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

BRIEF OF *AMICUS CURIAE* FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The Foundation for Individual Rights and Expression (FIRE) is a nonpartisan nonprofit that defends the rights of all Americans to free speech and free thought—the essential qualities of liberty. Since 1999, FIRE has successfully defended First Amendment rights nationwide through public advocacy, targeted litigation, and *amicus curiae* filings in cases implicating expressive rights, without regard to speakers' views. FIRE has a keen interest in ensuring the censorship it opposes across the country is not fostered in our public K-12 schools.

Because today's students are tomorrow's leaders, FIRE places a special emphasis on educating grade-school students about their expressive rights and defending them when those rights are violated.[2] FIRE strongly opposes attempts to discipline students for protected expression and litigates against schools that wrongfully punish student speakers. *See, e.g.*, *I.P. ex rel. B.P. v. Tullahoma City Sch.*, 4:23-cv-00026

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1. All parties were timely notified of the filing of this brief. No part of this brief was authored by any party's counsel, and no person or entity other than *amicus* funded its preparation or submission.

2. *See*, *e.g.*, Join the next generation of free speech leaders for the FIRE Free Speech Forum from June 21-27 in Washington, DC, The Foundation for Individual Rights and Expression, https://camp.fire.org/?gad_source=1&gad_campaignid=22041644552&gbraid=0AAAADKFIB3WyyKIZNjS_6FSnWlc9QIV0&gclid=CjwKCAiAqprNBhB6EiwAMe3yhmvV1JyqdxkhPUHhFoQf_zoR3_LU8SB5nSIg94cn2gyZEGjhheTLdhoCyK8QAvD_BwE.

(E.D. Tenn. filed July 19, 2023); *D.A. v. Tri County Area Schools*, 123-cv-00423 (W.D. Mich filed April 25, 2023).

FIRE also files *amicus curiae* briefs in cases implicating student First Amendment rights, including in this case. *See* Brief for FIRE, et al., as Amici Curiae in Supp. of Pls.-Appellants and Rehearing *En Banc*, *E.D. v. Noblesville Sch. Dist.*, No. 24-1608 (7th Cir. Sept. 22, 2025)*; see also, e.g.*, Brief for FIRE as Amicus Curiae, *B.L. ex rel. Levy v. Mahanoy Area Sch. Dist.*, 964 F.3d 170 (3d Cir. 2020); Brief for FIRE as Amicus Curiae, *Mahanoy Area Sch. Dist. v. B.L. ex rel. Levy*, 594 U.S. 180 (2021); Brief for FIRE as Amicus Curiae, *C1.G ex rel. C.G. v. Siegfried*, 38 F.4th 1270 (10th Cir. 2022); Brief for FIRE as Amicus Curiae, *Parents Defending Educ. v. Olentangy Loc. Sch. Dist. Bd. of Educ.*, 158 F.4th 732 (6th Cir. 2025). To best prepare students for success in our democracy, our nation's public schools must respect their First Amendment right to freedom of expression.[3]

SUMMARY OF ARGUMENT

The Court should grant *certiorari* to rein in lower courts, such as those in this case, that have embraced *dicta* in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 271 (1988), about schools "disassociating"

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3. *Pledge allegiance or else: Maryland public school forces students and teachers to salute the flag*, The Foundation for Individual Rights and Expression (May 30, 2024), https://www.thefire.org/news/pledge-allegiance-or-else-maryland-public-school-forces-students-and-teachers-salute-flag.

themselves from student speech of which they disapprove, to uphold censorship of expression that no one would perceive as bearing the "imprimatur" of the school. For 37 years, students in America's public schools have endured a "training wheels" version of free speech under *Hazelwood* that time and subsequent events have thoroughly discredited. *Hazelwood*'s nod to schools having authority to censor speech for the sole purpose of distancing themselves from political controversy is not only *dicta* but lacking rational foundation. It requires indulging two premises that even this Court no longer believes: (1) that reasonable observers cannot distinguish student speech from the school's speech, and (2) that the interest of a government actor in avoiding perceived entanglement in political controversy trumps citizens' rights to debate politics. By granting *certiorari*, this Court can confirm *Hazelwood*'s "disassociation" *dicta* is not binding and should not be followed.

ARGUMENT

Avoiding damage to the government's reputation is simply not a valid exercise of governmental censorship authority. Indeed, one might convincingly argue the First Amendment exists for the primary purpose of enabling citizens to damage the government's reputation. It is topsy-turvy to suggest the government's "right" to a controversy-free reputation overrides the right to engage in core political and religious speech the Constitution most fiercely protects.

Any notion that this Court has broadly licensed schools to censor student speech for the sole purpose

of avoiding association with controversy misreads both *Hazelwood* and four decades of subsequent caselaw. *Hazelwood* stands for the narrow proposition that school authorities may remove articles from student-produced newspapers if the articles are journalistically deficient or unsuitably mature for a young audience. The *only* rationales cited by the school in *Hazelwood* to justify its censorship were: (1) an article about teen pregnancy did not sufficiently anonymize interviewees or those they discussed; (2) younger students and their siblings were too immature to encounter discussion of birth control and premarital sex; and (3) an article about divorce criticized a student's absentee father without giving him an opportunity to respond. *Hazelwood*, 484 U.S. at 274–75. Nowhere did the school cite avoiding association with controversy. This "misattribution" rationale was simply unnecessary to the decision—classic *dicta* lower courts should not be using as a legal standard to decide constitutional rights in grade school settings. *See Weingarten v. Bd. of Educ.*, 591 F. Supp. 2d 511, 519 (S.D.N.Y. 2008) (recognizing "imprimatur" discussion in *Hazelwood* as "unnecessary to the result").

Commentators have overwhelmingly questioned *Hazelwood* and its doctrinal grounding.[4] Time has

4. A very partial sampling of scholarly critiques of *Hazelwood*'s failings includes: Frank D. LoMonte, *Censorship Makes the School Look Bad: Why Courts and Educators Must Embrace the "Passionate Conversation,"* 65 WASH. U. J.L. & PUB. POL'Y 91 (2021); Clare R. Norins, Taran Harmon-Walker & Navroz Tharani, *Restoring Student Press Freedoms: Why Every State Needs a "New Voices" Law*, 32 GEO. MASON U. C.R.L.J. 63 (2021); Roy S. Gutterman, *New Voices, New Rights, New York: A*

shown the 5–3 majority opinion stretched in relying on many of the cases it cited. *See* Eric D. Bender, *The Viability of Racist Speech from High Schools to Universities: A Welcome Matriculation*, 59 U. CIN. L. REV. 871, 881 n.56 (1991). And the Association for Education in Journalism and Mass Communication ("AEJMC"), the standard-setting body for journalism instruction nationwide, adopted a resolution marking *Hazelwood*'s 25th anniversary which declared:

> [N]o legitimate pedagogical purpose is served by the censorship of student journalism even if it reflects unflatteringly on school policies and programs, candidly discusses sensitive social and political issues, or voices opinions challenging to majority views on matters of public concern. The censorship of such speech is detrimental to effective learning and

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Case Study and a Call for Student Journalist Protections in New York, 83 ALBANY L. REV. 1115 (2020); Sonja R. West, *Student Press Exceptionalism*, 2 EDUC. L. & POL'Y REV. 130 (2015); Amanda Harmon Cooley, *Controlling Students and Teachers: The Increasing Constriction of Constitutional Rights in Public Education*, 66 BAYLOR L. REV. 235 (2014); Christine Snyder, *Reversing the Tide: Restoring First Amendment Ideals in America's Schools Through Legislative Protections for Journalism Students and Advisors*, 2014 BYU EDUC. & L.J. 71 (2014); Ann M. Gill, *In the Wake of* Fraser *and* Hazelwood, 20 J.L. & EDUC. 253 (1991); William G. Buss, *School Newspapers, Public Forum, and the First Amendment*, 74 IOWA L. REV. 505 (1989).

> teaching, and it cannot be justified by reference to "pedagogical concerns."[5]

Hazelwood has over the years received such a poor reception that 18 states have enacted laws specifically to nullify it in favor of recognizing that the authority of *Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969), sufficiently protects legitimate concerns for maintaining order.[6] Seldom in modern history has any decision of this Court impelled states from coast to coast to enact laws specifically to counteract it.[7]

Time and again since *Hazelwood*, this Court has admitted reasonable audiences are fully able to distinguish student speech from school messages. In *Rumsfeld v. Forum for Academic and Institutional*

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5. ASS'N FOR EDUC. IN JOURN. & MASS COMM., *AEJMC Resolution One 2013* (2013), https://www.aejmc.org/about/aejmc-resolutions/aejmc-2013-resolutions/resolution-one-2013.

6. "Anti-*Hazelwood*" statutes exist in Arkansas, California, Colorado, Hawaii, Illinois, Iowa, Kansas, Maryland, Massachusetts, Minnesota, Nevada, New Jersey, North Dakota, Oregon, Rhode Island, Vermont, Washington and West Virginia. STUDENT PRESS LAW CTR., *New Voices Timeline*, https://splc.org/1970/01/new-voices-timeline/ (last visited March 4, 2026).

7. In *Lawrence v. Texas*, 539 U.S. 558 (2003), this Court afforded great weight to the erosion of state laws criminalizing sodomy in overturning *Bowers v. Hardwick*, 478 U.S. 186 (1986), which had legitimized those laws. At the time of *Bowers*, 25 states made consensual sodomy a crime, and by the time of *Lawrence*, 12 states had repealed their laws, *see Lawrence*, 539 U.S. at 573, reflecting—as with *Hazelwood*—consensus that this Court's precedent was out of step with prevailing understanding of the matter at issue.

Rights, Inc., 547 U.S. 47, 65 (2006), this Court "held that high school students can appreciate the difference between speech a school sponsors and speech a school permits because it is legally required to do so, pursuant to an equal access policy." And *Hazelwood*'s "misattribution" *dicta* plainly cannot survive this Court's more recent and sweeping pronouncement in *Kennedy v. Bremerton School District*, 597 U.S. 507, 534–35 (2022), categorically rejecting the "heckler's veto" that would result from allowing schools to censor speech for fear hearers might misattribute it to the school. *Kennedy*'s repudiation of the Establishment Clause test from *Lemon v. Kurtzman*, 403 U.S. 602 (1971)—which asked whether a reasonable observer could conclude that a school endorsed a speaker's religious message—is the last shovel of dirt interring *Hazelwood*'s antiquated "imprimatur" rationale. The *Hazelwood* outlier aside, this Court has unfailingly recognized the government's reputational interests carry no weight in First Amendment analyses when pitted against a speaker's interest in being heard on matters of public concern. *Bridges v. California*, 314 U.S. 252, 270 (1941), cited the "prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions." And in *Landmark Communications, Inc. v. Virginia*, the Court reaffirmed its "prior cases have firmly established … that injury to official reputation is an insufficient reason 'for repressing speech that would otherwise be free.'" 435 U.S. 829, 841–42 (1978) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 272–73 (1964)).

For this reason, for example, government officials are expected to have thicker skins than ordinary citizens and turn the other cheek to verbal abuse. *See Houston Community College System v. Wilson*, 595 U.S. 468, 478 (2022) (government officials must "shoulder a degree of criticism about their public service from their constituents and their peers" and respond with counterspeech); *City of Houston v. Hill*, 482 U.S. 451, 461 (1987) ("[T]he First Amendment protects a significant amount of verbal criticism and challenge directed at police officers."). Outside the educational setting, nowhere in America is it regarded as tolerable for government authorities to silence people whose speech diminishes the public's opinion of them. That same rule should apply equally if not even more strongly "in the community of American schools," where "solicitude for First Amendment values should be at its zenith." *Shelton v. Tucker*, 364 U.S. 479, 487 (1960).

Government control over speakers' messages cannot be made self-validating. Allowing the decisions below to stand would sanction the circular principle that the more the government controls speech, the more control the government has. The school itself, in reasoning that the courts below adopted, notes all the ways the school used resources supporting E.D.'s club, including provision of school meeting space. Yet the school plainly does not regard any of *that* support to convert the students' speech into a school-endorsed message.

The school evidently believes reasonable audience members *can* distinguish individual speech from government-endorsed speech—even when speakers

meet in school facilities and post notices in school hallways. It is *only* because the school requires initials of a school employee to appear on club flyers that it even begins to have any defensible claim E.D.'s speech falls within *Hazelwood*. It is impossible to articulate this "principle"—that a government agency can exert near-total censorship authority over citizens' speech by insisting the speech carry a stamp of government approval—without feeling the chill.

As Justice Alito highlighted with themed license plates, it beggars belief that a reasonable audience member could believe various speakers' messages are attributable to the government when they are inconsistent or even directly contradictory. *Walker v. Sons of Confederate Veterans, Inc.*, 576 U.S. 200, 221 (2015) (Alito, J., dissenting).[8] Presumably, a competing student club was free to place an "Abortion-Rights Club meeting" flyer directly beside E.D.'s flyer. What reasonable viewer could believe the government intended to endorse both viewpoints? What "curricular lesson" could a reasonable audience member derive from the existence of these irreconcilable messages?

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8. Though stated in a dissent in *Walker*, Justice Alito's reasoning soon commanded a majority in *Matal v. Tam*, 582 U.S. 218, 236 (2017), which rejected the misattribution rationale in the context of a discredited claim that reasonable audience members believe the government is endorsing an ethnic slur by allowing a musician to register a trademark that includes the slur: "[I]t is far-fetched to suggest that the content of a registered mark is government speech. If the federal registration of a trademark makes the mark government speech, the Federal Government is babbling prodigiously and incoherently."

Like any government agency, a school is always free to engage in counterspeech as a less-restrictive means of avoiding misattribution. *See United States v. Alvarez*, 567 U.S. 709, 727 (2012) ("The remedy for speech that is false is speech that is true. [...] The response to the unreasoned is the rational; to the uninformed, the enlightened; to the straightout lie, the simple truth."); *see also* Nadine Strossen, *Counterspeech in Response to Changing Notions of Free Speech*, AM. BAR ASS'N HUM. RTS. (Nov. 19, 2018), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/the-ongoing-challenge-to-define-free-speech/counterspeech-in-response-to-free-speech ("[T]he constitutionally permissible response to speech conveying controversial, disfavored views is 'counterspeech,' not censorship—more speech, not silence."). A simple counterspeech addition to the bulletin board—"These messages are posted by student clubs and are not school-endorsed"—would suffice to remove whatever misattribution concerns might validly lie.

With *Hazelwood* as weak and discredited precedent, this Court should grant review here to take the opportunity to instruct lower courts to read it as narrowly as possible, not—as the panel did below—to expand upon it. That is particularly apt given the factors that convinced this Court to decide *Hazelwood* in the school district's favor are conspicuously absent here. Clubs are "*extra*curricular," not curricular. Unlike the *Hazelwood* newspaper, participating in E.D.'s club was not a graded academic exercise for which students received credit. There is no indication any school money supported E.D.'s message; the school would have maintained the message board

with or without E.D.'s posting, unlike the newspaper in *Hazelwood*, which existed for the sole purpose of disseminating student articles. The Sixth Circuit recognized *Hazelwood*'s narrowness in *Kincaid v. Gibson*, 236 F.3d 342, 346 (6th Cir. 2001) (*en banc*), in refusing to apply it to an extracurricular publication that university students produced as part of an out-of-class club.[9]

The school in this case similarly was not exercising its "educator" authority. Defendants did not say "please add more educationally rigorous information to the flyer." Defendant Luna gave the game away by stating the school's motivation was to avoid controversy ("walking on eggshells"). App.19a. When the school's decision is devoid of curricular basis, *Hazelwood*'s authority should be at its nadir. After all, this Court stated, to qualify for *Hazelwood* deference, a decision must be justified by "pedagogical" concerns, not reputational ones. 484 U.S. at 273. And there is nothing educational about censorship of speech protected by the First Amendment—at least not any

9. This Court has never endorsed the application of its grade-school jurisprudence to the university setting, *see*, *e.g.*, *Speech First, Inc. v. Cartwright*, 32 F.4th 1110, 1127 (11th Cir. 2022), and in fact emphasized its "precedents … leave no room for the view that … First Amendment protections should apply with less force on college campuses than in the community at large." *Healy v. James*, 408 U.S. 169, 180, 92 S.Ct. 2338, 33 L.Ed.2d 266 (1972); *see also Papish v. Bd. of Curators of Univ. of Mo.*, 410 U.S. 667, 669–70, 93 S.Ct. 1197, 35 L.Ed.2d 618 (1973) ("state colleges and universities are not enclaves immune from the sweep of the First Amendment"). The Court should accordingly take its first opportunity to explicitly clarify that its First Amendment grade-school caselaw does not apply on college and university campuses.

lesson students attending a public school in the United States of America should learn.

CONCLUSION

"America's public schools are the nurseries of democracy. Our representative democracy only works if we protect the 'marketplace of ideas.'" *Mahanoy Area Sch. Dist.*, 594 U.S. at 190. For the aforesaid reasons, the Court should grant *certiorari* to elucidate the limits of *Hazelwood* as precedent, and in particular that schools "disassociating" themselves from student speech of which they disapprove is not a constitutional ground for censoring it.

Respectfully submitted,

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March 4, 2026