

**In The  
Supreme Court of the United States**

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

*Petitioners,*

v.

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

*Respondents.*

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

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**BRIEF FOR *AMICI CURIAE* GATHIE BARNETT  
EDMONDS AND MARIE BARNETT SNODGRASS  
IN SUPPORT OF PETITIONERS**

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## **QUESTIONS PRESENTED**

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

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**INTEREST OF *AMICI CURIAE***<sup>1</sup>

This brief is filed on behalf of Gathie Barnett Edmonds and Marie Barnett Snodgrass (the “Barnett sisters”). When the Barnett sisters were elementary school students, they served as lead plaintiffs in the litigation culminating in the Supreme Court’s decision in *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).<sup>2</sup> That celebrated decision, an enduring landmark in this Court’s First Amendment jurisprudence, recognizes that public schoolchildren – including elementary school students – have constitutional rights to freedom of expression and freedom against viewpoint discrimination. In taking what at the time was an unpopular and courageous stand, the Barnett sisters helped establish precedent that for nearly seventy years has protected schoolchildren from religious persecution and, more broadly, imposition of an official orthodoxy in “politics, nationalism, religion, or other matters of opinion.” *Id.* at 642.

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<sup>1</sup> The parties have consented to the filing of this brief, and their letters of consent are on file with the Clerk. In accordance with Rule 37.6, *amici* state that no counsel for any party has authored this brief in whole or in part, and no person or entity, other than the *amici*, has made a monetary contribution to the preparation or submission of this brief. The parties received at least 10 days notice of the intent to file this brief.

<sup>2</sup> The names of the Barnett sisters do not match the case caption because, during the litigation, courts misspelled the Barnett family surname as “Barnette.” See Dan Seligman, *From Gobitis to Barnette: A Primer* 2 n. 1, The Supreme Court Historical Society Quarterly, XXVII (Summer 2006).

The Barnett sisters have a deep-seated interest in this case because respondents have sought to retreat from the essential First Amendment protections the Supreme Court vindicated in *Barnette*. The position respondents have maintained – and the Court of Appeals embraced – would turn back the clock to an unfortunate era in this Nation’s history when religious persecution was tolerated and school officials had no obligation to respect students’ First Amendment rights.

The Barnett sisters are particularly concerned that the school principals in the case at hand banned student speech solely because it expressed a religious viewpoint. The core teaching of *Barnette* – that officials may not discriminate against (or compel) student speech in public schools based on viewpoint – is consistent with an enduring line of this Court’s precedent recognizing that government must proceed with scrupulously evenhanded respect for the diverse beliefs of its citizens (including religious beliefs). As schoolchildren who courageously stood up for their own First Amendment rights, the Barnett sisters are keenly interested in ensuring that the principle of viewpoint neutrality prevails and protects all citizens, including children in public schools.

This brief is offered in support of petitioners to provide the Barnett sisters’ views on the important issues raised in this petition. Because the school principals’ conduct discriminating against religious viewpoints violates clearly established law dating back to *Barnette*, the Barnett sisters urge the Court

to grant the petition and reaffirm clearly established First Amendment principles.



### SUMMARY OF ARGUMENT

This Court has long recognized “the fundamental principle” that public school 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). This bedrock principle was reaffirmed in the controlling opinion of a recent student speech case. *See Morse v. Frederick*, 551 U.S. 393, 422 (2007) (Alito, J., concurring) (quotation omitted). This long-established principle traces its jurisprudential origins directly back to *Barnette*. The Barnett sisters fervently maintain that “it really means more to us today than it did sixty some years ago.” *See Gregory L. Peterson, et al., Recollections of West Va. State Bd. of Educ. v. Barnette*, 81 ST. JOHN’S L. REV. 755, 792 (2007).

It has long been established – and clearly so – that students, including elementary school students, enjoy the protections of the First Amendment, including the right to be free from discrimination against religious viewpoints. In *Barnette*, this Court recognized that the Free Speech Clause must “scrupulous[ly]” protect students in the school setting lest we “strangle the free mind at its source and teach youth to discount important principles of our government

as mere platitudes.” *See Barnette*, 319 U.S. at 637. In its iconic majority opinion, this Court famously concluded that the State could not compel elementary schoolchildren to salute and pledge allegiance to the flag. *See id.* at 640.

The Barnett sisters have lived their entire lives in their native West Virginia. Decades after the decision that bears their family’s surname, the two sisters remain steadfast in their view that the First Amendment protects public school students against viewpoint discrimination. Indeed, it was their view then – and remains so now – that the First and Fourteenth Amendments grant them this freedom of expression. Unfortunately, instances remain – around the nation – where the clearly established First Amendment rights of public school students are being subjected to official discrimination. That should cease. Neither the Constitution nor this Court’s decisions permit such viewpoint discrimination, particularly where (as here) no legitimate educational purpose undergirds the suppression of otherwise protected expression.



## ARGUMENT

### **I. This Court’s Precedent Clearly Establishes That Elementary School Students Are Protected Under The First Amendment’s Guarantee Of Free Speech.**

The principle that First Amendment protections apply to public school students dates back nearly

seventy years to the landmark decision in *West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). *Barnette* indisputably establishes that school officials may not abridge students' free speech rights merely because the speech occurs in a public school, much less because the speech is religious in nature.

**A. *West Virginia v. Barnette* Establishes That Students Have Constitutional Rights To Freedom Of Expression.**

The notion that public school students have free expression constitutional rights is hardly novel. More than forty years ago, this Court declared in its ground-breaking decision, *Tinker v. Des Moines Independent Community School District*, that “[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” 393 U.S. 503, 506 (1969). Subsequent cases have shaped the contours of student speech freedoms, but none has compromised that basic right. *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986) (upholding discipline against student who delivered vulgar and lewd speech where speech violated school rule against obscene language and teachers had advised the student against delivering the speech); *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988) (public school officials can refuse to disseminate student expression in a school-sponsored newspaper that is part of an academic course as long as their actions are

reasonably related to legitimate pedagogical concerns); *Morse v. Frederick*, 551 U.S. 393 (2007) (school could discipline student whose expression at a school-sponsored activity violated school policy prohibiting illegal drugs).

Of these cases, *Tinker*, *Hazelwood* and *Morse* have played the most prominent role in evaluating the constitutional rights of students. *Tinker* with its focus on disruption, *Hazelwood* with its focus on school officials' role in pedagogy, and *Morse* with its focus on established anti-drug policies have created the framework for protecting the free expression rights of students and the instructional and management roles of school officials.

This decades-long jurisprudential journey leads inexorably back to *Barnette*. During the height of World War II, *Barnette* held that public schools are required to operate "within the limits of the Bill of Rights." *Barnette*, 319 U.S. at 637. In a stirring passage that could well have been crafted with this case in mind, the Court eloquently articulated an enduring expression of the First Amendment's fundamental guarantee: "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 or force citizens to confess by word or act their faith therein." *Id.* at 642. That is – and long has been – the law of the land.

The Barnett sisters were two of the lead plaintiffs in the case that bears their name. They were public schoolchildren at the time. Their families challenged a West Virginia statute that compelled every child within the State's public school system to salute the American flag. As practicing Jehovah's Witnesses, the Barnett sisters believed that saluting the flag constituted a form of Biblically prohibited idol worship. Upon declining to participate in the compulsory ceremony, the two sisters were expelled. Challenging the statute, the siblings, their family, and others similarly situated took their case all the way to this Court.

The Barnett sisters' bold efforts to vindicate their First Amendment rights faced the daunting obstacle of a deeply controversial decision handed down just three years earlier, *Minersville School District v. Gobitis*, 310 U.S. 586 (1940). The *Barnette* Court, however, squarely overruled *Gobitis*, thereby ushering in the modern era of First Amendment jurisprudence. First principles of a free society triumphed. Speaking through Justice Jackson, the *Barnette* Court recognized: "It is only to adhere as a means of strength to individual freedom of mind in preference to officially disciplined uniformity for which history indicates a disappointing and disastrous end." *Barnette*, 319 U.S. at 637.

In *Gobitis*, grammar school students, ages 10 and 12, had been expelled from a Pennsylvania public school when they failed to salute the flag (they, too, were Jehovah's Witnesses). *Id.* at 591. Rejecting the

students' First Amendment arguments, the Court upheld the Commonwealth's statute requiring all public school students in Pennsylvania to pledge allegiance to the flag. *Id.* at 595. The *Gobitis* Court concluded that the statute served legitimate pedagogical purposes – namely, to “inculcat[e] those almost unconscious feelings which bind men together in a comprehending loyalty, whatever may be their lesser differences and difficulties.” *Id.* at 600. In the *Gobitis* majority's view, that sufficed to pass constitutional muster. To require that “exceptional immunity must be given to dissidents, is to maintain that there is no basis for a legislative judgment that such an exemption might introduce elements of difficulty into the school discipline, might cast doubts in the minds of the other children which would themselves weaken the effect of the exercise.” *Id.* at 599-600. Only one Justice dissented.

*Gobitis* unleashed a wave of religious persecution around the country. See *Recollections of Barnette*, 81 ST. JOHN'S L. REV. at 760-64 (2007). Newspapers accused Jehovah's Witnesses of being “against the flag and government” in a time of war. Br. of Appellees, *West Va. State Bd. of Educ. v. Barnette*, No. 591, 1943 WL 71856, at \*71 (1943). Other state legislatures (including West Virginia) rushed pell-mell to pass compulsory flag salute statutes. Schoolchildren were expelled from school in all (then) 48 states. See *id.* at \*22. The Department of Justice received hundreds of complaints describing assaults against Jehovah's Witnesses. In one of the worst attacks,

Jehovah's Witnesses who had requested police protection were forced to drink large doses of castor oil, tied together with rope, and then paraded through the streets of Richwood, West Virginia – not by an angry mob defying law enforcement, but by the Chief of Police and a Deputy Sheriff. *See Catlette v. United States*, 132 F.2d 902 (4th Cir. 1943) (affirming deputy sheriff's conviction). Against this backdrop, three Justices who had joined *Gobitis*'s majority changed course. Famously, in a span of less than three years, this Court corrected its decision.<sup>3</sup> *See Jones v. Opelika*, 316 U.S. 584, 623-24 (1942) (Black, J., dissenting) (acknowledging that *Gobitis* was “wrongly decided”).

In overruling *Gobitis*, *Barnette* established the bedrock principle that state officials may not “prescribe what shall be orthodox in . . . religion.” 319 U.S. at 642. Applying that principle, the *Barnette* Court condemned West Virginia's compulsory flag salute statute as unconstitutional. *Barnette* made this crystal clear: The First Amendment protects all citizens, including young elementary school students

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<sup>3</sup> Considerable turnover (of personnel and philosophy) at the Court occurred during this tumultuous period in American history. Significantly, three Justices (Justices Black, Douglas and Murphy) changed their minds, departing from the *Gobitis* majority; two Justices (Justices Byrnes and McReynolds) who had joined or concurred with the *Gobitis* majority had left the Court; and, two Justices (Justices Rutledge and Jackson) who had either spoken out against or written negatively about *Gobitis* had joined the Court. Thus, the 8-1 earlier majority was transformed into a 6-3 majority overruling *Gobitis*.

such as the Barnett sisters, “against the State itself and all of its creatures – Boards of Education not excepted.” *Id.* at 637. The Court held that school officials must respect religiously motivated objections to coerced speech, for even the “important, delicate, and highly discretionary functions” of public schools are subject to “the limits of the Bill of Rights.” *Id.* Indeed, the fact that schools “are educating the young for citizenship” provided a powerful reason to ensure “scrupulous protection of Constitutional freedoms of the individual,” not an excuse to dilute those freedoms. *Id.* at 637. To hold otherwise, the Court emphasized, would “strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.” *Id.* at 637.

In retrospect, the Supreme Court’s World War II decision in *Barnette* tilled the ground upon which the Vietnam era decision of *Tinker* was planted:

The freedom asserted . . . does not bring them into collision with rights asserted by any other individual. It is such conflicts which most frequently require intervention of the State to determine where the rights of one end and those of another begin. But the refusal of these persons to participate in the ceremony does not interfere with or deny rights of others to do so. Nor is there any question in this case that their behavior is peaceable and orderly. The sole conflict is between authority and rights of the individual.

*Barnette*, 319 U.S. at 630.

The Supreme Court's decisions in *Barnette*, *Tinker*, and their progeny are inextricably intertwined. Of particular note, the speech or expression at issue in *Tinker* was not invited, much less compelled. The speech or expression at issue in *Barnette* was. *Tinker* moved the *Barnette* principle forward – beyond state-coerced speech. *Tinker* established more generally that student speech cannot be banned unless the school presents facts that could reasonably lead it “to forecast substantial disruption of . . . school activities.” *Tinker*, 393 U.S. at 514. This is entirely consistent with the requirement of a legitimate educational purpose informing state suppression of free expression. Several familiar limitations are categorically permissible: Schools may ban offensive, lewd, or indecent speech regardless of that speech's *potential* for disruption. *Fraser*, 478 U.S. at 683, 685 (emphasis added); *Hazelwood*, 484 U.S. at 271 n. 4. *Morse* is in the same vein. But those categorical limitations were irrelevant in *Tinker*, and they are irrelevant to this case.

The policy at issue here fails under *Tinker* and ultimately under *Barnette*. The message here is not presented in an offensive, lewd or indecent manner. No one contends as much. Nor is the message at issue sponsored by the school. It could not reasonably appear to be. Rather, the student speech at issue is non-lewd (or other categorically impermissible) speech on school premises. The underlying question is whether schoolchildren have free-speech rights, subject to *Tinker*-type regulation. *Barnette* ringingly

answers yes. The Court has never wavered from that view.

**B. *West Virginia v. Barnette* And Its Progeny Require Reversing The Court Of Appeals' Grant Of Qualified Immunity.**

It has thus been clear for decades that this Court's jurisprudence vindicates the First Amendment rights of elementary school students, including the Barnett sisters, and rejects the notion that any public official – whether “high or petty” – may categorically suppress otherwise protected student speech. The fact that this Court may have found it unnecessary to explicate separately – and with laser-like precision – an element of its reasoning (that the First Amendment extends to elementary school students) does not in any way detract from the clarity of the Court's jurisprudence. Indeed, the Court's decisional law concerning viewpoint neutrality is entirely consistent without regard to whether the freedom-championing student is in primary, secondary, or higher education. See *Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez*, 130 S. Ct. 2971, 2985 (2010); *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995). After all, an elementary school student is a “person” in our constitutional order.

Principles of qualified immunity protect against unfair surprise; they do not require a prior court to have rejected the defendant's precise argument *in*

*haec verba* as applied to identical facts. See *Hope v. Pelzer*, 536 U.S. 730, 736, 739-41 (2002). The issue of qualified immunity, however, depends very much on the extent to which public school students share in the full panoply of constitutional rights accorded to all students pursuant to *Tinker*.

That the First Amendment's protections extend to elementary schoolchildren was made clear in *Barnette* itself. As recounted above, *Barnette* involved elementary school students – a fact evident on the face of the Court's opinion. See *Barnette*, 319 U.S. at 633, 644 (describing plaintiffs as “children” and “little children”); see also *Tinker*, 393 U.S. at 520 (Black, J., dissenting) (describing *Barnette* as holding that the First Amendment did not permit “a State to compel little schoolchildren to salute the United States flag”). When the lawsuit was filed, the Barnett sisters were only 9 and 11 respectively, attending Slip Hill Grade School in Charleston, West Virginia. Slip Hill had four rooms for students ranging from grades one through six. See *Recollections*, 81 ST. JOHN'S L. REV., at 768.

The West Virginia statute compelled every student attending a publicly-funded school, whether elementary or not, to salute the flag. The lawsuit was filed not only on behalf of the named plaintiffs, but also on behalf of all similarly situated schoolchildren attending public school throughout the State. This Court struck down the statute in its entirety, not only as applied to students who had reached a certain age. *Barnette*, 319 U.S. at 626. By overruling (instead of

distinguishing) *Gobitis*, this Court made crystal clear that it was not reserving any enclave of unchecked state authority over student expression. In the wake of the pathologies unleashed by *Gobitis*, the Court did not take the counter-productive step of reversing itself, only to leave elementary school students – such as the Barnett sisters – unprotected.

*Tinker* further underscores that First Amendment rights are not a rite of passage reserved for secondary school students. The *Tinker* students included 8-year-old Paul Tinker and 11-year-old Hope Tinker. The petition for certiorari “urg[ed] that the First and Fourteenth Amendments protect the right of school pupils to express their political views all the way ‘from kindergarten through high school.’” *Id.* at 516 (Black, J., dissenting). The *Tinker* majority reaffirmed that schoolchildren are protected under the First Amendment, which it noted had been the “unmistakable holding of [the Supreme Court] for almost 50 years.” *Id.* at 506-07. Indeed, even though Justice Black’s dissent expressed concern that the Court would usher in an era of “revolutionary permissiveness” where “pupils of state-supported schools, kindergartens, grammar schools, or high schools” could defy the orders of school officials, *id.* at 518, the majority opinion carved out no exception for grammar school students. *Id.* at 506.

This Court’s precedent establishes with abundant clarity that school officials presumptively may not discriminate against religious viewpoints at any level of the educational enterprise. Any position to the

contrary is foreclosed by *Barnette* itself. See *Barnette*, 319 U.S. at 634 (the Constitution “guards the individual’s right to speak his own mind”). While *Barnette* is widely identified as the font of the Supreme Court’s compelled speech doctrine, it is more. *Barnette* is more broadly a foundational decision of the Supreme Court’s modern First Amendment jurisprudence. Importantly, *Barnette* recognizes that “censorship or suppression of expression of opinion is tolerated by our Constitution only when the expression presents a clear and present danger of action of a kind the State is empowered to prevent and punish.” *Id.* at 633-34; see also *Wallace v. Jaffree*, 472 U.S. 38, 51 (1985) (noting that *Barnette* held that the “right of freedom of thought” protected under the First Amendment “includes both the right to speak freely and the right to refrain from speaking at all”). Accordingly, the controlling point is this: “children assuredly ‘do not shed their constitutional rights . . . at the schoolhouse gate.’” See *Morse*, 551 U.S. at 424 (opinion of Alito, J.); see also *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 655-56 (1995).

## **II. This Court’s Precedent Clearly Establishes That Discrimination Against Religious Viewpoints Is Prohibited.**

The notion that school administrators enjoy discretion to fashion viewpoint-based determinations that discriminate against religious speech is entirely without constitutional basis. Indeed, this radical notion is at war not only with the thrust of *Barnette*, it collides

with decades of well-settled and clearly-established law. Such “viewpoint discrimination is a clearly established violation of the First Amendment in any forum.” *Chiu v. Plano Indep. Sch. Dist.*, 260 F.3d 330, 350-51 (5th Cir. 2001); *see also Chiu v. Plano Indep. Sch. Dist.*, 339 F.3d 273, 280, 284 (5th Cir. 2003); *Children First Found., Inc. v. Martinez*, 169 Fed. Appx. 637, 639 (2d Cir. 2006) (“it is clearly established that, even in a nonpublic forum, restrictions on speech must be . . . viewpoint neutral”); *Monteiro v. City of Elizabeth*, 436 F.3d 397, 404 (3d Cir. 2006) (same); *Cook v. Gwinnett County School Dist.*, 414 F.3d 1313, 1321 (11th Cir. 2005) (same).

The fundamental principle that state officials may not engage in viewpoint discrimination applies with undiminished force when the speech in question has religious content. As this Court has emphasized time and again, “it is axiomatic that 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, 828-29 (1995); *see also Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001); *Lamb’s Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Board of Educ. of Westside Comty. Schs. v. Mergens*, 496 U.S. 226 (1990); *Widmar v. Vincent*, 454 U.S. 263 (1981); *cf. Hosanna-Tabor Evangelical Lutheran Church and Sch. v. E.E.O.C.*, 2012 WL 75047, \*18-20 (Jan. 11, 2012) (Alito, J., concurring). Restricting speech is prohibited “when the specific motivating ideology or the opinion or perspective of the speaker is the rationale

for the restriction.” *Rosenberger*, 515 U.S. at 829. “School authorities are not permitted to discriminate against student expression simply because of its religious character.” *C.H. ex rel. Z.H. v. Olivia*, 226 F.3d 198, 212 (3d Cir. 2000) (Alito, J., dissenting) (describing precedent).

The fact that school administrators may restrict speech that interferes with classroom instruction (or could reasonably be viewed as bearing the school’s imprimatur) does not mean that they may single out religious speech for special censure. The allegations here, which at this stage of proceedings must be accepted as true, establish that respondents restricted student speech solely because of its religious character. They identify no pedagogical reason for barring that speech. Rather, the allegations establish that respondents went to considerable lengths to ban any expression of religious viewpoints on school property, even though the speech occurred during non-curriculum activities and at non-curriculum times. Public schoolchildren were permitted to express their views from virtually any conceivable standpoint, save for the perspective of religious faith. That is manifestly unconstitutional.

Indeed, respondents’ conduct cannot be reconciled with this Court’s unrelenting denunciation of discrimination against religious viewpoints. *See Lamb’s Chapel*, 508 U.S. at 393 (officials may not permit “the presentation of all views . . . except those dealing with the subject matter from a religious standpoint”). So it is that courts have consistently insisted that, even in

the most restricted of non-public forums where officials may draw distinctions based on “subject matter and speaker identity,” the restrictions nonetheless must be viewpoint neutral. *Cornelius v. NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985); *Hobbs v. Hawkins*, 968 F.2d 471, 481 (5th Cir. 1992) (viewpoint discrimination “violates the First Amendment regardless of the forum’s classification”). The point is a foundational premise of American law: Speech is “not to be selectively permitted or proscribed according to official preference.” *Child Evangelism Fellowship of S.C. v. Anderson Sch. Dist. Five*, 470 F.3d 1062, 1070 (4th Cir. 2006). That is a core principle based on *Barnette*.

### **III. Respondents’ Viewpoint Discrimination Served No Legitimate Educational Purpose.**

A common tie that cohesively binds together this Court’s analysis of free expression in public schools is the prohibition against viewpoint discrimination, particularly if that discriminatory policy serves no legitimate educational purpose. Because of its insidious nature, viewpoint discrimination is “presumed impermissible when directed at speech otherwise within the forum’s limitations [educator’s authority].” *Rosenberger*, 515 U.S. at 831; *CLS*, 130 S. Ct. at 2988.

This Court observed in *Tinker* that “undifferentiated fear or apprehension of disturbance is not

enough to overcome the right to freedom of expression.” *Tinker*, 393 U.S. at 508. As one federal district court observed in granting a preliminary injunction against a school official who refused distribution of candy canes containing a religious message:

There is nothing in the evidence before the Court to suggest that other students were not free to decline the candy canes, that the student plaintiffs coerced others into accept [sic] their message, that the student plaintiffs invaded the rights of others not to receive literature by, for example, stuffing lockers, or that the student plaintiffs blocked other students from entering class, actions which could constitute even substantial interference and justify restricting distribution to a more reasonable time, manner, and place.

*Westfield High Sch. L.I.F.E. Club v. City of Westfield*, 249 F. Supp. 2d 98, 112 (D. Mass. 2003). Indeed, one could argue that the only disruptive activity in this case was respondent principals’ seizure of the students’ goodie bags and the aggressively threatening statements (by one principal) that a student would be suspended and a parent arrested for criminal misconduct. That sounds like a return to the bad old days of *Gobitis*.

To argue that the distribution of items with non-religious messages was somehow related to the school’s pedagogical purposes under *Hazelwood* still does not address the forum question as to why pens

with religious messages cannot be distributed during non-instructional time. *See Fleming v. Jefferson County School Dist. R-1*, 298 F.3d 918, 929-34 (10th Cir. 2002) (discussing forum analysis, viewpoint discrimination and *Hazelwood*). Even if in-class, school-sponsored holiday or birthday parties were somehow found to concern course content in a non-public classroom forum during instructional time, forum analysis does not proscribe “private speech that occurs during non-instructional time between classes, during recess, in the cafeteria, on the playing field, or other designated ‘free time’ during the school day.” *Westfield*, 248 F. Supp. 2d at 119. While student expression considered to be school-sponsored under *Hazelwood* can present nettlesome questions of viewpoint neutrality and public perception of school sponsorship, that is manifestly inapposite where, as here, the Court of Appeals has already determined that the facts of the case fall outside *Hazelwood*. *See Fleming v. Jefferson County School Dist. R-1*, 298 F.3d at 924-29 (discussing differing approaches by the federal circuits to addressing viewpoint neutrality and school-sponsored activities under *Hazelwood*).

At all events, as the Court of Appeals panel noted, respondents should be put to the burden of producing evidence that their restriction of student speech was for a pedagogical reason or to prevent students from misperceiving that the religious items bore the school district’s imprimatur. *Morgan v. Swanson*, 610 F.3d 877, 889, n. 14 (5th Cir. 2010); Pet. App. B. at 153-54, n. 14. That burden is entirely

appropriate in light of the fundamental importance of *Barnette*-recognized principles of law foundational to our system of free expression.

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## CONCLUSION

This case is profoundly important to Free Speech jurisprudence. The Court of Appeals grievously erred in refusing to acknowledge that the First Amendment's prohibition against viewpoint discrimination as to elementary schoolchildren in public schools is clearly established. The petition should be granted and the judgment below reversed.

Respectfully submitted,

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