NO. 08-190

IN THE

Supreme Court of the United States

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

Petitioners,

v.

IRENE HENSINGER, Principal, Handley School,

Respondent.

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

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

The narrow question before this Court is whether the Sixth Circuit's unprecedented *per se* rule authorizing school officials to censor religious viewpoints from otherwise permissible student speech in school projects, violates the First Amendment. Respondent Hensinger concedes that this "is a novel and important issue of law." Opp. at 12. Indeed it is. This Court should grant review.

The court of appeals grounded its startling rule on two crucial -- and faulty -- premises. First, that student speech that plainly is the student's own expression in a school project is nevertheless subject to the *Hazelwood* standard for speech under school auspices, rather than *Tinker*'s standard for student speech. And second, that legitimate pedagogical interests are served by the elimination of student religious viewpoints from the academic environment. "Here, the principal decided that allowing the card would not be appropriate because it was religious, and therefore could offend other students and their parents," App. 15a (emphasis added). The court severed its evaluation of pedagogical legitimacy not only from the First Amendment norms which protect private religious speech, but even from a review of the academic exercise in which the speech arose. At issue, then, is a blanket rule ratifying censorship of student religious viewpoints in class projects.

Respondent Hensinger defends this invidious suppression of private religious viewpoints by invoking Establishment Clause concerns over government acts. "In large part, Ms. Hensinger was worried about violating the establishment clause."

Opp. at 27. She converts her legal speculations on the Establishment Clause into a pedagogical concern under *Hazelwood*, and believes that schools officials should be accorded "wide latitude" when acting on such concerns, Opp. at 22. She adds that when "serious Establishment Clause concerns" are putatively at stake, a school official has "discretion" to prohibit student speech in a curricular context. Opp. at 28.

By characterizing a school official's ostensible but ill-founded Establishment Clause worry as a pedagogical concern, respondent would transform (with the Sixth Circuit's approval) exaggerated Establishment fears into a *Hazelwood* justification exclusively for censoring student religious viewpoints. But an educator's erroneous legal view merits no judicial deference because of the nominal artifice of designating it as pedagogical.

REPLY TO FACTUAL DISCUSSION

Throughout her brief, Principal Hensinger seeks to portray Joel's speech as if he were some sort of schoolhouse street preacher. For instance, she continuously refers to the tiny booklet attached to Joel's candy canes as an "unsolicited religious proselytizing message," an "unsolicited religious promotional message," etc. *See* Opp. at i, 1, 9, 10, 11, 18, 19, 22, 23, 28. But in reality, Joel's inconspicuous booklet simply detailed his attribution of Christian significance to a familiar ornament (a candy cane) associated with a Christian holiday. It contained no exhortation to believe, and disparaged no other beliefs. If this is proselytizing, then so are

all the daily classroom presentations of Handley School teachers.

Joel's project was no more "unsolicited" than any other product presented in Classroom City -- all of which were equally the result of individual student creativity, not teacher dictation. And if Joel's product was "promotional," equally so were the rest. Indeed, the very point of the exercise was student "promotion" of their wares. Ultimately, the only difference was that Joel's product contained a religiously-oriented perspective. That single difference provides no justification for censorship; indeed, it is a reason for protecting Joel's speech against such censorship.

Principal Hensinger proposes that other students were "essentially a captive audience" to Joel's "unsolicited religious promotional message." Opp. at 18. This is inaccurate. No student was required to approach Joel's storefront (which was only one of 56 in the gymnasium), let alone read the booklet attached to the candy cane ornament. Any student encounter with Joel's speech required the voluntary and active participation of that otherwise unrestrained "shopper," who would have had to take the affirmative step of reading his message (a feat, incidentally, that many of the younger students would have been insufficiently literate to accomplish in the first place).

Principal Hensinger impugns Joel's "belated" attachment of the card to his ornament project. *See, e.g.*, Opp. at i, 1, 9, 15, 19. This a red herring. Supervising teacher Ms. Sweebe confirmed that Joel had done nothing wrong in his attachment of the card. Stip. Facts (Dkt. 15) at ¶20. She confirmed

that he had complied with the rules of the assignment in so doing. *Id.* at ¶19. Most importantly, the timing of the card attachment had nothing to do with Principle Hensinger's censorship of it, which instead was based exclusively on its religious perspective. Hensinger Tr. (Dkt. 16) at 22, 42; Stip. Facts (Dkt. 15) at ¶31.

ARGUMENT IN REPLY

Respondent Principal Hensinger, though acknowledging the novelty and importance of the contested issue, and that it presents a clear "issue of law," Opp. at 10, nevertheless presents an amalgam of reasons why this Court should deny review in this case. None are meritorious.

I. THIS CASE CALLS FOR IMMEDIATE REVIEW.

Respondent Hensinger begins by proposing that the legal issue presented for review should "percolate" in the lower courts, rather than be resolved now. She offers no adequate reason for this suggestion. The need for swift repair of the Sixth Circuit's grave error outbalances any benefit that theoretically might obtain from other lower courts explaining why they would either repeat or repudiate that error.

Principal Hensinger next incomprehensibly argues that the subject of Joel Curry's certiorari petition was not argued below and was not directly ruled on below. Opp. at 11, 14-15. But Joel certainly has argued throughout this litigation that the Constitution forbids the targeted religious discrimination effectuated by Principal Hensinger's

censorship.[1] And the Sixth Circuit plainly rejected that argument, App. 14a-16a. The certiorari petition's focused critique of a *per se* ratification of religious discrimination is in response to the Sixth Circuit's alarming decision newly announcing such a rule.

II. THE SIXTH CIRCUIT DEVIATED FROM FIRST AMENDMENT STANDARDS.

Respondent Hensinger argues that the court of appeals decision was correctly decided. This begs the questions presented in the petition for review. In any event, the decision below was unmistakably not correctly decided. Never has this Court upheld a school's suppression of private speech solely because it contains religious content or viewpoint. *See*, *e.g.*, *Good News Club v. Milford*, 533 U.S. 98 (2001); *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819 (1995); *Widmar v. Vincent*, 454 U.S. 263 (1981). Nor has this Court ever held that genuinely student-initiated speech, in a context where the speaker is clearly the student, not the school or some school organ (like a newspaper, or play), is subject to *Hazelwood* rather than *Tinker*. *See infra*, § IV.

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[1] Principal Hensinger herself elsewhere recites that Joel made such arguments. Opp. at 5. To be sure, every brief he filed in the district court and court of appeals presents this argument as its principle theme. Principal Hensinger's curious mistake here seems to derive from her failure to identify that religious viewpoint discrimination is a species of offense under this Court's Speech Clause jurisprudence, not merely equal protection jurisprudence. *See* Opp. at 14.

III. THE RELIGIOUS PERSPECTIVE OF ASSIGNMENT-COMPLIANT STUDENT SPEECH IS NOT A BASIS FOR ITS PROHIBITION.

It is axiomatic that religious speech as a category is protected by the First Amendment. *Widmar*, 454 U.S. at 269; *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995). It is thus *prima facie* implausible to justify censorship of student speech, as does Principal Hensinger, on the mere fact that it is religious. *Cf. Good News Club*, 533 U.S. at 122 (Scalia, J., concurring) ("Lacking any legitimate reason for excluding the . . . speech from its forum—'because it's religious' will not do").

Principle Hensinger's additional contention that Joel's speech had to be suppressed in order to avoid an Establishment Clause violation is fanciful. Joel was one of over a hundred fifth-graders participating in a class assignment. His private speech in his individual academic effort does not constitute a government establishment of religion.

The familiar refrain from State officials that private parties' speech violates the Establishment Clause has been rejected by this Court every time it has confronted it. *Good News Club*, 533 U.S. at 113-20; *Rosenberger*, 515 U.S. at 839-46; *Capitol Square*, 515 U.S. 753; *Lamb's Chapel v. Center Moriches Free Sch. Dist.*, 508 U.S. 384, 395-97 (1993); *Widmar*, 454 U.S. 263, 271-75. And that misbegotten legal notion cannot be rehabilitated by classifying it as a pedagogical concern under *Hazelwood* requiring judicial deference when it is employed to censor students.

IV. THE RULE IN *HAZELWOOD* IS NOT PROPERLY APPLIED TO INDIVIDUAL STUDENT RESPONSES TO CLASS ASSIGNMENTS.

Principal Hensinger does not really engage analytically with Petitioner's challenge to the application of *Hazelwood* to this case. The logic of the case law indeed points to *Tinker* -- not *Hazelwood* -- as the standard governing the outcome of this case. This Court's emphasis in *Hazelwood*, which it reiterated in *Morse v. Frederick*, 551 U.S. ___, 127 S.Ct. 2618, 2627 (2007), is that application of its rule is contingent on a reasonable perception that the student speech at issue carries the imprimatur of the school. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988). Classroom City, by contrast, closely approximates a public forum, in which over a hundred fifth-graders were given occasion to express their individual creativity in response to a class assignment. It is not reasonable to ascribe a school imprimatur to the efforts of each participating student. Individual student class projects like this one are not analogous to the school-published newspaper or school-produced play that this Court in *Hazelwood* identified as paradigmatic instances of speech covered under the *Hazelwood* rule. *Id.* at 271-73.[2]

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[2] Principal Hensinger asserts that the United States in its amicus brief filed in the district court "urged that the *Hazelwood* analysis governs." Opp. at 30. This is incorrect. The Justice Department did not take a side on the question of which case rule should apply. Instead, it stated that this question "need not be reached" because even under *Hazelwood*

V. THE SIXTH CIRCUIT'S DECISION CONFLICTS WITH THE DEPARTMENT OF EDUCATION GUIDELINES ON STUDENT RELIGIOUS SPEECH.

Principal Hensinger manifestly misreads the nationally-binding Department of Education's *Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools*, 68 Fed. Reg. 9645 (Feb. 28, 2003), in order to claim that the Sixth Circuit's decision does not conflict with it. If the DOE *Guidance* standards were to authorize the censorship of student curricular speech simply because it is religious, as Respondent implausibly asserts, it would defeat the whole point of the promulgation of those standards, the obvious purpose of which is to communicate the opposite message.

Principal Hensinger does acknowledge (indeed quotes from) the *Guidance* standards that approve student religious expression in class assignments and that instruct that legitimate pedagogical interests do not authorize hostility to religious speech. Opp. at 17-18. However, she posits that these standards protect student religious speech only insofar as other students are unaware of the existence of that speech; when other students might be exposed to that speech, it is then properly targeted for its religious viewpoint. Opp. at 18. This is absurd. The DOE's *Guidance* never qualifies its rule to apply only to "confidential" student religious speech. Indeed, the *Guidance* excerpt on curricular speech quoted by Principal Hensinger herself

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Joel should prevail. Br. Amicus Curiae of United States (Dkt. 32) at 6.

explicitly validates student religious speech in "artwork" and "oral assignments" -- both of which will reach other students. Opp. at 17, quoting *Guidance*, 68 Fed. Reg. at 9647.[3] The Sixth Circuit's opinion is flatly in conflict with the DOE standards on student religious speech.

VI. PRINCIPAL HENSINGER'S QUALIFIED IMMUNITY ARGUMENT IS MISDIRECTED, AND WITHOUT MERIT.

The precedent-setting error of the Sixth Circuit -- the only question now before this Court -- presents pure questions of law that, if left unresolved, will spawn mischief in subsequent decisions. Yet Principle Hensinger suggests that review should be denied in this case because she merits qualified immunity -- an argument the Sixth Circuit did not fully explore.[4] The existence of a potential alternative basis for a judgment for a respondent, however, is not a ground to decline review when the court below has squarely ruled on an issue of law that merits independent

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[3] *Cf. Walz v. Egg Harbor Township Bd. of Education*, 342 F.3d 271, 278-79 (3d Cir. 2003):

> For a student in "show and tell" to pass around a Christmas ornament or a dreidel, and describe what the item means to him, may well be consistent with the activity's educational goals; . . . the student speaker is expressing himself in the context of a school assignment. . . . Individual student expression that articulates a particular view but that comes in response to a class assignment or activity would appear to be protected.

[4] Under *Saucier v. Katz*, 533 U.S. 194 (2001), a decision on the merits is technically a part of the qualified immunity analysis. The court below did not go beyond that step.

consideration by this Court. If this Court reverses the Sixth Circuit's erroneous decision on the merits, then on remand respondent is free to urge resolution of the outstanding qualified immunity question. At this point, however, there is no decision in the Sixth Circuit to review on that defense.[5]

And it is by no means a foregone conclusion that Principal Hensinger would be entitled to qualified immunity. The question on which the qualified immunity issue turns in this case is whether a student whose speech was presented in response to a class assignment, in a way that complies entirely with the terms and the pedagogical goals of the assignment, and is not disruptive of the educational environment, has a right to speak from a religious perspective in that assignment without being censored because of his religious viewpoint. The affirmative answer to that question is clearly established.

Principal Hensinger additionally argues for qualified immunity by echoing the district court's contention that because speech presented in the context of Classroom City may be susceptible to evaluation under several legal standards, with no certainty as to which standard governs, a grant of qualified immunity is appropriate. Opp. at 31-32. But also like the district court, Defendant Hensinger makes no effort to demonstrate how any of the ostensible legal standards would justify the censorship of non-disruptive, assignment-compliant student speech for the sole reason that the speech is presented from a religious viewpoint. The alleged

[5] See preceding footnote.

confusing menu of legal tests thus provides no basis upon which to immunize what would be a constitutional violation under any of the standards.

CONCLUSION

This Court should grant review.

Respectfully submitted,

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