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

BRIEF OF AMICI CURIAE LIFE LEGAL DEFENSE FOUNDATION AND YOUNG AMERICA'S FOUNDATION IN SUPPORT OF PETITIONERS

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INTERESTS OF AMICI CURIAE[1]

Amicus Life Legal Defense Foundation ("Life Legal") is a California non-profit corporation that provides legal assistance to pro-life advocates, with a special emphasis on the protection of First Amendment rights.

Life Legal is concerned with expansive applications of *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), which result in suppression of free speech on political issues in public schools and college campuses under the guise of avoiding "disruption" and maintaining a "stable, neutral educational environment." Pet. 15a-16a.

With the overturning of *Roe v. Wade*, 410 U.S. 113 (1973) and the return of the issue of abortion "to the people and their elected representatives", *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 302 (2022), the need to protect the speech of pro-life citizens has taken center stage. Courts must resist the attempts of governments at any level to use their powers to limit the speech of students on this life and death issue, as well as on other political issues that engender strong emotional responses from hearers. Free speech serves "its highest purpose when it . . . even stirs people to anger." *Terminiello v. Chicago,* 337 U.S. 1, 4 (1949).

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[1] Pursuant to Rule 37, no counsel for any party authored this brief in whole or in part; no party counsel or party made a monetary contribution intended to fund its preparation or submission; and no person other than *amici* or its counsel funded it. Counsel for all parties were notified more than ten days prior to the filing of this brief.

Amicus Young America's Foundation ("YAF") is a nonprofit organization whose mission is to educate and inspire young Americans from middle school through college with the ideas of individual freedom, a strong national defense, free enterprise, and traditional values. In part, YAF fulfills its mission through student-led Young Americans for Freedom chapters on campuses and through individual membership. YAF members are frequently berated, penalized, and banned by school actors who label their speech as harmful, hateful, or otherwise problematic.

SUMMARY OF ARGUMENT

This Court's decision in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), determined that a curricular student newspaper was school-sponsored speech that bore the imprimatur of the school and that therefore school officials could exercise "editorial control over the style and content of student speech . . . so long as their actions are reasonably related to legitimate pedagogical concerns." *Id.* at 271, 273.

In the wake of *Kuhlmeier*, conflicts have emerged in various Courts of Appeals over its correct application, arguably resulting in more censorship of student speech than this Court intended to allow in *Kuhlmeier*. See Pet. 15-23. This confusion has spilled over into cases involving postsecondary student speech as Courts of Appeals apply their various interpretations of *Kuhlmeier* in the college context.

This Court should grant the Petition for Ceriorari in order to clarify the reach of *Kuhlmeier*

so that schools from the lower grades up through college and postgraduate levels can continue to adequately prepare students to participate in a democracy that includes—indeed requires—the free and robust exchange of ideas.

ARGUMENT

I. Applying *Kuhlmeier* beyond curricular speech to any student speech that arguably appears to "bear the school's imprimatur" enables discriminatory treatment.

The Court in *Kuhlmeier* determined that a high school newspaper was curricular because it was 1) produced by a journalism class, 2) designed to impart particular knowledge and skills to students, and 3) supervised by the class teacher and school principal who retained "ultimate control" over the contents of the final product. *Id*. at 268-71. Because such curricular activities therefore might "reasonably [be] perceive[d] to bear the imprimatur of the school", *id*. at 271, the Court determined that educators could exercise "editorial control over the style and content of student speech . . . so long as their actions are reasonably related to legitimate pedagogical concerns." *Id*. at 273.

There are several key differences between this case and *Kuhlmeier* that make the Seventh Circuit's conclusion that E.D.'s speech would bear the imprimatur of Noblesville High School unreasonable. Unlike *Kuhlmeier*, this case does not involve curricular speech; rather, by the school's own admission, it involves an extracurricular student-

initiated club. Pet. 5. Further, while the journalism class and school newspaper in *Kuhlmeier* were designed *by the school faculty* to impart particular knowledge or skills to students, *Kuhlmeier*, 484 U.S. at 271, in the instant case the students themselves initiate and *design* their clubs' activities around their own interests. Pet. 5. Also, the faculty oversight is more limited than that involved in *Kuhlmeier*. In this case, the faculty "cannot have anything to do with the club other than advising on school rules and policy and making sure everyone is safe." *Kuhlmeier*, 484 U.S. at 271. So, critically for purposes of applying *Kuhlmeier*, the faculty's function is ministerial, not pedagogical.

Despite these differences, the lower court determined that *Kuhlmeier* was the relevant precedent and reinterpreted the latter's holding in a simplified form as applying to "student speech that others might reasonably perceive to bear the imprimatur of the school" without reference to its non-curricular nature. Pet. App. 10a-11a (internal quotes omitted). Because the flyers were "closely tied to school resources and would appear on the school's walls largely indistinguishable from other school-sponsored postings," Pet. App. 13a, the court applied *Kuhlmeier*'s standard and allowed the school district's restriction on political content in student flyers because, per *Kuhlmeier*, it was reasonably related to legitimate pedagogical concerns in creating "a stable, neutral educational environment." Pet. App. 16a.

The fact that the Seventh Circuit found that speech on a student club flyer, displaying the name "Pro-Life *Students*" (emphasis added), could *reasonably* be perceived as bearing the school's

imprimatur shows the perils of the "imprimatur" test unhinged from the curriculum element. The Seventh Circuit did not ground its assertion that the speech might be thus perceived from the nature of the club or its speech, which differed in numerous relevant respects from the newspaper involved in *Kuhlmeier*. Rather the court based it on the flyer's location "on school walls alongside announcements for school-sponsored events . . . in common areas for days." Pet. App. 11a. The court overlooked, or failed to mention, the relevant fact that other school groups' flyers would also be present, many of which could express views opposed to each other and to the viewpoint expressed by the Noblesville Students for Life ("NSFL"). Pet. 5. Indeed, the conflicting political content of the flyers is inescapably inherent in some of the clubs' names, which are required to appear on the flyers. "Clubs range from the Young Democrats to the Young Republicans and from the Gender and Sexuality Alliance to the Fellowship of Christian Athletes and Campus Crusade for Christ (CRU)." *Id*. This makes the school's "rule" (assuming there was such a rule) against "political" speech appearing on club flyers even more suspect. Logically, conflicting political messages cannot possibly all represent the school's views. The court's factually unsupported assertion that "warring political messages" might "undermine [school] order and divert attention from learning", Pet. App. 15a,[2] in fact undermines its "imprimatur" argument.

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[2] Here, the lower court seems to be speculatively applying the standard of "substantial disruption of or material interference

(continues)

Several of this Court's precedents suggest that, when multiple private views are expressed on government property, the perception that the speech is government-sponsored is untenable. Although these cases were applying the now rejected "entanglement" test of *Lemon v. Kurtzman*, 403, U.S. 602 (1971),[3] that test is similar enough to the "reasonable observer" test employed in the Seventh Circuit's opinion to be instructive here. Pet. 24-25. Several of this Court's precedents, decided under *Lemon*, invalidate the Seventh Circuit's view that NSFL's flyer appearing on the school wall next to other student and school messages would convey the school's approval.

In *Widmar v. Vincent*, 454 U.S. 263 (1981), the Court found that a religious student group's use of school facilities "*does not confer any imprimatur of state approval* on religious sects or practices" any more than it would convey agreement with any other of the more than one hundred nonreligious and religious student groups which used its facilities. *Id.* at 274 (emphasis added) (holding that a university restriction against religious groups from using school facilities violated their speech and association rights). Similarly, in the instant case, there are more than seventy student-initiated groups with varied and, for some, conflicting purposes. Pet. 5. They are all allowed to post flyers in the common areas of the

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with school activities" given in *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 514 (1969), without providing the factual basis that case requires.

[3] This Court noted in *Kennedy v. Bremerton Sch. Dist.,* 597 U.S. 507, 534 (2022), that the *Lemon* test had been long ago abandoned.

school, which include the school walls. *Widmar*, 454 U.S. at 274. The result in *Widmar* would have been very different had the Court used the Seventh Circuit's nonsensical approach that the mere use of school property creates the impression that the school endorses the goals of each of the diverse student affinity groups gathering there.

In *Lynch v. Donnelly*, 465 U.S. 668 (1984), this Court held that a city's inclusion of a creche in its annual Christmas display in a park alongside other secular figures associated with Christmas (e.g., a Santa Claus house, reindeer pulling Santa's sleigh, a Christmas tree, carolers, etc.), *id.* at 671, did not violate the Establishment Clause. *Id.* at 687. In a concurring opinion, Justice O'Connor noted that the city's inclusion of the creche "in the larger display" did not promote the religious contents of the creche or place the city's "imprimatur" on it. *Id.* at 693 (O'Connor, J., concurring). Notably, unlike the present case, *Lynch* involved government speech, not private speech on government property. The dangers of the perception of entanglement were therefore greater, but the existence of other government-sponsored non-religious displays in the same venue mitigated any concern.

Capitol Square Review & Advisory Board v. Pinette, 515 U.S. 753 (1995) involved a lawsuit by a private group that sought permission to erect a cross on a state-owned plaza that included various other holiday displays and was open to all. The Board in that case argued that the plaza's proximity to the seat of government "may produce the perception that the cross bears the state's approval." *Id.* at 763. This argument is very similar to the Seventh Circuit's speculation here about the danger that the

NSFL flyer's proximity to school-sponsored flyers could convey the school's approval of the speech. Pet. App. 13a. The Court found for the private group, rejecting the government's claim of potential misperception of official endorsement. The Court reasoned that when a traditional or designated public forum is open to all private groups on equal terms, "erroneous conclusions" of state endorsement "by outsiders or individual members of the community uninformed" about the rules regarding the forum "do not count." *Capitol Square Review,* 515 U.S. at 765, 770. To allow a veto on the basis of not only reasonable but also *unreasonable* views of when private speech might be attributed to the state undercuts free speech rights in any type of public forum, contradicts common sense, and violates this Court's precedents.

The dilution of *Kuhlmeier*'s curriculum-focused test to a subjective "what will people think?" standard has resulted in courts applying the case to situations that involve student speech that is more properly analyzed under *Tinker v. Des Moines Independent Community School Disrict*, 393 U.S. 503 (1969), or for public universities and colleges, under traditional public forum analysis. See Pet. 15-17. The Seventh Circuit's expansive view of *Kuhlmeier* threatens more censorship of student speech than Amici believe is constitutionally permissible.

II. Courts of Appeals' expansive applications of *Kuhlmeier* stifle speech at the college level.

In *Healy v. James*, 408 U.S. 169 (1972), this Court made clear that there are important differences between colleges and the lower grades. Immediately after quoting *Tinker* regarding applying First Amendment rights in light of the special characteristics of the school environment, this Court stated:

> [T]he precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses *than in the community at large*. Quite to the contrary, the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools. . . . *The college classroom with its surrounding environs is peculiarly the marketplace of ideas*."

Id. at 180 (emphases added) (simplified) (reversing lower court's ruling upholding the university's nonrecognition of group Students for a Democratic Society).

Unfortunately, some Courts of Appeals have applied *Kuhlmeier* expansively to college student speech as well. This practice is at odds not only with *Healy*, but with other pronouncements of this Court

in cases involving the strength of free speech protections on college campuses.[4]

A. *Hosty v. Carter* – Seventh Circuit applies *Kuhlmeier* to a non-curricular student newspaper

In *Hosty v. Carter*, 412 F.3d 731 (7th Cir. 2005), the Seventh Circuit considered an extracurricular college newspaper's 42 U.S.C. § 1983 claim for damages against a university, its trustees, administrators and several staff members. Carter, the college Dean of Student Affairs, had refused to pay for the printing of the paper after it declined to retract factual statements disputed as false by the Dean of the College of Arts and Sciences. The lower court denied defendant Carter's motion for summary judgment, finding that the evidence could support a conclusion that a constitutional violation had occurred and that she was not entitled to qualified

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[4] *See Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 835-36 (1995) (noting the danger in the chilling of thought and expression in the university setting which has a "background and tradition of thought and experiment that is at the center of our intellectual and philosophic tradition" and which serves as "the vital center[] for the Nation's intellectual life"); *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 238 n.4 (2000) (Souter, J., concurring) (citing *Kuhlmeier* and *Tinker* as examples and noting that "[C]ases dealing with the right of teaching institutions to limit expressive freedom of students have been confined to high schools . . . whose students and their schools' relation to them are different and at least arguably distinguishable from their counterparts in college education").

immunity because *Kuhlmeier* clearly did not apply to a college extracurricular newspaper. *Id*. at 733.[5]

Even though the curricular nature of the student newspaper in *Kuhlmeier* was central to its holding that the paper bore the imprimatur of the school, *Kuhlmeier*, 484 U.S. at 271, the Seventh Circuit in *Hosty* reasoned that the case "depends in large measure on the operation of public-forum analysis rather than the distinction between curricular and extra-curricular activities." *Hosty,* 412 F.3d at 738. The *Hosty* court instead emphasized the subsidized nature of the school newspaper, observing that the university "may have created a venue that goes by the name of designated public forum or limited-purpose public forum. . . . Participants in such a forum, declared open to speech *ex ante*, may not be censored *ex post* when the sponsor decides that particular speech is unwelcome." *Id.* at 737 (emphasis in original) (internal quotation marks omitted). Thus, assuming facts in a light most favorable to the plaintiffs in this summary judgment context, the court found that a constitutional violation had occurred. Nevertheless the court found that qualified immunity applied to all the defendant school officials, including Carter, because no public official could be expected to know whether his actions were wrong given the "constitutional uncertainties" surrounding the application of *Kuhlmeier*. *Id*. at 738-39. These uncertainties include 1) whether *Kuhlmeier* applies

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[5] In so holding, the district court was in agreement with at least one circuit that has stated that *Kuhlmeier* does not apply to the college context. *See Student Gov't Ass'n v. Bd. of Trs*., 868 F.2d 473, 480, n.6 (1st Cir. 1989).

to colleges at all, 2) whether it depends on the curricular nature of the speech as the district court held, 3) the role of age, and 4) the differences of opinions among other Courts of Appeals on the proper application of *Kuhlmeier* to colleges. *Id.*

The four dissenting judges vehemently opposed applying *Kuhlmeier* to college speech, citing the well-documented differences in age and maturity between college attendees and minors. *Id*. at 740-41 (Evans, J., dissenting). The dissenters also noted the critical differences in mission between the "custodial and tutelary" roles of elementary/high schools and the role of colleges in exposing young adults to the "marketplace of ideas." *Id*. at 741. These contrasts between the elementary/high school and college settings caused the dissent to reject application of the more restrictive and paternalistic *Kuhlmeier* in favor of applying traditional forum analysis to the case. This would have resulted in a clear finding of a prior restraint in Carter's actions and denied administrators any right to qualified immunity. "[A]s a result of today's holding, Dean Carter could have censored the *Innovator* by merely establishing 'legitimate pedagogical reasons.' This court now gives the green light to school administrators to restrict student speech in a manner inconsistent with the First Amendment." *Id*. at 742.

Thus, in *Hosty,* the Seventh Circuit disregarded critical differences between colleges and lower schools and injected *Kuhlmeier's* "legitimate pedagocial concerns" justification for speech suppression into a college case that did not involve curricular speech and should more properly have

been analyzed under traditional forum analysis.[6] *Hosty*'s recognition of the confusion that has resulted from *Kuhlmeier* highlights the urgent need for this Court to provide clarity on its proper reach.[7]

B. *Keefe v.* Adams: Eighth Circuit applies *Kuhlmeier* to off-campus speech

Keefe v. Adams, 840 F.3d 523, 525-29 (8th Cir. 2016) involved a nursing student who was removed from a college nursing program for off-campus Facebook posts that the college deemed to be in violation of professional standards outlined in the student Code of Conduct and the Student Handbook. Rejecting the "categorical contention" that a college may not punish a student for on-line, off-campus speech, the court invoked *Kuhlmeier*, stating that "educators in a professional school have discretion to require compliance with recognized standards of the profession, *both on and off campus*, 'so long as their actions are reasonably related to legitimate pedagogical concerns.'" *Id.* at 531 (emphasis added) (quoting *Kuhlmeier*). Ignoring this Court's hesitance

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[6] *Rosenberger, Healy, Widmar*, and *Southworth* are all analogous to *Hosty* and obviate the need to apply *Kuhlmeier* to colleges.

7 "Largely in response to the *Hosty* decision, the Illinois state legislature passed the Illinois College Campus Press Act, 110 ILCS 13/1 et seq, which went into effect on January 1, 2008. That statute designates that '[a]ll campus media produced primarily by students at a State-sponsored institution of higher learning is a public forum for expression by the student journalists and editors at the particular institution.' 110 ILCS 13/10." *Moore v. Watson*, 738 F. Supp. 2d 817, 830 (N.D. Ill. 2010).

to state whether *Kuhlmeier* applied to colleges at all much less to off-campus speech, the Eighth Circuit justified its extension of *Kuhlmeier* by asserting that "a college or university may have *an even stronger interest* in the content of its curriculum and imposing adacemic discipline than did the high school at issue in *Kuhlmeier*." *Id*. (emphasis added).[8]

The only connection to course curriculum the court made was the assertion that the posts were "directed at classmates, involved their conduct in the Nursing Program, and included a physical threat related to their medical studies." *Id*. at 532. As a result of the postings at issue, certain classmates complained that they "could not function in the same clinical space with Keefe," so his statements had a "direct impact" on their "educational experience" and could "impact patient care." *Id*.

Interestingly, one of the cases the court cited in support of its application of *Kuhlmeier* flatly contradicts the court's own reasoning. In *Tatro v. University of Minn.*, 816 N.W.2d 509 (Minn. 2012), the Minnesota Supreme Court declined to apply *Kuhlmeier* to a case involving the University's discipline of a mortuary science student for her Facebook posts about her experience working on a cadaver. The court stated that the posts could not be

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[8] The college cases cited in support of this hypothesis involved only on-campus, mainly curricular speech. *Ward v. Polite*, 667 F.3d 727, 733-34 (6th Cir. 2012) (curricular speech); *Keeton v. Anderson-Wiley*, 664 F.3d 865, 875-76 (11th Cir. 2011) (curricular speech); *Hosty v. Carter,* 412 F.3d 731 (7th Cir. 2005) (extra-curricular college newspaper); *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1286-90 (10th Cir. 2004) (curricular speech); *Brown v. Li*, 308 F.3d 939, 947-49 (9th Cir. 2002) (opinion of Graber, J.), *cert. denied*, 538 U.S. 908 (2003) (curricular speech).

characterized as "school-sponsored speech" and that application of the "legitimate pedagogical concerns standard" to such posts "would give universities wide-ranging authority to constrain offensive or controversial Internet activity by requiring only that a school's actions be 'reasonably related' to 'legitimate pedagogical concerns.'" *Id*. at 518. Instead, the court held that a university could constitutionally impose sanctions for student Facebook posts that violate narrowly tailored academic program rules that directly relate to established professional conduct rules. *Id*. at 521.

The question of whether a school can discipline a high school student for off-campus speech was later directly addressed by this Court in *Mahanoy Area School District v. B.L.*, 594 U.S. 180 (2021). The case involved a student's vulgar Snapchat posts which criticized the school and the cheerleading squad. In finding for the student, the Court distinguished *Kuhlmeier*'s concern for the "unique educational characteristics" of the school environment from the off-campus speech at issue in *Mahanoy*. All three distinctions in *Mahanoy* are relevant to off-campus speech engaged in by college students. First, the *in loco parentis* role of schools while students are on campus does not apply when students are off-campus. Much less, then, does that role apply when dealing with adults in a college setting. Second, the fact that extending on-campus speech regulations to off-campus speech would mean students could not engage in the speech at issue at all. Third, as "nurseries of democracy," schools have an interest in protecting a student's unpopular expression, especially off-campus. *Id*. at 189-90. Rather than applying *Kuhlmeier*, the Court assessed

the case in light of its other precedents protecting caustic and offensive speech, whether or not in the school setting. *Id*. at 190-93.[9]

Twenty years prior to *Keefe*, the concurring opinion in *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986) had already noted that a school could not have censored a student's vulgar speech had it been uttered off-campus. *Id*. at 699 (Brennan, J., concurring). Assuming the Court's elementary/ high school cases are even applicable to college speech, the *Keefe* court could have applied *Tinker*'s "substantial disruption/invasion of the rights of others" standard and determined whether the speech in question had met that threshold, as the Court suggested might have been done in *Mahanoy,* 594 U.S. at 192-93. Instead, the court unnecessarily stretched *Kuhlmeier* beyond all recognition and applied it to off-campus college speech.

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[9] Citing *Chaplinsky v. New Hampshire*, 315 U. S. 568 (1942); *Cohen v. California*, 403 U. S. 15, 19-20 (1971); *Snyder v. Phelps*, 562 U.S. 443, 461 (2011); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 688 (1986) (Brennan, J., concurring); *Tinker v. Des Moines Indep. Cmty. Sch. Dist*., 393 U.S. 503, 514 (1969); *Tyson & Brother—United Theatre Ticket Offs., Inc. v. Banton*, 273 U.S. 418, 447 (1927).

C. Alabama Student Party v. Student Government Association of the University of Alabama: Eleventh Circuit applies *Kuhlmeier* to non-curricular "school-related" speech

In *Alabama Student Party v. Student Government Association of the University of Alabama,* 867 F.2d 1344 (11th Cir. 1989), the Eleventh Circuit upheld campaign regulations imposed by the extra-curricular Student Government Association ("SGA"), on student candidates for office. The court determined that the SGA was a state actor presumably because the SGA was a university-created club,[10] unlike the student-initiated club at issue in the present case. *Id*. at 1348. The regulations regulated the time, place and manner (even off-campus) where campaign literature could be distributed and debates could be held. *Id*. at 1345; 1352 (Tjoflat, J., dissenting).

The court's analysis involved an amalgamation of the reasoning and standards of *Kuhlmeier* and *Tinker*. Purporting to follow *Kuhlmeier*'s line of thinking, the court noted that the student government association "support[ed] the educational mission of the University", *id*. at 1345, and that it, together with the campaigns, comprised a "learning laboratory, similar to the student newspaper or student yearbook." *Id*. at 1347 (internal quotation marks omitted). The court attempted to equate the student speech in this

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[10] While the court determined the SGA was a state actor, oddly, the university itself thought that the regulations were overly restrictive of students' right to free speech. *Id*. at 1351, 1354 (Tjoflat, C., dissenting).

extra-curricular activity with *Kuhlmeier*'s school-*sponsored* curricular speech by referring to the former as "school-*related*." *Id*. at 1346 (emphasis added). The court then decided that educators' control over "school-related speech" may be exercised "so long as their actions are reasonably related to legitimate pedagogical concerns." *Id*. (citing *Kuhlmeier*).

There is—or at least there should be—a world of constitutional difference between student speech that is merely *related* to school and speech that is *sponsored by and therefore objectively bears the imprimatur* of the school. This verbal sleight of hand allowed the court to sweep under the ambit of *Kuhlmeier* most, if not all, extracurricular student speech if it somehow relates to the school's educational purpose—an easy bar to clear.

In the final analysis, the court only assessed the regulations in terms of "reasonableness" without explaining how they were related to the university's educational concerns. Echoing *Tinker*, it said the regulations "sought to minimize the disruptive effect of campus electioneering" and were viewpoint-neutral. *Id*. at 1347. To make matters even worse for the First Amendment interests of the students, the court failed to identify any facts which might have caused the student government association to expect any "disruptive effect" of the campus campaigning or any past history of disruption, as *Tinker* requires. *Tinker,* 393 U.S. at 514.

The dissenting judge strongly disagreed with the majority's analysis. First, the dissent found that the enforcement of SGA's restrictions on the time, place and manner of campaign speech did not further any interest of the school itself, as opposed

to those of the student government association itself. *Id*. at 1351-52 (Tjoflat, J., dissenting). In addition, applying forum analysis, the dissent concluded that the content-based regulations on speech occurring in public fora off-campus were overbroad. *Id*. at 1352.

Even applying the standard applicable to a limited public forum to the on-campus speech, the dissent considered the regulations to be invalid. "[O]nce a state university opens its campus as a limited public forum for student speech, the university cannot eliminate a topic of speech merely by stating that it is placing a 'limitation' on the forum. If a university could do so, the result in *Widmar* would have been different." *Id*. at 1353.

In sum, *Alabama* applied a weakened version of the *Kuhlmeier* standard (school-related equals school-sponsored) to a set of facts that more properly should have been assessed using traditional forum analysis. It substituted *Tinker*'s school disruption rationale for *Kuhlmeier*'s "legitimate pedagogical concern" justification and eliminated the need for facts to justify the school's censorship. In melding the two cases, the court gave schools the best possible world for imposing excessive restrictions on student speech.

D. *Kuhlmeier* has generated confusion in the Courts of Appeals in its application to college speech.

The *Hosty* court is not alone in expressing concern over the uncertainties surrounding *Kuhlmeier*'s application to the college setting,

including whether the precedent applies to colleges at all,[11] and even beyond.

In *Hunt v. Board of Regents*, 729 Fed. Appx. 595 (10th Cir. 2019) the Tenth Circuit granted university officials qualified immunity in a case involving a medical student's off-campus on-line political postings. Citing *Keefe*, the court noted that these cases "involve[] an emerging area of constitutional law" so that it could not be said the college officials had abridged a right that was "clearly established. *Id*. at 601.

> [W]e conclude that the Supreme Court's K-12 cases of *Tinker*, *Fraser*, *Hazelwood*, and *Morse* and its university cases of *Papish* and *Healy* fail to supply the requisite on-point precedent. Moreover, decisions from our court and other circuits have not bridged the unmistakable gaps in the case law, including whether: (1) *Tinker* applies off campus; (2) the on-campus/off-campus distinction applies to online speech; and (3) *Tinker* provides an appropriate framework for speech by students in graduate-level professional programs, such as medical schools.

Id. at 606.

In *McCauley v. University of the Virgin Islands*, 618 F.3d 232 (3d Cir. 2010) the court held

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[11] This Court in *Kuhlmeier* left open the question as to whether "the same degree of deference is appropriate with respect to school-sponsored expressive activities at the college and university level." *Kuhlmeier*, 484 U.S. at 273, n. 7.

that several sections of the university's Student Code of Conduct regulating on-campus speech were facially overbroad. *Id*. at 247-52. After noting that public universities are less free to regulate student speech than in the K-12 context, the court acknowledged the difficulty in applying this principle, stating: "[I]t is unlikely that any broad categorical rules will emerge from its application. At a minimum, the teachings of *Tinker, Fraser, Hazelwood, Morse*, and other decisions involving speech in public elementary and high schools, cannot be taken as gospel in cases involving public universities." *Id*. at 247. To underscore its belief that *Kuhlmeier* was particularly unhelpful, the court stated, "In reaching our conclusion today, we decline to consider whether the teachings of *Hazelwood* apply in the university setting or *whether* Hazelwood *is limited to curricular activities*." *Id*. at 250 n.12 (emphasis added); *see also Yeasin v. Durham*, 719 Fed.Appx. 844 (10th Cir. 2018) (holding that university officials were entitled to qualified immunity because it is unclear if *Tinker, Fraser, Kuhlmeier*, and *Morse* apply to the college setting, and cases involving college speech are unclear as to their application to online off-campus speech).

* * * *

If Courts of Appeals continue to apply expansive views of *Kuhlmeier* to college as well as K-12 education, then the adults exiting from sixteen or more years of state-controlled education may find themselves handicapped by an expectation confirmed by their elementary, high school and

college experiences—that some Big Brother-like entity will disallow their speech even in the "real world," leading them to self-censor. Student speech in these "vital centers for the Nation's intellectual life", *Rosenberger,* 515 U.S. at 836, should not be hamstrung in this way by misapplication of this Court's precedent in *Kuhlmeier*.

CONCLUSION

While the present case does not involve college speech, the resolution of the questions presented would benefit the Courts of Appeals that continue to apply *Kuhlmeier* to the college setting. Clarity will also assist all public schools in their mission of preparing students to function in our democratic society.

For the foregoing reasons, this Court should grant the Petition and resolve the conflicts and confusion amongst the circuits on this important issue of the proper reach of *Kuhlmeier*.

Respectfully Submitted,

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