

No. \_\_\_\_\_

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

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ANDREA SKOROS, individually, and next  
friend of NICHOLAS TINE, a minor,  
and CHRISTOS TINE, a minor,  
*Petitioners,*

v.

CITY OF NEW YORK, JOEL L. KLEIN,  
in his official capacity as Chancellor,  
New York City Department of Education, et al.,  
*Respondents.*

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

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**PETITION FOR WRIT OF CERTIORARI**

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## QUESTIONS PRESENTED

This case presents an issue of exceptional public importance. It involves an Establishment Clause challenge to a religiously divisive policy promulgated by the Department of Education for the City of New York—the largest public school system in the country—that affects over one million students enrolled in 1,200 public elementary and secondary schools. The public school policy at issue expressly permits Jewish and Islamic religious symbols in year-end holiday celebrations, but bans the similar use of Christian religious symbols.

In a lengthy decision, a sharply divided panel of the Second Circuit held that this policy does not violate the Constitution. Because this decision conflicts with decisions from this and other federal courts, review is necessary to secure and maintain uniformity of this Court’s decisions. Moreover, review is necessary to provide much needed guidance to the lower courts that is capable of consistent application in cases arising under the Establishment Clause.

1. Whether the Establishment Clause prohibits a public school policy directed at schoolchildren participating in year-end holiday celebrations that expressly utilizes Jewish and Islamic religious symbols, but bans the similar use of Christian religious symbols, thereby making denominational preferences and showing hostility toward the Christian religion.

2. Whether the reasonable observer standard of the endorsement test was changed in *McCreary County v. ACLU*, 125 S.Ct. 2722 (2005), such that young schoolchildren can no longer satisfy the requirements of an “objective observer,” as the Second Circuit held in this case.

3. Whether this Court should abandon the endorsement test because it is unworkable and incapable of consistent application, as this case demonstrates.

**PARTIES TO THE PROCEEDING**

The Petitioners are Andrea Skoros, individually and as next friend of her minor children, Nicholas Tine and Christos Tine (“Petitioners”).

The Respondents are the City of New York, Joel L. Kline, in his official capacity as Chancellor, New York City Department of Education, and Sonya Lupion, individually and in her official capacity as Principal, Edith K. Bergtraum School, New York City Department of Education (“Respondents”).

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**PETITION FOR WRIT OF CERTIORARI**

**OPINIONS BELOW**

The opinion of the two-judge majority, App. 3a, appears at 437 F.3d 1. The dissenting opinion, App. 83a, appears at 437 F.3d at 42. The unpublished district judge's opinion appears at App. 124a.

**JURISDICTION**

The opinion of the panel was issued on February 2, 2006. A petition for panel rehearing and a petition for rehearing en banc were denied on May 25, 2006. App. 1a-2a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

**CONSTITUTIONAL PROVISION INVOLVED**

The Establishment Clause of the United States Constitution provides that "Congress shall make no law respecting an establishment of religion." U.S. Const. amend. I.

**STATEMENT OF THE CASE**

On February 25, 2003, Petitioners filed a First Amended Complaint for declaratory and injunctive relief and nominal damages pursuant to 42 U.S.C. § 1983, challenging the constitutionality of the religious display policy of the New York City Department of Education.<sup>1</sup> Pursuant to this policy, Respondents permit and encourage the public display of the

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<sup>1</sup> The district court had jurisdiction pursuant to 28 U.S.C. §§ 1331 & 1343(a)(3).

menorah, a Jewish religious symbol, and the star and crescent, a religious symbol of the Islamic faith, during various religious holidays and year-end seasonal observances. However, this policy prohibits the similar display of the Christian crèche or nativity at any time, including a simple picture of the nativity displayed during the Christmas season. *See, e.g.*, App. 157a (picture of the nativity). As described by the Second Circuit majority, the Respondents’ “policy allows the menorah to be displayed as a symbol of the Jewish holiday of Chanukah and the star and crescent to be displayed as a symbol of the Islamic holiday of Ramadan, but it does not allow a crèche or nativity scene to be displayed as a symbol of the Christian holiday of Christmas.” App. 4a. This policy applies in all of the primary and secondary public schools in the City of New York, which has the Nation’s largest public school system.

Petitioners challenged the constitutionality of Respondents’ policy under the First and Fourteenth Amendments to the United States Constitution, claiming, *inter alia*, that this policy and its application violate the Establishment Clause.

The parties initially cross-moved for summary judgment, and Petitioners moved in the alternative for a preliminary injunction. On December 4, 2003, the parties subsequently appeared before the district judge and agreed to withdraw their motions for summary judgment and to present the matter on a stipulated record to the court for decision as a bench trial. The district judge ordered a consolidation of the preliminary injunction hearing with the bench trial pursuant to Rule 65 of the Federal Rules of Civil Procedure, and on December 16, 2003, the matter was taken on submission. On

February 18, 2004, the district court ruled in favor of Respondents on all claims. Petitioners appealed.<sup>2</sup>

On February 2, 2006, a divided panel of the Second Circuit affirmed. The dissenting circuit judge issued a lengthy opinion on the Establishment Clause issue, arguing that the majority “effectively turn[ed] a blind eye” to controlling precedent and concluding that the challenged policy “fails under the endorsement prong of the *Lemon* test, both on its face and as applied.” App. 83a. (dissent).

Petitioners timely filed a petition for panel rehearing and a petition for rehearing en banc on the Establishment Clause issue. On May 25, 2006, the petitions were denied.

#### **REASONS FOR GRANTING THE PETITION**

#### **I. THE CONSTITUTION FORBIDS PRACTICES THAT SUGGEST A DENOMINATIONAL PREFERENCE, SUCH AS THE POLICY AT ISSUE.**

“The clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another.” *Larson v. Valente*, 456 U.S. 228, 244 (1982). Thus, this Court has “expressly required ‘strict scrutiny’ of practices *suggesting* ‘a denominational preference.’” *County of Allegheny v. ACLU*, 492 U.S. 573, 608-09 (1989) (citation omitted) (emphasis added); *see also Edwards v. Aguillard*, 482 U.S. 578, 593 (1987) (showing a “preference” for particular religious beliefs violates the Establishment Clause).

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<sup>2</sup> The Second Circuit had jurisdiction pursuant to 28 U.S.C. § 1291.

This Court has made clear that when evaluating claims under the Establishment Clause “the Constitution also requires that we keep in mind the myriad, subtle ways in which Establishment Clause values can be eroded and guard against other different, yet equally important, constitutional injuries.” *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 314 (2000) (internal citation omitted). One is plainly the passage by the government of a policy that creates divisiveness along religious lines in the special context of public elementary and secondary schools. *See id.*

Because Respondents’ policy *suggests a denominational preference*, application of the strict scrutiny standard in light of the special context of public elementary and secondary schools compels a finding of unconstitutionality. *See Edwards*, 482 U.S. at 583-84 (applying the Establishment Clause with special sensitivity in the public-school context).

The policy at issue states, in relevant part, “The display of secular holiday symbol decorations is permitted. Such symbols include, but are not limited to, Christmas trees, Menorahs, and the Star and Crescent.” App. 9a. (emphasis in the original). As stipulated to by Respondents, this policy does *not* permit the public display of *any* nativity scene or crèche by school officials or as part of a school-authorized holiday or seasonal display in the New York City public schools.<sup>3</sup> It prohibits the display of a simple picture of the

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<sup>3</sup> *See Lynch v. Donnelly*, 465 U.S. 668, 680 & 686 (1984) (“The crèche in the display depicts the historical origins of this traditional event [i.e., Christmas] long recognized as a National Holiday” and “[t]o forbid the use of this one passive symbol—the crèche—at the very time people are taking note of the season with Christmas hymns and carols in public schools and other public places, and while the Congress and Legislatures open sessions with prayers by

nativity. *See, e.g.*, App. 157a (picture of the nativity). And it even prohibits students from drawing or coloring pictures of the nativity during classroom instruction, even though students receive books with the menorah for that purpose. App. 15a.

Yet, the policy expressly permits the public display of the menorah and the star and crescent, religious symbols of the Jewish and Islamic faiths respectively. This includes a freestanding, three-dimensional menorah prominently displayed in the main office of a public school.<sup>4</sup>

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paid chaplains would be a stilted over-reaction contrary to our history and to our holdings”).

<sup>4</sup> Pursuant to this policy, Respondents displayed in the main administrative office of a public school attended by Petitioner Skoros’s child a three-dimensional menorah standing next to a tree. *See* App. 158a (photograph of menorah display). The menorah, which included a Star of David, was the prominent element in this display, and there was no explanatory plaque. *See County of Allegheny*, 492 U.S. at 617-619 (finding that the tree was the “predominant element in the city’s display” and noting that the city’s display contained an “explanatory plaque,” which was a significant factor in upholding the constitutionality of the display). Combine these facts with the fact that this display was made pursuant to an official policy that prohibits the similar display of Christian religious symbols, and it is clear that this display does not withstand constitutional scrutiny, *see id.* at 620 n.69 (noting that the combined display of a Christmas tree and a menorah may not be constitutional wherever it is located on government property; “[f]or example, when located in a public school, such a display might raise additional constitutional considerations”) (Blackmun, J.), further demonstrating the inability of the endorsement test to achieve consistent results. *See* section III, *infra*.

Respondents do not permit the display of the nativity scene or crèche in any form during the various seasonal displays, including Christmas displays, because they claim that a nativity scene or crèche is a “purely religious” symbol. App. 22a. Respondents permit the display of the menorah and the star and crescent as part of school-approved displays because they claim that these are “secular” symbols, as stated in the policy.

As the majority properly points out, Respondents’ policy “mischaracterizes” the menorah and star and crescent as secular symbols.<sup>5</sup> App. 81a-82a. Nonetheless, the majority simply excuses Respondents for this canard, referring to it as an “interpretive error.”<sup>6</sup> App. 41a. As a result, Respondents’ discriminatory policy—which is applied in our Nation’s largest public school system—now has the backing of a federal appellate court.

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<sup>5</sup> The dissent properly notes that this aspect of the policy is itself unconstitutional because it “risks excessive entanglement inasmuch as it adopts an official State position on a point of religious doctrine by defining a menorah and star and crescent as secular symbols, and a ‘crèche’ as ‘purely religious.’” App. 84a; *see also* App. 117a (dissent) (citing *Commack Self-Service Kosher Meats v. Weiss*, 294 F.3d 415, 423, 427 (2d Cir. 2002) (holding that the State’s defining “kosher” as “prepared in accordance with orthodox Hebrew religious requirements” violated the First Amendment because it suggested a “preference for the views of one branch of Judaism”)). The violation of the third prong of the *Lemon* test (excessive entanglement) is grounds for granting this petition.

<sup>6</sup> The Catholic League pointed out this “interpretive error” to Respondents on numerous occasions prior to the filing of this lawsuit. *See* App. 10a-12a. Petitioners further demonstrated Respondents’ prevarication throughout the course of this litigation, both in the legal briefing and in expert testimony—to no avail.

Given the majority's recognition that the menorah and the star and crescent are indeed religious symbols, the majority's decision approves, in essence, the following public school policy:

The display of religious holiday symbol decorations for Jews and Muslims is permitted. Such symbols include Menorahs and the Star and Crescent. The display of religious holiday symbol decorations for Christians is not permitted. Only the display of secular holiday symbol decorations is permitted for Christian holidays. Such symbols include Christmas trees.

Thus, this "hypothetical" policy, according to the majority, does not violate the Establishment Clause.

Remarkably, the majority reached its decision in this case despite the fact that the Second Circuit had previously recognized that "[t]he rationale behind the requirement of neutrality is, in part, that governmental actions giving even the appearance of favoring one religion over another are likely to cause divisiveness and disrespect for government by those who hold contrary beliefs." *Parents Ass'n of P.S. 16 v. Quinones*, 803 F.2d 1235, 1240 (2d Cir. 1986).

In the final analysis, New York City's public school policy crosses the line of constitutionality by drawing lines along religious grounds and *suggesting* a denominational preference for Jewish and Islamic religious symbols while disfavoring Christian symbols. This policy does not withstand strict scrutiny under the Establishment Clause.

## II. NEW YORK CITY'S POLICY EXHIBITS HOSTILITY TOWARD THE CHRISTIAN RELIGION IN VIOLATION OF THE ESTABLISHMENT CLAUSE.

Petitioners do not seek the removal of religious symbols from the New York City public schools. *See* App. 4a-5a. Such intolerance toward religion is not required by the Constitution. Rather, Petitioners merely want the neutrality and accommodation that the Constitution demands.

In *Lynch*, this Court clearly articulated the principle of law applicable here:

It has never been thought either possible or desirable to enforce a regime of total separation. Nor does the Constitution require complete separation of church and state; *it affirmatively mandates accommodation, not merely tolerance of all religions, and forbids hostility toward any*. Anything less would require the callous indifference we have said was never intended by the Establishment Clause. Indeed, we have observed, such hostility would bring us into war with our national tradition as embodied in the First Amendment's guaranty of the free exercise of religion.

*Lynch*, 465 U.S. at 673 (internal punctuation, quotations, and citations omitted) (emphasis added); *see also Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993) (“In our Establishment Clause cases we have often stated the principle that the First Amendment forbids an official purpose to disapprove of a *particular* religion or of religion in general.”) (emphasis added).

With no hint of irony, the majority concluded that New York City’s discriminatory policy achieved a valid “pedagogical endeavor” by “us[ing] children’s natural excitement about various year-end holidays to teach the lesson of *pluralism* by showing children the rich cultural diversity of the city in which they live and by encouraging them to show *tolerance* and respect for traditions other than their own.” App. 35a (emphasis added). Apparently, New York City’s brand of “pluralism” and “tolerance” excludes Christianity. Moreover, the apparent “pedagogical endeavor” with regard to the Christian holiday of Christmas is to demonstrate to the impressionable, young students in the New York City public schools that this “tradition” has nothing to do with the nativity. In sum, New York City’s stated purpose for this policy—“to foster mutual understanding and respect for the many beliefs and customs stemming from our community’s religious, racial, ethnic and cultural heritage”—is a sham. *See Edwards*, 482 U.S. at 587 (finding that the government’s purpose was a sham because the policy did not promote—indeed, it undermined—the alleged educational goal).

As previously noted, our Constitution “affirmatively mandates accommodation, not merely tolerance of *all* religions, and forbids hostility toward *any*.” *Lynch*, 465 U.S. at 673 (emphasis added). This case will afford this Court the opportunity to breathe life into this fundamental principle of constitutional law that is largely ignored by the lower federal courts, as this case demonstrates. Indeed, New York City should not be permitted to discriminate against the Christian religion in its public schools under the guise of “tolerance” and “pluralism.” There is no affirmative action prong of the Establishment Clause—our Constitution demands tolerance of all religions, including Christianity. The challenged policy is plainly unconstitutional.

**III. BY NOT VIEWING THE “EFFECT” OF NEW YORK CITY’S POLICY FROM THE PERSPECTIVE OF YOUNG AND IMPRESSIONABLE STUDENTS, THE MAJORITY HAS CREATED DECISIONAL CONFLICT ON AN IMPORTANT ISSUE OF FEDERAL LAW.**

The “effect” analysis at issue here is the application of the second prong of the test articulated in *Lemon v. Kurtzman*, 403 U.S. 602 (1971). *See Lynch*, 465 U.S. at 691-92 (O’Connor, J., concurring); *see also Santa Fe Indep. Sch. Dist.*, 530 U.S. at 307 n.21 (“[T]he Establishment Clause forbids a State to hide behind the application of formally neutral criteria and remain studiously oblivious to the effects of its actions.”) (internal quotations and citations omitted). As this Court explained, “Since *Lynch*, the Court has made clear that, when evaluating the effect of government conduct under the Establishment Clause, we must ascertain whether ‘the challenged governmental action is sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices.’” *County of Allegheny*, 492 U.S. at 597 (citation omitted). In its present form, this “endorsement” test, as it is also known, precludes government from conveying or attempting to convey a message that a particular religion is favored or preferred, and it prohibits making adherence to a particular religion relevant in some way to a person’s standing in the community. *See id.* at 593-94.

Under the endorsement test, the question presented by this case is whether a reasonable observer would find that the policy and its application in the public elementary and secondary schools of New York City have the effect of

endorsing a particular religion or religions or disfavoring a certain religion or religions. *See County of Allegheny*, 492 U.S. at 593-94. The identification of the reasonable observer and the amount of information attributable to this “objective” person is often dispositive, as the conflict between the majority and dissenting opinions in this case demonstrates. More fundamentally, this conflict demonstrates that the reasonable observer standard of the endorsement test is incapable of consistent application, and is, therefore, no standard whatsoever. *See, e.g., Van Orden v. Perry*, 125 S.Ct. 2854, 2867 (2005) (criticizing the reasonable observer standard and noting that “[t]he unintelligibility of this Court’s precedent raises the further concern that, either in appearance or in fact, adjudication of Establishment Clause challenges turns on judicial predilections”) (Thomas, J., concurring); *County of Allegheny*, 492 U.S. at 669 (“[T]he endorsement test is flawed in its fundamentals and unworkable in practice. The uncritical adoption of this standard is every bit as troubling as the bizarre result it produces in the cases before us.”) (Kennedy, J., concurring in judgment in part and dissenting in part); *see also Capitol Square Rev. & Advisory Bd. v. Pinette*, 515 U.S. 753, 768 n.3 (1995) (rejecting the application of the endorsement test and stating, “[T]he endorsement test does not supply an appropriate standard for the inquiry before us. It supplies no standard whatsoever. . . . And, of course, even when one achieves agreement upon [who the hypothetical beholder is], it will be unrealistic to expect different judges (or should it be juries?) to reach consistent answers as to what any beholder, the average beholder, or the ultrareasonable beholder (as the case may be) would think. It is irresponsible to make the Nation’s legislators walk this minefield.”) (Scalia, J., plurality opinion joined by Chief Justice Rehnquist and Justices Kennedy and Thomas).

As controlling precedent would *seem* to dictate, the reasonable observers in this case *should be* elementary school students (i.e., young and impressionable children) who are subjected to the inherently coercive atmosphere found in public elementary schools, *see Edwards*, 482 U.S. at 583-85, and their parents. *See* App. 98a-117a (dissent). As the majority noted, “[T]he schoolchildren for whose benefit these displays are created have no option but to view them and, sometimes, to participate in the craft projects that are integral to many of the displays.” App. 62a.

However, the majority applied a fundamentally different reasonable observer standard by analyzing the purpose and effect of the challenged policy from the perspective of a disinterested adult. App. 44a-45a; *see also* 107a (dissent). The majority stated, “[W]e do not think the intended recipient of a display necessarily defines the objective observer.” App. 46a. As such, the majority held that because “young schoolchildren cannot satisfy the requirements of an objective observer recently specified by the Supreme Court in *McCreary*, we conclude that such children cannot provide the model of the objective observer for purposes of *Lemon* analysis in this case.” App. 46a-47a (emphasis added). This conclusion, which, according to the majority is based on this Court’s decision in *McCreary County v. ACLU*, 125 S.Ct. 2722 (2005), fundamentally conflicts with decisions from this Court and other federal courts of appeals in cases addressing Establishment Clause challenges arising in the public school context.<sup>7</sup> *See Santa Fe Indep. Sch. Dist.*, 530 U.S. at 308

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<sup>7</sup> *See, e.g., Peck v. Upshur County Bd. of Educ.*, 155 F.3d 274, 287 n\* (4<sup>th</sup> Cir. 1998) (upholding constitutionality of school board policy permitting nonstudents to disseminate Bibles and other religious materials in public schools during school hours, except as

(“[A]n objective Santa Fe High School *student* will unquestionably perceive the inevitable pregame prayer as stamped with her school’s seal of approval.”) (emphasis added); *id.* (“The text and history of this policy, moreover, reinforce our *objective student’s perception* that the prayer is, in actuality, encouraged by the school.”) (emphasis added); *Lee v. Weisman*, 505 U.S. 577, 593 (1992) (“We do not address whether that choice [participating in the prayer or protesting] is acceptable if the affected citizens are mature adults, but we think the State may not, consistent with the Establishment Clause, place *primary and secondary school children* in this position.”) (emphasis added); *Edwards*, 482 U.S. at 584, n.5 (distinguishing cases and holding that the potential for undue influence as between college students and grade school pupils is a “distinction [that] warrants a difference in constitutional results”) (internal quotation marks and citation omitted); *see also Wallace v. Jaffree*, 472 U.S. 38, 66, n.9 (1985) (Powell, J., concurring) (“If it were necessary to reach the ‘effects’ prong of *Lemon*, we would be concerned primarily with the *effect on the minds and feelings of immature pupils.*”) (emphasis added); *id.* at 81 (O’Connor, J., concurring) (“The Court’s decisions have recognized a distinction when government-sponsored religious exercises are

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to elementary schools due to the “impressionability of young elementary-age children”); *Freiler v. Tangiapahoa Parish Bd. of Educ.*, 185 F.3d 337, 346 (5<sup>th</sup> Cir. 1999) (“In assessing the primary effect of the contested disclaimer, we focus on the message conveyed by the disclaimer to the *students who are its intended audience.*”) (emphasis added); *Fleischfresser v. Directors of Sch. Dist. 200*, 15 F.3d 680, 688-89 (7<sup>th</sup> Cir. 1994) (deciding Establishment Clause challenge to the school district’s supplemental reading program and stating, “We are concerned, of course, with the *effect on the elementary school students* of using [the challenged reading series]”) (emphasis added).

directed at *impressionable children* who are required to attend school, for then government endorsement is much more likely to result in coerced religious beliefs.”) (emphasis added).

In fact, the majority’s decision conflicts with decisions from its own Circuit.<sup>8</sup> This fact is further evidence that the majority viewed the *McCreary* decision as creating a sea change in the reasonable observer standard for Establishment Clause cases. And it further demonstrates the inconsistent application of this Establishment Clause test.

As noted by the dissent, “In failing to examine the displays and celebrations from the perspective of the students, the majority pays only lip service, and indeed, effectively turns a blind eye, to the significant impact of the students’ impressionability and youth.” App. 83a-84a (dissent).

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<sup>8</sup> Prior to the decision below, the Second Circuit had recognized that the “effects” of a challenged policy directed at public elementary and secondary school students must be viewed from the perspective of the impressionable young students. *See Quinones*, 803 F.2d at 1240-41 (stating that “[t]he concern for neutrality is nowhere more important than in education programs, for the government’s activities in this area can have a magnified impact on *impressionable young minds*” and analyzing the “effect” of the City’s plan “on the *minds of the youngsters attending P.S. 16*”) (citation omitted) (emphasis added); *Brandon v. Board of Educ.*, 635 F.2d 971, 978 (2d Cir. 1980) (“Our nation’s elementary and secondary schools play a unique role in transmitting basic and fundamental values to our youth. To an *impressionable student*, even the mere appearance of secular involvement in religious activities might indicate that the state has placed its imprimatur on a particular religious creed. This symbolic inference is *too dangerous to permit.*”) (emphasis added).

As the dissent points out, the majority's decision "approves a policy directed at the participation of public school children in a year-end holiday celebration that utilizes religious symbols of certain religions, but bans the religious symbol of another. . . . [T]he policy of the New York City Department of Education . . . to arrange for the children to celebrate the holiday season in schools through the use of displays and activities that include religious symbols of the Jewish holiday of Chanukah and the Muslim commemoration of Ramadan, but starkly exclude any religious symbols of the Christian holiday of Christmas, fails under the endorsement prong of the *Lemon* test, both on its face and as applied." App. 83a (dissent).

In the final analysis, the majority's decision materially alters the reasonable observer standard for Establishment Clause cases affecting public school students. Changing the "observer" from a young and impressionable student to a disinterested adult substantially alters the outcome of the case. *See, e.g., Edwards*, 482 U.S. at 584, n.5 (noting that a difference in the intended audience as between college students and secondary school students "warrants a difference in constitutional results") (internal quotation marks and citation omitted). If the Second Circuit is correct, the *McCreary* decision could potentially alter the precedential effect of cases such as *Edwards v. Aguillard*, *Lee v. Weisman*, and *Wallace v. Jaffree*. Moreover, the vastly different conclusions reached by the majority and the dissent demonstrate the inability of the endorsement test to achieve consistent results. Thus, review of this case is necessary to resolve the decisional conflict and to provide much needed guidance to the lower federal courts regarding the application of the Establishment Clause, particularly in the context of public elementary and secondary schools.

**IV. THE MAJORITY FAILED TO PROPERLY CONSIDER THE PUBLIC SCHOOL CONTEXT OF THIS CASE IN CONFLICT WITH DECISIONS FROM THIS AND OTHER FEDERAL COURTS.**

The “context” of the challenged governmental action is a material factor in the constitutional analysis under the Establishment Clause. *See, e.g., Van Orden*, 125 S.Ct. at 2863-64 (comparing the display of religious messages or symbols in the context of public elementary and secondary schools with other non-school contexts). The majority gave little weight to this important and often determinative aspect of the constitutional analysis, contrary to decisions from this and other federal courts.

The majority stated, “[W]e have no reason to conclude that the Supreme Court’s decision in *Allegheny* about the pluralistic message conveyed by the inclusion of a menorah (or a star and crescent) in a multicultural holiday display applies with any lesser force when such a display appears in a public school rather than a public park.” App. 52a. Thus, the majority equated the special context of this case with the very dissimilar context of a public park. This is contrary to the great weight of authority, including Justice Blackmun’s opinion in the *Allegheny* case referenced by the majority. *See County of Allegheny*, 492 U.S. at 620 n.69 (“This is not to say that the combined display of a Christmas tree and a menorah is constitutional wherever it may be located on government property. For example, when located in a public school, such a display might raise additional constitutional considerations.”) (Blackmun, J.) (citing *Edwards*, 482 U.S. at 583-84 (holding that the Establishment Clause must be applied with special sensitivity in the public-school context)); *Van Orden*, 125 S.Ct. at 2856 (holding that the Ten

Commandments display did not violate the Establishment Clause and distinguishing *Stone v. Graham*, 449 U.S. 39 (1980), which struck down the display of the Ten Commandments in public schools, stating, “neither *Stone* itself nor subsequent opinions have indicated that *Stone*’s holding would extend beyond the context of public schools . . . where the text confronted elementary school students every day”); *id.* at 2871 (Breyer, J., concurring) (upholding Ten Commandments display and noting that the display presented a much different context than one “on the grounds of a public school, where, given the impressionability of the young, government must exercise particular care in separating church and state”).

When evaluating claims under the Establishment Clause, context is critical and often dispositive. As stated by this Court, “[T]he government’s use of religious symbolism is unconstitutional if it has the effect of endorsing religious beliefs, and the effect of the government’s use of religious symbolism *depends upon its context.*” *County of Allegheny*, 492 U.S. at 597 (emphasis added). The context for this case is New York City public elementary and secondary schools, not Central Park.

As emphasized by this Court, “‘The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.’” *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) (quoting *Shelton v. Tucker*, 364 U.S. 479, 487 (1960)). “‘In no activity of the State is it more vital to keep out divisive forces than in its schools.’” *Edwards*, 482 U.S. at 584 (quoting *Illinois ex rel. McCollum v. Board of Educ.*, 333 U.S. 203, 231 (1948) (Frankfurter, J.)).

This Court has recognized that public schools present a special context. In *Edwards*, for example, this Court stated, “In this case, the Court must determine whether the Establishment Clause was violated *in the special context of the public elementary and secondary school system.*” *Edwards*, 482 U.S. at 583 (emphasis added). This Court noted that it “has been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools,” *id.* at 583-84, and when it employed the three-pronged *Lemon* test, it did so “mindful of the particular concerns that arise in [this] context,” *id.* at 585.

In *Lee*, this Court stated, “What to most believers may seem nothing more than a reasonable request that the nonbeliever respect their religious practices, *in a school context* may appear to the nonbeliever or dissenter to be an attempt to employ the machinery of the State to enforce a religious orthodoxy.” *Lee*, 505 U.S. at 592 (emphasis added); *see also Santa Fe Indep. Sch. Dist.*, 530 U.S. at 311 (holding that the election mechanism of the school policy was itself unconstitutional and stating that “[t]he mechanism encourages divisiveness along religious lines in *a public school setting*, a result at odds with the Establishment Clause”) (emphasis added).

Throughout its Establishment Clause decisions, this Court carefully and deliberately considers the “special context” of public elementary and secondary schools because “[s]tudents in such institutions are impressionable and their attendance is involuntary. The State exerts great authority and coercive power through mandatory attendance requirements, and because of the students’ emulation of teachers as role models and the children’s susceptibility to peer pressure.” *Edwards*, 482 U.S. at 584. *See also Lee*, 505 U.S. at 592 (“[T]here are heightened concerns with protecting freedom of conscience

from subtle coercive pressure in the elementary and secondary public schools.”).

In fact, prior to the decision below, the Second Circuit had recognized that the heightened scrutiny applied in cases involving public schools was related to the protection provided impressionable students. In *Quinones*, the Second Circuit stated, “The concern for neutrality is nowhere more important than in *education programs*, for the government’s activities in this area can have *a magnified impact on impressionable young minds*, providing a crucial symbolic link between government and religion, thereby enlisting—at least in the eyes of the impressionable youngsters—the powers of government to the support of the religious denomination.” *Quinones*, 803 F.2d at 1240 (internal quotations and citations omitted) (emphasis added).

In summary, the special context of this case raises heightened concerns under the Establishment Clause that the majority disregarded, contrary to the decisions of this and other federal courts.

## CONCLUSION

Because the majority’s decision conflicts with decisions from this Court and other federal courts of appeals regarding the application of the Establishment Clause in the context of public elementary and secondary schools, consideration by this Court is therefore necessary to secure and maintain uniformity of decisions on an important issue of federal law. Moreover, as this and many other cases have demonstrated, the Establishment Clause jurisprudence of this Court is in need of substantial revision. This Court should grant review of this case and take the opportunity to abandon the

endorsement test in favor of a workable standard that is capable of consistent application.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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