No. 25-906

IN THE

Supreme Court of the United States

E.D., A MINOR, BY HER PARENT AND NEXT FRIEND, LISA DUELL, ET AL.,

Petitioners,

v.

NOBLESVILLE SCHOOL DISTRICT, ET AL,

Respondents.

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

BRIEF FOR *AMICUS CURIAE* AMERICANS FOR PROSPERITY FOUNDATION IN SUPPORT OF PETITIONER

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February 23, 2026

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INTEREST OF *AMICUS CURIAE*[1]

Americans for Prosperity Foundation ("AFPF") is a 501(c)(3) nonprofit organization committed to educating and empowering Americans to address the most important issues facing our country, including civil liberties and constitutionally limited government. As part of this mission, it appears as *amicus curiae* before federal and state courts. AFPF is interested in this case because ensuring the freedoms of speech and assembly guaranteed by the First Amendment is essential for all Americans, including students. Campuses are not just a place where free expression should be protected; it is vital to their mission. And they are uniquely positioned to instill an appreciation for free speech in the next generation. This is why "the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) (cleaned up).

SUMMARY OF ARGUMENT

This Court has been clear that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 506 (1969). Nevertheless, the search for exceptions to *Tinker* persists. Here, the narrow exception the Court recognized in *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260 (1988), relating to a newspaper published by the school as part of the

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[1] No counsel for a party authored this brief in whole or in part and no person other than *amicus* or its counsel made any monetary contributions to fund the preparation or submission of this brief. AFPF timely notified all counsel of its intent to file.

journalism curriculum, has been read so broadly that the *Tinker* material-disruption standard has been displaced. Instead, a hypothetical listener, who is envisioned to perceive "the imprimatur of the school," is deemed the standard for defeating First Amendment protection. Unlike the solitary newspaper published by the school in *Hazelwood*, here, the school has a laudable array of over 70 student organizations, Pet. at 5 (Doc. 101 ¶ 347; Doc. 158-30 at 1–3), that could not all simultaneously represent the views of the school. But even that robust plurality was not enough to protect E.D. from speculation that among those 70 voices her speech stood out as bearing the school's imprimatur.

Moreover, when E.D. advocated for her position with the school administration, she found that her right to petition for redress was also chimerical. She was reckoned insubordinate and punished by having her club kicked off campus—even though the record contains no evidence of disruptive behavior that might surmount *Tinker*.

Although it is clear student speech is protected under *Tinker*, an expansive reading of *Hazelwood* is imperiling the *Tinker* standard. The Court should take this case to solidify the primacy of *Tinker* in all but very narrow circumstances in which the curriculum requires application of *Hazelwood*.

ARGUMENT

I. THE *TINKER* STANDARD SHOULD NOT BE SWALLOWED BY THE *HAZELWOOD* EXCEPTION.

Tinker was decided against the backdrop of the Vietnam War in which differences in viewpoint were often expressed vehemently and could trigger strong

adverse reactions. But the Court protected the right of students to silently protest. *Tinker* has remained controlling precedent for the speech of public-school students, providing robust protection for even provocative and vulgar speech unless special circumstances apply. *See, e.g.*, *Mahanoy Area School District v. B. L.*, 594 U.S. 180, 187 (2021).

The exception to *Tinker* set forth in *Hazelwood* was based on the tight connection between the school newspaper, the school curriculum, and the school's role as publisher of the paper. That relationship, while applicable to scenarios in which the school's curricular duties could require limits on student speech, should not be read broadly to subsume extracurricular speech—or even *all* curricular speech—unless it poses an actual threat to the school's pedagogical function. Otherwise, any speech that occurs in public school could be interpreted to bear the imprimatur of the school simply because the school did not stop it. That is not what *Tinker* stands for.

A. The Narrow *Hazelwood* Exception is Only Workable When Coupled with the School's Pedagogical Function.

Hazelwood created an exception to *Tinker* based on facts that do not apply here and that should be limited to curriculum-based speech where "curriculum" is read narrowly to apply to pedagogical activity with a standard of performance.

Hazelwood dealt with a school newspaper produced by the Journalism II class, which was part of the school curriculum and governed by the School Board Policy and the Hazelwood East Curriculum Guide. *Hazelwood*, 484 U.S. at 268. The Policy provided that "[s]chool sponsored publications are

developed within the adopted curriculum and its educational implications in regular classroom activities." *Id*. (citing Hazelwood School Board Policy 348.51). The Hazelwood East Curriculum Guide described the course as a "laboratory situation in which the students publish the school newspaper applying skills they have learned in Journalism I." *Id*. (citing Hazelwood East Curriculum Guide). Journalism II was taught by a faculty member during regular class hours and students received grades and academic credit for their performance in the course, which included development of journalistic skills under deadline pressure, "the legal, moral, and ethical restrictions imposed upon journalists within the school community," and "responsibility and acceptance of criticism for articles of opinion." *Id*. (citing Hazelwood East Curriculum Guide). Thus, production of the newspaper was part of the formal curriculum—not an extracurricular activity accommodated by the school.

Indeed, the class's teacher was directly involved in production of the paper as part of his pedagogical duties, in which he "selected the editors of the newspaper, scheduled publication dates, decided the number of pages for each issue, assigned story ideas to class members, advised students on the development of their stories, reviewed the use of quotations, edited stories, selected and edited the letters to the editor, and dealt with the printing company." *Hazelwood*, 484 U.S. at 268. "Many of these decisions were made without consultation with the Journalism II students." *Id*. The rubric and process required editing by the teacher as part of his official duties to achieve the standards in the Curriculum

Guide, following which the edition was reviewed by the principal prior to publication. *Id*. at 268–69.

Thus final responsibility to ensure school community standards had been met prior to publication fell upon the principal, who, as the Court noted, "could reasonably have concluded that the students who had written and edited these articles had not sufficiently mastered those portions of the Journalism II curriculum that pertained to the treatment of controversial issues and personal attacks, the need to protect the privacy of individuals whose most intimate concerns are to be revealed in the newspaper, and 'the legal, moral, and ethical restrictions imposed upon journalists within [a] school community'". *Hazelwood*, 484 U.S. at 276. Accordingly, the school may censor student speech-based activities that 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." *Id*. at 271.

But even this exception to *Tinker* drew a scathing dissent from three justices who would have limited the school's ability to censor student speech to expression that "directly prevent[s] the school from pursuing its pedagogical mission" such as when the "young polemic who stands on a soapbox during calculus class to deliver an eloquent political diatribe interferes with the legitimate teaching of calculus," but not "merely by expressing a message that conflicts with the school's, without directly interfering with the school's expression of its message" such as when a "student who responds to a political science teacher's

question with the retort, 'socialism is good,' subverts the school's inculcation of the message that capitalism is better." *Hazelwood*, 484 U.S. at 279–80 (Brennan, J. dissenting).

Moreover, the tight timeframe in *Hazelwood* in which the principal was forced to decide which sections of the newspaper to send to the printer was clearly material to his choice. 484 U.S. at 263–64. ("Reynolds believed that there was no time to make the necessary changes in the stories before the scheduled press run and that the newspaper would not appear before the end of the school year if printing were delayed to any significant extent."). Had the decision-making timeframe been longer, options for accommodating the articles may have been developed.

None of those factors apply here. There is no assertion that E.D.'s flyer was classwork for a grade, that she interfered with any other classroom activity, that there is any curricular relationship between her club and a class, or even that the administration faced time pressure that precluded a nuanced approach.

Instead, a new and expansive interpretation of *Hazelwood* was introduced, enabling the lower court to hold that the flyers "could reasonably be perceived as bearing the school's imprimatur." App. 11a. Because the flyers "would have appeared on school walls alongside announcements for school sponsored events and remained in common areas for days," a hypothetical set of students, parents, and visitors was presumed to "naturally" see them as reflecting the school's endorsement. App.11a. But the notion that readers "naturally" equate handbills with the owner of the structure on which they are posted flies in the face of the extensive body of precedent relating to

posting of bills on public property or government fora, which requires government's motivation to remove them to be "unrelated to the suppression of free expression." *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 792, 805 (1984) (posting signs on public property); *Lehman v. City of Shaker Heights*, 418 U.S. 298, 299, 303 (1974) (signs on city buses, collecting cases). Thus, whether the school flyer-posting areas were "literally its walls," App. 12a, is not the standard for concluding that speech is subject to government censorship.

Second, and somewhat ironically, the Opinion deemed that because "all flyers for *non–school-sponsored* events must receive prior administrative approval, regardless of the views expressed" (emphasis added), the flyers have "a literal stamp of the school's authority." App. 12a, 17a–18a. How a rule that applies only to non-school-sponsored events could create a "risk of mistaken attribution" is a mystery.

Moreover, the notion that the speech of over 70 approved noncurricular student interest groups could be attributed to the school is akin to the argument in *Matal v. Tam*, 582 U.S. 218, 238 (2017) that somehow trademarks represent federal government speech. And, like that argument, if the initials of the reviewing faculty indicate that flyers from 70+ groups express the schools' perspective, then the school "is babbling prodigiously and incoherently". *Matal*, 582 U.S. at 238.

Creating a standard that relies on an imaginary witness who draws the least plausible inferences from a flyer's context, such as the express intent of the speaker to communicate an extracurricular event, the nature of the content to which the faculty-initials-rule

applies ("non-school-sponsored"), and the existence of 70+ distinct voices who could not simultaneously express the school's perspective, would overwhelm the *Tinker* material disruption standard with speculation based on the most implausible interpretation.

B. Under *Tinker*, There is No Disruption.

Applying the *Tinker* material-disruption standard E.D.'s flyer is fully protected. The *Tinker* standard is rigorous and requires "substantial disruption of or material interference with school activities" to justify censorship of passive expression. 393 U.S. at 514. Whatever "substantial" and "material" mean, it's more than the mere potential that political messaging in school hallways may divert attention from learning.

By way of background, thirty years after *Tinker* was decided, Professor John W. Johnson[2] discussed some facts of *Tinker* that were not included in the official record.[3] He first focused on the often-overlooked, third named plaintiff, Christopher Eckhardt, and his experiences leading up to the litigation. Chris Eckhardt was fifteen and a sophomore at Roosevelt high school in 1965. *Id*. at 475. "On the day before the December 1965 armband demonstration, word circulated in various Des Moines schools that a protest of some sort was imminent." *Id*.

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[2] Professor and Head of the Department of History at the University of Northern Iowa, Cedar Falls, Iowa.

[3] John W. Johnon, *Behind the Scenes in Iowa's Greatest Case: What is Not in the Official Record of Tinker v. Des Moines Independent Community School District*, Drake Law Review, Vol. 48, p. 473 (2000), https://drakelawreview.org/wp-ontent/uploads/2016/09/johnson.pdf (internal citations omitted).

at 477. The protest organization letter summarized the concerns of the organizers surrounding the 12-hour truce proposed by the "National Liberation Front (Vietcong)" and Senator Robert Kennedy's suggestion to extend the truce.[4] The letter proposed wearing black armbands and fasting over the holiday season as well as foregoing New Year's Eve celebrations to gather and discuss the "complex war and possible ways of ending the killing of Vietnamese and Americans." *Id*. It was a matter of life and death that engaged prospective protesters to make personal sacrifice to make their point.

On the other hand, gym teachers and coaches at Roosevelt were upset about the possibility of a protest against the Vietnam War.[5] "Instead of conducting calisthenics to the chant of 'Beat East High'—as was usually the case" . . . "gym teachers on that day encouraged students to substitute the phrase 'Beat the Vietcong.'" Johnson at 477. "However, the phrase may also have sprung from the students themselves." *Id*. at n 32. The prevailing sentiment was hostile to the protestors' viewpoint.

"The coaches at Roosevelt also made it known that students wearing armbands to class were communist sympathizers and that they, as coaches and teachers, could not be held responsible for what might happen to students who demonstrated such a lack of patriotism." *Id*. at 477. Chris was personally confronted by "a group of angry male students who screamed at them: 'If you [wear armbands tomorrow]

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[4] *We Mourn*, protest organization letter available at: https://www.docsteach.org/documents/document/we-mourn;

[5] Johnson, at p. 477.

. . . you'll find our fists in your face and our foot up your ass.'" *Id*. at 477. And the following day, while walking to the principal's office to turn himself in for wearing the armband in defiance of school policy, "the captain of the football team" . . . "attempted to rip the armband off his jacket. After a brief scuffle, the football player left Eckhardt with words to the effect that he had better take the armband off in the principal's office or he would come looking for him." *Id*. at 478. And even after Chris arrived at the principal's office, "students filed by the glass enclosed office and taunted him with caustic remarks like 'you're dead.'" *Id*. at 478. There was confrontation and the potential for further trouble.

In a recent interview, Mary Beth Tinker discussed the schools banning the armbands "because of the 'intense feelings' they might inspire"[6] as well as the Tinker family's experience. "The Tinkers were . . . subject to a barrage of hate and harassment. Red paint was tossed on their driveway; they were called communists; and they even received death threats." *Id*.

The disruption standard from *Tinker* was developed against fraught circumstances in which the point of the armbands was to promote dissent and a call to action—and succeeded in doing so. Violence was both a risk and a reality, and members of the school community from students to teachers to the administration were acutely aware of the dispute.

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[6] Sophie Hayssen, *Students' Right to Protest at School Was Affirmed by Tinker v. Des Moines,* teenVOGUE, December 16, 2021, available at: https://www.teenvogue.com/story/supreme-court-student-free-speech-tinker

Nevertheless, the disruption was not substantial enough and did not materially interfere with school activities sufficient to justify censorship.

By contrast, the alleged provocation here is hard to discern. Two flyers present photographs of cheerful individuals (not students) who were clearly photographed somewhere other than at the school. The flyers give every indication of being professionally produced boilerplate meeting announcements. The photographs include images of signs, some of which say, "Defund Planned Parenthood". App. 4a–5a. There is no evidence of any actual disruption or that anyone misunderstood the flyers as being something other than what they were. Nevertheless, the lower courts concluded that flyers "promoting a polarizing political slogan" could reasonably support the conclusion that order would be undermined and attention diverted from the business of learning. App. 15a. The anodyne messaging of the flyers here does not even approach the environment in which *Tinker* was decided.

Moreover, under *Tinker*,—indeed under general First Amendment jurisprudence—timing matters. *Tinker* focused on contemporaneous harm, protecting student speech except where the "conduct by the student, in class or out of it, which for any reason—whether it stems from time, place, or type of behavior—materially *disrupts* classwork or *involves* substantial disorder or invasion of the rights of others." *Tinker*, 393 U.S. at 513 (emphasis added). This is not a conditional standard and does not depend on speculation or inference. Indeed, in *Tinker*, the Court cautioned against regulating based on "undifferentiated fear or apprehension of disturbance," instead, limiting the school's authority

over student speech to identified disruption of school operations. *Id*. at 508.

It is commonplace that "censorship or suppression of expression of opinion is tolerated by our Constitution only when the expression presents a clear and *present danger* of action of a kind the State is empowered to prevent and punish." *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 633 (1943) (emphasis added). And, that "[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963) (collecting cases).

Consistent with these principles, *Tinker* precludes school intervention where "[t]here is . . . no evidence whatever of petitioners' interference, actual or nascent, with the schools' work or of collision with the rights of other students to be secure and to be let alone." *Tinker* 393 U.S at 508. Here, the record is bereft of evidence of interference with the school's work or the rights of other students. Had *Tinker* been applied, this would be an easy case.

II. "IT IS THE RIGHT OF THE SUBJECTS TO PETITION THE KING."[7]

The final clause of the First Amendment protects the right of the people to petition the government for redress of grievances. When E.D.'s club was kicked off campus, it was in response to her seeking redress for

[7] "and all commitments and prosecutions for such petitioning are illegal." English Bill of Rights 1689, available at: https://avalon.law.yale.edu/17th_century/england.asp

the perceived infringement of her speech rights—not for the speech itself.

When E.D. submitted her proposed flyers to Assistant Principal Mobley, "Mobley emailed NSFL's faculty sponsor, Brian McCauley, and asked him to work with E.D. to revise the flyer." App. 5a. E.D. and McCauley exchanged emails about the flyers and "McCauley . . . advised her to contact Dean of Students Jeremy Luna to schedule NSFL's first meeting." App. 6a. "A couple days later, E.D. met with Luna, accompanied again by her mother." At that time "E.D. re-raised the issue of the flyer." App. 6a.

There's no indication that the meeting with Luna was contentious, that Luna had objected to the mother's presence, or that the presence of a parent with a fourteen-year-old at a meeting with the Dean of Students was out of the ordinary.

Nevertheless, following the meeting between the Dean of Students, E.D., and her mother, Luna, Mobley, and Principal McCaffrey decided that by re-raising the issue of the flyer, E.D.'s request for review was an "attempt at insubordination," and therefore "warranted discipline". App.6a–7a. That rationale is not an exception to the First Amendment. Indeed, if merely asking for reconsideration of a previous decision were a punishable offense, then the right to petition for redress would be an empty promise and we would not have courts of appeals.

This Court has made clear that the "right to petition is cut from the same cloth as the other guarantees of [the First] Amendment, and is an assurance of a particular freedom of expression." *McDonald v. Smith*, 472 U.S. 479, 482 (1985). Indeed, the "historical roots of the Petition Clause long

antedate the Constitution." *Id*. at 482 (citing the 1689 English Bill Rights). The "Stamp Act Congress of 1765 included a right to petition the King and Parliament in its Declaration of Rights and Grievances." *Id.* (citing 1 B. Schwartz, The Bill of Rights—A Documentary History 198 (1971)). And "the Declarations of Rights enacted by many state conventions contained a right to petition for redress of grievances. *See, e.g.*, Pennsylvania Declaration of Rights (1776)." *Id*. at 482–83. Freedom of Petition goes hand in hand with speech rights and is not a lesser right that can be minimalized to undermine both.

Moreover, the "the right to petition extends to all departments of the Government" *California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510, (1972)", including among other locales, "[t]he jailhouse," "an executive mansion," "a legislative chamber," "a courthouse," or "the statehouse." *Adderley v. State of Fla.*, 385 U.S. 39, 49 (1966). There would thus be no reason to preclude its exercise by E.D. at school. Moreover, the "methods [of its exercise] should not be condemned as tactics of obstruction and harassment as long as the assembly and petition are peaceable." 385 U.S. at 51. Instead, the public school must "start with the premise that the rights to assemble peaceably and to petition for a redress of grievances are among the most precious of the liberties safeguarded by the Bill of Rights." *United Mine Workers of Am., Dist. 12 v. Illinois State Bar Ass'n*, 389 U.S. 217, 222 (1967).

A. Characterizing a Request for Reconsideration as Insubordination Is Not Sufficient to Bypass the First Amendment.

Characterizing a student's orderly request for reconsideration of an administrative decision as insubordination to nullify the right to petition has no precedential support. Instead, precedent regarding "insubordination," tends to focus on fraught cases from the time of the world wars in which protestors sought to interfere with the military draft. *E.g.*, *Schenck v United States*, 249 U.S. 47 (1919). Schenk was charged with "a conspiracy to violate the Espionage Act of June 15, 1917, c. 30, tit. 1, § 3, 40 Stat. 217, 219 (Comp. St. 1918, § 10212c), by causing and attempting to cause insubordination . . . in the military and naval forces of the United States, and to obstruct the recruiting and enlistment service of the United States, when the United States was at war with the German Empire," by conspiring "to have printed and circulated to men who had been called and accepted for military service" a document "calculated to cause . . .insubordination and obstruction." *Schenck*, 249 U.S. at 48–49. His defense was that distribution of the circulars was protected by the First Amendment. *Id.* at 51.

The Court applied the "clear and present danger" test to consider whether the circumstances allowed for limitations of his speech, holding that the "question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." *Schenck*, 249 U.S. at 52. In this way the

Schenck insubordination test mirrors the *Tinker* material-disruption test, but writ large and with a higher standard for imminent danger before insubordination may excuse abridgment of First Amendment rights.

The same could hardly be said to apply here, where a fourteen-year-old sought and was granted a meeting with school personnel to discuss her flyers. App. 6a. To overcome *Schenk*, the difference between insubordination in the wider world and insubordination in public school must be so wide and deep that even a request for a higher administrator to review the decision of a faculty member is beyond the pale. Such a standard would be no standard at all, much less reflective of what is required to render a public-school student insubordinate and subject to discipline.

Fortunately, this Court has held otherwise. In *Barnette*, for example, the West Virginia Board of Education adopted a resolution that provided that "refusal to salute the Flag be regarded as an Act of insubordination, and shall be dealt with accordingly." *Barnette*, 319 U.S. at 626, 629 ("Failure to conform is 'insubordination' dealt with by expulsion."). This Court rejected outright the notion that "insubordination" as the professed basis for compelling speech in school was sufficient to overcome the students' right to not speak and to create a punishable offense. *Id.* at 642. Like *Schenck*, the dispute in *Barnette* arose in wartime when feelings ran high. But "National unity as an end which officials may foster by persuasion and example is not in question. The problem is whether under our Constitution compulsion as here employed is a

permissible means for its achievement." *Id.* at 640. The Court held it was not. *Barnette,* 319 U.S. at 642.

Here, the act of alleged "insubordination" involved no such national security rationale, nor was it in defiance of school process or authority. Rather, E.D. followed the direction of her faculty advisor and set a meeting with the Dean of Students, who evidently allowed E.D.'s mother to attend the meeting. While in that meeting, E.D. advocated for her position. Only after the fact did the administration convince itself that this was punishable behavior. In addition to being a disproportionate response, it fundamentally misunderstands that bypassing the First Amendment requires more than mislabeling vexation as insubordination.

B. The Ignoble Attempt to Teach Submission Should be Resisted.

"Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can even do much to help it."

—Judge Learned Hand[8]

The ignoble attempt of the Noblesville School District to condition students to unthinking submission should be resisted if the students are to develop the talent for self-governance. This Court has consistently recognized that "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Tinker*, 393 U.S. at 512 citing *Shelton v. Tucker*, 364 U.S. 479, 487 (1960). Regarding boards of education, the Court has

[8] Judge Learned Hand, *The Spirit of Liberty*, 1944, available at Digital History, http://bit.ly/3raLZQN.

said that they have "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." *Tinker*, 393 U.S. at 507 (citing *Barnette,* 319 U.S. at 637). And schools themselves have "an interest in protecting a student's unpopular expression," because "America's public schools are the nurseries of democracy". *Mahanoy*, 594 U.S. at 190. "Thus, schools have a strong interest in ensuring that future generations understand the workings in practice of the well-known aphorism, 'I disapprove of what you say, but I will defend to the death your right to say it.'" *Id*. at 190 (citation omitted). These stouthearted statements depart from *ad hoc* justification by public schools for crushing student advocacy of their own First Amendment rights, notwithstanding precedent to the contrary.

Facile excuses for bypassing the First Amendment, educate students in misunderstanding of the American system that is anathema to the rights secured by the Constitution and educates the next generation that this is the kind of relationship citizens should expect with their government. Consistent with *Barnette* and *Tinker*, schools should teach students to carry with them the understanding that government must respect constitutional freedoms.

The expansion of *Hazelwood*, raises troubling possibilities. First, that this case may remove the limiting principle from *Hazelwood*, which allowed an

exception to *Tinker* only for "school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school;" *Hazelwood*, 484 U.S. at 271, and be read instead to encompass a vague and ill-defined universe of student speech that is neither part of the curriculum, published by the school, nor even visible to the public. Second, that this case may come to stand for the proposition that advocating for student rights is a second-order offense, punishable by delisting the organization whose rights were under debate in the first place.

Tinker did not address the first of those scenarios. But the bulk of *Tinker* did focus on the second, for it was the persistent wearing of the armband despite school demands to stop the speech that prompted the punishment. *Tinker*, 393 U.S. at 504 (discussing ramifications of refusal to remove arm band). The Court should resist any extension of school authority to simultaneously claim sponsorship of a plurality of student speech while silencing that speech.

As Justice Brennan proclaimed in his dissent to *Hazelwood*,

> Public education serves vital national interests in preparing the Nation's youth for life in our increasingly complex society and for the duties of citizenship in our democratic Republic. *See Brown v. Board of Education*, 347 U.S. 483, 493 (1954). The public school conveys to our young the information and tools required not merely to survive in, but to contribute to, civilized society. It also inculcates in tomorrow's

> leaders the "fundamental values necessary to the maintenance of a democratic political system...." *Ambach v. Norwick*, 441 U.S. 68, 77 (1979). All the while, the public educator nurtures students' social and moral development by transmitting to them an official dogma of "'community values.'" *Board of Education v. Pico*, 457 U.S. 853, 864 (1982) (plurality opinion) (citation omitted).

Hazelwood, 484 U.S. at 278 (Brennan, J. dissenting).

While Justice Brennan's exhortation may be aspirational, at a minimum, public schools must resist the urge to go a step beyond *Hazelwood* to quash the exercise of student speech rights and teach students they are mere subjects who must obey.

If mere incompatibility with the school's unwritten expectations[9] were a constitutionally sufficient justification for the suppression of student speech, then school officials could censor students at their discretion, converting our public schools into "enclaves of totalitarianism," that "strangle the free mind at its source." *Hazelwood*, 484 U.S. at 280 (Brennan, J. dissenting (quoting *Tinker*, 393 U.S. at 511; *Barnette*, 319 U.S. at 637). Such an approach should be rejected.

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[9] "At the time, NHS had no formal written policy governing the content of flyers for student interest clubs, beyond the general guidance in the 2021–2022 . . . NHS officials 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." App. at 4a.

CONCLUSION

For the foregoing reasons, this Court should grant the petition.

Respectfully submitted,

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February 23, 2026