena of high school student speech rights, it is not "axiomatic" that restrictions on student speech are always prohibited.[5]

C. The law was and is unclear as to whether "viewpoint discrimination," properly defined, requires that the restriction be motivated by animosity or hostility toward the speech in question.

Third, the law is unclear as to whether "viewpoint discrimination" occurs only where the motive

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[4] Solicitor General Paul Clement's Brief for the United States as Amicus Curiae Supporting Petitioners in *Morse v. Frederick* is available at http://www.oyez.org/node/61720 (last visited May 2, 2012).

[5] *See Morse*, 551 U.S. at 306-08 (Thomas, J.) (traditionally public school students had no affirmative speech rights at school).

for a restriction is official hostility or disagreement with a restricted message. To cite one prominent example, five years after this Court's decision in *Rosenberger* (and a year prior to the alleged misconduct here), a majority of this Court held that "[t]he principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech *because of disagreement* with the message it conveys." *Hill v. Colorado*, 530 U.S. 703, 707-10 (2000) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781 (1989) (emphasis added)). Applying this test, the Court upheld a law establishing a restricted buffer zone around abortion facilities that was plainly (though not facially) aimed at restricting anti-abortion speech; the Court affirmed that one "independent reason[ ]" for this conclusion was that the legislative history indicated that the law, although intentionally discriminatory, "was not adopted 'because of disagreement with the message.'" *Hill*, 530 U.S. at 719 (again quoting *Ward*). Justice Scalia, joined by Justice Thomas, vigorously dissented from the holding that the absence of official disagreement was decisive in the First Amendment context; he noted that while "the *principal* inquiry" is whether official disagreement was the motive – for "suppression of uncongenial ideas is the worst offense against the First Amendment – but it is not the *only* inquiry." *Id.* at 746-47 (emphasis in original).

Last term, this Court used this "disagreement" standard in defining "viewpoint discrimination." *Sorrell v. IMS Health, Inc.*, No. 10-779, 131 S. Ct.

2653, 2663-64 (2011). The Court found that a state's regulation of pharmaceutical marketing constituted "viewpoint discrimination," because the law's express purpose was to hinder marketing messages adverse to the goals of policymakers. *Id.*

III. Qualified immunity is also warranted because elementary-school educators should be permitted to exercise some degree of control over the content of written materials that are distributed to their young students.

Parents have traditionally entrusted public schools with the education of their children, but condition that trust on the understanding that the classroom will not purposefully be used to advance views that may conflict with the private beliefs of the student and his or her family. *Edwards v. Aguillard*, 482 U.S. 578, 584 (1987). Educators cannot fulfill that trust if they have no ability to restrict divisive materials from being distributed to their students. *Cf. Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 231 (1948) (Frankfurter, J.).

Educators' authority to restrict the written materials distributed to their students derives from their common law authority to act *in loco parentis*, an authority that continues to be recognized by this Court. *Vernonia Sch. Dist. 47j v. Acton*, 515 U.S. 646, 655 (1995). Despite the fact that such restrictions would affect the ability of other individuals (whether students, parents, or third-parties) to distribute

written materials to elementary-school children, such restrictions are permissible in light of the special characteristics of the elementary-school environment. *Cf. Tinker*, 393 U.S. at 506; *see also Morse*, 551 U.S. at 306-08 (Thomas, J., concurring) (traditionally public school students had no affirmative speech rights at school); *Walker-Serrano v. Leonard*, 325 F.3d 412, 416-17 (3d Cir. 2003) (school officials may impose greater restrictions on speech directed at younger children).

As numerous lower courts have recognized, elementary schools do not constitute the "marketplace of ideas" that the First Amendment was intended to protect. *See, e.g.*, *Muller v. Jefferson Lighthouse Sch.*, 98 F.3d 1530, 1539-40 (7th Cir. 1996). Elementary schools are designed to "inculcate the habits and manners of civility." *Bethel School District No. 403 v. Fraser*, 478 U.S. 675, 681 (1986). Such goals generally require some freedom to make decisions (sometimes, perhaps, incorrect decisions) regarding the content and form of communications that are appropriate in a specific environment.

Decisions regarding the appropriateness of specific restrictions on speech in elementary schools are best left to parents, teachers, and other local school district officials. Particularly in elementary schools, parents generally know their children's teachers and visit the classes. *Bd. of Educ. v. Pico*, 457 U.S. 853, 894 (1982) (Burger, C.J.). Through the election of school board members, involvement in parent-teacher associations, and numerous other

formal and informal arrangements, parents are informed and often may influence decisions of their local school board. *Id.* at 891 and 894. The school board is not a giant bureaucracy far removed from accountability for its actions; it is truly "of the people and by the people." *Id.* at 891. That is why school boards have been described as uniquely local and democratic institutions and local control of education involves democracy in a microcosm. *Id.* at 894 (Powell, J.); *Id.* at 891 (Burger, C.J.). As the United States pointed out in *Morse*, "No single tradition in public education is more deeply rooted than local control, and this case underscores the wisdom of the court's oft-expressed view that the education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges." Brief of United States, *supra* at 16-17 (citations removed).

Elementary-school educators should not be deprived of their ability to act *in loco parentis*, to carefully consider and make decisions regarding the materials that are distributed to their students at school. Parents are able to make those decisions when their children are with them. Parents should also be able to trust that teachers and administrators will be able to make those same decisions when parents entrust their young children to their local elementary school.

Swanson and Bomchill are entitled to qualified immunity because the Constitution allows elementary-school educators, like the parents whose shoes they

stand in, the broad authority to restrict, during the times they are acting *in loco parentis*, the written materials that are distributed to their young students. The conduct of the principals, even as alleged by Petitioners, did not violate our Constitution, let alone any clearly-established law.

IV. This appeal does not present a good opportunity to resolve the underlying confusion in the First Amendment case law.

This Court should, once again,[6] deny review of this case. There has been no discovery conducted, no trial, and no finding of facts by a jury. To the extent that this Court seeks to resolve the underlying conflict that exists in the application of First Amendment case law in elementary schools, this appeal does not present a useful vehicle.

A. This is an appeal from a motion to dismiss and the allegations in the complaint are conclusory and unreliable.

This appeal does not present a good opportunity to resolve the underlying confusion in the First Amendment case law because this appeal is an interlocutory appeal from a motion to dismiss and is based on frequently vague, conclusory allegations in

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[6] *Morgan v. Plano Indep. Sch. Dist.*, No. 09-1131, petition for writ of certiorari denied on June 28, 2010.

Petitioners' complaint. Judge Benavides, in his majority opinion, noted that the Fifth Circuit would do well to withhold final judgment on whether a constitutional violation occurred "until a developed record reveals more about the circumstances." App. 43 n.106. Similarly, Judge King, joined by Judge Davis, specially concurred, noting that they were uncomfortable with reaching the constitutional issue based on the unclear allegations in the complaint. App. 61. Judge Garza explained that he was reluctant to proceed further and declare as a matter of law, based only on the pleadings, that these incidents constituted First Amendment violations because the answer to whether there was a violation may depend on a kaleidoscope of facts not yet fully developed. App. 63 (quoting *Pearson v. Callahan*, 555 U.S. 223, 238-39 (2009).

The reluctance of these judges to find that the alleged conduct, as a matter of law, violated the Constitution demonstrates a particular wisdom for several reasons. First, a decision not to reach the issue is in complete accord with this Court's teaching in *Camreta v. Greene*, No. 09-1454, 131 S. Ct. 2020 (2011). Second, Petitioners' own complaint, with its complete lack of fact-specific allegations to support a claim of animosity as to Petitioners' message, simply cannot support a finding that the alleged conduct, as a matter of law, violated the Constitution. Third, even if Petitioners' complaint had listed enough fact-specific allegations to support a claim that Swanson's and Bomchill's conduct was motivated by personal disagreement with the content of the message, the

simple truth is that the allegation (which has surfaced only on appeal and appears nowhere in Petitioners' lengthy complaint) has been vehemently disputed and has never been and likely never will be proven. *See* App. 45 n.10 ("Throughout this appeal, the defendants have vigorously contested the plaintiffs' version of the facts."). It is unwise to announce, at this stage in the proceeding, that Swanson's and Bomchill's conduct violated the Constitution when neither Swanson nor Bomchill have yet presented their case to a finder of fact. Swanson and Bomchill should remain free to assert, as they have, and prove, as they will, that far from being opposed to the Christian message, they are both themselves Christians who had a tough job to do and have been sued for doing it. Finally, as the Fifth Circuit indicated, it is fitting to withhold judgment until a developed record reveals more about the circumstances. The Fifth Circuit noted that principals such as Swanson and Bomchill "often have to make on-the-spot constitutional determinations in the face of litigious parents already determined to sue." App. 43 n.106. The Fifth Circuit further noted that

> Amici educators remind us that parents across the nation have thusly sought to engineer "gotcha" moments for use as fodder for litigation and media campaigns. Only a more developed fact record will reveal if that was the case here.

App. 43-44 n.106.

Petitioners' First Amendment claims against Plano Independent School District remain pending and provide a possible avenue for clarification of the underlying facts as they actually occurred. In addition to this Court's normal practice of deferring consideration of a case until it has been finally resolved in the lower courts, the limited nature of this appeal provides a clear example of why the Court's practice of restraint is appropriate.

B. This appeal represents a relatively small part of the plaintiffs' larger suit.

This appeal does not present a good opportunity to resolve the underlying confusion in the Free Speech case law because this appeal "represents a relatively small part of the plaintiffs' larger suit." App. 3 n.2 (Benavides, J.). While this is the second time in this litigation that Petitioners have sought review from this Court, the case still remains far from final resolution. The parties have not exchanged initial disclosures, written discovery or conducted depositions. Even if the Court were to grant Petitioners' request, it would not be in a position to resolve all of the claims against even Swanson, much less would it be in a position to finally resolve the myriad of other issues currently pending before both the district court and the Fifth Circuit. There is currently pending before the district court a motion to dismiss on

behalf of Swanson.[7] Claims against two other individual defendants are also pending in the district court. Claims against three other individual defendants were already dismissed by the district court and will not be ripe for appeal until after final resolution of the case before the district court. Some of the claims against the school district were dismissed in an earlier interlocutory appeal to the Fifth Circuit, and the school district recently filed a second interlocutory appeal to the Fifth Circuit.[8] Meanwhile, this appeal only directly involves Petitioners' claims against two of the many individual defendants. As Judge Benavides presciently noted, the Fifth Circuit's *en banc* decision on this appeal "is not our first word

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[7] *See* Defendant Swanson's Motion to Dismiss Plaintiffs' "Other Claims" Based on Qualified Immunity, No. 4:04-CV-447 (E.D. Tex. Apr. 25, 2012) [Dkt. # 331]. In this motion, Swanson asserts her entitlement to qualified immunity from Doug Morgan's parent-to-parent speech claim. Swanson allegedly told Doug Morgan, a parent, that he would be permitted to distribute his religious materials to other parents during the school day party in the same fashion as any other materials – on a distribution table in the school library. Mr. Morgan essentially alleges that Swanson violated the First Amendment by enforcing the same viewpoint neutral time-place-manner restriction that the Fifth Circuit has already upheld as constitutional. *See Morgan v. Plano Indep. Sch. Dist.*, 589 F.3d 740, 746 (5th Cir. 2009). Swanson has asserted her entitlement to qualified immunity from this parent-to-parent speech claim and that assertion is currently pending before the district court.

[8] *See* Plano Independent School District's Notice of Appeal, No. 4:04-CV-447 (E.D. Tex. Apr. 27, 2012) [Dkt. # 333].

on the issues in this case, and will likely not be our last." *Id.*

Even if the Court were inclined to grant review in this case, this appeal is not the best vehicle. This appeal will provide only a fragmented opportunity for review, restricting the Court to unsubstantiated, conclusory facts on a small portion of this litigation.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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