NO. _____

In the
Supreme Court of the United States

DOUG MORGAN; ROBIN MORGAN; JIM SHELL; SUNNY SHELL; SHERRIE VERSHER; AND CHRISTINE WADE,

PETITIONERS,

v.

PLANO INDEPENDENT SCHOOL DISTRICT, ET AL.,

RESPONDENT.

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

PETITION FOR WRIT OF CERTIORARI

KELLY SHACKELFORD
HIRAM S. SASSER, III
JEFFREY C. MATEER
LIBERTY LEGAL INSTITUTE
2001 Plano Parkway
Suite 1600
Plano, TX 75075
(972) 941-4444

PAUL D. CLEMENT
Counsel of Record
ASHLEY C. PARRISH
CANDICE CHIU
KING & SPALDING LLP
1700 Pennsylvania Ave., NW
Washington, DC 20006
pclement@kslaw.com
(202) 737-0500

Counsel for Petitioners

*additional counsel listed on inside cover

March 17, 2010

Additional Counsel for Petitioners:

CLYDE MOODY SIEBMAN
SIEBMAN REYNOLDS
BURG & PHILLIPS LLP
300 N. Travis St.
Sherman, TX 75090
(903) 870-0070

WM. CHARLES BUNDREN
WM. CHARLES
BUNDREN & ASSOCIATES
2591 Dallas Parkway
Suite 300
Frisco, TX 75034
(972) 624-5338

QUESTION PRESENTED

Whether the constitutionality of a public school district's student speech policy imposing a sweeping ban on the distribution of any written material should be evaluated under the "substantial disruption" standard established in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), which this Court has generally applied to restrictions on student speech, or whether because the student speech policy is facially content- and viewpoint-neutral, it should be evaluated under the less exacting "intermediate scrutiny" standard established in *United States v. O'Brien*, 391 U.S. 367 (1968), which this Court has applied to restrictions on expressive conduct that have only an incidental effect on First Amendment freedoms.

RULE 14.1 STATEMENT

The following parties are not listed on the caption but participated in the proceedings below.

1. Lynn Swanson, in her individual capacity and as Principal of Thomas Elementary School.

2. Jackie Bomchill, in her individual capacity and as Principal of Rasor Elementary School.

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This petition presents the Court with an opportunity to reaffirm the continuing vitality of its student speech jurisprudence, anchored by its landmark decision in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969). In *Tinker*, and in subsequent cases refining that decision, the Court has struck a careful balance between, on the one hand, students' "undoubted" right "to advocate unpopular and controversial views in schools," *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986), and, on the other, the need for school officials to restrict student speech given the "special characteristics of the school environment." *Tinker*, 393 U. S. at 506. In balancing these competing considerations, the Court has held that, unless speech is lewd, vulgar, school-sponsored, or drug-promoting, *Tinker* provides the general rule: *i.e.*, 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 513; *see also Morse v. Frederick*, 551 U.S. 393, 422–23 (2007) (Alito, J., concurring).

The Fifth Circuit's decision below jettisons that standard and, instead, borrows the less exacting "intermediate scrutiny" standard from *United States v. O'Brien*, 391 U.S. 367 (1968), ordinarily used to assess restrictions on expressive conduct resulting in only "incidental limitations on First Amendment freedoms." *Id.* at 376. The Fifth Circuit held that, even when a school district policy targets pure student speech, a lower standard of

scrutiny is appropriate as long as the policy is facially content- and viewpoint-neutral. But *Tinker* already provides a test tailored to the time and place of the school setting. Lowering the standard of review further for neutral time, place, and manner restrictions in the school setting amounts to impermissible double counting that dilutes the First Amendment's protections.

In this case, the effect of that diluted standard of review was dramatic: the school district did not even attempt to defend its draconian student speech policy under *Tinker*. Yet the court of appeals blessed the policy, permitting the school district to impose sweeping restrictions on pure student speech. Moreover, the dispute over the standard of review is cleanly presented in this case. The district court recognized the importance of the standard of review to the resolution of this case and certified the issue to the Fifth Circuit. The Fifth Circuit then decided the issue in a way that deviates from this Court's precedents and radically under-protects student speech. The Court's intervention is needed to correct the Fifth Circuit's improper doctrinal departures, including its decision to discard constitutional principles that have long grounded the Court's student speech jurisprudence.

Apart from contravening this Court's precedents, the Fifth Circuit's decision also further deepens an existing and well-recognized conflict within the courts of appeals on a recurring issue of practical and constitutional importance—namely, the proper standard to apply when a school imposes

restrictions on pure student speech that are facially content- and viewpoint-neutral. The Court's guidance is needed to restore clarity to this unsettled area of law.

OPINIONS BELOW

The court of appeals' decision is reported at 589 F.3d 740 and reproduced in the Appendix at App. 1. The court of appeals' unpublished order denying rehearing and rehearing *en banc* is reproduced at App. 15. The decision of the United States District Court for the Eastern District of Texas does not appear in the official reports but is available at 2007 WL 654308 and is reproduced at App. 17.

JURISDICTION

The court of appeals rendered its decision on December 1, 2009. App. 1. It denied petitioners' timely petition for rehearing and rehearing *en banc* on January 5, 2010. App. 15. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

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

STATEMENT OF THE CASE

This case involves a northern Texas school district that has attempted to banish religious expression from school. The school district has adopted a series of student speech policies that purport to prohibit virtually all non-verbal student speech in any school-related context, and have been used by school officials to root out religious speech. School officials have never justified their sweeping restrictions on student speech as necessary to avoid substantial disruptions to school operations. Instead, they persuaded the court below that the all-encompassing nature of their speech suppression is a constitutional virtue that lowers the level of scrutiny and obviates the need to justify the policy as necessary to avoid substantial disruption.

A. The Initial Student Speech Policy

1. Respondent Plano Independent School District ("PISD") has long maintained a student speech policy, entitled *Student Expression: Distribution of Nonschool Literature*, that gives school officials broad authority to restrict virtually any and all forms of non-verbal student speech. Until April 2005—after petitioners filed this lawsuit—the PISD policy broadly restricted students' distribution of any "written material, tapes, or other media." Among other things, the policy (i) required that all students submit any written materials they wished to distribute to the school principal for prior review and approval; (ii) banned the distribution of any material in classrooms and hallways; and (iii) provided that

materials could be distributed only at a school-designated area subject to further time, place, and manner restrictions. App. 95. When PISD formally adopted the policy in October 2003, the PISD Board of Trustees did not consider or offer any evidence concerning the need for the policy.

2. Although the policy purported to impose a broad ban on distributing any kind of written material, in practice, the speech code was used by PISD officials to promote an anti-religious orthodoxy and to root out any and all student religious speech. In particular, PISD officials applied the *Student Expression* policy to prohibit students from distributing materials with religious messages, while at the same time permitting students to distribute materials containing non-religious messages.

For example, in December 2001, as part of a school-sponsored winter break party where students were allowed to exchange gifts, first-grader Michaela Wade brought goodie bags containing candy canes and pencils to give to her classmates. *See* Second Am. Compl. ¶ 6.71. Michaela's teacher asked Michaela whether the bags contained anything "religious" and, upon inspecting the bags, confiscated the pencils because they were inscribed with the message "Jesus is the reason for the season." Second Am. Compl. ¶¶ 6.77-6.79. The school principal later instructed Michaela's mother that, under PISD policy, the candy canes were permissible gifts but the "religious" pencils were not. Second Am. Compl. ¶ 6.100.

In December 2003, third-grader Jonathan Morgan wished to give his classmates goodie bags containing pens shaped as candy canes at another winter break party where students were allowed to exchange gifts. Each pen was affixed to a card, entitled "Legend of the Candy Cane," containing a poem about the Christian origin of candy canes. App. 65. A few weeks before the party, Jonathan's parents met with PISD officials and asked about the school's policy prohibiting students from exchanging religious gifts and from writing "Merry Christmas" on personalized student-made holiday cards sent to military troops and nursing homes. At the meeting, the principal confirmed that a PISD policy approved at the "highest level" barred students from including religious messages in their goodie bags and from using the word "Christmas." App. 66. On the day of the party, Jonathan's teacher stopped Jonathan from bringing his goodie bags into the classroom because they contained "religious" messages. Other students whose goodie bags did not contain religious messages were allowed to distribute their gifts regardless of what message those gifts may have conveyed. App. 67.

In January 2004, fifth-grader Stephanie Versher held a "half-birthday" party at school—a customary practice for PISD students whose birthdays fall within the summer months. App. 70. PISD students celebrating half-birthdays typically distribute snacks and gifts to other students, which have included items such as bookmarks, key rings, bracelets, and pencils. App. 70. Stephanie wished to give each classmate a brownie and two pencils, one inscribed with the word "moon," and one with

"Jesus loves me this I know for the Bible tells me so." App. 71. On the day of the party, a school official handed Stephanie's mother a letter stating that she was improperly distributing material to students on school property. App. 71. The letter warned that, if Stephanie's mother failed to submit the materials to the principal for prior review, or failed to leave school grounds when requested, the school would call the police. App. 71. The principal further explained to Stephanie's mother that her fifth-grader was distributing objectionable "religious" material with a message with which other students might disagree. App. 72. The principal instructed that Stephanie could distribute the brownies and "moon" pencils, but not the pencils that mentioned "Jesus." App. 72. After school, when Stephanie was giving pencils mentioning "Jesus" to friends on the school lawn, the principal grabbed her, confiscated a pencil she had given a classmate, and informed her that it was impermissible to distribute pencils with religious messages on school property. App. 73. School officials then warned Stephanie's mother that Stephanie could be expelled if she again tried to distribute materials to her friends at school if the materials included a religious message. App. 73.

3. On other occasions, PISD officials employed the *Student Expression* policy to prohibit students from discussing "religious" events or distributing free tickets to those events. In April 2003, for example, second-grader Kevin Shell wanted to tell his school friends about free tickets to his church's Easter sunrise service. App. 62. Kevin's teacher consulted the principal, who explained that PISD

policy prohibited "religious" tickets from being discussed or distributed on school property. App. 62-63. The following month, Kevin was again told that he could not mention or distribute free tickets to a spring musical at his church. A school official informed Kevin's mother that PISD policy prohibited elementary students from discussing or distributing materials expressing a religious viewpoint. App. 64. In January 2004, Kevin's mother asked the school official and the principal about the possibility of offering her son's friends free tickets to a church rally. App. 69. The principal stated that her son could not mention or distribute tickets to any religious event.

In January 2004, fifth-grader Stephanie Versher wished to give her friends free tickets to a Christian drama. Outside of class, Stephanie offered tickets to a few friends who had expressed an interest in attending. App. 69-70. Stephanie's teacher, after consulting with the principal, threw away the tickets and prohibited Stephanie from giving away any more tickets to religious events. App. 70.

B. The Amended Student Speech Policy

1. On December 15, 2004, petitioners—four families whose children are (or were) students at PISD public schools and were prohibited from distributing materials deemed "religious"—filed suit against PISD and two PISD school principals, Lynn Swanson and Jackie Bomchill, in the District Court for the Eastern District of Texas. Complaining that school officials were impermissibly restricting speech and

discriminating against religious views, the petitioners requested a temporary restraining order, preliminary and permanent injunctive relief, declaratory judgment, nominal damages, and attorney's fees. App. 33. On December 16, 2004, the district court issued a temporary restraining order prohibiting PISD, Swanson, and Bomchill from "interfering with or prohibiting Plaintiffs and other students from distributing religious viewpoint gifts to classmates at the December 17, 2004 'winter break' parties." App. 33. The court's order also prohibited the PISD officials from causing students to feel embarrassed, uncomfortable, or fearful for exercising their legal rights, and enjoined the school officials from engaging in any further First Amendment violations. App. 33.

2. Four months after petitioners filed their lawsuit, PISD amended its student speech policy. The amended version of PISD's *Student Expression: Distribution of Nonschool Literature* broadly bans students from distributing "materials" in "classrooms" during "school hours." App. 98. The policy defines "materials" expansively to include any "writings, items, objects, articles or other materials." App. 98. It also defines "classrooms" broadly as "any location designated for providing and/or facilitating: student instruction; student education; achievement of curricular objectives; achievement of state-mandated learning requirements; school-sponsored extracurricular activities; and/or school-sponsored programming for students." App. 98. The policy explains that students are prohibited from distributing materials

not only in "traditional classrooms," but also in "school campus gymnasiums, auditoriums, cafeterias, hallways, and outdoor facilities." App. 98. Finally, the policy defines "school hours" to include not just the school day but any time "when students are receiving educational instruction, participating in or attending extracurricular activities, or otherwise being involved in educational/curricular programming." App. 98.

The amended policy modifies some of the restrictions included in the earlier policy. First, it eliminates the requirement that students submit materials to the principal for pre-approval. Second, it allows all students to distribute materials "30 minutes before school and 30 minutes after school hours" at school entrances, exits, and any principal-designated "gathering areas," and permits elementary students to distribute materials during designated recess periods. Third, it allows middle and secondary students—but not elementary students—to distribute materials in hallways and cafeterias. *See* App. 99, 103.

3. In November 2005, after petitioners moved for summary judgment on their facial challenge to the constitutionality of both the initial and amended PISD student speech policies, PISD held a public hearing at which PISD officials offered "additional evidence" in support of the amended policy. App. 37-38. At the end of the hearing, the Board of Trustees re-adopted the amended policy with no substantive alterations. It added, however, a preamble that "memorialized" PISD's reasons for the policy—purportedly, "to decrease distractions, to decrease disruption, to increase the time

available and dedicated to learning, and to improve the educational process, environment, safety and order at District schools and not invade or collide with the rights of others." App. 38, 106. The preamble also noted that the additional restrictions on elementary students were "intended to facilitate the safe, organized and structured movements of students between classes and at lunch, as well as to reduce littering." App. 110.

C. The Decisions Below

1. On February 26, 2007, the district court ruled on petitioners' motion for summary judgment on their facial challenge to the constitutionality of both the initial and amended PISD policies, as well as PISD's cross-motion for summary judgment. App. 17. With respect to PISD's initial policy, the district court—accepting the recommendation of a magistrate—found that petitioners' challenge was moot. App. 19. With respect to PISD's amended policy, the district court agreed with the magistrate that, because the restrictions were viewpoint-neutral, the Fifth Circuit's decision in *Canady v. Bossier Parish School Board*, 240 F.3d 437 (5th Cir. 2001), compelled applying the standard for evaluating "time, place, and manner restrictions" on expressive conduct. App. 18. Under that standard, the district court upheld all of PISD's restrictions on student speech as facially constitutional, except one: the district court found that the categorical bar on elementary students from distributing materials in the cafeteria was overbroad. App. 19.

After the district court issued its ruling, this Court released its decision in *Morse* and the Fifth Circuit held that Justice Alito's concurring opinion was controlling. *See Ponce v. Socorro Indep. Sch. Dist.*, 508 F.3d 765, 768 (5th Cir. 2007). In the wake of these developments, the district court certified its judgment resolving the facial challenges to both PISD policies as final and appealable under Rule 54(b) of the Federal Rules of Civil Procedure. App. 21. Explaining that the as-applied challenges to the PISD policies posed distinct legal questions, the district court deemed it appropriate for the Fifth Circuit to clarify the legal standard for evaluating the constitutionality of restrictions on student speech. App. 22. The district court concluded that, to further "the interest of avoiding unnecessary time and expense and the unnecessary expenditure of … scarce judicial resources," it was appropriate for its "resolution of the distinct legal question regarding the facial constitutionality of the school district policies" to be presented to the Fifth Circuit "for resolution and decision." App. 22.

2. On December 1, 2009, the U.S. Court of Appeals for the Fifth Circuit affirmed in part and reversed in part. App. 1. The Fifth Circuit disagreed that the facial challenge to the initial policy was moot, recognizing that petitioners sought nominal damages in addition to injunctive and declaratory relief. The Fifth Circuit remanded all claims addressing the initial policy to the district court for further proceedings.

Addressing the facial constitutionality of PISD's amended policy, the Fifth Circuit agreed

with the district court that *Tinker*—which requires that student expression must "materially and substantially disrupt the work and discipline of the school" to be suppressed—did not supply the relevant legal standard. Instead, the Fifth Circuit determined that, under its precedent in *Canady*, "intermediate scrutiny" was appropriate to determine whether content- and viewpoint-neutral restrictions on student speech comport with the First Amendment. Applying that less demanding standard of review, the Fifth Circuit upheld all of PISD's restrictions on student speech as constitutional, including the categorical ban prohibiting elementary students from distributing materials in the cafeteria (which the district court had declared overbroad). In the Fifth Circuit's view, because PISD's amended policy restrictions do not target particular content or viewpoints, it was "of no moment" that PISD policy restricted "pure speech." App. 9.

On January 5, 2010, the court of appeals denied rehearing and rehearing *en banc*. App. 15. This petition follows.

REASONS FOR GRANTING THE PETITION

This petition provides an important opportunity to reaffirm the centrality of *Tinker* to the Court's student speech jurisprudence. The decision below dilutes the First Amendment rights of students by borrowing an inapposite test and ignoring the Court's own doctrine specifically directed to speech restrictions addressed to the "time" and "place" of the school setting. In addition, this case presents a uniquely clean

vehicle to address the standard of review: the legal issue was certified below and viewed by all as critical to the outcome of the entire case. This Court has long held that First Amendment rights do not stop at the schoolhouse gate. This case presents an opportunity to make that promise a reality by reaffirming that the *Tinker* test applies to restrictions on student speech.

Three factors underscore the case for *certiorari* here. *First*, the Fifth Circuit's decision deepens a well-recognized split in authority among the lower courts over the proper standard to apply when evaluating the constitutionality of content- and viewpoint-neutral restrictions on student speech. *Second*, the Fifth Circuit's decision cannot be squared with fundamental principles of First Amendment law that have undergirded this Court's student speech jurisprudence. *Third*, the question presented addresses an important, recurring issue. If left uncorrected, the decision below threatens to wipe out any meaningful limits on school officials' ability to restrict student speech, and greatly increases the risk that school officials will employ student speech codes as a means of suppressing disfavored views on issues of religion, politics, and other matters of public opinion.

I. The Courts of Appeals Are Sharply Divided Over Whether *Tinker* Applies To Content- And Viewpoint-Neutral Restrictions On Student Speech.

The decision below exacerbates a clear and well-recognized circuit split over the proper scope of *Tinker*. In particular, there is a clear and acknowledged split of authority concerning whether

the *Tinker* standard generally governs the constitutionality of school policies that restrict student speech or whether that standard applies narrowly only to content- and viewpoint-based policies.

1. Over four decades ago, this Court held that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." 393 U.S. at 506. In *Tinker*, school officials adopted a facially viewpoint-neutral policy prohibiting students from wearing arm bands at school and, applying that policy, punished high school students for wearing black armbands in protest of the Vietnam War—a political statement that the Court deemed "akin to 'pure speech.'" *Id.* at 505. Evaluating whether school officials had violated the First Amendment, *Tinker* set out the standard directed to the unique context of student speech in school: "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.'" *Morse*, 551 U.S. at 403 (quoting *Tinker*, 393 U.S. at 513). Applying that standard, the Court emphasized that wearing a black armband was "a silent, passive expression of opinion, unaccompanied by any disorder or disturbance," and concluded that the school had violated the students' First Amendment rights. *Tinker*, 393 U.S. at 508.

In three subsequent student speech cases, the Court has elaborated on *Tinker*'s "substantial disruption" rule. In *Bethel School District No. 403*

v. Fraser, 478 U.S. 675 (1986), the Court indicated that schools may categorically suppress "lewd" or "vulgar" student speech. *Id.* at 685. In *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), the Court gave schools greater leeway in addressing school-sponsored speech, allowing restrictions "reasonably related to legitimate pedagogical concerns" when student speech is sponsored by the school. *Id.* at 273. And, most recently, in *Morse v. Frederick*, 551 U.S. 393, the Court determined that schools may restrict student speech that is reasonably viewed as promoting illegal drug use. All three cases have treated the school context as unique and treated *Tinker* as stating the general rule for student speech.

2. Against this precedential backdrop, the Second, Third, Fourth, and Eighth Circuits have held that, outside the special categories of lewd or vulgar, school-sponsored, and drug-promoting speech, *Tinker* sets forth a *general rule* for assessing the constitutionality of restrictions on student speech. *See Lowry v. Watson Chapel Sch. Dist.*, 540 F.3d 752, 761 (8th Cir. 2008); *Guiles v. Marineau*, 461 F.3d 320, 325 (2d Cir. 2006); *Newsom v. Albemarle County Sch. Bd.*, 354 F.3d 249 (4th Cir. 2003); *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 214 (3d Cir. 2001). As then-Judge Alito explained in a 2001 Third Circuit decision, "[s]peech falling outside" of the narrow exceptions recognized in *Fraser* and *Hazelwood* (and now *Morse*) "is subject to *Tinker*'s general rule" and "may be regulated only if it would substantially disrupt school operations or interfere with the right of others." *Saxe*, 240 F.3d at 214

(Alito, J.); *see also Guiles*, 461 F.3d at 325 ("for all other speech ... the rule of *Tinker* applies").

These courts view the "substantial disruption" standard as applicable to *all* student speech (so long as it is not lewd or vulgar, school-sponsored, or drug-promoting), regardless whether the restrictions are content- or viewpoint-neutral. In *Guiles v. Marineau*, for example, the Second Circuit concluded that, although *Tinker*'s facts involved school officials who were discriminating against political viewpoints, there was no reason to limit the "substantial disruption" standard to viewpoint-based restrictions on speech. 461 F.3d at 326. Instead, noting that *Tinker* is "generally applicable to student-speech cases," the Second Circuit applied the "substantial disruption" test to determine whether a school's viewpoint-neutral application of its dress code to prohibit a student from wearing an anti-war T-shirt ran afoul of the First Amendment. *Id*. at 326, 330. Other courts of appeals have employed similar reasoning in applying *Tinker* when evaluating the constitutionality of content- and viewpoint-neutral restrictions on student speech. *See Holloman v. Harland*, 370 F.3d 1252, 1276 (11th Cir. 2004) (applying *Tinker* even though student "was punished" for the viewpoint-neutral reason of "disobeying directions"); *Walker-Serrano v. Leonard*, 325 F.3d 412, 416 (3d Cir. 2003) (applying *Tinker* even though school's materials-distribution policy was content- and viewpoint-neutral).

3. In stark contrast, the Fifth, Sixth, and Ninth Circuits have held that *Tinker* is irrelevant

in most student speech cases. Instead, they have narrowly interpreted *Tinker* as setting out a heightened standard that applies only in the limited context where school officials seek to restrict student speech because of its content or viewpoint. In contrast, in the vast majority of cases when student speech restrictions can be characterized as content- and viewpoint-neutral, these courts have applied the intermediate scrutiny standard of *United States v. O'Brien*, 391 U.S. 367 (1968). That standard has traditionally been used to evaluate time, place, and manner restrictions on expressive conduct that, unlike student speech codes, have only an incidental effect on First Amendment freedoms.

The Fifth Circuit's decision in *Canady v. Bossier Parish School Board*, 240 F.3d 437 (5th Cir. 2001), is the fountainhead of this misguided line of cases. In *Canady*, the Fifth Circuit concluded for the first time that "[a]pplying the *Tinker* analysis to all other restrictions on student speech does not account for regulations that are completely viewpoint-neutral." *Id.* at 443. Although it acknowledged that "several circuits" had applied *Tinker* to cases beyond the "viewpoint-specific category," the court chose to depart from its sister circuits and apply *O'Brien*. Under *O'Brien*, a content- or viewpoint-neutral restriction on expressive conduct will be sustained under the First Amendment if "it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is

no greater than essential to the furtherance of that interest." *O'Brien*, 391 U.S. at 377. The rule adopted in *Canady* has been consistently applied in the Fifth Circuit to cases involving restrictions on student speech. *See Palmer v. Waxahachie Indep. Sch. Dist.*, 579 F.3d 502 (5th Cir. 2009); *Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608, 615 (5th Cir. 2004).

The Fifth Circuit's novel approach to content- and viewpoint-neutral restrictions on student speech has since spread to the Sixth and Ninth Circuits. Although both circuits at one time approached *Tinker* as a general rule applicable to all student speech, *see Barr v. Lafon*, 538 F.3d 554, 563-64 (6th Cir. 2008); *Chandler v. McMinnville Sch. Dist.*, 978 F.2d 524, 529 (9th Cir. 1992), in more recent cases the Sixth and Ninth Circuits have aligned themselves with the Fifth Circuit's position.

In *M.A.L. v. Kinsland*, 543 F.3d 841 (6th Cir. 2008), for example, the Sixth Circuit held that a school district was "entitled to put time, place, and manner restrictions on hallway speech so long as the restrictions are viewpoint neutral and reasonable in light of the school's interest." *Id.* at 847; *see also Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 391 (6th Cir. 2005) (applying *O'Brien* and rejecting *Tinker* in challenge to school dress code). Citing the Fifth Circuit's *Canady* decision, the Sixth Circuit distinguished *Tinker* as a case about efforts "to silence the student because of the particular viewpoint he expressed," and concluded that the school district "certainly need not satisfy

this demanding standard merely to impose a viewpoint-neutral regulation." *M.A.L.*, 543 F.3d at 849-50 & n.4. Similarly, in its divided opinion in *Jacobs v. Clark County Sch. Dist.*, 526 F.3d 419 (9th Cir. 2008), the Ninth Circuit applied *O'Brien* to conclude that a school dress code comported with the First Amendment. Over a strongly worded dissent from Judge Thomas, the panel majority concluded that "applying intermediate scrutiny to school policies that effect content-neutral restrictions upon pure speech or place limitations upon expressive conduct … strikes the correct balance between students' expressive rights and schools' interests in furthering their educational missions." *Id.* at 434; *cf. id.* at 442-43 (Thomas, J., dissenting).

3. Further confirming that the law in this area is unsettled, the Seventh Circuit appears to have taken a third path and adopted something of a hybrid approach. In *Nuxoll v. Indian Prairie School District No. 204*, 523 F.3d 668 (7th Cir. 2008), Judge Posner writing for the panel majority distinguished *Tinker* as a case about "discriminating against a particular point of view." *Id.* at 673. When the restriction is viewpoint-neutral, Judge Posner reasoned, the school need not prove that the speech it wants to suppress "would materially and substantially disrupt the work and discipline of the school." *Id.* The Seventh Circuit nonetheless applied a variant of the "substantial disruption" test—albeit a less demanding one—to the viewpoint-neutral restriction on student speech. *See id.* Concurring in the judgment, Judge Rovner criticized the panel

majority's "convoluted" distinction of *Tinker* as a case limited to viewpoint discrimination, and asserted that *Tinker*'s "substantial disruption" test "straight-forwardly" applied. *Cf. id.* at 676 (Rovner, J., concurring).

4. This split in authority is deep-seated and real. It is one that both courts and commentators have long and widely recognized as a source of serious division and ongoing confusion among the courts of appeals. *See Guiles*, 461 F.3d at 326 (acknowledging "lack of clarity in the Supreme Court's student-speech cases" over the proper standard); *Canady*, 240 F.3d at 443 (acknowledging circuit split). As commentators have explained, "[w]hether *Tinker* should be read to apply to not only viewpoint- or content-based regulations, but also to content-neutral regulations of speech is unclear" because "the circuit courts are currently divided." R. George Wright, *Doubtful Threats and the Limits of Student Speech Rights*, 42 U.C. DAVIS. L. REV. 679, 712-13 (2009); Jeremiah Galus, Note, *Bong Hits 4 Jesus: Student Speech and the 'Educational Mission' Argument After Morse v. Frederick*, 71 U. PITT. L. REV. 143, 159 (2009) (the "debate continues over whether *Tinker*'s general rule applies to all student speech ... or to student speech that is subject to content-based regulations").

II. The Decision Below Cannot Be Reconciled With This Court's Student Speech Jurisprudence.

The decision below not only conflicts with decisions from other courts of appeals, but also

contravenes fundamental principles recognized in this Court's student speech jurisprudence. In failing to apply *Tinker*'s "substantial disruption" standard, the Fifth Circuit adopted a new analytical framework for evaluating restrictions on student speech that relies on an expansive interpretation of *O'Brien*, and essentially reduces *Tinker* to a narrow exception, rather than the general rule governing student speech cases.

A. The Fifth Circuit Misapplied *O'Brien*.

The Fifth Circuit's decision conflicts with this Court's statements that intermediate scrutiny does not apply where, as here, a government official seeks to regulate *pure speech* as opposed to regulating conduct that has an expressive component. The lower court's decision to apply *O'Brien* in a context where government-imposed regulations target pure student speech thus represents a significant departure from precedent.

1. In *O'Brien*, this Court carefully distinguished between government regulations that target pure speech and those addressing conduct. Expressive conduct, such as draft-card burning, the Court explained, is not entitled to the full panoply of First Amendment protections. Instead, "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in *regulating the nonspeech element* can justify *incidental limitations* on First Amendment freedoms." *O'Brien*, 391 U.S. at 376 (emphases added); *see also Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 567 (1991) (holding that a statute barring nude dancing was "justified despite

its incidental limitations on some expressive activity").

The Court has thus "limited the applicability of *O'Brien*'s relatively lenient standard to those cases in which" the "governmental interest" is "unconnected to expression" and "unrelated to the suppression of free expression.'" *Texas v. Johnson*, 491 U.S. 397, 407 (1989) (citation omitted). In such circumstances, the risk of impinging on First Amendment freedoms is diminished because the government is seeking to regulate the "nonspeech element" of the conduct and is only "incidentally" infringing on the "speech element." *Id.*

2. It is therefore significant that PISD's student speech policy—which is tellingly entitled *Student Expression*—is not "unconnected to expression." *Id.* To the contrary, it is all about expression. Its sweeping limitations on the distribution of any written material are directly, not just incidentally, designed to suppress pure student speech. *See Bartnicki v. Vopper*, 532 U.S. 514, 427 (2001) ("the delivery of a handbill or a pamphlet ... is the kind of 'speech' that the First Amendment protects"); *Schenck v. Pro-Choice Network*, 519 U.S. 357, 377 (1997) ("[l]eafletting and commenting on matters on public concern are classic forms of speech that lie at the heart of the First Amendment"); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 345 (1995) (statute prohibiting distribution of campaign literature is "a regulation of pure speech"); *Bigelow v. Virginia*, 421 U.S. 809, 817 (1975) (circulating a publication encouraging abortion is "pure speech"). Accordingly, because PISD officials are not seeking

to regulate the non-speech element of student conduct, but rather targeting speech itself, *O'Brien* is completely out of place.

B. The Fifth Circuit Misinterpreted *Tinker*.

The Fifth Circuit also failed to give appropriate weight to this Court's decisions specifically addressing restrictions on speech in the school context. In particular, in declining to apply *Tinker*'s "substantial disruption" standard, the Fifth Circuit placed heavy reliance on the fact that *Tinker* involved what some courts have since characterized as a viewpoint-based restriction on student speech. But cabining *Tinker* to its precise facts cannot be reconciled with this Court's subsequent precedents.

1. Although *Tinker* did not explicitly spell out its applicability to content- and viewpoint-neutral regulations, those "terms of art had not yet been used by the Supreme Court when *Tinker* was decided in 1969." *Jacobs*, 526 F.3d at 430. *Tinker*'s general applicability is nonetheless implicit in the Court's decision. In *Tinker*, school officials adopted a facially viewpoint-neutral policy that banned students from wearing any armband no matter what message the armband may have conveyed. That the policy was facially viewpoint-neutral, however, made no difference to the Court's decision. The students' free speech rights were entitled to protection even though an ad hoc reaction to anti-war armbands had been converted to a general no-armband policy. Indeed, if students' First Amendment protections were contingent on

whether the restrictions were content- and viewpoint-neutral, that would as a practical matter nullify the protections that *Tinker* recognized. The armbands in *Tinker*—which this Court has described as "[p]olitical speech ... 'at the core of what the First Amendment is designed to protect,'" 551 U.S. at 403—could be banned so long as the restriction purported to be content- and viewpoint-neutral. Likewise, the "undifferentiated fear or apprehension of disturbance" that *Tinker* deemed an impermissible basis for restricting speech, 393 U.S. at 508, could become a permissible basis for restricting speech, as long as the school district adopted a policy that is content- and viewpoint-neutral on its face. *See U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 829 (1995) (the "Constitution 'nullifies sophisticated as well as simple-minded modes' of infringing on constitutional protections") (citation omitted).

In any event, in a case decided just three years after *Tinker*—*Grayned v. City of Rockford*, 408 U.S. 104 (1972)—this Court relied on *Tinker*'s "substantial disruption" test to uphold a content- and viewpoint-neutral city ordinance prohibiting noises or diversions that tended to disturb the peace or good order of the school. Declaring *Tinker* the "touchstone" for "how to accommodate First Amendment rights with the 'special characteristics of the school environment,'" *id.* at 117 (quoting *Tinker*, 393 U.S. at 506), the Court directly analogized the speech rights of citizens *near* a school to those of students *within* a school: "in each case, expressive activity may be prohibited if it 'materially disrupts classwork or involves

substantial disorder or invasion of the rights of others.'" *Id.* at 118 (quoting *Tinker*, 393 U.S. at 513). Because the ordinance suppressed only speech that was disrupting or was about to disrupt school activities, the Court deemed the regulation consistent with the First Amendment. *Id.* at 119.

Taken together, *Tinker* and *Grayned* "teach that even when analyzing content-neutral time, place, and manner restrictions on student speech in public schools, the proper approach is to examine the restriction to determine if it furthers the purpose of preventing material and substantial disruption of the school's work and discipline." Jay Alan Sekulow et al., *Proposed Guidelines for Student Religious Speech and Observance in Public Schools*, 46 MERCER L. REV. 1017, 1037 (1995).

2. This Court's more recent student speech precedents likewise confirm that the Fifth Circuit's approach is misguided. Those precedents make clear that—unless speech falls within the special categories recognized in *Fraser*, *Hazelwood*, and *Morse*—*Tinker* applies, regardless whether the restriction on speech is content-based or content-neutral, viewpoint-based or viewpoint-neutral. *See, e.g.*, *Hazelwood*, 484 U.S. at 270-73 (*Tinker* is the test "for determining when a school may punish student expression"). Justice Alito's opinion in *Morse,* which offered the narrowest grounds for the majority's decision and is therefore controlling, *see Marks v. United States*, 430 U. S. 188, 193 (1977), unequivocally clarified that no restrictions on student speech beyond those in *Tinker*, *Fraser*, *Hazelwood*, and *Morse*, are permissible:

> I do not read the opinion to mean that there are necessarily any grounds for [student speech] regulation that *are not already recognized in the holdings of this Court.* In addition to *Tinker*, the decision in the present case allows the restriction of speech advocating illegal drug use; … *Fraser* .... permits the regulation of speech that is delivered in a lewd or vulgar manner as part of a middle school program; and *Hazelwood …* allows a school to regulate what is in essence the school's own speech .... I join the opinion of the Court on the understanding that the opinion does not hold that the special characteristics of the public schools necessarily justify *any other speech restrictions*.

Morse, 551 U.S. at 422-23 (Alito, J., concurring) (emphases added).

By refusing to apply *Tinker* to PISD's strict student speech policy, the Fifth Circuit has in effect justified restrictions on student speech not recognized in this Court's precedents. Indeed, its self-described recognition of a *fifth* (and by far the largest) category of student speech regulations—on top of *Tinker*, *Fraser*, *Hazelwood*, and *Morse*—directly contravenes this Court's instructions in *Morse*. *See* App. 6.

C. The Fifth Circuit Undervalued Student Speech.

Finally, the Fifth Circuit's decision is at odds with this Court's precedents because it fails to take

into account the special features of the school environment. Those features require protecting the educational prerogatives of school officials when student speech is lewd or vulgar, school-sponsored, or drug-promoting. But beyond that, the school environment does not justify speech codes that limit First Amendment rights unless the targeted speech can be reasonably expected to substantially disrupt school operations. This sensible rule allows schools to do their jobs while safeguarding students' rights to hold diverse views and to be free from the impositions of an official orthodoxy. *See Jacobs*, 526 F.3d at 434 (applying *Tinker* "strikes the correct balance between students' expressive rights and schools' interests in furthering their educational missions").

Rejecting this approach, the Fifth Circuit characterized *Tinker*'s "substantial disruption" standard as incompatible with the school's need to impose "time, place, and manner restrictions." App. 10. But that reasoning ignores *Tinker*'s own language. *Tinker's* "substantial disruption" standard affords school officials broad authority to impose reasonable time, place, and manner regulations on student speech: "conduct by the student, in class or out of it, which for any reason—whether it stems from *time, place, or type* of behavior—materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech." *Tinker*, 393 U.S. at 513 (emphasis added); *Grayned*, 408 U.S. at 117-18 ("[*Tinker*] nowhere suggested that students ... [have] an absolute constitutional

right to ... unlimited expressive purposes"). *Tinker* itself is a standard specifically tailored to the time and place of the school setting. To attempt to give greater deference to neutral time, place, and manner restrictions in that setting amounts to impermissible double counting. Thus, as *Tinker* itself makes clear, time, place, and manner restrictions in the school setting are constitutional precisely to the extent they comply with *Tinker* and its substantial disruption test.

The Fifth Circuit also neglected to consider the fact that *Tinker*'s standard protects impressionable young school children by ensuring that school officials do not abuse their power by employing sweeping speech bans as a cover for inculcating students in political, religious, or social orthodoxies. *See West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943); *see also Morse*, 551 U.S. at 423–25 (Alito, J., concurring). School officials entrusted with educating our nation's children should celebrate their students' diverse views, not seek to silence them. When student speech is not disruptive, courts must be vigilant to protect against restrictions on speech. *See* Douglas Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 NW. U. L. REV. 1, 48 (1986) ("*Tinker* thus protects the right to speak in the halls and on the school grounds—in all the students' free time when the school is not presenting its own messages."). This Court has recognized that even young students can differentiate between messages the state allows and messages the state endorses. *See Good News Club v. Milford Cent. Sch.*, 533 U.S.

98, 118 (2001); *Board of Educ. of Westside Cmty. Schs. (Dist. 66) v. Mergens*, 496 U.S. 226, 252 (1990) (plurality opinion). But students can only make that distinction if the school allows room for speech it does not control. As this Court has recognized, "state-operated schools may not be enclaves of totalitarianism" and student should not "be regarded as closed-circuit recipients of only that which the State chooses to communicate." *Tinker*, 393 U.S. at 511.

III. This Case Presents An Ideal Vehicle For Resolving An Important, Recurring Constitutional Issue.

The issue raised in this petition is important and recurring, and the Court is unlikely to find a better vehicle to address the issue.

1. The decision below presents a clean vehicle for addressing and resolving the legal question presented. Recognizing the importance of the issue, the district court certified its decision to the Fifth Circuit, which delivered a definitive ruling on the facial constitutionality of the amended PISD policy. In upholding PISD's student speech policy, the Fifth Circuit's adoption of one legal standard over the other—*O'Brien* over *Tinker*—proved outcome-determinative. Indeed, PISD did not even argue that PISD's sweeping restrictions on student speech satisfied *Tinker*'s "substantial disruption" test.

The stakes are particularly high here because petitioners' separate, pending challenges to the facial constitutionality of PISD's earlier student

speech policy and as-applied challenge to the constitutionality of both PISD policies are bound up in the decision below. The requirement to apply *O'Brien*, instead of *Tinker*, is now binding circuit precedent, and will govern those challenges as well. As those challenges move forward, PISD has indicated that it intends to take literally one hundred depositions and engage in other litigation maneuvers that will impose significant burdens on the few families that have spoken out against the school district's anti-religious orthodoxy and stood up for students' First Amendment rights. Resolving the issues posed in the petition will avoid expending judicial resources in litigating closely related matters under an erroneous constitutional standard.

2. More broadly, the Court's intervention is warranted to arrest what, under any reasonable measure, is a broad and improper grant of authority to school officials incompatible with our educational and constitutional traditions. The outcome of this case will affect the First Amendment rights of millions of students in school districts throughout the Fifth Circuit and beyond.

As this Court has long recognized, the "vigilant protection of constitutional freedom is nowhere more vital than in the community of American schools." *Keyishian v. Board of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967) (citation omitted). Public education is "the very foundation of good citizenship." *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954). Accordingly, because "schools must teach by example the shared values of a

civilized social order" and "inculcate the habits and manners of civility," *Fraser*, 478 U.S. at 681, 683, the "scrupulous protection" of student liberties is important. *Barnette*, 319 U.S. at 637 (the fact that schools "are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms").

Substituting *O'Brien*'s less exacting intermediate scrutiny standard for *Tinker*'s "substantial disruption" test when schools are directly suppressing speech is inimical to the responsibility of schools to prepare students for lives of engaged citizenship. Rather than being taught to value the expression of diverse ideas, the lesson for PISD students is that non-disruptive student speech may nonetheless be suppressed under the vague and flimsy guise of advancing "a focused learning environment." App. 10; *cf. Morse*, 551 U.S. at 423 (Alito, J., concurring) (rejecting claim that schools may censor student speech that interferes with their "educational mission" because such an argument could "easily be manipulated in dangerous ways"). Indeed, the Fifth Circuit upheld a policy that controls speech in every respect—physical scope, temporal scope, and the scope of proscribable materials—and amounts to a draconian set of restrictions that signal that there are no meaningful limits on school officials' ability to restrict student speech.

Permitting schools to restrict speech also opens up the serious concern that schools will use blanket restrictions on speech to discriminate against disfavored views. In this case, for instance,

petitioners filed this lawsuit because PISD officials were singling out for suppression student speech that they deemed "religious"—confiscating, among other things, pencils bearing positive religious messages; candy canes affixed to poems noting the religious origins of candy canes; and free tickets to church events in which students were participating. It would be perverse if PISD could insulate its alleged violations of religious speech by simply pointing to the viewpoint-neutral language of its policy. Religious speech is "'at the core of what the First Amendment is designed to protect.'" *Morse*, 551 U.S. at 403 (quoting *Virginia v. Black*, 538 U.S. 343, 365 (2003)). But under the Fifth Circuit's approach, schools that wish to suppress particular viewpoints can still do just that—by passing sweeping speech bans that appear content- and viewpoint-neutral on their face. In short, *Tinker* would be reduced to a mere technicality to be circumvented through clever and ultimately more speech-restrictive policies.

CONCLUSION

For these reasons, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

PAUL D. CLEMENT
Counsel of Record
ASHLEY C. PARRISH
CANDICE CHIU
KING & SPALDING LLP
1700 Pennsylvania Ave., NW
Washington, DC 20006
pclement@kslaw.com
(202) 737-0500

KELLY SHACKELFORD
HIRAM S. SASSER, III
JEFFREY C. MATEER
LIBERTY LEGAL INSTITUTE
2001 Plano Parkway, Ste. 1600
Plano, TX 75075
(972) 941-4444

Clyde Moody Siebman
SIEBMAN REYNOLDS BURG
& PHILLIPS LLP
300 N. Travis St.
Sherman, TX 75090
(903) 870-0070

WM. CHARLES BUNDREN
WM. CHARLES BUNDREN &
ASSOCIATES
2591 Dallas Parkway, Ste. 300
Frisco, TX 75034
(972) 624-5338

March 17, 2010 *Counsel for Petitioners*