JAN 11 2010

No. 09-671

IN THE

Supreme Court of the United States

KATHRYN NURRE,

Petitioner,

v.

DR. CAROL WHITEHEAD, in her individual and official capacity as the Superintendent of Everett School District No. 2,

Respondent.

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

BRIEF IN OPPOSITION

MICHAEL A. PATTERSON
Counsel of Record
SARAH S. MACK
PATTERSON BUCHANAN
FOBES LEITCH & KALZER, INC., P.S.
2112 Third Ave., Suite 500
Seattle, WA 98121
(206) 462-6700

Counsel for Respondent

227399

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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INTRODUCTION

Petitioner, Kathryn Nurre, has presented no "compelling reason" for her Petition for Writ of Certiorari ("Petition") to be granted. Specifically, Ms. Nurre fails to demonstrate that the Ninth Circuit's September 8, 2009 Opinion is in conflict with a decision of this Court or another Court of Appeals; that the Ninth Circuit has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power; that the Ninth Circuit decided an important federal question that has not been settled with this Court; or that the Ninth Circuit has decided an important federal question in a way that conflicts with relevant decisions of this Court. Instead, Ms. Nurre mischaracterizes the limited opinion set forth by the Ninth Circuit, erroneously asserting that "the decision below sanctions censorship of artistic expression without any legitimate reason."[1] As a result, as further discussed below, her Petition should be denied.

STATEMENT OF THE CASE

A. Course of Proceedings and Disposition of Claims

On June 26, 2006, Kathryn Nurre filed a Complaint against Dr. Carol Whitehead, Everett School District Superintendent.[2] Ms. Nurre alleged that Dr. Whitehead violated her First Amendment Free Speech rights by

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[1] *Petition for Certiorari* at 13.

[2] Excerpts of Record filed by Kathryn Nurre in the Ninth Circuit Court of Appeals. ("ER") 275-83 and 289.

declining the Jackson High School Wind Ensemble's request to play "Ave Maria" at the 2006 graduation ceremony.[3] Ms. Nurre further alleged that such decision violated the Establishment Clause of the First Amendment, and the Fourteenth Amendment's Equal Protection Clause.[4]

The parties agreed that Ms. Nurre's claims could be resolved on motions for summary judgment, and, on September 20, 2007, Chief Judge Robert S. Lasnik granted Dr. Whitehead's motion and denied Ms. Nurre's motion, dismissing all of Ms. Nurre's claims. *Nurre v. Whitehead*, 520 F.Supp.2d 1222 (W.D. Wash. 2007).[5] Judgment was entered for Dr. Whitehead the same day.[6] On October 19, 2007, Ms. Nurre timely filed her Notice of Appeal and Representation Statement.[7]

On September 8, 2009, the Ninth Circuit Court of Appeals, in a 2-1 Opinion, affirmed the District Court. *Nurre v. Whitehead*, 580 F.3d 1087 (9th Cir. 2009).[8] The Honorable Circuit Judge Milan D. Smith, dissenting in part, but concurring with the judgment, agreed with The Honorable Circuit Judges Robert Beezer and

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[3] ER 280-81.

[4] ER 281-83.

[5] *See also* ER 2-29; *Petition for Certiorari*, Appendix at 32a.

[6] ER 1.

[7] ER 30-33 and 292.

[8] *See also Petition for Certiorari*, Appendix at 1a.

Richard C. Tallman that there was no violation of either the First Amendment Establishment Clause or the Fourteenth Amendment Equal Protection Clause.[9] However, he disagreed "with the majority's conclusion that banning the playing of an instrumental version of the musical number *Ave Maria* at the Jackson High School graduation ceremony was a reasonable restraint on freedom of expression."[10] Importantly, despite his dissent, Judge Smith recognized the reality that school officials "often find themselves in a Cath-22" and "[b]ecause of this unfortunate reality . . . qualified immunity is appropriate in this case."[11] The majority also agreed that qualified immunity would "attach to Whitehead."[12]

Ms. Nurre's Petition for Certiorari followed.

B. Everett School District's Policies and Procedures

Everett School District's Board of Directors has adopted numerous policies to effect the orderly administration of the education it provides for students.[13] The District's policies are implemented through specific procedures.[14] Relevant to the instant

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[9] *Petition for Certiorari*, Appendix at 23a, fn. 1.

[10] *Id.*, Appendix at 23a.

[11] *Id.*, Appendix at 31a.

[12] *Petition for Certiorari*, Appendix at 6a.

[13] ER 30-33 and 292.

[14] *Id.*

case is Board Policy 2340, entitled "Religious-Related Activities and Practices," which is required by Washington state regulation.[15] The policy recognizes "that views and opinions regarding the relationship of the schools and religion are diverse," but requires adherence to state and federal laws.[16] Procedure 2340P implements the policy and governs religious matters within the District's schools.[17] Significantly, that Procedure draws a distinction between musical performances or concerts and graduations, allowing religious-themed musical, artistic and dramatic presentations in coursework and school programs within specific guidelines, but prohibiting invocations, benedictions or prayer at any school activity, including graduation.[18]

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[15] *See* WAC 392-400-227. The regulation provides:

> It shall be the responsibility and duty of each school district to adopt policies of the district for implementation of students' rights to freedom of religion and to have their schools free from sectarian control or influence while they are participating in any school district conducted or sponsored activity or while they are otherwise subject to school district supervision and control. Such rules shall be adopted and transmitted to the superintendent of public instruction.

WAC 392-400-227.

[16] ER 89.

[17] ER 91-93.

[18] ER 61.

Dr. Whitehead also testified at deposition that graduation is distinct from music concerts or assemblies in that it is a once in a lifetime opportunity for students:

> Q. What is your understanding of the distinction between a commencement program and an assembly or a concert regarding what the students can play?
>
> A. It's my understanding that the commencement is a once in a lifetime opportunity for students and their families, that it should be a neutral experience so that every student and every family can feel comfortable coming there. . . . [I]t is not really an opportunity that would be voluntary in that should the student or their parents or other family members opt not to attend, they would never have another opportunity to get that back, which is very different than attending another assembly or attending another concert.
>
> There are many opportunities in the K-12 experience to have that kind of experience, but a commencement ceremony is only one opportunity for each student.[19]

Further, high school commencement is distinct from other matters relating to educational instruction, where

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[19] ER at 214-15.

a student may opt out of participating in any activity that conflicts with his or her religious beliefs.[20]

C. Complaints from 2005 Graduation

Everett School District holds graduation ceremonies for each of its high schools on the same day at the Everett Events Center. Although the District does not own that property, it sponsors the entire ceremony, and District funds are used to rent the facility.[21] The District plans each ceremony, is fully responsible for all content and conduct that occurs, and maintains supervisory control over each aspect.[22] Speeches are reviewed in advance to ensure they comply with District policies.[23] Music is also reviewed in advance.[24]

The year prior to Ms. Nurre's commencement, at the 2005 Jackson High School graduation, the senior choir sang "Up Above My Head" as part of the ceremony.[25] Jackson High School Principal, Terry Cheshire, had just begun his tenure at Jackson and was unaware that it was his responsibility to review not only the titles of the planned music, but also the content of the music to ensure compliance with District policy.[26]

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[20] ER 92.

[21] ER 85 and 220-21.

[22] ER 85.

[23] *Id.*

[24] *Id.*

[25] ER 57, 86, 104, 109 and 217-18.

[26] ER 57.

Because the title to the song "Up Above My Head" appeared secular, Mr. Cheshire approved it.[27] As a result, and unbeknownst to the District, the selected song included Christian lyrics affirming "There must be a God somewhere" because "Up above my head I hear angels singing."[28] Dr. Whitehead received complaints from people in attendance at the graduation cermony, and at least one attendee sent complaints to the editor of Snohomish County's largest newspaper, The Herald.[29] As a result, Mr. Cheshire and all other principals were instructed to review all music selections for graduation.[30]

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[27] *Id.*

[28] *See* ER 57 and 86; *see also* KIRK FRANKLIN Lyrics – UP ABOVE MY HEAD, *at* http://www.mp3lyrics.org/k/kirk-franklin/up-above-my-head/ (last visited January 8, 2010). Other versions of the song have been performed by artists such as Elvis Presley, Rod Stewart and Randy Travis. *See* Elvis Presley – Up Above My Head SONG LYRICS, *at* http://www.wowlyrics.com/read.php?wow=1377223 (last visited January 8, 2010); ROD STEWART Lyrics – UP ABOVE MY HEAD, *at* http://www.mp3lyrics.org/r/rod-stewart/up/ (last visited January 8, 2010). Some of these versions contain a variant on the lyrics, substituting the word "God" with "heaven." Dr. Whitehead recalled specific references to Jesus Christ in the version performed by the Jackson High School Choir in 2005. ER 217-18.

[29] ER 86, 218 and 287.

[30] ER 57.

D. Prior Approval of Music Selections

Every year at the Jackson High School graduation ceremony, seniors from the school's wind ensemble would play a single musical selection.[31] The former band teacher, Jim Rice, who taught at Jackson High School through the 2001-02 school year, always selected the piece without any input from the seniors.[32] Lesley Moffat replaced Mr. Rice during the summer of 2002, which was Ms. Nurre's freshman year.[33] When it came time to choose the musical selection for graduation, the students incorrectly informed Ms. Moffat that the seniors had a "tradition" of selecting the final piece.[34] Having no knowledge of Mr. Rice's prior practice of personally selecting the graduation piece without student input, Ms. Moffat permitted the students to select the music to be performed.[35] In Ms. Moffat's first three years at Jackson High School, the seniors selected the same song every year, a song that had actually been chosen in earlier years by Mr. Rice, and which had been previously approved by District administrators.[36]

Although Ms. Moffat allowed students to suggest the musical selection to be played at graduation, neither Ms. Moffat nor Ms. Nurre dispute the fact that the

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[31] ER 112.

[32] *Id.*

[33] *See* ER 118 and 243-44.

[34] ER 118-19.

[35] *See* ER 120 and 137.

[36] ER 122-23, 125-26 and 137.

senior members of the wind ensemble did not have absolute discretion to play whatever song they chose.[37] Ms. Nurre acknowledged that the District similarly exercised control over the content of speeches presented during the ceremony.[38]

E. The Selection of "Ave Maria"

As the 2006 Jackson High School graduation approached, the graduating senior ensemble members conferred over which song they desired to play for commencement, ultimately seeking Franz Biebl's "Ave Maria," a piece that had been played at their Winter Concert.[39] Both Ms. Nurre and Ms. Moffat were aware that "Ave Maria" is Latin for "Hail Mary," a specific reference to Jesus Christ's mother, and an interpretation that could not be confused for anything else.[40] Ms. Nurre also acknowledges that allowing religion in public schools and public graduation ceremonies can be controversial.[41]

The seniors selected "Ave Maria" through an informal voting process, and the decision was

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[37] *See* ER 138-39, 250 and 252.

[38] ER 253 and Supplemental Excerpts of Record filed by Carol Whitehead in the Ninth Circuit Court of Appeals ("SER") at 2.

[39] ER 125-26, 269 and 278.

[40] ER 134-36, 139-40 and 247-48.

[41] ER 257and 262-63.

unanimous.[42] Ms. Moffat does not believe that religion was a factor in the students' decision.[43] Indeed, Ms. Nurre later testified during deposition that religion did not enter their minds at all.[44] Ms. Moffat then conveyed the students' choice to Mr. Cheshire.[45] Mr. Cheshire informed Lynn Evans, the District's Executive Director who oversees operations at Jackson High School, of his concerns about whether playing "Ave Maria" at commencement would be consistent with District policy in light of the 2005 "Up Above My Head" incident.[46] Ms. Evans then brought the matter to her superior, Associate Superintendent Karst Brandsma, who concurred with Ms. Evans and Mr. Cheshire that "Ave Maria" should not be played at graduation.[47] Further, Dr. Whitehead believed that because the title of the song literally read "Hail Mary," and the title would appear in the graduation program, the band should be directed to choose another song.[48] Because the song was a featured piece as opposed to a prelude to the ceremony, the District concluded that it would be more appropriate to choose another song, rather than simply

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[42] ER 127-28.

[43] ER 128.

[44] ER at 258-9 and 266.

[45] ER 57.

[46] ER 57, 109 and 213.

[47] ER 86 and 109.

[48] ER 223-24.

list the name of the piece in the program under a different title.[49]

Ms. Moffat followed her superiors' directive and asked the wind ensemble members to choose another piece.[50] The seniors then selected the fourth movement of the "Holst Second Suite in F."[51] Ms. Nurre participated in her graduation ceremonies, and is now a Jackson High School graduate.[52] Everett School District has never disputed that Ms. Nurre was free to play "Ave Maria" or otherwise pray as she deemed fit outside of the school-sponsored graduation.[53]

REASONS FOR DENYING THE PETITION

As further discussed below, Ms. Nurre has not carried her burden of demonstrating any "compelling reasons" for her Petition to be granted. Accordingly, the Petition should be denied.

A. The Petition for Certiorari was not properly served on Respondent Carol Whitehead.

As an initial matter, Dr. Whitehead notes that the Petition for Certiorari was not properly served. Supreme Court Rule 29.3 requires that the Petition be

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[49] ER 224-25; *see also* 57-58, 109 and 130-31.

[50] ER 131-32.

[51] *Id.*

[52] ER 243-44 and 255-56.

[53] ER 87.

served "within 3 calendar days on each party to the proceeding at or before the time of filing." Further,

> If service is by mail or third-party commercial carrier, it shall consist of depositing the document with the United States Postal Service, with no less than first-class postage pre-paid, or delivery to the carrier for delivery within 3 calendar days, addressed to the counsel of record *at the proper address.*

Sup. Ct. R. 29.3.

Despite the fact that Dr. Whitehead's counsel filed a Notice of Change of Address in the Ninth Circuit Court of Appeals on June 2, 2008, Ms. Nurre did not serve opposing counsel at that address; rather, she served the Petition at counsel's former address. Indeed, it was not until Dr. Whitehead's counsel discovered through a third-party vendor that the Petition had been filed, and after counsel contacted Ms. Nurre's Washington attorney, that she was served with the Petition on December 17, 2009, ten days after the Petition was filed. Accordingly, the Petition should be denied for failure to comply with this Court's procedural rules.

B. Petitioner Mischaracterizes the Scope and Impact of the Ninth Circuit's Decision in this Matter.

Even if this Court does not deny the Petition for procedural reasons, the Court should deny the Petition for substantive ones. First, this Court should deny the Petition because Ms. Nurre mischaracterizes the scope

and potential impact of the Ninth Circuit's decision. While Ms. Nurre would have this Court believe that "the backbone of Western Art and Culture" will now crumble because of the Court decisions below, in fact, the Ninth Circuit's decision is

> confine[d] . . . to the narrow conclusion that when there is a captive audience at a graduation ceremony, which spans a finite amount of time, and during which the demand for equal time is so great that comparable non-religious musical works might not be presented, it is reasonable for a school official to prohibit the performance of an obviously religious piece.[54]

As a result, her arguments as to the alleged broad impact of the Ninth Circuit's decision are not well-founded. Indeed, the Ninth Circuit's decision does not sanction censorship of artistic expression without legitimate reason, as Ms. Nurre asserts; the decision does not threaten all opportunities to perform music pieces with a religious foundation, as she asserts; and the decision does not stand for the broad proposition that school administrators and other public officials may, with impunity, sacrifice individual student expression, as she asserts.

Rather, the decision is based on the standard set forth by this Court that when analyzing limitations placed on certain speech in a limited public forum, any such limitations must be viewpoint neutral and limited

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[54] *Petition for Certiorari*, Appendix at 13a.

to reasonably legitimate pedagogical concerns.[55] Both *Rosenberger* and *Lamb's Chapel*, upon which Ms. Nurre herself relies, set forth this reasonableness standard, explaining that courts must focus on whether the limitation that has been placed on the speech at issue is consistent with preserving the property for the purposes to which it is dedicated.[56]

In the instant matter, both the District Court and the Ninth Circuit Court of Appeals found that the District was acting to avoid a repeat of the 2005 controversy by prohibiting any reference to religion at its graduation ceremonies. The District's policies evidence a desire to remain neutral with respect to all religions, and there are practical limitations to a graduation ceremony that present comparable selections.[57] Ms. Nurre may not agree with these factual findings, but as this Court's Rules explicitly state, a "petition for writ of certiorari is *rarely* granted when the asserted error consists of erroneous factual findings".[58]

Likewise, a petition for writ of certiorari is "rarely granted" when the asserted error consists of a

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[55] *See Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1995); *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993).

[56] *Rosenberger*, 515 U.S. at 829; *Lamb's Chapel*, 508 U.S. at 392-93.

[57] *See Petition for Certiorari*, Appendix at 12a-13a and 62a-65a.

[58] Sup. Ct. R. 10 (emphasis added).

"misapplication of a properly stated rule of law."[59] At best, that is what Ms. Nurre is asserting here. For example, she complains that she has been subjected to "viewpoint discrimination," yet she has not claimed that the Ninth Circuit misstated the law applicable to claims of viewpoint discrimination. In fact, she cannot so assert, because the Ninth Circuit properly stated that "this is not a case involving viewpoint discrimination" because Ms. Nurre, by her own admission, was not attempting to express any specific religious viewpoint.[60] Accordingly, this Court should not be distracted by Ms. Nurre's viewpoint discrimination arguments.

C. The Ninth Circuit Court of Appeals' Decision Does Not Run Contrary to this Court's Precedent.

Plaintiff's arguments that the Ninth Circuit decision runs contrary to this Court's prior decisions are also without legal basis. In *Hazelwood School Dist. v. Kuhlmeier*, this Court addressed nearly the same issue presented in this case – "whether the First Amendment requires a school affirmatively to promote particular

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[59] *Id.*

[60] *Petition for Certiorari*, Appendix at14a n. 6 (quoting *Rosenberger*, 515 U.S. at 829

> When the government targets not subject matter, but *particular views taken by speakers* on a subject, the violation of the First Amendment is [viewpoint discrimination] . . . . The government must abstain from regulating speech when the *specific motivating idealogy or the opinion or perspective of the speaker* is the rationale for the restriction.

(emphases added).

student speech."[61] This "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."[62] This Court explained:

> Educators are entitled to exercise greater control over this . . . form of student expression to assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school. Hence, a school may . . . "disassociate itself," not only from speech that would "substantially interfere with [its] work . . . or impinge upon the rights of other students," but also from speech that is, for example, ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences. A school must be able to set high standards for the student speech that is disseminated under its auspices . . . and may refuse to disseminate student speech that does not meet those standards. . . . A school must also retain the authority to refuse to sponsor student speech that might

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[61] 484 U.S. 260, 271 (1988).

[62] *Id.*

> reasonably be perceived to advocate drug or alcohol use, irresponsible sex, or conduct otherwise inconsistent with "the shared values of a civilized social order," or to associate the school with any position other than neutrality on matters of political controversy. Accordingly, we conclude that the standard articulated in *Tinker* [*v. Des Moines Ind. Comm'y Sch. Dist.*, 393 U.S. 503 (1969)] for determining when a school may punish 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.[63]

The Ninth Circuit recognized these principles, as well as those set forth in this Court's decision in *Lee v. Weisman*, in which this Court noted that graduation ceremonies are special and not truly voluntary as "a student is not free to absent herself from the graduation exercise."[64] In determining that Dr. Whitehead's actions were reasonable in this case, the Ninth Circuit recognized that the graduation context was crucial to its analysis. The lower courts further

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[63] *Id.* at 271-72 (citations omitted).

[64] 505 U.S. 577, 595 (1992).

distinguished, as should this Court, this Court's decisions in *Widmar v. Vincent*, 454 U.S. 263 (1981), *Good News Club v. Milford Cent. School*, 533 U.S. 98 (2001) and *Lamb's Chapel*, *supra*, because in those cases this Court held that there was no realistic danger that the community would think the District was endorsing the activity at issue.

Finally, this Court should ignore Ms. Nurre's red herring arguments pertaining to the Establishment Clause. Ms. Nurre has presented one issue in her Petition – whether or not she has suffered a violation of her First Amendment Free Speech rights – yet she briefs at length whether an Establishment Clause violation was ever established. Whether such Establishment Clause violation does or does not exist is simply not before this Court, and is meant only to distract this Court from her weak legal arguments pertaining to her First Amendment claim.

D. This Court Should Deny the Petition Because Qualified Immunity Is Intended for these Very Types of Cases

Even if the Ninth Circuit incorrectly concluded that no constitutional violation had occurred in this case, this Court should still deny the Petition, because it is not a case in which this Court will ever need to make a determination about the Constitutional question before it. Indeed, the entire Ninth Circuit panel agreed that even if Ms. Nurre's free speech rights had been violated by Dr. Whitehead, qualified immunity would have

protected Dr. Whitehead from suit.[65] This is particularly important given this Court's recent decision in *Pearson v. Callahan*, 555 U.S. __, 129 S. Ct. 808 (2009). The *Pearson* Court examined the qualified immunity standard set forth in *Saucier v. Katz*, 533 U.S. 194, 121 S.Ct. 2151 (2001), and held that the Judges of the District Courts and the Courts of Appeals are now permitted to exercise their discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in each particular case.[66] This is because "the judges of the district courts and courts of appeals are in the best position to determine the order of decisionmaking [that] will best facilitate the fair and efficient disposition of each case."[67]

Without ever getting to whether a First Amendment violation occurred in this case, this Court may determine the law was not clearly established at the time Dr. Whitehead denied Ms. Nurre the right to play "Ave Maria." The rationale articulated by the District for its prohibition of the playing of "Ave Maria" at graduation was the potential for an Establishment Clause violation if it allowed the wind ensemble to play the piece. While this Court has left open the question of whether "'a State's interest in avoiding an Establishment Clause

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[65] The District acknowledges that, as a municipal entity, it is not entitled to qualified immunity, and that, if this Court determines that constitutional violations by Dr. Whitehead occurred, the Court would need to perform a separate liability analysis with respect to the District.

[66] *Pearson*, 555 U.S. __, __, 129 S. Ct. 808, 818 (2009).

[67] *Id.* at 821.

violation would justify viewpoint discrimination,'"[68] several Circuit Courts of Appeals, including the Ninth Circuit, have "recognized that Establishment Clause concerns can justify speech restrictions 'in order to avoid the appearance of government sponsorship of religion."[69]

Further, this Court has recently acknowledged that "[s]chool superintendents have a difficult job" and "the law should not demand that they fully understand the intricacies of... First Amendment jurisprudence."[70] This is especially true given that qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law."[71]

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[68] *Hills v. Scottsdale Unified Sch. Dist.*, 329 F.3d 1044, 1053 n. 7 (9th Cir. 2003).

[69] *Hills*, 329 F.3d at 1053 (citations omitted); *Stratechuk v. Bd. of Education, South Orange-Maplewood Sch. Dist.*, 587 F.3d 597 (3d Cir. 2009); *Roberts v. Madigan*, 921 F.2d 1047, 1054 (10th Cir. 1990) (holding that school district's order directing teacher not to leave his bible in sight or read silently from it during classroom hours had a secular purpose in that it was intended "to assure that none of [the teacher's] classroom materials or conduct violated the Establishment Clause").

[70] *Morse v. Frederick*, 551 U.S. 393, 408 and 425, 127 S. Ct. 2618 (2007) (Breyer, J., concurring in the judgment in part and dissenting in part).

[71] *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

CONCLUSION

Contrary to Ms. Nurre's Petition, the School District is not seeking to deprive students of learning opportunities, nor is it seeking to purge altogether religious-inspired works from public education. Instead, it simply sought to provide an atmosphere in which all graduates could celebrate their academic achievements, free from controversial messages, and free from the controversy that plagued its past graduation ceremony. In this instance, the District simply had no choice but to act as it did, within the confines of the law. For all of the reasons set forth above, Dr. Whitehead respectfully requests that this Court deny Ms. Nurre's Petition.

DATED this 11th of January, 2010.

Respectfully submitted,

MICHAEL A. PATTERSON
Counsel of Record
SARAH S. MACK
PATTERSON BUCHANAN
FOBES LEITCH & KALZER, INC., P.S.
2112 Third Ave., Suite 500
Seattle, WA 98121
(206) 462-6700

Counsel for Respondent

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