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

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND BRIEF OF AMICUS CURIAE FOUNDATION FOR MORAL LAW IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE AMICUS BRIEF

The Foundation for Moral Law, Inc. ("the Foundation"), hereby files this motion for leave to file an *amicus* brief in the matter of *E.D., et al., v. Noblesville School District, No. 25-A704.*

The Foundation is a national public interest organization based in Montgomery, Alabama, dedicated to the defense of religious liberty and the strict interpretation of the Constitution as written and intended by its Framers. The Foundation has an interest in this case because it believes students in public schools have God-given free speech rights guaranteed by the First Amendment as articulated by this Court in *Tinker v. Des Moines Independent Community School District,* 393 U.S. 503 (1969), which the lower court failed to apply in the case at hand.

The accompanying *amicus* brief is warranted and would be helpful to this Court because it presents case law and legal analysis demonstrating that the case at hand comes under the *Tinker* standard rather than the *Hazelwood School District v. Kuhlmeier,* 484 U.S. 260 (1998) standard applied by the lower courts.

Accordingly, the Foundation respectfully requests that the Court grant this motion and accept the *amicus* brief which accompanies this filing.

RESPECTFULLY SUBMITTED this 4th day of March, 2026.

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CORPORATE DISCLOSURE STATEMENT

Under Rule 26.1 and Rule 29(a)(4)(A) of the Federal Rules of Appellate Procedure, the *amicus* Foundation for Moral Law, Inc., certifies that it is not a subsidiary or affiliate of a publicly owned corporation.

/s/ *John Eidsmoe*

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INTEREST OF THE *AMICUS* [1]

Amicus curiae Foundation for Moral Law, Inc. ("the Foundation") is a non-profit, non-partisan public interest organization dedicated to the defense of constitutional liberties and to the strict interpretation of the Constitution as intended by its Framers. The Foundation has a direct interest in this case because we believe that the freedom of speech as protected by the First Amendment is a cornerstone of our constitutional republic upon which all our rights and liberties depend. Further, we believe that the schoolhouse is an important venue for our youth to exercise their right of free speech as Americans and special vigilance is required to ensure that our youngest citizens' rights are respected.

[1] No party or party's counsel authored this brief in whole or in part or contributed money that was intended to fund its preparation or submission; and no person other than the *amicus curiae,* its members, or its counsel, contributed money that was intended to fund the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969), was a landmark precedent that saw a major victory for free speech for high school students. As this Court famously stated, "it can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." This case raises a substantial issue upon which the lower courts are split: whether *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 271 (1998), should be allowed to eviscerate the student free speech rights recognized in *Tinker.* The Foundation believes *Hazelwood* was intended to be, and should be read today as, a narrow exception to *Tinker* that applies only student speech that is clearly officially school-sponsored.

ARGUMENT

Our argument is as follows:

I. The Court below erred in holding that *Hazelwood,* not *Tinker,* governs this case.

The Seventh Circuit below relied upon *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 271 (1998), as the controlling precedent for this case, and rejected *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), and with it, *Tinker's* more expansive view of student speech.

The Foundation believes *Tinker* applies to the facts of this case more than does *Hazelwood. Tinker* involved high school students who were protesting the Vietnam War by wearing black armbands at school. This Court upheld their right to do so, famously holding 503, 506, 89, that "it can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."

Hazelwood, on the other hand, involved the official school newspaper of Hazelwood East High School, school-funded and school-sponsored. The articles that appeared in the newspaper were prepared in the school's Journalism II class. The paper thus bore the imprimatur of the school, and this Court therefore concluded that the school could regulate its content.

"Extracurricular" is the key word that pinpoints the difference between *Hazelwood* and the case at hand. The Hazelwood East newspaper is an official school publication produced with school funds in a school journalism class. Noblesville Students For Life (hereinafter, "NSFL") is an extracurricular club that is not sponsored by the Noblesville High School (hereinafter, "the school") that by school regulations has to be student-initiated and student-led, that receives no school funds, and that meets during non-school hours.

Under the *Tinker* rationale, a high school can suppress student speech only if it can demonstrate that the speech causes a "material and substantial disruption" to the functioning of the school. This Court

found that there was no material and substantial disruption from the students' armbands in *Tinker,* and there is no evidence of any material and substantial disruption from the Noblesville Students for Life posters. The Seventh Circuit's statement that "The District could reasonably conclude that covering its walls with warring political messages would undermine that order and divert attention from the business of learning" seems far-fetched as there is no evidence that that is a present problem. If student political clubs ever proliferated at Noblesville High School so that this became a problem in the future, the school could address it then.

The court below emphasized that NSFL was free to promote ideas like "Defund Planned Parenthood" at their meetings; they just couldn't use that slogan or similar slogans in their advertising. The opinion indicates that the advertising posters could mention only the name of the organization and the time and place of the meeting and apparently could not list the topics, at least provocative topics, of the meetings. This in itself is a substantial free speech violation.

Before a student decides whether to stay after school to attend an event of an extracurricular organization, that student will want to know what is going to happen at the meeting. Some of the more dedicated members of NSFL might attend just because it is a meeting of their organization, but many others will not attend unless they know the meeting is about a subject of interest to them. In *Metromedia Inc. v. City of San Diego,* 453 U.S. 490 (1981), this Court held that billboard advertising was protected

First Amendment speech and struck down a San Diego ordinance that restricted most billboards. The Court held that the city has a legitimate interest in controlling the noncommunicative aspects of billboards but may not prohibit the communicative aspects of billboards.

In the case at hand, this limit on NSLF posting notices is not just a time, place, or manner restriction on the noncommunicative aspects of the posters such as their size, color, etc. It strikes at the very heart of the NSFL students' ability to get their message across. It is therefore unconstitutional under the First Amendment free speech clause as applied by *Tinker.*

II. Even if *Hazelwood* governs this case, the Court below erred in holding that, under *Hazelwood,* Noblesville High School could ban Noblesville Students for Life's poster.

The only basis for the Circuit Court's holding that *Hazelwood* governs this case, is court's assertion that NSFL's poster bore the imprimatur of the school and thus appeared to imply school sponsorship or endorsement of the club's views and actions. The Foundation believes, for the reasons set forth in Section I above, that students would not reasonably perceive the posters to bear the imprimatur of the school. However, if this Court concludes that the posters could reasonably be perceived to bear the imprimatur of the school, this Court should still conclude that the First Amendment prohibits Noblesville High School from prohibiting NSFL's poster.

Even if *Hazelwood* governs, the school may not engage in viewpoint discrimination and probably may not engage in content discrimination.

The record below is clear that the Appellees censorship of E.D.'s speech was not viewpoint neutral. Both Dean Luna's statement that he could not approve the poster because the school was "dancing on eggshells" regarding political speech, and Principal McCaffrey's statement that he determined the "appropriateness" of the student group's flyers "based on what the current hot topic is in our culture" are unequivocal viewpoint discrimination because they discriminate against topics that are "hot" and in favor of topics that are not "hot," Doc. 152-2 at 35, 103, and because the Black Student Union had posted a flyer featuring an image of three raised fists.[2]

The Fourth Circuit recently noted in *Robertson v. Anderson Mill Elem. Sch.*, 989 F.3d 282, 290 (4th Cir. 2021).[3] that this Court has not decided whether restrictions on school-sponsored student speech must

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[2] The record is unclear as to whether the school had ever officially approved this poster of the Black Student Union, but it had been displayed and there is no evidence that the school ever disapproved it or took it down.

[3] *Citing in comparison*, *e.g.*, *Peck ex rel. Peck v. Baldwinsville Cent. Sch. Dist.*, 426 F.3d 617, 633 (2d Cir. 2005) (declining to abandon the requirement of viewpoint neutrality, "even in the limited context of school-sponsored student speech," absent "clear direction from the Supreme Court"), with *Fleming v. Jefferson Cnty. Sch. Dist. R-1*, 298 F.3d 918, 926 (10th Cir. 2002) ("[W]e conclude that Hazelwood allows educators to make viewpoint-based decisions about school-sponsored speech.").

be viewpoint-neutral under *Hazelwood,* and the Fourth Circuit declined to address that issue because the plaintiff had not plausibly alleged viewpoint discrimination. The general argument that *Hazelwood* prohibits viewpoint discrimination is, as explained by the Eleventh Circuit in *Searcy v. Harris*, rooted in core First Amendment analysis and the fact that "although *Hazelwood* provides reasons for allowing a school official to discriminate based on *content*, we do not believe it offers any justification for allowing educators to discriminate based on viewpoint." 888 F.2d 1314, 1315 (11th Cir. 1989) (emphasis original).

On the other hand, the opposing argument that *Hazelwood* does allow for schools to engage in viewpoint discrimination is explained by Judge Black's concurrence in *Bannon v. Sch. Dist.*, 387 F.3d 1208, 1218 (11th Cir. 2004). In *Bannon*, the Eleventh Circuit *per curiam* directly upheld *Searcey's* holding that "*Hazelwood* does not allow a school to censor school-sponsored speech based on viewpoint." *Id.* at 1215. However, in concurrence, Judge Black suggests that *Hazelwood* does allow for viewpoint censorship based on its language, the circuit split at that time, and as a policy matter. *Id.* at 1218. On each point, Judge Black's argument for viewpoint discrimination under *Hazelwood* fails and has only become less persuasive with time.

A. *Hazelwood's* language refers to content-based discrimination rather than viewpoint-based discrimination.

First, *Hazelwood's* language suggests:

> A school must also retain the authority to refuse to sponsor student speech that *might 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*. Otherwise, the 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.

484 U.S. at 272 (emphasis added; citations and internal quotation marks omitted). Judge Black uses this language to distinguish *Searcy* as not dealing with student speech, but rather an outside group's speech. *Bannon*, 387 F.3d at 1218 (Black, J., concurring). However, in doing so, Judge Black makes a critical error by presuming this language describes "the epitome of discrimination based on viewpoint." *Id.*

The basic premise is that, even under *Hazelwood,* schools may not engage in viewpoint discrimination. The narrow exception, if it is an exception at all, in the paragraph quoted above, is that the school may prohibit speech that is directly contrary to the policies of the school, such as speech advocating drug or alcohol use, irresponsible sex, or conduct inconsistent

with the shared values of a civilized social order. NSFL's poster saying "Defund Planned Parenthood" clearly does not fit into any of these categories.

As the Fourth Circuit explained in *Robertson*, "viewpoint-based discrimination occurs when a government official 'targets not subject matter, but particular views taken by speakers on a subject.'" 989 F.3d at 290 (*quoting Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995)). Each of the items listed in *Hazelwood* above is a subject matter category, not individual and particular viewpoints.

In other words, schools can prohibit all content promoting drug or alcohol use, all content promoting irresponsible sex, all other content that is inconsistent with shared values of civilized order, and all content that associates the school with any position other than neutrality on matters of political controversy. The majority in *Bannon* held that *Hazelwood* "permits subject-matter-based restrictions on school-sponsored student expression [and] does not permit viewpoint-based discrimination." 387 F.3d at 1215. That last content category touches on the present case, but as Appellants' brief thoroughly argues, the Noblesville School District cannot defend its actions under *Hazelwood* because it did engage in viewpoint-based discrimination rather than content-based discrimination.

The content/viewpoint distinction can be confusing, and various courts have acknowledged the issues this confusion presents. *See e.g.*, *Rosenberger v. Rector & Visitors of the Univ. of Va.* 515 U.S. 819 (1995) ("it must be acknowledged [that] the distinction

[between content and viewpoint discrimination] is not a precise one."). The Tenth Circuit case that Judge Black cites makes the same error by asserting that *Hazelwood* allows viewpoint discrimination because "no doubt the school could promote student speech advocating against drug use, without being obligated to sponsor speech with the opposing viewpoint." *Fleming v. Jefferson County Sch. Dist. R-1*, 298 F.3d 918, 928 (10th Cir. 2002). However, this logic does not follow *Hazelwood's* language. Speech that advocates drug and alcohol use is within the category of "conduct otherwise inconsistent with the shared values of a civilized social order," so under *Hazelwood*, schools can prohibit it while being free to allow advocacy against drug use which would be its own content category. 484 U.S. at 272.

B. The current status of the *Hazelwood* circuit split.

The circuit split now squarely points towards viewpoint neutrality with the Second, Ninth, and Eleventh Circuits holding that viewpoint neutrality is required under *Hazelwood*. *See Peck ex rel. Peck*, 426 F.2d at 632-33 & n.9 (2d. Cir. 2005); *Planned Parenthood of Southern Nevada*, 941 F.2d 817, 829-30 (9th Cir. 1991) (*en banc*); *Searcey*, 888 F.3d at 1319 n.7, 1325 (11th Cir. 1989). The Fourth and Fifth Circuits have acknowledged the split but have not reached the issue. *See Roberts*, 989 F.3d at 290 (4th Cir. 2021); *Chiras v. Miller*, 432 F.3d 606, 615 n.27 (5th Cir. 2005). The Third Circuit did hold that *Hazelwood* did not require viewpoint neutrality in *C.H. v. Oliva*, 195 F.3d 167, 172-73 (3d Cir. 1998), but

this decision was later vacated, and the issue was not reached by the *en banc* court on review.

Now Justice Alito, joined by Judge Mansmann, dissented from the Third Circuit's *en banc* decision in *C.H.* on the basis that the panel's understanding of *Hazelwood* was incorrect. *C.H. v. Oliva*, 226 F.3d 198, 213 (3d Cir. 2000) (*en banc*). Judge Alito's main point was that "things that students express in class or in assignments when called upon to express their own views do not 'bear the imprimatur of the school' and do not represent the school's own speech." *Id.* at 214 (*citing Hazelwood*, 484 U.S. at 271; *Rosenberger*, 515 U.S. at 834). Judge Alito based his reasoning on "fundamental First Amendment principles" including the principle that "viewpoint discrimination strikes at the heart of the freedom of expression." *Id.* at 213. While his dissent supports Appellants' correct argument that *Hazelwood* doesn't apply in the present case because E.D.'s speech is her own rather than the school's, Judge Alito also points out that if the vacated panel of the Third Circuit's view of *Hazelwood* was correct, the students in *Tinker* could have been prevented from expressing views against Vietnam in the class solely on the basis that some students would resent the expression of antiwar views. *Id.* In other words, the position that *Hazelwood* allows for viewpoint discrimination is totally untenable with Supreme Court First Amendment jurisprudence and is close to allowing a "heckler's veto," *Terminiello v. Chicago,* 337 U.S. 1 (1949).

C. The Need to Employ Less Restrictive Means

It seems extremely unlikely that a high school student, especially a reasonable and informed high school student, would assume that the school is endorsing the messages of extracurricular organizations like NSFL; see, *Capitol Square Review and Advisory Board v. Pinette,* 515 U.S. 763 (1995).

Furthermore, even if *Hazelwood* applies and allows content or viewpoint discrimination because the school was concerned that E.D.'s poster could be construed as the school sponsoring or endorsing the pro-life cause, before suppressing E.D.'s speech the school had a duty to use a less restrictive means, such as requiring E.D. to put a disclaimer on her poster to the effect that "This poster and the viewpoints it promotes are in no way endorsed or sponsored by the Noblesville Public Schools." However, this should not be necessary. As this Court recognized in *Board of Education of Westside Community Schools v. Mergens,* 496 U.S. 226, 240 (1990), "To the extent that a religious club is merely one of many different student-initiated voluntary clubs, students should perceive no message of government endorsement of religion." The same would apply to government endorsement of the pro-life position. *See also*, *Verbena United Methodist Church v. Chilton County,* 765 F. Supp. 704 (M.D. Ala. 1991).

The court below notes that NSFL and other extracurricular clubs must post their notices of meetings on the same bulletin board as official school notices, that an extracurricular club must have an advisor, and that the advisor's initials must appear on

the club's poster. But why? Only because the school has made that a requirement. The school cannot impose those requirements upon extracurricular clubs and then use those requirements as justification for infringing the clubs' freedom of speech. The school could have one wall for posting notices of official school organizations and a separate wall for extracurricular clubs. The school could forego the requirement that faculty advisors place their initials on their clubs' posters, or it could allow them to initial the posters on the back rather than the front.[4]

These less restrictive means would satisfy any potential problem of students assuming Noblesville High School was sponsoring the event.

CONCLUSION

This case is and should be resolvable of the basis of *Tinker* alone. Nevertheless, E.D. and Noblesville Students for Life's free speech rights have been violated even under *Hazelwood.*

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[4] One might even question whether the requirement of a faculty advisor is an unconstitutional infringement on students' free speech. Teachers may refuse to serve as faculty advisors because they are too busy, or because they disagree with the goals and beliefs of an organization, or because they fear ostracism by other teachers for serving as faculty advisor to an unpopular organization. If not a single teacher is willing to serve as faculty advisor, the students are denied their right to have an organization to promote their beliefs. The requirement of a faculty advisor may be a means of silencing or suppressing unpopular causes.

The Foundation urges this Court to grant Petitioners' Petition for Writ of Certiorari, reverse the decision of the Seventh Circuit, and clarify the state of the law by holding that *Hazelwood* is a narrow exception to *Tinker* and that *Hazelwood* applies only to student speech that is clearly officially school-sponsored.

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