No. 25-906

In the Supreme Court of the United States

E.D., a minor, by her parents and next friends, MICHAEL DUELL and LISA DUELL, and NOBLESVILLE STUDENTS FOR LIFE,
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 OF *AMICI CURIAE* THE FAMILY FOUNDATION AND CATHOLICVOTE.ORG EDUCATION FUND IN SUPPORT OF PETITIONERS

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INTERESTS OF *AMICI*[1]

The Family Foundation ("TFF") is a non-partisan Virginia non-profit organization committed to promoting strong family values in Virginia through its citizen advocacy and education initiatives. As the largest pro-family advocacy organization in Virginia, TFF is committed to protecting and promoting free speech for all, including students who seek to advance pro-life and pro-family positions at public schools.

CatholicVote.org Education Fund ("CVEF") is a nonpartisan voter education program devoted to serving the Nation by supporting educational activities that promote an authentic understanding of ordered liberty and the common good. CVEF is committed to, among other things, safeguarding and supporting student expression, such as the pro-life flyers of Noblesville Students for Life ("NSFL").

Given their missions, TFF and CVEF are deeply concerned about the First Amendment issues implicated by *E.D. v. Noblesville Sch. Dist.*, 151 F.4th 907 (7th Cir. 2025). The panel's opinion exacerbates the three-way split among five other Circuits regarding the proper scope of *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988). Aligning itself with the Fifth and Tenth Circuits, the Seventh Circuit invokes *Hazelwood* to divest students of their speech rights on public school campuses whenever school

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[1] Each party received notice of the filing of this *amici* brief, as required by Rule 37.2, and pursuant to Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part, and no person other than the *amici* and their counsel made any monetary contribution intended to fund the preparation or submission of this brief.

officials believe certain student expression *might* cause disruption or be *erroneously* attributed to the school. Because this interpretation allows public schools to censor passive, non-disruptive speech of student-run groups whenever a passerby might misattribute the group's message to the school, it directly conflicts with *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969) and *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753 (1995). As a result, *amici* come forward to support the right of all students to respectfully participate in nondisruptive expression on school grounds regarding important national and political issues even when—or perhaps especially when—those issues are controversial. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943) ("That [schools] 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.").

SUMMARY OF ARGUMENT

The Seventh Circuit's opinion elides the critical distinction in the public school context between student expression (which is subject to *Tinker*) and school-sponsored, curriculum-based speech (which falls under *Hazelwood*). *Hazelwood*, 484 U.S. at 271 and n.3 (noting the central distinction "between speech that is sponsored by the school [as part of the school curriculum] and speech that is not"); *Walker v. Texas Div., Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 222, 232 (2015) (Alito, J., dissenting) (discussing the distinction "between government speech (that is, speech by the government in furtherance of its

programs) and governmental blessing (or condemnation) of private speech"). Under the Seventh Circuit's capacious view of *Hazelwood*, school officials can censor student speech on school property simply by (i) opening up some portion of its property to student-run groups (walls in certain parts of the school), (ii) requiring these student-run groups to apply to use the property for a temporary period (by submitting flyers about student group meetings to the administration for approval), and (iii) exercising perfunctory review of student expression prior to posting in the designated area (by having a faulty member initial each flyer to show school approval). Why? Because given "where and how E.D. sought to display her flyers, they could reasonably be perceived as bearing the school's imprimatur." 151 F.4th at 915; *Id*. (claiming that the flyers "would naturally (and perhaps inevitably) be seen by students, parents, and visitors as reflecting the school's endorsement").

This broad reading is inconsistent with *Hazelwood* and significantly trenches on the protection afforded student expression under *Tinker*. The school-sponsored newspaper in *Hazelwood* was subject to the school's editorial control only because it was "supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences." 484 U.S. at 271. Although students engaged in speech (*e.g.*, writing articles), they did so in a journalism class, which was part of the school's overarching curriculum. As a result, the newspaper was the expression of the school, not the students. *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 656 (1995) (citing *Hazelwood* for the proposition that "public school authorities may censor

school-sponsored publications, so long as the censorship is 'reasonably related to legitimate pedagogical concerns' "); *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995) ("When the University determines the content of the education it provides, it is the University speaking…."). Given that NSFL is a student-run club, its speech falls outside *Hazelwood* and, contrary to the Seventh Circuit, is fully protected under *Tinker*.

The panel opinion also is inconsistent with this Court's recognition in *Capitol Square* and *Shurtleff v. City of Boston*, 596 U.S. 243 (2022) that the government cannot bar private expression in a designated limited or nonpublic forum simply because some hypothetical viewer might erroneously attribute that speech to the government. *Id.* at 271-72 ("[P]rivate-party expression in any type of forum recognized by our precedents does not constitute government speech."). This Court has rejected the reasonable observer test in the religion context, *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 510 (2002), and should grant certiorari to prevent the Seventh Circuit from importing that same ahistorical standard into the public school speech context. Erroneous attribution is just that—erroneous. Under the Court's forum cases, the non-curriculum-based expression of a student-run group does not become school-sponsored whenever an observer might wrongly attribute the speech to the school. As a result, this Court should grant certiorari and "exercise great caution before" allowing the Fifth, Seventh, and Tenth Circuits to "extend [*Hazelwood*]" beyond its narrow protection of school-sponsored, curriculum-based expression. *Matal v. Tam*, 582 U.S. 218, 235 (2017).

ARGUMENT

I. Because NSFL is a student-run group, *Hazelwood* does not apply, and Noblesville High School can censor the pictures on NSFL's proposed flyers only if that student expression substantially interferes with school operations.

Under the government speech doctrine, Noblesville High School ("NHS") has the right to "speak for itself," *Bd. of Regents of Univ. of Wis. System v. Southworth*, 529 U.S. 217, 229 (2000), "say what it wishes," *Rosenberger*, 515 U.S. at 833, and "select the views that it wants to express." *Pleasant Grove City v. Summum*, 555 U.S. 460, 468 (2009). When NHS engages in its own expression, "the Free Speech Clause has no application," *id.* at 467, and the school may discriminate based on content or viewpoint to ensure that *its* desired message is conveyed. *Johanns v. Livestock Marketing Ass'n*, 544 U.S. 550, 553 (2005) ("[T]he Government's own speech … is exempt from First Amendment scrutiny."). For example, when school officials adopt NHS's curriculum, publish policies, correspond with parents, and post on NHS's website, the free speech clause (generally) does not limit its expression. *Woolard v. Thurmond*, 152 F.4th 1050, 1057 (9th Cir. 2025) ("'[A] public school's curriculum is an 'expression of its policy,' and [] 'information and speech … present[ed] to school children may be deemed to be part of the school's curriculum and thus School District speech.' ") (citations omitted).

Hazelwood recognizes that government speech also includes student expression that occurs within the

context of "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," because "[t]hese activities may fairly be characterized as part of the school curriculum." 484 U.S. at 271. Even though students may engage in expression when participating in school-sponsored, curriculum-based activities (*i.e.*, those that "are supervised by faculty members and designed to impart particular knowledge or skills to student participants"), the speech remains that of the public school. *Morse v. Frederick*, 551 U.S. 393, 418 (2007) (Thomas, J., concurring) (explaining how "the Court made an exception to *Tinker* for school-sponsored activities … creat[ing] a new standard that permitted school regulations of student speech [in school-sponsored activities] that are 'reasonably related to legitimate pedagogical concerns' "); *Id*. at 423 (Alito, J., concurring) (taking *Hazelwood* to "allow[] a school to regulate what is in essence the school's own speech, that is, articles that appear in a publication that is an official school organ").

To fall within *Hazelwood*, though, the school itself must be *speaking*—not merely permitting student groups to engage in expression on parts of its property opened for student speech. *Summum*, 555 U.S. at 469 ("While government speech is not restricted by the Free Speech Clause, the government does not have a free hand to regulate private speech on government property."). This distinction between school-sponsored speech and a student's own expression on school grounds safeguards a school's ability to control school-sponsored speech that it fosters by and through its

curriculum while still "protect[ing] the marketplace of ideas." *Walker*, 576 U.S. at 207; *Matal*, 582 U.S. at 235 ("If private speech could be passed off as government speech by simply affixing a government seal of approval, government could silence or muffle the expression of disfavored viewpoints."). When the speech is not part of the curriculum (such as the expression of student-run groups like NSFL), however, *Tinker* governs, protecting the students' right to "express[] their personal views on the school premises," *Hazelwood*, 484 U.S. at 266, whether "in the cafeteria, or on the playing field, or on the campus during the authorized hours." *Tinker*, 393 U.S. at 512-13.

This right, of course, must be understood "in light of the special characteristics of the school environment." *Id.* at 506. But under this Court's First Amendment precedents, public schools can bar the private expression of students in only three limited circumstances, where (1) officials "have reason to believe that such expression will 'substantially interfere with the work of the school or impinge upon the rights of other students'," *Hazelwood*, 484 U.S. at 266 (quoting *Tinker*, 393 U.S. at 509); (2) student expression is "wholly inconsistent with the 'fundamental values' of public school education" or the school's "basic educational mission," such as the "sexually explicit" speech at the student assembly in *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685-86 (1986); or (3) student speech "would [be] interpret[ed by a reasonable observer] as advocating illegal drug use and … can[not] plausibly be interpreted as commenting on any political or social issue, including speech on issues such as 'the wisdom

of the war on drugs or of legalizing marijuana for medicinal use.' " *Morse*, 551 U.S. at 422 (Alito, J., concurring).

Unlike the school-run newspaper in *Hazelwood*, the flyers in this case were the private expression of NSFL, a student-run club, and were not part of any school-sponsored, curriculum-based activity. As the district court confirmed, student interest clubs like NSFL "are student-driven and student-led" and, therefore, unlike all other student groups at NHS, which "are school sponsored and led by a school-approved adult who is actively involved in organizing and running the group." *E.D. v. Noblesville Sch. Dist.*, 2024 WL 1140919 at *2 (S.D. Ind. 2024). E.D. started NSFL " 'to educate [NHS students] on the issue of abortion and empower [them] to volunteer in the local community with pregnancy-related items.' " *Id.* at *3 (citation omitted). NHS had no role in formulating NSFL's mission or its messaging. Moreover, the proposed flyers included neither sexually explicit expression nor implicated illegal drug use.

Undeterred, the Seventh Circuit concluded that NHS had the authority to regulate NSFL's flyers because "they could reasonably be perceived as bearing the school's imprimatur," 151 F.4th at 915, even if that speech did not satisfy *Tinker*'s "substantial disruption" standard. *Id.* at 913 (noting that the Principal "reiterated that 'posters cannot contain any content that is political or that could disrupt the school environment' "). According to the panel, *Hazelwood* applies to any "situation[] where student speech might reasonably be attributed to the school." *Id.* at 916.

There are at least two problems with the Seventh Circuit's analysis, each of which warrants review.

First, the Seventh Circuit squeezes this case within *Hazelwood* only by significantly narrowing *Tinker*. To sidestep *Tinker*, the panel asserts that, given "where and how E.D. sought to display her flyers, they could reasonably be perceived as bearing the school's imprimatur" and that the "risk of mistaken attribution is precisely the kind of institutional concern [*Hazelwood*] addresses." *Id*. at 915. But *Hazlewood* is concerned only with school-sponsored, curriculum-based student expression being attributed to the school, not the misattribution of speech by separate student-run clubs. In drawing a distinction "between speech that is sponsored by the school and speech that is not," 484 U.S. at 271 n.3, *Hazelwood* explained that the former "concerns educators' authority over 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." *Id*. at 271. Attributing *school-sponsored* activities to the school is reasonable because, as *Hazelwood* further clarified, such activities "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 skill to student participants and audiences." *Id*.

The contrast with the present case is striking. The newspaper in *Hazelwood* was school-sponsored and school-run, being "part of the educational curriculum and a 'regular classroom activit[y]' " that "the journalism teacher … 'both had the authority to exercise and in fact exercised a great deal of control over.' " *Id*. at 268 (citation omitted). The teacher "was

the final authority with respect to almost every aspect of the production and publication of [the newspaper], including its content." *Id.* at 268 (internal punctuation and citation omitted). Among other things, the journalism teacher selected the editors, assigned story ideas, advised student writers, edited articles, chose and edited letters to the editor, scheduled publication dates, and dealt with the printing company. *Id.* Because the newspaper provided "a supervised learning experience for journalism students," "school officials were entitled to regulate the contents of [the newspaper] in any reasonable manner." *Id.* at 270. When implementing a school's curriculum, "[e]ducators are entitled to exercise greater control … to assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school." *Id.* at 271.

Consistent with the government-speech doctrine, school-sponsored, curriculum-based student expression remains the speech of the school that authorized and approved it. *Rosenberger*, 515 U.S. at 833 ("When the University determines the content of the education it provides. … we have permitted [it] to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message."). Because such speech is the school's, school officials "retain the authority to refuse to sponsor student speech that might reasonably be perceived to … associate the school with any position other than neutrality on matters of political controversy." *Id.* at 272.

Accordingly, the ultimate rule adopted in *Hazelwood* is that "educators do not offend the First Amendment by exercising editorial control over the style and content of *student speech in school-sponsored expressive activities* so long as their actions are reasonably related to legitimate pedagogical concerns." *Id.* at 273 (emphasis added).

This rule is inconsistent with the Seventh Circuit's holding because NSFL's expressive activity was *not* school-sponsored. Whereas all other student groups at NHS "are school sponsored and led by a school-approved adult who is actively involved in organizing and running the group," student interest clubs (like NSFL) "are created by students who want to gather with other students who hold similar interest in a particular subject." *E.D.*, 2024 WL 1140919 at *2. Unlike their school-sponsored counterparts, student interest clubs "are student-driven and student-led." *Id.* Although they have a faculty sponsor, "the adult does not actively participate in the club." *Id.* In fact, the lower court opinions cite nothing in the record indicating that NSFL's expression was school-sponsored or curriculum-based. Consequently, the expression at issue was the private speech of NSFL and, therefore, subject to *Tinker*.

Second, review is necessary to ensure that *Tinker* continues to safeguard student expression in the Fifth, Seventh, and Tenth Circuits. Like the armbands in *Tinker*, the proposed flyers were passive, nondisruptive expressions of NSFL's views. As the Seventh Circuit has acknowledged, *Tinker* "[b]alanc[ed] the speech rights of students with the need for school officials to set standards for student conduct" and concluded that "restrictions on student

speech are constitutionally justified if school authorities reasonably forecast that the speech in question 'would materially and substantially disrupt the work and discipline of the school' or invade the rights of others." *N.J. by Jacob v. Sonnabend*, 37 F.4th 412, 423 (7th Cir. 2022) (quoting *Tinker*, 393 U.S. at 513). To restrict speech based on "substantial disruption," however, a school must ground its decision on "more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint" or an "undifferentiated fear or apprehension of disturbance." *Tinker*, 393 U.S. at 508-09. Such amorphous standards severely undermine the free speech rights of students given that "[a]ny variation from the majority's opinion may inspire fear" and "[a]ny word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance." *Id*. at 508; *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949) ("[A] function of free speech under our system of government is to invite dispute…. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea."). Accordingly, "where there is no finding and no showing that engaging in the forbidden [speech] would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,' the prohibition cannot be sustained." *Tinker*, 393 U.S. at 509.

NHS proffered no evidence that the proposed pictures of students holding pro-life banners in front of the Capitol building would substantially interfere with the school's operations. All NHS could muster were

statements from school officials that the pictures were "political" and "could disrupt the school environment." *E.D.*, 2024 WL 1140919 at *14. The same general concerns motivated the school officials in *Tinker*, yet this Court rejected them. Review is needed, therefore, because NSFL's proposed flyers, like the black armbands in *Tinker*, were a form of "silent, passive expression of opinion, unaccompanied by any disorder or disturbance." 393 U.S. at 508. As in *Tinker*, "[i]t is also relevant that the school authorities did not purport to prohibit the" expression of political messages (including pro-life messages) on clothing, buttons, or stickers on books or computers. *Id.* at 510. In fact, "E.D. was permitted to form NSFL, promote it at the student activities fair, and distribute materials without limitation on what she could wear, say, or hand out." 151 F.4th at 917. Given the lack of any evidence that such political messages had any effect, let alone a substantial or material one, on the functioning of the school, it is difficult to credit the panel's claim that "[t]he potential for such misunderstanding—and for disruption—is greater here than in" *Hazelwood*. *Id.*

The panel apparently took solace in the fact that E.D. could express her views in other ways, being "free to express her views and engage in debate during club meetings and elsewhere on campus." *Id.* The school precluded only one form of expression—"[f]lyers promoting a polarizing political slogan ('Defund Planned Parenthood') and bearing an administrator's initials alongside school-sponsored postings"—that the panel believed "could mislead observers into thinking the school endorses that view." *Id.*

Yet the availability of alternative avenues of expression does not alleviate the constitutional violation in this case: " '[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the pleas that it may be exercised in some other place.' " *Spence v. Washington*, 418 U.S. 405, 411 n.4 (1974) (quoting *Schneider v. New Jersey, Town of Irvington*, 308 U.S. 147, 163 (1939)). The student protesters in *Tinker* also had other protected means of expressing their views—*e.g.*, wearing t-shirts or meeting in a group to discuss their opposition to Vietnam—but the Court focused only on the right of the students to engage in their *chosen* form of expression, wearing black armbands. It is small consolation to NSFL that it can say what it wants during its meetings when it is precluded from conveying information about the group and its mission to generate student interest in attending those meetings. *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788, 799 (1985) ("Although the CFC does not entail direct discourse between the solicitor and the donor, the CFC literature facilitates the dissemination of views and ideas by directing employees to the soliciting agency to obtain more extensive information.").

After all, "personal intercommunication among the students … is also an important part of the educational process." *Tinker*, 393 U.S. at 512. Pictures on flyers (like black armbands) convey a powerful message to a wider audience—all those who view the flyers (or armbands)—and do so without interfering with the educational mission of the school. As a result, the First Amendment protects NSFL's expression:

> In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views.

Id.; *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) (" 'The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.' … The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, (rather) than through any kind of authoritative selection.' ") (quoting *Shelton v. Tucker*, 364 U.S. 479, 487 (1960) and *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943)).

The Fifth, Seventh, and Tenth Circuits expand the scope of *Hazelwood* (and significantly narrow *Tinker*) by removing *Hazelwood*'s requirement that the regulated expressive activity be curriculum-based. Under their revised standard, *Tinker* does not apply to *any* student expression at the school—whether curriculum-based or not—that "could mislead observers into thinking the school endorses that view." 151 F.4th at 917. And the perception can be reasonable, according to these Circuits, even if the perception is erroneous, *i.e.*, even if the expression is that of an entirely student-run club like NSFL. Only this Court can ensure that public school students retain *Tinker*'s protection by confirming that

Hazelwood is limited to student speech that occurs as part of a school-sponsored, curriculum-based activity.

II. The panel's reliance on how a third party might reasonably perceive non-curriculum-based student speech is inconsistent with *Johanns*, *Capitol Square*, and *Shurtleff*.

Although NSFL's expression was that of a student-run group, the Seventh Circuit concluded that the flyers fell within *Hazelwood* because of the threat of misattribution: "[Given] where and how E.D. sought to display her flyers, they could reasonably be perceived as bearing the school's imprimatur." 151 F.4th at 915. And this perception was reasonable, according to the lower courts, even though it was erroneous, *i.e.*, even though the expression was that of an entirely student-run club. *E.D.*, 2024 WL 1140919 at *15 ("[I]t would be reasonable for parents and other members of the public … who observed such flyers displayed on school walls to erroneously attribute any political messaging they contained to the school district or the school itself, despite the clubs['] being student-run.").

This Court should grant certiorari and reverse the Seventh Circuit's analysis for at least three reasons. First, as discussed above, the panel's opinion directly conflicts with *Hazelwood*. *Hazelwood* is expressly limited to school-sponsored expressive activities—like a newspaper created as part of a journalism course—that are part of the school-approved and school-controlled curriculum. Allowing school officials to regulate student expression that is part of school-sponsored curricular activities is meant to ensure that schools can control their own curricular messages, not permit schools to leverage the possibility of

misattribution to restrict the speech of student-run groups. 484 U.S. at 271 ("Educators are entitled to exercise greater control over [school-sponsored] student expression to assure … that the views of the individual speaker are not erroneously attributed to the school.").

Moreover, given that "secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis," parents and school visitors also can understand this important distinction. *Bd. of Educ. of Westside Cmty. Sch. v. Mergens*, 496 U.S. 226, 250 (1990); *Id.* ("The proposition that schools do not endorse everything they fail to censor is not complicated."). To the extent NHS is worried about the misattribution of student-sponsored expression, the school can avoid that problem simply by posting a disclaimer where the student flyers are displayed or sending a letter to parents explaining that non-curriculum-based expression of students and student clubs is not the expression of NHS. *Shurtleff*, 596 U.S. at 266 (Alito, J., concurring) ("The government can always disavow any messages that might be mistakenly attributed to it.").

Second, this Court has never adopted a reasonable observer standard for government speech in (or out of) the school context. Justice Souter proposed such a standard in *Summum*, but no other Justices joined his concurrence. 555 U.S. at 487 (Souter, J., concurring) ("[T]he best approach that occurs to me is to ask whether a reasonable and fully informed observer would understand the expression to be government speech, as distinct from private speech the government

chooses to oblige by allowing the monument to be placed on public land."). In fact, this Court has now rejected the long-criticized reasonable observer test in the religion context: "given the apparent 'shortcomings' associated with *Lemon*'s 'ambitiou[s],' abstract, and ahistorical approach to the Establishment Clause—this Court long ago abandoned *Lemon* and its endorsement test offshoot." *Kennedy*, 597 U.S. at 534 (citation omitted); *Am. Legion v. Am. Humanist Ass'n*, 588 U.S. 29, 50 (2019) ("The test has been harshly criticized by Members of this Court, lamented by lower court judges, and questioned by a diverse roster of scholars."). The reasonable observer test " 'invited chaos' in lower courts, led to 'differing results' in materially identical cases, and created a 'minefield' for legislators." *Kennedy*, 597 U.S. at 534 (quoting *Capitol Square*, 515 U.S. at 768-69 and n.3 (plurality opinion)). Consistent with *Kennedy*, *Hazelwood* does not authorize schools to wield "a 'modified heckler's veto, in which' " student expression " 'can be proscribed' based on 'perceptions' or 'discomfort'," *id.* (quoting *Good News Club v. Milford Central School*, 533 U.S. 98, 119 (2001))—or, as in this case, a school's generic concern that student speech includes "a polarizing political slogan" and "would undermine that order and divert attention from the business of learning." *Noblesville*, 151 F.4th at 917. Contrary to the Fifth, Seventh, and Tenth Circuits, such student speech is governed by *Tinker*, not *Hazelwood*.

Finally, allowing the government to bar the private speech of a student group that otherwise has permission to use a nonpublic forum because a viewer might erroneously attribute that speech to the

government is inconsistent with *Johanns*, *Capitol Square*, and *Shurtleff*. These cases confirm that whether an observer views the expression at issue as the school's is neither necessary nor sufficient when deciding if *Hazelwood* governs. It is not necessary because, if a public school is speaking through its curriculum-based activities, the speech is that of the school regardless of to whom anyone attributes the student expression. A visitor to Hazelwood East High School, seeing a pile of *Spectrum* newspapers at the entrance to the school, might pick one up and learn that it is filled with articles that students wrote. Absent any additional information, the visitor might reasonably believe that *Spectrum* was an outlet for a student-run group and, therefore, constituted student expression. But, for the reasons discussed in *Hazelwood*, the visitor would be wrong. The newspaper was created as part of a journalism class, being "supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences." 484 U.S. at 271.

Johanns confirms that government speech (curriculum-based or otherwise) is not predicated on attribution. Many (perhaps most) people viewing the government's "Beef It's What's for Dinner" ad campaign had no idea that the government created and promulgated those ads. 544 U.S. at 577 and n.6 (Souter, J., dissenting) (explaining how labeling the promotions as Funded by America's Beef Producers "all but ensures that no one reading the[ads] will suspect that the message comes from the" government and how "even someone generally familiar with the Beef Act and its taxation mandate might not recognize the checkoff logo as signifying government

involvement"). Yet the Court explained that the "correct focus is not on whether the ads' audience realizes the Government is speaking." *Id.* at 564 n.7. Rather, the expression was that of the government "whether or not the reasonable observer would identify the speech as the government's." *Id.*

Similarly, *Capitol Square* and *Shurtleff* demonstrate that a third-party's misattribution is not sufficient to convert private speech into government speech. If a student-run group posts a flyer in a forum opened for such speech, an observer cannot transform that expression into NHS's speech by erroneously attributing it to the school. Non-curriculum-based student expression remains that of the student-run group, not the school. *Capitol Square* applied this principle in the Establishment Clause context. In *Capitol Square*, the Court upheld a religious cross display on a parcel of land next to the statehouse in Columbus, Ohio that had been opened for public expression. Those challenging the display adopted the same argument as the Seventh Circuit in this case (albeit in the religion context)—"that, because an observer might mistake private expression for officially endorsed religious expression, the State's content-based restriction is constitutional." 515 U.S. at 763 (plurality opinion).

The Court rejected this argument because there was no threat of an Establishment Clause violation where "[t]he State did not sponsor respondents' expression, the expression was made on government property that had been opened to the public for speech, and permission was requested through the same application process and on the same terms required of other private groups." *Id.* The fact that "outsiders or

individual members of the community uninformed about the school's practice … *might* leap to the erroneous conclusion of state endorsement" was not dispositive because, given a forum open to the kind of speech at issue and "private sponsorship, erroneous conclusions do not count." *Id.* at 765. The plurality expressly rejected the view "that the distinction [between government and private speech] disappears whenever private speech can be mistaken for government speech." *Id.*; *Id.* at 768 ("It has radical implications for our public policy to suggest that neutral laws are invalid whenever hypothetical observers may—*even reasonably*—confuse an incidental benefit to religion with state endorsement."); *Kennedy*, 597 U.S. at 535 (citation omitted) (explaining that the Establishment Clause does not " 'compel the government to purge from the public sphere' anything an objective observer could reasonably infer endorses or 'partakes of the religious' ").

In *Shurtleff*, the Court held that the central inquiry was the same as that in *Hazelwood*—"whether the government intends to speak for itself or to regulate private expression." 596 U.S. at 252. In making that determination, *Shurtleff* did not take "the public's likely perception as to who (the government or a private person) is speaking" to be dispositive. 596 U.S. 243, 252 (2022). The City of Boston frequently allowed private groups to raise their own flags on one of three flagpoles outside Boston City Hall, which otherwise flew the City's flag. The City never refused a single request until a religious group asked to fly the Christian flag as part of a Constitution Day event at the flagpole. Whether a viewer might attribute the

Christian flag to the government was only one of several factors bearing on whether the City or the private group was speaking through the particular flag. While "the public seem[ed] likely to see the flags as 'conveying some message' on the government's behalf," others seeing "a group of private citizens conducting a ceremony without the city's presence [might] associate the new flag with them, not Boston." *Id*. at 256 (quoting *Walker*, 576 U.S. at 212). Thus, the key factor was "the extent to which the government has actively shaped or controlled the expression." *Id*. at 252. Boston did neither, "lack[ing] … meaningful involvement in the selection of flags or the crafting of their messages." *Id* at 258. As a result, the Court concluded the private flags were government speech even though some might erroneously attribute them to Boston.

Although the context differs in this case, the free speech inquiry is the same: who is speaking through the flyers on NHS's walls—NHS or the student-run group? *Shurtleff*, 596 U.S. at 271-72 ("[P]rivate-party expression in any type of forum recognized by our precedents does not constitute government speech."). NHS opened part of its nonpublic forum (certain walls in the school) to student expression (club flyers). NHS did not sponsor NSFL's expression; in fact, the Seventh Circuit acknowledged that student interest clubs are "student-initiated" and "student-led." 151 F.4th at 911. Like the groups in *Capitol Square* and *Shurtleff*, NSFL sought to post its flyers only in locations that NHS opened for student-run groups, and it sought permission through the normal, school-established channels. That some parents or members of the public might *erroneously* believe that NHS

sponsored or endorsed NSFL's expression is irrelevant because "erroneous conclusions do not count." *Capitol Square*, 515 U.S. at 765 (plurality opinion); *Johanns*, 544 U.S. at 564 n.7 (explaining that "the correct focus" when determining whether the government is speaking "is not on whether the … reasonable viewer would identify the speech as the government's."). Why? Because, "[u]nless the public is assumed to be omniscient, public perception cannot be relevant to whether the government *is* speaking, as opposed [to] merely *appearing* to speak. Focusing on public perception encourages courts to categorize private expression as government speech in circumstances in which the public is liable to misattribute that speech to the government." *Shurtleff*, 596 U.S. at 265-66 (Alito, J., concurring). Consequently, *Hazelwood*'s discussion of what the public might "reasonably perceive" does not authorize school officials to censor non-curricular-based student expression, like NSFL's flyers. *Mergens*, 496 U.S. at 250 (recognizing "that secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis").

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari to safeguard the speech of student-run clubs and to ensure that *Hazelwood* remains limited to student expression that is part of school-sponsored, curriculum-based activities.

Respectfully submitted,

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March 4, 2026