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IN THE

Supreme Court of the United States

A.M., a minor, by her Parent and next Friend, JOANNE MCKAY,

Petitioner,

v.

TACONIC HILLS CENTRAL SCHOOL DISTRICT,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

As co-president of her eighth-grade class, A.M. qualified to give a speech at her middle school graduation ceremony. She desired to conclude her remarks, as do most students who give graduation speeches, with positive words of encouragement and well-wishes for the future. But Taconic Hills School District officials deemed A.M.'s encouraging words and well-wishes to be "too religious," and prohibited her from expressing them.

1. Are a student graduation speaker's remarks private speech when she is selected based on neutral criteria and is solely responsible for the content?

2. Must a public school comply with the First Amendment's viewpoint neutrality requirement when regulating the speech of a neutrally-selected, student graduation speaker who is solely responsible for the content of her remarks?

PARTIES TO THE PROCEEDING

Petitioner is A.M., a minor, whose claims are being brought by and through her parent and next friend, Joanne McKay. Respondent is Taconic Hills Central School District.

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INTRODUCTION

As co-president of the eighth grade class, A.M. qualified via neutral, secular criteria to speak at her graduation ceremony. Her speech was written by her and subject to no written standards from the Taconic Hills Central School District ("the "District") limiting its content or topic. Like most student graduation speakers, she desired to conclude her speech with words of encouragement and well-wishes for the future. Specifically, she sought to close her remarks with the following:

> As we say our goodbyes and leave middle school behind, I say to you, may the Lord bless you and keep you; make His face shine upon you and be gracious to you; lift up His countenance upon you, and give you peace.

Appendix (App.) 45a-46a. District officials prohibited A.M. from wishing her classmates well, a common graduation topic, because it deemed her views "too religious." App. 5a.

Every year, the nearly 25,000 secondary schools in our nation, like A.M.'s school, set aside a few hours in late May or early June to allow their graduates to celebrate their accomplishments and reflect upon their journey through school. Each school has its own unique traditions and customs, but common among nearly all of them is providing an opportunity for a few students selected via neutral, secular criteria—often a valedictorian, class president, or someone voted upon by the student body—to say a few words about his or her own

unique journey. It is a time for personal reflection on the past and encouragement for the future.

Yet year after year, as these tens of thousands of student graduation speakers, like A.M., sit down and put pencil to paper (or more likely, fingers to keyboard) to begin drafting their speeches, they are faced with the same questions: What can I say? Can I include my personal beliefs? Can I talk about what I am most passionate about, like my social, political, or religious views? Can I rely on my personal views to encourage my classmates in their future endeavors?

Many students will turn to their principal or guidance counselor to answer these questions. But unfortunately, school officials—those individuals who have time after time provided guidance and direction to these students over the past several years—simply don't have consistent answers. Some will remain neutral towards students' personal expression in their graduation speeches; others, like officials at the District, will censor the students' personal views.

This confusion does not originate with the school officials. The federal judiciary itself has no consistent answer. Indeed, the Courts of Appeals are in conflict on the pressing and fundamental legal question presented in this Petition: Is the speech of a student graduation speaker private or attributable to a school when: (1) the student is selected to speak based on neutral criteria; (2) she writes her own speech; and (3) the school provides no topic or content restrictions? Two Courts of Appeals have

specifically noted the need for this Court's guidance on this issue. School officials and students who face these tough questions year after year are in desperate need of this Court's guidance as well. This Court should grant certiorari and provide it.

Critically, the Second Circuit's approach—under which student speech delivered under the above circumstances is attributable to the school—gives school officials unbridled power to censor the personal expression of all student graduation speakers, not just those who desire to engage in religious expression like A.M. In effect, the Second Circuit has instituted a "heckler's veto," wherein school officials can restrict any student graduation speech they think may offend someone in the audience. But as this Court said in *Morse v. Frederick*, 551 U.S. 393, 409 (2007), "offense" is an unworkable standard for governing student speech because "much political and religious speech" is likely to be "perceived as offensive to some." *See also id.* at 441-42 ("[I]t would be a strange constitutional doctrine that . . . would permit a listener's perceptions to determine which speech deserved constitutional protection") (Stevens, J., Souter, J., and Ginsberg, J., dissenting). The Court should grant review to rectify the conflict with this Court's precedent and to bring much-needed clarity to the exceptionally important legal questions presented by this petition.

DECISIONS BELOW

The district court's unreported ruling granting the District's summary judgment motion is available

at No. 1:10-CV-20 GLS/RFT, 2012 WL 177954 (N.D.N.Y. Jan. 23, 2012) and reprinted at App. 15a-30a. The Second Circuit's unpublished opinion is available at No. 12-753-CV, 2013 WL 342680 (2d Cir. Jan. 30, 2013) and reprinted at App. 1a-14a. The order denying the petition for panel rehearing and for rehearing en banc is reprinted at App. 31a-32a.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Second Circuit rendered its decision on January 30, 2013. The Second Circuit denied the petition for panel rehearing and for rehearing en banc on March 26, 2013. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

The First Amendment to the United States Constitution provides, in pertinent part: "Congress shall make no law respecting an establishment of religion, . . . or abridging the freedom of speech . . . ." U.S. Const. amend. I.

STATEMENT OF THE CASE

A. Factual Background

The material facts of this case are not in dispute. When the controversy arose, A.M. was an eighth grade student and co-president of her class at Taconic Hills Middle School. App. 4a. The school is operated, administered, and supervised by the District. *Id*.

Each year, District students who successfully complete the eighth grade participate in a graduation celebration, called the "moving up" ceremony. App. 36a ¶ 2. The graduation ceremony is voluntary and held in the evening. App. 34a ¶¶ 7-8. The ceremony is not part of the District's academic curriculum. App. 42a-43a. Students who give speeches at the event receive no academic credit and their speeches are not graded. App. 34a ¶ 6.

Traditionally, the class president gives a speech at the ceremony. App. 42a. The president is elected by the members of the student council, who are all students. App. 36a ¶ 5. A.M. and a fellow classmate, A.S., were elected co-presidents. *Id*. Both were permitted to deliver speeches at their graduation ceremony, which occurred on June 25, 2009. *Id*. ¶ 6. As with all students who deliver remarks at the graduation ceremony, A.M. was solely responsible for writing her own speech. App. 34a ¶ 14.

District officials give student graduation speakers no written standards regarding the content of their speeches. App. 43a. "[I]t's their evening. So they write their speech and the only guidance, basically, they're given is keep it short." App. 48a. The school lacks written guidelines for student speeches because "each child has a very personal experience and their personal connections," and thus they are permitted to "draw upon their personal experiences" in drafting their remarks. App 43a. The only guidance given to student speakers is that their speeches "be appropriate and . . . a little upbeat." *Id*.

A.M.'s speech addressed the topics typical of most graduation speeches: memories and accomplishments of her class; thankfulness for her teachers and administrators; and a challenge for the future. App. 45a-46a. Her speech also, like nearly every graduation speech, concluded with words of encouragement and well-wishes for the future. Specifically, A.M. desired to end her speech with the following words:

> As we say our goodbyes and leave middle school behind, I say to you, may the Lord bless you and keep you; make His face shine upon you and be gracious to you; lift up His countenance upon you, and give you peace.

App. 46a.

The District admits that A.M. "was expressing her own viewpoint" in her speech and that her speech was not "proselytizing or encouraging a conversion." App. 44a. Nevertheless, the District determined her viewpoint to be "too religious." App. 5a. Specifically, the District was concerned that "people would perceive [A.M.'s speech] as us supporting a particular religious view or religious viewpoint," and identified that viewpoint as "there is a higher being, there is a God." App. 42a.[1]

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[1] A.M., not the District, initiated the District's review of her speech. Several days before the graduation ceremony, A.M. requested that her English teacher review her speech for punctuation and grammar. App. 4a. Then, one day before the ceremony, Leeanne Thornton, the faculty advisor for the student council, reviewed the speech. App. 4a-5a. Both teachers "expressed concerns" about A.M.'s expression of her

Accordingly, the District told A.M. she could not give her speech unless she removed the religious lines quoted above. App. 6a. Under protest, A.M. gave her speech minus the lines the District required she remove. App. 6a.

Critically, school officials would have prohibited A.M.'s religious remarks at a high school graduation or any other public school event as well. App. 50a. This would include if A.M. unfurled a banner expressing her religious message at the torch relay event at issue in *Morse*.

B. Procedural Background

A.M. filed suit in federal district court on January 6, 2010. She sought to vindicate her federal and state constitutional rights to free speech. The district court had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343.

On January 23, 2012, following cross-motions for summary judgment, the district court granted the District's motion and dismissed all of A.M.'s claims. The court found that A.M.'s speech was attributable to the school under *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), and that the school could justifiably restrict A.M.'s speech "simply [based on] the . . . desire to avoid controversy within a school environment." App. 26a. Without any

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religious views, and "recommended that Principal Neil Howard review the speech as well." *Id.* Principal Howard then set a meeting for the morning of the graduation ceremony, at which he reviewed A.M.'s speech. App. 5a.

analysis, the court also found that "A.M.'s viewpoint discrimination claim is meritless." App. 27a.

A.M. timely appealed to the Second Circuit. The court of appeals held that *Kuhlmeier* "provides the governing standard" for determining whether the District's censorship of A.M.'s religious viewpoint violated the First Amendment. App. 8a-9a. Specifically, the court found that based on the "School District's involvement in directing the Ceremony and in reviewing the speeches before they were delivered . . . a reasonable observer would perceive A.M.'s speech as being endorsed by the Middle School." App. 9a. This holding would apply equally to a high school graduation speaker.

The Second Circuit recognized that viewpoint neutrality is required under *Kuhlmeier*, App. 10a, but found that no viewpoint discrimination had occurred. The court observed that "[i]n the context of religious speech, content discrimination would entail excluding speech for which 'there is no real secular analogue.'" App. 11a (quoting *Bronx Household of Faith v. Cmty. Sch. Dist. No. 10*, 127 F.3d 207, 221 (2d Cir. 1997) (Cabranes, J., concurring in part and dissenting in part)). Despite A.M. plainly expressing a religious perspective on the common graduation speech topic of encouragement and well-wishes for the future, the court found that A.M.'s speech "constituted purely religious speech" that did not "offer[] a religiously-informed viewpoint on an otherwise secular subject matter." App. 11a-12a. The court thus concluded that A.M.'s speech had "no real secular analogue" and that the District therefore engaged in content,

rather than viewpoint, discrimination in barring it. App. 12a.

Finally, the Second Circuit also held that the District's mere concern that A.M.'s speech "could violate the Establishment Clause" satisfied *Kuhlmeier*'s "legitimate pedagogical concern" test. App. 6a, 13a.

REASONS FOR GRANTING THE WRIT

There are many reasons this Court should grant review, but none more critical than the question of whether A.M.'s speech is private or attributable to the District. The Courts of Appeals are in conflict on this legal question after evaluating it in the same basic context present here: a student speaker is neutrally selected; the speech's content and topic are left completely up to her; the school does not encourage or discourage religious content; and the school exercises control over the ceremony commensurate with any other non-curricular event. Several courts of appeals have noted the need for this Court's guidance on this exceptionally important legal question.

In landing on the school speech side of the above circuit conflict, the Second Circuit's opinion also exponentially expands the scope of *Kuhlmeier* in a manner that cannot be squared with this Court's decision in *Morse*, or with *Kuhlmeier* itself. This expansion of *Kuhlmeier* beyond the curricular context threatens the continued vitality of *Tinker* and the essential protection it has provided for

decades to private student speech, both secular and religious.

This Court should also grant review because the Second Circuit's decision directly conflicts with this Court's decisions regarding viewpoint discrimination. The lower court found no viewpoint discrimination despite A.M.'s intent to express a religious perspective on a typical graduation-speech topic: encouragement and well-wishes for the future. The District's censorship of A.M.'s religious expression is textbook viewpoint discrimination under this Court's precedent.

The Second Circuit's opinion also directly implicates another question on which the Courts of Appeals are in conflict: whether schools must comply with the First Amendment's viewpoint neutrality requirement when regulating student speech, and specifically whether viewpoint neutrality is required under *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), and *Kuhlmeier*. This long-standing circuit conflict, involving another critical question related to students' free speech rights, requires this Court's attention.

I. The Second Circuit's Decision that A.M.'s Graduation Speech Is Attributable to the School Magnifies a Circuit Conflict and Contravenes this Court's Precedent.

A. The Courts of Appeals Are Divided on the Primary Question Presented by this Petition.

The Circuits are in conflict on the question of whether speech by neutrally-selected students at school functions is private or attributable to the school. The Circuits have reached different conclusions regarding this important legal question despite evaluating it under highly similar circumstances. Indeed, these cases typically involve neutral selection of a speaker (*i.e.*, through student elections, academic merit, or a similar mechanism), speaker choice over the content of the message, no state encouragement of a religious message, and school involvement solely in organizing and directing the event.

On the private speech side of the conflict, the Eleventh Circuit ruled in *Adler v. Duval County School Board,* 206 F.3d 1070, 1074-78 (11th Cir. 2000) (en banc)*, reinstated by* 250 F.3d 1330 (11th Cir. 2001), that a student who is selected via neutral criteria and chooses to include her religious views in a graduation speech is expressing "her own" message, not the state's. *Id*. at 1083. Critical to the court's holding were the following familiar facts: the student speaker was selected via "secular criterion" (*i.e.*, a student election); the student was solely responsible for the content of her message; and the

school did not in any way encourage the selection of a religious speaker or the inclusion of religious content. *Id*. at 1074-76. As the court said, "No feature of the [school's] policy favors or endorses religion. The graduation policy is simply content-neutral, and allows an autonomous elected speaker, selected by her class, to deliver a religious or secular message on an equal basis." *Id*. at 1077. The court also flatly rejected "the notion that the religious content of *any* speech at a graduation ceremony is attributable to the school merely because of the school's sponsorship of the event or its control over the graduation's schedule, timing, decorum, or sequence of events." *Id*. at 1080. Accordingly, the court found that student speech with religious content delivered under these circumstances would not violate the Establishment Clause. *Id*. at 1081.

The Ninth and Tenth Circuits represent the other side of the circuit conflict. In *Corder v. Lewis Palmer School District No. 38*, 566 F.3d 1219, 1229 (10th Cir. 2009), a school permitted student valedictorians to speak at graduation, an honor they achieved by attaining a 4.0 grade point average. *Id*. at 1229. These neutrally-selected student speakers wrote their own speeches, subject to no "instruction concerning the conduct or content of the speeches," except that they needed to be presented to the principal for prior review. *Id*. at 1222. The court also noted that the graduation ceremony "was supervised by the school's faculty and was clearly a school-sponsored event." *Id*. at 1229. Despite its factual similarities with *Adler,* the Tenth Circuit found that a valedictorian's speech that included her religious beliefs was attributable to the school. *Id*. at

1229. The court thus held that the student's speech was governed by *Kuhlmeier* and could be regulated by the school for any legitimate pedagogical concern. *Id.* Under this malleable standard, the court found that the school's mere interest in "avoid[ing] controversy" justified censoring the religious aspects of the student's graduation speech. *Id.* at 1230.

Similarly, in *Cole v. Oroville Union High School District*, 228 F.3d 1092, 1103 (9th Cir. 2000), the Ninth Circuit held that a valedictorian's graduation speech was not "private" but rather "attributable to the District." In *Cole*, the valedictorian was neutrally-selected (*i.e.*, via academic merit) and the policy permitting the valedictorian to speak "neither encourage[d] a religious message nor subject[ed] the speaker to a majority vote that operate[d] to ensure only a popular message [was] expressed at the graduation." *Id.* Nonetheless, because the District had "plenary control over the graduation ceremony" the court concluded that the valedictorian's speech "constituted government endorsement of religious speech similar to the prayer policies found unconstitutional in *Santa Fe* and *Lee*." *Id.*

By deciding that A.M.'s speech in this case is attributable to the school and thus governed by *Kuhlmeier*, the Second Circuit's decision aligns with that of the Ninth and Tenth Circuits. It thereby exacerbates the circuit conflict with the Eleventh Circuit on the important legal question presented by this petition. And, critically, this case involves the same controlling facts at issue in *Adler*, *Corder*, and *Cole*. The District permitted A.M. to speak at graduation pursuant to neutral, secular criteria.

App. 4a. The District gave A.M. the freedom to write her own speech, admitting that it provides no written standards to students regarding the content of their speeches, that students "draw upon their personal experiences" in drafting their remarks, and that A.M.'s speech "express[ed] her own viewpoint." App. 43a-44a.

The Eleventh Circuit has held that a student's graduation speech under these circumstances constitutes private expression, and that religious views expressed in the speech do not violate the Establishment Clause. In sharp contrast, the Ninth, Tenth, and now Second Circuits have held that a student's graduation speech under the same circumstances is attributable to the school, and that schools may censor religious views expressed in the speech merely to avoid controversy or assuage concerns over violating the Establishment Clause.[2]

At least two courts of appeals have observed that this Court has yet to provide guidance in this area. *See Doe v. Sch. Dist. of Norfolk*, 340 F.3d 605, 612 (8th Cir. 2003) (analyzing constitutionality of

[2] Under the facts of this case, the District's Establishment Clause concerns are meritless. No reasonable observer aware that A.M. was neutrally selected and that she had control over the content of her speech, *inter alia*, would believe that her remarks were endorsed by the District. Simply put, properly regarding A.M.'s remarks as *her private speech* eliminates Establishment Clause concerns. *See Bd. of Educ. of Westside Cmty. Sch. v. Mergens*, 496 U.S. 226, 250 (1990) (noting that "there is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect").

religious speech at school graduation ceremony and noting that this Court has not "provide[d] an answer to the question of when religious speech at a school function can be considered private, and thus, protected"); *Chandler v. Siegelman*, 230 F.3d 1313, 1316 (11th Cir. 2000) (noting that this Court has left "unanswered . . . under what circumstances religious speech in schools can be considered *private*, and, therefore, protected"). Additionally, this Court has stressed that "not every message delivered" on "government property at government-sponsored school-related events," like a graduation ceremony, "is the government's own." *Santa Fe Indep. Sch. Dist. v. Doe,* 530 U.S. 290, 302 (2000).[3] This Court should grant review to resolve this circuit conflict and bring much-needed clarity to this important area of law.

B. Applying the *Kuhlmeier* Standard to Extracurricular Student Speech Directly Conflicts with this Court's Decisions in *Morse* and *Kuhlmeier*.

The Second Circuit's decision that *Kuhlmeier* provides the relevant standard for evaluating the constitutionality of the District's censorship of A.M's speech directly conflicts with this Court's decision in *Morse* and with *Kuhlmeier's* own guidance regarding its scope. It also expands *Kuhlmeier* in a manner that threatens to swallow up *Tinker*, which has stood

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[3] *See also Lee v. Weisman*, 505 U.S. 577, 598-99 (1992) (*"[A]t graduation time* and throughout the course of the educational process, there will be instances when religious values, religious practices, and religious persons will have some interaction with the public schools and their students") (emphasis added).

as an essential bulwark against school censorship of student expression, whether political, religious, etc., for nearly half a century.

Morse involved a school's ability to regulate student expression under conditions that cannot be meaningfully distinguished from A.M.'s graduation ceremony. The Olympic Torch Relay event at issue in *Morse* was "school-sanctioned and school-supervised," was overseen by school administrators and teachers, involved active participation by some students, like members of the school band (while most other students observed), and was extracurricular in nature. 551 U.S. at 396, 400-01. At this event, Frederick unfurled a banner that read "BONG HiTS 4 JESUS." *Id.* at 397. The principal demanded he take the banner down. *Id.* at 398. When Frederick refused, he was suspended for several days. *Id.*

Critically, this Court expressly rejected the applicability of *Kuhlmeier* to those facts and held that it "does not control this case because no one would reasonably believe that Frederick's banner bore the school's imprimatur." *Id.* at 405. Instead, the Court decided the case by reference to *Tinker*. *Id.* at 408-09. The Court explained that the restriction on Frederick's speech was permissible because it was not based on "a mere desire to avoid the discomfort or unpleasantness that always accompany an unpopular viewpoint." *Id.* at 408 (quoting *Tinker*, 393 U.S. at 509). The school's concern was "to prevent student drug abuse," a compelling goal enshrined in school policy that "extends well beyond an abstract desire to avoid

controversy." *Id.* at 408-09. And, this Court rejected the school's invitation to uphold the restriction because Frederick's speech was (in the school's view) "offensive." *Id.* at 409.

A.M.'s graduation ceremony is on all fours with the Olympic Torch Relay event in *Morse*. This event was school-sanctioned and organized, supervised by administrators and teachers, involved some student participation (*i.e.*, A.M. and her co-president giving speeches) while most other students observed, and was not part of the curriculum. App. 6a, 36a, 42a-43a. As in *Morse*, no reasonable observer under these circumstances would believe A.M.'s speech bore the imprimatur of the school. Accordingly, *Kuhlmeier* simply cannot supply the standard for evaluating the District's restriction on A.M.'s speech.

This is especially true under the circumstances of this case, where A.M. was neutrally-selected and chose the content of her message. *See Lee*, 505 U.S. at 630 n.8 ("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") (Souter, J., concurring). Indeed, the District admits that A.M.'s speech "express[ed] her own viewpoint." App. 44a. *Kuhlmeier* simply has no application here.

Kuhlmeier itself bears this out. Its rule applies to only those "activities [that] may be fairly characterized as part of the school curriculum." *Kuhlmeier*, 484 U.S. at 271. *See Morse*, 551 U.S. at

423 (explaining that *Kuhlmeier* is a narrow holding applicable only to "what is in essence the school's own speech, that is, articles that appear in a publication that is an official school organ") (Alito, J., and Kennedy, J., concurring). Such activities are limited to those which are "designed to impart particular knowledge or skills," and for which students "receive[] grades and academic credit." *Kuhlmeier*, 484 U.S. at 268-271. Notably, the *Kuhlmeier* Court approved excising several student articles from the school's paper because the students had failed to comprehend a specific curricular lesson specified in the Curriculum Guide of the Journalism class that produced it, namely, "the legal, moral, and ethical restrictions imposed upon journalists within [a] school community." *Id.* at 276 (quotation omitted).

A.M.'s graduation ceremony stands in stark contrast to the school paper in *Kuhlmeier*. First and foremost, its *post*-curricular and *purely* extracurricular nature immediately distinguishes it from the school paper produced as part of a journalism class pursuant to the school's "Curriculum Guide" in *Kuhlmeier*. Indeed, the ceremony was not part of any class, nor was it designed to impart any particular knowledge or skills. In fact, graduation signifies *the successful completion* of a school's curriculum, not its continuation. Every student and parent knows that students' classes are completed and their grades tabulated before graduation, and that only those students whose final transcripts demonstrate successful completion of the requisite course material may "walk" at a graduation ceremony.

Simply put, the District cannot credibly claim that the graduation ceremony forms part of its curriculum, an essential prerequisite to *Kuhlmeier*'s application.

Moreover, A.M.'s graduation speech was not a course presentation, she received no academic credit for preparing or delivering it, she was neutrally-selected to give the speech, and the school permitted her to write her speech free of any content restrictions and absent any encouragement or discouragement that it include a religious message. Under these circumstances, "[N]o one would reasonably believe that [A.M.'s speech] bore the school's imprimatur." *Morse*, 551 U.S. at 405.

Ignoring the factual predicates that trigger *Kuhlmeier*, the Second Circuit held that it provided the requisite standard for evaluating A.M.'s speech claims because of the "District's involvement in directing the Ceremony and in reviewing the speeches before they were delivered." App. 9a. This marks a dramatic and unwarranted expansion of *Kuhlmeier* that would render *Tinker* all but a dead letter. Schools are, or at least claim to be, "involved" in nearly every aspect of what occurs on their campuses during the school day (and often in what occurs after school as well).[4] Further, schools typically have policies requiring prior review of

[4] *See, e.g., Mergens*, 496 U.S. at 247-48 (rejecting claims that religious student club's meetings on campus would bear the school's imprimatur because, among other things, the school operated the student club forum as an integral part of its educational mission and provided the platform for the club to promote its religious message).

student speech, be it materials to be distributed, club announcements to be read over the public address system, speeches to be delivered at graduation, etc. The Second Circuit's notion that prior review turns private student speech into school-sponsored speech governed by *Kuhlmeier* would all but eliminate student's First Amendment rights.

Unchaining *Kuhlmeier* from its curricular moorings, as the Second Circuit did in this case, results in the exponential expansion of its scope. This expansion of *Kuhlmeier* necessarily contracts *Tinker*'s reach and concomitantly students' free speech rights as well. Exacerbating this problem is the highly deferential approach many courts take in applying *Kuhlmeier*'s "legitimate pedagogical concerns" test, permitting schools to restrict speech simply out of a desire to avoid controversy, or based on an unfounded Establishment Clause worry, and not requiring those restrictions to be viewpoint neutral.

This case presents a perfect example of the danger *Kuhlmeier*'s expansion poses to student speech rights. If, under *Kuhlmeier*, viewpoint neutrality is either not required, or easily sidestepped (as the Second Circuit did here), and the "legitimate pedagogical concern" standard can be satisfied by a mistaken belief that allowing private religious speech "could violate the Establishment Clause" (which the Second Circuit held here), then student religious speech has little hope of survival.[5]

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[5] *Kuhlmeier*'s "pedagogical concern" test can only bear so much weight. The term "pedagogical" means "of, relating to, or

The same is true for nonreligious student speech, as courts often find that a school's mere desire to avoid controversy is sufficient to justify speech restrictions under *Kuhlmeier*. Under the Second Circuit's approach, student graduation speakers seeking to express religious and secular messages are at equal risk of having their expression censored. Simply put, as *Kuhlmeier* expands, student speech rights will contract, until there is little, if anything, left. This Court's intervention is thus necessary to rein in improper application of *Kuhlmeier* and ensure the continued vitality of students' free speech rights.

II. The Second Circuit's Decision Conflicts with this Court's Precedent Concerning Viewpoint Discrimination and Directly Implicates a Circuit Conflict regarding the Relationship between Viewpoint Discrimination and Student Speech.

A. The District's Censorship of A.M.'s Religious Speech Was Viewpoint Discriminatory Under this Court's Precedent.

The government engages in viewpoint discrimination when it regulates speech based on "the specific motivating ideology or the opinion or

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befitting a teacher or education." Merriam-Webster Online Dictionary (last visited June 18, 2013). Its scope does not extend to purely legal considerations, such as compliance with the Establishment Clause. This is especially true here, as the Establishment Clause is not even implicated by A.M.'s private speech. *See* n.2, *supra*.

perspective of the speaker." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995). This mandate of ideological neutrality ensures that government does "not favor one speaker over another." *Id.* at 828. In the religious speech context, this mandate is breached when the government excludes speech that addresses otherwise permissible subjects "on the ground that the subject is discussed from a religious viewpoint." *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 112 (2001).

This Court's decisions in *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993), *Rosenberger*, and *Good News Club* firmly establish the First Amendment's ban on religious viewpoint discrimination. In each case, the educational institution committed viewpoint discrimination by excluding speakers because they addressed permissible topics from a religious perspective. *See Lamb's Chapel*, 508 U.S. at 393-94 (excluding film about child-rearing and family values because of its religious perspective); *Rosenberger*, 515 U.S. at 831 (excluding only those student publications expressing "religious editorial viewpoints" from funding made available to all student publications); *Good News Club*, 533 U.S. at 107-10 (excluding religious club because it taught morals and character development to children from a religious perspective).

The Second Circuit held that excluding A.M.'s speech was not viewpoint discriminatory because it did not "offer[] a religiously-informed viewpoint on an otherwise [permissible] subject matter." App. 11a-12a. This holding simply cannot be reconciled

with the above-cited precedent. The only justification the District gave for censoring A.M.'s speech was that it "sounded 'too religious.'" App. 5a. Importantly, the District has never argued that student graduation speakers are generally banned from expressing messages of hope, encouragement, and well wishes for the future, nor could it since these subject matters are central themes in virtually all graduation speeches. A.M. desired to express her religious perspective on these permissible topics, and the District engaged in viewpoint discrimination by prohibiting her from doing so.

The Second Circuit found that the District engaged in content, rather than viewpoint, discrimination based on its mischaracterization of A.M.'s religiously-inspired concluding remarks as "purely religious speech" for which there is "no real secular analogue." App. 11a-12a.[6] But this rationale cannot be squared with this Court's precedent. Like the attempted distinction between "religious worship" and "religious speech" rejected in *Widmar v. Vincent*, 454 U.S. 263, 269-70 n.6 (1981), the Second Circuit's distinction between "purely religious speech" and "religious speech" lacks "intelligible content," is impossible to administer, and would "inevitably . . . entangle the state with religion in a manner forbidden by [this Court's] cases." *See also Rosenberger*, 515 U.S. at 845 (discussing same). Whether articulated as a ban on

[6] Treating the restriction of A.M.'s speech as content, rather than viewpoint, based discrimination does not help the District. Indeed, "discrimination against speech because of its message is presumed to be unconstitutional." *Rosenberger* 515 U.S. at 828.

"'quintessentially" or "decidedly" religious speech, *see Good News Club*, 533 U.S. at 111, or, as the Second Circuit put it, "purely religious speech" with "no real secular analogue," this Court has uniformly rejected such restrictions on religious expression.

Moreover, the Second Circuit's claim that the District is not guilty of viewpoint discrimination because there is "no real secular analogue" to A.M.'s religiously-inspired well wishes crumbles under the most rudimentary scrutiny. Indeed, the card racks in Hallmark and department stores across the country testify to the fact that both secular and religious expressions of good will abound in our society. Anyone perusing those cards can choose between both religious and secular messages wishing newlyweds well in their life together, offering hope for the future of a newborn, expressing wishes that a friend's broken body will mend quickly, and much more. The same is true of well-wishes in the graduation speech context. And prohibiting student graduation speakers from expressing only religious well-wishes is viewpoint discrimination.

Additionally, a "blessing" is not inherently religious. Rather, a blessing is defined as words offering "approval" and "encouragement," or the expression of hope for a future "conducive to [another's] happiness or welfare." Merriam-Webster Online Dictionary (last visited June 18, 2013).[7]

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[7] For some modern examples of secular blessings for weddings, funerals, baby namings, and various other occasions, see the American Humanist Organization's *Secular Seasons: Secular*

Consider, for example, the following well-known Irish blessing:

> May love and laughter light your days, and warm your heart and home. May good and faithful friends be yours, wherever you may roam. May peace and plenty bless your world with joy that long endures. May all life's passing seasons bring the best to you and yours.[8]

Consider also the following Gaelic blessing:

> Deep peace of the running wave to you.
> Deep peace of the flowing air to you.
> Deep peace of the quiet earth to you.
> Deep peace of the shining stars to you.
> Deep peace of the infinite peace to you.[9]

And also this old Celtic blessing:

> May the longtime sun shine on you.
> All love surround you.
> And the pure light within you.
> Guide you on your way.[10]

Celebrations & Humanist Ceremonies, http://www.secularseasons.org/celebrations/index.html (last visited June 18, 2013).

[8] *See* Irish Blessings and Prayers, *An Old Irish Blessing*, http://www.islandireland.com/Pages/folk/sets/bless.html (last visited June 18, 2013).

[9] *See* Happy.fm, *12 Blessings: Some Original Quotes About Happiness*, http://happy.fm/12-blessings-some-original-quotes-about-happiness/ (last visited June 18, 2013).

The District has never suggested that it would have barred students from repeating these secular blessings. To ban A.M.'s religiously-inspired blessings for peace, guidance, and hope for the future is impermissible viewpoint discrimination. The Second Circuit's holding to the contrary contravenes this Court's clear precedent.

B. The Courts of Appeals Are Divided on Whether Student Speech Regulation Must be Viewpoint Neutral.

This Court has characterized the rule against viewpoint discrimination as "axiomatic." *Rosenberger*, 515 U.S. at 828. Yet, as the Fourth Circuit recently noted in *Hardwick v. Heyward*, 711 F.3d 426, 443 (4th Cir. 2013), this Court "has not expressly discussed the relationship between viewpoint discrimination and student speech." As a result, the Circuits are in conflict on the applicability of the rule in the school setting and, specifically, whether viewpoint neutrality is required under *Tinker* and *Kuhlmeier*.

Regarding the relationship between viewpoint neutrality and *Tinker*, the Sixth Circuit has held that "schools' regulation of student speech must be consistent with both the *Tinker* standard and *Rosenberger*'s prohibition on viewpoint discrimination." *Barr v. Lafon*, 538 F.3d 554, 571 (6th Cir. 2008); *see also Castorina v. Madison Cnty.*

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[10] *See* CelticMeditationMusic.com, *Celtic Blessings*, http://www.celtic meditationmusic.com/celtic-meditations/celtic-blessings.htm (last visited June 18, 2013).

Sch. Bd., 246 F.3d 536, 544 (6th Cir. 2001) (holding that even if there is a history of material disruption regarding a particular topic sufficient to justify restricting student speech, a school "does not have the authority to enforce a viewpoint-specific ban").

The Eighth and Fifth Circuits disagree. In *B.W.A. v. Farmington R-7 School District*, 554 F.3d 734, 740 (8th Cir. 2009), the Eighth Circuit held that "viewpoint discrimination by school officials is not violative of the First Amendment if the *Tinker* standard requiring a reasonable forecast of substantial disruption or material interference is met." And in *Morgan v. Swanson*, 659 F.3d 359, 379 (5th Cir. 2011), the Fifth Circuit held that "[n]o matter how 'axiomatic' the generalized rule against viewpoint discrimination may be, we cannot neglect that this case arises in the public schools, a special First Amendment context, which admits of no categorical prohibition on viewpoint discrimination."

A similar circuit conflict exists regarding whether viewpoint neutrality is required under *Kuhlmeier*. The Second, Eleventh, and Ninth Circuits have held that it is. *See Peck v. Baldwinsville Cent. Sch. Dist.*, 426 F.3d 617, 633 (2d Cir. 2005) (under *Kuhlmeier*, "a manifestly viewpoint discriminatory restriction on school-sponsored speech is, prima facie, unconstitutional"); *Searcey v. Harris*, 888 F.2d 1314, 1325 (11th Cir. 1989) (rejecting school's argument that *Kuhlmeier* does not prohibit schools from making viewpoint-based decisions and observing that "[t]he prohibition against viewpoint discrimination is firmly embedded in first amendment analysis"); *Planned Parenthood*

of S. Nev., Inc. v. Clark Cnty. Sch. Dist., 941 F.2d 817, 829 (9th Cir. 1991) (applying *Kuhlmeier* and requiring school's speech restrictions to be "viewpoint neutral"). The First and Tenth Circuits are on the other side of this conflict. *See Ward v. Hickey*, 996 F.2d 448, 454 (1st Cir. 1993) (holding that "*Kuhlmeier* d[oes] not require that school regulation of school-sponsored speech be viewpoint neutral"); *Fleming v. Jefferson Cnty. Sch. Dist. R-1*, 298 F.3d 918, 926 (10th Cir. 2002) ("[W]e conclude that [*Kuhlmeier*] allows educators to make viewpoint-based decisions about school-sponsored speech").

The legal question of the relationship between viewpoint discrimination and student speech is of monumental importance. Depriving students of this fundamental protection, as some courts of appeals have done by rejecting its applicability under *Tinker* or *Kuhlmeier*, has dire consequences. Indeed, "[m]ost parents . . . have no choice but to send their children to a public school." *Morse*, 551 U.S. at 424 (Alito, J., and Kennedy, J., concurring). And schools are increasingly "defin[ing] their educational missions as including the inculcation of whatever political and social views are held by" the "elected and appointed public officials with authority over the schools and . . . the school administrators and faculty." *Id.* at 423. As with granting school officials the authority to restrict student speech contrary to a school's "educational mission," eliminating viewpoint neutrality in the student speech context would give "public school authorities a license to suppress speech on political and social issues based on

disagreement with the viewpoint expressed."[11] *Id.* Such an approach "strikes at the very heart of the First Amendment." *Id.*

The Second Circuit's opinion in this case wades directly into troubled judicial waters regarding viewpoint neutrality and its relationship to student speech restrictions. This case thus offers an excellent opportunity for this Court to provide much needed clarity on this important legal question, and to ensure that the fundamental rule against viewpoint discrimination applies with full force in the student speech context.

CONCLUSION

A.M. respectfully requests that this Court grant review.

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[11] Considering that "[t]he whole theory of viewpoint neutrality is that minority views are treated with the same respect as are majority views," *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 235 (2000), eliminating the rule against viewpoint discrimination will have a disproportionate effect on students that hold minority views.

Respectfully submitted,

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June 20, 2013

APPENDIX TABLE OF CONTENTS

Filed: January 30, 2013

12-753-cv
A.M. *ex rel.* McKay v. Taconic Hills Cent. Sch. Dist.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 30th day of January, two thousand thirteen.

PRESENT: DENNY CHIN,
CHRISTOPHER F. DRONEY,
Circuit Judges,
JOHN GLEESON

*District Judge.**

A.M., a minor, by her Parent and Next Friend, JOANNE MCKAY,

Plaintiff-Appellant,

v. 12-753-cv

TACONIC HILLS CENTRAL SCHOOL DISTRICT, **

Defendant-Appellees.

FOR APPELLANT: David C. Gibbs, III, Gibbs Law Firm, P.A., Seminole, FL (on submission).

FOR APPELLEES: Patrick J. Fitzgerald and Scott P. Quesnel, Girvin & Ferlazzo, P.C., Albany, NY (on submission).

FOR AMICUS: Ayesha N. Khan and Alex J. Luchenitser, Americans United for Separation of Church and State, Washington, DC, *for Americans*

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* The Honorable John Gleeson, United States District Judge for the Eastern District of New York, sitting by designation.

** The Clerk of the Court is respectfully directed to amend the caption to conform with the above.

United for Separation of Church and State as amici curiae *in support of Appellees* (on submission).

Appeal from a judgment of the United States District Court for the Northern District of New York (Sharpe, *C.J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the District Court is AFFIRMED.

Plaintiff-Appellant A.M., by and through her mother, Joanne McKay, appeals from the January 23, 2012, decision and order of the district court granting summary judgment to Defendant-Appellee Taconic Hills Central School District (the "School District") on all claims.[1] On appeal, A.M. seeks declaratory relief and damages from the School District under 42 U.S.C. § 1983 to redress violations of A.M.'s rights under the First and Fourteenth Amendments of the United States Constitution and Article I, Section 8 of the New York Constitution. We assume the parties' familiarity with the underlying facts and procedural history of this case, which we reference only as necessary to explain our decision to affirm.

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[1] The district court had previously granted a motion to dismiss with respect to Defendants Dr. Mark Sposato, in his official capacity as Superintendent of the School District, and Dr. Neil Howard, in his official capacity as Principal of Taconic Hills Middle School. *See* ECF No. 22.

I. Background

The following facts, contained in the record on the Defendants' motion for summary judgment, are recounted in the light most favorable to A.M. They are undisputed unless otherwise indicated.

Taconic Hills Middle School (the "Middle School") is part of the School District, which is a public school system organized under the laws of the State of New York. During the 2008-09 academic year, A.M. was a student in the eighth grade at the Middle School, and had been elected class co-president of the student council with fellow student A.S. By virtue of this position, both A.M. and A.S. were each permitted to deliver a "brief message" at the annual Moving–Up Ceremony (the "Ceremony"), which was scheduled for June 25, 2009, in the Middle School's auditorium.

Several days before the Ceremony, A.M. asked her English and Language Arts teacher, Jamie Keenan, to review her draft speech for "punctuation and grammar." Upon reading the speech, Keenan became concerned regarding the appropriateness of the final sentence in the speech, which read: "As we say our goodbyes and leave middle school behind, I say to you, may the LORD bless you and keep you; make His face shine upon you and be gracious to you; lift up His countenance upon you, and give you peace."[2] On June 24, 2009, Leanne Thornton, the

[2] A.M. later described this language as a "blessing" and indicated that she was "taught to give blessings and it was good to receive blessings from God."

faculty advisory of the student council, also reviewed the speech. Thornton expressed concerns similar to Keenan and recommended that Principal Neil Howard review the speech as well.[3] Howard then scheduled a meeting for the morning of June 25, 2009, with A.M. and A.S. to review their speeches for the Ceremony.[4]

At the meeting on June 25, after approving A.S.'s speech, Howard requested that A.M. remove the last sentence of her speech because it sounded "too religious" and because it could be perceived as an endorsement of one religion over another. A.M. refused to remove the lines and gave Howard pamphlets she and her mother had found on the internet describing the rights of public school students under the Free Speech Clause of the First Amendment. Howard then called A.M.'s mother, who objected to the removal of the language as well and requested that Howard speak with Superintendent

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[3] The parties appear to dispute whether Principal Howard had a policy of reviewing the students' speeches for the Ceremony beforehand, or whether he only did so in this case because A.M.'s speech was brought to his attention and so instituted a policy of review only after the events in the instant case. However, the parties do not dispute that the Middle School's principals typically heard the students' speeches during a rehearsal the morning of the Ceremony. The parties also do not dispute that Keenan, Thornton, and Howard all reviewed A.M.'s speech in this case and shared concerns regarding its appropriateness for the Ceremony.

[4] Neither Keenan, Thornton, nor Howard knew the precise source of the language in the final sentence of A.M.'s speech, which is a quotation from verses 24-26 of chapter 6 of the Book of Numbers of the Old Testament.

Sposato. Howard spoke with Sposato and the School District's legal counsel, who agreed that allowing A.M. to deliver the speech as written could violate the Establishment Clause. Sposato then called A.M.'s mother and informed her that A.M. would not be permitted to speak at the Ceremony unless she removed the last sentence from her speech. A.M. and her mother agreed to comply with this request.

Later that evening at the Ceremony, A.M. delivered her speech without the final sentence. The Ceremony was entirely funded and insured by the School District, held in the Middle School's auditorium, and publicized on materials bearing the School District's letterhead.[5] The Ceremony also featured banners and signs decorated with the Middle School's mascot and insignia, and the students received "diplomas" signifying their ascent to high school. The Ceremony was attended by the students and their families, the Middle School's faculty, and various School District administrators.

Shortly after the Ceremony, A.M. commenced this suit alleging violations of her rights under the Free Speech Clause of the First Amendment of the United States Constitution and under Article I, Section 8 of the New York Constitution.[6] On January

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[5] A.M. argues that the student council runs the Ceremony, but otherwise concedes that the Middle School funds and generally organizes the Ceremony.

[6] A.M. cites to several Establishment Clause cases in her brief, but does not otherwise raise an Establishment Clause claim. In addition, the district court decided this case solely on

25, 2011, the district court granted the Defendants' motion to dismiss with respect to Sposato and Howard as duplicative of the claims against the School District, but denied the motion to dismiss with respect to the School District. On January 23, 2012, the district court granted the School District's motion for summary judgment.

II. Discussion

A. Legal Standard

This Court reviews *de novo* a district court's grant of summary judgment. *See, e.g., Easterling v. Collecto, Inc.,* 692 F.3d 229, 232 (2d Cir. 2012). A grant of summary judgment should be affirmed "only where there is no genuine issue of material fact to be tried, and the facts as to which there is no such issue warrant the entry of judgment for the moving party as a matter of law." *Kaytor v. Electric Boat Corp.,* 609 F.3d 537, 545 (2d Cir. 2010) (citing Fed. R. Civ. P. 56(c)(2)). In making its determinations, the court deciding summary judgment should "view the facts and draw reasonable inferences in the light most favorable to the party opposing the summary judgment motion." *Scott v. Harris,* 550 U.S. 372, 378 (2007) (internal quotation marks and alteration omitted).

Free Speech Clause grounds. We therefore restrict our analysis to the Free Speech Clause.

B. Free Speech Claim

To determine whether the Defendants abrogated A.M.'s free speech rights, it is necessary first to determine the appropriate governing standard. If A.M.'s address for the Ceremony constituted "school-sponsored expressive activities," then the standard is given by *Hazelwood School District v. Kuhlmeier,* 484 U.S. 260 (1988). Under *Hazelwood,* educators may exercise editorial control over student speech "so long as their actions are reasonably related to legitimate pedagogical concerns." *Id.* at 273. If, on the other hand, A.M.'s address constituted "a student's personal expression that happens to occur on the school premises," *id.* at 271, then the standard is given by *Tinker v. Des Moines Independent Community School District,* 393 U.S. 503 (1969). Under *Tinker,* school officials may exercise editorial control over student speech only if the speech at issue would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school." *Tinker,* 393 U.S. at 509 (internal quotation marks omitted).[7]

We agree with the district court's determination as a matter of law that A.M.'s address for the Ceremony constituted "school-sponsored expressive

[7] The Supreme Court has also articulated two other standards governing restrictions on student speech not relevant to the instant case. *See Morse v. Frederick,* 551 U.S. 393 (2007) (addressing student speech that promotes illegal drug use); *Bethel Sch. Dist. No. 403 v. Fraser,* 478 U.S. 675 (1986) (addressing vulgar, lewd, obscene, or offensive student speech).

activities" and that *Hazelwood* thus provides the governing standard.[8] Student speech constitutes a "school-sponsored expressive activity" if observers, such as "students, parents, and members of the public[,] might reasonably perceive [the speech] to bear the imprimatur of the school." *Morse v. Frederick,* 551 U.S. 393, 405 (2007) (quoting *Hazelwood,* 484 U.S. at 271). In the instant case, the Ceremony was set to occur "at a school-sponsored assembly, to take place in the school [auditorium], to which parents of the [students] were invited." *Peck* ex rel. *Peck v. Baldwinsville Cent. Sch. Dist.,* 426 F.3d 617, 629 (2d Cir. 2005). In addition, the School District funded and managed the Ceremony, and the Middle School's name and insignia appeared prominently on banners, signs, and programs prepared specifically for the Ceremony. *See R.O.* ex rel. *Ochshorn v. Ithaca City Sch. Dist.,* 645 F.3d 533, 541 (2d Cir. 2011). In light of the School District's involvement in directing the Ceremony and in reviewing the speeches before they were delivered, we believe as a matter of law that a reasonable observer would perceive A.M.'s speech as being endorsed by the Middle School, and that *Hazelwood* thus provides the governing standard for

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[8] The parties did not substantively address the question of the type of forum represented by the Middle School auditorium at the Ceremony. We nonetheless assume without deciding that the district court correctly accepted the School District's "conclusory assertion that the school auditorium was a non-public forum." *A.M.,* 2012 WL 177954, at *3 n.4. In a non-public forum, "[r]estrictions on speech . . . need only be reasonable and viewpoint neutral" to survive constitutional scrutiny. *Peck* ex rel. *Peck v. Baldwinsville Cent. Sch. Dist.,* 426 F.3d 617, 626 (2d Cir. 2005) (internal quotation marks omitted).

determining the appropriateness of the Defendants' conduct.[9]

The operative question under *Hazelwood* is whether the Defendants' actions were "reasonably related to legitimate pedagogical concerns." 484 U.S. at 273. To determine whether the Defendants acted "reasonably," it is necessary to ascertain whether the Defendants' request that A.M. remove the final sentence of her speech constituted content-based or viewpoint-based restrictions on speech. Even under the deferential standard articulated in *Hazelwood,* viewpoint discrimination can only be justified by an "overriding" state interest. *Peck,* 426 F.3d at 633. Viewpoint discrimination occurs when the government seeks to regulate "speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Rosenberger v. Rector & Visitors of the Univ. of Va.,* 515 U.S. 819, 829 (1995). In the context of religious speech, viewpoint discrimination would include making a forum accessible to speakers expressing "all views about [secular] issues . . .

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[9] *See also Corder v. Lewis Palmer Sch. Dist. No. 38,* 566 F.3d 1219, 1228 (10th Cir. 2009) ("[I]n order to determine whether challenged speech is school-sponsored and bears the imprimatur of the school, a reviewing court should appraise the level of involvement the school had in organizing or supervising the contested speech . . . ."); *Lassonde v. Pleasanton Unified Sch. Dist.,* 320 F.3d 979, 985 (9th Cir. 2003) ("The graduation ceremony was a school-sponsored function that all graduating seniors could be expected to attend."); *Brody* ex rel. *Sugzdinis v. Spang,* 957 F.2d 1108, 1119 (3d Cir. 1992) ("The process for setting the format and contents of a graduation ceremony are more likely to resemble the tightly controlled school newspaper policies at issue in *Hazelwood* . . . .").

except those dealing with the subject matter from a religious standpoint." *Id.* at 830 (quoting *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.,* 508 U.S. 384, 393 (1993)).

By contrast, content discrimination entails the exclusion of a "general subject matter" from a forum, rather than a "prohibited perspective." *Bronx Household of Faith v. Bd. of Educ.,* 650 F.3d 30, 39 (2d Cir.) (quoting *Rosenberger,* 515 U.S. at 831), *cert. denied,* 132 S.Ct. 816 (2011). In the context of religious speech, content discrimination would entail excluding speech for which "there is no real secular analogue." *Id.* at 38 (quoting *Bronx Household of Faith v. Cmty. Sch. Dist. No. 10,* 127 F.3d 207, 221 (2d Cir. 1997) (Cabranes, *J.,* concurring in part and dissenting in part)). Where the government engages in content-based discrimination in the context of school-sponsored speech, the "*Hazelwood* standard does not require that the [government-imposed restrictions] be the *most* reasonable or the *only* reasonable limitations, only that they be reasonable." *Peck,* 426 F.3d at 630 (internal quotation marks omitted); *see also Marchi v. Bd. of Coop. Educ. Servs. of Albany,* 173 F.3d 469, 476 (2d Cir. 1999) ("[W]hen government endeavors to police itself and its employees in an effort to avoid transgressing Establishment Clause limits, it must be accorded some leeway, even though the conduct it forbids might not inevitably be determined to violate the Establishment Clause . . . ").

We believe that the final sentence in A.M.'s speech constituted purely religious speech and that the Defendants, in requesting that she remove it

from her address, were thus engaged in content-based discrimination. The final sentence in A.M.'s speech consisted of a direct quotation from the Old Testament calling for a divine blessing of the audience, rather than a statement offering a religiously-informed viewpoint on an otherwise secular subject matter. *See Rosenberger,* 515 U.S. at 830; *see also Bronx Household,* 650 F.3d at 39 (noting that a public school may lawfully exclude "the conduct of a certain type of activity — the conduct of worship services — and not . . . the free expression of religious views associated with it"). Statements of this nature have "no real secular analogue." *Bronx Household,* 650 F.3d at 38 (internal quotation marks omitted).[10] Our understanding of A.M.'s speech is confirmed by her own characterization of the sentence as a "blessing" motivated by her desire to deliver "blessings from God." *See id.* at 46 (examining the subjective intent of the speaker to determine the nature of the speech (citing *Christian Legal Soc'y v. Martinez,* 130 S.Ct. 2971, 2982-84 (2010)). We therefore conclude that the Defendants acted reasonably in requiring that A.M. remove the final sentence from her speech.

In addition to determining that the Defendants were engaged in content-based discrimination, we agree with the district court that the Defendants'

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[10] *Cf. Lee v. Weisman,* 505 U.S. 577, 603 (1992) (Blackmun, *J.,* concurring) ("There can be 'no doubt' that the 'invocation of God's blessings' . . . is a religious activity. In the words of *Engel,* the . . . prayer 'is a solemn avowal of divine faith and supplication for the blessings of the Almighty. The nature of such a prayer has always been religious.'" (quoting *Engel v. Vitale,* 370 U.S. 421, 424 (1962))).

desire to avoid violating the Establishment Clause represented a "legitimate pedagogical concern." "There is no doubt that compliance with the Establishment Clause is a state interest sufficiently compelling to justify content-based restrictions on speech." *Id.* at 40 (quoting *Capitol Square Review & Advisory Bd. v. Pinette,* 515 U.S. 753, 761–62 (1995) (plurality opinion)).[11] In the context of student speech, a "school must also retain the authority to refuse to sponsor student speech that might reasonably be perceived . . . to associate the school with any position other than neutrality on matters of political controversy." *Hazelwood,* 484 U.S. at 272 (internal citation omitted). As a result, we conclude that the Defendants were motivated by "legitimate pedagogical concerns" and that their actions thus complied with the *Hazelwood* standard. Accordingly, we affirm the district court's grant of summary judgment to the School District on A.M.'s free speech claim.

Because we affirm the district court's judgment with respect to A.M.'s federal cause of action, we correspondingly affirm the district court's dismissal of A.M.'s claim grounded in the New York State

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[11] *See also Corder,* 566 F.3d at 1228-29 (holding that so long as the *Hazelwood* test for whether speech bears a school's imprimatur is met, the "[legitimate] pedagogical [concern] test may be satisfied 'simply by the school district's desire to avoid controversy within a school environment'" (quoting *Fleming v. Jefferson Cnty. Sch. Dist. R-1,* 298 F.3d 918, 925-26 (10th Cir. 2002))); *Webster v. New Lenox Sch. Dist. No. 122,* 917 F.2d 1004, 1008 (7th Cir. 1990) (finding a school board's "legitimate concern with possible establishment clause violations" to be a sufficient reason to prohibit "the teaching of creation science to junior high school students").

Constitution as an inappropriate exercise of supplemental jurisdiction. *See* 28 U.S.C. § 1367(c).

We have considered all of A.M.'s other arguments and conclude that they are without merit. For the foregoing reasons, the judgment of the district court is AFFIRMED.

FOR THE COURT:
Catherine O'Hagan Wolfe,
Clerk of Court

United States Court of Appeals
Second Circuit
s/Catherine O'Hagan Wolfe

Filed: January 23, 2012

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

A.M., a Minor, by her Parent and Next Friend, **JOANNE McKAY**,

Plaintiff, **1:10-cv-20 (GLS/RFT)**

v.

TACONIC HILLS CENTRAL SCHOOL DISTRICT,

Defendant.

APPEARANCES:	**OF COUNSEL:**
FOR THE PLAINTIFF:	
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Gibbs Law Firm, P.A. 5666 Seminole Boulevard Suite 2 Seminole, FL 33772	DAVID C. GIBBS, ESQ.
FOR THE DEFENDANT:	
Girvin, Ferlazzo Law Firm 20 Corporate Woods Blvd. 2nd Floor Albany, NY 12211-2350	SCOTT P. QUESNEL, ESQ. PATRICK J. FITZGERALD, III, ESQ.

Gary L. Sharpe
Chief Judge

MEMORANDUM-DECISION AND ORDER

I. Introduction

Plaintiff A.M., a minor, by her parent and next friend, Joanne McKay, commenced this action under 42 U.S.C. § 1983 against defendant Taconic Hills Central School District ("Taconic"), alleging violations of her free speech rights under the First Amendment to the United States Constitution and Article I, Section 8 of the New York State Constitution. (*See* Compl., Dkt. No. 1.) Pending are the parties' cross-motions for summary judgment. (Dkt. Nos. 36, 37.) For the reasons that follow, Taconic's motion is granted and A.M.'s motion is denied.

II. Background[1]

During the 2008-2009 academic year, the student council elected A.M., an eighth grader in Taconic's middle school, to be a co-class president.[2] (Pl.'s Statement of Material Facts ("SMF") ¶¶ 1-2, Dkt. No. 36, Attach. 3.) By virtue of her position, A.M. was permitted to deliver a "brief message" at

[1] The facts are undisputed unless otherwise noted.

[2] Taconic is a K-12 public school system organized under the laws of the State of New York. (Def.'s Statement of Material Facts ("SMF") ¶ 1, Dkt. No. 37, Attach. 1.) "All grade levels of the Taconic Hills School District are housed within a single building in Craryville, New York, and share one main auditorium." (*Id.* ¶ 34.)

the annual Moving Up Ceremony ("Ceremony") scheduled for June 25, 2009 in the school auditorium. (Def.'s SMF ¶ 7; Pl.'s SMF ¶ 7.)

A few days before the Ceremony, A.M. asked her English teacher, Jamie Keenan, to look over her speech. (Def.'s SMF ¶ 8.) As Keenan read the speech, she came to the last sentence, which stated: "*As we say our goodbyes and leave middle school behind, I say to you, may the LORD bless you and keep you; make His face shine upon you and be gracious to you; lift up His countenance upon you, and give you peace*." (*Id.* ¶ 9.) Unsure if this sentence was appropriate for the Ceremony, Keenan advised A.M. to have Principal Neil Howard review the speech. (*Id.* ¶ 12.) Keenan's concern was shared by Leanne Thorton, the faculty advisor for the student council, after she read A.M. and her co-class president's speeches on June 24, 2009. (*Id.* ¶¶ 13-15.)

Though previous principals heard the speeches for the first time during the rehearsal on the morning of the Ceremony, Principal Howard, who was in his first year at Taconic's middle school, opted to go over them in his office. (Pl.'s SMF ¶¶ 20, 22, 28.) After reviewing A.M.'s speech, Principal Howard concurred with Keenan and Thorton's assessment, stating the closing line "sounded too religious." (Pl.'s SMF ¶ 30; Dkt. No. 43 ¶ 11.) A.M. disagreed and presented Principal Howard with literature on student free speech rights from the "Christian Law Association's web site." (Pl.'s SMF ¶ 29; Def.'s SMF ¶¶ 22-23.) However, this literature did not change his perspective, and Principal Howard advised A.M. that if she wished to deliver the speech, she would

have to remove the last sentence. (Def.'s SMF ¶¶ 23-24.) In response, A.M. asked Principal Howard to contact her mother, which he did shortly thereafter. (*Id.* ¶ 25.) During his conversation with A.M.'s mother, Principal Howard reiterated his assessment and proposed solution. (*Id.* ¶ 26.) However, A.M.'s mother was unsatisfied and requested that he contact Superintendent Mark Sposato about the speech. (*Id.* ¶¶ 27-28.) Principal Howard obliged and later that day met with Superintendent Sposato to discuss the matter. (*Id.* ¶ 29.)

Following his review of the speech, Superintendent Sposato sought advice from Taconic's legal counsel. (*Id.* ¶ 30.) According to Taconic, its legal counsel agreed that the message sounded religious and moreover, that "delivering the religious message at a school sponsored event could violate the Establishment Clause."[3] (*Id.* ¶ 31.) Based on this advice, Superintendent Sposato contacted A.M.'s mother and informed her that A.M. would not be permitted to give the speech unless the last sentence was removed. (*Id.*) Although she protested what she believed was "a violation of A.M.'s constitutional free speech rights," A.M.'s mother agreed to allow A.M. to deliver the speech without the last sentence. (*Id.* ¶ 32.)

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[3] Prior to the June 2009 Moving Up Ceremony, Taconic received complaints from the parents of a Jewish student, objecting to the display of a Christmas tree with ornaments on school property, and from the parents of a student who was a Jehovah's Witness, in response to the school's Halloween activities. (Def.'s SMF ¶¶ 58-59.)

The Ceremony began at approximately 6 p.m. in the school's auditorium. (Pl.'s SMF ¶ 7.) While A.M. avers the Ceremony was run by the student council, she concedes that it was "generally organized and overseen" by Taconic's administrators. (*See* Dkt. No. 43 ¶ 39.) Nevertheless, it is undisputed that Taconic provided all of the following for the Ceremony: the requisite funds and insurance; the official announcements, which were sent on school letterhead; the event programs; and the "diplomas." (Pl.'s SMF ¶¶ 4, 10; Def.'s SMF ¶¶ 35, 38, 44.) In addition to music by the school band, the Ceremony was decorated with school "banners and signs with [Taconic's] name, logo and mascot," as well as orange and white balloons, Taconic's colors. (Def.'s SMF ¶¶ 41-42.) Finally, Taconic provided the podium and the microphone for the speeches. (*Id.* ¶ 45.)

Although the Ceremony was neither mandatory nor graded, it was attended by the students' families, "Board of Education members, teachers, staff, administrators, students and community members." (Pl.'s SMF ¶¶ 6, 8; Def.'s SMF ¶ 37.) The Ceremony's speakers included Principal Howard, Board of Education President Ronald Morales and Taconic's high school valedictorian. (Def.'s SMF ¶ 43.) After being introduced by Principal Howard, A.M. began her speech with "'I'd like to take this opportunity to thank our families and friends for joining us tonight for our moving up celebration.'" (*Id.* ¶ 50.) Despite disagreeing with Taconic's perception of the last sentence—which she described as a "blessing"—A.M. delivered the speech in accordance with Principal Howard's instructions. (Pl.'s SMF ¶ 35; Def.'s SMF ¶

54.) Shortly thereafter, she commenced the instant suit.

In her Complaint, A.M. alleges that Taconic, Principal Howard and Superintendent Sposato violated her right to free speech as protected by the First Amendment of the United States Constitution, and Article I, Section 8 of the New York Constitution. (*See* Compl. ¶¶ 23-33, Dkt. No. 1.) In a January 25, 2011 Memorandum-Decision and Order, this court dismissed A.M.'s claims against Principal Howard and Superintendent Sposato in their official capacities as duplicative, but otherwise denied Taconic's motion to dismiss. (*See* Dkt. Nos. 12, 22.)

III. Standard of Review

The standard of review under Fed. R. Civ. P. 56 is well established and will not be repeated here. For a full discussion of the standard, the court refers the parties to its decision in *Wagner v. Swarts*, No. 1:09-cv-652, 2011 WL 5599571, at *4 (N.D.N.Y. Nov. 17, 2011).

IV. Discussion

Though a public school student's right to free speech is not "shed . . . at the schoolhouse gate," *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969), it is "not automatically coextensive with the rights of adults in other settings," *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986). This is so because of the "special characteristics" of the school environment and the need to ensure that student speech is consistent with the school's "basic educational

mission." *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988) (internal citations omitted). Ultimately, it is the province of the schools—and not the federal courts—to determine "what manner of speech" is appropriate for "the classroom or in school assembly." *Hazelwood*, 484 U.S. at 267 (quoting *Fraser*, 478 U.S. at 683).

Here, the success of either party rests in large part on the legal standard that is applied to the underlying facts. A.M. argues that *Tinker* governs the instant case because she was expressing a religious viewpoint. (*See* Dkt. No. 36, Attach. 1 at 10.) Taconic counters that A.M.'s speech was attributable to the school, and thus *Hazelwood* provides the appropriate framework. To this end, the court first discusses the controlling legal standard, and then, its application to the undisputed facts in this case.

A. School Sponsored Free Speech

The essence of A.M.'s argument is that *Hazelwood* is inapplicable because the Ceremony was neither part of Taconic's curriculum nor a pedagogical exercise. (*See* Dkt. No. 36, Attach. 1 at 9.) Conversely, Taconic claims "this is not a case where A.M.'s speech *happens* to occur on school grounds[;] . . . [r]ather, A.M.'s message was the School District's speech, or at least attributable to [it]." (*See* Dkt. No. 37, Attach. 2 at 16-17.) The court concurs with Taconic.[4]

[4] Notably, the parties' opted not to substantively address the type of forum at issue. *See, e.g.*, *Make the Rd. by Walking,*

In *Hazelwood*, the Supreme Court explained *Tinker*'s shortcomings in addressing school-sponsored speech as follows:

> The question whether the First Amendment requires a school to tolerate particular student speech—the question that we addressed in *Tinker*—is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech. The former question addresses educators' ability to silence a student's personal expression that happens to occur on the school premises. The latter question concerns educators' authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and

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Inc. v. Turner, 378 F.3d 133, 142-43 (2d Cir. 2004) (discussing the relationship between the level of scrutiny applied to a restriction on speech and "the nature of the forum" in which the speech occurs.) In spite of this omission, the court, after reviewing the uncontested facts, accepts Taconic's conclusory assertion that the school auditorium was a non-public forum. (*See* Dkt. No. 37, Attach. 2 at 12); *see also Hazelwood*, 484 U.S. at 267 (School facilities will only be deemed "public forums" when they have been opened for "indiscriminate use by the general public, or by some segment of the public, such as student organizations . . . . If the facilities have instead been reserved for other intended purposes, communicative or otherwise, then no public forum has been created, and school officials may impose reasonable restrictions on" student speech) (internal quotations and citations omitted)); *Peck. v. Baldwinsville Cent. Sch. Dist.*, 426 F.3d 617, 626 (2d Cir. 2005) (stating that "[r]estrictions on speech in a nonpublic forum need only be reasonable and viewpoint neutral" to survive constitutional scrutiny) (internal citations omitted)).

> members of the public might reasonably perceive to bear the imprimatur of the school. These activities may fairly be characterized as part of the school curriculum, *whether or not they occur in a traditional classroom setting,* so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences.

484 U.S. at 270-71 (emphasis added); *see also Poling v. Murphy*, 872 F.2d 757, 762 (6th Cir. 1989) (finding that a school election and election assembly were undoubtedly "'school sponsored' activities within the meaning of *Hazelwood*" because, *inter alia*, school officials "vetted the speeches in advance, . . . attempting to weed out or temper inappropriate content."). Simply put, "[i]f the speech at issue bears the imprimatur of the school and involves pedagogical interests, then it is school-sponsored speech." *Fleming v. Jefferson Cnty. Sch. Dist. R-1*, 298 F.3d 918, 924 (10th Cir. 2002).

Among other factors, "the level of involvement of school officials in organizing and supervising an event" is relevant in determining whether an activity bears the imprimatur of the school. *Fleming*, 298 F.3d at 925; *see also Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 307-08 (2000) (finding that a school endorsed a religious message where, *inter alia*, the school's public address system was used to deliver the message, and numerous indicia of the school, including banners and flags displaying the school's name, were present). Though the Court has yet to define *Hazelwood*'s parameters, the Tenth

Circuit concluded it contemplates any "activities that affect learning, or in other words, affect pedagogical concerns." *Fleming*, 298 F.3d at 925; *see also Poling*, 872 F.2d at 762 ("The universe of legitimate pedagogical concerns is by no means confined to the academic; . . . [it includes] discipline, courtesy, and respect for authority."). To this end, the Third, Ninth and Tenth Circuits each found graduation ceremonies to be "expressive activities" under *Hazelwood*. *See Brody v. Spang*, 957 F.2d 1108, 1122 (3d Cir. 1992); *Nurre v. Whitehead*, 580 F.3d 1087, 1095 (9th Cir. 2009), *cert. denied*, 130 S. Ct. 1937 (2010); *Corder v. Lewis Palmer Sch. Dist. No. 38*, 566 F.3d 1219, 1229 (10th Cir. 2009), *cert. denied*, 130 S. Ct. 742 (2009).

Here, Taconic provided all of the following for the Ceremony: the venue, *i.e.,* the school auditorium; the funding and insurance; the official announcements, which were printed on its letterhead; the event programs; the diplomas the students received; and the microphone and podium for the speeches. (Def.'s SMF ¶¶ 33, 35, 38, 44, 45; Pl.'s SMF ¶ 10.) In addition, there was music by the school band; "banners and signs with [Taconic's] name, logo and mascot"; and orange and white balloons—Taconic's colors—flanking the stage. (Def.'s SMF ¶¶ 41-42.) Finally, A.M. was not only introduced by Principal Howard, but she also began her speech with "I'd like to take this opportunity to thank our families and friends for joining us tonight for our moving up celebration."[5] (*See id.* ¶ 50.)

[5] Notably, A.M.'s speech, like the election speeches in *Poling*, 872 F.2d at 762, was reviewed and edited by Principal

Despite admitting these facts, (*see* Dkt. No. 43 ¶¶ 19-21, 33, 35, 38, 41-42, 44-45, 50), A.M. still avers the Ceremony was not a curricular event because it was a non-graded, voluntary activity run by the student council and not by Taconic. (*See* Dkt. No. 36, Attach. 1 at 9.) However, the *Hazelwood* Court explicitly stated its holding was not limited to "expressive activities [that] . . . occur in a traditional classroom setting." *See* 484 U.S. at 271. Furthermore, A.M. undermined her own argument. Not only did she fail to articulate the student council's role in planning and running the Ceremony, but she also conceded the student council was subject to faculty oversight, and "that the ceremony is run by" Taconic. (Def.'s SMF ¶ 13; Dkt. No. 43 ¶¶ 3, 13.)

In sum, the Ceremony was a school-sponsored expressive activity, which was supervised by Taconic's faculty and "designed to impart particular knowledge or skills to student participants and audiences." *Hazelwood*, 484 U.S. at 271. It follows that *Hazelwood*, and not *Tinker*, is controlling. *See id.*

B. <u>The Reasonableness of Taconic's Conduct</u>

Though she failed to directly address the *Hazelwood* test, A.M. claims that Taconic's censorship of the last sentence of her speech amounted to impermissible viewpoint

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Howard. (Def.'s SMF ¶¶ 19-21.) Although this fact is not dispositive, it demonstrates Taconic's belief that it would be accountable for any controversy resulting from A.M.'s speech.

discrimination. (*See* Dkt. No. 37, Attach. 1 at 12-18.) Taconic counters its conduct was reasonable in light of its desire to avoid violating the Establishment Clause.[6] (*See* Dkt. No. 37, Attach. 2 at 19-23.) Again, the court agrees with Taconic.

Under *Hazelwood*, "educators do not offend the First Amendment by exercising editorial control over the . . . content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns." 484 U.S. at 273. Where, as here, the imprimatur prong is fulfilled, "the pedagogical test is satisfied simply by the school district's desire to avoid controversy within a school environment." *Fleming*, 298 F.3d at 925-26 (collecting cases); *see also Peck*, 426 F.3d at 633 (citing *Widmar v. Vincent*, 454 U.S. 263, 270-71 ("concluding that avoidance of a violation of the Establishment Clause could constitute a compelling state interest to justify a content-based restriction in a limited public forum.")).

Here, Taconic sought to avoid controversy by removing the "blessing" from A.M.'s speech. Indeed, Principal Howard believed the last sentence "sounded too religious" and "might offend people."

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[6] While A.M.'s sole claim is a violation of her "free speech" rights, (*see* Compl. ¶¶ 23- 33), her submissions contain multiple references to Establishment Clause cases. (*See* Dkt. No. 36, Attach. 1 at 6-8.) With the exception of Taconic's assertion that it sought to avoid violating the Establishment Clause when it censored A.M.'s speech, (Def.'s SMF ¶ 31; Dkt. No. 37, Attach. 2 at 19), the court cannot discern the relevance of A.M.'s discussion of, and citation to, Establishment Clause precedent.

(Pl.'s SMF ¶ 30.) Given the past complaints Taconic received from the parents of the Jewish and Jehovah's Witness students, and their desire to avoid violating the Establishment Clause, (Def.'s SMF ¶¶ 31, 58-59), its decision to edit the last sentence of A.M.'s speech was reasonable.

Rather than explaining why the restriction was not content-based, A.M. asserts Taconic engaged in viewpoint discrimination, and that there were alternative measures to avoid censoring the speech. (Dkt. No. 36, Attach. 1 at 12-18.) Besides being unpersuasive, these arguments are unsubstantiated.

A.M.'s viewpoint discrimination claim is meritless. Unlike a subject matter or content restriction, viewpoint discrimination involves the targeting of "particular views taken by speakers on a subject." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995). While Taconic must "abstain from regulating speech when the specific motivating ideology . . . of the speaker is the rationale for the restriction," *Rosenberger*, 515 U.S. at 829, it is entirely permissible to "refuse to sponsor student speech that might reasonably be perceived . . . to associate the school with any position other than neutrality on matters of political controversy," *Hazelwood*, 484 U.S. at 272. Irrespective of whether Taconic knew the origin of the last sentence, or believed that it was not proselytizing—two points which A.M. belabors in her submissions—the restriction in question was content-based. (*See, e.g.*, Pl.'s SMF ¶ 31.)

Moreover, the availability of an oral or written disclaimer is irrelevant. (*See* Pl.'s SMF ¶ 42; Dkt. No. 36, Attach. 1 at 16-18.) As the Second Circuit stated in *Peck*, "[t]he *Hazelwood* standard does not require that the guidelines be the *most* reasonable or the *only* reasonable limitations, only that they be reasonable."[7] 426 F.3d at 630 (internal citations omitted). Notably, the Court in *Hazelwood* held that the principal's decision to remove two entire pages from the school newspaper, as opposed to just the offensive articles, was reasonable under the circumstances. *See* 484 U.S. at 274. By comparison, Taconic's restriction was *de minimus* given that it removed only the religious language.

Although Taconic remains subject to judicial scrutiny "when [its] decision to censor . . . student expression has no valid educational purpose," *Hazelwood,* 484 U.S. at 273, that is far from the case here. The Ceremony was a pedagogical exercise designed to "impart lessons on discipline, courtesy, and respect for authority," *Corder*, 566 F.3d at 1229, and Taconic's content-based restriction was reasonably related to its goal of maintaining neutrality. *See Peck*, 426 F.3d at 626. Because Taconic was permitted to censor A.M.'s speech, her rights under the First Amendment were not violated,

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[7] Throughout her submissions, A.M. insinuates that Taconic's conduct was impermissible because it did not have a formal policy for speech review. (*See, e.g.*, Pl.'s SMF ¶ 21.) However, a nearly identical argument was rejected by the Court in *Hazelwood*, where it stated "[t]o require such regulations in the context of a curricular activity could unduly constrain the ability of educators to educate." 484 U.S. at 273 n.6.

and Taconic is entitled to judgment as a matter of law. As such, Taconic's cross-motion for summary judgment is granted and A.M.'s motion is denied.

C. A.M.'s State Law Claim

In light of the court's decision with respect to A.M.'s federal cause of action, her sole remaining claim, which is based on a violation of the New York State Constitution, is dismissed as an exercise of supplemental jurisdiction is inappropriate in this case. *See* 28 U.S.C. § 1367(c).

V. Conclusion

WHEREFORE, for the foregoing reasons, it is hereby

ORDERED that Taconic's motion for summary judgment (Dkt. No. 37) is **GRANTED**; and it is further

ORDERED that A.M.'s motion for summary judgment (Dkt. No. 36) is **DENIED**; and it is further

ORDERED that all claims against Taconic are **DISMISSED**; and it is further

ORDERED that the Clerk close this case; and it is further

ORDERED that the Clerk provide a copy of this Memorandum-Decision and Order to the parties.

IT IS SO ORDERED.

January 23, 2012
Albany, New York

s/ Gary L. Sharpe
Gary L. Sharpe
Chief Judge
U.S. District Court

Filed: March 26, 2013

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 26th day of March, two thousand thirteen,

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A.M., a minor, by her Parent and Next Friend, Joanne McKay,

Plaintiff - Appellant,

ORDER

v. Docket No: 12-753

Taconic Hills Central School District,

Defendant - Appellees.

Appellant A.M., by her Parent and Next Friend Joanne McKay, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members

of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk

United States Court of Appeals
Second Circuit
s/Catherine O'Hagan Wolfe

Filed: October 10, 2011

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

A.M., a minor, by her parent and next Friend, JOANNE MCKAY,	**ELECTRONICALLY FILED**
Plaintiff,	**Civil Case No.: 1:10-cv-00020 (GLS/RFT)**
vs.	
TACONIC HILLS CENTRAL SCHOOL DISTRICT,	
Defendant.	

PLAINTIFF'S STATEMENT OF FACTS IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

GIBBS LAW FIRM, P.A.
5666 Seminole Blvd., Ste. 2
Seminole, FL 33772
Tel.: (727) 399-8300

and

KRISS, KRISS, &
BRIGNOLA, LLP

350 Northern Boulevard,
Third Floor, Suite 306
Albany, New York 12204
Tel.: (518) 449-2037

ATTORNEYS FOR
PLAINTIFF A.M.

PLAINTIFF'S STATEMENT OF FACTS

* * *

6. A.M. was not given a grade or academic credit for her speech. App. 79, 146.

7. A.M.'s Moving Up ceremony was held on Thursday, June 25, 2009 at 6 or 6:30 in the evening in the school auditorium. App. 1-2, 87, 118.

8. Attendance at the Moving Up ceremony is voluntary for students, family and friends. App. 84-85, 147.

9. As a part of the program, students and other attendees at the Moving Up ceremony recite the Pledge of Allegiance, which contains the words, "one nation, under God." App. 4, 89-90, 148, 187.

* * *

14. A.M. wrote her own speech for her Moving Up ceremony. App. 23.

* * *

Filed: October 28, 2011

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF THE STATE OF NEW YORK

A.M., a minor, by her parent and next Friend, JOANNE MCKAY,

Plaintiff,

-against- **Civil Case No.: 10-cv-0002 (GLS/RFT)**

TACONIC HILLS CENTRAL SCHOOL DISTRICT; DR. MARK A. SPOSATO, sued in his official capacity as Superintendent of Taconic Hills Central School District; and DR. NEIL HOWARD, sued in his official capacity as Principal of Taconic Hills Middle School,

Defendants.

STATEMENT OF MATERIAL FACTS PURSUANT TO LOCAL RULE 7.1(a)(3)

* * *

2. Each year, the School District hosts a ceremony for students completing the eighth grade and moving on to the ninth grade known as the "Moving Up" ceremony (Howard Aff., ¶ 3).

* * *

5. During the 2008-2009 academic school year, the Student Council elected co-class Presidents: Plaintiff A.M. and another student A.S. (Howard Aff., ¶ 3).

6. By virtue of their positions as co-class Presidents, both students were permitted to deliver a brief message at the "Moving Up" ceremony (Howard Aff., ¶ 3).

* * *

Filed: December 13, 2011

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

A.M., a minor, by her parent and next Friend, JOANNE MCKAY,	
Plaintiff,	**ELECTRONICALLY FILED**
vs.	
TACONIC HILLS CENTRAL SCHOOL DISTRICT; DR. MARK A. SPASATO, sued in his official capacity as Superintendent of Taconic Hills Central School District; and DR. NEIL HOWARD, sued in his official Capacity as Principal of Taconic Hills Middle School.	**Civil Case No.: 1:10-cv-00020 (GLS/RFT)**
Defendants.	

PLAINTIFF'S RESPONSE TO DEFENDANTS' STATEMENT OF MATERIAL FACTS

* * *

2. Admit.

* * *

5. Admit.

6. Admitted that it was traditional for the student council president(s) to give a speech at the "Moving Up" ceremony, but the student was not given a grade or academic credit for her speech. (Dkt. 36-4, pp. 2-5, 6, 9, 37-38, 79, 80, 146, 153, 163-65, 183-88).

* * *

Filed: November 14, 2011

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

A.M., a minor, by her parent
and next Friend,
JOANNE MCKAY,

Plaintiff,

ELECTRONICALLY FILED

-against-

Civil Case No.: 10-cv-00020 (GLS/RFT)

TACONIC HILLS
CENTRAL SCHOOL
DISTRICT; DR. MARK
A. SPOSATO, sued in his
official capacity as
Superintendent of Taconic
Hills Central School District;
and DR. NEIL HOWARD,
sued in his official capacity
as Principal of Taconic Hills
Middle School.

Defendants.

DEFENDANT'S RESPONSE TO PLAINTIFFS' STATEMENT OF MATERIAL FACTS

* * *

6. Admit.

7. Admit.

8. Admit, in so far as student, parents, family and friends are not required to attend the "Moving up" ceremony. Superintendent Sposato testified that the School District expects students and parents to attend the ceremony. *See* Dkt. No. 36-4, p. 147.

9. Admit.

* * *

14. Admit, only in so far as A.M. testified that she physically wrote her "Moving Up" ceremony speech without any assistance. A.M. further testified that she discussed the inclusion of the Biblical quotation at issue with her mother while drafting her message. *See* Quesnel Opp. Aff., ¶ 4, Ex. B, pp. 43-5.

* * *

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK ALBANY DIVISION

A.M., a minor, by her parent and next Friend, JOANNE MCKAY,

Plaintiff,

-against-

TACONIC HILLS CENTRAL SCHOOL DISTRICT; DR. MARK A. SPOSATO, sued in his official capacity as Superintendent of Taconic Hills Central School District; and DR. NEIL HOWARD, sued in his official capacity as principal of Taconic Hills Middle School,

Defendants.

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73 County Route 11a
Craryville, New York
June 6, 2011
9:22 a.m.

Deposition of NEIL LEE HOWARD, JR., a Defendant in the above-captioned matter, held at the above time and place before a Notary Public of the State of New York.

Valerie Tatavitto,
Shorthand Reporter

* * *

[28] [A120] Q. And what would be your concerns of perception?

A. My concerns that people would perceive it as us supporting a particular religious view or religious viewpoint.

Q. What particular religious view or viewpoint?

A. Again, that there is a higher being, there is a God, and I don't think that we -- I don't think -- whatever my personal beliefs are, I don't think that we have, or I have, the luxury to make those choices for people in believing or not believing whether there is a God or not.

* * *

[31] [A123] Q. Is it part of an academic curriculum that the school puts forward, these programs?

MR. FITZGERALD: Objection to form.

A. No.

* * *

[35] [A124] Q. How was A. selected to give a speech?

A. Her student council, the people in the student council, selected her as a co-vice president, and, traditionally, the president or co-vice presidents have said a few words at the ceremony.

Q. And this is a tradition that predates you, or is this something that you instituted when you became the principal?

A. As far as I know, this predates me.

* * *

[40] [A129] Q. Anybody get their grade reduced for not attending?

A. No, no.

Q. It's not an academic event?

[41] [A130] NEIL LEE HOWARD, JR.

A. No, it's not, but I would say that it is nice for -- see everyone all dressed up. It's nice for all the family pictures that are taken, and it's a nice honor for them.

* * *

[63] [A146] Q. Does the school have any written guidelines for students to use in composing their speeches?

A. Any written guidelines? No.

Q. Why not?

MR. FITZGERALD: Objection to form.

A. I think that each child has a very personal experience and their personal connections. I think that they can draw upon their personal experiences. I'm not sure why the school district does not have these. I'm just not aware of. The only thing that I've told students is to be appropriate and try to make it a little upbeat. That's pretty much just what I've told them. That's the guidance that they've received from me.

* * *

[77] [A152] Q. Did you believe that A. was expressing her own viewpoint in her closing blessing?

MR. FITZGERALD: Objection to form.

A. Yes.

Q. Did you believe A. was expressing her own viewpoint in giving well wishes in that phrase that you censored out?

MR. FITZGERALD: Objection to form.

A. Yes.

* * *

[117] [A416] Q. Yes. Converting. Encouraging conversion would probably be a fair dictionary

[118] [A164] NEIL LEE HOWARD, JR.

definition of proselytizing. And I'm asking you: Did you view her lines in the speech, that were removed, as proselytizing or encouraging a conversion?

MR. FITZGERALD: Using that definition.

A. I don't think so, no.

* * *

Ashley's speech

I'd like to take this opportunity to thank our families and friends for joining us tonight for our moving up celebration. This night is special for so many reasons. It's a celebration of overcoming difficulties and obstacles. It's a celebration of success and achievements. As everyone one of us, graduating from the eighth grade, prepares to enter into high school we bring along with us memories and friendships formed over the years. Although the class of 2013 was separated into three different groups, Hufflepuff, Ravenclaw, and Gryffindor, we still had the same expectations and goals even though we learned all in different ways by different people. The students of the class of 2013 stick together. We learn together and we also help each other along the way.

EXHIBIT
Plaintiff's 1
6/6/11 VT

In our middle school career we have accomplished so many things and have reached beyond our goals. During middle school we have made so many memories with our friends and teachers. Class trips, school activities, and class room discussions had a great impact on our lives and taught us a lot. We have grown in respect and in responsibility. Some of the memories that we made will stay with us forever.

As we leave behind a committed and dedicated staff, people so wonderful that there are not enough

adjectives to describe them, we say hello to the new. From the maintenance staff to the principle, they are all wonderful, but now is the time to change from our old ways and transform into young adults who have grown so much in knowledge and maturity. In middle school we have learned higher and more mature thinking in our work and actions, but in high school we will learn things that we never thought existed. Middle school has prepared us for high school and we are looking toward being prepared to live our lives.

To my fellow classmates I would like to give you a challenge to take a stand, be yourself, don't stop working hard, be strong, dream big. There's nothing that you can't accomplish. You only lives once, but if you do it right, once is enough. We have to grab this opportunity to make our life great and live it to its fullest. Graduating from eighth grade is one more step up the ladder to the rest of your life. Don't give up no matter how hard and bumpy the ride is, just jump on and enjoy it while you can. As we say our goodbyes and leave middle school behind, I say to you, may the Lord bless you and keep you; make His face shine upon you and be gracious to you; lift up His countenance upon you, and give you peace.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK ALBANY DIVISION

A.M., a minor, by her parent and next Friend, JOANNE MCKAY,

Plaintiff,

-against-

TACONIC HILLS CENTRAL SCHOOL DISTRICT; DR. MARK A. SPOSATO, sued in his official capacity as Superintendent of Taconic Hills Central School District; and DR. NEIL HOWARD, sued in his official capacity as principal of Taconic Hills Middle School,

Defendants.

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73 County Route 11a
Craryville, New York
June 7, 2011
10:26 a.m.

Deposition of the Defendant, TACONIC HILLS CENTRAL SCHOOL DISTRICT, by and through LEEANNE THORNTON, held at the above time and place before a Notary Public of the State of New York.

Valerie Tatavitto,
Shorthand Reporter

* * *

[19] [A230] Q. And these student presidents, or in A.'s case, co-president, they write their own speeches?

A. Yes, they do. I mean, that's part of -- it's their evening. So they write their speech and the only guidance, basically, they're given is keep it short. . . .

* * *

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK ALBANY DIVISION

A.M., a minor, by her parent and next Friend, JOANNE MCKAY,

Plaintiff,

-against-

TACONIC HILLS CENTRAL SCHOOL DISTRICT; DR. MARK A. SPOSATO, sued in his official capacity as Superintendent of Taconic Hills Central School District; and DR. NEIL HOWARD, sued in his official capacity as principal of Taconic Hills Middle School,

Defendants.

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73 County Route 11a
Craryville, New York
June 6, 2011
1:28 p.m.

Deposition of MARK A. SPOSATO, a Defendant in the above-captioned matter, held at the above time and place before a Notary Public of the State of New York.

Valerie Tatavitto,
Shorthand Reporter

* * *

[80] [A199] Q. . . . did you get any complaints about A.'s speech?

A. No.

Q. Would it have been appropriate if it had been high school --

A. No.

MR. FITZGERALD: Objection to the form.

MR. GIBBS: And I didn't even quite get the question fully out, but I think he answered it.

Q. It wasn't that this was middle school versus high school? You just believed it was too religious for any public school event?

A. In a school event.

Q. In your opinion?

A. Yes.

* * *