

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 FIRST LIBERTY INSTITUTE AS
AMICUS CURIAE SUPPORTING PETITIONERS**

JORDAN W. LORENCE
MEGAN N. SHERWIN*
FIRST LIBERTY INSTITUTE
1331 Penn. Ave. NW
Suite 1410
Washington, DC 20004
**Supervised by D.C. bar
member*

KELLY J. SHACKELFORD
Counsel of Record
JEFFREY C. MATEER
DAVID J. HACKER
JEREMIAH G. DYS
FIRST LIBERTY INSTITUTE
2001 W. Plano Pkwy
Suite 1600
Plano, TX 75075
(972) 941-4444
kshackelford@firstliberty.org

Counsel for Amicus Curiae

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	iii
INTEREST OF <i>AMICUS CURIAE</i>	1
SUMMARY OF THE ARGUMENT	2
ARGUMENT	3
I. The Establishment Clause’s “Reasonable Observer” Test Was Flawed at its Outset.....	3
A. Origins of the “Reasonable Observer” Test.....	3
B. Evolution of the “Reasonable Observer” Test.....	6
C. Criticisms of the “Reasonable Observer” Test.....	8
D. Rejection of the “Reasonable Observer” Test.....	10
II. The “Reasonable Observer” Test Is Improper to Analyze Student Speech in Schools.....	11
A. Origins of the “Reasonable Observer” Test.....	12
B. Evolution of the “Reasonable Observer” Test.....	14
1. This “Reasonable Observer” Test Ignores an Obvious Possible Disclaimer for Schools.....	14
2. This “Reasonable Observer” Test Does Not Comport with the Court’s Precedent.....	17

3. This “Reasonable Observer” Test Fails to Provide a Clear Benchmark...	20
4. This “Reasonable Observer” Test Amounts to an Ignoramus’s Veto.....	22
CONCLUSION.....	23

TABLE OF AUTHORITIES

Cases

<i>Am. Legion v. Am. Humanist Ass’n</i> , 588 U.S. 29 (2019)	1, 10, 11
<i>Americans United for Separation of Church and State v. City of Grand Rapids</i> , 980 F.2d 1538 (6th Cir. 1992)	22
<i>Bannon v. Sch. Dist. of Palm Beach Cnty.</i> , 387 F.3d 1208 (11th Cir. 2004)	2, 22
<i>Bethel Sch. Dist. No. 403 v. Fraser</i> , 478 U.S. 675 (1986)	12
<i>Bd. of Educ. of Westside Cmty. Sch. v. Mergens ex rel. Mergens</i> , 496 U.S. 226 (1990)	15, 16
<i>Brown v. Bd. of Educ.</i> , 347 U.S. 483 (1954)	12
<i>Chess v. Widmar</i> , 635 F.2d 1310 (8th Cir. 1980)	19
<i>Cnty. of Allegheny v. ACLU</i> , 492 U.S. 573 (1989)	2, 6, 7, 8, 9
<i>Comm. for Pub. Educ. and Religious Liberty v. Nyquist</i> , 413 U.S. 756 (1973)	4
<i>Curry v. Hensiner</i> , 513 F.3d 570 (6th Cir. 2008)	21, 22

<i>E.D. v. Noblesville Sch. Dist.</i> , 151 F.4th 907 (7th Cir. 2025)	15, 18, 23
<i>Fleming v. Jefferson Cnty. Sch. Dist. R-1</i> , 298 F.3d 918 (10th Cir. 2002)	2, 20, 21
<i>Good News Club v. Milford Cent. Sch.</i> , 533 U.S. 98 (2001)	11
<i>Hazelwood Sch. Dist. v. Kuhlmeier</i> , 484 U.S. 260 (1988)	2, 12, 13, 17, 18
<i>Hunt v. McNair</i> , 413 U.S. 734 (1973)	4
<i>Kennedy v. Bremerton Sch. Dist.</i> , 597 U.S. 507 (2022)	1, 2, 4, 10, 11
<i>Kuhlmeier v. Hazelwood Sch. Dist.</i> , 607 F.Supp 1450 (E.D. Mo. May 9, 1985)	18
<i>Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.</i> , 508 U.S. 384 (1993)	8
<i>Lemon v. Kurtzman</i> , 403 U.S. 602 (1971)	2, 3, 4
<i>Lynch v. Donnelly</i> , 465 U.S. 668 (1984)	3, 5, 6
<i>Marsh v. Chambers</i> , 463 U.S. 783 (1983)	10

<i>Morse v. Frederick</i> , 551 U.S. 393 (2007)	13, 17
<i>Mueller v. Allen</i> , 463 U.S. 388 (1983)	4
<i>Santa Fe Indep. Sch. Dist. v. Doe</i> , 530 U.S. 290 (2000)	6, 7
<i>Sch. Dist. of City of Grand Rapids v. Ball</i> , 473 U.S. 373 (1985)	6
<i>Shurtleff v. City of Boston</i> , 596 U.S. 243 (2022)	19
<i>Tinker v. Des Moines Indep. Cmty. Sch. Dist.</i> , 393 U.S. 503 (1969)	12, 17, 19
<i>Town of Greece v. Galloway</i> , 572 U.S. 565 (2014)	11
<i>Van Orden v. Perry</i> , 545 U.S. 677 (2005)	10, 11, 12
<i>Wallace v. Jaffree</i> , 472 U.S. 38 (1985)	9, 10, 11
<i>Widmar v. Vincent</i> , 454 U.S. 263 (1981)	14, 18, 19
<i>Zelman v. Simmons-Harris</i> , 536 U.S. 263 (1981)	7

Other Authorities

- Jesse H. Choper, *Some Difficulties in Assuring
Equality and Avoiding Endorsement*, 54 VILL. L.
REV. 613, 616 (2009)9
- Kim Severson, *Meat is Back, on Plates and In
Politics*, THE NEW YORK TIMES (Apr. 18, 2025).....23

INTEREST OF *AMICUS CURIAE*¹

First Liberty Institute (“FLI”) is a nonprofit, public interest law firm dedicated to defending religious liberty for all Americans. FLI has prevailed in cases where the Supreme Court repudiated the “reasonable observer” test in the Establishment Clause context. *Am. Legion v. Am. Humanist Ass’n*, 588 U.S. 29 (2019); *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507 (2022). FLI also represents students in schools located in circuits across the country. Those students deserve full protection of their First Amendment rights. They also deserve *consistent* protection of those rights.

FLI respectfully urges the Court to grant certiorari to clarify that the “reasonable observer” test is inapt in evaluating student speech in schools, just as it was inapt in evaluating Establishment Clause issues.

¹ Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution toward the preparation or submission of this brief. Timely notice was provided to the parties of the filing of this brief.

SUMMARY OF THE ARGUMENT

The messy quagmire the “reasonable observer” test brought to Establishment Clause doctrine should convince the Court to reject its insertion into student free speech jurisprudence. The Court first established the *Lemon* test to analyze potential Establishment Clause violations in 1971. *See Lemon v. Kurtzman*, 403 U.S. 602 (1971). Almost immediately, though, the Court distanced itself from the test, instead providing nuances and alterations to it. One such alteration was the creation of the “reasonable observer” test, which evaluated how a reasonable observer would view the purported Establishment Clause violation. *See Cnty. of Allegheny v. ACLU*, 492 U.S. 573 (1989). This standard, too, was unworkable, and the Court abandoned it four terms ago in *Kennedy v. Bremerton School District*. 597 U.S. 507 (2022).

However, lower courts have used a cousin of the test when evaluating student expressive activity in public schools. Some circuits have found a “reasonable observer” implicit in the Court’s decision in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), and apply different variations of the “reasonable observer” test to examine whether schools can censor student activity. *See, e.g., Fleming v. Jefferson Cnty. Sch. Dist. R-1*, 298 F.3d 918 (10th Cir. 2002); *Bannon v. Sch. Dist. of Palm Beach Cnty.*, 387 F.3d 1208 (11th Cir. 2004). The test works no better in this context; it is unsuitable, arbitrary, and a misreading of the Court’s freedom of speech precedent. The Court should grant review to reject the growing use of the “reasonable observer” test in the student speech context.

ARGUMENT

The Court has long derided the “reasonable observer” test in the Establishment Clause context for its “apparent ‘shortcomings[,]’” finally ending its ghoulish haunting in 2022. *Kennedy*, 597 U.S. at 510. Lower courts, however, have resurrected this test like a zombie to analyze student speech hosted by public school forums. In that context, the test fares no better. The Court should grant certiorari to make clear that students’ First Amendment rights do not depend on an amorphous “reasonable observer’s” belief.

I. The Establishment Clause’s “Reasonable Observer” Test Was Flawed at its Outset.

The Court’s relationship with the “reasonable observer” test in the Establishment Clause setting has been an unsteady one. The test is an outgrowth of the second prong of the now-defunct *Lemon* test, as elaborated upon by Justice O’Connor. *See Lynch v. Donnelly*, 465 U.S. 668, 688–94 (1984) (O’Connor, J., concurring). But even after the Court ratified the test, it altered its contours, requiring more and more of the fictional observer. And finally, the Court rejected the test altogether and replaced it with “historical practices and understandings.” *Kennedy*, 597 U.S. at 535.

A. Origins of the “Reasonable Observer” Test

The origin of the Establishment Clause’s “reasonable observer” test lies in the *Lemon* test, the Court’s attempt at a comprehensive analysis for all Establishment Clause matters. *See Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971). In

determining whether a state program providing financial support to nonpublic schools violated the Establishment Clause, the Court wrote that “[f]irst, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster ‘an excessive government entanglement with religion.’” *Id.* (citation omitted). In finding that the state aid program violated the Establishment Clause, the majority focused on the “excessive entanglement between government and religion” inherent in the program and thus did not provide guidance on how to determine a statute’s “principal or primary effect.” *Id.* at 613–14.

While the Court almost immediately described the *Lemon* test’s prongs as “no more than helpful signposts,” *Hunt v. McNair*, 413 U.S. 734, 741 (1973), it struck down or upheld numerous statutes using the test’s second prong—asking whether the statute’s primary effect advanced or inhibited religion—by examining the actual effect of the statute, regardless of how it appeared to others. For example, in *Committee for Public Education and Religious Liberty v. Nyquist*, the Court held that a New York statute providing grant money to nonpublic schools for facility maintenance and tuition reimbursement violated the Establishment Clause because its effect (*not* its mere appearance) was to subsidize Roman Catholic schools. 413 U.S. 756 (1973). In contrast, in *Mueller v. Allen*, the Court held that a Minnesota statute allowing taxpayers to deduct educational expenses—for sectarian or public schools—from their income did not violate the Establishment Clause because its effect was broad and enjoyed by all parents. 463 U.S. 388 (1983).

Thirteen years after *Lemon*, the Court analyzed whether a Christmas display including a nativity scene violated the Establishment Clause. *See Lynch*, 465 U.S. at 671–72. Upholding the scene, the Court wrote that even if observers perceived that a city was aligning itself with a certain faith, and even if that alignment advanced religion, “on occasion some advancement of religion will result from governmental action” and “not every law that confers an ‘indirect,’ ‘remote,’ or ‘incidental’ benefit upon [religion] is, for that reason alone, constitutionally invalid.” *Id.* at 683.

In her concurrence, Justice O’Connor described her conception of the proper Establishment Clause analysis. She wrote that “[t]he Establishment Clause prohibits government from making adherence to a religion relevant in any way to a person’s standing in the political community.” *Id.* at 687 (O’Connor, J., concurring). She clarified that the second prong—the “effect” prong—asked “whether, irrespective of government’s actual purpose, the practice under review in fact conveys a message of endorsement or disapproval.” *Id.* at 690. And only government practices “communicating a message of government endorsement or disapproval of religion[.]” intentionally or unintentionally, made “religion relevant, in reality or public perception, to status in the political community.” *Id.* at 692. Thus, she believed the *Lemon* test’s “effect” prong examined whether the government action could be perceived as favoring or disfavoring religion, altering one’s public status.

B. Evolution of the “Reasonable Observer” Test

Although no other justice joined Justice O’Connor’s *Lynch* concurrence, the Court later adopted her view. In *County of Allegheny v. ACLU*, the Court ruled that a nativity scene on public property violated the Establishment Clause. 492 U.S. 573 (1989). Justice Blackmun, for the majority, wrote that Establishment Clause analysis required a special focus on “whether the challenged governmental practice either has the purpose or effect of ‘endorsing’ religion.” *Id.* at 592. In a later part of the opinion joined only by Justice Stevens, Justice Blackmun called upon Justice O’Connor’s *Lynch* concurrence to note that “the question is ‘what viewers may fairly understand to be the purpose of the [government’s] display.’” *Id.* at 595 (quoting *Lynch*, 465 U.S. at 692 (O’Connor, J., concurring)). That inquiry, though, depended “upon the context in which the contested object appear[ed].” *Cnty. of Allegheny*, 492 U.S. at 595. For example, “[a] typical museum setting, though not neutralizing the religious content of a religious painting, negates any message of endorsement of that content.” *Id.* (quoting *Lynch*, 465 U.S. at 692 (O’Connor, J., concurring)). And the majority made clear that the relevant inquiry was whether “the challenged governmental action [wa]s sufficiently likely to be perceived by adherents of the controlling denominations as an endorsement, and by the nonadherents as a disapproval, of their individual religious choices.” *Id.* at 597 (quoting *Sch. Dist. of City of Grand Rapids v. Ball*, 473 U.S. 373, 390 (1985)).

The Court’s standard changed again in *Santa Fe Independent School District v. Doe*. 530 U.S. 290

(2000). There, in analyzing whether student-led, student-initiated prayers at football games violated the Establishment Clause, a relevant question was “whether an objective observer, *acquainted with the text, legislative history, and implementation of the statute*, would perceive it as a state endorsement.” *Id.* at 308 (citing *Wallace v. Jaffree*, 472 U.S. 38, 76 (1985) (O’Connor, J., concurring in the judgment) (emphasis added)). Before, reasonable observers merely needed to know the context—*i.e.*, the setting—of a religious display. Here, the Court articulated a standard requiring that reasonable observers also possess textual, historical, and political knowledge about the action.

The Court reiterated their new “reasonable observer” standard two years later in *Zelman v. Simmons-Harris*. There, the Court concluded that Ohio’s neutral aid program allowing citizens to direct funds to religious schools relied on private choice. 536 U.S. 639, 652 (2002). As a result, the “incidental advancement of a religious mission, or the perceived endorsement of a religious message, [wa]s reasonably attributable to the individual recipient, not to the government[.]” *Id.* This further distanced the Court’s “reasonable observer” test from *Lemon*’s initial standard. The *Zelman* Court assumed the reasonable observer had extensive background knowledge of the law at issue, as the observer would need to know the government gave parents vouchers to spend on education. The “reasonable observer” test had evolved yet again, as the initial “reasonable observer” was not assumed to be well-informed. After all, in *County of Allegheny*, the nativity scene on display belonged to a Roman Catholic organization, not to the city, but the Court still struck down the display because the

government was “lending its support to the communication of a religious organization’s religious message.” 492 U.S. at 600–01.

C. Criticisms of the “Reasonable Observer” Test

This “reasonable observer” standard—examining purported establishment based on subjective perception of government endorsement—was never without its critics. Its arbitrariness and ambiguity were both obvious and noted. Yet for many years, it and the *Lemon* test stalked Establishment Clause jurisprudence “[l]ike some ghoul in a late-night horror movie.” *Lamb’s Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring in the judgment).

When a majority of the Court first embraced the “reasonable observer” test in *County of Allegheny*, Justice Kennedy, joined by Chief Justice Rehnquist and Justices White and Scalia, dissented from the “recent” and “unwelcome” addition of the “reasonable observer” test to the Court’s “tangled Establishment Clause jurisprudence.” 492 U.S. 573, 668 (1989) (Kennedy, J., concurring in the judgment in part and dissenting in part). The opinion derided “the very nature of the endorsement test, with its emphasis on the feelings of the objective observer,” as it easily lent itself to inquiry into the “minority or majority status of a religion.” *Id.* at 677. If a “reasonable observer” ever existed, Justice Kennedy wrote, he or she would conclude from the Court’s precedent that “the First Amendment creates classes of religions based on the relative numbers of their adherents. Those religions enjoying the largest following must be consigned to the status of least-favored faiths so as to avoid any

possible risk of offending members of minority religions.” *Id.*

In *Van Orden v. Perry*, Justice Thomas wrote a concurrence noting that investigation into how observers would view a religious display was “not fully satisfying to either [religious] nonadherents or adherents.” 545 U.S. 677, 696 (2005) (Thomas, J., concurring). The nonadherent, perhaps more sensitive than the hypothetical reasonable observer, or perhaps without all the facts and context of the Court’s reasonable observer, would feel the test “fail[ed] to capture completely the honest and deeply felt offense he t[ook] from the government conduct.” *Id.* at 696–97. On the other hand, the adherent might view removal of the sign or display as “an act hostile to his religious faith.” *Id.* at 697. “The Court’s foray into religious meaning either g[ave] insufficient weight to the views of nonadherents and adherents alike, or it provide[d] no principled way to choose between those views.” *Id.*

And “[a]lthough there are often close questions in constitutional law, the reasonable observer issue seem[ed] to be peculiarly troublesome, as is illustrated by the constant division of the Court over it.” Jesse H. Choper, *Some Difficulties in Assuring Equality and Avoiding Endorsement*, 54 VILL. L. REV. 613, 616 (2009). “[W]hen the nine justices of the Supreme Court try to identify the ‘reasonable, objective observer,’ it often becomes perfectly clear that it means a majority of themselves.” *Id.* The knowledge and understanding the reasonable observer possessed changed over the thirty years the Court used the test. Additionally, outcomes of cases depended on how much the justices assumed the

imaginary reasonable observer knew. Nowhere did the Court explain why or how the reasonable observer learned knowledge about historical practice or text.

In a decisive shift away from *Lemon*, the Court abandoned the “effect” prong altogether, instead relying only on “historical evidence” to evaluate the constitutionality of religious activity. *Am. Legion v. Am. Humanist Ass’n*, 588 U.S. 29, 60 (2019) (citing *Marsh v. Chambers*, 463 U.S. 783, 790 (1983)). In *American Legion*, the majority wrote that the *Lemon* test could not “explain the Establishment Clause’s tolerance, for example, of the prayers that open legislative meetings, ... certain references to, and invocations of, the Deity in the public words of public officials; the public references to God on coins, decrees, and buildings; or the attention paid to the religious objectives of certain holidays, including Thanksgiving.” 588 U.S. 29, 49 (2019) (quoting *Van Orden*, 545 U.S. at 699 (Breyer, J., concurring in the judgment)). The “reasonable observer” test clearly conflicted with some historically-sanctioned practices, and at no point did the Court attempt to reconcile the conflict.

D. Rejection of the “Reasonable Observer” Test

Finally, the Court discarded all of *Lemon*’s distortions of Establishment Clause doctrine in *Kennedy v. Bremerton School District*, where they faced whether a high school football coach violated the Establishment Clause when he prayed at midfield after football games. 597 U.S. 507 (2022). In finding that he did not, the Court wrote that “the ‘shortcomings’ associated with [the *Lemon* test’s] ‘ambitiou[s],’ abstract, and ahistorical approach to the

Establishment Clause became so ‘apparent’ that the Court long ago abandoned *Lemon* and its endorsement test offshoot.” *Id.* at 534 (quoting *Am. Legion*, 588 U.S. at 48–49). The *Kennedy* majority instead made clear that the Establishment Clause was to “be interpreted by ‘reference to historical practices and understandings.’” *Id.* at 535 (quoting *Town of Greece v. Galloway*, 572 U.S. 565, 576 (2014)). The *Kennedy* dissent left no room to doubt this renouncement by writing that the majority “overrule[d] *Lemon v. Kurtzman*, and call[ed] into question decades of subsequent precedents that it deem[ed] ‘offshoot[s]’ of that decision.” *Id.* at 546 (Sotomayor, J., dissenting) (internal citations omitted).

The Court also held that the Establishment Clause did not “include anything like a ‘modified heckler’s veto, in which ... religious activity can be proscribed’ based on ‘perceptions’ or ‘discomfort,’” nor did it “compel the government to purge from the public sphere’ anything an objective observer could reasonably infer endorses or ‘partakes of the religious.’” *Id.* at 534–35 (first quoting *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 119 (2001); then quoting *Van Orden*, 545 U.S. at 699). The Court thus soundly rejected the idea that an observer’s offense equated to a constitutional violation.

II. The “Reasonable Observer” Test Is Improper to Analyze Student Speech in Schools.

Despite the Court’s rejection of the “reasonable observer” test in Establishment Clause cases, lower courts are now using it in the context of public school student speech cases. The test fares no better in this

new environment; its same flaws of illogicality and inconsistency are wreaking havoc on student speech.

**A. Origins of the Student Speech
“Reasonable Observer” Test Used
by the Seventh Circuit**

In *Hazelwood School District v. Kuhlmeier*, the Court upheld a school official’s decision to remove parts of a student newspaper, as the censorship was related to “legitimate pedagogical concerns.” 484 U.S. 260, 273 (1988). Students could not “be punished merely for expressing their personal views on the school premises,” unless school authorities had reason to believe such expression would “substantially interfere with the work of the school or impinge upon the rights of other students,” or unless the speech was inconsistent with its “basic educational mission.” *Id.* at 266 (first quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969); then quoting *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986)). And schools “retain[ed] the authority to refuse to sponsor student speech that [could] reasonably be perceived to advocate drug or alcohol use, irresponsible sex, or conduct otherwise inconsistent with ‘the shared values of a civilized social order,’ or to associate the school with any position other than neutrality on matters of political controversy.” *Hazelwood*, 484 U.S. at 272 (internal citation omitted). Otherwise, “schools would be unduly constrained from fulfilling their role as ‘a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment.’” *Id.* (quoting *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954)).

Because the newspaper in *Hazelwood* was clearly school-sponsored and administrators were concerned portions of the newspaper issue did not adequately protect student privacy and was inappropriate, the school administrators did not violate students' First Amendment rights. Yet lower courts found the seed for the "reasonable observer" test planted in *Hazelwood*, which allowed a school "to refuse to sponsor student speech that might reasonably be perceived to advocate . . . conduct otherwise inconsistent with 'the shared values of a civilized social order.'" *Id.* at 272. *Hazelwood* became vulnerable to misinterpretation by lower courts, who saw no need to examine whether the students' speech was objectively private and not school-sponsored (and therefore protected under the First Amendment), but instead looked to what a hypothetical reasonable observer might perceive. Schools could then rely on subjective views of observers to justify their refusal to host private student speech, on the grounds that permitting such speech would be viewed as official endorsement of it.

The Court gave another benchmark with *Morse v. Frederick*, where a student at a school event held up a sign reading "BONG HiTS 4 JESUS." 551 U.S. 393, 397 (2007). The majority held that the school did not violate the student's First Amendment rights by confiscating the banner. *Id.* *Hazelwood* did not control, as "no one would reasonably believe that Frederick's banner bore the school's imprimatur." *Id.* at 405. Yet Frederick was a student, attending a school-sponsored event, across the street from school property. *Id.* at 397. Couldn't a reasonable observer assume the "BONG HiTS 4 JESUS" banner had the school's approval? The Court blazed past *Hazelwood*

but provided little explanation for its lack of engagement with the “reasonable observer” test.

As with the Establishment Clause’s reasonable observer, the Free Speech Clause’s reasonable observer comes pre-set with whatever background information the Court decides it should have. And that background information is often determinative. Additionally, if this was private student speech, as the Court found, then discussion of what some outside observer perceived would not matter. Even mentioning the “reasonable observer” gave lower courts ammunition to continue charting their deviant path.

B. The “Reasonable Observer” Test Is an Inapt Way to Analyze Student Activities in Schools.

At least four distinct challenges arise from the Seventh Circuit’s student speech “reasonable observer” test which it adopted in the decision below. First, it provides an inappropriate opt in/opt out mechanism with perverse incentives. Second, it represents a misunderstanding of the Court’s jurisprudence. Third, it provides no clear benchmark. And fourth, it enables an ignoramus’s veto.

1. This “Reasonable Observer” Test Ignores an Obvious Possible Disclaimer for Schools.

Schools can simply say they do not necessarily endorse viewpoints advocated by student groups that meet on campus. The government does not endorse everything it permits in a forum. *See Widmar v. Vincent*, 454 U.S. 263, 274 (1981). But the “reasonable

observer” standard injected into a student speech context gives the public school an easy way to censor student speech it finds unsavory. Schools can claim that a reasonable observer might associate the student’s advocacy with the schools; therefore, they can suppress it.

That is borne out here: the Seventh Circuit found that because of the location and content of E.D.’s flyers, they “would naturally (and perhaps inevitably) be seen by students, parents, and visitors as reflecting the school’s endorsement[,]” and thus, the *Hazelwood* exception, not the *Tinker* rule, applied. *E.D. v. Noblesville Sch. Dist.*, 151 F.4th 907, 915 (7th Cir. 2025). But objectively, the posters at issue here were the private speech of the student group, not speech coming from some official organ of the school. Even if a reasonable observer noted the presence of a school’s logo or a teacher’s initials on posters, or the location of posters or a student’s activity, it is not a foregone conclusion that observers would attribute the poster to the school. Schools have an easy solution: they can issue a general disclaimer, distancing themselves from the student speech they host. Permitting private speech does not mean the government endorses that speech.

The Court has recognized this basic principle. In *Board of Education of Westside Community Schools v. Mergens*, the school, like Noblesville, faced a collision between Establishment Clause and Free Speech Clause jurisprudence when students sought to form a religious after-school club, similar to already-existing non-religious clubs. 496 U.S. 226, 227 (1990). A plurality of the Court additionally addressed the Establishment Clause claim using the “reasonable

observer” test, writing that a “school itself has control over any impressions it gives its students.” *Id.* at 251 (plurality opinion). “To the extent a school makes clear that its recognition of respondents’ proposed club is not an endorsement of the views of the club’s participants, students will reasonably understand that the school’s official recognition of the club evinces neutrality toward, rather than endorsement of, religious speech.” *Id.* (internal citation omitted). And “a school that permits a student-initiated and student-led religious club to meet after school, just as it permits any other student group to do, does not convey a message of state approval or endorsement of the particular religion.” *Id.* at 252. If a religious club was one of many student-initiated ones, “students should perceive no message of government endorsement of religion.” *Id.*

As the *Mergens* plurality recognized, when a school takes affirmative action to disclaim speech it hosts, a reasonable observer will have no basis to believe the school endorsed the content of the message. A school—the mere forum of the message—can distance itself from any message it might host, regardless of what a viewer might believe absent the disclaimer.

But without a disclaimer, under the “reasonable observer” test, a reasonable observer might believe a message hosted on a school forum was attributable to the school. Therefore, a school with no disclaimer regarding content it hosted could defend its censorship of speech by, as here, arguing that a reasonable observer would impute the speech to the school. The *Mergens* plurality implicitly recognized that the “reasonable observer” test wrongly removes responsibility from schools to protect students’ free

speech rights and instead gives them an excuse to censor students' First Amendment rights. Schools possess the authority to awaken children to cultural values, to prepare them for later professional training, and to help them adjust to their environment, *see Hazelwood*, 484 U.S. at 272, and yet the “reasonable observer” test gives them a hall pass to censor different viewpoints expressing those cultural values. That is no way to protect students' First Amendment rights. This flaw inherent in the “reasonable observer” test illustrates its absurdity.

2. This “Reasonable Observer” Test Does Not Comport with the Court’s Precedent.

Students and teachers do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” *Tinker*, 393 U.S. at 506. The Court has emphasized that *Tinker* remains the standard; *Hazelwood* is an exception. *See, e.g., Morse v. Frederick*, 551 U.S. 393 (2007) (acknowledging *Hazelwood* while holding the *Tinker* principle as the baseline). While the exact contours of *Hazelwood* remain murky, the Seventh Circuit’s “reasonable observer” test is a significant expansion of the Court’s precedent to permit government suppression of student speech that *Tinker* says government should protect. The Court must correct the Seventh Circuit, which has let the tail wag the dog.

Hazelwood describes the student speech to which it applies: “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” that “may fairly be characterized as part of the school curriculum. . . so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences.” 484 U.S. at 271. In *Hazelwood*, the student speech at issue was a school-sponsored newspaper, overseen by a teacher, and edited by a journalism class. *Id.* at 262–63.

In contrast, E.D.’s flyer was for a “student-initiated, student-led” group “focused on pro-life advocacy,” *not* an issue pertaining to the school curriculum. *E.D. v. Noblesville*, 151 F.4th at 911. While the student group was to have a faculty sponsor, the sponsor “supervise[d] the use of school facilities and provide[d] logistical support[.]” *id.*, in *Hazelwood*, the journalism teacher overseeing the newspaper “both had the authority to exercise and in fact exercised a great deal of control over [the newspaper].” *Hazelwood*, 484 U.S. at 268 (quoting *Kuhlmeier v. Hazelwood Sch. Dist.*, 607 F. Supp 1450, 1453 (E.D. Mo. May 9, 1985)). The Seventh Circuit strayed from *Hazelwood’s* articulation, and in so doing, allowed the school to improperly censor student speech unrelated to the school’s curriculum.

The Court has also stated that “an open forum in a public university does not confer any imprimatur of state approval on religious sects or practices.” *Widmar v. Vincent*, 454 U.S. 263, 274 (1981). In *Widmar*, a university prohibited a religious group from conducting its meetings in university facilities, and the Court held that the school’s exclusionary policy violated the First Amendment. *Id.* at 263. If hosting meetings at a university did not convey school approval, it is hard to imagine how posting a mere

flyer at a high school would. Rather, that flyer would no more commit the school to religious goals than “to the goals of the Students for a Democratic Society, the Young Socialist Alliance,’ or any other group eligible to use its facilities.” *Id.* (quoting *Chess v. Widmar*, 635 F.2d 1310, 1317 (8th Cir. 1980)).

The Establishment Clause’s “reasonable observer” test has already been repudiated, for good reason. There is a difference between government speech, where “the First Amendment does not demand airtime for all views[,]” *Shurtleff v. City of Boston*, 596 U.S. 243, 247–48 (2022), and private (“pure”) speech, which “is entitled to comprehensive protection under the First Amendment.” *Tinker*, 393 U.S. at 506. However, the “reasonable observer” test improperly conflates the two, allowing the government to regulate protected, private speech because outsiders might perceive it as government speech.

In *Shurtleff*, the Court found that the extent to which the city controlled and shaped the message at issue was dispositive; the public’s perception of the government’s role in hosting the message was not. 596 U.S. at 244–45. That principle applies here. A reasonable observer might or might not be correct about the government’s approval or disapproval of a message it hosts. Their view is not dispositive. *Tinker*’s general rule—that absent school sponsorship, student speech is protected by the First Amendment—applies to E.D.’s private speech.

3. This “Reasonable Observer” Test Fails to Provide a Clear Benchmark.

Hazelwood provided no further guidance on how to evaluate whether an activity could be attributed to the school. This has left courts, which have adopted a “reasonable observer” standard, in the same position as they were in after *Lynch* articulated the Establishment Clause’s “reasonable observer” test. The Seventh Circuit’s opinion is evidence of that. How much background knowledge should the reasonable observer possess? Does that knowledge depend on the grade level the school serves? How do observers view conflicting messages in school forums? Without more guidance, lower courts will continue to misconstrue *Hazelwood*’s instructions.

Other circuits who have adopted the “reasonable observer” standard for student speech demonstrate how unclear the test is. For example, the Tenth Circuit in *Fleming v. Jefferson County School District R-1* addressed whether a tile memorial in the school that was the site of the Columbine shooting bore the imprimatur of the school such that school officials could remove certain tiles. 298 F.3d 918 (10th Cir. 2002). The Tenth Circuit noted that “[e]xpressive activities that do not bear the imprimatur of the school could include a variety of activities conducted by outside groups that take place on school facilities after-school, such as club meetings.” *Id.* at 925. The court found that because the tiles would “become a lasting part of the school[,]” which implicated “the school’s approval of those tiles[,]” and because the school organized, supervised, approved the funding, and screened the tiles, “the school’s decision

permanently to mount them on the walls convey[ed] a level of approval of the message.” *Id.* at 930. And while the court acknowledged that “the variety and number of tiles would lead an observer to understand that the school itself did not paint the tiles[,]” “the observer would likely perceive that the school had a role in setting guidelines for, and ultimately approving, the tiles it allowed to become a part of the school itself[.]” *Id.* Thus, some school involvement in the student’s expressive activity meant it bore the school’s imprimatur.

The Eleventh Circuit followed in the Tenth Circuit’s footsteps in similarly holding that a school beautification project—a mural on school property—was school-sponsored expression. *See Bannon v. Sch. Dist. of Palm Beach Cnty.*, 387 F.3d 1208 (11th Cir. 2004). The court wrote that “the murals constituted school-sponsored expression within the meaning of *Hazelwood*.” *Id.* at 1214. “Given the location of these murals,” which appeared “in prominent locations in the school[,]” “a reasonable ‘observer would likely perceive that the school had a role in setting guidelines for, and ultimately approving, the [murals] it allowed to become a part of the school itself, which in this case, it did.” *Id.* (quoting *Fleming*, 298 F.3d at 930). *Hazelwood* controlled because there was “no question students, parents, and other members of the public might reasonably believe” the student’s murals bore “the imprimatur of the school.” *Id.*

In contrast, the Sixth Circuit limits *Hazelwood*’s exception to curricular assignments. In *Curry v. Hensiner*, the court analyzed whether a student’s card explaining the religious meaning of the candy cane attached to candy canes he sold as part of a school

project was properly restricted under *Hazelwood*. 513 F.3d 570 (6th Cir. 2008). Instead of analyzing whether an observer would attribute the candy cane cards to the school, the court examined “the type of speech, the age of the locutor and audience, the school’s control over the activity in which the expression occur[ed], and whether the school solicit[ed] individual views from students during the activity.” *Id.* at 578–79. Because the “expression was part of a curricular assignment” that “did not solicit viewpoints[,]” and because “the school had complete control[,]” the court held that *Hazelwood*’s exception applied. *Id.* at 579. The school did not improperly restrict the student’s speech because the student’s speech, which included his personal views, was outside the scope of the assignment. *See id.* This split from the Tenth and Eleventh Circuits illustrates lower court confusion.

4. **This “Reasonable Observer” Test Amounts to an Ignoramus’s Veto.**

As with the Establishment Clause’s “reasonable observer” test, this test risks giving in to an “ignoramus’s veto” by which critics can claim that speech they dislike bears the imprimatur of the school. *See Americans United for Separation of Church and State v. City of Grand Rapids*, 980 F.2d 1538, 1553 (6th Cir. 1992). While the Establishment Clause’s “reasonable observer” test risked allowing the religion with the utmost minority status to halt any government recognition of other religions, the “reasonable observer” test here would allow the most ignorant or easily offended viewer to stifle student speech on the theory that the school endorsed the message.

Take, for example, a school’s vegan club that advocates for living a vegan lifestyle. If the club complied with all Noblesville School District’s requirements, it could post flyers bearing a faculty member’s initials—“a literal stamp of the school’s authority”—on the school’s walls “alongside announcements for school-sponsored events.” *See E.D. v. Noblesville*, 151 F.4th at 915. Under the Seventh Circuit’s reasoning, the flyer could be viewed by a student following a carnivorous diet, or whose family raised cattle, chickens, or hogs, as the school’s endorsement of eschewing animal products. And if defunding Planned Parenthood is considered political, so too might be adopting a vegan diet, given the increasing politicization of food and eating habits. *See, e.g.*, Kim Severson, *Meat is Back, on Plates and In Politics*, THE NEW YORK TIMES (Apr. 18, 2025), <https://perma.cc/K62U-ZMJN>. The view of the pro-meat student—the ignoramus—would counsel in favor of the school’s ability to restrict the vegan club’s flyers. Yet the First Amendment does not give least-favored-nation status to student activities. A mere observer should not be able to stifle student speech because of his or her ignorance.

CONCLUSION

This Court should grant the petition for certiorari.

Respectfully submitted,

JORDAN LORENCE
MEGAN SHERWIN*
FIRST LIBERTY INSTITUTE
1331 Pennsylvania Ave. NW
Suite 1410
Washington, DC 20004
**Supervised by D.C. bar
member*

KELLY J. SHACKELFORD
Counsel of Record
JEFFREY C. MATEER
DAVID J. HACKER
JEREMIAH G. DYS
FIRST LIBERTY INSTITUTE
2001 W. Plano Pkwy
Suite 1600
Plano, TX 75075
(972) 941-4444
kshackelford@firstliberty.org

Counsel for Amicus Curiae

March 4, 2026