No. _____

In The Supreme Court of the United States

BRITTANY McCOMB and MARIANNA McCOMB,
by her best friend, CONSTANCE J. McCOMB,

Petitioners,

v.

GRETCHEN CREHAN, ROY THOMPSON, and CHRISTOPHER SEFCHECK, individually and in their official capacities as employees of Foothill High School, and the Clark County School District, a political subdivision of the State of Nevada, and WALT RUFFLES, in his official capacity as Superintendent of the Clark County School District, a political subdivision of the State of Nevada, et al.,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The questions presented are:

1. Does the First Amendment prohibit public high school officials from censoring student-initiated, student-composed religious speech at a high school graduation ceremony?

2. Do the First Amendment Free Speech, Free Exercise and Establishment clauses prohibit a school district from censoring religious speech that expressly identifies with a particular religion while permitting non-sectarian religious speech?

3. Does the First Amendment and this Court's decision in *Hazelwood v. Kuhlmeier*, 484 U.S. 260 (1988), prohibit a public high school from using viewpoint-based criteria in restricting student-initiated religious speech at high school graduation ceremonies?

4. Can an interlocutory appellant unilaterally re-start the 30-day clock for filing an interlocutory appeal (per FED. R. APP. P. 4 jurisdiction limits) by re-filing the same motion previously denied by the lower court?

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Brittany McComb, Constance J. McComb and Marianna McComb respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

PARTIES TO THE PROCEEDING

The Petitioners are Brittany McComb, Constance J. McComb and Marianna McComb, through her guardian Constance J. McComb.

Respondents are Gretchen Crehan, Roy Thompson, and Christopher Sefcheck, individually and in their official capacities as employees of Foothill High School, and the Clark County School District, a political subdivision of the State of Nevada, and Walt Ruffles, in his official capacity as Superintendent of the Clark County School District, a political subdivision of the State of Nevada.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Ninth Circuit is not reported but attached. Appendices at 1 ("App. ___".). The Orders of the District Court denying Respondents' motions to dismiss are also not reported and attached. (App. 62-65.)

STATEMENT OF JURISDICTION

The District Court exercised jurisdiction over Petitioners' federal claims pursuant to 28 U.S.C. § 1331. The Complaint was filed on July 13, 2006. Respondents filed their first motion to dismiss on October 5, 2006 which the Court denied at a hearing held on December 18, 2006, as noted by a minute-entry on the docket entered the next day. The District Court filed an Order denying this motion to dismiss on January 9, 2007. (App. 62.) Petitioner filed an Amended Complaint on December 21, 2009. Respondents filed a second motion to dismiss on January 11, 2007, which the District Court denied by order entered on June 18, 2007. (App. 65.)

Respondents filed what Petitioners believe was an untimely Notice of Interlocutory Appeal on June 28, 2007. *See* FED. R. APP. P. 4(A)(2).

The Ninth Circuit Court of Appeals filed its Memorandum Opinion on March 20, 2009 (App. 1) and Petitioners accordingly timely file this Petition pursuant to SUP. CT. R. 13.1.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Petitioners' claims arise under the First and Fourteenth Amendments to the United States Constitution, which provide in relevant part:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof;

> or abridging the freedom of speech .... (U.S. Const. amend. I)
>
> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. (U.S. Const. amend. XIV, § 1)

Petitioners' claims arise under Clark County School District Administrative Regulation 6113.2, *Sectarianism, Religious Free Speech and Religious Holidays* ("Regulation 6113.2"), which provides in relevant part:

> (III) Student initiated non-school sponsored religious speech is acceptable in the public schools in the same manner as other free speech.
>
> (IV) School officials may not mandate or organize prayer at graduation or other extracurricular activities or select speakers for such events in a manner that favors religious speech such as prayer. Where students or other private graduation speakers are selected on the basis of genuinely neutral, evenhanded criteria and retain primary control over the content of their expression, however, that expression is not attributable to

> the school and, therefore, may not be restricted because of its religious (or anti-religious) content. To avoid any mistaken perception that a school endorses student or other private speech that is not in fact attributable to the school, school officials may make appropriate, neutral disclaimers to clarify that such speech is not school sponsored.

(Regulation 6113.2 §§ (III) & (IV)) (App. 1.)

Petitioners also raise a claim regarding the interpretation of Rule 4 of the Federal Rules of Appellate Procedure's jurisdictional limitations.

INTRODUCTION

Petitioner Brittany McComb ("Brittany" or "Petitioner") and two other students were asked to speak at their high school graduation ceremony because they each had achieved the distinction of valedictorian by virtue of their grade point average. Each student was asked to speak about their high school experience and what they wished from life for themselves and others. Brittany sought to speak about the importance of her newly found Christian commitment and how it related to her success in high school; another student, Janelle Oehler ("Janelle"), spoke about the importance of "Our Heavenly Father" in the success achieved in her life. Brittany was censored; Janelle was not.

The Respondents' (collectively the "School Officials") decision to censor Brittany's views cannot

be reconciled with the language and spirit of this Court's First Amendment jurisprudence. This Court has cautioned against treating "nondenominational" or civically-oriented religious speech differently from sectarian religious speech, yet that is precisely the distinction the Ninth Circuit drew in this case and in two other cases over the past several years on which it relied.

This Court should grant certiorari to clarify to the lower courts that student-initiated, student-composed religious speech at high school graduation ceremonies does not violate the Establishment clause and that censoring such speech violates the Free Speech clause and, in this instance, the Establishment clause.

Second, the Court should grant certiorari because the reasoning employed by respondents and the Ninth Circuit to justify different treatment of religious speech does not comport with *Santa Fe Independent School District v. Doe*, 530 U.S. 290 (2000) and *Lee v. Weisman*, 505 U.S. 577 (1992), the Court's two leading "school speaker" Establishment clause cases. Ninth Circuit precedent currently permits standardless censorship of religious speech that the Ninth Circuit courts believe is proselytizing. But *Weisman* and *Santa Fe* do not permit a school district to make judgments about the merits of sectarian versus "civically-oriented" religious speech. Nor do they authorize school officials to discriminate between nonsectarian student religious speech and student speech that is proselytizing. Indeed, *Weisman* specifically cautioned against favoring one religious view over another, particularly on the ground that one is more civic-seeming than another.

Weisman, 505 U.S. at 598. The reason is simple -- to favor non-sectarian religious speech over sectarian religious speech gives one religious viewpoint preferential treatment in violation of the Establishment clause. Here, the School Officials made a considered judgment that notwithstanding the students' neutral selection and primary control over their speeches, the School Officials' limited involvement in reviewing the speeches and permitting them to be delivered at graduation rendered them "endorsed" by the school. Permitting Janelle to highlight the benefits of her relationship with her Heavenly Father but prohibiting Brittany from highlighting the benefits of her relationship with Jesus Christ, the School Officials favored one religion over another in violation of the Establishment Clause.

Third, certiorari should be granted to resolve confusion among the Circuits concerning the correct standard of review for evaluating claims of viewpoint discrimination in "school-sponsored" events. Under *Hazelwood School District v. Kuhlmeier, et al.* 484 U.S. 260 (1988), a school has the authority to "exercis[e] editorial control over the style and content of student speech in *school-sponsored* expressive activities as long as its actions are reasonably related to *legitimate pedagogical concerns*." *Id.* at 273 (footnote omitted; emphasis added). The Circuits are split, however, as to whether a school's decision must be based on viewpoint-neutral criteria. Here, the School Officials, exercising unfettered, standardless discretion, labeled the religious content in Brittany's speech as "proselytizing" and thus turned off the microphone in the middle of her speech. Yet, at the

same graduation ceremony, the School Officials allowed another graduation speaker to deliver a similar speech with religious content. The sole distinction was that Brittany's speech mentioned Jesus Christ and was deemed to be proselytizing and the other student's was not. Putting aside whether the School Officials are qualified to make such judgments, they should not be discriminating between different types of religious speech. Notwithstanding the split in the Circuits, this Court has not spoken on that precise issue and should do so.

Finally, the Court should grant certiorari to resolve a split among the Circuits concerning the time limitation for filing interlocutory appeals. Rule 4 of the Federal Rules of Appellate Procedure requires a party to file an interlocutory appeal within thirty days of entry of the judgment or order. FED. R. APP. P. 4(a)(1). In the instant matter, the Ninth Circuit allowed Respondents' appeal to proceed even though they did not file a timely notice of appeal from the District Court's denial of their first motion to dismiss. Rather, relying on *Knox v. Southwest Airlines*, 124 F.3d 1103, 1106 (9th Cir. 1997), the Court of Appeals allowed Respondents to appeal from an Order denying their virtually identical motion directed at an amended complaint. The Ninth Circuit's ruling is inconsistent with the rulings of other Circuits that have held otherwise. This Court should resolve this dispute and hold that Rule 4(a)(1) prohibits a party that fails to file a timely interlocutory appeal from salvaging that appeal by filing an appeal from the denial of an identical successive motion to dismiss.

STATEMENT OF THE CASE

Brittany was one of three class of 2006 valedictorians of Foothill High School ("Foothill" or the "School") selected to give a commencement speech at the school's annual commencement ceremony held at the "Orleans Arena" in "The Orleans Hotel & Casino" in Las Vegas, Nevada. *See* Compl. at ¶ 25 (App. 29).[1] On June 15, 2006, as Brittany delivered her speech, she was silenced in front of 400 of her peers, and thousands of guests, simply because she mentioned the importance of her Christian faith to her success in high school. *See* Compl. at ¶¶ 62-63 (App. 36.)[2] At the same time, the School Officials permitted another valedictorian to invoke her religious beliefs repeatedly in her speech and others to speak about the reasons for their success and inspiration. *See* Compl. at ¶ 64C (App. 37-38.)

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[1] Brittany's mother, Constance J. McComb, and her sister, Marianna McComb, then a student at Foothill High School, are also plaintiffs in this case. Constance and Marianna were both deprived of the right to hear Brittany's speech in a public forum and each joined in the suit because of that deprivation and the potential future discrimination against religious speech in future commencement exercises at Foothill. *See* Compl. at ¶¶ 3A, 4 (App. 20.)

[2] A video of the speech may be found at: http://www.youtube.com/watch?v=kqzfIitfHjU (last visited 6/16/09).

A. The School Officials' Selective Censorship of Brittany's Speech Violated Her Constitutional Rights

Foothill selected speakers based solely upon the neutral criterion of student grade-point average. Compl. at ¶¶ 17-18 (App. 24.) When invited to speak, Respondent Thompson, Foothill's acting Assistant Principal, provided each valedictorian with a document entitled "Commencement Speech *Suggestions*" (emphasis added) (App. 5); *see also* Compl. at ¶¶ 20, 20A (App. 25.) These suggestions neither encouraged nor discouraged speakers from utilizing religious content in their speeches. *Id.*; Compl. at ¶ 27 (App. 29.) Rather, they ranged from the procedural ("[l]imited to 200 words"; "length: 1-2 minutes"), to the substantive:

> Use "imagery and metaphorical comparison";
>
> "Interject HOPE";
>
> "OMIT thank you ...";
>
> include "[t]hings that bind us to one another";
>
> "[r]eflect over past experiences and lessons learned"; and
>
> "say things that come from the heart."

Id.

Brittany followed these "suggestions" to the letter. Her draft speech, entitled "Filling That Void," used "imagery and metaphorical comparison," "interject[ed] hope," "[r]eflect[ed] over past

experiences and lessons learned" at Foothill and spoke "from the heart" about the emptiness she experienced from accomplishments, achievements, and failures in her early high school years, and the fulfillment and satisfaction she later came to experience in something greater than herself, namely in God's love, and in Christ. *See* Brittany's Draft of Commencement Speech ("Draft Speech") (App. 6); Compl. at ¶¶ 28-30 (App. 20.) To Brittany, any remarks about her success and formative experiences in high school would be dissembling without reference to her relationship with God. Compl. at ¶ 30 (App. 29-30.) Like the speeches by the Salutatorian, the other Valedictorians and, indeed, the Principal and a Member of the Clark County School District's Board of Trustees (the "District"), Brittany's speech fit within the School's "suggestions." It was a personal statement about the lessons that she learned during her odyssey at Foothill, and how those experiences affected her life and her future. *See* Draft Speech (App. 6); Compl. at ¶¶ 29-30, 64C (App. 29-30, 37-39.)

Brittany's speech as drafted quoted the Bible, described her Christian outlook and told the audience that they could likewise find fulfillment through Christ if they chose. She did not say a prayer, and whether her remarks were proselytizing is at most a matter of debate. What is indisputable is that her words were her own. She wrote primarily from the first person about what "worked for her." *Id.* She spoke about what she wanted for herself and for others. She was one speaker among several, all of whom spoke about similar topics but as individuals who brought to bear different and unique perspectives. A reader of Brittany's draft speech,

recognizing the context in which it would be presented, could not reasonably have believed the school was sponsoring her religious views; instead Brittany's words were explicitly and forthrightly the views of a young, vibrant straight-A student explaining her view of the foundations of her success. *See id.* Nor would a listener of the other students' speeches reasonably believe that the school was endorsing or sponsoring their views. All students knew from the program and introduction that Brittany and the other students were speaking as Valedictorians, selected solely because they were the three students with the highest grade-point averages, and expressing their own views about life.

At Mr. Thompson's request, Brittany submitted the speech she had drafted. Compl. at ¶¶ 34-35 (App. 30-31.) He returned the speech to her heavily censored. *See* Draft Speech (App. 6); Compl. at ¶¶ 40-41 (App. 31-32.) Substantial passages were crossed out, and annotated with "IDENTIFIES A PARTICULAR RELIGION," "DEITY," and "PROSELYTIZING." *Id.* Respondents Crehan and Thompson informed Brittany that she could not deliver the speech she had written because of its "religious references," including her mention of Jesus Christ. *Id.*

The School and its attorney rebuffed numerous attempts by Brittany and her mother (and attorney) to meet to discuss the content of the speech and to clarify the basis for their censorship. Compl. at ¶¶ 48-52 (App. 33-34.) Ultimately, on the day of her Commencement, Brittany chose to deliver the original unedited version of her speech. *Id.* at ¶¶ 61-62 (App. 36.) The moment Brittany began to speak

the words the School Officials had crossed out, Respondent Sefcheck turned off the microphone. *Id.* Despite a school policy that permitted school officials to "make appropriate, neutral disclaimers to clarify that such speech is not school sponsored,"[3] at no point did any of the Respondents attempt to give a disclaimer to the audience prior to the commencement speeches. *Id.* at ¶¶ 56-66 (App. 35-36.) Such a disclaimer would have made clear -- if anyone believed it was not clear already -- that the views of the speakers were not endorsed by the school district. *See id.*

The School district thereupon permitted another valedictorian to speak, *without* interference, about her own religious viewpoint. Compl. at ¶ 64C (App. 37-38.) Janelle Oehler, another Valedictorian selected based on her grade point average, described how a deity, her "Heavenly Father," and "prayer" had played an extremely important role in her life. *Id.* Using the metaphor of a balanced meal, Janelle shared with the audience the following:

> And, of course, *our* meal is never started *without prayer*. My *Heavenly Father* plays an extremely important role in my life. I am confident that I would not be standing before you today if I had not included Him in my life. He is the One who truly understands *our* individual needs. He is always there to listen, to lead, to guide, and to give me strength I need

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[3] *See* Administrative Regulation 6113.2 (IV) (App. 3).

> to keep, when I need and to give me strength that I need to keep on going when I no longer believe I can, I would be nothing without Him. *Find your inspiration. Living with the hope* for a brighter future will make significant difference in *our* lives, provide *us* with *true inner happiness* and personal success. If *we* strive to be more motivated by inspiration, *we* will find *ourselves* more satisfied, as if *we* had enjoyed a complete balanced and nutritional spaghetti dinner.

Id. (emphases added).[4] The sole material difference between the viewpoints expressed by these two students was that Brittany's was avowedly Christian and Janelle's was not. But both referred to a deity as a source of inspiration; both provided views as how others could achieve happiness; and both represented indisputably religious viewpoints.

Later, Mary Beth Scow, a Member of the District, offered a speech that quoted a "Chinese proverb," and Respondent Crehan chose in her speech an inspirational charge with a secular bent devoid of "religious references." Compl. at ¶ 64C (App. 37-38); Commencement Excerpts (App. 8-9.)

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[4] Janelle delivered her speech immediately after Brittany's speech was censored. *See* Excerpts of 2006 Commencement Speeches ("Commencement Excerpts") (App. 8-9).

B. The District's Regulations Ensured That the Audience Would Not View Brittany's Speech as School-Sponsored

Respondents repeatedly have justified their censorship as necessary to prevent an Establishment clause violation because graduation speeches containing religious content would bear the imprimatur of school sponsorship. But the District in this matter had numerous policies that it specifically enacted to ensure that student speeches would *not* bear the imprimatur of school sponsorship, which its officials failed to follow.

First, Clark County School District regulations required the School Officials to permit Brittany to address her classmates and their families in her own words. Specifically, Clark County School District Administrative Regulation 6113.2 provided that:

> Where students or other private graduation speakers are selected on the basis of *genuinely neutral, evenhanded criteria* and retain *primary control* over *the content of their expression*, however, that expression is not attributable to the school and, therefore, may not be restricted because of its religious (or anti-religious) content. To avoid any mistaken perception that a school endorses student or other private speech that is not in fact attributable to the school, school officials may make appropriate, neutral disclaimers

> to clarify that such speech is not school sponsored.

See Regulation 6113.2 §§ (III) & (IV) (App. 3) (emphasis added).[5]

Thus, Brittany and the other Valedictorians were selected on the basis of neutral criteria. While they were provided with suggestions for the content of their speeches, it was incumbent upon them to select the topic and write the substance of their speeches. Their speeches were their own, and not the school system's. Moreover, in these circumstances, under the District's own regulations, the School Officials were proscribed from restricting the students' expression based upon religious or anti-religious content.

Furthermore, the District's own regulations and Board minutes show that it recognized that exerting school control over even religious speeches was unnecessary to protect against an Establishment clause violation, because a neutral disclaimer would resolve any appearance of state sponsorship of a speaker's message. Specifically, the District's Board of Trustees, in enacting the current version of Regulation 6113.2, was advised by their General Counsel that the "administration does review the comments that are going to be made by student speakers at graduations," and that "once the

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[5] This regulation is but one of many that provide "specific details and procedures" governing "the details of District operations," and therefore binding on School Officials. *See* Compl. at ¶¶ 23, 24 (App. 26-28.)

administration reviews the comments, it becomes school or district sponsorship." *See* Clark County School District Meeting Minutes (App. 10).[6] Nonetheless, they were told that "[w]hat a student says for a particular success they might have had *is probably going to fall in the area of free speech and going to be allowed ... .*" *Id.* (emphasis added). Notably absent was advice as to standards by which school officials could draw lines as to whether speech was "proselytizing," and whether such "school-sponsored" speech could nevertheless be censored based on viewpoint. Instead, the policy, as adopted, provided for a neutral disclaimer to eliminate all doubt as to school sponsorship of the speech in question. *See* Regulation 6113.2 (App. 3).

Notwithstanding the strictures of Regulation 6113.2 and the policy of invoking a neutral disclaimer, the School Officials instead resorted to the drastic action of turning off the microphone and censoring Brittany's speech as she spoke.

C. The Proceedings Below.

On July 13, 2006, Petitioners filed a Complaint in the United States District Court for the District of Nevada commencing the instant case. *See* Docket for the United States District Court for the District of Nevada ("Court Docket"). Instead of answering the Complaint, the School Officials filed a

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[6] The District's General Counsel is Carl William Hoffman, Esq., who represents the School Officials in this action, and who argued the School Officials' motion to dismiss before the courts below. *See id.*

Rule 12(b)(6) motion to dismiss. *Id.* Those school officials who were sued in their individual capacities argued, among other things, that they were entitled to qualified immunity. *Id.*

The District Court held oral argument on December 18, 2006 on all aspects of the School Officials' motion, including the claim of qualified immunity. At the close of the argument, the court ruled against the School Officials because "it's not clear what was being censored here and what was the basis for the censorship" and discovery was necessary to determine whether the School Officials were entitled to the claimed qualified immunity.[7] The next day the Court placed a minute-entry on the docket denying the School Officials' motion to dismiss. *See* Court Docket. The court subsequently entered a written order denying the motion on January 9, 2007. December 22, 2006 Court Order.[8] The School Officials did not appeal the court's decision within the 30 days provided them by Rule 4. *See* Court Docket.

Shortly after the hearing, Petitioners served a First Amended Complaint to address one or two housekeeping matters and to name the school district's superintendent in his official capacity only. *See generally* Amended Complaint (App. 17.) The Amended Complaint raised no new causes of action, no new allegations of breach of duty, no new

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[7] *See* Official Transcript of December 18, 2006 Oral Arguments Before the District Court of Nevada.

[8] The Order is dated December 22, 2006, but was signed January 5, 2007 and was docketed January 9, 2007.

constitutional claims and certainly nothing that would change the analysis of the School Officials' entitlement to qualified immunity in their individual capacity at the pleading stage. *See id.* The School Officials nevertheless chose to file a *second* motion to dismiss on grounds identical to their first motion. *See* Court Docket. The School Officials made no effort to demonstrate that the intervening complaint somehow changed the governing law or facts, warranting a second consideration by the District Court. They made no effort to show that the District Court made a clear error of law or fact. Instead, the School Officials filed a near carbon copy of their first motion.

The District Court denied the second motion summarily, on the ground that it had already ruled on the identical motion. *See* June 18, 2007 Court Order (App. 65). The court explained:

> [T]he Amended Complaint named ... an additional Defendant and clarified Plaintiffs' factual allegations. However, the Amended Complaint did not add additional causes of action or new allegations. Defendants nevertheless filed a second Motion to Dismiss the Amended Complaint. Defendants' present Motion is virtually identical to the initial Motion to Dismiss. *It raises arguments that have already been briefed, discussed at oral argument, and ultimately rejected by the Court.*

Id. (emphasis added).

On June 28, 2007, The School Officials filed a Notice of Interlocutory Appeal of the June Order. *See* Court Docket. The School Officials to this day have not sought to appeal the court's first Order. *See id.* The School Officials filed their Notice of Interlocutory Appeal more than five months after the District Court denied their initial Motion to Dismiss—well outside the 30-day window provided by Rule 4 of the Federal Rules of Appellate Procedure. The School Officials immediately filed their motion to dismiss the appeal for lack of jurisdiction based on the failure of the School Officials to appeal the District Court's denial of the Rule 12(b)(6) motion within the 30-day period allowed by Rule 4. The issue was joined, with the court deferring its ruling until disposition on the merits.

On the merits, the School Officials argued that their actions did not violate "clearly established" law, and that they were thus entitled to qualified immunity per *Saucier v. Katz*, 533 U.S. 194 (2001). The Ninth Circuit did not decide this issue, but exercised its discretion to decide the case solely on constitutional grounds, as permitted by this Court's recent decision in *Pearson, et al. v. Callahan*, No. 07-751, slip op. 13, 129 S. Ct. 808, 172 L. Ed. 2d 565, 2009 WL 128768 (Jan. 21, 2009).

In its Memorandum opinion, the Ninth Circuit addressed the constitutional issues and ruled summarily "that Defendants did not violate McComb's free speech and free exercise rights by preventing her from making a proselytizing graduation speech," relying on its earlier decisions in *Cole v. Oroville Union High School District*, 228 F.3d

1092, 1101 (9th Cir. 2000), and *Lassonde v. Pleasanton Unified School District*, 320 F.3d 979, 983 (9th Cir. 2003). (App. 1.) The Court continued: "[n]or did [Defendants] violate McComb's right to equal protection; they did not allow other graduation speakers to proselytize." On the jurisdictional issue, the Court assumed jurisdiction over the appeal under Ninth Circuit precedents, citing *Knox v. Southwest Airlines*, 124 F.3d 1103 (9th Cir. 1997), and *Hydrick v. Hunter*, 500 F.3d 978 (9th Cir. 2007). (App. 1.)

I. REASONS FOR GRANTING THE PETITION

1. Selectively Enforcing the Establishment Clause Violates the First Amendment

The Ninth Circuit's decision, which sustained censorship of student-initiated sectarian religious speech but permitted student-initiated nonsectarian religious speech (a) conflicts with other Establishment clause precedents in the Circuits, as well as the decisions of this Court; (b) results in a violation of both the Free Speech and Establishment clauses; and (c) creates confusion among the Circuits regarding viewpoint discrimination.

a. Confusion Among the Circuits Regarding Scope of Establishment Clause

Following *Weisman* and *Santa Fe*, confusion has arisen among the Circuits about how the Establishment clause applies to student *speech* at school graduation exercises. This Court has not

addressed this area of the law and should do so in light of the diverging law in the Circuits.

In *Weisman*, the *only* Supreme Court decision to address prayer at public school graduation programs, the Court found that the school violated the Establishment clause when it invited a rabbi to deliver an "invocation" and "benediction" at a school graduation ceremony and provided him with content for use in delivering the benediction. 505 U.S. at 586, 588. In holding this prayer policy/ practice to be unconstitutional, the Court emphasized two synergistic factors: the extent of state control and the perceived coercion of students to participate. *Id.* The Court determined that "the principal directed and controlled the content of the prayers," thus transforming the prayer into a state-sponsored "*religious exercise*." *Id.* (emphasis added).

This Court's more recent decision in *Santa Fe* held that a policy allowing members of a senior high school class to elect whether to include a *prayer* before home football games violated the Establishment clause, even if the prayers were "nonsectarian" and "non-proselytizing." 530 U.S. at 298, n.5, n.6. The Court reasoned that the school specifically directed students to consider whether a prayer should be included; therefore the school implicitly encouraged school prayer and created "both perceived and actual endorsement of religion." *Id.* at 305.

Both *Weisman* and *Santa Fe* involved actions by school officials endorsing or approving of school *prayer*. Yet the Ninth Circuit, in this and in its prior decisions in *Cole*, 228 F.3d at 1092, and *Lassonde*,

320 F.3d at 979, interpreted them to prohibit *student-initiated* religious *speech* that, in the Court's view, was proselytizing. These rulings not only misinterpret the direction of *Weisman* and *Santa Fe*; they conflict with other Circuit court decisions examining this issue.

The Eleventh Circuit in *Adler v. Duval County School Board*, 250 F.3d 1330 (11th Cir. 2001), under similar facts, reached a different conclusion than the Ninth Circuit. There, several students challenged a school policy permitting the graduating class to vote for a student speaker to deliver a message at graduation. In practice, the message invariably was a prayer, but there had been no requirement that it be such, and the student was allowed to deliver any message he or she chose. *Id.* at 1336. Applying *Santa Fe*, the court held that the school's policy neither subjected the speech to "'particular regulations that confine[d] the content and topic of the student's message,'" nor "invited and encouraged religious messages." *Id.* at 1336 (quoting *Santa Fe*, 530 U.S. at 303). As such, any religious speech that occurred was student-initiated and could not be attributed to the school.

More recently, in *Doe ex rel. Doe v. School District of Norfolk*, 340 F.3d 605 (8th Cir. 2003), the Eighth Circuit rejected an Establishment clause claim brought against the School District for allowing a member of the school board (who was also the parent of a graduating student) to recite a prayer at the graduation ceremony. *Id.* at 611. The school district argued that it did not sponsor the speech because the board member acted in his personal capacity by invoking his right to speak under an

informal school policy. That policy allowed "(1) a parent of a graduating senior; and (2) a member of the School Board" to speak at graduations as of right. *Id.* (footnote omitted). The court reasoned that under these facts, the Board member was acting on his own and his views could not be attributed to the school; therefore *Weisman* and *Santa Fe* did not require censorship.[9]

There is a direct tension between the law applied in the Eighth and Eleventh Circuit cases cited above and the Ninth Circuit's decision in this case. This case involved a student *speech* that was one of many speeches at the graduation ceremony by students selected on the basis of neutral criteria. The precedents relied on by the Ninth Circuit incorrectly conflate principles that apply to prayer with those that apply to speech. Prayer by definition invites an immediate and participatory, often ritualistic, audience response which the Court has held to be coercive when mandated by the State. As Justice Kennedy wrote for the majority in *Weisman*: "The prayer exercises in this case are especially improper because the State has in every practical sense compelled attendance and participation in an

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[9] Recently the Tenth Circuit in *Corder v. Lewis Palmer School District No. 38*, No. 08-1293, 2009 WL 1492547 (10th Cir. May 29, 2009), upheld a school's decision to censor a student's graduation speech based on its religious content. *Id*, at *1-2, 6. However, this holding is inapplicable to the current matter for two reasons: (1) the Establishment Clause issues in the current matter were not before the *Corder* court, and (2) the school addressed the free speech claim under the *Hazelwood* standard that is inapplicable to the case at bar for reasons explained *infra*. *Id.*

explicit religious exercise at an event of singular importance to every student, one the objecting student had no real alternative to avoid." *Weisman*, 505 U.S. at 598.

But a speech does not constitute a "religious exercise" simply because it has a religious orientation.[10] In the present case, the School Officials did *not* censor Brittany because her speech was a religious exercise akin to prayer; they censored her speech because it was closely identified with the Christian religion and because she suggested that, as with her experience, audience members might benefit from a relationship with Christ. This suggestion required no one to do

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[10] We do not address -- and this Court need not address -- whether and when student-initiated proselytizing religious speech is so akin to prayer that it should be analyzed as such. As anyone who has observed religious speech knows, there is a wide spectrum of what might be termed proselytizing. To be sure, some types of proselytizing speech will, like prayer, invite an immediate and participatory response, perhaps requiring audience members to convert on the spot and come forward. But other forms of religious speech, described by some as proselytizing invite reflection rather than an immediate participatory response. For example, a speaker might recite a parable from which lessons can be drawn or tell the audience that conversion can be a life-changing event from which they have drawn benefits. These distinctions are not relevant here for two reasons. First, Brittany's speech (as well as Janelle's) clearly was personal and not reasonably attributed to the School. Second, no one has suggested that Brittany's speech invited an immediate and participatory audience response that rendered it akin to the prayer that this Court prohibited in *Weisman*.

anything; nor was it significantly different from the suggestions advanced by Janelle or the other speakers who, from each of their own perspectives, challenged students in a similar fashion.

Brittany's speech, based on its content and context, and viewed in light of the school policy against restricting student-promulgated speech, was more akin to the policy and event approved in *Adler* and the perceptions justifying non-intervention in the *Norfolk* case.

The Court should grant certiorari and clarify that student-initiated speeches at graduation, written by the student without any direction by the school to include a religious message, do not violate the Establishment clause.

If the Ninth Circuit's reading of *Weisman* and *Santa Fe* is not overruled, future graduation speeches by students in that Circuit and other Circuits that choose to follow its precedent will be unable to speak with a particular religious viewpoint, even if that viewpoint is critical to the topic on which they are asked to speak. The silencing of personal but sectarian religious expression is inconsistent with the First Amendment, this Court's jurisprudence and the principles that underlie our nation's founding. Moreover, such an indiscriminate result would require the State to distinguish between different messages given by different students and selectively prohibit religious messages. Far from protecting *against* Establishment clause violations, such a result would foster just such violations.

In determining whether student-initiated speech violates the Establishment clause, *Weisman* and *Santa Fe* suggest the proper focus is to examine whether the student was selected to speak based on neutral criteria and whether the school district directed or otherwise provided the content for the student's speech. If the speech was student-initiated, primarily penned by the student, and the school did not specifically direct or provide for religious content, then the speech -- whether sectarian or not -- should not be considered as school-sponsored speech.[11]

Indeed, in *Weisman*, Justice Souter envisioned such a circumstance. In his concurring opinion (joined by Justices Stevens and O'Connor), he stated:

> If the State had chosen its graduation day speakers according to wholly secular criteria, and if one of those speakers (not a state actor) had individually chosen to deliver a religious message, it would have been harder to attribute an endorsement of religion to the State.

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[11] Similarly, if a school requires a student to follow non-sectarian directions when drafting the speech (as it did for Brittany) and the student personally chooses to deliver a religious speech within the bounds of those directions, the fact that the school had provided non-sectarian directions does not transform the speech into state-sponsored religious speech.

Weisman, 505 U.S. at 630, n.8.[12]

Brittany's case represents what Justice Souter envisioned. The School did not invite Brittany to deliver a religious speech, and certainly did not request her to recite a prayer; nor was her speech a prayer. The School simply told her to write a graduation speech and provided only "suggestions," which specifically erected a barrier between the content of her speech and the views of the District. It is hard to imagine what more the School could have done to dispel the notion that it endorsed the students' speeches. (Of course, the School could have provided a written disclaimer, which its regulations expressly contemplated).

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[12] The guidance offered by the Secretary of Education under the federal Elementary and Secondary Education Act of 1965 ("ESEA"), as amended by the No Child Left Behind Act of 2001, 20 U.S.C. § 6301, *et seq.* (2001), is to the same effect, advising that "[w]here students or other private graduation speakers are selected on the basis of genuinely neutral, evenhanded criteria and retain primary control over the content of their expression ... [then] that expression is not attributable to the school and therefore may not be restricted because of its religious (or anti-religious) content." *Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools*, Dep't. of Educ., (http://www.ed.gov/policy/gen/guid/religionandschools/prayer_guidance.html) (last visited 6/16/09). The Clark County District Regulation 6113.2 governing Brittany McComb's graduation speech is virtually identical to the federal guidance. *See* (App. 3.)

b. The School Officials Violated Both the Establishment and Free Speech Clauses

The School Officials not only had no Establishment clause justification to censor Brittany's speech, they in fact violated that clause by favoring one type of religious speech over another. In selection of permissible and impermissible religious speech, the school district allowed another student -- Janelle -- to deliver a clearly religious message presumably because, in its view, Janelle's was more acceptable.[13]

Weisman, applied appropriately, *prohibits* a school district from treating one form of religion -- even if "civic" or "nonsectarian" -- more favorably than sectarian religion. In that case, the school argued that the benediction and invocation should have been permitted because they were "nonsectarian." In rejecting that argument, the Court emphasized "that the intrusion was in the course of promulgating religion that sought to be

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[13] The record is not clear at this stage on how School Officials distinguished between the two speeches. It is clear that the censor's pen objected to Brittany's speech because it "IDENTIFIES A PARTICULAR RELIGION," "DEITY," and "PROSELYTIZING." Janelle's speech, however, similarly mentioned a deity, her "Heavenly Father," and spoke of prayer and other practices that identified it with Judeo-Christian concepts of religion. We also know that this Court has never held that religious speech becomes "endorsed" and subject to censorship simply because it is proselytizing. Indeed, neither the School Officials, nor the Ninth Circuit set forth any standards other than the unexplained brief references described in the text. (App. 6.)

civic or nonsectarian rather than pertaining to one sect does not lessen the offense or isolation to the objectors. At best it narrows their number. At worst it increases their sense of isolation and affront." *Weisman*, 505 U.S. at 594.

The principle this Court articulated in *Weisman* -- that religious speech is religious speech -- apparently is not always heeded by the lower courts and certainly not by the Ninth Circuit here. Religious speech may not be treated more protectively if it is non-denominational, nonsectarian or comports with a government official's understanding or belief of what is an approved or uncontroversial "civic religion." Yet the School Officials here did precisely what *Weisman* prohibited -- they permitted a student-initiated religious speech solely *because* it was nonsectarian. Of course, in Petitioners' view, both Janelle and Brittany engaged in constitutionally protected speech. But if the School Officials *truly* believed that the School retained primary control over student-initiated, student-composed graduation speeches and that the students' speeches therefore reasonably would be viewed as endorsed by the School, the appropriate result would have been to silence *both* Brittany and Janelle.

The specter of secular school officials making judgments about what religious speech is nonsectarian (and presumably non-threatening) and what is sectarian and proselytizing not only presents questions of equal protection of the law under *Larson v. Valente*, 456 U.S. 228, 238-39 (1982), it also runs head-on into *Lemon v. Kurzman's* prohibition against the government's "excessive

entanglement" in religion. 403 U.S. 602, 612-13 (1971). School officials will be expected to draw fine lines of a religious nature each time they review a student speech. This Court made clear over six decades ago that "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943). Here, parsing students speech for what is or is not "proselytizing," or determining that religious speech is "civic" or nondenominational enough, or judging whether mention of a sectarian as opposed to neutral "deity" is offensive, crosses the fabled wall of separation between state and religion and is prohibited. School officials are simply not qualified, nor should they be, to make such judgments.

The disparate treatment of Janelle and Brittany also violates the Free Speech clause. *See Rosenberger v. Rector & Visitors of The Univ. of VA*, 515 U.S. 819, 829 (1995) (holding "[w]hen the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant"). Once a school has opened up a forum to a certain type of speech, it "must respect the lawful boundaries it has itself set." *Id.* It cannot prohibit a qualified speaker from addressing a subject otherwise permitted by its own rules. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 109-10 (2001); *see also Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 393-94 (1993) (holding "First Amendment forbids the government

to regulate speech in ways that favor some viewpoints or ideas at the expense of others") (citation omitted).

It is axiomatic that "secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis." *See Board of Education of Westside Cmty. Schs. 66 v. Mergens by and through Mergens*, 496 U.S. 226, 228 (1990), citing *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 89 S. Ct. 733, 21 L. Ed. 2d 731 (1969) (no danger that high school students' symbolic speech implied school endorsement); *Barnette*, 319 U.S. at 624 (1943), and Note, *The Constitutional Dimensions of Student-Initiated Religious Activity in Public High Schools*, 92 Yale L.J. 499, 507-509 (1983) (summarizing research in adolescent psychology). The School District's own regulation recognized this non-endorsement principle.

c. Confusion Among the Circuits Regarding Viewpoint Discrimination

Assuming that the School Officials could argue that it restricted Brittany's speech because it was school-sponsored and advanced legitimate "pedagogical" concerns, there exists a conflict among the Circuits regarding the extent to which a school can engage in viewpoint discrimination when enforcing such restrictions under *Hazelwood*.

In *Hazelwood*, the Court broadly pronounced 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." *Id.* at 273 (footnote omitted). The Court did not address what level of scrutiny the lower courts need to apply when reviewing a school's restriction of speech for these "pedagogical concerns," but Justice Brennan noted in dissent the school's concession that any distinctions on speech it drew were required to be viewpoint-neutral. *Id.* at 287, n.3 (Brennan, J. dissenting).

Some Circuits, however, have read *Hazelwood* as establishing solely a rational basis standard for speech in the public school setting. *See Fleming v. Jefferson County Sch. Dist. R-1*, 298 F.3d 918, 926-29 (10th Cir. 2002) (holding "pedagogical test is satisfied simply by the school district's desire to avoid controversy within a school environment"); *Ward v. Hickey*, 996 F.2d 448, 454 (1st Cir. 1993) (stating that *Hazelwood* Court "did not require that school regulation of school-sponsored speech be viewpoint neutral"); *C.H. ex rel. Z.H. v. Oliva*, 195 F.3d 167, 172-73 (3d Cir.) (holding "*Hazelwood* clearly stands for the proposition that educators may impose non-viewpoint neutral restrictions on the content of student speech in school-sponsored expressive activities so long as those restrictions are reasonably related to legitimate pedagogical concerns"), *vacated & reh'g en banc granted*, 197 F.3d 63 (3d Cir. 1999).

Other courts have required a school's restriction not only to be reasonable, but also viewpoint-neutral. *See Peck ex rel. Peck v.*

Baldwinsville Cent. Sch. Dist., 426 F.3d 617, 626, 629-30, 633 (2d Cir. 2005) (concluding that "a manifestly viewpoint discriminatory restriction on school-sponsored speech is, *prima facie*, unconstitutional, *even if* reasonably related to legitimate pedagogical interests") (emphasis in original); *Searcey v. Harris*, 888 F.2d 1314, 1320, n.7 (11th Cir. 1989) (holding that "[a]lthough the Supreme Court did not discuss viewpoint neutrality in *Hazelwood*, there is no indication that the Court intended to drastically rewrite First Amendment law to allow a school official to discriminate based on a speaker's views").

Even though the latter view has been adopted by the Ninth Circuit (*see Planned Parenthood of Southern Nevada, Inc. v. Clark County School District*, 941 F.2d 817, 829 (9th Cir. 1991)) the School Officials in the current matter chose not to employ viewpoint-neutral criteria when censoring Brittany's speech. Rather than banning all religious speech at the graduation ceremony, the School faulted Brittany's speech for "IDENTIFIES A PARTICULAR RELIGION," "DEITY," and "PROSELYTIZING." (App. 6.)

In *Cole* and *Lassonde*, the Ninth Circuit ruled that "proselytizing, no less than prayer, is a religious practice." *Cole,* 228 F.3d 1104, citing *Follett v. Town of McCormick*, 321 U.S. 573, 576-77 (1944), and *Murdock v. Pennsylvania*, 319 U.S. 105, 108-10 (1943).[14] On its face, this self-evident proposition

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[14] In *Follett,* the defendant was "'preaching the gospel' by going 'from house to house presenting the gospel of the

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hardly seems disputable. But to analogize coerced prayer and door-to-door religious solicitation with a student-initiated graduation speech on a permitted topic that is not inherently religious raises a host of constitutional difficulties. First, prayer and one-on-one religious solicitation indisputably demand a personal response. But a speech at a public event, in the context of multiple speeches from multiple perspectives, may be challenging, but does not require such a personal response. What then are the standards for proselytizing? When does a speech become proselytizing? Can non-religious speech be proselytizing and, if so, why should religious speech be treated differently? If students are asked to speak about their values, is it permissible to coerce them to misrepresent their viewpoints when their values are religiously based, or to deny them the honor and benefit of speaking *because* of their religious viewpoints?

The Ninth Circuit -- in a one-page summary disposition -- did not elaborate as to what standards it applied to Brittany's speech, holding simply that the School Officials did not discriminate because they "did not allow other graduation speakers to proselytize" (App. 1-2). Allowing schools to

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kingdom in printed form.'" *Follett* at 576. And in *Murdock*, the defendants were claiming "to follow the example of Paul, teaching 'publicly, and from house to house.' Acts 20:20." *Murdock* at 108. The Court recognized this as "an age-old form of missionary evangelism" where "colporteurs carry the Gospel to thousands upon thousands of homes and seek through personal visitations to win adherents to their faith." *Id.*

haphazardly censor speech in this manner with the indiscriminate application of the "proselytizing" label, corrupts the purposes of both the Free Speech and Establishment clauses. If the Ninth Circuit ruling is sustained, schools would effectively have free license to choose exactly which religious content will be given a voice at school ceremonies, as they did in this case.

2. Allowing an Appellant to Indefinitely Toll the Time To File an Interlocutory Appeal Would Render Rule 4 Meaningless

Petitioners request the Court to alleviate confusion among the lower courts regarding the interpretation of the 30-day jurisdictional limitation of Rule 4 of the Federal Rules of Appellate Procedure. FED. R. APP. P. 4(a)(1)(A) (requiring a party to file a "notice of appeal ... with the district court within 30 days after the judgment or order appealed from is entered").

In the matter before the Court, the School Officials failed to file their interlocutory appeal within the 30-day jurisdictional limit required under Rule 4. Instead, after the District Court denied the School Officials' motion to dismiss, the School Officials filed a near-identical motion to dismiss, raising no new issues.[15] It was not until the District

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[15] The School Officials filed the renewed motion to dismiss in response to Brittany's First Amended Complaint. However, the District Court found that the Amended Complaint contained no substantive changes, which accounts for its further conclusion that the School Officials'

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Court dismissed this second motion to dismiss, five months later, that the School Officials filed their interlocutory appeal.

The lower court, relying on *Knox v. Southwest Airlines*, 124 F.3d 1103, 1106 (9th Cir. 1997), held that an appellant was permitted to toll the clock in this manner. However, this ruling does not comport with other Circuits' interpretation of Rule 4's jurisdictional requirement.

Phillips v. Montgomery County, 24 F.3d 736 (5th Cir. 1994), is a case similar to the instant one. There, as here, the District Court denied the defendants' motion to dismiss on qualified immunity grounds. *Id.* at 737. There, as in the present case, the plaintiffs filed an amended complaint that was "identical to the [previous] complaint except that one plaintiff had been eliminated and two new ones had been added." *Id.* There, as here, defendants filed a second motion to dismiss. *Id.* When the District Court again denied the motion "[b]ecause defendants ha[d] not provided any new grounds to dismiss," the defendants noticed an appeal of the District Court's second order. *Id.* Because the Notice of Appeal was not filed within 30 days of the original Order, the Fifth Circuit dismissed the appeal. *Id.* at 737. The court explained: "defendants may not fail to appeal an order denying them immunity and then restart the 30-day clock by refiling the same motion." *Id.* (citations omitted). A second motion, the court

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renewed motion contained no new arguments. *See* Jun. 18, 2007 Order (App. 65.)

concluded, does not interrupt the 30-day period to appeal "where the second motion raises substantially the same grounds as urged in the earlier motion." *Id.* at 738 (citation omitted); *see also Armstrong v. Texas State Board of Barber Exam'rs*, 30 F.3d 643, 644 (5th Cir. 1994) (holding that an additional motion to dismiss an amended complaint brought before the start of discovery will not restart the clock since such a motion "is primarily a vehicle to test the sufficiency of pleadings as to qualified immunity").

The First, Eighth and Eleventh Circuits have similarly rejected attempts by appellants to evade the 30-day time limit by filing and "appealing" motions substantively identical to those already rejected by the trial court. *See Pruett v. Choctaw County, Ala.*, 9 F.3d 96, 97 (11th Cir. 1993) (holding that defendants could not appeal from the District Court's denial of a second motion since "the district court did not ... take any other steps indicating that it had reopened the immunity issue ... [but] [r]ather ... determined that there was no cause to revisit its previously entered order"); *Taylor v. Cater*, 960 F.2d 763, 764 (8th Cir. 1992) (holding that a defendant may not "repeatedly file the same motion with a district court thereby starting a new clock running for the purposes of appeal"); *Fisichelli v. City Known As Town of Methuen*, 884 F.2d 17, 19 (1st Cir. 1989) (holding that defendants may not restart the clock by filing a second, identical motion). This rule makes sense on practical grounds and from the standpoint of judicial economy. As the Eighth Circuit explained in *Taylor*:

> If we were forced to entertain appeals . . . whenever a defendant had

> unsuccessfully sought reconsideration, the district court's trial calendar would be bemired; Rule 4(a)(1) would be stripped of all meaning; the uncertain business of qualified immunity would be made measurably more problematic; and a dilatory defendant would receive not only his allotted bite at the apple, but an invitation to gnaw at will.

Taylor, 960 F.2d at 764 (citations omitted).

II. CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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