No. 18-1438

IN THE

Supreme Court of the United States

CALEIGH WOOD,

Petitioner,

v.

EVELYN ARNOLD, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

EDMUND J. O'MEALLY
Counsel of Record
LISA Y. SETTLES
ANDREW G. SCOTT
PESSIN KATZ LAW, P.A.
901 Dulaney Valley Road, Suite 500
Towson, Maryland 21204
(410) 938-8800
eomeally@pklaw.com

Counsel for Respondents

289256

COUNSEL PRESS

(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

It is well-settled that public school authorities, not the courts, are charged with the responsibility of deciding the appropriate parameters of classroom speech, and that context is crucial for purposes of First Amendment analysis. It is further well-settled that, while government may not generally compel the speech of private actors, the First Amendment rights of public school students in a classroom setting are not coextensive with the rights of adults in other settings. In this case, the Fourth Circuit held that two statements concerning Islamic beliefs taught in a high school world history course did not violate Petitioner Caleigh Wood's First Amendment rights under the Establishment Clause or the Free Speech Clause because, viewed in context, they did not impermissibly endorse any religion nor did they compel Wood to profess any belief.

The questions presented are:

1. Whether statements concerning religious matters, presented as part of a world history class, violate the Establishment Clause?

2. Whether requiring a public school student to complete an assignment that is reasonably related to legitimate pedagogical concerns but that nevertheless conflicts with the student's personal religious views violates the Free Speech Clause?

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INTRODUCTION

Decades ago this Court made clear that public school authorities, not the courts, are charged with the responsibility of deciding what speech is appropriate in the classroom and that, for purposes of First Amendment analysis, context is crucial. *See Hazelwood v. Kuhlmeier*, 484 U.S. 260, 267 (1988) (citing *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986) for the proposition that "[t]he determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board"); *County of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 597 (1989) ("[T]he effect of the government's use of religious symbolism depends on its context."); *Lynch v. Donnelly*, 465 U.S. 668, 679-80 (1984) ("Focus exclusively on the religious component of any activity would inevitably lead to its invalidation under the Establishment Clause."); *see also Am. Legion v. Am. Humanist Assoc.*, 588 U.S. ___ (2019) ("*American Legion*") (Slip. Op. at 2) (explaining that, with regard to the Court's Establishment Clause analysis of a Latin Cross war memorial, "the adoption of the cross as the Bladensburg memorial must be viewed in . . . historical context"). This Court has also long held "that the First Amendment rights of students in the public schools 'are not automatically coextensive with the rights of adults in other settings,' and must be 'applied in light of the special characteristics of the school environment." *Hazelwood*, 484 U.S. at 266 (internal citation omitted) (quoting *Bethel*, 478 U.S. at 682, and *Tinker v. Des Moines Indep. Comm. Sch. Dist.*, 393 U.S. 503, 506 (1969), respectively).

Contrary to Wood's contention, this is not a case in which a public school made "preferential statements about one religion over another," Petition ("Pet.") at i., nor is it a case wherein Wood "was required to *profess* in writing that 'There is no god but Allah and Muhammad is the messenger of Allah.'" Pet. 3 (emphasis added).[1] Rather, as the Fourth Circuit correctly concluded, this is a case wherein the materials at issue, viewed within the context in which they were presented, satisfied all three of the prongs set forth in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and "the record is clear that the *shahada* assignment did not require Wood to profess or accept the tenets of Islam." Petition Appendix ("Pet App.") 19.

In short, this Court should deny Wood's petition for writ of certiorari because the Fourth Circuit's opinion was decided in a manner consistent with this Court's well-settled precedent regarding the limits on students' First Amendment rights in the Nation's public schools.

STATEMENT OF THE CASE

A. Factual History

Wood attended La Plata High School, a public high school in Charles County, Maryland, as an 11th grade student during the 2014-2015 school year (the "Relevant Period"). Pet. App. 22. During the Relevant Period, Principal Evelyn Arnold was the school principal at La Plata, and Vice Principal Shannon Morris was one of several vice principals assigned to La Plata. Pet. App. 3.

World History is a required course mandated by the Maryland State Department of Education, is part of the

1. The Fourth Circuit defined this statement as "the *shahada* assignment." Pet. App. 5.

Charles County Public Schools ("CCPS") social studies curriculum, and is taught in the 11th grade at La Plata. Pet. App. 22. During the Relevant Period, Wood was enrolled in a World History course taught by Trevor Bryden. Pet. App. 22. The smallest unit of the course, encompassing five days, was entitled "The Muslim World," which was "designed to explore, among other things, formation of Middle Eastern empires including the basic concepts of the Islamic faith and how it along with politics, culture, economics, and geography contributed to the development of those empires." Pet. App. 4.

As part of "The Muslim World" unit, students were presented with a Power Point slide entitled "Islam Today" which instructed students on the differences between "peaceful Islam" and "radical fundamental Islam" and contained, among other things, the statement "Most Muslim's faith is stronger than the average Christian," which the Fourth Circuit called "the comparative faith statement." Pet. App. 4, 72 (underlining in original). Additionally, Wood and her classmates were required to complete a fill-in-the-blank worksheet to provide missing words within the statements that comprise the "Five Pillars of Islam," including the statement "There is no god but Allah and Muhammad is the messenger of Allah,"[2] which, as noted above, the Fourth Circuit called "the *shahada* assignment." Pet. App. 4-5, 23, 63-64.[3] Wood

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2. The underlined words reflect the parts of the statement that the students were required to complete. Pet. App. 5 n.1.

3. The Fourth Circuit collectively referred to the comparative faith statement and the *shahada* assignment as the "challenged materials." Pet. App. 5. Although Wood objected to other portions of the world history curriculum, Wood waived those arguments by

refused to complete several assignments in the unit which had the effect of lowering her percentage grade but not her final letter grade. Pet. App. 5.

Neither Principal Arnold nor Vice Principal Morris ever spoke with Wood about their religious beliefs, nor did they suggest Wood practice the Islamic faith. Pet. App. 24. Neither Principal Arnold nor Vice Principal Morris ever directed Wood to recite the five pillars of the Islamic faith, pledge allegiance to Allah, or profess the *Shahada*, nor did they direct Wood to profess or write out faith statements concerning Islam. Pet. App. 24.

B. Proceedings Below

In January 2016, Wood sued the Board of Education of Charles County (the "Board"), Principal Arnold, and Vice Principal Morris, asserting claims for violation of the Establishment Clause, the Free Speech Clause, Title IX of the Education Amendments of 1972, Title VI of the Civil Rights Act of 1964, and Article 36 of the Maryland Declaration of Rights ("Article 36"). Pet. App. 26.[4] The district court subsequently dismissed all claims against

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failing to raise them in her opening brief in the Fourth Circuit. Pet. App. 17.

4. At the time the Complaint was filed, Wood was a minor and the suit was therefore initially filed by her parents on her behalf. Pet. App. 5. The Complaint was later amended to name Ms. Wood as a plaintiff once she reached the age of majority. *Id.* Wood's father also brought claims in his own right against Respondents under the First Amendment (for retaliation) and the Fourteenth Amendment (for violation of due process), but those claims were dismissed by the federal district court and were not appealed to the Fourth Circuit. Pet. App. 6.

the Board, as well as those against Principal Arnold and Vice Principal Morris in their official capacities, leaving only the Establishment Clause and Free Speech clause claims against Principal Arnold and Vice Principal Morris in their individual capacities. Pet. App. 26-27.[5]

In March 2018, the district court granted summary judgment in favor of Respondents, reasoning that while the First Amendment "prohibits the sponsorship, financial support, and active involvement of the sovereign in religious activity" and "prevents the government from prohibiting speech or compelling individuals to express certain views," it "does not afford the right to build impenetrable silos, completely separating adherents of one religion from ever learning of beliefs contrary to their own," "[n]or . . . does it prohibit a high school teacher from leading a purely academic study of a religion that may differ from the religious beliefs of some of his students." Pet. App. 20-21.[6]

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5. Ms. Wood's Article 36 claim, which is read *in pari materia* with the First Amendment, also survived, but Ms. Wood did not appeal the district court's ultimate ruling on that claim in Respondents' favor to the Fourth Circuit.

6. Near the end of discovery, Ms. Wood filed a Motion to Amend to add Kimberly Hill (Superintendent of CCPS), Amy Hollstein (Assistant Superintendent of Curriculum and Instruction for CCPS), Jack Tuttle (Social Studies Consent Specialist for CCPS), and Mr. Bryden (the classroom teacher) as additional defendants. Pet. App. 50. In its Memorandum Opinion granting summary judgment in Respondents' favor, the district court denied Wood's Motion to Amend as moot insofar "as the Court evaluated the alleged constitutional violations in their entirety, without regard to which actions were taken by the named defendants as compared to the proposed defendants." *Id.*

The Fourth Circuit affirmed. As to Wood's Establishment Clause claim, the Fourth Circuit applied the three-prong *Lemon* test, but before doing so, the Court "determine[d] the proper scope of [its] inquiry, namely, whether [it] should examine the challenged materials in isolation or in the broader context of the world history curriculum." Pet. App. 7. Relying on this Court's holdings in *Allegheny*, *supra*, and *Lynch*, *supra*, the Fourth Circuit explained that "context is crucial," and it further reasoned that "if courts were to find an Establishment Clause violation every time that a student or parent thought that a single statement by a teacher either advanced or disapproved of religion, instruction in our public schools 'would be reduced to the lowest common denominator,'" which "would transform each student, parent, and by extension, the courts, into *de facto* 'curriculum review committees,' monitoring every sentence for a constitutional violation." Pet. App. at 8-9 (quoting *Brown v. Woodland Joint Unified Sch. Dist.*, 27 F.3d 1373, 1379 (9th Cir. 1994)).

Analyzing the first prong of the *Lemon* test, and acknowledging this Court's recognition of the secular value of studying religion on a comparative basis, the Fourth Circuit concluded that the comparative faith statement had a secular purpose because it was presented as part of an academic unit exploring Islam's influence on Middle Eastern political entities, and there was nothing in the record indicating that it was made with a subjective or pretextual purpose to advance Islam. Pet. App. 11 (citing *Sch. Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 255 (1963)). Moreover, the Fourth Circuit concluded that the *shahada* assignment—which was a single fill-in-the-blank worksheet "to be completed by the students on the history of Islam, 'beliefs and practices' of Muslims,

and links between Islam, Judaism, and Christianity"—was "precisely the sort of academic exercise that the Supreme Court has indicated would not run afoul of the Establishment Clause." Pet. App. 12 (citing *Schempp*, 374 U.S. at 225, for the proposition that "[n]othing we have said here indicates that such study of religion, when presented objectively *as part of a secular program of education*, may not be effected consistently with the First Amendment") (emphasis added by Fourth Circuit).

Applying the second prong of the *Lemon* test, the Fourth Circuit concluded that the challenged materials "involved no more than having the class read, discuss, and think about Islam." Pet. App. 13. As such, the Fourth Circuit distinguished the case from those of this Court wherein students were required to participate in religious exercises. Pet. App. 14 (citing *Lee v. Weisman*, 505 U.S. 577, 598-99 (1992); *Stone v. Graham*, 449 U.S. 39, 41-42 (1980); and *Engel v. Vitale*, 370 U.S. 421, 424-25 (1962)). The Fourth Circuit also reiterated the need to view the challenged materials in context, and in doing so concluded that, "[a]s a matter of common sense, an objective observer would not perceive a singular statement such as the comparative faith statement, or a lone question about a religion's core principle on a fill-in-the-blank assignment, as an endorsement or disapproval of religion." Pet. App. 15.[7]

7. Concluding that "the 'primary effect' prong of the *Lemon* test must be assessed objectively," the Fourth Circuit rejected as "unavailing" Wood's argument that the comparative faith statement was an "offensive," "subjective, biased statement" which "some school officials thought . . . was inappropriate." Pet. App. 14 n.4 (citing *Lee*, 505 U.S. at 597, for the proposition that "[w]e do not hold that every state action implicating religion is invalid if one or a few citizens find it offensive").

Applying the third prong of the *Lemon* test, the Fourth Circuit concluded that the challenged materials did not create an excessive entanglement with religion because the materials "did not advance[] or inhibit[] any religion," "there is no evidence in the record that the[] materials were obtained from a religious institution or benefited any such institution," and "there is no evidence that the challenged materials resulted in 'invasive monitoring' of activities to prevent or advance religious speech." Pet. App. 16-17 (citing *Bd. of Educ. of Westside Cmty. Sch. v. Mergens*, 496 U.S. 226, 253 (1990)).

As to Wood's Free Speech Clause claim, which was based upon the *shahada* assignment, the Fourth Circuit acknowledged this Court's instruction that "students' First Amendment rights in public schools 'are not automatically coextensive with the rights of adults in other settings.'" Pet. App. 18 (quoting *Hazelwood*, 484 U.S. at 266). Furthermore, "[i]n considering the right against compelled speech in the public school context," the Fourth Circuit adopted the Third Circuit's reasoning in *C.N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159, 187 (3d Cir. 2005), wherein the Third Circuit stated:

> First Amendment jurisprudence recognizes that the educational process itself may sometimes require a state actor to force a student to speak when the student would rather refrain. A student may also be forced to speak or write on a particular topic even though the student might prefer a different topic. And while a public educational institution may not demand that a student profess beliefs or views with which the student does not agree, a school may in some circumstances require a student

> to state the arguments that could be made in support of such beliefs or views.

Pet. App. 18-19. Applying that standard to the instant case, the Fourth Circuit concluded that,

> [i]n the present case, the record is clear that the *shahada* assignment did not require Wood to profess or accept the tenets of Islam. The students were not asked to recite the *shahada*, nor were they required to engage in any devotional practice related to Islam. *Cf. W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 631-32 (1943) (distinguishing between compelling students to declare a belief through mandatory recital of the pledge of allegiance, and "merely acquainting students with the flag salute so that they may be informed as to what it is or even what it means"). Instead, the *shahada* assignment required Wood to write only two words of the *shahada* as an academic exercise to demonstrate her understanding of the world history curriculum. On these facts, we conclude that Wood's First Amendment right against compelled speech was not violated.

Pet. App. 19.

REASONS FOR DENYING THE PETITION

Throughout her petition Wood makes significant misstatements of the record below which has the effect of inaccurately framing the issues presented to this Court. Most notably, Wood routinely contends that she was

required to "profess" her belief in the *shahada*,[8] but the record is clear that no such thing occurred.[9] This Court must decide whether to grant Wood's petition based on the record before it, not the record as Wood would like it to be. *See, e.g., American Legion*, *supra* (Breyer, J., concurring at 2) (stating that, with regard to the Court's Establishment Clause analysis of a Latin Cross war memorial, "[t]he case would be different, in my view, if there were evidence that the [cross'] organizers had 'deliberately disrespected' members of minority faiths or if the Cross had been erected only recently, rather than in the aftermath of World War I, . . . [b]ut those are not the circumstances presented to us here, and I see no reason to order *this* cross torn down simply because *other* crosses would raise constitutional concerns") (emphasis in original). This Court should deny Wood's petition because: (1) there is no circuit split about the application of the Establishment Clause and Free Speech Clause to the public school setting; and (2) the Fourth Circuit's decision was correct and not in conflict with the precedent of this Court.

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8. *See* Pet. at i, 3, 7, and 11.

9. *See* Pet. App. 12 (Fourth Circuit stating that "[t]he students were not required to memorize the *shahada*, to recite it, or even to write the complete statement of faith"), 13-14 (Fourth Circuit stating that the record revealed that the *shahada* assignment "asked the students to identify the tenets of Islam, but did not suggest that a student should adopt those beliefs as her own"), and 39-40 (district court explaining that it initially denied the defendants' motion to dismiss Wood's Free Speech Clause claim because she alleged that "Defendants require that students write out and *confess* the Shahada," but that "[f]ollowing discovery, the record is clear that Ms. Wood was not compelled to *confess* the *Shahada*; rather, she was simply asked to understand the significance of the statement to Muslims") (emphasis in original).

I. There Is No Circuit Split About the Application of the Establishment Clause and Free Speech Clause to the Public School Setting.

Despite arguing that, "[f]or the past several decades, courts have struggled to determine when public schools may permissively teach about religion and when public schools cross the line and offend the First Amendment," Pet. at i., Wood does not argue that there is a circuit split that would warrant granting Wood's petition.

II. The Fourth Circuit's Decision was Correct and Not in Conflict with the Precedent of this Court.

A. Establishment Clause Claim

This Court has long applied the *Lemon* test to Establishment Clause cases involving public schools, and, as recently as June 2019, this Court declined to abandon it despite significant criticism of the test both from within and without this Court. *See American Legion*, *supra*, Slip Op. at 14. In *American Legion*, this Court explained that "*Lemon* ambitiously attempted to distill from the Court's existing case law a test that would bring order and predictability to Establishment Clause decisionmaking," but "[i]f the *Lemon* Court thought that its test would provide a framework for all future Establishment Clause decisions, its expectation has not been met." Slip. Op. at 12-13. Dividing "the dozens of Establishment Clause cases that the Court has decided since *Everson v. Board of Ed. of Ewing*, 330 U.S. 1, (1947)" into "six rough categories,"[10]

10. Those six categories were as follows: (1) "religious references or imagery in public monuments, symbols, mottos, displays, and ceremonies" (2) "religious accommodations and

the Court explained that, "[f]or at least four reasons, the *Lemon* test presents particularly daunting problems in cases, including the one now before us, that involve the use, for ceremonial, celebratory, or commemorative purposes, of words or symbols with religious associations." Slip. Op. at 15 & n.16.[11] While not abandoning the *Lemon* test, the Court explained that, since *Lemon*, it has "taken a more modest approach that focuses on the particular issue at hand and looks to history for guidance." Slip. Op. at 25. "Applying these principles" and reemphasizing the criticality of context,[12] the Court concluded that the cross

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exemptions from generally applicable laws"; (3) "subsidies and tax exemptions"; (4) "religious expression in public schools"; (5) "regulation of private religious speech"; and (6) "state interference with internal church affairs." Slip Op. at 15 n.16.

11. The four reasons were: (1) "these cases often concern monuments, symbols, or practices that were first established long ago, and in such cases, identifying their original purpose or purposes may be especially difficult"; (2) "as time goes by, the purposes associated with an established monument, symbol, or practice often multiply"; (3) "just as the purpose for maintaining a monument symbol, or practice may evolve, the message conveyed may change over time"; and (4) "when time's passage imbues a religiously expressive monument, symbol, or practice with this kind of familiarity and historical significance, removing it may no longer appear neutral, especially to a local community for which it has taken on particular meaning." Slip Op. at 15 n.16 (quotations omitted). To the extent these four factors do not apply to the type of speech at issue in this case, it is reasonable to conclude that the Court would not abandon the *Lemon* test in the "religious expression in schools" category.

12. In conducting its analysis, the Court stated that "the design of the Bladensburg Cross must be understood in light of th[e] background" at issue—namely, that the cross "took on an added secular meaning when used in World War I memorials."

at issue did not violate the Establishment Clause. Slip. Op. at 24-25, 28-31.

The Fourth Circuit's decision in the instant case was correctly decided because it properly applied the *Lemon* test to the facts at hand while emphasizing the context in which the challenged materials were presented. Moreover, regardless of whether this Court were to apply the *Lemon* test, the "endorsement" test, the "coercion" test, or some combination of them, the unmistakable commonality between them all—as affirmed in *American Legion*—is the focus on context, which clearly supports the Fourth Circuit's holding in this case.

Wood argues that "the Fourth Circuit's opinion runs afoul of this Court's holdings in *McCreary Cty., Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844 (2005); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000); *Sch. Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203 (1963); and *Lee v. Weisman*, 505 U.S. 577 (1992)." Pet. 7. However, Wood fails to explain why. In any event, those cases are inapposite to the one at bar insofar as *McCreary* is a monuments case that does not involve the public schools,

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Slip. Op. at 28. Furthermore, the Court rejected the respondent's attempt "to connect the Bladensburg Cross and even the [petitioner] with anti-Semitism and the Ku Klux Klan," stating that "when the events surrounding the erection of the Cross are viewed in historical context, a very different picture may perhaps be discerned." Slip. Op. at 29. The Court concluded by stating that "[t]he cross is undoubtedly a Christian symbol, but that fact should not blind us to everything else that the Bladensburg Cross has come to represent," and "destroying or defacing the Cross . . . would not be neutral and would not further the ideals of respect and tolerance embodied in the First Amendment." Slip Op. at 31.

Santa Fe involved an official school policy of student-led and student-initiated devotional prayer at varsity football games, *Schempp* involved a statute requiring the daily devotional reading of the Bible at the opening of school and a school board rule requiring the daily devotional reading of a chapter of the Bible or the Lord's Prayer, and *Lee* involved a school board policy permitting school principals to invite clergy members to give invocations and benedictions at graduation ceremonies. Here, by contrast, there is no evidence that the challenged materials were presented in any devotional sense.

Wood argues that, aside from the *Lemon* test, "[t]his Court has advanced two other approaches by which an Establishment Clause violation is analyzed"—namely, the "endorsement test," pursuant to which "the Court analyzes the totality of the circumstances to determine whether a reasonable person would believe that the alleged violation amounts to an endorsement of religion," and the "coercion test," which posits that a violation occurs if a state actor "applies coercive pressure on an individual to support or participate in religion." Pet. 8-9 (citing *Stone, supra*; *Santa Fe*, *supra*; and *Lee*, *supra*). However, based upon the record in this case, no reasonable jury could conclude that the challenged materials amounted to an "endorsement of religion" or coercively pressured Wood or other students to "support or participate in religion."

Respondents do not disagree that "there are heightened concerns with protecting freedom of conscience from subtle coercive pressure in the elementary and secondary public schools." *Lee*, 505 U.S. at 592 (citing cases). But even were this Court to apply the "coercion test" to the facts of this case, Respondents respectfully submit that

the challenged materials would pass constitutional muster because, as the district court noted, "[t]he material was taught as part of an academic endeavor and neither the school administrators [n]or the teacher endorsed a religion or coerced Ms. Wood to participate in religious exercises." Pet. App. 38 n.13. Indeed, the impressionability of public school students cuts in the other direction as well, lest every student in the Nation be given a heckler's veto over curriculum and instruction merely because he/she finds the material objectionable. *See Lee*, 505 U.S. at 597 ("We do not hold that every state action implicating religion is invalid if one or a few citizens find it offensive. People may take offense at all manner of religious as well as nonreligious messages, but offense alone does not in every case show a violation."). As Justice Jackson exhorted more than 70 years ago: "Authorities list 256 separate and substantial religious bodies to exist in continental United States. If we are to eliminate everything that is objectionable to any of these warring sects or inconsistent with any of their doctrines, we will leave public education in shreds." *McCollum v. Bd. of Educ. of Sch. Dist. No. 71, Champaign Cty., Ill.*, 333 U.S. 203, 235 (1948) (Jackson, J., concurring). Given this Court's recent acknowledgment that our society has become "more and more religiously diverse" in recent decades, *American Legion*, Slip. Op. at 18, that exhortation is all the more relevant today.

Wood argues that the Fourth Circuit concluded that the challenged materials did not violate the Establishment Clause because they "targeted pedagogical goals" but the Fourth Circuit "failed to articulate what those specific goals might be and how appropriate such religious activities are for schoolchildren in a public-school setting." Pet. 11. The record, however, proves otherwise. The

Fourth Circuit explained that "the comparative faith statement was part of an academic unit in which students studied Middle Eastern empires and the role of Islam" and "focused on the development of Islamic fundamentalism as a political force," and it further noted that "[t]he unit did not focus exclusively on Islam's core principles, but explored among other things . . . how [Islam] along with politics, culture, economics, and geography contributed to the development of those empires." Pet App. 11, 13. The Fourth Circuit further explained that "the *shahada* assignment was a tool to assess the students' understanding of the lesson on Islam." Pet. App. 12. Given this Court's emphasis on context above all else, the Fourth Circuit did not err. *See American Legion*, Slip. Op. at 6-7 (Ginsburg, J., dissenting) (stating that "when a public school history teacher discusses the Protestant Reformation, the setting makes clear that the teacher's purpose is to educate, not to proselytize").

Lastly, Wood argues that "the nation's Establish[ment] Clause jurisprudence is one of the most ununiformed, unpredictable, and misapplied constitutional analysis," and "[t]here is a great need for this Court to clarify how lower courts should properly apply the *Lemon* test in the public-school setting." Pet. 12 n.1. Respondents do not disagree that certain members of this Court have questioned the efficacy and continued validity of the *Lemon* test generally. But as with other Court-made tests,[13] the *Lemon* test is not an end in-and-of-itself;

13. For example, this Court has cautioned against the rigid application of the test for establishing a prima facie case of discrimination under the framework set forth in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973), stating that "the precise requirements of a prima facie case can vary depending on

rather, it is a means of determining whether the state action in question violates the spirit and purposes of the Establishment Clause. *See American Legion*, Slip. Op. at 1 (Breyer, J., concurring) (stating that "there is no single formula for resolving Establishment Clause challenges," and that "[t]he Court must instead consider each case in light of the basic purposes that the Religion Clauses were meant to serve: assuring religious liberty and tolerance for all, avoiding religiously based social conflict, and maintaining that separation of church and state that allows each to flourish in its separate sphere") (internal quotation marks omitted). Respondents respectfully submit that, regardless of the test applied, the Fourth Circuit was correct in concluding that, when viewed in context, the challenged materials did not violate the Establishment Clause.

B. Free Speech Clause Claim

Wood argues that the Fourth Circuit's holding constitutes a "departure" from this Court's ruling in *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), that government may not generally compel the speech of private actors. But the *Barnette* Court, as noted by the Fourth Circuit below, "distinguish[ed] between compelling students to declare a belief through mandatory recital of the pledge of allegiance, and 'merely acquainting students with the flag salute so that they may be informed as to what it is or even what it means.'" Pet. App. 19 (quoting

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the context and were never intended to be rigid, mechanized, or ritualistic." *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 512 (2002) (further explaining that "[g]iven that the prima facie case operates as a flexible evidentiary standard, it should not be transposed into a rigid pleading standard for discrimination cases").

Barnette, 319 U.S. at 631-32). As noted above, the Fourth Circuit concluded that there was no evidence that Wood was forced "to profess or accept the tenets of Islam" by virtue of the *shahada* assignment, and Wood does not dispute that factual finding in her petition. As such, *Barnette* actually supports the soundness of Fourth Circuit's decision.

Wood admits that, under *Hazelwood*, 484 U.S. at 266, "[s]chools enjoy far greater latitude to regulate student speech that fairly occurs as part of the school curriculum so long as the school's actions are reasonably related to legitimate pedagogical concerns." Pet. 14. Wood nevertheless argues that "there is a conflict in the law when a school compels speech as a part of its curriculum that would otherwise be impermissible under *Barnette*, such as compelled religious statements, compelled prayer, and national pledges." *Id.* Again, the fatal flaw in Wood's argument is that it is not rooted in the record of this case. Indeed, there is no evidence in this case of any compelled speech for the truth of the matter therein. "Instead," as the Fourth Circuit correctly noted, "the *shahada* assignment required Wood to write only two words of the *shahada* as an academic exercise to demonstrate her understanding of the world history curriculum." Pet. App. 19.

Wood argues that "[t]he Fifth, Sixth, Ninth, and Tenth Circuits have all struggled to apply *Hazelwood* to compelled speech in the public-school context." Pet. 14-15 (citing *Brinsdon v. McAllen Indep. Sch. Dist.*, 863 F.3d 338 (5th Cir. 2017); *Settle v. Dickson County Sch. Bd.*, 53 F.3d 152 (6th Cir. 1995); *Brown v. Li*, 308 F.3d 939 (9th Cir. 2002); and *Axson-Flynn v. Johnson*, 356 F.3d

1277 (10th Cir. 2004)).[14] Contrary to Wood's contention, each of those circuits applied *Hazelwood* to the public education context without any overt sign of "struggle." *See Brinsdon*, *supra* (holding that the forced oral recitation of the Mexican Pledge of Allegiance while standing and raising right hand at a 90-degree angle during a week-long celebration of Mexican Independence Day did not constitute unconstitutional compelled speech because "[t]here [wa]s no evidence that the pledge in Spanish class was seeking to force orthodoxy," and concluding that "it is clearly established that a school may compel some speech. Otherwise, a student who refuses to respond in class or do homework would not suffer any consequences. Students, moreover, generally do not have a right to reject curricular choices as these decisions are left to the sound discretion of instructors."); *Settle*, *supra* (holding that teacher's requirement that student write paper on a topic other than her personal faith-based beliefs did not constitute unconstitutional compelled speech on the reasoning that, under *Hazelwood*, "[s]o long as the teacher limits speech or grades speech in the classroom in the name of learning and not as a pretext for punishing the student for her race, gender, economic class, religion or political persuasion, the federal courts should not interfere"); *Brown*, *supra* (concluding that "*Hazelwood* and *Settle* lead to the conclusion that an educator can, consistent with the First Amendment, require that a student comply with the terms of an academic assignment," and that "the First Amendment does not require an educator to change the assignment to suit the student's opinion" so long as, under

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14. Although not indicated in Wood's petition, this Court denied certiorari in *Settle* (516 U.S. 989 (1995)) and *Brown* (538 U.S. 908 (2003)).

Hazelwood, the educator's "actions are reasonably related to legitimate pedagogical concerns"); *Axson-Flynn*, *supra* (upholding under *Hazelwood* an academic program's requirement that a student participate in activities that conflicted with her religious beliefs on the reasoning that to conclude otherwise "would effectively give each student veto power over curricular requirements, subjecting the curricular decisions of teachers to the whims of what a particular student does or does not feel like learning on a given day").[15] As noted above, the Third Circuit has held similarly in *C.N. v. Ridgewood Bd. of Educ.*, 430 F.3d 159 (3d Cir. 2005). Pet. App. 19 (Fourth Circuit agreeing with the Third Circuit's reasoning). Thus, there is no merit in Wood's contention that "[t]he implementation of *Hazelwood* has caused division in the lower courts and clarity is needed." Pet. 15-16.

Lastly, Wood argues in a footnote that "[t]here is also substantial confusion in the lower court[s] as to whether *Hazelwood* permits educators to engage in viewpoint discrimination." Pet. 16 n.2. Again, even assuming *arguendo* that such confusion exists, this issue is not before the Court in this case because there is absolutely no evidence in the record that Wood was treated any differently than any other students in the world history class at issue.

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15. The Tenth Circuit ultimately reversed and remanded the free speech claim on the grounds that there were facts in the record which showed that the "Defendants forced [Axson-Flynn] to adhere strictly to the script not because of their educational goals, but rather because of 'anti-Mormon sentiment.'" *Axson-Flynn*, 356 F.3d at 1293. Here, there is no evidence that Wood was treated any differently than any other students in her World History class.

CONCLUSION

This Court should deny the petition.

Respectfully submitted,

Edmund J. O'Meally
Counsel of Record
Lisa Y. Settles
Andrew G. Scott
Pessin Katz Law, P.A.
901 Dulaney Valley Road, Suite 500
Towson, Maryland 21204
(410) 938-8800
eomeally@pklaw.com

Counsel for Respondents