

No. 11-804

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IN THE  
**Supreme Court of the United States**

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JONATHAN MORGAN, by and through his parents as legal guardians, DOUG MORGAN and ROBIN MORGAN, AND STEPHANIE VERSHER, by and through her parent and legal guardian, SHERRIE VERSHER,  
*Petitioners,*

*v.*

LYNN SWANSON, in her individual capacity and as Principal of Thomas Elementary School, AND JACKIE BOMCHILL, in her individual capacity and as Principal of Rasor Elementary School,  
*Respondents.*

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On Petition for Writ of Certiorari to the  
United States Court of Appeals for the Fifth Circuit

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**AMICUS CURIAE BRIEF OF THE AMERICAN  
CENTER FOR LAW AND JUSTICE IN SUPPORT  
OF PETITIONERS WRIT OF CERTIORARI**

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**INTEREST OF AMICUS\***

*Amicus*, American Center for Law and Justice (ACLJ), is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys have argued in numerous cases involving the First Amendment before the Supreme Court of the United States and other federal and state courts. *See, e.g., Pleasant Grove City v. Summum*, 555 U.S. 460 (2009); *McConnell v. FEC*, 540 U.S. 93 (2003); *Lamb's Chapel v. Center Moriches Sch. Dist.*, 508 U.S. 384 (1993); *Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990); *Bd. of Airport Comm'rs v. Jews for Jesus*, 482 U.S. 569 (1987). The ACLJ is concerned with the proper resolution of this case because it will likely have a significant impact on freedom of speech within the public school system.

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**SUMMARY OF THE ARGUMENT**

This Court should grant certiorari because the Fifth Circuit's decision on an important federal question conflicts with relevant decisions of this

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\* Petitioners and Respondents have filed with the Court their written consent to the filing of all briefs amicus curiae in this case. Attorneys for the Parties were notified ten days prior to the filing of this brief. No counsel for any party in this case authored this brief in whole or in part. No person or entity aside from the ACLJ, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Amicus has no parent corporation, and no publicly held company owns 10% or more of its stock.

Court, and the Fifth Circuit's decision may be used to immunize further violations of the First Amendment in other Circuits.

There are certain axioms that are beyond debate: that the First Amendment categorically prohibits government actors from engaging in viewpoint discrimination is one of these axioms.

This Court should grant certiorari because, first, discrimination against religious viewpoints in elementary schools sends a message of government hostility toward religion to students, teaching them that religious intolerance is acceptable. Second, the Fifth Circuit's decision creates ambiguity where this Court has established clarity, paving the way for unchecked viewpoint discrimination by school officials in other circuits.

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## ARGUMENT

### **I. RELIGIOUS VIEWPOINT DISCRIMINATION IN ELEMENTARY SCHOOLS SENDS A MESSAGE OF GOVERNMENT HOSTILITY TOWARD RELIGION TO YOUNG STUDENTS, TEACHING THEM THAT RELIGIOUS INTOLERANCE IS ACCEPTABLE.**

The discriminatory actions of Principals Swanson and Bomchill send a message of intolerance and government hostility towards a religious viewpoint—a message that is sure to communicate to elementary school students that intolerance of religion is acceptable, indeed that censorship of religious views is mandatory, and that any expression of a religious viewpoint is not appropriate in the public school.



Therefore, it is especially important that school officials be held to account for their behavior—behavior that clearly violated established law.

The most relevant incidents involved in this case may be summarized as follows. The Schools' practice was to allow children to distribute goodie bags to their classmates. Appendix to Petitioners' Brief 238 [hereinafter App.]. Only goodie bag items with such religious messages as "Jesus Loves Me," or the "Legend of the Candy Cane" were excluded, while pencils with secular symbols were allowed. App. 239. Specifically, Principal Bomchill not only prohibited Stephanie Versher from including her "Jesus Loves Me" pencil in the class goodie bag exchange, Bomchill actually told Stephanie that she could not give her friends the pencils on the school lawn or on school property at all and threatened Stephanie with expulsion. App. 317.

Principal Swanson's attempt to accommodate the Legend of the Candy Cane by relegating the message to a table in the library, when no other "Winter Break" gifts received such treatment, App. 280–81, while not as egregious as Principal Bomchill's expulsion of the "Jesus pencils" from school grounds, App. 317, also falls short of the viewpoint neutrality mandated by the First Amendment.

#### **A. Schools Instruct Children.**

It is axiomatic that elementary school students are there to learn. The question is what message school officials teach by their words and actions. In the present case, young children are likely to view

the school's discrimination against religious speech as teaching hostility toward religion.

When Congress passed the Equal Access Act, 20 U.S.C. §§ 4071-4074 (2006), to protect against school restrictions in limited, open forums on the basis of religious content, the Senate specifically reported on the perceptions of students below college level. In Senate Report 98-357, the Senate Judiciary Committee argued that

[D]enial of student-initiated, extracurricular, religious speech, in cases where other extracurricular student speech is permitted, rests on two false assumptions. The first false assumption is that students who are below the college level are not able to distinguish between state-initiated, school-sponsored, or teacher-led, religious speech, and student-initiated, student-led, religious speech allowed as one of a variety of extracurricular activities. The second false assumption is that students will not perceive a ban on all extracurricular religious speech as state hostility toward religion.

S. Rep. No. 98-357, at 8 (1984). The committee heard evidence from students below the college level who were "capable of distinguishing" between state-sponsored and student-led religious speech, and consequently were directly affected by restrictions that allowed non-religious, student-led speech, but prohibited religious, student-led speech. *Id.* at 8-10. The "student witnesses told the committee that they and their peers viewed the ban on religious speech as evidence of state hostility toward religion," *id.* at 10, prompting the committee to recommend passing the Equal Access Act. Fundamentally, children in school

“understand hostility towards religion as easily as they understand approval of religion.” David Woodcock, *Too Young to Understand? Extending Equal Access to All Children in Public Schools Regardless of Age*, 13 St. Thomas L. Rev. 491, 492 (2001).

**B. Government-condoned viewpoint  
discrimination instructs young students in the  
art of intolerance.**

Because students understand government hostility toward religion as easily as they understand approval of religion, and because of the inherent character-shaping nature of the school environment, it is essential that public schools send a message of neutrality, not hostility, toward religious views. As the Court observed in *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589 (1967), “[t]he classroom is peculiarly the ‘marketplace of ideas.’ The Nation’s future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth ‘out of a multitude of tongues, (rather) than through any kind of authoritative selection.’” *Id.* at 603 (quoting *United States v. Associated Press, D.C.*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943) *aff’d*, 326 U.S. 1 (1945)).

The kind of authoritarian viewpoint discrimination practiced by Principals Swanson and Bomchill is the very kind of discrimination that communicates a message of government-endorsed religious intolerance.

When government actors allow student speech, yet exclude student speech with religious viewpoints (as Principals Swanson and Bomchill did), it cements in the mind of the student the lesson that his or her religious expression is somehow wrong. This selective censorship, likewise, educates the student's classmates in the art of religious intolerance. Such blatant religious discrimination has never been tolerated in under the Constitution and never should be. As the Department of Education guidelines, published by the Secretary of Education to every public school just a few years before these incidents occurred, state,

Students have a right to distribute religious literature to their schoolmates on the same terms as they are permitted to distribute other literature that is unrelated to school curriculum or activities. Schools may impose the same reasonable time, place, and manner or other constitutional restrictions on distribution of religious literature as they do on nonschool literature generally, but they may not single out religious literature for special regulation.

Richard W. Riley, U.S. Sec'y of Educ., *Guidelines: Religious Expression in Public Schools*, available at <http://www2.ed.gov/Speeches/08-1995/religion.html> (last modified Jan. 26, 2000). The Secretary's introduction to the Guidelines admonishes principals to "neither foster religion nor preclude it. Our public schools must treat religion with fairness and respect and vigorously protect religious expression as well as the freedom of conscience of all other students. In so doing our public schools reaffirm the First

Amendment and enrich the lives of their students.”  
*Id.*

Instead of enriching students’ lives and affirming the First Amendment, as the Secretary encouraged, Principals Swanson and Bomchill chose to single out for discrimination students’ expression of a religious viewpoint.

The principals’ message to students was a message of intolerance. It was a message that violated clearly articulated constitutional principles, *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984) (holding that the Constitution “affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any”), a message that told these students their viewpoint was inferior, and a message that told their classmates it is more than okay, it is obligatory to forcefully suppress the expression of religious ideas in the school setting.<sup>1</sup>

**C. The nature of public school as an educational institution with coercive government authority and as a peer influenced atmosphere requires vigilant protection of constitutional freedoms.**

“The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.” *Shelton v. Tucker*, 364 U.S. 479, 487 (1960). This is so for two reasons: first, because “[t]he State exerts great authority and coercive

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<sup>1</sup> “Forcefully” is not used lightly. In this case it is alleged that Principal Bomchill used physical force to grab Stephanie Versher’s shoulder and confiscate her pencils while Stephanie was standing on the lawn after school. App. 317.

power through mandatory attendance requirements,” and second, “because . . . students’ emulat[e] teachers as role models and . . . children[] [are] susceptibil[e] to peer pressure.” *Edwards v. Aguillard*, 482 U.S. 578, 584 (1987).

In this case, Principals Swanson and Bomchill exercised coercive government authority to selectively suppress their students’ expression for no other reason than that the expression came from a religious viewpoint. Such authoritarian suppression of a religious viewpoint is incompatible with our Constitution and the public education system. The “scrupulous protection of Constitutional freedoms of the individual, [is necessary] if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.” *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943).

Not only were the principals’ actions an abuse of coercive government authority, their behavior sets an example that other students will emulate. In this case, the next generation learns that the expression of religious ideas is somehow rude or out of line. Such discrimination is not only unconscionable, it is, and has been, unconstitutional.

## **II. THE FIFTH CIRCUIT’S DECISION SETS A PRECEDENT FOR IMMUNIZING FURTHER VIEWPOINT DISCRIMINATION BECAUSE IT CREATES AMBIGUITY WHERE THIS COURT HAS ESTABLISHED CLARITY.**

The doctrine of qualified immunity requires a balancing of two important interests: “the need to

hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably.” *Pearson v. Callahan*, 129 S. Ct. 808, 815 (2009). The School Principals in this case did not perform their duties reasonably. By discriminating against the Petitioners’ speech solely on the basis of its viewpoint, the principals violated clearly established First Amendment norms. The Fifth Circuit’s holding that the principals’ actions were protected because the law was not “beyond debate” is in direct contradiction to this Court’s clear holdings, and the decision manufactures ambiguity where this Court has provided clarity.

**A. It was clearly established that viewpoint discrimination is not permissible, even in public elementary schools.**

“A Government official’s conduct violates clearly established law when, at the time of the challenged conduct, ‘[t]he contours of [a] right [are] sufficiently clear’ that every ‘reasonable official would have understood that what he is doing violates that right.’” *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2083 (2011) (citations omitted). This standard does “not require a case directly on point, but existing precedent must have placed the statutory or constitutional question beyond debate.” *Id.* This Court’s Free Speech and Establishment Clause jurisprudence place the actions of the Principals in the “beyond debate” category of prohibited government discrimination.

**i. The Free Speech Clause prohibits viewpoint discrimination.**

This Court's jurisprudence, while not addressing every nuance of every conceivable speech issue, has placed one rule of law beyond debate: "Discrimination against speech because of its message is presumed to be unconstitutional." *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 828 (1995); *see also Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 112 (2001) ("speech discussing otherwise permissible subjects cannot be excluded from a limited public forum on the ground that the subject is discussed from a religious viewpoint"); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993) (same); *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985) ("[T]he government violates the First Amendment when it denies access to a speaker solely to suppress the point of view he espouses on an otherwise includible subject.").

Elementary school students are not second class citizens, and, as the Fifth Circuit expressly recognized, *see Morgan v. Swanson*, 659 F.3d 359, 386 (5th Cir. 2011), App. 49, this Court has affirmed their right to protection under the First Amendment. *See Barnette*, 319 U.S. 624 (1943). In light of the clarity of this general rule, and in the absence of this Court's pronouncement of exceptions or limiting principles that would justify religious viewpoint discrimination against purely private non-curricular speech, the Fifth Circuit's conclusion that the law was open to debate must fail.



- ii. **The circuit courts' divisions do not permit the viewpoint discrimination at issue in this case.**

The Fifth Circuit's conclusion that the law was open to debate was based on an unfortunate misreading of other circuits' decisions. Specifically, the Fifth Circuit held that Bomchill's discriminatory actions, while unconstitutional, were protected by qualified immunity because the Fourth Circuit's decision in *Peck v. Upshur County Bd. of Educ.*, 155 F.3d 274 (4th Cir. 1998), "forbade the distribution of religious materials in elementary schools on Establishment Clause grounds." *Morgan* 659 F.3d at 384 (5th Cir. 2011), App. 44. *Peck* did not extend this far. The facts at issue in *Peck*, are markedly different from those presented in this case. *Peck* affirmed an Establishment Clause challenge in the elementary school context when the district allowed an outside group to set up a table in the school to distribute Bibles. *Peck*, 155 F.3d at 288. That case presented the potential that elementary school students would perceive a table with free Bibles on it as bearing the imprimatur of the school. A student giving her friend a pencil on the sidewalk after school does not raise the same concerns. *Peck* did not in any way suggest that a school administrator could prohibit an individual student from giving a pencil to a friend on the school lawn after school hours simply because the pencil had the words "Jesus Loves Me" on it. If such blatant discrimination is "open to debate," then the First Amendment is in poor condition indeed.

The principals' reliance on suggestions by other circuits that elementary students may receive less First Amendment protection than older students is also misplaced. Such cases do not cast doubt on the First Amendment's prohibition on viewpoint discrimination against private individual speech.

The Third Circuit decision in *Walker-Serrano ex rel. Walker v. Leonard*, 325 F.3d 412 (3d Cir. 2003), suggested that elementary school students' First Amendment rights are limited, *id.* at 417, but notes that just because "age is a crucial factor in this calculus does not necessary (sic) mean that third graders do not have First Amendment rights under *Tinker*." *Id.* In *Walker*, the student's speech did not receive disfavored treatment because of its viewpoint. The student was only asked to put away her petition when 1) she was gathering a crowd on an icy portion of the playground and a student fell and was bleeding, and 2) she was gathering a crowd of students during quiet reading time. *Id.* at 414. *Walker* does not stand for the proposition that religious viewpoint discrimination, constitutionally prohibited as to other private speech, is somehow permissible in the elementary school context.

Similarly, *Walz ex rel. Walz v. Egg Harbor Twp. Bd. of Educ.*, 342 F.3d 271 (3d Cir. 2003), does not suggest that viewpoint discrimination in the context of a non-curricular activity is constitutional. Rather, in that case the Third Circuit approved a discriminatory policy restricting speech "in the context of an organized curricular activity," "that had a clearly defined curricular purpose" which included "highly structured, supervised, and regulated . . . instructional activities." *Id.* at 278–79. *Walz* does not

justify religious viewpoint discrimination against private speech between students on the sidewalk or lawn after school hours.

None of these cases open to debate the well established principle that religious viewpoint discrimination is not permissible. Moreover, these cases should be read in light of this Court's categorical recognition of students' (including elementary school students') free speech rights. While limitations have been recognized for speech that is disruptive, lewd, etc., this Court has never articulated a free speech exception that would call into question the right of elementary school students to express their religious viewpoints on equal footing with non-religious viewpoints. The Court's holdings that treat elementary school students differently have all been in the Establishment Clause context.

**iii. The Establishment Clause prohibits hostility toward religion.**

Far from justifying hostility, the Establishment Clause "affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any." *Lynch*, 465 U.S. at 673. Principal Bomchill demonstrated religious hostility when she left her office to confront the student who was handing out pencils to a small group of friends on a sidewalk and lawn after school hours. Apparently, when viewpoint discrimination is "open to debate," children giving goodie bags with secular gifts are acceptable at school, but if a child's goodie bag has a "religious" message it is relegated to "outside of the

building and across the street.” App. 317. The Establishment Clause does not justify such hostility, it prohibits it.

**B. The Fifth Circuit’s decision opens the door to immunizing further viewpoint discrimination by school officials in other circuits by perpetuating ambiguity in an area of clearly established law.**

Despite the First Amendment’s clear prohibition against non-curricular viewpoint discrimination and hostile religious intolerance, the Fifth Circuit held that these principles were not clear. Such a holding, based on expansive interpretations of other circuit decisions, may reasonably be applied to allow continued First Amendment violations in those circuits. For example, school administrators in the Fourth Circuit may claim qualified immunity for viewpoint discrimination based on the Fifth Circuit’s expansion of *Peck* to read that the Establishment Clause “forb[ids] the distribution of religious materials in elementary schools.” *Morgan*, 659 F.3d at 384, App. 44. While it is clear that the Establishment Clause does not categorically forbid private distribution of religious materials that do not bear the imprimatur of the school, the Fifth Circuit’s decision, while contradicting *Peck*, also expands *Peck* beyond its original holding thus creating confusion, not clarity, among the circuits.

CONCLUSION

The Court should grant certiorari.

Respectfully submitted,

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