No. 09-409

IN THE
Supreme Court of the United States

PAUL T. PALMER, BY AND THROUGH HIS PARENTS AND LEGAL GUARDIANS, PAUL D. PALMER AND DR. SUSAN GONZALEZ BAKER,

*PETITIONER,*

V.

WAXAHACHIE INDEPENDENT SCHOOL DISTRICT,

*RESPONDENT.*

**On Petition For A Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit**

# BRIEF FOR CATO INSTITUTE, INSTITUTE FOR JUSTICE, BECKET FUND FOR RELIGIOUS LIBERTY, CHRISTIAN LEGAL SOCIETY, AND NATIONAL ASSOCIATION OF EVANGELICALS AS AMICI CURIAE IN SUPPORT OF PETITIONER

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The amici joining in this brief are not-for-profit organizations committed to protecting essential liberties of the American people. More detailed statements describing each amicus are set forth in an Appendix.

## SUMMARY OF THE ARGUMENT

Just under 50 million Americans attend public schools.[2] Nearly 16 million of them are enrolled in the nation's high schools. Only a little more than half of those students will attend college, and many of those will not attend college for long. Thus, the majority of the civic training of the country's young adults, many of whom will vote and establish their own households shortly upon graduating, occurs in the public schools.

In *Tinker v. Des Moines Independent Community School District*, this Court made clear that this critical population enjoys First Amendment rights, and that core political and religious speech cannot be suppressed absent a showing that the speech will "materially and substantially disrupt" the

[1] The parties have consented to the filing of this brief. Counsel of record for all parties received notice at least ten days prior to the due date of the intention of *Amici Curiae* to file this brief. Pursuant to Supreme Court Rule 37.6, counsel for *amici* certify that this brief was not written in whole or in part by counsel for any party, and that no person or entity other than *amici*, their members, and their counsel has made a monetary contribution to the preparation and submission of this brief.

[2] Maria Gold, *A Changing Student Body*, WASH. POST (June 1, 2009), *available at* http://www.washingtonpost.com/wp-dyn/content/article/2009/05/31/AR2009053102229.html.

educational process. Over the ensuing forty years, this Court has repeatedly reaffirmed this central holding of *Tinker*, which protects nondisruptive, respectful dialogue in the public schools on issues of public concern. Such speech is critical to the development of a civil society. Nevertheless, the Fifth Circuit's decision in this case effectively empowers school administrators to quash this speech.

The Fifth Circuit's decision threatens to eliminate whatever student-speech protections *Tinker* assures by uniting two Fifth Circuit precedents. First, the Fifth Circuit held that content-neutral speech regulation is an independent exception to *Tinker*, relieving school officials of any obligation to permit nondisruptive political or religious speech or to tailor prohibitions on speech in any meaningful way. Second, the Fifth Circuit adopted a definition of content neutrality that allows schools to overtly distinguish between different categories of speech—to undertake content-based and even viewpoint-based regulation—yet still enjoy the relaxed scrutiny extended to content-neutral regulation. To this combination, the Fifth Circuit added an extraordinarily deferential standard of review. The combined effect of the two precedents and the standard of review is that schools enjoy virtually unlimited discretion to restrict student speech.

Both Fifth Circuit precedents are contrary to the precedent of this Court. Without this Court's resolution of these issues, it is highly likely that important political and religious speech will bear much of the brunt of the discrimination, because it often represents the most controversial and

challenging speech that school administrators encounter and seek to avoid. Review is therefore essential to clarify and confirm the most basic rights of students.

## ARGUMENT

### I. THE COURT OF APPEALS HAS DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT.

#### A. The First Amendment Forbids Suppression of Nondisruptive Political and Religious Student Speech.

In *Tinker v. Des Moines Independent Community School District*, this Court made clear that students in public schools enjoy First Amendment rights. 393 U.S. 503, 511 (1969). As the Court poignantly observed in a statement that has been reaffirmed by a host of subsequent decisions: public school students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Id.* at 506. The Fifth Circuit's decision in this matter undermines *Tinker* at its foundation. At the very least, the decision below presents a fundamental question about the meaning of a landmark decision of this Court. Review is essential, therefore, to clarify and enforce *Tinker* and to reaffirm the most basic rights of this nation's students.

### B. This Court's First Amendment Jurisprudence Protects Students' Right to Speak While Attending School.

In *Tinker*, school officials attempted to thwart a plan by high school students to wear black arm bands to school in protest of the Vietnam War by preemptively adopting a policy prohibiting all armbands. *Id.* at 504. The students nonetheless wore the armbands, and were subsequently suspended for violating the policy. *Id.* The students' motivation originated in Social-Gospel Methodism and Quaker beliefs. Mary Beth Tinker, *Reflections on Tinker*, 58 AM. U. L. REV. 1119, 1120, 1123 (2009). The students sued, contending that the suspension violated their constitutional rights to free speech and expression, and this Court agreed. *Tinker*, 393 U.S. at 504.

The Court held that student speech—at least the core political speech engaged in by the students in *Tinker*—could not be suppressed absent a showing that it would "materially and substantially disrupt the work and discipline of the school." *Id.* at 513. According to the Court, neither the "mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint" nor "an urgent wish to avoid the controversy which might result from the expression," are sufficient to strip public school students of their First Amendment rights. *Id.* at 509-10. Although not specifically emphasized by the Court, the speech in *Tinker* was undeniably core political expression: the students used the armbands to express their "disapproval of the Vietnam hostilities and their advocacy of a truce, to make their views known, and, by their example influence others to adopt them." *Id.* at 514.

In the forty years since *Tinker*, this Court has expanded on its school speech jurisprudence in just a handful of cases. Each of those cases does two things: (1) it upholds a prohibition on student speech that is divorced from the political and religious expression at the heart of the First Amendment; and (2) it reaffirms the central holding of *Tinker*—that core political and religious speech cannot be suppressed absent a showing that the speech will "materially and substantially disrupt" the educational process.

Thus in *Bethel School District v. Fraser*, the Court upheld a school district's decision to suspend a student that gave a lewd speech at a school assembly, but it did so only after reaffirming the basic premise of *Tinker*—that students do not shed their First Amendment rights at the school gate—and noting the "marked distinction between the political 'message' of the armbands in *Tinker* and the sexual content of [the student's speech] in this case." 478 U.S. 675, 679-80 (1986). Similarly, in *Hazelwood School District v. Kuhlmeier*, the Court again reaffirmed the "standard articulated in *Tinker* for determining when a school may punish student expression," but went on to hold that this standard does not extend to situations where a school refuses to *sponsor* student expression. 484 U.S. 260, 272-73 (1988). The student newspaper was part of the school's curriculum, and faculty provided oversight. *Id.* at 268-70.

Most recently, in *Morse v. Frederick*, this Court held that public schools may prohibit speech advocating unlawful drug use. 551 U.S. 393, 410 (2007). But it did so only after distinguishing the advocacy of unlawful drug use from the "essential facts of *Tinker*," which "implicat[ed] concerns at the

heart of the First Amendment," namely core political and religious expression. *Id.* at 403. And once again, the Court reaffirmed, in unqualified terms, the central holding of *Tinker*: that "student expression may not be suppressed unless school officials reasonably conclude that it will 'materially and substantially disrupt the work and discipline of the school.'" *Id.* at 403 (quoting *Tinker*, 393 U.S. at 513). Indeed, in a concurring opinion, Justice Alito, joined by Justice Kennedy, applauded the majority for "correctly reaffirm[ing] the recognition in [*Tinker*] of the fundamental principle that students do not 'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.'" *Id.* at 422.

The *Tinker* Court expressly refused to limit its holding to the narrow confines of viewpoint discrimination. Of course the Court said that it would be unconstitutional for the school to prohibit expression "of opposition to" the war in Vietnam. *Tinker*, 503 U.S. at 513. But the Court also said that it would be unconstitutional for the school to forbid "all discussion of the Vietnam conflict," *id.*, a rule that would be viewpoint neutral. And the Court said of students that "[w]hen he is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinions . . ." *Id.* This describes an affirmative right to speak, not merely a right to be free of discrimination with respect to the contents of his speech. A rule prohibiting all speech in the cafeteria would be a content-neutral rule, but *Tinker* says that such a rule would be unconstitutional.

This conclusion follows from *Tinker*'s central premise that students do not shed their rights at the

schoolhouse gate. The students in *Tinker* were in a place where they were entitled to be (indeed, required to be), and they were speaking entirely with their own resources. They did not seek to use a public address system, bulletin board, or other school facility, or to reserve a classroom or other space where they were not already entitled to be. So there was no issue of public forum or access to school property. The only question was whether the school could silence the student's nondisruptive speech. At least in that context, they were entitled to speak in any place they were entitled to be—in the classroom, the cafeteria, the playing fields, or anywhere else on the campus, so long as they did so nondisruptively. *See* Douglas Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 NW. U.L. REV. 1, 47-48 (1986).

If a student's speech threatened material disruption, the school could regulate it. If a student sought to use school facilities or resources (beyond the spaces he was entitled to occupy), additional issues would be presented, and content-neutral rules might appropriately regulate access. Subsequent cases clarified that school-sponsored speech is not the student's own speech, and thus is not free, and that schools may regulate content that is seriously inappropriate for young students and not necessary to the advocacy of any political or religious idea. Taken as a whole, then, *Tinker* and its progeny establish a workable framework for balancing the needs of educators to maintain order in their classrooms with the unquestioned First Amendment rights that students carry with them into the schoolhouse: Core political and religious speech, in a place where the student is entitled to be, cannot be

suppressed absent a showing that such speech substantially and materially disrupts the educational process.

## II. THE FEDERAL COURTS OF APPEALS HAVE EXPRESSED DEEP CONFUSION OVER THE PROPER SCOPE OF *TINKER*.

Despite the clear framework established by this Court's school-speech jurisprudence, the Courts of Appeals have expressed deep confusion over the application of *Tinker*'s rule in the context of content-neutral regulations. The Second Circuit has said that "It is not entirely clear whether *Tinker's* rule applies to all student speech that is not sponsored by schools, subject to the rule of *Fraser,* or whether it applies only to political speech or to political viewpoint-based discrimination." *Guiles v. Marineau*, 461 F.3d 320, 326 (2d Cir. 2006). The Third Circuit has stated that all student speech that is not lewd, vulgar, or profane under *Fraser* or school-sponsored under *Hazelwood*, "is subject to *Tinker*'s general rule: it may be regulated only if it would substantially disrupt school operations or interfere with the rights of others." *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 214 (3d Cir. 2001) (Alito, J.).

But the Sixth and Ninth Circuits have said that *Tinker* does not apply beyond the narrow context of viewpoint discrimination. The Sixth Circuit has held that *Tinker* does not apply to policies that "merely [seek] to regulate the time, place, and manner" of student speech. *M.A.L. v. Kinsland*, 543 F.3d 841, 849 (6th Cir. 2008). The Ninth Circuit has said that "*Tinker* says nothing about how viewpoint- and content-neutral restrictions on student speech

should be analyzed, thereby leaving room for a different level of scrutiny." *Jacobs v. Clark County Sch. Dist.*, 526 F.3d 419, 431-32 (9th Cir. 2008).

The Fifth Circuit in this case further deepened this confusion and created yet another approach to student speech that effectively reverses *Tinker's* protection of nondisruptive political and religious speech.

## III. THE FIFTH CIRCUIT RULE THREATENS POLITICAL AND RELIGIOUS SPEECH AT THE CORE OF THE FIRST AMENDMENT.

The Fifth Circuit's decision threatens to eviscerate whatever student-speech protections exist under *Tinker* by joining together two separate Fifth Circuit precedents—a broad exception to *Tinker* and an incorrect understanding of content-neutrality—in a way that affords schools virtually unlimited discretion to restrict student speech. While the Constitution certainly permits schools to impose dress codes, it also requires that those dress codes not restrict nondisruptive political and religious speech. The Fifth Circuit's decision casts aside this critical distinction.

The Fifth Circuit first seeks to elevate content-neutral speech restriction alongside the recognized restrictions on disruptive, lewd, school-sponsored, and drug-related student speech as a permissible exception to *Tinker's* protections. But the Fifth Circuit also crafts an accompanying definition of content-neutrality so broad that—if allowed as a permissible exception to *Tinker*—it would provide schools largely unfettered ability to pick and choose which student speech to allow and which to forbid.

Such discretion would strip *Tinker* of any continued relevance. More troubling still, it is highly likely that important political and religious speech would ultimately bear much of the brunt of the discrimination.

### A. The Fifth Circuit Seeks to Elevate Content-Neutral Speech Discrimination Alongside the Other Exceptions to *Tinker*.

According to the Fifth Circuit, content-neutral speech regulation is an independent exception to *Tinker*, relieving school officials of any obligation to permit nondisruptive political or religious speech or to tailor prohibitions on speech in any meaningful way. *See* App. 7-8 (rejecting Palmer's interpretation of *Tinker* "because it fails to include another type of student speech restriction that schools can institute: content-neutral regulations."). The Fifth Circuit based that determination largely on its own prior precedent in *Canady v. Bossier Parish School Board*, 240 F.3d 437, 440 (5th Cir. 2001), in which it upheld a school uniform code against a First Amendment challenge. In that case, the Fifth Circuit made the same fundamental error as the Sixth and Ninth Circuits—somehow transforming *Tinker* into a narrow protection against only viewpoint discrimination. This is deeply mistaken.

The rule established in *Tinker* was simple: when students are where they belong on the campus, schools can stop them from speaking about topics at the heart of the First Amendment only if their speech is disruptive. *Tinker*, 393 U.S. at 513. Importantly, subsequent decisions of this Court approving narrow restrictions on student speech did not overrule this

basic premise. To the contrary, those decisions recognized the continued vitality of *Tinker*'s broad protection. *See, e.g., Morse*, 551 U.S. at 422 (Alito, J., concurring) (joining opinion "on the understanding" that it was confined to the advocacy of illegal drug use and that "it provides no support for any restriction of speech that can plausibly be interpreted as commenting on any political or social issue").

In short, if student speech comments on a political or religious issue and is not disruptive, school-sponsored, lewd, or advocating illegal drug use, it cannot be suppressed. Of course, the existing exceptions are probably not exclusive and the Court may recognize other, similarly narrow exceptions to *Tinker* in the future. *See* Douglas Laycock, *High-Value Speech and the Basic Educational Mission of a Public School: Some Preliminary Thoughts*, 12 LEWIS & CLARK L. REV. 111, 112 (2008) ("[I]t is quite reasonable to infer that there will be more cases upholding restrictions on student speech in the future. Especially in the absence of any coherent principle [for identifying exceptions], another *Tinker* 'exception' is likely to emerge whenever school censorship seems reasonable to the Court."). But none of this Court's limitations on *Tinker* have threatened the basic rule that non-disruptive student speech on core First Amendment topics is protected. The approach adopted by the Fifth Circuit here is far more than an exception; it is a transformation. The Fifth Circuit's proposed "exception" represents an altogether new rule under which even core political speech that poses no discernible threat of disruption can be completely and thoroughly driven off school grounds at the whim of administrators, so long as they do so under the guise of content-neutral speech

regulation. This is in direct conflict with this Court's precedent.

Content-neutral regulation of speech is not so obviously dangerous as viewpoint discrimination, but even so, content-neutral rules deserve serious judicial review, because they can easily be used to achieve substantial suppression of free speech. To restrict or prohibit discussion of controversial topics is to insulate the status quo from criticism. To restrict or prohibit all discussion is necessarily to restrict or prohibit discussion of controversial topics. To confine speech to one or a few times, places, or manners can easily be to render speech ineffectual and irrelevant. This Court in *Tinker* was alert to such dangers. The Court warned that free speech is not "to be so circumscribed that it exists in principle but not in fact." *Tinker*, 503 U.S. at 513.

This Court's public-forum doctrine is a set of content-neutral rules.[3] And as Justice Kennedy once said in criticizing certain features of that doctrine, "it leaves the government with almost unlimited authority to restrict speech on its property by doing

[3] Indeed, the school tried to shelter under public-forum doctrine here. The dress code in this case proclaims the high schools to be "a closed forum for student expression through student attire." App. 30. But this misapplies the doctrine. The students are required to be at school, and their attire is not school property or a school facility; suppression of messages on the student's own clothing is not a regulation of access to government property for purposes of speech, and thus not within the domain of the public-forum doctrine. The school could as easily declare itself "a closed forum for student expression through oral communication," or "a closed forum for student expression," period. If the school could close "forums" that do not require access to its own property or facilities, it could suppress all speech by fiat, with not even a shadow of judicial review.

nothing more than articulating a non-speech-related purpose for the area." *ISKCON v. Lee*, 505 U.S. 672, 695 (1992) (Kennedy, J., concurring in the judgment). Instead of giving the government unreviewable power to designate forums as open or closed "by fiat," *id.* at 694, Justice Kennedy proposed an "objective" inquiry "based on the actual, physical characteristics and uses of the property." *Id.* at 695. *Tinker* specifies that inquiry in school cases: whether student speech "materially disrupts classwork or involves substantial disorder or invasion of the rights of others." *Tinker*, 399 U.S. at 513.

### B. The Fifth Circuit's Definition of Content-Neutrality Is Wrong and Greatly Expands Its Assault On *Tinker*.

As explained above, the Fifth Circuit's elevation of content-neutral speech regulation to excepted status under *Tinker* eviscerates *Tinker*. The Fifth Circuit's decision, however, goes further still by adopting a definition of content-neutrality that allows schools to overtly distinguish between different categories of speech—indeed, to undertake content-based and even viewpoint-based regulation—yet still enjoy the relaxed scrutiny generally extended to content-neutral regulation. Those two principles together threaten to render *Tinker* irrelevant and to drive the First Amendment from the public learning environment.

To be clear, school districts are fully entitled to enact dress codes. But the rules at issue in this case are no ordinary dress code. They do not regulate clothing as clothing; rather, they target messages and

they expressly distinguish those messages on the basis of viewpoint:

> [S]tudent clothing should be free of any slogans, words or symbols except those that promote the school district and its instructional programs.

App. 30-31. In other words, the policy expressly favors and even encourages speech that promotes the school's interest, and it prohibits all other speech. Under this rule, the student could be wearing a coat and tie, but if his tie displays a word or a symbol that does not promote the school district, he is in violation of the "dress" code.

Moreover, students who display approved messages get exempted from other parts of the dress code. The general rule requires polo shirts, collared shirts, or blouses; t-shirts are not permitted. App. 31. But students *may* wear "campus principal-approved WISD sponsored curricular clubs and organizations, athletic teams, or school 'spirit' collared shirts *or t-shirts*." *Id.* (emphasis added). So t-shirts are permitted if, and only if, they display an officially approved message that promotes the school or one of its activities.

In sum, no messages are permitted on clothing except those that promote the school district and its programs, and those who display such supportive messages are awarded special privileges. Yet according to the Fifth Circuit, these are content-neutral rules. Even though they expressly discriminate on the basis of viewpoint, they are said

to be content neutral because the school did not have a constitutionally prohibited motive. "The principal inquiry in determining content-neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." App. 13, quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). And of course, the burden of proving bad motive falls on plaintiffs, motive is often easy to hide, and federal judges are reluctant to accuse school officials of bad motive. If overt viewpoint discrimination is content neutral unless the plaintiff proves bad motive, little is left of freedom of speech.

The Fifth Circuit's quotation from this Court's opinion in *Ward* is accurate but out of context. *Ward* involved a restriction on the volume of sound; the restriction applied to any band that used the bandshell no matter what music they were playing. That regulation was objectively content neutral. Even so, if plaintiffs could show that this seemingly neutral regulation had been adopted out of disagreement with the band's message (or perhaps with the message of rock bands more generally), it could be treated as content based rather than content neutral. Similarly in *Hill v. Colorado*, 530 U.S. 703, 719 (2000), where the Court quoted the statement from *Ward*, the rule on its face applied to any conceivable message delivered near a health center. There was no content discrimination in the rule itself; the issue was whether it was motivated by hostility to abortion protestors or gerrymandered to single them out.

The rule at issue here is radically different. With respect to messages on clothing, the rule is that

students are silenced unless they are promoting the incumbent administration and the programs it sponsors and approves. There is no need to demand evidence of subjective motive; when the rule facially discriminates on the basis of content, it is not content neutral. The rule expressly distinguishes between favored speech—pro-school speech—and disfavored speech—everything else. Such a policy epitomizes content-based speech regulation.

As this Court has made clear, a rule is content-based if it prefers certain kinds of speech. *See Regan v. Time Inc.*, 468 U.S. 641, 647-49 (1984) (finding ban on the use of photographic reproductions of currency to be content based, and unconstitutional, where there were exceptions for "philatelic, numismatic, educational, historical, or newsworthy purposes"); *Carey v. Brown*, 447 U.S. 455, 466-67 (1980) (finding complete ban on all picketing, with lone exception for labor picketing, to be unconstitutional); *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 101-02 (1972) ("Chicago may not vindicate its interest in preventing disruption by the wholesale exclusion of picketing on all but one preferred subject.").

Of course, a school clearly has an interest in promoting its own programs and organizations, but it cannot pursue that policy by censoring all speech that fails to promote that interest. The practice itself—of effectively restricting all speech and then selectively allowing exceptions that the District believes are reasonable—inevitably places the District in the position of favoring certain categories of speech over others. An exception for promoting the school's interests might appear innocuous, or a rule that prohibits all speech except for speech promoting

the school might appear Big Brotherish, depending on the frame of reference. But even if one views this exception as innocuous, it is perched atop a very slippery slope.

By making that initial distinction, the District has already engaged in viewpoint-based discrimination. The District is not permitting the *category* of speech concerning the District itself and its clubs, teams and programs; it is permitting only the pro-school viewpoint. If a student wished to wear a shirt bearing the logo of a rival school's athletic team, for example, such speech would be prohibited under the existing policy. If a student wore a shirt criticizing some school policy, that speech would be prohibited because it would neither "promote" the school district nor support a club, organization, team, or school spirit. App. 30-31. These rules are viewpoint-based discrimination.

The possible exceptions that a school might make to its policy—while still remaining content-neutral according to the Fifth Circuit—are limited only by the preferences of the school administrators tasked with making them. For example, an agricultural club might be permitted to wear shirts that support farming and agricultural efforts; an art club may be permitted to wear shirts depicting famous works of art; members of the Jazz band might be permitted to wear shirts depicting Louis Armstrong and Charlie Parker. Once again, according to the Fifth Circuit, all of these exceptions could be made and the policy would nevertheless remain content-neutral so long as all remaining speech is restricted. Each exception would be motivated by *agreement* with the excepted message; nothing would be provably motivated by

*dis*agreement with the messages subject to the general ban. The seemingly inevitable final destination of such an approach is that a school may simply restrict all speech at the outset then selectively make exceptions one at a time until the district has exempted all the speech it approves and restricts only the speech that it chooses not to approve.

### C. The Decision Below Is Aggravated by the Unlimited Discretion Vested in School Officials by the School's Rules and by the Fifth Circuit's Standard of Review.

The problem is aggravated further by the vesting of the decision-making authority in the "campus principal" without further direction. App. 12, 31. Despite the claims of content-neutrality, such a policy is ultimately a restriction on speech not deemed worthy of an exception by a single school administrator unilaterally applying his or her own personal preferences and unspoken criteria. Such an approach is content-based—and indeed often viewpoint-based—discrimination and is strictly forbidden under *Tinker*. Indeed, such unguided discretion to approve or disapprove of private speech has been constitutionally prohibited since long before *Tinker*. *See*, *e.g.*, *Niemotko v. Maryland*, 340 U.S. 268, 272 (1951); *see also Child Evangelism Fellowship of MD, Inc. v. Montgomery County Public Schools*, 457 F.3d 376, 386 (4th Cir. 2006) ("The Supreme Court has long held that the government violates the First Amendment when it gives a public official unbounded discretion to decide which speakers may access a traditional public forum.")

(citing *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 129-33 (1992); *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 769-72 (1988); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-51 (1969)); *Southworth v. Bd. of Regents*, 307 F.3d 566, 592 (7th Cir. 2002) (on remand) (invalidating policy granting decision makers unbridled discretion and thereby permitting viewpoint discrimination).

Nor did the Fifth Circuit hold these school principals to any objective standard in its standard of judicial review. Although the court below went through the motions of requiring that the restrictions on speech serve an "important or substantial government interest," "unrelated to the suppression of student expression," and that the restrictions be "no more than necessary to facilitate that interest," App. 14, in practice, it gave total deference to the school. Indeed, the mere invocation of a laundry list of educational goals—from improving test scores to an "orderly learning environment" to "encouraging professional dress"—qualified as important and substantial government interests. *Id.* at 15-16. The court explicitly "set a low bar for the evidence" required to show that the restrictions on speech were no more restrictive than necessary to achieve these goals. According to the court, studies are not required, and "[t]he sworn testimony of teachers or administrators would . . . suffice." *Id.* Even though important First Amendment rights were at stake, the court simply took the school's word for it.

Rather than properly address the specific rules about speech, including the promotion of favored speech, the court relied on broader testimony and

evidence from other cases to the effect that dress codes improve discipline and learning outcomes. That may be true, but it is not the issue here. Plaintiffs do not challenge the whole dress code, or even very much of it. They challenge only the express ban on "slogans, words or symbols" that do not "promote the school district and its instructional programs." *Id.* at 30-31. The court below cites no testimony that the ban on "slogans, words or symbols" improved discipline or achievement, let alone testimony that the restrictions on speech were "no more than necessary" to achieve the school's interest. By treating this as a dress code case, the court largely ignored the real issue, which is express restrictions on speech coupled with overt promotion of favored speech and viewpoints.

## IV. NONDISRUPTIVE POLITICAL AND RELIGIOUS SPEECH WILL LIKELY SUFFER THE GREATEST DISCRIMINATION.

By melding together its extraordinarily deferential standard of review and its two faulty precedents—the content-neutrality exception to *Tinker* and the expansive reading of content neutrality—the Fifth Circuit has set in place an approach to student speech that effectively flips *Tinker* upside down. Whereas under *Tinker* all student speech is presumptively protected at the outset and the schools and courts must identify specific exceptions to that protection on a case-by-case basis, under the Fifth Circuit approach all student speech may be presumptively restricted and the schools alone are empowered to make the discretionary determination of what speech to permit

on a case-by-case basis. Under such an approach, the most certain casualty will be speech that is in any way controversial. Rather than risk complaints from students, teachers, or citizens who disagree with some controversial student speech, the easy course in many districts will be to suppress all controversial speech and thus avoid all controversy. Political and religious speech is among the speech most likely to be controversial, for the obvious reason that people disagree about politics and religion. It is that very disagreement that will motivate some students to speak out and others to complain.

Religious speech has been a particular source of confusion, and is particularly at risk, because of the distinction between governmental and private religious speech. Private religious speech, like political speech, "is at the core of the First Amendment." Douglas Laycock, *High-Value Speech*, 12 LEWIS & CLARK L. REV. 111, 123-24 (2008); *see Capitol Square Rev. & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995) ("Indeed, in Anglo-American history, at least, government suppression of speech has so commonly been directed precisely at religious speech that a free-speech clause without religion would be Hamlet without the prince."). This Court has repeatedly held that private religious speech is protected in public schools. *See, e.g., Good News Club v. Milford Cent. Sch. Dist.*, 533 U.S. 98 (2001); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990); *cf. Widmar v. Vincent*, 454 U.S. 263 (1981) (same issue at university level). Despite this, "[s]chools have repeatedly claimed that the Establishment Clause requires or justifies them in censoring religious speech, on grounds derived from

their own confused definition of their mission." *Laycock*, *supra* at 124. "Because the Establishment Clause prohibits *schools* from promoting religion, some schools conclude that any *student* speech promoting religion is inherently inconsistent with the educational mission of the school." *Id.* at 125. Just as some school administrators resist this Court's decisions restricting school-sponsored prayer, and try to inject as much religion as they can into the school's own speech, other school administrators resist this Court's religious-free-speech decisions and seek to suppress all mention of religion lest they be accused of encouraging or promoting religious speech.

The rule at issue here aggravates this problem. Under a student-speech approach in which schools may first presumptively restrict all speech, and then make case-by-case exceptions to allow certain speech, there is a suggestion—at least to some—that the school is sponsoring or supporting whatever limited speech it permits. This is certainly the situation in the case below in which the District permits only speech that promotes the school and its programs. App. 12. Under that scheme, school administrators would be concerned that making a "special exception" to permit religious speech would, in effect, constitute a school endorsement of such speech and run afoul of the Establishment Clause. This fear might persist even if a school had already perforated its policy with other exceptions. Accordingly, an exception for private religious speech might be among the least likely to actually be made, despite the highly protected character of religious speech.

While the approach adopted by the Fifth Circuit is offensive to student speech rights in general, it is potentially especially hostile to the

speech that is constitutionally most important. If schools can presumptively suppress all student speech and permit only what they explicitly approve, controversial political speech has little chance for approval, and religious speech may have even less chance. Yet the First Amendment is most essential when our people disagree on important matters of politics or religion.

## CONCLUSION

For the foregoing reasons, the Court should grant certiorari.

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## INTERESTS OF THE AMICI

**The Cato Institute** was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences and forums, publishes the annual *Cato Supreme Court Review*, and files amicus briefs with the courts—including in a variety of First Amendment cases, as well as in others involving student rights. Cato files the instant brief to address the need to clarify constitutional speech protections in the face of heavy-handed government regulations.

**The Institute for Justice** (IJ) is a nonprofit, public interest law center dedicated to advancing the essential foundation of a free society: constitutional protection for individual liberty. Since its founding in 1991, IJ has litigated in federal and state courts across the country protecting property rights, freedom of speech, economic liberty, and educational choice.

**The Becket Fund for Religious Liberty** is a nonprofit, nonpartisan, law firm dedicated to protecting the free expression of all religious traditions. The Becket Fund has represented agnostics, Buddhists, Christians, Hindus, Jews, Muslims, Native Americans, Santeros, Sikhs, and Zoroastrians, among others, in lawsuits across the

country and around the world. In particular, the Becket Fund has vigorously advocated for the right of religious individuals and institutions to express their beliefs freely and peacefully.

**The Christian Legal Society** ("CLS") is a nonprofit, interdenominational association of Christian attorneys, law students, judges, and law professors with chapters in nearly every state and at numerous accredited law schools. Through its Center for Law & Religious Freedom, CLS works for the protection of religious belief and practice, as well as for the autonomy from the government of religion and religious organizations. CLS frequently defends the religious freedom of its law student chapters and other student religious groups in public education settings.

**The National Association of Evangelicals** ("NAE") is the largest network of evangelical churches, denominations, colleges, and independent ministries in the United States. It serves 50 member denominations and associations, representing 45,000 local churches and over 30 million Christians. NAE serves as the collective voice of evangelical churches and other religious ministries. Recognition that religious speech is often the first target of the censor goes at least as far back as John Milton's *Areopagitica* (1644). NAE believes that protection of religious speech is imperative. NAE also believes that religious freedom is a gift of God, and its protection is vital to limiting the government that is our American constitutional republic.