No. 08-190

IN THE

Supreme Court of the United States

JOEL CURRY, a minor by and through his parents PAUL & MELANIE CURRY,

Petitioners,

v.

IRENE HENSINGER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Joel Curry created a candy cane with an explicitly religious proselytizing message belatedly attached to it after its approval for selling as a home-made product in a simulated marketplace open to all elementary school students at Handley School. The school principal declined to allow the student to attach the religious proselytizing message to the candy cane.

1. Did the Sixth Circuit err by holding that a public elementary school principal's determination that a student could not engage in unsolicited religious proselytizing speech as part of a graded classroom assignment during instructional time was reasonably related to legitimate pedagogical concerns and therefore not violative of the First Amendment?

2. Did the Sixth Circuit err by holding that a student's unsolicited religious proselytizing speech engaged in as part of a graded classroom assignment during instructional time is subject to the standards of *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), instead of those found in *Tinker v. Des Moines Ind. Cmty. Sch. Dist.*, 393 U.S. 503 (1969)?

TABLE OF CONTENTS

Contents

Cited Authorities

Page

Federal Cases

Cited Authorities

Cited Authorities

Cited Authorities

Page

STATEMENT

Joel Curry, a minor through his parents, Paul and Melanie Curry, (hereinafter "the Student" or "Curry") sued the School District of the City of Saginaw and its then-principal, Irene Hensinger (hereinafter "the Principal") claiming that his rights under the First Amendment had been violated. (R. 1 Complaint). Curry complained the school district and its principal had unconstitutionally impeded his religious speech by preventing him from attaching a religious proselytizing message to candy canes that had been pre-approved for sale without the message in a simulated marketplace created for elementary students as part of a school curriculum graded assignment. (*Id.*) Hensinger contended that Curry's constitutional rights had not been violated, and in any event, that she was protected by qualified immunity because her conduct did not violate established statutory or constitutional rights of which a reasonable person would have known. (R. 22, Motion for Summary Judgment by all Defendants). The district court ruled that Hensinger and the School District for the City of Saginaw had violated Curry's rights but that Hensinger was protected with qualified immunity because the law was not clearly established. Curry appealed. The Court of Appeals reversed the district court's finding of a constitutional violation and held that Hensinger's conduct was constitutionally permissible.

When filing their motion for summary judgment, defendants adopted the joint statement of stipulated facts submitted to the district court on January 14, 2005. (R.15 Stipulation, Joint Statement of Facts;

Apx. pg. 59). In addition, they relied upon facts submitted to the district court that same date along with the affidavit of Irene Hensinger. (R.18 Statement of Resolved and Unresolved Issues). Hensinger's affidavit is consistent with the stipulated facts. She explained her involvement as follows:

> For several years, the Fifth Grade curriculum at Handley School included an event called Classroom City. Classroom City is a multi-disciplinary project or unit which involves teaching of literature, marketing, civics, economics and math.
>
> On the first day of the Classroom City event in December of 2003, a teacher named Lisa Sweebe informed me that a student named Joel Curry was "selling" or distributing candy cane ornaments with a writing attached entitled, "The Meaning of the Candy Cane." I was given a copy of the writing. When I reviewed the writing, I found it to be overtly religious and proselytizing in nature.
>
> Shortly thereafter, the teacher provided me with a copy of some legal information from Mrs. Curry which appeared to have been printed off of the Internet. I reviewed the information. I did not find the information to be persuasive, because it did not focus upon events occurring during instructional time.

I forwarded both the note with the writing, "The Meaning of the Candy Cane" and the Internet information to my supervisor, Dr. John Norwood, Assistant Superintendent for School Performance. Shortly thereafter, I discussed the situation with Dr. Norwood.

Ultimately, I decided, with input from Dr. Norwood, that the student, Joel Curry, would not be allowed to distribute the writing, "The Meaning of the Candy Cane" with the candy cane ornaments he was "selling" at Classroom City. In making this decision, I was concerned about offending other students and parents, actual and potential disruption of the educational environment, and avoiding a possible violation of the Establishment Clause.

I do not recall the "selling" or distributing of overtly religious materials to have been in issue at Handley School prior to the December 2003 Classroom City event.

In deciding not to allow the writing, "The Meaning of the Candy Cane" to be distributed by Joel Curry at the December 2003 Classroom City event, I was not referring to or relying upon any written or unwritten policy or custom or practice of the school district. I am not aware of any policy or custom or practice of the school district relating to the distribution of overtly religious materials. However, as a lawyer and a Principal, I was very aware of the doctrine of separation of church and state and wanted to avoid a violation of the Establishment Clause.

> I met with Mrs. Curry to discuss my decision during the Classroom City event. When I explained to her that the Classroom City event was instructional time, she seemed surprised.
>
> Later, in April of 2004, I met again to discuss this issue with Mr. and Mrs. Curry, and a private attorney retained by the school district, Mr. B.J. Humphreys. Mr. Humphrey's statements at the meeting supported my decision that the distribution of the writing, "The Meaning of the Candy Cane" was not appropriate during instructional time.
>
> To the best of my knowledge and information, the issue of the distribution of the writing, "The Meaning of the Candy Cane" with the candy cane ornaments at Classroom City was never brought to the attention of either the Superintendent of Schools or the Board of Education prior to the filing of the Complaint in this case.

Joel Curry filed a complaint as a civil rights action under 42 U.S.C. § 1983 seeking to enjoin the defendants' purported policy and practice of discrimination against students who use religious contents when responding to a class assignment. (R.1 Complaint, ¶1; Apx. pg. 9). Curry alleged that he was prohibited from "selling" candy cane ornaments with an attached message explaining the religious origin of the candy cane as part of a "Classroom City" simulation designed to teach students in his class how to be

contributing citizens of a town by participating in its marketplace. (*Id.*) In addition, he maintained that defendants violated his right to freedom of speech by censoring his candy cane ornament with its attached religious message and that defendants violated the free exercise and establishment clauses of the First Amendment as well as his rights to due process and equal protection of the law under the Fourteenth Amendment.

Arguing that the Student was unable to demonstrate a constitutional violation and that she was cloaked with qualified immunity, the Principal moved for summary judgment pursuant to Fed. R. Civ. P. 56(c). (R.22 Motion for Summary Judgment by All Defendants). She contended that none of the actions complained of by the Student led to the violation of his constitutional rights and that, even if they did, she was entitled to qualified immunity where her conduct did not violate clearly established statutory or constitutional rights of which a reasonable person would have known (*Id.*)

Curry filed a cross motion for summary judgment (R.25 Cross Motion for Summary Judgment by All Plaintiffs). He challenged defendants' ability to present a specific showing of constitutionally valid reasons for the regulation of his speech. (*Id.*) Curry also urged that, in light of the jurisprudence affirming protection for proper religious expression, censorship of religious speech, simply because of its content, could not be a legitimate pedagogical concern as a matter of fixed constitutional principle. (*Id.*) In his brief in response to the defendants' motion for summary judgment, Curry disputed Hensinger's assertion of a qualified immunity defense (R.34 Brief in Support of Motion Opposing Defendants' Motion for Summary Judgment).

The district court denied Curry's cross motion for summary judgment and granted the defendants' motion for summary judgment (R.50 Memorandum, Opinion and Order; Apx. pg. 87). In so ruling, the district court found that the defendants did not violate Joel Curry's rights under the free exercise clause of the First Amendment; agreed that defendants abridged Joel Curry's First Amendment free speech rights; rejected Joel Curry's claim that the School District failed to train its personnel in dealing with such issues or otherwise establish municipal liability; and accepted Principal Irene Hensinger's argument that she was entitled to qualified immunity. (*Id.*)

The district court partly based its ruling on plaintiff's counsel's acknowledgment that the main thrust of the case was the alleged violation of First Amendment speech rights, not his other theories. (R.50 Memorandum Opinion and Order, pg. 13; Apx. pg. 99). The district court concluded that defendants' restriction of Joel Curry's speech could not be justified even under the more generous standard provided in *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260 (1988). (R.50 Memorandum Opinion and Order, pg. 15; Apx. pg. 101). The district court also ruled that the defendants' concern over an establishment clause violation was not a valid reason to curtail Joel Curry's speech rights. (R.50 Memorandum Opinion and Order, pg. 24; Apx. pg. 110). For these and other reasons, the district court held that Curry established a violation of constitutional rights under the First Amendment's free speech protection (*Id.*)

The district court held that the Student had not proved a violation of the free exercise clause (R.50 Memorandum Opinion and Order, pg. 25; Apx. pg. 111); had not demonstrated a violation of constitutional rights

based upon the due process clause (R.50 Memorandum Opinion and Order, pg. 26; Apx. pg. 112); and that the court need not address the equal protection claim given the finding that the Student's free speech rights under the First Amendment were violated (R.50 Memorandum Opinion and Order, pg. 25; Apx. pg. 111).

As for the availability of the qualified immunity defense for the Principal, the district court indicated that it was a question of whether the constitutional rights were clearly established. The district court found that they were not clearly established. Thus, the district court held that the Principal was entitled to successfully assert a qualified immunity defense:

> In this case, the Court finds that the First Amendment speech rights of a student to make religious statements in a quasi-classroom setting were not clearly established at the time of the incident. As noted earlier, the Supreme Court has articulated at least three different tests to be applied to speech restrictions in the academic arena. The nature of Classroom City defies an easy categorization as to the type or form it created, and therefore, the School administrator reasonably could not be expected to identify the subtle distinctions that differentiate one type of forum that resulted or the appropriate that should be applied.

(R.50 Memorandum Opinion and Order, pgs. 27-28; Apx. pgs. 113-114). Observing that this appeared to be precisely the type of case for which the qualified immunity defense was intended, the district court

rendered judgment in favor of defendants. (R.50 Memorandum Opinion and Order, pg. 29; Apx. pg. 115; R.51 Judgment; Apx. pg. 118).

Notably, the district court determined that the Student's request for declaratory and injunctive relief against the School District for the City of Saginaw was moot because Curry had graduated our of Hadley Middle School in 2004. (Opinion and Order Granting Defendants' Motion for Summary Judgment and Denying Plaintiffs' Motion for Summary Judgment, Pet. Apx. Pg. 38b). The court determined that the Student's damage claim saved the lawsuit from the mootness challenge, but denied his request for declaratory and injunctive relief. *Id.* The district court then evaluated whether the Student could succeed with his money damage claim against the School District, and concluded that he could not because the law of 42 U.S.C. § 1983 required a showing of either an unconstitutional policy or practice on the school district's part, or a showing that the school district could be liable under a failure-to-train theory. *Id.* at 40b. The Student failed to raise a fact question regarding any of these grounds for imposing liability under 42 U.S.C. § 1983. The district court also rejected the Student's money damage claim against the Principal because she was entitled to qualified immunity. *Id.* at 40b.

The School District for the City of Saginaw did not pursue an appeal. The Student appealed from the judgment dismissing his claim against the Principal, and the sole issue raised on appeal was whether the district court erred in concluding that she was protected with qualified immunity. The Principal urged the Court of

Appeals to affirm the judgment, arguing that it could be supported by both prongs of the qualified immunity analysis: 1) that she did not violate Curry's constitutional rights; and 2) that no clearly established law would have told a reasonable person that the complained-of conduct was unconstitutional.

The court of appeals determined that the Student's speech was made as part of school activities and thus, the standard for restricting his speech was to be found in *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988). Noting that the Student had evaded the formal approval process by submitting the candy canes without any religious attachment for the market survey and approval process, the court reasoned that the decision not to allow the attachment was based on the legitimate pedagogical concerns. The court recognized a number of such concerns including that allowing the card in that setting could offend other children and subject younger children to an unsolicited religious promotional message during classroom time. The court emphasized in its decision that schools have broad discretion to make such judgments regarding speech in a classroom instructional setting. Based on this, the court held that the Student's rights were not abridged. It therefore affirmed the district court's grant of summary judgment in favor of the Principal.

REASONS FOR DENYING THE PETITION

I. CURRY HAS NOT ESTABLISHED THAT THESE CONSTITUTIONAL ISSUES SHOULD BE REVIEWED BY THIS COURT.

Curry, an elementary school student, contends that this Court should grant review to consider whether the court of appeals correctly held that a school principal may exercise her discretion to prevent an elementary school student from engaging in unsolicited religious proselytizing speech as part of a classroom assignment during instructional time because her determination was reasonably related to legitimate pedagogical concerns. Curry also urges this Court to consider whether an elementary school principal's decision regarding whether to approve a student's unsolicited religious proselytizing speech engaged in as part of a classroom assignment during instructional time is subject to the standards of *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), instead of those found in *Tinker v. Des Moines Ind. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

Curry argues certiorari should be granted because the decision conflicts with this Court's decisions, allows discrimination against religious speech, and deviates from guidelines of the Department of Education on students' constitutional rights of religious speech. This case was correctly decided below and, in any event, is a poor candidate for review.

First, the case presents an issue of law that is not well developed in the circuit courts of appeals. The question of constitutionally permissible parameters for

school discretion regarding when to permit student religious proselytizing speech in the classroom setting should be allowed to percolate in the lower courts before this Court accepts a case for review. Second, Curry's petition for certiorari focuses on a claim of discrimination against religious speech (Petition for Writ of Certiorari, pgs. 15-17), which was not the focus of his argument on appeal and was not directly ruled on below. *Curry v Hensinger*, 513 F.3d 570, (6th Cir. 2008) ("On appeal, Plaintiff claims only a violation of the constitutional right to freedom of speech"). Third, the Court of Appeals decision is correct. Fourth, Curry's effort to suggest the Sixth Circuit decision conflicts with Department of Education guidelines ignores the unique circumstance that the speech at issue involved an unsolicited religious proselytizing message, which would be presented during classroom instructional time to early elementary school students after it had been reviewed and approved by the school. Fifth, Curry's argument that the Sixth Circuit applied the wrong standard in analyzing the speech at issue here cannot be reconciled with this Court's repeated emphasis on preserving discretion for local educational officials regarding speech in the classroom setting that the public "might reasonably perceive to bear the imprimatur of the school." *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988). Sixth, even if Curry is correct about the legal standard and constitutional rule of law, the outcome here will be the same because the Principal would still be entitled to the protection of qualified immunity because the law governing speech in a classroom in these circumstances was not clearly established.

A. Contrary to Curry's argument, no conflict exists in the lower courts and the issues should be allowed to percolate before this Court intervenes to resolve them.

The constitutionality of a public elementary school principal's determination that a student may not engage in unsolicited religious proselytizing speech as part of a classroom assignment during instructional time is a novel and important issue of law. But the intermediate federal appellate courts and state appellate courts have not yet grappled with the issue sufficiently to allow this Court the benefit of their thinking. Absent time for the issue to percolate, this Court will be in the position of deciding the issue without the benefit of this process. Rather than point to conflicting decisions, Curry relies on a series of decisions involving speech made outside the context of graded classroom assignments to support his argument that the court of appeals erred. (Petition for Writ of Certiorari, pg. 10 citing *Capitol Share Review Advisory Bd. V. Pinette*, 505 U.S. 753 (1995) (involving question of unattended cross on grounds of state capital and not student conduct or speech in a school setting).

Curry cites some decisions in the school setting, but they involve public or limited public forums in a school outside the classroom setting. *See, e.g.*, (Petition for Writ of Certiorari, pgs. 22-23 citing *Morse v Frederick*, 551 U.S. ___, 127 S. Ct. 2618 (2007) and *Child Evangelism Fellowship of New Jersey, Inc. v. Stafford Twp. School Dist.*, 386 F.3d 514 (3rd Cir. 2004). Curry's approach underscores the absence of a conflict in the decisions of lower courts or of this Court. And while the parameters of appropriate school discretion in the context of the

classroom instructional setting arguably remains hazy, this stems from the fact-based analysis that this Court has historically applied and the distinctions between categories of speech regulation in schools, not from a conflict in the lower courts. The level of scrutiny applied to regulations of student expression depends on the substance of the message, the purpose of the regulation, and the manner in which the message is conveyed. *See Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260 (1988); *Bethel School Dist. v. Fraser*, 478 U.S. 675 (1986); *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503 (1969). *See also Boroff v. Van Wert City Board of Educ.*, 220 F.3d 465, 467-71 (6th Cir.2000) (analyzing the Supreme Court's decisions in *Tinker*, *Fraser*, and *Kuhlmeier*); *Henerey v. City of St. Charles*, 200 F.3d 1128, 1132 (8th Cir.1999) (comparing the level of scrutiny applied *Tinker* in and *Hazelwood*); *Chandler v. McMinnville School Dist.*, 978 F.2d 524, 527-29 (9th Cir.1992) (analyzing the distinctions between the Supreme Court's decisions in *Tinker*, *Fraser*, and *Kuhlmeier*). Compare *Curry v. Hensinger*, 315 F.3d 570 (6th Cir. 2008) with *M.A.L. v. Kinsland*, 2008 WL 4471097, 2008 U.S. App. LEXIS 21028, __ F.3d __ (6th Cir. 2008) and *Canady v. Bossier Parish School Board*, 240 F.3d 437 (5th Cir. 2001). No conflict exists. In addition, this Court will benefit from allowing these issues to further percolate in the lower courts before it grapples with them.

B. Curry's claim of per se discrimination against religious speech was not the focus of his argument on appeal and was not directly ruled on below.

Curry's petition for a writ of certiorari alters the focus of his claim. The district court pointed out in its opinion that "during oral argument on the motion [for summary judgment], the plaintiffs' attorney acknowledged that the main thrust of the case was the alleged violation of the boy's First Amendment speech rights." (R.50 Memorandum Opinion and Order, pg. 13). The district court later announced that Curry's focus was not religious or viewpoint discrimination but free speech:

> The plaintiffs also de-emphasized their equal protection claim at oral argument. They have pointed to no law, regulation, statute, ordinance, or regulation that was applied unequally to Joel Curry in this case.

Id. at pg. 25. Not only was this discrimination claim de-emphasized, but the district court declined to rule on it:

> Given the finding that the plaintiffs' free speech rights under the First Amendment were violated, the Court need not address the Equal Protection claim.

Id. On appeal, Curry challenged the district court's determination that the Principal was protected with qualified immunity. *Curry v Hensinger*, 513 F.3d 570 (6th Cir. 2008). Curry did not appeal as to the school district

or challenge the district court's failure to decide his equal protection claim. Nor did Curry argue in the Sixth Circuit that the First Amendment bars the discriminatory exclusion of religious viewpoints as such. At best, Curry mentioned the word "discrimination" in passing in the course of discussing whether the decision not to allow the religious message served a pedagogical purpose. (Appellant's Brief, pgs. 23-26).

But in his petition for a writ of certiorari, Curry's focus has changed. He now urges review because it was error to "hold that a public elementary student's religious speech presented in response to, and in compliance with, a class assignment, may be categorized as *per se* 'offensive' because it is religious...." (Petition for a Writ of Certiorari, pg. i). And Curry's argument is squarely predicated on a claim of the "discriminatory exclusion of religious viewpoints as such." *Id.* at pgs. 15-19.

Not only is this argument newly raised, but it is inconsistent with a nuanced view of the facts. The parties stipulated to the fact that Curry was obligated to obtain approval for his product, and to engage in a market survey. At the time he did so, he failed to include the card with the religious message or alert the school that it had been added to the candy canes before their sale. *Curry v Hensinger*, 513 F.3d 570, 574-575 (6th Cir. 2008). Curry's *per se* discrimination argument is not well-developed since it was never presented below. This case is a poor candidate for review of that issue given the lack of developed appellate record, and the fact that Curry's proposed speech, the candy cane with the religious card, failed to meet the school's standards since he had not done a market survey with the religious card, but added it after-the-fact contrary to the requirements of the assignment.

C. Despite Curry's assertions to this Court, the court of appeals decision does not conflict with Department of Education guidelines and this argument was not presented or ruled on below.

Curry also argues that the court of appeals' decision conflicts with the standards of the U.S. Department of Education, as set forth in *Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools*, 68 Fed. Reg. 9645 (Feb. 28, 2003). Curry reads the *Guidance* standards to bar use of pedagogical concerns to excuse "censorship" of students' religious speech. This argument misconstrues both the standards upon which Curry relies and their application to the facts of this case. The "Prayer During Noninstructional Time" standard provides that school authorities may not structure rules of order and pedagogical restrictions to discriminate against religious speech in noninstructional time.

> Students may pray when not engaged in school activities or instruction, subject to the same rules designed to prevent material disruption of the educational program that are applied to other privately initiated expressive activities. Among other things, students may read their Bibles or other scriptures, say grace before meals, and pray or study religious materials with fellow students during recess, the lunch hour, or other non-instructional time to the same extent that they may engage in nonreligious activities. While school authorities may

> impose rules of order and pedagogical restrictions on student activities, they may not discriminate against student prayer or religious speech in applying such rules and restrictions.

Guidance, 68 Fed. Reg. at 9647. This standard embodies the constitutional requirement that student religious speech must be allowed to the same extent as other speech during recess, lunch hour, and other non-instructional time.

This non-instructional-time standard does not apply to this case. The Classroom City event where the religious card was presented was indisputably considered instructional time. (Affidavit of Irene Hensinger, ¶¶ 10-11). Thus, Curry is wrong that the court of appeals decision conflicts with the standard insofar as this one is concerned.

Curry also relies upon the "Religious Express and Prayer in Class Assignments," standard, which allows a student to be graded on legitimate pedagogical concerns identified by the school.

> Students may express their beliefs about religion in homework, artwork, and other written and oral assignments free from discrimination based on the religious content of their submissions. Such home and classroom work should be judged by ordinary academic standards of substance and relevance and against other legitimate pedagogical concerns identified by the school.

> Thus, if a teacher's assignment involves writing a poem, the work of a student who submits a poem in the form of a prayer (for example a psalm) should be judged on the basis of academic standards (such as literary quality) and neither penalized nor rewarded on account of its religious content.

Guidance, 68 Fed. Reg. at 9647. To be sure, this standard comes closer to the facts of this case. But the standard encompasses the requirement that whether religious content is allowed must be judged "by ordinary academic standards of substance and relevance and against other legitimate pedagogical concerns identified by the school." *Id.*

The court of appeals' opined that the Principal's decision to prevent the Student from attaching the cards to the candy canes was based on a valid pedagogical concern, namely, to avoid having its curricular event offend other children or their parents and to avoid subjecting young children to an unsolicited religious promotional message while they were essentially a captive audience participating in a classroom activity. Compare with *Santa Fe Ind. Sch. Dist. v. Jane Doe*, 540 U.S. 290, 302-304 (2000). This opinion notes a key factual difference between the factual posture of this case and that which the standard addresses – the Classroom City event was not simply a graded assignment. It was an instructional, curricular event that required the student's work to be exhibited and sold at a school sponsored marketplace to other students. This factual difference raises a pedagogical concern of exposing students, their parents, and other young children to an

unsolicited religious promotional message at a school-sponsored curricular event, potentially disrupting the educational environment. This Court has recognized the validity of these concerns in the context of expressing religious views in the classroom. See *Edwards v. Aguillard*, 482 U.S. 578, 584 (1987) ("Families entrust public schools with the education of their children, but condition their trust on the understanding that the classroom will not purposely be used to advance religious views that may conflict with the private beliefs of the Student and his or her family.").

Curry's reliance upon the *Guidance* standard as creating a conflict with a court of appeals opinion regarding unsolicited religious messages at a school sponsored event is, therefore, misplaced.

D. The court of appeals' decision is correct.

The court of appeals properly concluded that Principal Hensinger was entitled to qualified immunity because she did not violate petitioner's First Amendment rights under the *Hazelwood* standard, which applies to speech by a student in a closed forum of an elementary school classroom. The court of appeals properly concluded that the Principal did not violate the Student's First Amendment rights when she disallowed him to belatedly add a religious proselytizing message to a product to be sold to elementary school students during classroom time.

The Classroom City exercise was a part of the curriculum and an elementary school setting is a closed forum. The closed forum determination rests not only

on the elementary school setting, but also exists by virtue of the fact that the teacher previewed and approved all of the products to be sold by the students during the Classroom City event. In *Walz v. Egg Harbor Twp. Bd. of Ed.*, 342 F.3d 271 (3d Cir. 2003), an elementary school student brought a First Amendment freedom of speech claim after he was prohibited from distributing candy canes with an attached "religious story, entitled "A Candy Maker's Witness." The story was similar to the card in the instant case in that it described the candy cane as Christian symbolism but the story in *Walz* had more of a historical context. Mrs. Walz checked with the school district in advance of the holiday party and requested that her son, Daniel, be allowed to distribute the candy canes with story attached.[1] Mrs. Walz was "informed that Daniel could distribute the candy canes and the attached story to his classmates, but only before school, or after school, not during the classroom party itself." 342 F.3d at 274. The Walzs then filed suit.

The *Walz* court followed *Hazelwood* emphasizing the need to afford leeway to local school officials. 342 F.3d at 277-278. The court went on to find that a school district may reasonably act to prevent proselytizing speech in a classroom setting. The court recognized a difference between speech as personal expression and speech to promote religion in the school setting:

> Context is essential in evaluating student speech in the elementary school setting.

1. The Currys, on the other hand, gave the School District no advance warning regarding the issue, despite the fact that Mrs. Curry had attended a seminar on the issue and knew that the distribution of the cards would raise an issue.

> It would seem reasonable that student expression may implicate religion if done out of personal observance as opposed to outward promotion. There is a marked difference between expression that symbolizes individual religious observance, such as wearing a cross on a necklace, and expression that proselytizes a particular view.

Id. at 278-279. The *Walz* court reiterated its concerns regarding speech intended to proselytize in the explicit holding of the case:

> In short, Daniel Walz was not attempting to exercise a right to personal religious observance in response to a class assignment or activity. His mother's stated purpose was to promote a religious message through the channel of a benign classroom activity. In the context of its classroom holiday parties, the school's restrictions on this expression were designed to prevent proselytizing speech that, if permitted, would be at cross-purposes with its education goal and could appear to bear the school's seal of approval.

Id. at 280-281. Those concerns apply here.

The Sixth Circuit has also applied the *Hazelwood* standard in the First Amendment freedom of speech case of *Poling v. Murphy*, 872 F.2d 757 (6th Cir. 1989). In *Poling*, the court stated that limitations on speech may be proper in the school context even where they would be unconstitutional in a non-school setting. The

court observed that school officials retain control of the public school system including as to speech that would be protected elsewhere. 872 F.2d at 762. The court went on to find that the decision of school officials to prohibit Dean Poling from participation in the school election was justified by the legitimate pedagogical concern of teaching civility. The decision was based on the need to provide "wide latitude" to local school officials. 872 F.2d at 762-763. Applying the *Hazelwood* standard, the court concluded that the decision of school officials to disallow the speech was reasonably related to a legitimate educational concern and, therefore, proper. The *Hazelwood* standard does not compel defendants to show actual, material and substantial disruption of the school environment. Rather, school officials may be found to have acted reasonably when acting to avoid disruption of the educational environment, to avoid offending other students, and to avoid violations of the establishment clause. *Coles v. Cleveland Bd. of Education*, 171 F.3d 369, 377 (6th Cir. 1999).

The Principal sought to prohibit distribution of overtly religious proselytizing material as part of a graded curricular assignment during classroom time so as to avoid disrupting the educational environment, offending other students, or violating the establishment clause. She did not regulate speech due to the viewpoint expressed. Rather, she regulated the speech so as to avoid disruption of the educational environment and to protect the rights of all. The Principal's decision with input from Mr. Norwood, was reasonably tailored, and reasonably related to legitimate pedagogical concerns. The Principal disallowed distribution of religious literature which was proselytizing in nature during

instructional time because she was concerned about offending other students, the actual and potential disruption of the educational environment, and in avoiding a possible violation of the establishment clause. As the Sixth Circuit properly pointed out, "the school's desire to avoid having its curricular event offend other children or their parents, and to avoid subjecting young children to an unsolicited religious promotional message that might conflict with what they are taught at home qualifies as a valid educational purpose." Opinion at 15a-16a, citing *Edwards*, 482 U.S. at 584. This evaluation of a legitimate pedagogical concern falls within the Principal's discretion as a school administrator and, as the Sixth Circuit properly concluded, did not violate any right the Student enjoyed under the First Amendment.

E. Contrary to Curry's argument, the *Hazelwood* standard applies to conduct or speech engaged in during classroom instructional time when that conductor speech is engaged in as part of a graded classroom assignment.

This Court has recognized a continuum of speech in or on the premises of a school. Student speech that happens to occur on the school premises is governed by this Court's opinion in *Tinker v. Des Moines Independent School Dist.*, 393 U.S. 503 (1969). This is pure student speech. It must be tolerated by the school "unless school authorities have reason to believe that such expression will 'substantially interfere with the work of the school or impinge upon the rights of other students.'" *Hazelwood*, *supra*, at 266, quoting *Tinker*, *supra*, at 509.

Under *Tinker*, pure student speech may be prohibited if it materially and substantially interferes with the needs of school discipline, substantially interferes with the work of the school, or impinges upon the rights of other students, 393 U.S. at 509. In *Tinker*, the Court held that a student could wear a black arm band to school to protest the Vietnam War. Central to the holding of *Tinker* was the fact that wearing the arm band would not substantially interfere with the work of the school or impinge on the rights of other students. 393 U.S. at 509. The Court specifically limited the reach of its holding by noting that a school can limit otherwise protected speech if it does so as part of a prescribed classroom exercise:

> Accordingly, we conclude that the standard articulated in Tinker for determining when a school may censor a student expression need not also be the standard for determining when a school may refuse to lend its name and resources to the dissemination of student expression. Instead, we hold that educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.

Id. The opposite of student-sponsored speech is government speech. For example, that occurs when the principal speaks at a school assembly. When the government itself is the speaker, it may make viewpoint-based choices and choose what to say and what not to say, *Rosenberger v. Rector & Visitors of the Univ. of Virginia*, 515 U.S. 819, 833 (1995).

Between pure student speech and government speech is school-sponsored speech which is governed by *Hazelwood, supra.* School-sponsored speech is student speech that a school affirmatively promotes as opposed to speech that it tolerates. *Hazelwood,* at 270-271. Expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school constitute student-sponsored speech over which the school may exercise editorial control so long as its actions in doing so are reasonably related to legitimate pedagogical concerns. *Id.* at 273.

This Court has drawn a distinction between personal expression that happens to occur on school premises and expressive activities that are sponsored by the school and may fairly be characterized as part of the school curriculum. *Hazelwood, supra.* Speech sponsored by the school is subject to greater control by school authorities than speech not so sponsored because educators have a legitimate interest in assuring that participants in the sponsored activity "learn whatever lessons the activity is designed to teach . . ." Id. As long as the actions of the educators are reasonably related to legitimate pedagogical concerns, the *Hazelwood* court held that educators do not offend the First Amendment by exercising editorial control over the style and content of the student's speech in school sponsored expressive activities.

In *Hazelwood,* this Court ruled that a school could control the style and content of student-authored articles published in the student newspaper. The Court first engaged in a forum analysis in order to determine

the level of scrutiny required to evaluate the school's actions. There are three types of forums: traditional public forums, limited public forums, and closed forums.

Traditional public forums include areas, such as streets and parks, which have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Limited public forums are those created by the state when it opens its property for expressive activity. The government may only restrict speech in public forums or limited public forums if the restriction is necessary to serve a compelling state interest and is narrowly drawn to achieve that end. Those state facilities which have not been dedicated to public use but have instead been reserved for other purposes are closed forums. The state may impose reasonable restrictions on speech in closed forums.

Schools are not traditional public forums, *Hazelwood, supra*, at 267. However, school officials may create a limited public forum if, by policy or practice, they open the school for indiscriminate use by the public. In *Hazelwood*, the Court held that school officials did not intend to open the school newspaper as a public forum for indiscriminate use by student reporters or editors or by the school body generally. Following *Hazelwood*, other courts have found that classrooms are not public forums if there is no evidence that school authorities have opened them for indiscriminate public expression.

If a student asserts the right to speech in a closed forum, the school authorities may regulate the content of the speech in any reasonable manner, *Hazelwood*,

supra, at 270. In addition to holding that speech in the closed forum of a classroom can be regulated in any reasonable manner, *Hazelwood* recognized that school-sponsored speech that is part of the curriculum may also be reasonably regulated. On that point, the *Hazelwood* Court distinguished the *Tinker* holding as follows:

> The question whether the First Amendment requires a school to tolerate particular student speech - the question that we addressed in *Tinker* - is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech. The former question addresses educators' ability to silence a student's personal expression that happens to occur on the school premises. The latter question concerns educators' authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school . . .

The contours of a student's activity that are protected by the First Amendment are defined in the school context by *Tinker* and *Hazelwood* and their progeny. Courts have struggled over determining the type of speech involved and the governing test. *Tinker* and *Hazelwood* coexist.

In large part, Ms. Hensinger worried about violating the establishment clause. In *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the Supreme Court articulated a three-

part test to decide if a government-sponsored activity offends the establishment clause. Thereunder, a government-sponsored activity will not violate the establishment clause if (1) it has a secular purpose, (2) its principal or primary effect neither advances nor inhibits religion, and (3) it does not create an excessive entanglement of the government with religion. If the challenged practice fails any part of the three-part test, it violates the establishment clause, *Stone v. Graham*, 449 U.S. 39, 40-41 (1980). Whether a particular state action endorses religion depends upon how a reasonable observer would interpret the action, *Capital Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 779-780 (1995).

This Court has said that, a state interest in avoiding an establishment clause violation may be characterized as compelling and, therefore, may justify content-based discrimination, *Widmar v. Vincent*, 454 U.S. 263, 271 (1981). This fact underscores the propriety of the Principal's conduct. Allowing religious proselytizing as part of classroom instructional time in an elementary school raises serious establishment clause concerns. Given the approval process, the fact that the speech would have been engaged in during classroom instructional time, and the context of it in an elementary school, the local school principal had discretion to decide that religious (or anti-religious) messages would not be permitted.

F. A reversal in this case would not change the outcome because Principal Hensinger's conduct was protected with qualified immunity, and the law was not clearly established.

Finally, certiorari should be denied because a reversal in this case will not change the outcome. The Principal is protected with qualified immunity, and even if this Court were to conclude that her decision regarding the candy canes amounted to a violation of the free speech clause of the First Amendment, she would still be cloaked with immunity because the contours of the right were not clearly established. See *Anderson v Creighton*, 483 U.S. 635 (1987).

It is true, to be sure, that students do not shed their constitutional rights to freedom of speech or expression at the schoolhouse gate and that school officials do not possess absolute authority over their students. *Tinker*, *supra*, at 503-506, and 511. That notion was well honored by the Principal. She acted reasonably and prudently throughout. But if her exercise of discretion regarding the candy cane is deemed to give rise to a constitutional violation, the law on this point was not clearly established. Curry does not cite decisions from this Court or the Sixth Circuit or any other circuit deciding that speech such as this is constitutionally protected in an elementary school as part of a graded classroom project.

As evidence of the difficulty in ascertaining the proper test, there is the discussion in *Settle v. Dickson County School Board*, 53 F.3d 152 (6th Cir. 1995). The issue before that court concerned whether a teacher

violated the free speech rights of one of her ninth grade students by refusing to accept a research paper entitled "The Life of Jesus Christ" and by giving the student a zero for failing to write on another topic. In a concurring opinion, Judge Batchelder offered that, if there were a First Amendment issue, it would fall somewhere in between *Hazelwood* and *Tinker* as a form of student expression allowed under the school curriculum but not sponsored or endorsed by the school.

Further, while Curry argues that a *Tinker* analysis or a limited forum analysis should apply to censorship of student expression within the Classroom City exercise, the United States, in its amicus brief urged that the *Hazelwood* analysis governs. (R.32 Amicus Curiae Brief). Had the Principal undertaken to research the issue herself, the most analogous decision she would have found would have been the case of *DeNooyer v. Livonia Public Schools*, 799 F.Supp. 744 (E.D. Mich. 1992), *aff' d. sub. nom. DeNooyer v. Merinelli*, Docket No. 92-2080 (6th Cir. 1993). In *DeNooyer*, the plaintiff, an elementary school student, wanted to use a video tape of her singing a proselytizing song about accepting Jesus as her Savior. The *DeNooyer* court began its First Amendment analysis by finding that an elementary classroom is a closed forum in which school authorities may limit speech for reasons related to legitimate educational concerns. In discussing the legitimate concerns of the school district, the *DeNooyer* court said as follows:

> The Supreme Court gave examples of permissible concerns. A school may ensure that the participants learn the lesson that the

> activity is required to teach, that students are not presented with material inappropriate with their level of maturity, and that students' views are not mistakenly attributed to the school.

Id. at 750. The *DeNooyer* court then cited the case of *Duran v. Nitsche*, 780 F. Supp. 1048 (E.D. Pa. 1991) and made the following point:

> Further, in *Duran*, the court found that the actions of the school authorities were based upon reasonable pedagogical concerns, i.e., that the religious nature of the speech was inappropriate for the level of maturity students have reached in fifth grade. The court held that it was reasonable for the school not to want to take the substantial risk that the student's views would be erroneously attributed to the school.

799 F. Supp. at 751.

The Student's argument is premised upon the standard articulated by the court in *Tinker*, *supra*. The Principal took the position that the *Hazelwood* standard applies . The Student also attempted to apply a forum analysis "independent of the *Tinker* or *Hazelwood* analysis" (R.34 Brief in Support of Motion Opposing Defendants' Motion for Summary Judgment, Argument IV).

This Court has articulated at least three different tests to be used in considering speech restrictions in the academic arena. By its nature, Classroom City defied

easy categorization as to the type of forum it created. Therefore, a reasonable school administrator could not be expected to identify the subtle distinctions that differentiate one type of forum from another in determining that result with the appropriate standard that should be applied. According to the district court, reasonable persons could view the nature of the Classroom City environment in different ways. (R.50 Memorandum Opinion and Order, pg. 20; Apx. pg. 106).

In response to the Principal's motion for summary judgment based upon qualified immunity, the Student simply made conclusory allegations that the law was clearly established. He failed to point to decisional authority that would have put the Principal on notice that her conduct was unconstitutional.

CONCLUSION

For these reasons, this Court should deny review.

Respectfully submitted,

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