No. 09-409 OCT 5 - 2009

In The
Supreme Court of the United States

PAUL T. PALMER, by and through his parents and legal guardians, PAUL D. PALMER and DR. SUSAN GONZALEZ BAKER,

Petitioner,

v.

WAXAHACHIE INDEPENDENT SCHOOL DISTRICT,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503, 514 (1969), this Court held that the First Amendment only permits regulation of student speech upon a showing of "facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities." This Court has since recognized other narrow categories of student speech that may be limited without a showing of substantial disruption: speech that is sexually explicit, indecent, or lewd (*Fraser*); is school-sponsored (*Hazelwood*); or advocates illegal drug use (*Morse*). In conflict with the Second and Third Circuits, the Fifth, Sixth, and Ninth Circuits have held that content-neutral regulations of student speech are not subject to the general rule of *Tinker*. The questions presented are:

1. Whether, notwithstanding *Tinker*, public schools may, consistent with the First Amendment, broadly impose content-neutral and viewpoint-neutral restrictions on student speech as long as the restrictions satisfy the lower standard of intermediate scrutiny normally applied to expressive conduct, and not to pure speech.

2. Whether the intermediate standard enunciated by this Court in *United States* v. *O'Brien*, 391 U.S. 367 (1968), is satisfied when, contrary to *O'Brien*, the court does not require the government to demonstrate that the regulation at issue actually furthers an important government interest or that it is no greater than necessary to serve such an interest.

PARTIES TO THE PROCEEDINGS BELOW

Petitioner is Paul T. Palmer, by and through his parents and legal guardians, Paul D. Palmer and Dr. Susan Gonzalez Baker. Respondent is the Waxahachie Independent School District.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Paul T. "Pete" Palmer, by and through his parents and legal guardians, Paul D. Palmer and Dr. Susan Gonzalez Baker, respectfully submits this petition for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Fifth Circuit.

OPINIONS AND ORDERS BELOW

The opinion of the court of appeals (App., *infra*, 1-21) has been designated for publication but is not yet reported. The order of the district court denying petitioner's motion for a preliminary injunction (App., *infra*, 23-29) is unreported.

STATEMENT OF JURISDICTION

The court of appeals filed its opinion on August 13, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the United States Constitution provides, in pertinent part: "Congress shall make no law * * * abridging the freedom of speech* * * *" U.S. CONST. amend. I.

STATEMENT

This case is an optimal vehicle for resolving an exceptionally important question that has divided the lower courts: whether the framework for student-speech claims established by this Court over 40 years ago in *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503 (1969), may be set aside, and a different standard of constitutional scrutiny applied, to regulations of student speech deemed content and viewpoint neutral. This Court's review is necessary to resolve the conflict and clear up the pervasive confusion among the lower courts (not to mention among school officials, students, and parents) regarding the scope of student-speech rights under *Tinker*. No set of facts—undisputed in the courts below—could more squarely frame the issue than those presented in this case.

If left undisturbed, the Fifth Circuit's decision not only threatens to vest government-run schools with virtually unfettered authority to censor student speech. It also threatens to extend the reach of government's ability to restrict protected speech into other contexts beyond schools. This Court's review is necessary to resolve the conflict, restore the sensible balance the Court has struck between the rights of students and the responsibilities of educators, and prevent the systematic application of a defective analytical framework for determining when restrictions on student speech violate the First Amendment.

1. During the 2008 presidential campaign, Waxahachie Independent School District ("WISD") officials informed Paul T. "Pete" Palmer—then a sophomore at Waxahachie High School—that he would be punished if he expressed his political support for then-presidential candidate and former U.S. Senator John Edwards by wearing a t-shirt emblazoned with the words "John Edwards 08" and "www.johnedwards.com" to class. App. 42; R.431-32 at ¶¶ 7-9. School officials explained to Pete's parents that the political message on Pete's shirt was not prohibited because it was offensive, but because it contained "unapproved words" under the school district's policy. R.432-33 at ¶ 10. At that time, the policy allowed "WISD clubs, organizations, sports, or spirit t-shirts, college or university t-shirts, or solid-colored t-shirts." App. 37.

For several months, Pete and his parents unsuccessfully sought redress through WISD's grievance process. App. 42-47. Ultimately, the superintendent rejected their appeal, acknowledging that "Pete was disciplined for wearing a t-shirt with the logo 'John Edwards 08' emblazoned on the front," but reiterating that WISD's policy allowed students to express messages on their t-shirts concerning "WISD clubs, organizations, sports, or spirit * * * [or] college[s] or universit[ies]" but no others, including political messages. *Id.* at 42-43.

2. After deciding that further appeals within WISD would be futile, Pete filed this action by and through his parents in the Northern District of Texas.

App. 2; R.434-35. The original complaint alleged a claim under 28 U.S.C. § 1983 that the school district's censorship of Pete's political speech violated the First Amendment, and sought declaratory relief, preliminary and permanent injunctive relief, and nominal damages. App. 2.

In its answer, WISD admitted that Pete's "political message" presented "no concrete threat of 'substantial disruption or material disturbances to school activities.'" App. 2-3; R.298. WISD also admitted that Pete's political message was not "sexually explicit, indecent or lewd," "was not communicated as part of a school-sponsored activity," and "does not promote the use of illegal drugs." *Id.* at 3. In its response to Pete's preliminary injunction motion, WISD conceded that Pete's speech "is indisputably political in nature." R.218. And in its motion to consolidate the hearing on the preliminary injunction motion with "the final hearing on the merits," WISD stated that "[t]he facts are essentially uncontested, and the legal positions of the parties on the merits need no further development by way of discovery* * * *" R.245.

3. At the preliminary injunction hearing, WISD's assistant superintendent, Mr. Truitt, testified in response to questions by the district court that, on its face, the school district's policy of prohibiting students from expressing political messages on t-shirts did not apply to prohibit political messages on polo shirts. Tr.75:16-20 (R.83). Prompted by the district court, WISD represented it would not enforce its existing policy to prohibit Pete from wearing a

polo shirt emblazoned with "John Edwards" or any other political message for the remainder of the school year. Tr.83:1-7 (R.91). The district court denied Pete's preliminary injunction motion without prejudice. App. 3; Tr.84:25-85:9 (R.92-93).

The district court ordered WISD to finalize and submit its new policy for the 2008-2009 school year by June 1, 2008, instructed Pete "to make a request to wear specific attire" under the new policy within seven days after that, and ordered WISD to "respond to that request." Tr.85:8-9 (R.93).

4. In May 2008, the school board approved its new policy. App. 3, 30-36. That policy, which is still in effect, purports to ban all "slogans, words, [and] symbols" on clothing, but makes exceptions for messages that "promote the school district and its instructional programs." *Id.* at 30-31. Although WISD's policy no longer allows "college or university t-shirts," it continues to make exceptions for "campus principal-approved WISD sponsored curricular clubs and organizations, athletic team, or school 'spirit' collared shirts or t-shirts." *Id.* at 31.

As directed by the district court, Pete submitted a written request to WISD that he be allowed to wear three different shirts to class. App. 4. Pete enclosed three shirts with that request: (1) a polo shirt displaying the words "Freedom of Speech" on the front and the text of the First Amendment—"Congress shall make No Law * * * abridging Freedom of Speech"—and "First Amendment" on the back; (2) another polo shirt

displaying the words "John Edwards 08" on the back; and (3) the original "John Edwards 08" t-shirt. *Ibid.* WISD denied Pete's request as to all three shirts. *Ibid.* WISD stated that even if Pete were to seek an exemption "based upon Pete's desire to express his personal political preferences, such a request would be denied." R.525 at ¶ 8; R.548.

5. In light of those representations, Pete filed an amended complaint and a second motion for a preliminary injunction. App. 4. Pete's amended complaint seeks relief identical to that sought in his original complaint. In its answer to the amended complaint, WISD once again admitted that Pete's political "messages" are "not disruptive." R.519 at ¶ 44.

6. At the hearing on Pete's second motion for a preliminary injunction, WISD's witness, deputy superintendent Mr. Truitt, confirmed that Pete would not be granted an exemption from the policy to express political messages on his shirts. Tr.32:21-33:15 (R.127-28). Mr. Truitt further testified that the policy did not prohibit students from affixing to their clothing "campaign buttons" or even "bumper stickers" that express political views. App. 4. Counsel for WISD represented that even "pie" sized buttons would be permissible under WISD's interpretation of its policy. Tr.35:23-37:6 (R.130-32); Tr.42:20-22 (R.137).

Counsel for WISD elaborated that the permissibility of buttons and bumper stickers affixed to

clothing would be governed under a provision of the policy providing that "[a]ny aspect of a student's appearance or attire that is likely to distract or disrupt the learning environment, including images or messages that are lewd, vulgar, sexually suggestive, containing profanity, or promoting violation of school rules (such as promoting drug or alcohol use) are prohibited." R.306; Tr.46:10-20 (R.141).

7. The district court denied Pete's motion for a preliminary injunction on the ground that Pete had "not satisfied [his] burden of proving irreparable injury in light of the court's determination that the school district will not prevent Mr. Palmer or other students from conveying political messages via bumper stickers affixed to their clothing, or buttons that do the same." App. 5.

The district court expressed the view that although the merits present "a close question," the school district's prohibition on political speech is "permissible under the cases as I have read them." App. 26-27. Even so, the district court emphasized that "this is an important question that ought to be adjudicated at least by the Circuit" and "[i]f not by the Circuit, then by the Supreme Court." *Id.* at 27.

8. On appeal, the Fifth Circuit affirmed. App. 21. The court of appeals first held that the district court abused its discretion by departing from the well-established rule that where, as here, a plaintiff alleges injury from a regulation that directly limits

speech, the irreparable nature of the harm may be presumed. App. at 5.

Proceeding to the merits, the court of appeals acknowledged that under the general rule established by *Tinker*—i.e., that a school may regulate student speech if "necessary to avoid material and substantial interference with schoolwork or discipline" (*Tinker*, 393 U.S. at 511)—Pete "would prevail" on his free-speech claim given the school district's stipulations that Pete's speech "is not disruptive, lewd, school-sponsored, or drug-related." App. 7-8. But the panel nonetheless ruled for the school district, holding that it was bound by Fifth Circuit precedent permitting the restriction of student speech where school officials have put in place regulations deemed viewpoint and content neutral, see *Canady* v. *Bossier Parish School Board*, 240 F.3d 437 (5th Cir. 2001). App. 16-21.

Under that circuit precedent, the panel explained, content-neutral restrictions on student speech are not subject to constitutional review under the *Tinker* framework. App. 12. Rather, they are subject only to the intermediate scrutiny accorded expressive conduct, such as draft-card burning and nude dancing, enunciated by this Court in *United States* v. *O'Brien*, 391 U.S. 367 (1968). App. at 8-12. The court of appeals acknowledged that "'although it would be fair * * * to debate whether' intermediate scrutiny should ever apply to student speech, 'that debate already took place' in *Canady*." *Id.* at 9.

The court of appeals next determined that the school district's policy was "content neutral." App. 12-14. The court acknowledged Pete's position that the policy is content-based because, on its face, it allows some categories of speech while prohibiting others—and noted that Pete's position "has some judicial support."[1] *Id.* at 12-13. Nonetheless, the court of appeals held that the policy was content neutral because, in the court of appeals' view, the school district "was in no way attempting to suppress any student's expression* * * *" App. 13-14.

Having thus deemed the policy content neutral, the court of appeals purported to analyze the constitutionality of the "dress code" as a whole under intermediate scrutiny—ignoring that Pete's narrow as-applied constitutional challenge puts at issue only WISD's decision to make exceptions to its prohibition

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[1] The court of appeals deemed the restriction on Pete's political speech content neutral under *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989) ("The principal inquiry in determining content neutrality * * * is whether the government has adopted a regulation of speech because of disagreement with the message it conveys."). App. 13. But the Court has also held that "[a]s a general rule, laws that *by their terms* distinguish favored speech from disfavored speech on the basis of the ideas or views expressed are content based." *Turner Broad. Sys., Inc.* v. *F.C.C.*, 512 U.S. 622, 643 (1994) (emphasis added). Thus, "a regulation" like this one "that 'does not favor either side of a political controversy' is nonetheless impermissible because the 'First Amendment's hostility to content-based regulation extends * * * to prohibition of public discussion of an entire topic." *Boos* v. *Barry*, 485 U.S. 312, 319 (1988) (quoting *Consol. Edison Co.* v. *Pub. Serv. Comm'n*, 447 U.S. 530, 537 (1980)).

on "slogans, words, and symbols" on student clothing for speech that "promotes the school district and its instruction programs," but not for Pete's political speech. App. 14-21; see *Harper* v. *Poway Unified Sch. Dist.*, 445 F.3d 1166, 1175 n.11 (9th Cir. 2006) ("We need not rule upon the validity of the School's dress code or other * * * policies" where, as here, the student "did not seek to enjoin the enforcement of the School's dress code or any other school policies against any and all students, but sought only to stop the violation of [the student's] purported constitutional right").

The court of appeals concluded its analysis by noting that so long as students in public schools retain some means of expression—such as "outside of school" and "orally at school or through their written work"—intermediate scrutiny's requirement that a government regulation be "no more strict than is essential to achieve its goals" is satisfied. App. 20-21. Under the Fifth Circuit's approach, the prohibition on armbands struck down by the Court in *Tinker* would have survived scrutiny because the students could have worn their armbands after school and at home, and could have expressed their views to the small number of students with whom they conversed during the school day.

REASONS FOR GRANTING THE PETITION

The "vigilant protection of constitutional freedoms is nowhere more vital than in the community of [our] schools." *Healy* v. *James*, 408 U.S. 169, 180 (1972). Among those constitutional freedoms is the right to engage in political speech, which lies "at the core of what the First Amendment is designed to protect." *Morse* v. *Frederick*, 127 S. Ct. 2618, 2626 (2007) (quoting *Virginia* v. *Black*, 538 U.S. 343, 365 (2003)). Because students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," *Tinker*, 393 U.S. at 506, this Court has held that absent evidence of school disruption, the First Amendment requires that students be permitted to express their political views. *Morse*, 127 S. Ct. at 2636-37 (Alito, J., concurring).

In violation of these fundamental constitutional principles, the school district here adopted a policy prohibiting the very speech that the "First Amendment [was] designed to protect" (see *Morse*, 127 S. Ct. at 2626), while allowing speech that "promotes" the school district and its "instructional" mission. The Fifth Circuit furthered an entrenched circuit split by upholding this censorship, consistent with the decisions of the Ninth and Sixth Circuits but in conflict with the Second and Third Circuits. It reached this conclusion notwithstanding the school district's admissions that Pete's silent, passive expression of support for a presidential candidate did not fall into any of the categories of student speech

that this Court has recognized as subject to regulation. Specifically, Pete's attempted communication was "indisputably political in nature," posed "no concrete threat" of "substantial disruption" or "material disturbances" to school activities, "was not communicated as part of a school sponsored activity," was not "offensive" or "sexually explicit, indecent, or lewd," and did "not promote the use of illegal drugs" or any other activity harmful to young people.

The Fifth Circuit's decision not only conflicts with the decisions of other Circuits, but also departs from the traditional principles that have long guided this Court's student-speech jurisprudence. Rather than a problem to be contained or a dangerous activity to be minimized, this Court has held up non-disruptive political speech by students as a transcendent value, one that lies "at the core of what the First Amendment is designed to protect"—even in schools. *Morse*, 127 S. Ct. at 2626 (quoting *Virginia* v. *Black*, 538 U.S. 343, 365 (2003)); *Bethel Sch. Dist. No. 403* v. *Fraser*, 478 U.S. 675, 681 (1986) (noting the "marked distinction between the political 'message' of the armbands in *Tinker*," which upheld "students' right to engage in a nondisruptive, passive expression of a political viewpoint," and "the sexual content" of the speech in *Fraser*).

Our public schools have a responsibility to teach students about constitutional principles not only as part of the curriculum, but also by faithfully applying them. In the context of a presidential election, that

responsibility would seem, if anything, to lead our schools to encourage non-disruptive means of expressing political views—not to stifle them.

To be sure, public school officials have a responsibility to maintain order and discipline so that students can learn. The Court has struck a sensible balance by permitting school officials to curtail the exercise of political speech, but only when it poses a concrete threat to school discipline. Any other rule would foster cynicism and disrespect in our youth, who would perceive on the part of those in authority a hypocritical failure to respect and defend the values upon which our Nation was founded. This case is an ideal vehicle for re-affirming those principles, resolving the conflict among the Circuits about the proper application of *Tinker*, and bringing badly needed clarity to an important area of the law—one that daily impacts millions of students, their teachers, and school administrators.

The petition should be granted because the Fifth Circuit has decided an important, recurring issue of constitutional law in a manner contrary to that of other Circuits. It should be granted because the Fifth Circuit's decision is in conflict with the decisions of this Court. And it should be granted because the Fifth Circuit's lenient review of government censorship sets an exceptionally dangerous precedent that, if permitted to stand, cannot be limited in any principled fashion to expressive conduct or even to schools—thereby enlarging government's ability to censor the

exercise of core First Amendment freedoms in a wide variety of contexts.

I. THE CIRCUITS ARE DEEPLY DIVIDED ON WHETHER *TINKER* APPLIES TO CONTENT-NEUTRAL REGULATIONS OF STUDENT SPEECH

This Court set out the framework for student free-speech claims in *Tinker* v. *Des Moines Independent Community School District*, *supra*. In *Tinker*, students decided to wear black armbands to school to express their opposition to the Vietnam War. In response to the planned protest, school officials prohibited the wearing of all armbands and provided that any students wearing armbands would be suspended from school until they returned without them. The Court held that the students could not be disciplined under the school policy, explaining that the wearing of armbands was "closely akin to 'pure speech' which, we have repeatedly held, is entitled to comprehensive protection under the First Amendment." *Id.* at 505-06. The Court explained that a student "may express his opinions * * * if he does so without 'materially and substantially interfer[ing] with the requirements of appropriate discipline in the operation of the school' and without colliding with the rights of others." *Id.* at 513.

The Court took care to acknowledge "the special characteristics of the school environment," *id.* at 506,

by making clear that school officials could prohibit student speech if that speech "would materially and substantially interfere with the requirements of appropriate discipline in the operation of the school." *Id.* at 509. Recognizing that school officials have comprehensive authority, consistent with constitutional safeguards, to prescribe and control conduct in the schools, the Court held that absent a showing by the school "that engaging in the forbidden conduct would materially and substantially interfere" with school discipline, school policies that place restrictions on a student's freedom of speech cannot be sustained. *Ibid.* (internal quotations and citations omitted). The Court explained that "in our system" students "may not be confined to the expression of those sentiments that are officially approved." *Id.* at 511. Thus, "[i]n the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views." *Ibid.*

The Court re-affirmed *Tinker* and further delineated the scope of *Tinker*'s general rule in *Bethel School District No. 403* v. *Fraser*, 478 U.S. 675 (1986). In *Fraser*, the Court upheld disciplinary action against a student who gave a speech at a high school assembly that was laced with "pervasive sexual innuendo." *Id.* at 677-79. The Court held the school's actions permissible because "it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse" among students. *Id.* at 683. School policies thus can

prohibit student speech if it is "vulgar," "lewd," "indecent," or "plainly offensive." *Id.* at 683-85.

The Court next affirmed *Tinker* as the general standard and addressed student-speech rights in *Hazelwood School District* v. *Kuhlmeier*, 484 U.S. 260 (1988), permitting a high school principal to censor articles in a school-sponsored newspaper. While the Court upheld the principal's deletion of the articles from the student newspaper, it limited the reach of its holding to school-sponsored speech. As the Court put it, "whether the First Amendment requires a school to *tolerate* particular student speech—the question we addressed in *Tinker*—is different from the question whether the First Amendment requires a school affirmatively to *promote* particular student speech." *Id.* at 270-71 (emphasis added). Under *Hazelwood*, school officials may exercise "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.* at 273.

In its most recent student-speech case, the Court held that school officials may permissibly restrict student speech that could be "reasonably viewed as promoting illegal drug use." *Morse* v. *Frederick*, *supra*, at 2625. The speech at issue in *Morse* was a large banner reading "Bong Hits 4 Jesus" unfurled by students at a school-supervised event. *Id.* at 2622. Noting that "deterring drug use by schoolchildren is an 'important—indeed, perhaps compelling' interest,"

the majority concluded that the "First Amendment does not require schools to tolerate at school events student expression that contributes to" the dangers posed by illegal drugs. *Id.* at 2628-29. In reaching its holding, the Court expressly declined to prohibit student speech promoting illegal drug use on grounds that such speech was "offensive," noting that "much political and religious speech might be perceived as offensive to some." *Id.* at 2629.

In *Morse*, the Court re-affirmed *Tinker* and described it as holding—without limitation or qualification—that "student expression may not be suppressed unless school officials reasonably conclude that it will 'materially and substantially disrupt the work and discipline of the school.'" *Id.* at 2626. The Court focused on the "essential facts" that the students in *Tinker* "sought to engage in political speech, using the armbands to express their 'disapproval of the Vietnam hostilities and their advocacy of a truce, to make their views known, and, by their example, to influence others to adopt them.'" *Id.* at 2626 (quoting *Tinker*, 393 U.S. at 514).

In a concurring opinion, Justice Alito, joined by Justice Kennedy, agreed that "public schools may ban speech advocating illegal drug use." *Morse*, 127 S. Ct. at 2638 (Alito, J., concurring). But Justice Alito "join[ed] the opinion of the Court on the understanding that (a) it goes no further than to hold that a public school may restrict speech that a reasonable observer would interpret as advocating illegal drug use and (b) it provides no support for any restriction

of speech that can plausibly be interpreted as commenting on any political or social issue * * * * *" *Id.* at 2636.

The majority opinion, Justice Alito stressed, "correctly reaffirms the recognition in [*Tinker*] of the fundamental principle that students do not 'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.'" *Id.* at 2636-37 (Alito, J., concurring). Justice Alito acknowledged that "*Tinker*, which permits the regulation of student speech that threatens a concrete and 'substantial disruption,' [*Tinker*, 393 U.S.] at 514, does not set out the only ground on which in-school student speech may be regulated by state actors in a way that would not be constitutional in other settings." *Id.* at 2637. "But," Justice Alito emphasized, "I do not read the opinion to mean that there are necessarily any grounds for such regulation that are not already recognized in the holdings of this Court." *Ibid.* Justice Alito thus joined the majority opinion "on the understanding that the opinion does not hold that the special characteristics of the public schools necessarily justify any other speech restrictions." *Ibid.*

Over the last 40 years, then, the Court has carved out a few narrow categories of speech that a school may restrict even without the threat of substantial disruption, while at the same time reaffirming the general rule set forth in *Tinker* that "[i]n the absence of a specific showing of *constitutionally valid reasons* to regulate their speech, students are entitled to freedom of expression of their

views." *Tinker*, 393 U.S. at 511 (emphasis added). But, as numerous courts have noted, there is conflict and confusion in the lower courts about what counts as a "constitutionally valid reason" for regulating student speech. See, e.g., *Guiles* v. *Marineau*, 461 F.3d 320, 326 (2d Cir. 2006) (Cardamone, Sotomayor, Pooler, JJ.), *cert. denied sub nom. Marineau* v. *Guiles*, 127 S. Ct. 3054 (2007) ("It is not entirely clear whether *Tinker*'s rule applies to all student speech that is not sponsored by schools, subject to the rule of *Fraser*, or whether it applies only to political speech or to political viewpoint-based discrimination."); *Bar-Navon* v. *Sch. Bd. of Brevard County, Fla.*, No. 6:06-cv-1434-Orl-19KRS, 2007 WL 3284322, at *5 (M.D. Fla. Nov. 5, 2007) ("Courts at all levels have demonstrated confusion as to the scope of *Tinker*'s holding * * * * Courts disagree * * * as to the broader question of whether the legal standard in *Tinker* is applicable more generally to all regulation of student speech and not simply speech that expresses a particularized view.").

Specifically, courts are split on whether the *Tinker* framework extends to content-neutral and viewpoint-neutral regulations. The Ninth Circuit has taken the position that "*Tinker* says nothing about how viewpoint- and content-neutral restrictions on student speech should be analyzed, thereby leaving room for a different level of scrutiny." *Jacobs* v. *Clark County Sch. Dist.*, 526 F.3d 419, 431-32 (9th Cir. 2008). Similarly, the Sixth Circuit holds that "[w]hile *Tinker* requires schools to demonstrate a 'material

and substantial interference' with the educational process in order constitutionally to silence a student on the basis of the student's particular viewpoint," a school district "need not satisfy this demanding standard merely to impose a viewpoint-neutral regulation" of student speech. *M.A.L.* v. *Kinsland*, 543 F.3d 841, 850 (6th Cir. 2008); *accord Blau* v. *Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 391-93 (6th Cir. 2005).

In sharp conflict, the Third Circuit holds that *all* student speech "falling outside" of the narrow categories of speech recognized by this Court "is subject to *Tinker*'s general rule: it may be regulated only if it would substantially disrupt school operations or interfere with the rights of others." *Saxe* v. *State Coll. Area Sch. Dist.*, 240 F.3d 200, 214 (3d Cir. 2001) (Alito, J.). The Second Circuit has held likewise, while acknowledging the "lack of clarity" on the issue. *Guiles* v. *Marineau*, *supra*, at 326 ("*Tinker* applies to all non-school-sponsored student speech that is not lewd or otherwise vulgar").

Indeed, those courts have vindicated student-speech rights under circumstances far less constitutionally compelling than those presented here, which involve quintessentially political, admittedly inoffensive, and indisputably non-disruptive speech. In *Guiles* v. *Marineau*, for example, a middle-school student wore a shirt emblazoned with words and images denigrating then-President George W. Bush by, among other things, referring to him as "Chicken-Hawk-in-Chief" and including images of cocaine, a

martini glass, dollar signs, and oil rigs. *Id.* at 322. School officials decided that the shirt violated the school's dress code. *Ibid.* The Second Circuit, however, decided that the school had violated the student's free-speech rights. *Id.* at 331.

Concluding that the images of drugs and alcohol were not offensive because they were anti-drug and combined with a political message, the Second Circuit rejected the applicability of *Fraser*, noting "the absence of any political message in Fraser's speech." *Id.* at 330. Because the speech was not school-sponsored, *Hazelwood* did not apply. *Id.* at 327. Instead, the longstanding *Tinker* rule applied. *Id.* at 330. Because the speech caused no disruption, the Second Circuit held that the school violated the student's speech rights in censoring that speech. *Id.* at 331; see also *Newsom* v. *Albermarle County Sch. Bd.*, 354 F.3d 249, 252, 259 (4th Cir. 2003) (holding that middle-school principal's ban on a student's pro-National Rifle Association shirt that "depicted three black silhouettes of men holding firearms" was impermissible because there was no evidence that the NRA shirt "ever substantially disrupted school operations or interfered with the rights of others").

Similarly, the Seventh Circuit, in *Nuxoll* v. *Indian Prairie School District*, 523 F.3d 668 (7th Cir. 2008), reversed the denial of a preliminary injunction and compelled the school district to allow a high school student to wear a shirt in school bearing the legend "Be Happy, Not Gay." The school had prohibited the student from wearing the shirt as a

violation of its policy prohibiting "derogatory comments, oral or written, that refer to race, ethnicity, religion, gender, sexual orientation, or disability." In an opinion authored by Judge Posner, the Seventh Circuit concluded that the school's restriction on student speech could not be justified as a foreseeable "substantial disruption" under *Tinker*. A federal district court in Florida reached a similar conclusion regarding pro-gay symbols such as rainbows and pink triangles. *Gillman* v. *Sch. Bd. for Holmes County, Fla.*, 567 F. Supp. 2d 1359 (N.D. Fla. 2008).

Those decisions are difficult to square with the Fifth Circuit's in this case. If the First Amendment requires school districts in the Second Circuit to allow non-disruptive student speech on clothing expressing disapproval of a sitting president, then it is difficult to understand how the First Amendment can permit school districts in the Fifth Circuit to censor non-disruptive student speech expressing support for a presidential candidate when the Fifth Circuit has concluded that the speech is not disruptive.

To be sure, speech that cannot be proscribed constitutionally by school officials in one circumstance may nonetheless be prohibited in another—but that distinction turns on the speech's potential for *disruption*, which indisputably is not present here. See, e.g., *Barr* v. *Lafon*, 538 F.3d 554, 564 (6th Cir. 2008) (pet. filed, April 22, 2009) (holding that ban on wearing or displaying the Confederate flag was justified under *Tinker* because the ban was "necessary to avoid material and substantial interference with

schoolwork or discipline") (quoting *Tinker*, 393 U.S. at 511).

The Fifth Circuit has further entrenched the split by expressly holding, in agreement with the Ninth and Sixth Circuits (but in conflict with the Second and Third), that the *Tinker* framework does not apply when restrictions on pure student speech are content- and viewpoint-neutral. The conflict is mature, significant, and irreconcilable. Further percolation will not assist the Court in resolving it. The Court's review is needed now to settle the important legal issues at stake and provide clarity about the scope of student-speech rights for students, parents, and school officials alike.

This case squarely presents the issue on which the lower courts have divided almost evenly, thereby presenting the Court with a much-needed opportunity to resolve the conflict illuminated but not settled by *Morse* (and to eliminate confusion on the part of school boards, administrators, teachers, and students). It also implicates precisely the concerns expressed by Justices Alito and Kennedy in their concurring opinion in *Morse* about unnecessarily broad restrictions on student speech.

As their concurring opinion explains, "public schools are invaluable and beneficent institutions, but they are, after all, organs of the State." *Morse*, 127 S. Ct. at 2637 (Alito, J., concurring). In particular, the concurring opinion cautioned about the

notion that "educational mission" is a panacea allowing for virtually unlimited curtailment of student speech:

> This argument can easily be manipulated in dangerous ways, and I would reject it before such abuse occurs. The "educational mission" of the public schools is defined by elected and appointed public officials with authority over the schools and by the school administrators and faculty. As a result, some public schools have defined their educational missions as including the inculcation of whatever political and social views are held by the members of these groups.

Ibid. (Alito, J., concurring). The school district has explicitly taken the position that it may allow speech that "promotes" its educational mission while prohibiting speech that, in the school district's view, does not—precisely the sort of restriction singled out by the concurring opinion as raising particular concern. See *ibid.*; see also *Harper*, 445 F.3d at 1196 n.7 (Kozinski, J., dissenting) (admonishing that "one man's civic responsibility is another man's thought control").

This case is an ideal vehicle for resolving the conflict among the lower courts, clarifying the constitutional limits on student-speech restrictions, and re-affirming the long-recognized role of public schools in educating youth for responsible citizenship—a vital mission that cannot be achieved without "scrupulous protection of Constitutional freedoms of

the individual." *W. Va. State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 637 (1943); see also *Hodgkins ex rel. Hodgkins* v. *Peterson*, 355 F.3d 1048 (7th Cir. 2004) (Rovner, J.) ("We not only permit but expect youths to exercise those liberties—to learn to think for themselves, to give voice to their opinions, to hear and evaluate competing points of view—so that they might attain the right to vote at age eighteen with the tools to exercise that right."). The Fifth Circuit expressly acknowledged that its treatment of the issue was outcome-determinative, given the school district's stipulations that Pete's political speech was not disruptive. Nothing will be gained by waiting for another case to present similar issues. This case is an optimal vehicle for resolving an important, recurring issue of constitutional law that affects students, parents, and school officials across the Nation.

II. THE APPLICATION OF *O'BRIEN* IN THE DECISION BELOW SHARPLY DEPARTS FROM LONG-ACCEPTED FIRST AMENDMENT PRINCIPLES

The Fifth Circuit's determination that intermediate scrutiny can properly be applied to restrictions on pure student speech should, as explained above, be reviewed (and ultimately reversed) by this Court. Even if intermediate scrutiny could be applied in this context, however, the Fifth Circuit's understanding of that standard in this case—which, despite purporting to be intermediate scrutiny, effectively operates as rational basis review, if that—is in direct

conflict with this Court's cases establishing the standards applicable to regulations governed by intermediate scrutiny. The Fifth Circuit's lenient review of government censorship sets an exceptionally dangerous precedent that, if permitted to stand, would vest government-run schools with virtually unfettered authority to censor speech.

What is more, there is no principled basis for limiting the Fifth Circuit's analysis to the context of student speech. Because the Fifth Circuit's application of intermediate scrutiny is not only erroneous, but also sets a dangerous example for other courts to follow, this Court may wish to consider summary reversal. At a minimum, the Court should grant review to provide much-needed guidance on the proper application of intermediate scrutiny in the public school setting, particularly if it is to be applied to all "content neutral" restrictions on pure speech, such as the written word, and not merely expressive conduct.

It is settled law that under intermediate scrutiny, the government bears the burden of demonstrating that a speech regulation (1) must be "within the constitutional power of the Government;" (2) must "further[ ] an important or substantial governmental interest;" (3) "the governmental interest" must be "unrelated to the suppression of free expression;" and (4) "the incidental restriction on alleged First Amendment freedoms" must be "no greater than is essential to the furtherance of that interest." *O'Brien*, 391 U.S. at 377. As applied by the Fifth Circuit in this case,

however, that scrutiny was effectively diluted to mere rational-basis review, at most.

First, the court of appeals impermissibly supplied hypothetical justifications for the school district's censorship that not even the school district advanced. See App. 15-18; see also *Annex Books, Inc.* v. *City of Indianapolis*, ___ F.3d ___, No. 05-1926, 2009 WL 2855813, at *3 (7th Cir. Sept. 3, 2009) (Easterbrook, J.) (distinguishing intermediate scrutiny from the "rational-relation test," under which "all a court need do is ask whether a sound justification of a law may be imagined"). For example, the court of appeals hypothesized—without addressing the school district's actual interpretation of its policy as permitting political messages when on bumper stickers stuck on shirts, but prohibiting political messages when printed on shirts—that the school's interest in "promoting professional and responsible dress" still "functions" because "students are prepared for a working world in which pins and buttons may be appropriate at work but large, stark political message t-shirts usually are not." App. 18.

The court of appeals did not explain how a policy that, by the school district's own admission, would permit an unlimited number of bumper stickers and buttons of all sizes and shapes—even "pie"-sized buttons—to be stuck on student clothing, while prohibiting political writing printed on student clothing, actually *furthers*, as intermediate scrutiny requires, *any* governmental interest, much less one in promoting "professional and responsible dress." Nor

did the court of appeals explain how a policy that allows messages on t-shirts supporting the school's football team or cheerleading squad, while prohibiting messages on t-shirts expressing support for presidential candidates or the text of the First Amendment, furthers any such interest. See *Police Dept. of Chicago* v. *Mosley*, 408 U.S. 92, 100 (1972) (striking down ordinance banning all picketing except for labor picketing outside public schools and explaining that "[i]f peaceful labor picketing is permitted, there is no justification for prohibiting all nonlabor picketing, both peaceful and nonpeaceful" even under *O'Brien*'s intermediate scrutiny standard).

The court of appeals did not even attempt to scrutinize the speech restriction actually challenged by Pete: WISD's policy of making exceptions to its ban on "slogans, words, and symbols" deemed by school officials to promote the school district and its instructional mission, such as messages supporting curricular clubs, athletic teams, and school "spirit," but refusing to make similar exceptions for Pete's undisruptive, core political speech—in short, why a policy banning some words and allowing others approved by the government is content neutral.[2]

[2] The restriction on speech unanimously struck down by the Court in *Board of Airport Commissioners of Los Angeles* v. *Jews for Jesus, Inc.*, 482 U.S. 569 (1987), was by any measure far more neutral than the regulation upheld here. The regulation in *Jews for Jesus* even-handedly banned all "First Amendment activities by any individual and/or entity." *Id.* at 570-71. That

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Such deference to government, even in the school setting, is wholly incompatible with intermediate scrutiny, properly applied. See, e.g., *Hodgkins*, 355 F.3d at 1048 (holding that youth curfew policy could not survive intermediate scrutiny in First Amendment challenge because it was not sufficiently narrowly tailored to further the government's important and substantial interests).

Similarly inappropriate was the court of appeals' demand that *Pete* "show that the button allowance *destroys* all of the District's stated important governmental interests." App. 18. The court of appeals' analysis is exactly backwards: Under intermediate scrutiny, it is the *government's* burden to show that the restriction *furthers* its interests. The Fifth Circuit did not appear even to consider whether, as intermediate scrutiny requires, the government had shown its restriction on Pete's political speech was no greater than necessary to further the government's stated interests. Instead, it asked a very different question: Whether those stated interests still "function" in light of the differential treatment accorded Pete's political speech under the policy. See *ibid.* That is not the test under intermediate scrutiny, because the First Amendment requires more. See *Int'l*

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ban was impermissible, this Court explained, in part because "[m]uch nondisruptive speech—such as the wearing of a T-shirt or button that contains a political message—* * * is still protected speech even in a nonpublic forum." *Id.* at 576 (citing *Cohen* v. *California*, 403 U.S. 15 (1971)).

Soc'y for Krishna Consciousness v. *Lee*, 505 U.S. 672, 693-94 (1992) (Kennedy, J., concurring) (warning against "convert[ing] what was once an analysis protective of expression into one which grants the government authority to restrict speech by fiat").

The Fifth Circuit's dilution of intermediate scrutiny in the course of upholding the school district's censorship of Pete's political speech would be troubling enough were it limited to the school context, or to "dress codes," or to expressive conduct. But it is not. And there is no principled basis for doing so. This Court's intervention is therefore needed not only to clarify the permissible grounds upon which student speech in government-run schools may be restricted, but also to ensure that the Fifth Circuit's erroneous application of intermediate scrutiny in this case does not extend the reach of government's ability to regulate protected speech into other contexts to which intermediate scrutiny applies, as well.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted. The Court may also wish to consider summary reversal.

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