


In the
Supreme Court of the United States



E.D., A MINOR, BY HER PARENTS AND NEXT FRIENDS,
MICHAEL DUELL AND LISA DUELL, ET AL.,

Petitioners,

v.

NOBLESVILLE SCHOOL DISTRICT, ET AL.,

Respondents.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The case addresses whether a school must lend its walls to students to disseminate political messages. This is not a case about student's private expression at school.

E.D. expressed her pro-life views by taking part in the activities fair with flyers, a table-top display, and a shirt that said, "I am the pro-life generation." The issue arose when E.D. wanted to hang flyers with political content on the school walls. The School allowed club flyers to advertise the date, time, and location of the club meeting. The School categorically prohibited political content in flyers posted on its walls. E.D. challenged whether that prohibition violated the First Amendment.

The court of appeals found the School designated its walls as a limited public forum and because the proposed flyers would appear on the school's walls largely indistinguishable from other school-sponsored postings, *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), applied and the proper inquiry was whether the speech bore the school's imprimatur.

The Question Presented is:

Did the court of appeals properly apply *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), when it found Noblesville School District did not have to open its walls to allow students to post political messages simply because it allowed students to hang flyers advertising the date, time, and location of their club meetings?

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INTRODUCTION

This brief is filed on behalf of all Respondents – Noblesville School District; Beth Niedermeyer; Craig McCaffrey; Janae Mobley; and Jeremy Luna.

As a high school freshman, E.D. asked to start a pro-life student club at Noblesville High School. Administrators explained the process, E.D. complied with each requirement, and the club was established. E.D. was given a table at the activities fair where she wore a pro-life shirt and displayed pro-life signs while recruiting club members.

To further advertise her club, E.D. wanted to hang a political flyer on the walls at Noblesville High School. The School had not opened its walls to indiscriminate use by students creating a public forum for student speech. Rather, the School designated its walls for the narrow purpose of allowing student clubs to advertise meeting dates, times, and locations. Flyers for club meetings had to have the initials of the administrator who approved the flyer and a handwritten take-down date. The flyers could only be hung in the main hallway, near bus entrances and the auditorium, and in the cafeteria. All flyers had to be uniformly hung with blue tape.

The Assistant Principal and the club's faculty advisor informed E.D. of the requirements for club flyers. E.D. acknowledged the requirements stating, "Sounds good, thanks!! I'll get to work on the flyers." But instead of doing as instructed, and as she stated she would, E.D. and her mother went to the school the next morning seeking approval of the political flyers

from a different administrator. This was the second time in a month that E.D.'s mother had participated in meetings regarding the student club. Because it appeared the club was not truly a student-led and student-driven club, and because of E.D.'s refusal to comply with instructions for the flyers the School, revoked the club's ability to meet at the school, subject to reinstatement the next semester.

The speech in this case involved flyers displayed on the school walls. The School left open other channels for students to express their political views that did not involve the use of the school's walls. The School could restrict political content on materials posted on its facility walls.

The lower courts correctly applied *Hazelwood*, which addressed student speech that others "might reasonably perceive to bear the imprimatur of the school." 484 U.S. at 271. The walls of the school were not a public forum, and the School could enforce restrictions that were "reasonably related to legitimate pedagogical concerns." 484 U.S. at 273.

Petitioners fail to identify a compelling reason for this Court to review the Seventh Circuit's application of *Hazelwood* to E.D.'s proposed flyers. Petitioners argue a circuit split exists between the Fifth, Seventh, and Tenth Circuits and the Sixth and Eleventh Circuits, with the Third Circuit falling somewhere in the middle, as to how *Hazelwood* should be applied. However, the cases Petitioners cite show all circuits engaged in similar *Hazelwood*-versus-*Tinker* analyses. Those decisions differed only as necessary to address the facts and arguments in each case. Differences in the courts' respective analyses come down to semantics, not substance. The circuits are not split on whether *Hazelwood*

applies to flyers posted on school walls. The Seventh Circuit properly applied *Hazelwood*, and the outcome of the case would be the same even under the Eleventh Circuit's analysis which Petitioner asserts is more favorable to student speech.

Even if a circuit split existed, this case is a poor vehicle to decide the question presented by Petitioners. Petitioners did not present the issue to the lower courts and even if they had the outcome of the case would not change. This case is also a poor vehicle for deciding the application of *Hazelwood* in the university context, which is a separate question for which there are far more paradigmatic cases than this one. The decision below is correct, and the petition should be denied.



STATEMENT OF THE CASE

I. Factual Background

A. E.D. starts Noblesville Students for Life at Noblesville High School and Advertises at the Activities Fair.

Noblesville Schools is a public school district in Noblesville, Indiana. App.28a. At Noblesville High School, students participate in several types of student groups, including school clubs, academic teams, extra-curricular activities, co-curricular activities, and student interest clubs. *Id.* at App.29a. Student interest clubs, unlike other categories of student groups, are student-initiated and student-led. *Id.* at App.30a. However, they must have a faculty sponsor to supervise the use

of school facilities, answer questions, and help with logistics. *Id.* In the fall of 2021, Noblesville High School had several active student interest clubs, including, but not limited to, Conservation Club, Campus Crusade for Christ, Fellowship of Christian Athletes, Gender and Sexuality Alliance, Noblesville Young Democrats, Young Republicans, and Police Explorers. *Id.*

Student interest clubs could hang flyers on school walls to advertise their callout meetings, but only with prior approval from a school administrator. *Id.* at App.31a, 33a. All approved flyers had to include a handwritten take-down date and the initials of the administrator who approved them, and they were hung with blue tape. *Id.* at App.32a.

In fall 2021, there were limited areas where students were permitted to hang flyers. *Id.* Those included the main hallway of the freshman center, near bus entrances, the cafeteria, and near the auditorium. *Id.* The guidance on content in student club callout flyers was established and known by school administrators and club sponsors: Flyers for club call-out meetings were to include the name of the club and the date, time, and location of the meeting. *Id.* at App.31a.

Before the fall 2021 school semester started, E.D., an incoming freshman at Noblesville High School, proposed a pro-life student club at NHS titled Noblesville Students for Life (“NSFL”), a local chapter of the national organization Students for Life of America (“SFLA”). *Id.* at App.32a. Noblesville High School Principal Craig McCaffrey met with E.D.¹ on the second

¹ E.D.’s mother, Lisa Duell, also attended and audio-recorded this meeting at the request of E.D. App.32a. Neither E.D. nor Mrs. Duell explained to Dr. McCaffrey the reason for Mrs. Duell’s

day of school and approved NSFL’s formation. *Id.* at App.34a. NSFL had a booth at the fall 2021 activities fair, along with all other clubs. *Id.* At the activities fair, E.D. wore a shirt that stated, “I am the pro-life generation,” and spoke with students about NSFL. *Id.* The booth had a tri-fold poster display E.D. created with NSFL’s mission statement and a sign that stated, “I am the pro-life generation.” *Id.* at App.35a. Over 30 students signed up to participate in NSFL. *Id.*

B. E.D. Requests to Hang a Flyer with Political Messages on the School Walls, and the School Denied E.D.’s Request.

On August 31, 2021, E.D. emailed NHS Assistant Principal Janae Mobley digital copies of two SFLA template flyers that E.D. wanted to hang on school walls. App.35a. Both flyers included photographs of students in front of the United States Supreme Court building carrying signs that read, “I Reject Abortion,” “Defund Planned Parenthood,” and “I Am the Pro-Life Generation,” among similar messages. *Id.* The proposed flyers also contained text stating, “Pro-Life Students, It’s Time to Meet Up!” and included blank spaces at the bottom for specific details regarding the meeting’s time, place, topic, and sponsor. *Id.* A small SFLA logo was at the bottom of both flyers. *Id.* The flyers did not include the name of the club, “Noblesville Students for Life.” *Id.*

The next morning, on September 1, 2021, Mobley responded to E.D.’s email that the flyers should contain only the name of the club and the meeting location, time, and date, without photographs of signage. *Id.* at

presence. *Id.* Mrs. Duell participated in the meeting by asking questions and prompting E.D. to explain SFLA’s involvement in the club. *Id.*

App.36a. As an example, Mobley referred to the Young Republican's club flyers, which "just simply state the club name and meeting/call-out information." *Id.* Mobley added that, "obviously at the club meeting and call-out," the club can discuss any topic desired. *Id.*

Mobley advised E.D. to work with her faculty sponsor, Brian McCauley, on appropriate revisions before resubmitting them for approval to hang on the school walls. App.36a.

Mobley emailed Mr. McCauley and advised him to work with E.D. on a revised version of the flyers. *Id.* Less than one hour later, Mr. McCauley emailed E.D. with guidance:

The best thing to do for the flyers is to simply put this info on them:

Noblesville Students for Life Club

Meeting Date: ???

Meeting Time: ???

Meeting Location: ???

Once you get the flyer finished, will you please email it to me so that I can approve it?

thanks

Mr. McCauley

Id.; D. Ct. Dkt. 158-5 at 4. Later that evening, E.D. informed McCauley she "was hoping to use the [flyers] from the Students for Life website" and add NSFL's club information. *Id.* at 37a; D. Ct. Dkt. 158-5 at 5. Mr. McCauley responded the next morning, September 2, 2021:

Also, I think it is best just to have this info only on the flyers: (no pictures, etc.)

Noblesville Students for Life Club

Meeting Date: ???

Meeting Time: ???

Meeting Location: ???

Send me a pic of the final flyer and we'll get it figured out.

Id. Less than an hour later, E.D. responded to Mr. McCauley:

Sounds good, thanks! I'll get to work on making the flyers.

Id.

C. E.D. and Her Mother Try to Gain Approval of the Same Flyer from a Different Administrator, and the School Suspends NSFL's Status for the Semester.

Subsequent events, while not material to what standard governs E.D.'s speech on the flyers, clarify some misrepresentations in Petitioners' Statement of the Case and show why the facts of this case make it a poor vehicle for deciding the question presented.

Petitioners digress into immaterial and out-of-context testimony from Mobley and McCaffrey in an attempt to characterize the School's flyer procedures as standardless and confusing to students. Petition at 6-9. Yet E.D. was promptly informed three times—once by Mobley and twice by McCauley—exactly what needed to be on the flyers. App.36a-37a. The School's procedures of having students rely on faculty advisors

and obtain administrator approval for flyers worked as intended. *Id.* E.D. received clear, consistent guidance, as shown by her written agreement to revise the flyers as directed. App.37a; D. Ct. Dkt. 158-5 at 5.

Nevertheless, the following morning, E.D. and her mother went to the school and met with Noblesville High School Dean Jeremy Luna to discuss the same flyers E.D. presented to Mobley and McCauley. App.38a. This was the second NSFL related meeting Mrs. Duell attended, without explaining the reason for her presence. *Id.*

At the meeting with Luna, E.D. did not tell Luna about Mobley's email denying the flyers and explaining why they were denied. *Id.* In line with Mobley and McCauley's guidance, Luna advised that the issue with the flyer was the political photo of a "picket" with multiple signs reading "Defund Planned Parenthood." *Id.* Petitioners incorrectly claim Luna "changed his mind" during this meeting from saying the issue with the flyers was that they had "pictures," to saying the flyers had "Defund Planned Parenthood" signage. Petition at 9. The cited testimony was E.D.'s perception based on her conversation with Luna, not Luna's actual statements. D. Ct. Dkt. 152-2 at 35. E.D. asked Luna if she could hang the flyers if she removed the "Defund Planned Parenthood" signs. Luna said that "should" or "would possibly" work. App.38a.

Immediately after the meeting, Luna saw McCaffrey and Mobley and asked them about the flyer E.D. had presented to him. Pet App. 39a. Luna summarized the meeting with E.D. and her mother to McCaffrey and Mobley. *Id.* Luna advised his impression from the meeting with E.D. and Mrs. Duell was that it was a three-way conversation with Mrs. Duell driving

the conversation. *Id.* Mobley informed McCaffrey during the meeting that E.D. had presented the same flyers to her for approval, that she had turned them down, and that there was a plan in place to correct them. *Id.* McCaffrey and Mobley expressed concerns about Mrs. Duell's participation in E.D.'s meetings about NSFL. *Id.*

McCaffrey thought E.D. and her mother attempted to make an end-run around the instructions E.D. received from Mobley and McCauley. *Id.* at App.39a. Based on Mrs. Duell's participation in two meetings in less than a month, McCaffrey was not confident that the club was a student-driven club, and he revoked approval of NSFL for the rest of the semester. App.40a. McCaffrey advised E.D. could reapply for NSFL in January. *Id.*

II. Procedural History

Petitioners sued Noblesville Schools, Luna, Mobley, McCaffrey, and others regarding the revocation of NSFL and denial of E.D.'s proposed flyers. Petitioners alleged, in pertinent part, that the Respondents violated their First Amendment rights by refusing to approve E.D.'s proposed flyers. Petitioners and Respondents filed cross-motions for summary judgment.

Respondents argued that Noblesville Schools did not create a public forum on NHS walls or open the school walls for indiscriminate use. Thus, pursuant to the Court's decision in *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 267 (1988), the School could impose reasonable restrictions on the content of student flyers, including a restriction on images and political content. D. Ct. Dkt. 158 at 29-30.

In response, Petitioners argued only that “[a]ny reasonable observer would understand that student club activities are the speech of those student clubs—not of the school,” and that “[h]undreds of public high schools across the nation permit students and student clubs to post flyers to the walls, and it is well understood that these are actions taken by students, rather than the administration.” Dkt. 164 at 14-15. Petitioners made no further argument against the application of *Hazelwood* to E.D.’s proposed flyers.

The district court held that *Hazelwood* controlled and gave Noblesville Schools the authority to regulate the content of student flyers posted on its walls. App.65a. The district court noted E.D. could express her pro-life message on her clothing and at NSFL meetings, but “[h]anging flyers on school walls advertising clubs that meet during school hours and on school grounds with a faculty advisor is expressive activity that could reasonably be perceived to bear the imprimatur of the school.” App.65a.

On appeal to the Seventh Circuit, Petitioners argued that *Hazelwood* should not apply because student club flyers do not bear the imprimatur of the school. According to Petitioners in their appellate brief, “The *Hazelwood* Court applied a different school-speech rule because activities that have the school’s ‘imprimatur’ ‘may fairly be characterized as part of the school curriculum.’” App. Ct. Dkt. 14 at 23 (citing *Hazelwood*, 484 U.S. at 271) (emphasis added). Under the facts in *Hazelwood*, Petitioners argued, “reasonable observers may have thought the newspaper to be the school’s speech, so educators could regulate it in line with the ‘lessons the activity is designed to teach.’” *Id.* (citing *Hazelwood*, 484 U.S. at 271) (emphasis added).

Petitioners argued E.D.’s proposed flyers were distinguishable because the diversity in viewpoints represented by various student flyers should make it obvious to the public that the flyers originated with students and were not endorsed by the School. *Id.* at 26.

Now, Petitioners depart from the language from *Hazelwood* they cited in their own brief to the Seventh Circuit and attempt to diminish *Hazelwood’s* ruling. Namely, Petitioners advocate for a significantly narrowed interpretation of *Hazelwood’s* reference to “curriculum” that conflicts with how courts have long used that term.



REASONS FOR DENYING THE PETITION

I. There Is No Circuit Split.

Petitioners argue a circuit split exists as to when *Hazelwood* applies to student speech, and that this has resulted in inconsistent protection of student speech across the circuits. According to Petitioners, the Seventh, Fifth, and Tenth Circuits are the most restrictive to student speech by dropping any requirement that student speech be “part of the curriculum” before *Hazelwood* applies.

Petitioners’ frame the question presented as needing clarification of when *Hazelwood* applies—whether it is (1) when student speech might be erroneously attributed to the school, (2) when speech occurs in the context of an organized and structured educational activity, or (3) when speech is part of the curriculum. That question is answered by *Hazelwood*

itself. The Court in *Hazelwood* explained that “expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school . . . may fairly be characterized as part of the school’s curriculum, whether or not they occur in a traditional classroom setting.” *Hazelwood*, 484 U.S. at 271. *Hazelwood* explained that activities that might be erroneously attributed to the school are part of the school’s “curriculum” for purposes of the First Amendment analysis.

Contrary to Petitioners’ arguments, all the circuit courts cited in Petitioners’ brief—not merely the Seventh, Tenth, and Fifth Circuits—uniformly apply *Hazelwood*. In both the Sixth and Eleventh Circuit cases cited by Petitioners, the court applied *Hazelwood*—not *Tinker*. Petitioners assert it is the reasoning in those cases that set them apart from decisions in other circuits, but a closer look reveals no clear departure. Rather, if those courts were presented with the facts of this case, they would come to the same conclusion as the district court and Seventh Circuit: that *Hazelwood* applies to flyers hung on school walls.

A. The Sixth and Eleventh Circuits Did Not Limit Application of *Hazelwood* to Curriculum Assignments or a Classroom Setting.

Petitioners rely on *Curry ex rel Curry v. Hesiner*, 513 F.3d 570 (6th Cir. 2008) and *Bannon v. School Dist. Of Palm Beach Cnty.*, 387 F.3d 1208 (11th Cir. 2001) in support of a purported circuit split. However, the Sixth and Eleventh Circuits did not narrow *Hazelwood*’s application to only speech arising within a school’s curriculum or in a classroom setting.

In *Curry*, fifth-grade students participated in a classroom simulation activity where they were instructed to create, market, and sell a product. 513 F.3d at 574. Student Joel Curry wanted to pass out candy canes tied to cards with religious messages, but the school thought the religious messaging was inappropriate for the setting and could be offensive to some students. *Id.*

The plaintiff in *Curry* argued that *Hazelwood* only applied to student speech “if the audience might mistake the speech as originating from the school.” *Id.* at 577. The court found that reading “too narrow.” *Id.* It stated, “For speech to be perceived as bearing the imprimatur of the school does not require that the audience believe the speech originated from the school, only that an observer would reasonably perceive that the school approved the speech.” *Id.* at 577 n.1. The court went on to cite cases emphasizing judicial deference to public school officials in deciding “what is appropriate for children in school.” *Id.* at 577-78.

In *Curry*, unlike this case, the speech took place in a classroom assignment that no party disputed was part of the school’s curriculum. The Sixth Circuit did not limit application of *Hazelwood* to the school’s curriculum or a classroom setting. Rather, the Sixth Circuit applied *Hazelwood* in a context where there was no dispute that the activity was part of the school’s curriculum. The Sixth Circuit did not determine that *Hazelwood* did not apply to speech outside curriculum assignments or the classroom setting. That court did not need to address that issue because it was not relevant to the issue before the court.

The Sixth Circuit’s reasoning in *Curry* does not depart from the Seventh Circuit’s interpretation of

Hazelwood. It simply considered a different set of facts and, therefore, applied different language from *Hazelwood* that was more applicable to the issues presented.

Similarly, the Eleventh Circuit's decision in *Bannon v. School Dist. of Palm Beach Cnty.*, 387 F.3d 1208 (11th Cir. 2001) does not support a purported circuit split. Rather, *Bannon* lends support to the Seventh Circuit's opinion in this case by showcasing a very similar set of facts with the same outcome.

In *Bannon*, a public-school invited students to paint murals on large, plywood panels being used to block off a long-term construction zone. 387 F.3d at 1210. Students did not have to participate, received no grade or credit for participation, painted the murals outside of school hours, and paid a small fee to participate. *Id.* at 1214. Student members of the Fellowship of Christian Athletes painted several murals with religious messages and symbols. *Id.* at 1210-11. Some murals painted by other students contained profanity, gang symbols, and satanic images. *Id.* at 1211. The school required all of those be painted over. *Id.*

As Petitioners note, the court in *Bannon* held that *Hazelwood* controls “school-sponsored expression that occurs in the context of a curricular activity.” *Id.* at 1214. However, Petitioners omit discussion of everything that comes after that quote, where the court emphasized the *broad* definition of “curricular” and held that the speech was curricular even though it occurred outside of the classroom and was not part of a curriculum assignment. *Id.* at 1214-1215. The Eleventh Circuit explained, “*Hazelwood* only controls school-sponsored expression that occurs in the context of a curricular activity,” and the murals at issue “constituted school-

sponsored expression within the meaning of *Hazelwood*.” *Id.* at 1208. The murals were in prominent locations near the school’s main office and in the main hallway, and a reasonable “observer would likely perceive that the school had a role in setting guidelines for, and ultimately approving, the [murals] it allowed to become a part of the school itself, which in this case, it did.” *Id.* at 1214.

Neither the Third Circuit nor the Eleventh Circuit directly contradict the Seventh Circuit’s decision here. The decisions of those circuits apply *Hazelwood* to curricular speech regardless of whether the speech is part of a curriculum assignment or in the classroom setting. Those decisions recognize that under *Hazelwood* speech perceived as bearing the imprimatur of the school is curricular.

B. The Third Circuit Did Not Broaden Application of *Hazelwood* Beyond the Curricular Context.

The Third Circuit case that Petitioners rely on to support their purported circuit split, *Walz ex rel. Walz v. Egg Harbor Twp. Bd. of Educ.*, 342 F.3d 271, 277 (3d Cir. 2003), does not stand as a middle ground position in the *Hazelwood*-versus-*Tinker* analysis. Rather, *Walz* stands for the broader authority of elementary schools to regulate speech due to the particular nature and concerns of educating young children.

In *Walz*, a pre-kindergarten student was prevented from passing out pencils to classmates with the imprint, “Jesus [Loves] The Little Children.” 342 F. 3d at 273. The next year, in kindergarten, the student wanted to pass out candy canes with a religious story

attached to them at his classroom holiday party. *Id.* at 273-74. He was permitted to do so only before school, during recess, or after school, but not at the holiday party. *Id.* The same thing occurred the next year in relation to his first-grade holiday party. *Id.* The student sued, lost at the district court, and appealed.

The Third Circuit focused heavily on the student's grade level and a school's legitimate interest in controlling speech at the elementary level, when students are young and impressionable. *Id.* at 276-280. The "rule" Petitioners ascribe to *Walz* comes from the following sentence in the court's opinion: "Where student expression interferes with the legitimate teaching of an organized and pedagogically-based classroom activity, a school may reasonably restrict or limit expression beyond the bounds of what the activity intends to teach." *Id.* at 276. But that quote was the court applying *Hazelwood* and other First Amendment jurisprudence to the facts presented. The court did not establish a rule limiting the application of *Hazelwood* with this sentence.

Walz must be viewed in context. It addressed the appropriate curricular standards in kindergarten and first grade when children are most impressionable. *Id.* at 277. The facts-specific discussion in *Walz* is shown by the pre- and post-*Walz* decisions from the Third Circuit.

In 2001, two years before *Walz* was decided, the Third Circuit stated, "Under *Hazelwood*, a school may regulate school-sponsored speech (that is, speech that a reasonable observer would view as the school's own speech) on the basis of any legitimate pedagogical concern." *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 214 (3d Cir. 2001). In 2013, ten years after *Walz*,

the Third Circuit referenced *Hazelwood* as holding that “school officials may regulate speech that is school-sponsored or can reasonably be viewed as the school’s own speech.” *K.A. ex rel. Ayers v. Pocono Mountain Sch. Dist.*, 710 F.3d 99, 107 (3d Cir. 2013). The pre- and post-Walz decisions apply the *Hazelwood* test for school-sponsored speech and do not apply an “educational activities” test as Petitioners argue.

None of the three circuits noted by Petitioners has narrowed the definition of “curriculum” under *Hazelwood*. No conflict exists with the circuits’ interpretation of *Hazelwood*. There is no circuit split that requires review by this Court.

II. This Court Has Not Abandoned Tests Such as the One Adopted in *Hazelwood* That Considers Whether Speech May Reasonably be Perceived as Bearing the Imprimatur of the School.

Petitioners assert this Court in *Lemon v. Kurtzman*, 403 U.S. 602 (1971), abandoned a “reasonable observer” test. Petitioners argue by extension, *Hazelwood*’s consideration of speech that may reasonably be perceived as bearing the imprimatur of the school is improper. Petition at 24-25. That is inaccurate.

Hazelwood was decided in 1988, seventeen years after *Lemon*. *Hazelwood* specifically granted schools authority over “expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school.” *Hazelwood*, 484 U.S. 271. As recently as *Mahanoy Area Sch. Dist. v. B. L.*, 594 U.S. 180 (2021), this Court recognized that is a category of student speech that schools could regulate. *Id.* at 188. There is no “*Lemon* problem” for

this Court to address. The Seventh Circuit’s decision that *Hazelwood* applies to speech that may reasonably be perceived as bearing the imprimatur of the school is consistent with this Court’s precedent and First Amendment jurisprudence. Petitioners’ *Lemon* argument does not present an issue warranting this Court’s review.

III. This Case Is a Poor Vehicle for Deciding the Question Presented.

Petitioners urge the Court to hear this case to “clarify[] that *Hazelwood* applies only to school-sponsored curricular speech” and to consider application of *Hazelwood* at the college and university level. Petition at 26-30. Even if the Court were inclined to address that question at some point, this case is an inappropriate vehicle to do so.

First, Petitioners did not present their argument to the lower courts for narrowing *Hazelwood*’s application. In the district court, Petitioners’ argued to apply *Tinker*, rather than *Hazelwood*. That argument was limited to two sentences: “Any reasonable observer would understand that student club activities are the speech of those student clubs—not of the school. Hundreds of public high schools across the nation permit students and student clubs to post flyers to the walls, and it is well understood that these are actions taken by students, rather than the administration.” D. Ct. Dkt. 164 at 14-15.

In the court of appeals, Petitioners expanded their argument slightly but not related to the question they pose to this Court. Rather, Petitioners made an imprimatur-related argument: They asserted that because E.D.’s posters originated with her, and because

student clubs are student-led, student-initiated, and represent a range of incompatible viewpoints, parents and other members of the public would not attribute the flyers to the school district. App. Dkt. 14 at 25-26. Petitioners did not argue that *Hazelwood* had been improperly expanded by the district court or other circuits.

Second, even if Petitioners had presented this question to the lower courts, the argument is not outcome dispositive. As addressed *supra*, even the Eleventh Circuit—a circuit Petitioners claim is one of the most protective of student speech—would not have held in Petitioners’ favor. The reasoning and analysis the Eleventh Circuit applied to the student murals painted on plywood barriers in the school applies to E.D.’s flyers. Both the Eleventh Circuit and the Seventh Circuit read *Hazelwood* to apply to school-sponsored expression that occurs in a curricular activity. Both applied *Hazelwood* outside of the classroom setting and to expression that was not part of a curriculum assignment. Both applied *Hazelwood* to a student’s message displayed in prominent locations of the school and on the school. Both found that the speech at issue could reasonably be perceived to be school sponsored or bearing the imprimatur of the school. Even if this Court found the Eleventh Circuit’s reading of *Hazelwood* differed from the Seventh Circuit and was the proper reading, it would not affect the outcome of this case. Under any circuit’s approach to *Hazelwood*, Petitioners’ proposed flyers would fall squarely within *Hazelwood*’s definition of curricular.

Third, this case should not be used to decide the application of *Hazelwood* in the university context. As Petitioners acknowledge, the Seventh, Eighth, Tenth,

and Eleventh Circuits have applied *Hazelwood* in the university context. Petition at 26-30. Those cases addressed independent news publications written by students, a university's restriction on distributing campaign literature, and a disciplinary action for a student's lack of professionalism. *Id.* Consideration of *Hazelwood's* application in the university setting is more appropriate in a case that involves a university, not a high school. This Court has been presented opportunities to consider application of *Hazelwood* in the university setting and has declined those invitations. Specifically, this Court denied Petitions for Certiorari in the Seventh, Eighth, and Tenth Circuit university cases relied on by Petitioners. *See Hosty v. Carter*, 412 F.3d 731 (7th Cir. 2005) (en banc), *cert. denied*, 126 S.Ct. 1330 (2006); *Keefe v. Adams*, 840 F.3d 523 (8th Cir. 2016), *cert. denied* 137 S.Ct. 1448 (2017); and *Hunt v. Bd. of Regents of Univ. of New Mexico*, 792 F. App'x 595 (10th Cir. 2019), *cert. denied*, 141 S. Ct. 885 (2020). Like those earlier Petitions, the Petition here does not present an issue warranting this Court's review.



CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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