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
Superintendent of Everett School District No. 2,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

REPLY BRIEF OF PETITIONER

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REPLY BRIEF OF PETITIONER

ARGUMENT IN REPLY

I. This Court Has Jurisdiction Over the Petition Despite Any Service Errors.

Respondent's request that this Court deny the Petition because of an unintentional error in the

service upon the Respondent[1] should be rejected. This Court has made clear that its rules regarding service are not jurisdictional. It is respectfully submitted that the inadvertent and non-prejudicial mailing error in the service of the Petition for Certiorari in this case is not an appropriate ground for denying the Petition. *United States v. Adams*, 383 U.S. 39, 42 (1966). *Accord Parker v. Levy*, 417 U.S. 733, 742 n. 10 (1974).

II. Certiorari Should Be Granted Because the Decision Below Conflicts With Precedent.

Respondent mistakenly contends that *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988), is the controlling precedent justifying denial of the Petition. But *Hazelwood* and its rule relating to curricular speech was not the basis for the panel majority's decision below. The decision in *Hazelwood* dealt with speech that appeared in activities

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[1] The Petition for Certiorari was mailed by Petitioner's printer at the direction of associate counsel on the day of filing to the address of Respondent's counsel shown on the Respondent's final brief filed in the Ninth Circuit prior to oral argument in the case. When the directions concerning service were given, associate counsel was unaware that Respondent's counsel had changed their address following the principal formal briefing in the case. Upon learning of the mistake, Petitioner's counsel immediately arranged to have a electronic copy of the Petition sent to Respondent's counsel and ordered additional copies of the Petition printed and sent for overnight delivery to Respondent's counsel. Respondent's counsel did not seek an extension of the responsive filing date, nor have they alleged prejudice.

intended to serve strictly pedagogical purposes. *Id.* at 273. In upholding the school's decision to forbid the publication of student articles, this Court made clear in *Hazelwood* that it was not addressing principles that apply to a public forum for expression. *Id.* at 267-69. Nor did *Hazelwood* involve the kind of limited public forum for expression that both lower courts determined existed in this case. Those forum principles apply here, along with the controlling precedent that Respondent chooses to completely ignore in her response. (Petition for Certiorari at 11a, 47a).[2] The facts of this case are also substantially distinct from *Hazelwood* in that here, school policy (which Respondent's response also ignores) actually permitted performance of religious works when "accompanied by comparable artistic works of a non-religious nature", which occurred at the graduation ceremony at issue here. (Petition for Certiorari at 81a) Thus, *Hazelwood* is not controlling and is not the proper measure of whether the decision below conflicts with the decisions of this or other courts.

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[2] Respondent insinuates that the school did not have a policy of allowing senior wind ensemble members to select a piece to perform at graduation, referring to evidence of the practices of a band teacher who left the school in 2002 (Brief in Opposition at 8). However, the District Court clearly pointed out that the facts were sufficient to show that a limited public forum was created by the school (Petition for Certiorari at 47a), and the Court of Appeals likewise assumed that such a forum existed in making its decision (Petition for Certiorari at 11a).

III. Certiorari Should Be Granted Because of the Impact of the Decision Below.

The Respondent contends that this case and its impact upon the rights of students to artistic expression is not important enough to warrant intervention by this Court. But the Petition does not overstate the far-reaching impact of the rationale for the decision below. Indeed, Judge Smith's dissent warned of the dire consequences that will flow from the logic of the panel's ruling, pointing out that the practical effect of the decision will be "to chill—or even kill—musical and artistic presentations by their students in school-sponsored limited public fora[.]" (Petition for Certiorari at 23a).

Contrary to the Respondent's claim, the decision below provides a legal justification and, indeed, an invitation, for invidious and unnecessary censorship of student speech by school administrators. The decision justifies censorship by what is, in effect, an administrator's personal predilection to avoid "controversy." As pointed out in the Petition, and not addressed by Respondent, this essentially allows a "heckler's veto" or the personal predilections of the administrator to squelch student expression at will, and is directly contrary to the precedents of this Court that avoidance of controversy is not a proper basis for censoring student speech. *Tinker v. Des Moines Area Ind. Sch. Dist.*, 393 U.S. 503, 510 (1969). It is one thing for the school system to require "balance" in a public forum to avoid the appearance of religious endorsement, as

the school policy *required* here and as was achieved at the graduation ceremony which included *eight* other secular instrumental works that would have counter-balanced a performance of "Ave Maria" (a point at which Respondent Whitehead chooses to blink). It is quite another thing, however, to censor a religious work from a graduation ceremony, or from study or performance in the classroom, or from a group musical performance, simply to "avoid controversy." The Ninth Circuit ruling that such standardless and arbitrary censorship is reasonable is contrary to sound constitutional doctrine and will surely foster the extensive harms the dissent below quite properly identifies.

The decision below implicitly provides judicial cover for school officials who desire to implement policies that are not viewpoint neutral. It provides a ready explanation for rules that ban any and all performance of religious music in virtually all circumstances. A school policy that permits the arbitrary singling out of music with religious allusions or derivations exhibits the kind of standardless discrimination forbidden by the Constitution. *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 130 (1992). *See also Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402, 407-08 (5th Cir. 1995) (to disqualify the majority of appropriate choral music from public school performances simply because it is religious would require hostility, not neutrality, toward religion). This Court should grant plenary review of this case to establish proper limits on the otherwise blank

check granted to school officials under the reasoning of the Ninth Circuit majority.

IV. The Doctrine of Qualified Immunity Does Not Require Denial of the Petition Because Claims Against the School District Remain In This Case.[3]

Even if this Court could conclude that the law governing this case was not "clearly established", and qualified immunity would apply to the claims against Respondent Whitehead in her *individual* capacity, application of the qualified immunity doctrine would *not* dispose of all the claims made in

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[3] The Respondent claims qualified immunity on the ground that the law in this area is not clearly established. However, for forty years it has been clearly established that avoidance of controversy is not a proper basis to censor student speech. *Tinker*, 393 U.S. at 510. Moreover, the boundaries of prohibited religious activity in school graduation ceremonies were clearly outlined in *Lee v. Weisman,* 505 U. S. 577 (1992), and that case did not authorize censorship of student speech that did not constitute a religious exercise. The parameters against unlawful viewpoint discrimination also have long been outlined in decisions including *Rosenberger v. Rector & Visitors of The University of Virginia*, 515 U.S. 819, 832 (1995), *Good News Club v. Milford Central School*, 533 U.S. 98, 109-10 (2001), and *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384, 393-94 (1993). Respondent Whitehead requests, in effect, that this Court grant a free pass (at the expense of Nurre and her fellow students) from the unmistakably clear holding of *Tinker* and this Court's other clearly-established precedent against arbitrary and unjustified interference with student speech.

this case. Respondent was sued in *both* her individual and official capacities. As an official capacity suit, the action was against her employer, Everett School District No. 2. *Kentucky v. Graham*, 473 U.S. 159, 165-66 (1985). Governmental entities are not entitled to claim qualified immunity. *Leatherman v. Tarrant County Narcotics, Intelligence & Coordination Unit*, 507 U.S. 163, 166 (1993). Everett School District No. 2 would be liable for any constitutional deprivation that results from the execution of District policy. Moreover, it is established that even the single decision of a government official may represent the execution of policy for which a governmental entity may be held liable under 42 U.S.C. § 1983. *Pembaur v. Cincinnati*, 475 U.S. 469, 483 (1986).

In this case, neither the District Court nor the Court of Appeals decided whether the censorship of "Ave Maria" resulted from the execution of School District policy (Petition for Certiorari at 71a). Proceeding under the ruling in *Saucier v. Katz*, 533 U.S. 194 (2001), *overruled in part*, *Pearson v. Callahan*, 129 S. Ct. 808 (2009), each court decided at the outset that no constitutional right was violated. Should this Court determine that there was a First Amendment violation in this case, the official capacity claim against the Respondent remains viable regardless of whether the right was clearly established.

CONCLUSION

For the reasons set forth above, the Petitioner respectfully requests that a writ of certiorari to review the judgment of the Court of Appeals be granted.

Respectfully submitted,

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