NO. 25-906

IN THE

# Supreme Court of the United States

E.D., a minor, by her parents and next friends, MICHAEL DUELL and LISA DUELL; NOBLESVILLE STUDENTS FOR LIFE,

*Petitioners,*

v.

NOBLESVILLE SCHOOL DISTRICT, et al.,

*Respondents.*

*On Petition for Writ of Certiorari to the U.S. Court of Appeals for the Seventh Circuit*

## REPLY BRIEF FOR PETITIONERS


JAMES A. CAMPBELL
TYSON C. LANGHOFER
CHRISTOPHER P. SCHANDEVEL
MATHEW W. HOFFMANN
ALLIANCE DEFENDING FREEDOM
44180 Riverside Pkwy
Lansdowne, VA 20176

JOHN J. BURSCH
*Counsel of Record*
ALLIANCE DEFENDING FREEDOM
440 First Street NW
Suite 600
Washington, DC 20001
(616) 450-4235
jbursch@adflegal.org

L. KATIE BUCKNER
SPENCER E. REHN
CHARITABLE ALLIES, INC.
3500 Depauw Blvd.
Suite 3090
Indianapolis, IN 46268

DAVID A. CORTMAN
CHLOE K. JONES
ALLIANCE DEFENDING FREEDOM
1000 Hurricane Shoals Rd. NE, Suite D-1100
Lawrenceville, GA 30043

*Counsel for Petitioners*

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases**

## REPLY ARGUMENT SUMMARY

This case presents a mature, 3–1–2 circuit split over when *Hazelwood*'s reduced speech protections apply. Pet.2–3. In three circuits, a school need merely show that student speech might reasonably be perceived as bearing the school's imprimatur. *Id.* at 18–20. In the others, a school must *also* show that the speech is part of the curriculum, though there is a secondary split over what is "curriculum." *Id.* at 20–23.

Respondents say there's "no circuit split that requires review by this Court." Opp.17. But Respondents concede that at least two circuits require a showing that student speech is part of the curriculum. Opp.14–17 (discussing *Bannon* v. *School Dist. of Palm Beach Cnty.*, 387 F.3d 1208 (11th Cir. 2004) (per curiam), and *Walz* v. *Egg Harbor Twp. Bd. of Educ.*, 342 F.3d 271 (3d Cir. 2003)). And that conflicts with what the Seventh Circuit held below.

That difference is outcome determinative. Contra Opp.19. After all, a flyer posted by a "noncurriculum-based" club that is "student-led and initiated," Pet.5, is not curricular. Indeed, the Seventh Circuit below acknowledged that Petitioners' speech was "extracurricular," Pet.App.21a, yet held it could be censored based on a "risk of mistaken attribution," App.12a. That's what *Lemon*-style, reasonable-observer tests create: heckler's vetoes and inconsistent results.

Finally, this case presents a clean vehicle. The parties agree there are no "material" fact disputes. Opp.7. And Petitioners asked the lower courts to "apply *Tinker*, rather than *Hazelwood*" because the speech here was extracurricular. Opp.18. The petition should be granted.

## ARGUMENT

### I. A mature circuit split exists.

This Court held in *Hazelwood* that schools can "exercise greater control over" student expressive activities that observers "might reasonably perceive to bear the imprimatur of the school … *so long as*" those activities "may fairly be characterized as part of the school curriculum," meaning "they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences." *Hazelwood Sch. Dist.* v. *Kuhlmeier*, 484 U.S. 260, 271 (1988) (emphasis added).

Distilling that holding to a simple, two-part test, the Eleventh Circuit says that "*Hazelwood* controls all expression that (1) bears the imprimatur of the school, *and* (2) occurs in a curricular activity." *Bannon*, 387 F.3d at 1214 (emphasis added). Similarly, the Sixth Circuit says that *Hazelwood* applies to "expressive activities that are [1] sponsored by the school *and* [2] may fairly be characterized as part of the school curriculum." *Curry* v. *Hensiner*, 513 F.3d 570, 577 (6th Cir. 2008) (emphasis added) (citation modified).

In contrast, other circuits have rejected "this reading of *Hazelwood* [as] too narrow." *Fleming* v. *Jefferson Cnty. Sch. Dist. R-1*, 298 F.3d 918, 924 (10th Cir. 2002). That created the 3–1–2 circuit split the court below joined when it applied *Hazelwood* to allow Respondents to censor Petitioners' admittedly "*extra*-curricular" speech. Pet.App.21a (emphasis added).

Unable to refute that split, Respondents try two moves to deny the need for review. Opp.17. First, they say the Sixth and Eleventh Circuits have collapsed the two prongs into a single showing. Opp.15. Second, they claim the Third and Eleventh Circuits are applying a "*broad* definition" of curriculum "under *Hazelwood*." Opp.14, 17. Neither move works. And to the extent there is confusion in the circuits about how broadly to define curriculum, that only strengthens the need for review.

### A. The Sixth and Eleventh Circuits have *not* collapsed the imprimatur and curricular prongs into a single showing.

Respondents try to equate the circuits that require a curricular showing with those that do not by asserting that all of them are essentially doing the same thing. Specifically, Respondents say the Sixth and Eleventh Circuits "recognize that under *Hazelwood* speech perceived as bearing the imprimatur of the school is curricular." Opp.15.[1]

In other words, Respondents claim that, in these circuits, simply satisfying the imprimatur prong satisfies the curricular prong. That would make these circuits like the Seventh and Tenth Circuits—which don't apply the curricular prong at all—if it were true. But it's not.

---

[1] Although Respondents mention "the *Third* Circuit [and] the Eleventh Circuit" in this discussion, it's clear from context they mean the *Sixth* and Eleventh Circuits. Opp.15 (emphasis added).

Like *Hazelwood*, the Sixth and Eleventh Circuits hold that both the imprimatur and the curricular prongs must be met. In the Eleventh, "*Hazelwood* controls all expression that (1) bears the imprimatur of the school, *and* (2) occurs in a curricular activity." *Bannon*, 387 F.3d at 1214 (emphasis added). The Sixth follows the same approach. *Curry*, 513 F.3d at 577 (quoting equally conjunctive language). And both courts' reasoning confirms that they treat the two prongs separately.

For example, the Eleventh Circuit in *Bannon* analyzed each prong in a separate paragraph. 387 F.3d at 1214. First, the Court explained why it thought there was "no question students, parents, and other members of the public might reasonably believe" the student expression "[bore] the imprimatur of the school." *Ibid.* Second, the Court explained why it thought the "*real question* [was] whether [that] expression occurred in the context of a curricular activity." *Ibid.* (emphasis added). For its part, the Sixth Circuit in *Curry* separated its discussion of the curricular nature of the speech, 513 F.3d at 577, from its footnote addressing the distinct imprimatur issue, *id.* at 577 n.1.

Neither court suggests that "speech perceived as bearing the imprimatur of the school" is necessarily "curricular." Contra Opp.15. It is Respondents who conflate the two issues. For example, in discussing *Bannon*, Respondents claim the Eleventh Circuit concluded the murals there were curricular because they "were in prominent locations near the school's main office and in the main hallway," and a reasonable observer would think the school set guidelines for and approved them. Opp.15.

But that is *not* why the court held the murals were curricular. It's why the court held the murals "[bore] the imprimatur of the school." *Bannon*, 387 F.3d at 1214. As *Hazelwood* requires, the court went on to hold that the murals were curricular because they were "(1) 'supervised by faculty members,' and (2) 'designed to impart particular knowledge or skills to student participants and audiences.'" *Ibid.* (quoting *Hazelwood*, 484 U.S. at 271). Accord *Jane Doe I* v. *Valencia Coll. Bd. of Trs.*, 838 F.3d 1207, 1211 (11th Cir. 2016) (similarly breaking down the curricular prong into those separate facets).

By conflating the two prongs, Respondents simply parrot what circuits on the other side of the split have done. Consider the Fifth Circuit's melded analysis in *Morgan* v. *Swanson*: speech that some people "might reasonably perceive to bear the imprimatur of the school … *is* speech that occurs within the context of school-sponsored activities, or activities that may fairly be characterized as part of the school curriculum." 659 F.3d 359, 375 (5th Cir. 2011) (en banc) (emphasis added) (citation modified). Under that test, whether a reasonable person might believe the speech bore the school's imprimatur is the "critical inquiry" under *Hazelwood*. *Id.* at 376, 387. No separate curricular inquiry exists.

The same is true in the Seventh Circuit. The court below ignored the curricular question entirely, Pet.App.10a–13a, 17a, because it believed the *only* "proper inquiry [is] whether the speech bears the school's imprimatur." Pet.App.13a. These fundamental analytical differences—not mere "different set[s] of facts," Opp.14—frame the deep and mature split this Court should resolve.

Respondents are also wrong that "the outcome of [this] case would be the same even under" the Sixth and Eleventh Circuits' approach. Opp.3, 19. Just last year, the Sixth Circuit applied *Tinker*, not *Hazelwood*, to student expression that occurred within the context of a "school-organized activity" because it "was *not* a supervised or required assignment or otherwise part of the curriculum." *C.S.* v. *McCrumb*, 135 F.4th 1056, 1062 n.4 (6th Cir. 2025) (emphasis added). Likewise, in the Eleventh Circuit, "*Hazelwood* only applies to expression that occurs in the context of curricular activities, as opposed to noncurricular activities." *Bannon*, 387 F.3d at 1214.

By contrast, in the Fifth, Seventh, and Tenth Circuits—and likely the Third—the noncurricular nature of the school-organized activity would *not* have been a basis for escaping *Hazelwood*. Accord *K.A.* v. *Pocono Mountain Sch. Dist.*, 710 F.3d 99, 111 n.6 (3d Cir. 2013) (emphasizing *Walz*'s looser "*organized and structured educational activity*" standard).

The decision below proves the point: the "extra-curricular" nature of Petitioners' speech was not enough to trigger *Tinker* under the Seventh Circuit's imprimatur-only approach. But if this case had arisen in the Sixth or Eleventh Circuits, those courts would have applied *Tinker*. And because there was zero evidence Petitioners' meeting flyers would have caused any "material and substantial interference with schoolwork or discipline," *Tinker* v. *Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969), the case necessarily would have come out differently.

Of equal concern, other circuits—like the Seventh Circuit below—have interpreted "imprimatur" more broadly than *Hazelwood*. Pet.App.11a–13a. Some of those circuits equate imprimatur with mere "sanction" or "approval." *Morgan*, 659 F.3d at 376. But "schools do not endorse everything they fail to censor." *Board of Educ. of Westside Cmty. Schs.* v. *Mergens*, 496 U.S. 226, 250 (1990) (O'Connor, J., for a plurality); accord *C.H.* v. *Oliva*, 226 F.3d 198, 213 (3d Cir. 2000) (Alito, J., dissenting) (making the same point in a case involving a school's censorship of a kindergarten student's poster expressing thankfulness for Jesus). This Court should grant review, clear up the confusion, and protect student speech under *Tinker*.

### B. If some circuits define "curricular" differently, that doesn't negate the split; it's another reason to grant review.

Respondents' second attempt to minimize the circuit split—claiming circuits like the Eleventh and the Third apply a broad definition of curriculum—fares no better. Addressing *Bannon*, they fault Petitioners for not highlighting portions of the Eleventh Circuit's discussion that "emphasized the *broad* definition of 'curricular'" the court applied. Opp.14. Respondents then say the Third Circuit's decision in "*Walz* stands for the broader authority of elementary schools to regulate speech" and set "the appropriate curricular standards in kindergarten and first grade when children are most impressionable." *Id.* at 15–16.

Those points highlight the need for review. *Ibid.* First, by admitting that *some* circuits impose a curricular requirement, Respondents concede the circuit split exists.

Second, to the extent there is a secondary split over what is "curricular," that's an additional reason to grant review. In *Curry*, the Sixth Circuit concluded that classroom exercises where students created, marketed, and sold products were curricular because they were actually "part of the fifth grade curriculum." 513 F.3d at 577 (citing *Hazelwood*, 484 U.S. at 271). In *Walz*, by contrast, the Third Circuit broadly reasoned that *classroom holiday parties* qualify as curricular because they have a "curricular purpose to teach social skills and respect for others in a festive setting." 342 F.3d at 279. Such a broad definition runs the risk of sweeping in *all* forms of student speech. Students work on their social skills anytime schools let them speak *in any setting*. But that cannot be the law. That's why the petition placed the Third Circuit in a different group than the Sixth and Eleventh Circuits. And the confusion these differing standards create—not to mention the disparate results—strengthens the necessity for review.

As for the circuits that dispense with a curricular requirement—like the Fifth, Seventh, and Tenth—First Amendment protections for students are vanishingly small. After all, courts can conclude that nearly *any* student speech might be erroneously attributed to the school. In the Seventh Circuit, it's enough that a student flyer appear on school walls near announcements for other school events. Pet.App.12a. Even if a flyer contains the name and logo of the sponsoring student group—like E.D.'s flyer here, Pet.8—passersby might mistakenly see it "as reflecting the school's endorsement." Pet.App.12a. In the Fifth, it's enough that the speech appears to be sanctioned or approved by the school. *Morgan*, 659 F.3d at 376.

In sum, this case presents an ideal opportunity for the Court to reaffirm *Hazelwood*'s curricular requirement and what it means for speech to be curricular. A student's free-speech rights should not depend on the circuit where she happens to attend school.

## II. The majority rule perpetuates *Lemon*'s now-defunct reasonable-observer test, limiting even college-student speech.

Respondents don't deny the many problems with *Lemon*-style rules that turn entirely on speculation about what a "reasonable observer" might think. See Pet.24. Nor do they deny that the Seventh Circuit's truncated analysis converts *Hazelwood* into a *Lemon*-style test for student speech claims. Instead, they say Petitioners argue that (1) *Lemon* itself "abandoned a 'reasonable observer' test," and (2) *Hazelwood* erred in adopting such a test with its imprimatur language. Opp.17. But that's not Petitioners' argument.

Petitioners' initial point is that "[t]his Court 'long ago abandoned' a test like the majority rule here—*'Lemon* and its endorsement test offshoot.'" Pet.24 (quoting *Kennedy* v. *Bremerton Sch. Dist.,* 597 U.S. 507, 534 (2022)). Petitioners' second point is that "[t]he Fifth, Seventh, and Tenth Circuit's reasonable-observer rule"—like the discredited *Lemon* test—"requires courts to undertake a similarly fraught task for student speech." *Ibid.* As *amicus* correctly explains, "[b]ecause this Court in *Hazelwood* intentionally tied the imprimatur inquiry to curricular, school-sponsored speech, third-party offense alone could not silence students' speech." TPUSA.Am.Br.6. By dropping the curricular requirement, "the Seventh Circuit severed that critical link," allowing the

"imprimatur inquiry [to] function[] as a 'modified heckler's veto.'" *Ibid.* (quoting *Kennedy,* 597 U.S. at 534). In the Sixth and Eleventh Circuits, enforcing the curricular requirement avoids that bad result.

The Sixth and Eleventh Circuits' approach doesn't denigrate *Hazelwood*—it stays faithful to it. Pet.25. *Hazelwood* recognized that "[e]ducators are entitled to exercise greater control over" student expression that (1) the public might "reasonably perceive to bear the imprimatur of the school … *so long as*" (2) the speech "may fairly be characterized as part of the school curriculum." 484 U.S. at 271 (emphasis added). That greater level of control over curricular speech that *also* bears the school's imprimatur is necessary "to assure that participants learn whatever lessons the activity is designed to teach" and to ensure "that the views of the individual speaker are not erroneously attributed to the school." *Ibid.*

But not everything a student says at school runs the risk of being "erroneously attributed to the school." *Ibid.* And for noncurricular speech like Petitioners' flyers, there is no need "to assure that participants learn" any specific lesson the school is trying to teach; that's not the point of allowing student clubs to advertise meetings. *Ibid.*

Separately, Respondents confirm the reasonable-observer test's misadventures on college campuses. Opp.20. Lower courts have extended *Hazelwood* far beyond its facts, ignoring the opinion's explicit disclaimer of application to colleges. Pet.26. In Respondents' words, those courts have upheld a prior-approval requirement for an "independent news publication written by students, a university's restriction

on distributing campaign literature, and a disciplinary action for a student's lack of professionalism." Opp.20. To be sure, the petition does *not* ask whether *Hazelwood* has any application to college-student speech. Contra Opp.19–20. But this Court's proper application of *Hazelwood*'s curricular requirement would help rein in those expansive applications.

**III. This is a clean vehicle to resolve the split.**

As Respondents admit, both lower courts agreed that the reasonable-observer test controls whether *Hazelwood*'s less-protective standard applies to Petitioners' speech. Opp.i, 10. Respondents also agree there are no disputes of "material" fact.[2] *Id.* at 7; Pet.30. This case cleanly presents the legal issue dividing the circuits.

So Respondents allege waiver. Opp.18. They're wrong. Petitioners consistently argued to both courts below that *Hazelwood* did not apply to their student-club flyers because the flyers were extracurricular.

Indeed, Respondents *concede* that Petitioners "argued to apply *Tinker*, rather than *Hazelwood*." Opp.18. And far beyond the "two sentences" Respondents cite, *ibid.*, Petitioners told the district court: "at issue here is not a school paper, but a student-led club" and "student club activities, including the hanging of flyers, are not included in the [*Hazelwood*] analysis," Doc. 164 at 4.

---

[2] The panel said Respondents "testified that, in practice, administrators expected student club flyers to include only the club's name and the meeting's time, date, and location, and to exclude any 'disruptive' or 'political' content." Pet.App.4a. That's wrong, see Pet.6, but immaterial.

Petitioners' Seventh Circuit opening brief "expanded," Opp.18, on that argument: "activities that have the school's 'imprimatur' 'may fairly be characterized as part of the school curriculum'" if they are "'supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences.'" CA7 Op. Br. 23 (quoting *Hazelwood*, 484 U.S. at 271). So too for the reply: "*Hazelwood* involved a school-sponsored newspaper—part of the educational curriculum and a regular classroom activity"—while Petitioners' flyers were not. CA7 Reply Br. 3–4 (citation modified). And the en banc petition: Petitioners' "student club was not part of a class nor designed to teach a specific lesson," so the panel misapplied *Hazelwood*. CA7 Pet. 7.

In sum, Petitioners' "imprimatur-related argument," Opp.18, used *Hazelwood*'s language consistent with "its explicit tie to curricular programs 'designed to impart particular knowledge or skills.'" Pet.18 (quoting *Hazelwood*, 484 U.S. at 271). The problem wasn't the legal issue's framing but the Seventh Circuit's extension of *Hazelwood* far beyond its limits—to apply to *any* speech someone might incorrectly think the school endorses. That's why this Court should grant the petition.

The Fifth, Seventh, and Tenth Circuits' reasonable-observer rule licenses school administrators to censor views with which they disagree. They can wield *Hazelwood* to squelch Petitioners' pro-life speech or punish a college student for his social-media electioneering. Pet.29–30.

That transforms our "nurseries of democracy," *Mahanoy Area Sch. Dist.* v. *B.L.*, 594 U.S. 180, 190 (2021), into "enclaves of totalitarianism," *Tinker*, 393 U.S. at 511. The Court should grant the petition and resolve the well-defined circuit split on this important legal question presented.

## CONCLUSION

For the foregoing reasons, and those discussed in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

JAMES A. CAMPBELL
TYSON C. LANGHOFER
CHRISTOPHER P. SCHANDEVEL
MATHEW W. HOFFMANN
ALLIANCE DEFENDING FREEDOM
44180 Riverside Pkwy
Lansdowne, VA 20176

L. KATIE BUCKNER
SPENCER E. REHN
CHARITABLE ALLIES, INC.
3500 Depauw Blvd.
Suite 3090
Indianapolis, IN 46268

JOHN J. BURSCH
*Counsel of Record*
ALLIANCE DEFENDING FREEDOM
440 First Street NW
Suite 600
Washington, DC 20001
(616) 450-4235
jbursch@adflegal.org

DAVID A. CORTMAN
CHLOE K. JONES
ALLIANCE DEFENDING FREEDOM
1000 Hurricane Shoals Rd.
NE, Suite D-1100
Lawrenceville, GA 30043

MARCH 2026