IN THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CASE NO. 06-2439

JOEL CURRY, a minor, by and through his parents,
PAUL and MELANIE CURRY,

Plaintiffs-Appellants,

v.

IRENE HENSINGER, Principal, Handley School

Defendant-Appellee,

and SAGINAW CITY SCHOOL DISTRICT, Defendant

On Appeal from the United States District Court
for the Eastern District of Michigan

APPELLANTS' PETITION FOR REHEARING EN BANC

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F.R.A.P. 35(B) STATEMENT

This case is appropriately subject to en banc rehearing because the panel decision implicates two issues of exceptional importance, and contradicts precedent of the Supreme Court, this Court, and other Courts of Appeals. Consideration by the full court is therefore necessary to secure and maintain uniformity and integrity of this Court's decisions. The issues are as follows.

1) Whether this Court should permit the most egregious form of viewpoint discrimination by allowing government school officials to censor entire categories of student speech simply by characterizing that speech as "offensive" (in this case merely because the speech was religious), even though the speech is of impeccable civility, and complies entirely with the standards and objectives of the school assignment to which it responds. *Morse v. Frederick*, 127 S.Ct. 2618 (2007); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1986); *Tinker v. Des Moines Ind. Cmty. Sch. Dist.*, 393 U.S. 503 (1969); *Poling v. Murphy*, 872 F.2d 757 (6th Cir. 1989).

2) Whether this Court should deny all speech rights to students expressing themselves in compliance with a school assignment, by identifying their individual speech as "school-sponsored," and thus without constitutional protection.

INTRODUCTION AND SUMMARY OF ARGUMENT

The panel decision in this case announces the unprecedented and alarming rule that government school officials may censor individual student religious speech by categorically resolving that "allowing [student speech] would not be appropriate because it [is] religious, and therefore could offend other students and their parents." Slip Op., at 7 (attached). The panel applies this rule even to student speech presented with unimpeachable decorum, that conforms to an assignment's guidelines, and facilitates the lessons intended for the assignment. The panel's rule on behalf of this Circuit strikes at the heart of the First Amendment.

Joel Curry and the rest of the fifth-grade students at Handley School were assigned by their teachers the task of creating products to sell from their cardboard-box storefronts in "Classroom City." These students were admonished to make for sale "a product that stands out from all the others" as part of an economic simulation intended to teach the students about the operation of the market economy and American local government. Joel made candy-cane-shaped ornaments, to which he attached a miniature pamphlet containing the mildest of religious messages: one ascribing a Christian meaning to the Christmas candy cane. His product met assignment criteria and he received an "A." However, Principle Hensinger, upon discovering that Joel's ornaments had tags attached

containing religious speech, ordered these tags be severed from the ornaments, and did so admittedly for the sole reason that the speech was religious.

The panel on review in this case ruled that it is a "valid educational purpose" for government schools to censor student speech which is "religious, and therefore could offend other students and their parents." Slip Op., at 7.

The panel's errors, though intertwined, are twofold. First, the panel's opinion is irreconcilable with the First Amendment's protection of student speech and religion, which disallows government viewpoint discrimination against categories of decorous and assignment-compliant student speech. Second, the panel denied students any First Amendment rights within the context of a classroom assignment, even rights against categorical censorship of religious speech (and, by extension, any other speech which officials contrive to characterize as "offensive"). These errors together allow the worst kind of viewpoint discrimination in conflict with the rulings of this Court, other Circuits and the Supreme Court.

ARGUMENT

I. The panel decision gives this Court's approval to the most egregious form of viewpoint discrimination by allowing government school officials to censor entire categories of student speech simply by categorizing that speech as "offensive" (in this case merely because the speech was religious), even though the speech is of impeccable civility, and complies entirely with the standards and objectives of the school assignment to which it responds.

Perhaps the most conspicuous characteristic of the panel's opinion is that it is utterly bereft of an analytical or legal defense of its unprecedented ruling that it is a "legitimate" pedagogical purpose to censor student speech because it is religious, even when such speech complies entirely with and serves the purposes of the assignment to which it is a response. The panel did not offer a single relevant citation in support of its conclusion, neither did it discuss or acknowledge the existence of constitutional principles militating against its pioneering ruling. It merely stipulated that censorship of religious (therefore offensive) student speech "qualifies as a valid educational purpose." Slip Op. at 7.

The panel approved this blatant viewpoint discrimination[1] without even discussing an existing circuit split in which it staked a claim beyond even the most deferential Courts of Appeals holding the minority view. The Second, Ninth and Eleventh Circuits reject viewpoint discrimination as a legitimate pedagogical concern under *Hazelwood*. *Peck v. Baldwinsville Central Sch. Dist.*, 426 F.3d 617, 633 (2d Cir. 2005); *Planned Parenthood of S. Nev. v. Clark County Sch. Dist.*, 941 F.2d 817, 829 (9th Cir. 1991) (en banc); *Searcey v. Harris*, 888 F.2d 1314, 1319–20 (11th Cir. 1989). The Third Circuit, *en banc*, split evenly on the issue but

[1] That discrimination against religious speech constitutes viewpoint discrimination is well-settled. *See, e.g.*, *Good News Club v. Milford Central School*, 533 U.S. 98, 108-109 (2001); *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 831 (1995); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 393-394 (1993).

ultimately avoided it. *C.H. v. Oliva*, 226 F.3d 198 (3d Cir. 2000); *see also Child Evangelism Fellowship v. Stafford Twp. Sch. Dist.*, 386 F.3d 514, 527 (3d Cir. 2004) (banning controversial speech is viewpoint discrimination); *Saxe v. State College Area Sch. Dist.*, 240 F.3d 200, 206 (3d Cir. 2001) (student speech cannot be censored just because it might offend). The First Circuit allows viewpoint discrimination under *Hazelwood* in regard to a teacher's speech, *Ward v. Hickey*, 996 F.2d 448, 452 (1st Cir. 1993), but such speech is "school-sponsored" in a way that an individual student's is not. Only the Tenth Circuit would classify student speech in an assignment as "school sponsored," and only in certain circumstances readily distinguishable from those found in Joel's case. *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1286 (10th Cir. 2004); *Fleming v. Jefferson County Sch. Dist. R-1*, 298 F.3d 918, 926-28 (10th Cir. 2002). No Circuit has authorized viewpoint discriminatory censorship in an instance comparable to Joel's speech in this case.

The Supreme Court unequivocally rejects the notion that government schools may declare categories of decorous student speech "offensive." Just last term, the Court decisively repudiated the view adopted by the panel. In *Morse v. Frederick*, 127 S. Ct. 2618 (2007), the plaintiff displayed a banner that jocularly referenced drugs at a school-attended parade. The school principal took down his banner, and the Court found that act constitutional because the banner contained speech that she reasonably interpreted as promoting illegal drug use. *Id.* at 2629.

Nevertheless, the Court explicitly refused to justify censorship on the basis that government schools have plenary power to define speech as "offensive":

> Petitioners urge us to adopt the broader rule that Frederick's speech is proscribable because it is plainly "offensive" as that term is used in [*Bethel Sch. Dist. No. 203 v. Fraser*, 478 U.S. 675 (1986) (allowing schools to exclude sexually explicit, "offensively lewd and indecent speech")]. We think this stretches *Fraser* too far; that case should not be read to encompass any speech that could fit under some definition of "offensive." After all, much political and religious speech might be perceived as offensive to some. The concern here is not that Frederick's speech was offensive, but that it was reasonably viewed as promoting illegal drug use.

Id. at 2629. In their concurrence, Justices Alito and Kennedy warned that

> some public schools have defined their educational missions as including the inculcation of whatever political and social views are held by the members of these groups. . . . The "educational mission" argument would give public school authorities a license to suppress speech on political and social issues based on disagreement with the viewpoint expressed. The argument, therefore, strikes at the very heart of the First Amendment.

Id. at 2637. Justices Stevens, Souter, and Ginsberg, in dissent, likewise harshly criticized censorship of students by government schools

> on the basis of a listener's disagreement with her understanding (or, more likely, misunderstanding) of the speaker's viewpoint. "If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

Id. at 2645. Thus the Court explicitly rejected a government school's power to define and censor categories of mannerly student speech as "offensive."

The *Morse* consensus is not new. "Any word spoken *in class* . . . that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says that we must take this risk." *Tinker*, 393 U.S. at 507 (emphasis added). "[T]he free speech clause protects a wide variety of speech that listeners may consider deeply offensive. . . ." *Saxe v. State College Area Sch. Dist.*, 240 F.3d 200, 206 (3d Cir. 2001) (citing *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *Cantwell v. Connecticut*, 310 U.S. 296 (1940)). The Sixth Circuit as well refuses to give a free pass to restrictions on speech that the government deems "offensive." *See, e.g., Morrison v. Board of Educ. of Boyd County*, 507 F.3d 494, 505 (6th Cir. 2007) (Court recognized potential chilling effect of a ban on student speech that school policy says may cause offense).

Assuming *arguendo* the application of *Hazelwood* to the facts of this case, the panel's validation of viewpoint discrimination ostensibly under the terms of that case simply cannot be sustained. The analysis under *Hazelwood* of what constitutes a "legitimate" pedagogical interest (thus justifying regulation of student speech) must be considered both in light of (1) the curricular assignment at issue, *Poling v. Murphy*, 872 F.2d 757, 762 (6th Cir. 1989), and (2) the dictates of the mutually-informing textual provisions of the First Amendment.[2] The panel

[2] "Indeed, in Anglo-American history, at least, government suppression of speech has so commonly been directed *precisely* at religious speech that a free-speech clause without religion would be Hamlet without the prince." *Capitol Square*

(unaccountably) looked to neither of these considerations, thus by its example consigning both to irrelevance in this Circuit.

In light of the clear precedent affirming protection for private religious expression, and the free exercise clause's prohibition on government targeting of religious exercise because of its religious character (*see* note 2), censorship of religious speech simply because of its religious message *cannot* be a legitimate pedagogical concern under *Hazelwood*, as a matter of fixed constitutional principle. As *Hazelwood* stands as expression of a First Amendment application, there is therefore an inescapable constitutional policy standard within it that limits what may constitute "legitimate" pedagogical purposes. Viewpoint hostility to religious speech simply cannot pass muster as "valid" so long as the First Amendment retains its meaning.

But the panel culpably detaches its "legitimate" pedagogical interest evaluation not only from the Constitution, but also even from the academic exercise in which the speech arises. This error is not only counterintuitive in itself, it is also condemned by the explanation of *Hazelwood* found in this Court's *Poling v. Murphy* decision which the panel itself reproduced in its opinion. Slip Op., at 5.

Review and Advisory Bd. v. Pinette, 515 U.S. 753, 760 (1995). Strict scrutiny applies to a government burden on religious freedom unless the law is 'neutral' and 'generally applicable.' *Employment Div. v. Smith*, 494 U.S. 872, 879 (1990). A law is not neutral, and strict scrutiny applies, 'if the object of a law is to infringe upon or restrict practices because of their religious motivation.' *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993).

In *Poling*, this Court explicitly recognizes and connects the *Hazelwood* "pedagogical interest" standard to the class assignment within which the student speech is presented. *Poling*, 872 F.2d at 762 ("Speech sponsored by the school is subject to 'greater control' by school authorities than speech not so sponsored, because educators have a legitimate interest in assuring that participants in the sponsored activity 'learn whatever lessons the activity is designed to teach….'").[3]

Since it is evident that Principal Hensinger's censorship was a viewpoint-based discriminatory imposition against religious speech as such (thereby violating First Amendment standards of "valid" speech regulation), and had nothing to do with "assuring that participants in the sponsored activity 'learn whatever lessons the activity is designed to teach'" (thus departing from *Hazelwood*'s justification for according broader speech regulating authority to school officials), the panel was obviously compelled to redesign the analysis if it were to be able to validate the Principal's censorship.

The effect of the panel's decision and example in this regard is to grant carte blanche to school officials to censor all student classroom speech without having to identify a purpose that complies with either constitutional prohibitions on

[3] Additionally, while this Court in *Poling* acknowledged that latitude is granted to school officials in their choice of pedagogical values, it likewise identified that these choices may not extend "beyond the constitutional pale," 872 F.2d at 762, thereby identifying that constitutional principles are indeed relevant in the evaluation of what constitutes a "legitimate" pedagogical interest.

viewpoint and religious hostility, or considerations pertaining to the class assignment then at issue. These restraints on censorship are removed. Moreover, beyond dramatically changing the *structure* of the analysis called for in student classroom speech cases, the panel has also given affirmative *substantive* approval to the censorship of all student speech that an official cares to categorize as generically "offensive" or (as also allowed by the panel) that communicates a viewpoint that might differ from what some other student may learn at home.

Turning to the specifics of the panel's analysis, the sum total of the discussion in which it evaluates and applies the "valid educational purpose" inquiry of *Hazelwood* is contained in *one* paragraph of its opinion: the second to last paragraph of section II. Slip Op., at 7. Being unmoored from the two objective standards by which to evaluate the "validity" of the pedagogical interest motivating the censorship, the panel instead engages simple volition. It announced that religious speech is offensive speech ("speech is religious, and therefore could offend,"); that the Principal desired that students and their parents not be offended, and that she did not want to "subject[] young children to an unsolicited religious promotional message that might conflict with what they are taught at home[.]";[4] and that this goal of the Principal "qualifies as a valid educational purpose." The

[4] The panel's characterization of Joel's candy cane product (which was available only to those who voluntarily sought it out in the market simulation) as "*subjecting* young children to an *unsolicited* religious promotional message," is baseless. Slip Op., at 7.

panel did not explain why Principal Hensinger's purpose was either "valid" or "educational." Accordingly, the panel's exposition was essentially nothing more than its *ipse dixit* that student religious speech, being both offensive and comprising a viewpoint potentially not shared by all families in the school district, is therefore subject to censorship.

Then-Judge Alito warned of the danger adhering to such a non-standard:

> If the panel's understanding of *Hazelwood* were correct, it would lead to disturbing results. Public school students—including high school students, since *Hazelwood* was a high school case—when called upon in class to express their views on important subjects, could be prevented from expressing any views that school officials could reasonably believe would cause "resentment" by other students or their parents. If this represented a correct interpretation of the First Amendment, the school officials in *Tinker* could have permitted students, as part of a class discussion, to express views in favor of, but not against, the war in Vietnam because some students plainly resented the expression of antiwar views. *See* 393 U.S. at 509 n.3. Today, school officials could permit students to express views on only one side of other currently controversial issues if the banned expression would cause resentment by some in the school, as it very likely would. Such a regime is antithetical to the First Amendment and the form of self-government that it was intended to foster.

C.H., 226 F.3d at 210–14 (Alito, J., dissenting from the en banc court's refusal to address the issue). How ironic, therefore, that this panel defends its approval of censorship on the claim that it is protecting students' and parents' rights. Slip Op., at 7. Comely written student speech about Jesus that is available to others only if they affirmatively act to view it is not a danger in our public schools. The danger lies in unlimited deference to school officials' arbitrary

definition of school-house orthodoxy, thereby oppressing parents and their children who are compelled to attend schools that have the power both to teach them values that may contradict views taught at home, and to simultaneously forbid these children from respectfully developing and expressing their own thoughts.[5]

Joel's speech did not merely meet academic guidelines, it triggered no other "pedagogical concern" to justify censorship.[6] Joel's note was not sexually explicit as in *Fraser*, nor did it promote illegality as in *Morse*. It did not reveal personal information about pregnancy, sex, or divorce as in *Hazelwood*, 484 U.S. at 263. It did not involve "rude remarks about his schoolmasters." *Poling v. Murphy*, 872 F.2d 757, 758 (6th Cir. 1989).[7] The panel alluded to *Poling*'s recognition that schools can teach civility and manners, and *Hazelwood*'s declaration that schools can refuse to "disseminate" speech that is "unsuitable for immature audiences." Slip Op., at 6 (citing *Poling*; referring to "young children"); *Hazelwood*, 484 U.S.

[5] It is an illuminating irony that the only authority the panel mustered to support its policy determination was dicta from an Establishment Clause case. Slip Op., at 7.

[6] Joel's speech indisputably met the assignment's guidelines, despite the panel's repeated *ad hominem* references to Joel's failure to seek prior approval for the candy cane note. He was not in any way censored for failing to obtain prior approval (indeed, his teacher found that he had technically complied), but only because the note was religious. Furthermore, on the panel's own take, "the constitutional analysis of the restriction would be the same whether a school proscribed religious products before or during the event." Slip Op. at 6.

[7] The panel incorrectly claims that Joel's religious expression "offended" his Classroom City business partner. Slip Op., at 7. Instead, the record reflects simply that his schoolmate said in response to Joel's product, "[n]obody wants to hear about Jesus." Facially, this is statement on marketability of the product; perhaps also personal disinterest. But his partner never communicated being "offended."

at 271–72. Plaintiff of course agrees that schools can teach civility, but this is beside the point. That his written speech was civil and polite is beyond question. Furthermore, Joel did not ask the school to "disseminate" any speech.

More fundamentally, it is repellent to the First Amendment (which protects speech and religion), and to Americans of various beliefs, to allow the government to categorize student written speech that attributes Christian significance to a common Christmas ornament as an off-limits topic alongside sex, drugs, and violence. "Our precedent establishes that private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression." *Pinette*, 515 U.S. at 760; *see also* n.2, *supra*. Even "poten[t] . . . religious speech is not a constitutional infirmity," *Pinette v. Capitol Square Review and Advisory Bd.*, 30 F.3d 675, 680 (6th Cir. 1994). Religious speech as a category may not be declared *ipso facto* infirm. Again, it would be anomalous for the first amendment speech clause (under which the *Hazelwood* standard operates) to vindicate as "legitimate" a state interest which targets religious speech simply because it is religious, when both the speech and free exercise clauses each identify such viewpoint-based attacks as invalid discrimination as a matter of constitutional principle.

II. The panel decision acknowledges absolutely no speech rights for students who express themselves in compliance with a school assignment.

The panel reaches its censorship-authorizing conclusion by interpreting *Hazelwood* to exclude any First Amendment protection for students speaking in response to classroom assignments. It is Plaintiff's position that student responses to class assignments which comply with assignment criteria are governed by the *Tinker* standard, rather than that of *Hazelwood*. *Tinker* explicitly encompassed student speech "in the classroom." 393 U.S. at 512. "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools. The classroom is peculiarly the 'marketplace of ideas.'" *Id.* *Tinker* assumes that classroom expression is protected, and merely extends that baseline understanding to other speech on campus. "Had the assignment been to write a paper of opinion, and had [the teacher] rejected the paper on the ground of its religious content alone, [the student's] freedom of speech truly would have been violated." *Settle v. Dickson County School Board*, 53 F.3d 152, 159 (6th Cir. 1995) (Batchelder, J. concurring in the result). "Individual student expression that articulates a particular view but that comes in response to a class assignment or

activity would appear to be protected [by the First Amendment]." *Walz*, 342 F.3 at 278–79.[8]

Hazelwood does not define student speech in an assignment as "school-sponsored" (nor does *Boroff v. Van Wert City Bd. of Educ.*, 220 F.3d 465, 468 (6th Cir. 2000)). *Hazelwood*, which dealt with a school newspaper, applies to student speech that occurs within "school-sponsored publications, [] productions, and other expressive activities that [] might reasonably [be] perceive[d] to bear the imprimatur of the school." *Id.* at 271, 273. "These activities," the Court noted, "may fairly be characterized as part of the school curriculum." *Id.* at 271. A hundred individual fifth-grade student responses to a "Classroom City" class assignment are not "school sponsored" in the way that a confederated single production like a school newspaper or school play is. No reasonable person or student would "erroneously attribute [Joel's views] to the school." 484 U.S. at 271–72. The Supreme Court has interpreted the *Hazelwood* distinction as being one between "the viewpoint of private persons whose speech [a school] facilitates"

[8] The panel ironically relies on the Third Circuit's *Walz* case to raise the specter of "proselytization" of young children, despite *Walz*'s explicit caution not to create a rule that lets government schools exclude categories of well-mannered student speech, such as in "'show and tell' to pass around a Christmas ornament or a dreidel, and describe what the item means to him." *Id.* at 278–79. The student's expression in *Walz* was not suppressible simply because it was religious, but because the student violated the requirements to give "generic gifts only" and to distribute gifts through the PTO and not directly to students; therefore he "contradict[ed]," "disrupt[ed]," "distract[ed] from," and "interfere[d] with" a curricular activity. *Id.* at 276–77, 279–80. None of these factors apply here.

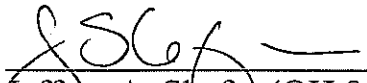
and "the University's own speech." *Rosenberger*, 515 U.S. at 834. Joel's speech is unmistakably his own.

The panel attempted to skirt this plain interpretation by parsing the dictionary meaning of "imprimatur" as including "approval." Slip Op., at 5, n.1. This simply begs the question, since "approve" can likewise mean either to endorse, or simply to allow. The former is what *Hazelwood* is concerned about. So also is the Establishment Clause case that the panel quotes as referencing an imprimatur, *Pinette*, 515 U.S. at 763, which holds that the First Amendment prevents endorsements but requires the government to allow religious speech. "The proposition that schools do not endorse everything that they fail to censor is not complicated." *Board of Educ. of Westside Community Schools v. Mergens*, 496 U.S. 226, 250 (1990). The protections for student speech should not be diminished through the improper application of regulating standards not tailored to the context in which they are applied.

CONCLUSION

For the reasons set forth above, Plaintiff-Appellant respectfully requests the Court to grant his petition, and undertake *en banc* review of this case.

Respectfully submitted,



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