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 FOR *AMICUS CURIAE* CHRISTIAN LEGAL SOCIETY IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Christian Legal Society agrees with Petitioners' statement of the Question Presented:

Whether *Hazelwood* applies (1) whenever student speech might be erroneously attributed to the school, as the Fifth, Seventh, and Tenth Circuits have held; (2) when student speech occurs in the context of an "organized and structured educational activity," as the Third Circuit has held; or (3) only when student speech is part of the "curriculum," as the Sixth and Eleventh Circuits have held.

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INTEREST OF AMICUS CURIAE[1]

Christian Legal Society ("CLS") is a nonprofit, nondenominational association of Christian attorneys, law students, and law professors. CLS defends the sanctity of human life and the First Amendment rights of all Americans.

For fifty years, through its Center for Law & Religious Freedom, CLS has worked to protect students' religious speech from discriminatory treatment by public school officials. CLS has represented religious student groups excluded from campus because public school officials disagree with their religious beliefs. *See, e.g., Fellowship of Christian Athletes v. San Jose Unified Sch. Dist. Bd. of Educ.,* 82 F.4th 664 (9th Cir. 2023) (en banc) (restoring recognition to high school student club denied equal treatment because school officials disliked its religious beliefs regarding sexual conduct); *Christian Legal Soc'y v. Martinez*, 561 U.S. 661 (2010) (allowing public law school to exclude religious student group because of its religious beliefs regarding sexual conduct); *Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534 (1986) (vacating on standing grounds a lower court ruling that the Establishment Clause required exclusion of religious student group from public high school campus).

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[1] Pursuant to Rule 37.6, no counsel for any party in this case wrote any part of this amicus brief, and no person except CLS contributed to the costs of its preparation. Counsel for CLS notified counsel for all parties on February 23, 2026, of its intention to file this brief.

CLS advised on the drafting of the Equal Access Act, 20 U.S.C. §§ 4071-4074, in which Congress protected public secondary students' right to meet for "religious, political, philosophical, or other" speech at their schools. *See Bd. of Educ. of Westside Cmty. Sch. v. Mergens*, 496 U.S. 226, 239 (1990) ("[T]he Act, which was passed by wide, bipartisan majorities in both the House and the Senate . . . was intended to address perceived widespread discrimination against religious speech in public schools."). While this case involves students' political speech, CLS's experience teaches that school officials too often seize any excuse to suppress students' religious speech as well. The First Amendment's protection of students' political speech likewise protects students' religious speech.

SUMMARY OF ARGUMENT

Properly read, this Court's decision in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), is not applicable to Petitioner E.D.'s flyers in this case. Student speech should be analyzed under a limited forum analysis when a school, by practice or policy, creates a limited public forum. *Hazelwood*'s limited exception to *Tinker v. Des Moines Independent Community School District,* 393 U.S. 503 (1969), should be cabined to curricular speech. Even when properly construing *Hazelwood*, school officials still retain abundant authority to regulate students' speech that "materially disrupts classwork or involves substantial disorder or invasion of the rights of others," *Tinker*, 393 U.S. at 513 (citation omitted); is lewd, indecent, or vulgar, *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986); or promotes illegal drug use. *Morse v. Frederick*, 551 U.S. 393, 409 (2007). Instead, the limited public forum analysis set forth in

Rosenberger v. Rector and Visitors of University of Virginia, 515 U.S. 819 (1995), and *Good News Club v. Milford Central School*, 533 U.S. 98 (2001), allows the proper weighing of free speech protections for diverse student viewpoints versus government academic and disruption interests.

Unfortunately, the court below did not follow the *Rosenberger-Good News Club* limited public forum analysis. Rather, the court misread and misapplied *Hazelwood*. The decision below—and other circuits' similar mistaken *Hazelwood* analyses—inflicts grave consequences on student speech that this Court's limited forum analysis protects.

In *Hazelwood*, the Court carved out a scenario where the standards for student speech articulated in *Tinker* do not apply. *Hazelwood*, 484 U.S. at 270-271. But crucially, *before* the *Hazelwood* Court explained why *Tinker* did not apply, it carefully analyzed the facts and concluded that the school had *not* created a limited public forum for student speech. *Id.* Therefore, forum analysis did not apply. And the fact that forum analysis did not apply sets *Hazelwood* apart from this Court's separate *subsequent* line of cases protecting students' speech rights in limited public forums created, either by policy or practice, for student speech.

By allowing student organizations to advertise their meetings by posting temporary flyers on its walls, Noblesville High School created a limited public forum under this Court's First Amendment precedents. The court below acknowledges as much. J.A. 15a. Likewise, the school created a "limited open forum" under the federal Equal Access Act for the

student clubs, §§ 4071-4074 ("EAA"), as this Court recognized in *Mergens*. 496 U.S. at 246-247.

But the court below flipped the forum script: it misread *Hazelwood* to hold that student speech is subject to a newly created "school-sponsored forum" analysis. J.A. 14a. According to the court below, if it might appear that a student's speech is "school-sponsored," then the speech loses its First Amendment protection. J.A. 15a.

This case merits the Court's review because the Seventh Circuit dangerously and incorrectly conflated *Hazelwood* with the correct analysis that applies when a school, by practice or policy, has created a limited public forum. J.A. 15a-16a. The Seventh Circuit's erroneous analysis, left uncorrected, will significantly undermine student speech rights not only in its jurisdiction, but also in other circuits that have likewise misapplied *Hazelwood* to suppress student speech. For these reasons, CLS respectfully requests that this Court grant the petition for certiorari to resolve the circuit split concerning when *Hazelwood* may be applied to suppress temporary political student speech that is otherwise squarely protected by *Tinker*.

ARGUMENT

I. THE COURT BELOW ERRED AS A MATTER OF LAW WHEN IT APPLIED A *HAZELWOOD* ANALYSIS TO E.D.'S FLYERS.

This case arises from a high school girl's attempt to bring a pro-life message to her public school. During her freshman year, E.D. founded Noblesville Students

for Life ("NSFL"), which was initially well received. J.A. 3a-4a. Over thirty students at Noblesville High School signed up for information about NSFL. J.A. 4a. Seeking to engage these students, E.D. created flyers for NSFL's first meeting to post on walls on the same basis as other clubs' flyers. J.A. 4a. E.D.'s flyers featured images of young people in front of the Supreme Court in Washington, D.C., holding common pro-life slogans, including "Defund Planned Parenthood" and "I am the Pro-Life Generation." J.A. 5a. Her proposed flyers even included a "Sponsored By" line to state explicitly that it was her group—and not the school—that was organizing the meeting. J.A. 5a. It was clear that the school was not involved in organizing or conducting NSFL's meetings and did not endorse NSFL or its message. Had school administrators thought it was not clear, the easy and correct solution would have been to ask NSFL to include a disclaimer of school endorsement on its flyer or for the school itself to make such a disclaimer. *See Mergens,* 496 U.S. at 251 (school officials' "fear of a mistaken inference of endorsement [of a religious club's speech] is largely self-imposed, because the school itself has control over any impressions it gives its students").

Nonetheless, multiple administrators told E.D. to change her flyers and remove the images, alleging that the school had an unwritten policy against "political messages," which it claimed the flyers violated. J.A. 4a-6a. E.D. continued to request that her flyers be allowed with the images in meetings and through emails that she and her mother exchanged with administrators. J.A. 5a-6a. The principal, after consulting the other administrators, ended up

suspending NSFL's status and told E.D. to reapply NSFL for recognition the next semester. J.A. 7a.

E.D. sought relief in federal court to protect her First Amendment rights. The district court ruled in the school's favor, using a misreading of *Hazelwood* to conclude, as a matter of law, that it would be "reasonable" for individuals on school grounds "to erroneously attribute any political messaging [the flyers] contained to the school district or the school itself." J.A. 65a. The Seventh Circuit affirmed. J.A. 14a. In reaching its decision that *Hazelwood*'s analysis applies to E.D.'s flyers, the Seventh Circuit rejected E.D.'s argument that *Tinker* should govern her case and explained that, under *Hazelwood*, "schools may regulate student expression in school-sponsored forums so long as their actions are tied to a valid educational purpose." J.A. 14a.

But *Hazelwood* did not create a broad new category of "school-sponsored forums" under which student speech may be readily subject to censorship. Instead, in *Hazelwood*, this Court specifically distinguished its analysis from forum analysis, as it has continued to do in subsequent student speech cases.

Specifically, in *Hazelwood*, this Court reversed the lower court's finding that a forum had been created by the school for student speech. 484 U.S. at 265. The Court explained that the newspaper was *not* a forum because the newspaper was related to the curriculum for the journalism class at issue, noting that the journalism teacher "exercised a great deal of control" over the newspaper's content. *Id.* at 268, 270. The Court specifically contrasted its holding with its line of cases that did involve forums for student speech,

such as *Widmar v. Vincent*, 454 U.S. 263 (1981). *Hazelwood*, 484 U.S. at 270. Only after concluding a speech forum was *not* involved did the *Hazelwood* Court determine that *Tinker* did not apply. The school newspaper's speech occurred in a curricular context. As part of his job, a teacher was intensively involved in editing the newspaper's content and responsible for involving students in the newspaper's production to advance specific curricular goals. *Id.*

Properly understood, the *Hazelwood* analysis first requires courts to engage in a forum analysis to determine if the school has created a limited public forum for student speech. *Id.* at 270. If a forum exists, *Hazelwood* is inapplicable. By misunderstanding these principles, the Seventh Circuit and at least two other circuits have misused *Hazelwood* to severely limit the First Amendment's protection of students' speech by employing an abbreviated "school-sponsored" analysis. This misreading and misapplication of *Hazelwood* is an affront to *Tinker* and is reversible error.

II. PRECISELY BECAUSE NOBLESVILLE HIGH SCHOOL CREATED A LIMITED PUBLIC FORUM FOR STUDENT CLUBS TO POST FLYERS, *TINKER* SHOULD APPLY.

A. E.D.'s Flyers Do Not Fall Within the Narrow Limits This Court Has Recognized on *Tinker*'s Protection of Students' Speech.

In *Tinker*, this Court expressly recognized that the Free Speech Clause protects student expression at school when it does not "materially disrupt[]

classwork or involve[] substantial disorder or invasion of the rights of others." 393 U.S. at 513. In addition, in an often-overlooked footnote, this Court signaled the beginning of public forum analysis in secondary schools. In footnote six, the Court articulated that the school campus is "a public place, and its dedication to specific uses does not imply that the constitutional rights of persons entitled to be there are to be gauged as if the premises were purely private property." *Id.* at 512 n.6.

Since *Tinker*, the Court has articulated three narrowly circumscribed situations in which the *Tinker* analysis does not apply. *See Mahanoy Area Sch. Dist. v. B. L.*, 594 U.S. 180, 187-188 (2021). In *Fraser*, the Court held that a school could restrict a student from using lewd, vulgar, or indecent language in a speech at a school assembly. 478 U.S. 675. In *Morse*, the Court held that *Tinker* does not protect speech promoting illegal drug use. *Morse*, 551 U.S. 393. And, at the heart of this case, the Court has held that *Tinker* does not apply to curricular speech, in contrast to a student group's speech made in a forum for student speech. *Hazelwood*, 484 U.S. at 270-271.[2]

Notably, this Court has made clear that these exceptions to *Tinker* should not be expansive or permitted to swallow up student speech rights. For example, in *Morse*, the Court warned against expanding *Fraser* too far, saying it must not

[2] Of course, *Tinker* does not apply when the school has not actually opened a forum for student speech. *See, e.g., Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000) (holding that despite a school district's claim to the contrary, the school district had not in fact created a limited public forum for student speech).

encompass all "offensive" things because "[a]fter all, much political and religious speech might be perceived as offensive to some." *Morse*, 551 U.S. at 409. The Court therefore restricted the *Morse* analysis to allowing schools to restrict the promotion of drug use. *Id.* More recently, in *Mahanoy*, this Court declined to extend *Fraser* to reach off-campus, off-color speech. *Mahanoy*, 594 U.S. at 192. This Court has made a clear commitment that *Tinker*'s exceptions found in *Fraser*, *Morse*, and *Hazelwood* are to be narrowly construed.

Here, the political speech for which E.D. was penalized by Noblesville High School cannot reasonably be expected to materially disrupt classwork, involve substantial disorder, or invade the rights of others under *Tinker*. It is not indecent, lewd, or vulgar under *Fraser*. And it does not promote illegal drug use under *Morse*.

Nor does E.D.'s speech fall within the third narrow category of curricular speech that a school may regulate under *Hazelwood*. The court below erred by applying *Hazelwood* in this case and, in doing so, exacerbated a conflict among the circuits as to the legal standard for applying the *Hazelwood* analysis to student speech.

B. This Court Has Held That the First Amendment Protects Equal Access for Students' Political and Religious Speech.

1. First Amendment limited public forum

In its primary line of cases protecting student speech in a limited public forum, this Court has

clarified the importance of preserving spaces for student expression. In its landmark ruling in *Widmar v. Vincent*, the Court first found a limited public forum for student groups' speech in the public university setting. 454 U.S. 263. The Court relied on *Tinker* as "leav[ing] no doubt that the First Amendment rights of speech and association extend to the campuses of state universities." *Widmar*, 454 U.S. at 269 (also citing *Healy v. James,* 408 U.S. 169 (1972)). Then the Court considered whether a public university could deny use of its facilities to a religious student group. *Widmar*, 454 U.S. at 264-65. The Court explained that "[t]hrough its policy of accommodating [student organization] meetings, the University has created a forum generally open for use by student groups." *Id*. at 267. Accordingly, the Court explained, any content-based discrimination in such a forum is subject to the highest level of scrutiny. *Id*. at 270.

The Court further elaborated on its limited public forum analysis in *Rosenberger*. There it stated that an educational institution can restrict the purposes of a limited public forum but may not exclude student groups based on their viewpoint. 515 U.S. at 829. That is, a school may control speech when it "is the speaker or when it enlists private entities to convey its own message." *Id.* at 833. But "when the University does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers[,]" a student group's speech may not be censored. *Id.* at 834 (citing *Hazelwood* 484 U.S. at 270-272, and *Mergens*, 296 U.S. at 250). Indeed, when a religious student group speaks within a limited public forum, it is clear that its speech is not government speech and, therefore,

there is no Establishment Clause concern. *Rosenberger*, 515 U.S. at 839.

In *Good News Club*, the Court held that a public school must allow a community group equal access to hold club meetings with religious speech content for elementary school students immediately after school. 533 U.S. 98. The school had argued that observers—the elementary students or their parents—might perceive the school to be endorsing the club's religious speech. *Id*. at 113-114. But the Court soundly rejected the school's argument because the club's religious speech occurred within a limited public forum. *Id*. at 116-118. Also, the school had produced no evidence of possible misperceptions about the school's involvement with the club's religious speech. *Id*. at 117.

Because such religious speech in a limited public forum is so clearly *not* attributable to the government, it logically follows that other speech within a limited public forum also may not "reasonably [be] perceive[d] to bear the imprimatur of the school." *Hazelwood*, 484 U.S. at 271. Therefore, the *Hazelwood* analysis should not be conflated with forum analysis. Yet that is exactly what the court below purported to do, claiming to apply *Hazelwood* and follow *Rosenberger* at the same time. J.A. 18a.

2. EAA limited open forum

In 1984, Congress passed the EAA, "extend[ing] the reasoning of *Widmar* to public secondary schools." *Mergens*, 496 U.S. at 235. Under the EAA, a public secondary school that creates a statutorily defined "limited open forum" is prohibited from

discriminating against students who wish to conduct a meeting within that forum on the basis of the "religious, political, philosophical, or other content of the speech at such meetings." 20 U.S.C. §§ 4071(a) and (b). A "limited open forum" exists whenever a public secondary school "grants an offering to or opportunity for one or more noncurricular related student groups to meet on school premises during noninstructional time." 20 U.S.C. § 4071(b). "Meeting" is defined to include "those activities of student groups which are permitted under a school's limited open forum and are not directly related to the school curriculum." 20 U.S.C. § 4072(3).

In *Mergens*, this Court considered the applicability, and constitutionality, of the EAA. 496 U.S. at 231. The *Mergens* Court held that the EAA prevented a public school from denying a religious club equal access to school facilities. *Id*. at 247. The Court ruled that the school's allowance of at least one other noncurricular-related student group created the "limited open forum" under the EAA and, therefore, the school could not deny equal access to any other student group on the basis of the content of that group's speech. *Id*. at 240.

The *Mergens* Court specifically explained that the "limited open forum" as defined in the EAA provides even broader protection for student groups than that provided by the First Amendment's "limited public forum" analysis. *Mergens*, 496 U.S. at 242 ("the Act itself neither uses the phrase 'limited public forum' nor so much as hints that that doctrine is somehow 'incorporated' into the words of the statute"). The

Court explained that "Congress' deliberate choice to use a different term—and to define that term—can only mean that it intended to establish a standard different from the one established by our free speech cases." *Id.*

The *Mergens* Court then interpreted the EAA to require not only meeting space for the religious student group, but also official recognition which "carries with it access to the school newspaper, bulletin boards, the public address system, and the annual Club Fair." *Id.* at 247. In other words, the EAA requires that student groups be given the same right to post temporary flyers with political or religious content as other student groups were given to post their flyers.

In holding that equal access for a religious student club does not violate the Establishment Clause, the Court anchored its holding on three basic principles regarding student clubs' speech in public schools. First, "there is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Id.* at 250 (emphasis in original). This distinction is particularly relevant here because *Hazelwood* addresses the school's own curricular speech rather than a student club's speech as in *Mergens* and this case.

Second, the *Mergens* Court found 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." *Id.* Again, this finding is

relevant here where the observers are secondary school students and, therefore, "likely to understand" that the school is not endorsing the NSFL flyer's speech. *See, e.g., Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 538 (2022).

Third, high school students can understand "[t]he proposition that schools do not endorse everything they fail to censor." *Mergens*, 496 U.S. at 250. Like the students in *Mergens*, Noblesville High School students, too, certainly can understand this proposition as it "is not complicated." *Id.; see Kennedy*, 597 U.S. at 534-35 ("Establishment Clause violation does not automatically follow whenever a public school . . . 'fail[s] to censor' private religious speech.").

3. *Hazelwood*'s forum analysis

Against the backdrop of *Widmar* and the EAA's passage but two years before *Mergens*, *Hazelwood* arose. While holding that a school newspaper published in a journalism class is *not* a limited public forum, *Hazelwood* reaffirmed that schools *can* create spaces for student speech by creating a limited public forum, and student speech in school is subject to a public forum analysis, if that forum is opened for student use. 484 U.S. at 267. *Hazelwood* succinctly explained that "school facilities may be deemed to be public forums only if school authorities have 'by policy or by practice' opened those facilities 'for indiscriminate use by the general public[]' . . . , or by some segment of the public, such as for student organizations." *Id.* (citations omitted).

As *Mergens* made clear, this Court did not consider *Hazelwood* as a means by which to circumvent the

EAA's limited open forum. Instead, the Court distinguished *Hazelwood* as involving a "high school newspaper produced as part of the school's journalism class [that] was part of the curriculum" in contrast to the noncurricular-related student groups meeting at the high school in *Mergens*. *Mergens*, 496 U.S. at 237. And this Court's subsequent decisions in *Rosenberger* and *Good News Club* demonstrate that the First Amendment's limited public forum analysis protects equal access for student groups' religious speech, and the *Hazelwood* analysis, which is limited to the government's own speech, is not applicable to student groups' speech. *See Rosenberger*, 515 U.S. at 834 (citing *Hazelwood* for "[a] holding that the University may not discriminate based on the viewpoint of private persons whose speech it facilitates does not restrict the University's own speech, which is controlled by different principles"); *Good News Club*, 533 U.S. 98 (protecting equal access for religious club without any mention of *Hazelwood*); s*ee also Kennedy*, 597 U.S. 507 (First Amendment protects teacher's religious expression without any mention of *Hazelwood*).

To be clear, the petition for certiorari now before this Court addresses the First Amendment's limited public forum analysis but not the EAA's limited open forum analysis. Both analyses, however, would reach the same result if the EAA were at issue: a student group's political or religious speech is protected from censorship. The decision below is directly contrary to this Court's precedent involving both the First Amendment's limited public forum analysis in *Rosenberger* and *Good News Club* and the EAA's

limited open forum analysis in *Mergens*—making it all the more dangerous to student speech.

C. The Seventh Circuit, as Well as Two Other Circuits, now Review Student Speech Under a Deeply Flawed "School-Sponsored" Analysis.

Ironically, in this case, the lower court did take the first step of the proper forum analysis by asking whether Noblesville High School had, by policy or practice, created a limited public forum by allowing student organizations to post temporary flyers at specified places in the school. The Seventh Circuit answered this inquiry in the positive—acknowledging that Noblesville High School's walls are a limited public forum. J.A. 15a. But, unfortunately, the court then took a misstep. Instead of applying the limits that follow the finding of a public forum, the court began its flawed "school-sponsored forum" analysis by conflating *Hazelwood* with part two of the proper forum analysis. J.A. 16a. It determined that "[*b*]*ecause of where and how* E.D. sought to display her flyers, they could reasonably be perceived as bearing the school's imprimatur." J.A. 11a (emphasis added). The Court then concluded that "schools may regulate [such] student expression in school-sponsored forums so long as their actions are tied to a valid educational purpose" pursuant to *Hazelwood*. J.A. 14a (citation omitted). By creating a novel "school-sponsored forum[]" analysis, the court below bypassed the *Tinker* analysis (invoking *Hazelwood* as an exception) and undercut both the limited public forum analysis under the Court's *Widmar* and *Rosenberger* line of cases and the "limited open forum" analysis under the EAA.

The Seventh Circuit's logic that E.D.'s flyers appeared "school-sponsored" and are therefore subject to a "school-sponsored forum[]" analysis is both circular and dangerous. Instead of asking whether a public forum has been created, courts will instead ask whether the student speech took place in school and whether some unidentified person might misperceive the speech as endorsed by the school. By then declaring it as fitting within *Hazelwood*'s "school-sponsored" concept, the student speech is instantly degraded to receiving only minimal First Amendment protections. This has already come to fruition in other circuits. *See*, *e.g.*, *Bannon v. Dist. of Palm Beach Cnty.*, 387 F.3d 1208, 1214-15 (11th Cir. 2004) (holding that student-painted murals on plywood panels in interior and exterior of high school hallways were "school-sponsored" expression under *Hazelwood*); *Fleming v. Jefferson Cnty. Sch. Dist. R-1*, 298 F.3d 918, 921, 935 (10th Cir. 2002) (finding that tile project allowing students to express "abstract artwork on 4-inch-by-4-inch tiles" that would be glazed, fired, and installed above the molding throughout the halls of the school was "school sponsored speech" subject to *Hazelwood*). This trend cannot continue.

D. This Court Should Again Cabin *Hazelwood* to Curricular Speech.

This Court should clarify the limited scope for applying the *Hazelwood* standard. *Hazelwood* itself conditioned its ruling on speech where educators have "authority over school-sponsored publications, theatrical productions, and other expressive activities" and which is "supervised by faculty members" and "designed to impart particular

knowledge or skills to student participants and audiences." 484 U.S. at 271. The simplest way to clarify *Hazelwood* is to affirm that its application is limited to speech that qualifies as the school's speech under this three-part test for curricular speech. Speech that "fails" this test is student speech and therefore analyzed under *Tinker* and the limited public forum analysis. *Hazelwood* should be inapplicable. *Tinker* provides the appropriate, necessary limits. *See* pp. 7-9 *supra.*

This is not to say that student speech will prevail every time. Schools and school districts retain meaningful authority to regulate student speech in the noncurricular context based on *Tinker*'s disruption standard, under *Fraser*'s restriction on lewd speech, and pursuant to *Morse*'s restriction on the promotion of drug use. A school may choose to either endorse certain student speech with its own speech or disclaim student speech occurring outside of the school's curriculum, making clear that speech does not represent the school's view. *See, e.g., Mergens*, 496 U.S. at 251 (school officials' "fear of a mistaken inference of endorsement [of a religious club's speech] is largely self-imposed, because the school itself has control over any impressions it gives its students"). Censorship cannot be the default position for a free society.

Here, E.D.'s flyers make for the perfect illustration. A simple disclaimer placed on her flyers would have clarified beyond a doubt that Noblesville High School did not endorse any message in NSFL's flyer. But without this Court's intervention, courts will continue to declare that *Hazelwood* broadly

applies when student speech occurs in "school-sponsored forums" or appears to be "school-sponsored speech." By unmooring *Hazelwood* from the narrow context of *curricular-related* speech (over which schools should be able to exert more control to ensure their teaching objectives are met, 484 U.S. at 268), this case will continue to erode *Tinker*'s promise that students do not "shed their constitutional rights to freedom of speech or expression" in the school context. 393 U.S. at 506.

III. IF THE SEVENTH CIRCUIT'S MISREADING OF *HAZELWOOD* STANDS, IT WILL LIKELY RESULT IN VIEWPOINT DISCRIMINATION WITH PARTICULAR HARM TO RELIGIOUS VOICES.

By declining to subject E.D.'s flyers to a proper public forum analysis, the court below has signaled that school administrators can invoke *Hazelwood* to censor most student speech. The predictable result is that viewpoints not endorsed by school officials will be disproportionately affected. Based on its fifty years of experience defending religious student groups, CLS particularly fears that many school administrators who already dislike certain religious beliefs and viewpoints will seize the opportunity to suppress disfavored religious beliefs. Even school administrators who are not opposed to religious student groups may be spooked by the prospect of allowing student groups to post any mention of religion, however temporary. One can imagine what a school principal might do if a photo on E.D.'s flyers had included a cross, the Star of David, or another religious symbol.

This Court's own precedents demonstrate that schools often overregulate religious speech on campus because of disagreement with the views expressed or out of speculative Establishment Clause concerns. *See*, *e.g.*, *Widmar*, 454 U.S. at 280-81 (Stevens, J., concurring in the judgment) (deeming "groundless" the "University's fear of violating the Establishment Clause"); *Good News* Club, 533 U.S. at 119 ("declin[ing] to employ Establishment Clause jurisprudence using a modified heckler's veto, in which a group's religious activity can be proscribed on the basis of what the youngest members of the audience might misperceive"); *Kennedy*, 597 U.S. at 514 (school's Establishment Clause concerns did not justify suppression of school employee's prayer). But "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." *Tinker*, 393 U.S. at 508. *Hazelwood* should not be misused to stifle student speech related to prayer, religion, or other matters. Otherwise, it will undermine the necessary focus on whether policies are neutral towards religion and will instead fixate on the worry that some may misperceive speech to be school sponsored. A school should not be allowed to use vague worries to justify its censorship of a student group's political or religious speech.

CONCLUSION

The petition for writ of certiorari should be granted. The Seventh Circuit's analysis contradicts this Court's line of cases describing its well-established standards for a limited public forum under the First Amendment. *See*, *e.g.*, *Rosenberger*, 515 U.S. at 829; *Good News Club*, 533 U.S. at 117.

Similarly, the lower court's erroneous analysis directly conflicts with this Court's instruction in *Mergens* that a public school that has a "limited open forum," as defined by the EAA, must provide a religious student club with "access to the school newspaper, bulletin boards, [and] the public address system" to announce its meetings. *Mergens*, 496 U.S. at 247. Finally, and perhaps most importantly, the Seventh Circuit's analysis is inconsistent with this Court's own analysis in *Hazelwood*. *Hazelwood* itself makes clear that student speech requires proper forum analysis and that its *Tinker* exception is limited to curricular speech.

For the foregoing reasons, and the reasons set forth by Petitioners, the petition should be granted.

Respectfully submitted,

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