No. 18-1438

In the
Supreme Court of the United States

CALEIGH WOOD,
Petitioner,

v.

EVELYN ARNOLD; SHANNON MORRIS,
Respondents.

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

REPLY BRIEF FOR PETITIONER

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Students within our nation's public schools deserve religious tolerance and the breathing space of pluralism. And the First Amendment guarantees both. Respondents argue that public schools have the right to teach students that one religious sect is stronger than another and to require that students scribe a religious, doctrinal conversion creed as part of a World History course needed for high school graduation. Respondents' contentions, and the holding of the Fourth Circuit, are fundamentally incompatible with the Constitution and this Court's precedent. No case, no authority, no law grants public school officials this sort of unbridled, unchecked power over students' religious formation or personal ideologies. Respondents' interpretation of the *Lemon* test and its denigration of individual rights are untenable, and only this Court can clarify the proper application of the Establishment Clause and the compelled speech doctrine for our public schools.

I. Respondents' Arguments Underscore the Need for this Court's Review.

Respondents begin their opposition by embracing an extreme reading of this Court's First Amendment jurisprudence in the public school context by declaring, "[d]ecades 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." Resp. 1. Respondents' claim is bold and blithely wrong. School officials, of course, are not the sole arbiters of First Amendment freedoms in the public schools. All state officials, including state

officials employed within our public schools, must act under the color of state law. *See, e.g.*, *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943) ("The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures—Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes."). And considering the actions taken by the school against the Petitioner in this case, school officials do need guidance and explanation from the Court to ascertain what actions run afoul to the First Amendment as it pertains to the treatment of religion in the public-school setting. Respondents' arguments only emphasize the conflict between the Fourth Circuit's opinion and this Court's Establishment Clause jurisprudence.

A. Review is Necessary to Clarify how the *Lemon* test should be applied to Establishment Clause Violations in the Public-School Setting.

Respondents argue that the Fourth Circuit correctly applied the *Lemon* test by focusing on the context of this case. *Lemon v. Kurtzman*, 403 U.S. 602 (1971); Resp. 13. Respondents, however, avoid addressing the undisputed facts of this case: Respondents required Petitioner to enroll in World History to fulfill a

graduation requirement. Pet. App. 3-4a. As part of the required course, Respondents taught Petitioner that "Most Muslim's [sic] faith is stronger than the average Christian," Pet. App. 4a, 72a. Respondents' own content specialist, Jack Tuttle, reviewed the lesson and found the statement "inappropriate." Pet. App. 4a.

Respondents claim to have fulfilled the secular purpose prong of the *Lemon* test because this statement "was presented as part of an academic unit exploring Islam's influence on Middle Eastern political entities." Resp. 6. Yet, there is no explanation for what secular purpose the specific statement ("Most Muslim's [sic] faith is stronger than the average Christian," Pet. App. 4a, 72a) would serve or share with Respondents' purported purpose. Further, the Fourth Circuit held that this statement appeared to have a secular purpose "on its face"—therefore implying no meaningful constitutional analysis of the statement's context ever took place. Pet. App. 11-12.

Respondents also required Petitioner to study and acquaint herself well enough to the *shahada*, the Muslim conversion creed, to successfully reiterate the creed to fill in the missing words of the religious doctrine as part of a class assignment. Pet. App. 4-5a. Petitioner, a Christian, objected to writing the *shahada* because it states "There is no god but Allah and Muhammad is the messenger of Allah," and Petitioner sincerely believes that it is a sin to profess, by word or in writing, that there is any other god except the Christian God. Pet. App. 5a-7a, *see also* Pet. App. 4a-7a, 55a-58a. Respondents refused to excuse Petitioner

from the assignment and gave Petitioner a lower grade in the course. Pet. App. 5a, 23a, 55a-62a.

Respondents argue this requirement served a secular purpose because it pertained to "the history of Islam, 'beliefs and practices' of Muslims, and links between Islam, Judaism, and Christianity." Resp. 6-7. But again, Respondents do not explain how or why. Further, these purported goals would be far better accomplished by learning relevant information on those subjects, not simply reciting and reiterating the text of the *Shahada*. The Islamic doctrinal conversion creed is by its very nature religious. *Marsh v. Chambers*, 463 U.S. 783, 797-98 (1983) ("prayer is by definition religious") (opinion of Brennan, J.); *Sch. Dist. of Abington Twp., Pa. v. Schempp*, 374 U.S. 203, 224 (1963) ("But even if its purpose is not strictly religious, it is sought to be accomplished through readings, without comment, from the Bible.").

Nor do Respondents ever explain why no other religious sects were explored in any similar manner during the World History course. The record fails to show that when Christianity was studied that the school children ever had to write out, for example, the Apostle's Creed or the Our Father, or that the same treatment was given to Judaism. Respondents make no effort to demonstrate how different religious sects were treated equally in the World History class. *McCreary Cty., Ky. v. Am. Civil Liberties Union of Ky.*, 545 U.S. 844, 881 (2005) (declaring the importance of treating different religious sects with neutrality for purposes of the Establishment Clause). They can't. The record demonstrates that Respondents disparaged

Christianity by claiming adherents to a differ religious sect has stronger faith.

Instead, Respondents minimize the effect the Respondents' religious teachings and requirements had on Petitioner and argue that this case is different from this Court's precedent on a superficial level. The Fourth Circuit rests its opinion on the fact that the Muslim faith was only studied for a period of five days. Pet. App. 17. Yet, an Establishment Clause violation can occur within the span of a week, if not in a moment. Respondents reiterate unavailing arguments, such as Petitioner experienced no coercion from being required to complete the *Shahada* assignment because she was not forced to stand up and recite the *Shahada*, only write portions of the *Shahada* on a worksheet.[1] However, this Court has never required for school officials to force students to stand and recite religious prayer or pledge one's nationalism to find that the school officials have gone too far. For example, in *Barnette*, this Court's holding did not hinge on whether the students believed the words of the pledge and meant them. Instead, this Court stated, "it is not clear whether the regulation contemplates that pupils forego any contrary convictions of their own and become unwilling converts to the prescribed ceremony or whether it will be acceptable if they simulate assent by words without belief and by a gesture barren of

[1] This Court has recognized that "[t]he State exerts great authority and coercive power" over students in the public school system, because, *inter alia*, pupils must respect mandatory attendance requirements and are exposed to faculty as role models. *Edwards v. Aguillard*, 482 U.S. 578, 584 (1987).

meaning." *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 633 (1943).[2] And in *Stone v. Graham*, the passive existence of the Ten Commandments on the wall of the schoolhouse with no requirement from school officials that the text even be read by students was held to have violated the Establishment Clause. 449 U.S. 39, 41-42 (1980). In *Wallace v. Jaffree*, a moment of passive silence was enough to violate the Establishment Clause. 472 U.S. 38, 60-61 (1985). In *Schempp*, the City of Baltimore regulation at issue requiring students to read to themselves, without comment, the Holy Bible or the Lord's Prayer allowed students to opt out of the exercise without penalty; however, this Court still found the law violated the Establishment Clause. *Schempp*, 374 U.S. at 203.

Indeed since *Everson v. Board of Ed. of Ewing*, 330 U.S. 1 (1947), nearly every case in this Court and in the lower courts involving religious doctrine, observance, discussion, or prayer in school has resulted in the finding of an Establishment Clause violation and a louder call for a distinct separation between church and the public schools. *See, e.g., Lee v. Weisman*, 505 U.S.

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[2] Petitioner directs the Court to her compelled speech argument in her Petition, pet. 13-16, and adds that the *Barnette* court specifically warns about the negative societal effects that occur with ignoring individual rights and pluralism by placing a greater value on uniformity. *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 641 (1943) ("As governmental pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it shall be. Probably no deeper division of our people could proceed from any provocation than from finding it necessary to choose what doctrine and whose program public educational officials shall compel youth to unite in embracing.).

577, 598-99 (1992); *Engel v. Vitale*, 370 U.S. 421, 424-25 (1962); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000); *Edwards v. Aguillard*, 482 U.S. 578, 593 (1987). And the lower courts have followed, even when the religious material is part of the curriculum or amounts to a passive display on school grounds. *See, e.g.*, *Nampa Classical Acad. v. Goesling*, 714 F. Supp. 2d 1079, 1092–93 (D. Idaho 2010), aff'd, 447 F. App'x 776 (9th Cir. 2011); *Selman v. Cobb Co. Bd. of Educ.*, 390 F. Supp. 2d 1286 (N.D. Ga. 2005), vacated and remanded, 449 F.3d 1320 (11th Cir. 2006); *Kitzmiller v. Dover Area Sch. Dist.*, 400 F. Supp. 2d 707 (M.D. Pa. 2005); *Johnson v. Poway Unified Sch. Dist.*, 658 F.3d 954 (9th Cir. 2011).

Respondents quote the Fourth Circuit's opinion that the reasonable observer standard is simply "a matter of common sense." Resp. 7. But this is exactly what is wrong with the *Lemon* test—it is an invitation to a lower court judge to apply his or her "common sense" standards to come to whatever conclusion meets his or her subjective opinions and ideologies. What is "common sense" to one court, the court next door will be just as certain his or her "common sense" demands an opposite finding.

B. Review is Necessary to Clarify the effect of *Am. Legion v. Am. Humanist Ass'n*.

Respondents argue that their actions would be found constitutional under the historical standard forwarded by this Court's recent opinion in *Am. Legion v. Am. Humanist Ass'n,* 139 S. Ct. 2067 (2019). Again, Respondents' arguments are unavailing. Respondents point to Justice Ginsburg's dissent as evidence 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." *Id*. at 2107. But here the Court would have to leap to the conclusion that when a history teacher teaches the Protestant Reformation, it does not offend the Constitution to also teach that most Protestants' faith is stronger than the faith of Catholics or Jews. Such statements would not serve a pedagogical purpose, but would constitute impermissible teaching, offensive to our First Amendment freedoms. And that is the situation before the Court in this Petition.

Additionally, the abandonment of the *Lemon* test in the context of a governmental monument also calls into question the future of the test in the context of religious expression in the public school setting. Several sitting Justices have voiced clear disdain with the test, and the lower courts will need guidance applying the Establishment Clause to these important constitutional cases involving First Amendment freedoms in the public schools. *See, e.g.*, *Am. Legion*, 139 S. Ct. at 2101 (concurring, Gorsuch, J.) ("*Lemon* was a misadventure."); *id.* at 2093 (concurring, Kavanaugh, J.) ("the Court has proscribed government-sponsored prayer in public schools. The Court has done so not because of *Lemon*, but because the Court concluded that government-sponsored prayer in public schools posed a risk of coercion of students. The Court's most prominent modern case on that subject, *Lee v. Weisman*, 505 U.S. 577, 112 S.Ct. 2649, 120 L.Ed.2d 467 (1992), did not rely on *Lemon*. In short, *Lemon* was not necessary to the Court's decisions holding government-sponsored school prayers

unconstitutional."). Additionally, were the lower courts to attempt to apply the historical approach to Establishment Clause cases involving religious expression in schools, it would result in further inconsistent application of the First Amendment as this Court has articulated that "a historical approach is not useful in determining the proper roles of church and state in public schools." *Edwards*, 482 U.S. at 583 n.4.

II. This Case Presents an Important Legal Conflict and is an Ideal Vehicle to Review Current First Amendment Law in Need of Clarification.

Respondents do not deny the importance of the questions presented. Respondents attempt to detract from the ideal nature of the Petition by asserting it contains misrepresentations of the lower court record. The argument is meritless, and presents no obstacle to review. The petition accurately reflects the record on appeal, and the factual record is contained in the Petitioner's appendix. *See* Pet. App. 1-6. There are no factual disputes. And this case was decided on the Respondents' motion for summary judgment. Fed. R. Civ. P. 56(c). As this Court has clarified, "[o]n summary judgment the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). Petitioner is the party opposing the motion, and therefore entitled to a favorable reading of the facts.

The Fourth Circuit's opinion creates a conflict between the lower courts' and this Court's precedent and poses an important, purely legal question in an area of First Amendment law that momentously needs clarification from this Court.

CONCLUSION

For the foregoing reasons and those stated in the Petition, certiorari should be granted.

Respectfully submitted,

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