No. 09-40373

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

DOUG MORGAN; ROBIN MORGAN; JIM SHELL; SUNNY SHELL; SHERRIE VERSHER; CHRISTINE WADE,

Plaintiffs-Appellees,

v.

LYNN SWANSON, IN HER INDIVIDUAL CAPACITY AND AS PRINCIPAL OF THOMAS ELEMENTARY SCHOOL; JACKIE BOMCHILL, IN HER INDIVIDUAL CAPACITY AND AS PRINCIPAL OF RASOR ELEMENTARY SCHOOL,

Defendants-Appellants.

On Appeal from the United States District Court for the Eastern District of Texas – Sherman Division

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BRIEF *AMICI CURIAE* OF CHRISTIAN LEGAL SOCIETY, NATIONAL ASSOCIATION OF EVANGELICALS, AND THE BECKET FUND FOR RELIGIOUS LIBERTY IN SUPPORT OF APPELLEES-SCHOOLCHILDREN

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SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that, in addition to those persons listed in the briefs already filed in this matter, the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. Christian Legal Society, National Association of Evangelicals, and The Becket Fund for Religious Liberty – Amici Curiae.

2. Frederick W. Claybrook, Jr., and Bruce J. Zabarauskas, Crowell & Moring LLP, 1001 Pennsylvania Avenue, N.W., Washington, DC 20004-2595 – Attorneys for Amici Curiae.

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This case is unfortunate in that it pits schoolchildren against their principals. But it would be doubly unfortunate if this Court were to adopt as a principle that it is "unclear" whether public schools may exercise open viewpoint discrimination against the private religious speech of elementary students. The First Amendment fully protects them from religious viewpoint discrimination.[1]

INTERESTS OF *AMICI CURIAE*

Christian Legal Society ("CLS") is a nonprofit, interdenominational association of Christian attorneys, law students, judges, and law professors with chapters in nearly every state and at numerous law schools. For three decades, CLS's legal advocacy division, the Center for Law & Religious Freedom ("Center"), has worked to protect students' right to be free from discriminatory treatment of their religious expression. The Center's staff assisted in drafting the original version of the Equal Access Act, 20 U.S.C. §§ 4071 *et seq*. (2010), passed by Congress in 1984 to protect the right of students to meet for religious speech on public secondary school campuses. *See* 128 Cong. Rec. 11784-85 (1982). The Center has frequently represented students and community groups engaged in religious expression in public education settings. *See, e.g., Bender v. Williamsport*

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[1] This brief is submitted with consent of all parties. No party or its counsel authored or funded it in whole or in part. Funding assistance has been requested from the Alliance Defense Fund.

Area Sch. Dist., 475 U.S. 534 (1986); *Garnett v. Renton Sch. Dist.,* 987 F.2d 641 (9th Cir. 1993); *Child Evangelism Fellowship of N.J., Inc. v. Stafford Twp. Sch. Dist.,* 386 F.3d 514 (3d Cir. 2004); *Child Evangelism Fellowship of Md., Inc. v. Montgomery County Pub. Schs.,* 457 F.3d 376 (4th Cir. 2006), *and* 373 F.3d 589 (4th Cir. 2004). The Center was a primary drafter, along with American Jewish Congress, of *Religion in the Public Schools: A Joint Statement of Current Law*, which became the basis for the Clinton Administration Department of Education's guidance letters regarding *Religious Expression in Public Schools,* issued to school administrators in 1995, 1998, and 1999, and the corresponding Bush Administration DOE letter and guidelines, *Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools*, issued in 2003, discussed *infra*.

The National Association of Evangelicals ("NAE") is the largest network of evangelical churches, denominations, colleges, and independent ministries in the United States. It serves 41 member denominations, as well as numerous evangelical associations, missions, nonprofits, colleges, seminaries, and independent churches. NAE serves as the collective voice of evangelical churches and other religious ministries. It believes that religious freedom is God-given and that the government does not create such freedom but is charged to protect it. NAE is grateful for the American legal tradition safeguarding religious freedom

and free speech and believes that this jurisprudential heritage should be maintained in this case.

The Becket Fund for Religious Liberty is a non-profit, non-partisan law firm dedicated to protecting the free expression of all religious traditions. The Becket Fund has represented Buddhists, Christians, Hindus, Jains, Jews, Muslims, Santeros, Sikhs, and Zoroastrians, among others, in litigation in the United States and around the world. It has also represented many state and local governments defending lawsuits based on the Establishment Clause. *See, e.g.*, *American Atheists, Inc. v. Davenport*, 2010 WL 5151630 (10th Cir. 2010). In the public school context, it has represented both students facing restrictions on religious expression, *e.g.*, *C.H. ex rel. Z.H. v. Oliva*, 226 F.3d 198 (3d Cir. 2000) (en banc); *Bauchman for Bauchman v. W High Sch.*, 132 F.3d 542 (10th Cir. 1997), and governments facing Establishment Clause challenges to religious accommodations, *e.g.*, *Moss v. Spartanburg County Sch. Dist. No. 7*, 2011 WL 1296699 (D.S.C. 2011). It joins this brief to emphasize that the specter of meritless Establishment Clause challenges should not be used as an excuse to suppress private religious expression.

SUMMARY OF ARGUMENT

The panel correctly found, based on longstanding Supreme Court precedent, that elementary schoolchildren possess First Amendment free speech rights. It also

correctly found that the exercise of a student's free speech rights, in a non-school-sponsored context, may not be suppressed by the school administration in a viewpoint-discriminatory way.

While the Appellants ("Principals") in their briefing at the *en banc* stage have backpedaled from a bald assertion that elementary schoolchildren lack constitutional free speech rights, they attempt to take away with one hand what they give with the other by asserting that those rights may be subject to unfettered viewpoint-based regulation in an elementary school setting. But that is clearly not the law. Instead, the law clearly prohibits the Principals acting as a censor of private religious speech. Indeed, since 1995, the constitutional prohibition on viewpoint discrimination against private religious speech in schools has been well publicized by the United States Department of Education ("DOE"), which has issued substantively identical guidelines in this area during both Democratic and Republican administrations.

It is indeed ironic that, while part of the Principals' job is to inculcate values in our children, they believe that they serve that goal by shielding students from any reference to religion or religious holidays, no matter how tangential or objective the reference and even though expressed by and among the students themselves. In support of this backwards thinking, the Principals equate case law relating to speech advocating illegal drug use, speech which disrupts the

classroom, and school-sponsored speech with the non-disruptive, private, religious speech at issue here.

The panel did not run away from analyzing the specifics of the particular situations involved here, and *Amici* certainly do not do so. It is those particulars that set this case apart from the lower court cases on which the Principals rely. Each of the situations clearly crosses over the line prohibiting the State's suppression of the free speech rights of schoolchildren.

ARGUMENT

The analysis demanded by this case is straightforward: (1) Are schoolchildren "persons" under our Constitution who possess First Amendment rights protected against state action through the Fourteenth Amendment? They certainly are. (2) Does viewpoint discrimination against non-school-sponsored religious speech violate personal constitutional protections? It certainly does. (3) Is the conduct at issue even arguably justified under the cases allowing school officials to restrict the speech of schoolchildren? It is not even close. To rule against the children here would throw the law into confusion and damage the First Amendment rights of schoolchildren everywhere.

I. Schoolchildren of All Ages Possess First Amendment Rights

> "In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969).

In their latest brief, the Principals rightly acknowledge that elementary schoolchildren possess at least some First Amendment rights. But, contrary to what they suggest, there is no age or mental ability line to be drawn at which people mature into such rights.

A. Schoolchildren Are Persons, and All Persons Possess First Amendment Rights

The First Amendment provides, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech . . . ." U.S. Const. amend. I. The Fourteenth Amendment made explicit that these rights are possessed by all persons − black or white, young or old:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV § 1 (emphases added). Because the Fourteenth Amendment prohibits the States from depriving "any person" of the rights against the government contained in the First Amendment, and all schoolchildren are

persons, elementary schoolchildren possess First Amendment free speech rights. As the Supreme Court stated in *Gitlow v. New York*, 268 U.S. 652 (1925), "[f]or present purposes we may and do assume that freedom of speech and of the press – which are protected by the First Amendment from abridgment by Congress – are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States." *Id.* at 666 (emphasis added).

Numerous Supreme Court cases affirm that schoolchildren are persons with First Amendment free speech rights. For example, in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), the Court held that "little children"[2] of elementary school age possess First Amendment rights: "The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures – Boards of Education not excepted." *Id.* at 637. The Supreme Court in *Barnette* made no distinction of rights based on the students' ages, and neither did it do so in *Tinker*, in which the Court explained that students, just like their teachers, possess First Amendment rights: "Students in school . . . are 'persons' under our Constitution." 393 U.S. at 511. The Court reinforced this conclusion by reference to cases applying other fundamental rights to "young

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[2] 319 U.S. at 644 (Black, J., concurring).

students" under the Due Process Clause of the Fourteenth Amendment. *Id.* at 506-07 (citations omitted). In sum, "schoolchildren do not shed their constitutional rights when they enter the schoolhouse . . . ." *Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls*, 536 U.S. 822, 829-30 (2002).

B. State Actors Have the Burden to Justify Restrictions on Personal Rights

The Principals attempt to place the onus on the Schoolchildren to prove that they possess First Amendment free speech rights. However, the general rule is the opposite: "[T]he Government bears the burden of identifying a substantial interest and justifying the challenged restriction" on speech. *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 183 (1999). *See also Edenfield v. Fame*, 507 U.S. 761, 770-71 (1993); *Bd. of Trs. of State Univ. of N.Y. v. Fox,* 492 U.S. 469, 480 (1989). This rule was applied by the Supreme Court in the school context in *Tinker*: "In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." 393 U.S. 509.

Ours is a nation in which <u>all</u> persons, including students, have a constitutional right to exercise free speech. We do <u>not</u> start with the presumption

that school officials possess absolute authority over their students and may restrict student speech however and whenever they will, including disfavoring religious messages. When Justice Thomas recently advanced this absolutist proposition in *Morse v. Frederick*, 551 U.S. 393, 410-22 (2007) (concurring opinion), every other justice emphatically rejected it, as the Court has consistently done for almost 70 years. *See id.* at 403-04 (majority opinion), 422-25 (Alito, J., concurring), 429-30 (Breyer, J., concurring in part and dissenting in part), 433-48 (Stevens, J., dissenting). Of course, Justice Thomas himself was well aware that he was advocating a change in clearly established law. *See id.* at 410.

As the Court stated in *Tinker*, "[i]n our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students." 393 U.S. at 511. Similarly, in *Barnette*, the Court stated in 1943 that "[school b]oards are numerous and their territorial jurisdiction often small. . . . [B]ut none who acts under color of law is beyond reach of the Constitution." 319 U.S. at 637-38. In perhaps its most renowned exposition of the First Amendment, the Court concluded, "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion." *Id.* at 642.

II. Viewpoint Discrimination Against Private Religious Expression Is Unconstitutional

> "Speech discussing otherwise permissible subjects cannot be excluded . . . on the ground that the subject is discussed from a religious viewpoint." *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 112 (2001).

Just as the Supreme Court has long recognized that students enjoy free speech rights under the First Amendment, the Supreme Court also has a long, uniform tradition of prohibiting viewpoint discrimination against private religious speech in the educational environment. Moreover, this law has been repeatedly summarized, reinforced, and distributed to all school districts throughout the country by DOE. School administrators have had ample opportunities to know the law.

A. The Supreme Court Has Consistently Held That a Public School Cannot Engage in Viewpoint Discrimination Against Religious Speech

There is a steady, consistent line of cases prohibiting state actors from singling out for restriction private, non-disruptive, religious speech in schools. For example, in *Widmar v. Vincent*, 454 U.S. 263 (1981), the Supreme Court held that a public university could not "close its facilities to a registered student group desiring to use the facilities for religious worship and religious discussion." *Id*. at 265. The Court ruled that this viewpoint discrimination against private religious speech could not be justified as a possible Establishment Clause violation. *Id*. at 273-75.

In *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993), a church sought to use school facilities for the purpose of showing a "[f]amily-oriented movie – from a Christian perspective." *Id.* at 389. The school district prevented the church from doing so, relying upon its rule prohibiting the use of school property for religious purposes and arguing that, by barring all religious groups, all religious speech was treated in an identical manner. However, since the showing of a family film from a non-religious perspective would have been permissible under the rules, the Supreme Court held that the prohibition of such speech from a religious perspective constituted unconstitutional viewpoint discrimination. *Id.* at 394-95.

In *Good News Club*, the Supreme Court held that a school violated the First Amendment when it prohibited a private Christian organization for children aged six to twelve from holding meetings at the school for the purpose of singing Christian songs, hearing Bible lessons, and memorizing Scripture. The Court cautioned that, while the State may be justified in reserving its forum for certain groups or for the discussion of certain topics, the "State's power to restrict speech . . . is not without limits. The restriction must not discriminate against speech on the basis of [religious] viewpoint . . . ." 533 U.S. at 106.

Rosenberger v. Rector and Visitors of the University of Virginia, 515 U.S. 819 (1995), involved the university's refusal to pay the printing costs incurred by a

student organization that was established "to publish a magazine of philosophical and religious expression" and "to provide a unifying focus for Christians of multicultural backgrounds." *Id.* at 826. The Supreme Court explained that the school's refusal on the grounds that the magazine "primarily promotes or manifests a particular belief in or about a deity or an ultimate reality," *id.* at 836, constituted unconstitutional viewpoint discrimination:

> Discrimination against speech because of its message is presumed to be unconstitutional . . . . When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.

Id. at 828-29 (citations omitted). In reaching this result, the Court once again rejected the argument that there was no viewpoint discrimination because the school's guidelines prohibited all religious speech. *Id.* at 831.

At this stage of the proceedings, as a matter of law, the Principals are presumed to have engaged in viewpoint discrimination against religious speech. They permitted students to exchange gifts at the school party that contained nonreligious messages and symbols (*e.g.*, snowmen), but prohibited the exchange of gifts that contained religious messages and symbols. The express purpose of the challenged actions was to prohibit religious speech – and only religious speech.

By this discriminatory treatment, the Principals endorsed and gave preference to non-religious speech while censoring the rights of students to engage in similar religious speech with their peers. This viewpoint discrimination violated the First Amendment under an unwavering line of Supreme Court precedent.

B. DOE's Guidelines on Religious Expression in Public Schools Gave Clear Notice That Schoolchildren May Engage in Religious Speech Free from Viewpoint Discrimination

Since 1995, the constitutional prohibition on viewpoint discrimination against religious speech in schools has been well publicized by DOE, which has issued substantively identical guidelines in this area during both Democratic and Republican administrations. The Bush Administration in 2003 issued *Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools* , 68 Fed. Reg. 9645 (Feb. 28, 2003) ("Bush DOE Guidelines"). The Clinton Administration issued similar guidelines ("Clinton DOE Guidelines") in 1995, 1998, and 1999 and sent the guidelines to all school district superintendents.[3]

The Clinton DOE Guidelines relied largely on guidelines prepared by a wide cross-section of organizations representing all sides of the debate on religion in public schools. Their purpose for the document, entitled *Religion in the Public*

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[3] http://www2.ed.gov/inits/religionandschools/index-archive.html (last visited April 13, 2011).

Schools: A Joint Statement of Current Law[4] ("Joint Statement"), was to catalogue those issues involving religion in the public schools that had been authoritatively addressed by the courts. As the Joint Statement explained, "while there are some difficult issues, much has been settled . . . . [U]nfortunately . . ., public school officials, due to their busy schedules, may not be as fully aware of this body of law as they could be. As a result, in some school districts some of these rights are not being observed."[5] The Joint Statement made clear that, in 1995, the settled law protected students' "right to distribute religious literature to their schoolmates, subject to those reasonable time, place, and manner or other constitutionally-acceptable restrictions imposed on the distribution of all non-school literature." The Joint Statement warned that a school "may not single out religious literature for burdensome regulation."[6]

The Joint Statement was issued and endorsed both by religious organizations of diverse persuasions, including *Amici* CLS and NAE, and by secular civil liberties organizations, including groups that advocate a fierce "separationist" understanding of the Establishment Clause, such as the American Civil Liberties

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4 http://www2.ed.gov/Speeches/04-1995/prayer.html (last visited April 13, 2011).

5 *Id*.

6 *Id*. ¶ 9.

Union, Americans United for Separation of Church and State, and People for the American Way. The following parties signed the Joint Statement:

American Civil Liberties Union

American Ethical Union

Washington Ethical Action Office

American Humanist Association

American Jewish Committee

American Jewish Congress

American Muslim Council

Americans for Religious Liberty

Americans United for Separation of Church and State

Anti-Defamation League

Baptist Joint Committee

B'nai B'rith

Christian Legal Society

Church of the Brethren, Washington Office

Christian Science Church

Church of Scientology International

Evangelical Lutheran Church in America

Federation of Reconstructionist Congregations and Havurot

Friends Committee on National Legislation

General Conference of Seventh-day Adventists

Guru Gobind Singh Foundation

Interfaith Impact for Justice and Peace

National Association of Evangelicals

National Council of Churches

National Council of Jewish Women

National Jewish Community Relations Advisory Council (NJCRAC)

National Ministries, American Baptist Churches, USA

National Sikh Center

North American Council for Muslim Women

People for the American Way

Presbyterian Church (USA)

Reorganized Church of Jesus Christ of Latter Day Saints

Union of American Hebrew Congregations

Unitarian Universalist Association of Congregations

United Church of Christ, Office for Church in Society

The Bush and Clinton DOE Guidelines contain multiple explanations and admonitions that private student religious speech at school is protected and may not be singled out for discriminatory prohibition, in either curricular or non-curricular situations. For example, the Clinton DOE Guidelines stated,

> The Establishment Clause of the First Amendment does not prohibit purely private religious speech by students. Students, therefore, have the same right to engage in individual or group prayer and religious discussion during the school day as they do to engage in other comparable activity. . . . Local school authorities possess substantial discretion to impose rules of order and other pedagogical restrictions on student activities, <u>but they may not structure or administer such rules to discriminate against religious activity or speech.</u>
>
> . . . Students may also speak to, and attempt to persuade, their peers about religious topics just as they do with regard to political topics. . . .
>
> . . . .
>
> 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. <u>Schools . . . may not single out religious literature for special regulation</u>. . . .
>
> . . . .

> Students may display religious messages on items of clothing to the same extent that they are permitted to display other comparable messages. Religious messages may not be singled out for suppression . . . .[7]

Reinforcing these same points, the Bush DOE Guidelines instructed,

> While school authorities may impose rules of order and pedagogical restrictions on student activities, they may not discriminate against student prayer or religious speech in applying such rules and restrictions.
>
> . . . .
>
> Students may express their beliefs about religion in homework, artwork, and other written and oral assignments free from discrimination based on the religious content of their submissions.

68 Fed. Reg. at 9647 (citations omitted) (emphasis added).

The Bush and Clinton DOE Guidelines simply reflect what the Supreme Court has long declared: viewpoint discrimination against a student's private religious speech is unconstitutional and prohibited, regardless of whether it is "curricular" or "non-curricular" speech.

III. The Incidents Before This Court Involve Students' Own Religious Speech, Not the Government's Religious Speech

> "The proposition that schools do not endorse everything they fail to censor is not complicated."
> *Bd. of Educ. v. Mergens*, 496 U.S. 226, 250 (1990) (plurality opinion).

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[7] http://www2.ed.gov/Speeches/08-1995/religion.html (last visited April 13, 2011) (emphasis added).

Amici fully recognize that a schoolchild's exercise of speech in the school environment generally is subject to legitimate restriction in certain circumstances under certain principles. But that principle does not justify viewpoint discrimination against students' own religious speech. The Principals' arguments confuse the critical difference between governmental and private religious speech, which is clearly set out in Supreme Court precedent.

A. The Supreme Court Draws a Sharp Line Between Governmental and Student Religious Speech

In considering the regulation of student speech, the Supreme Court has carefully distinguished between speech that is school-sponsored from that which is not. But while freely and frequently admitting that the speech involved here is "non-curricular," beginning with their statement of the issue presented (Principals' En Banc Br. at 2), the Principals also attempt to rely on cases involving the principles set out in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), for curricular, school-sponsored speech.

The Court in *Kuhlmeier* went out of its way to clarify that it was dealing only with curricular, school-sponsored speech, stressing that the school newspaper in which the regulated speech appeared was "school-sponsored" and "disseminated under its auspices" (*id.* at 268-69, 271-72). The Court then punctuated the difference in the types of speech involved in school cases in these words:

> The question whether the First Amendment requires a school to tolerate particular student speech – the question that we addressed in *Tinker* – is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech. The former question addresses educators' ability to silence a student's personal expression that happens to occur on the school premises. The latter question concerns educators' authority over school-sponsored . . . expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school.

Id. at 270-71. Justice Alito described the *Kuhlmeier* test in his controlling, concurring opinion in *Morse* as whether the school is regulating "what is in essence the school's own speech." 551 U.S. at 423.

This distinction in *Kuhlmeier* is part of a uniform pattern of precedent that is most fully developed in cases of religious speech. For fifty years, litigants have brought to the Supreme Court a steady flow of cases concerning religious speech in the public schools. And, for fifty years, that Court has decided those cases with remarkable consistency. Without a single exception in all that time, the Supreme Court's school cases are explained by the "'crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.'" *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 324 (2000) (italics in original), quoting *Mergens*, 496 U.S. at 250 (plurality opinion). *Accord Rosenberger*, 515 U.S. at 833-34 (collecting cases).

This distinction between government speakers and private speakers is at the very core of the First Amendment. The difference between protected free speech and free exercise of religion, on the one hand, and forbidden establishment of religion, on the other, is the difference between private action and government action. In our system, religion is left wholly to private choice. Citizens may freely debate, practice, and implement their religious beliefs, but government may not participate in that debate. *Lee v. Weisman*, 505 U.S. 577, 589-92 (1992). Government's duty is to protect both religious and secular speech and to remain neutral between the two. In places where government permits expression of a diverse range of views, it has neither the duty nor the authority to exclude religious speakers.

To elaborate: Religious speech is attributable to the government if government employees select the religious message, *Engel v. Vitale*, 370 U.S. 421 (1962); deliver the religious message, *Sch. Dist. of Abington Twp. v. Schempp*, 374 U.S. 203 (1963); encourage or endorse the religious message, *Wallace v. Jaffree*, 472 U.S. 38 (1985); *Treen v. Karen B.*, 455 U.S. 913 (1982); arrange for the religious message, *Lee*; or give an otherwise private speaker preferential access to a school forum, program, audience, or facility, *Santa Fe*; *Stone v. Graham*, 449 U.S. 39 (1980).

If government has not endorsed religious speech by one of the means just discussed, that speech is private and constitutionally protected. To elaborate: If a private speaker selects and delivers his own message; if government employees express no opinion about that message; if government employees do not invite or arrange for the message; if government employees give the speaker no preferential access to government forums, programs, audiences, or facilities; and, in general, if government employees treat the religious speaker like secular speakers similarly situated, the religious speech is attributable to the private speaker. This is the rule in public schools. *Good News Club*, 533 U.S. 98; *Lamb's Chapel*, 508 U.S. 384; *Mergens*, 496 U.S. 226. It is the rule in higher education. *Rosenberger*, 515 U.S. at 833-34; *Widmar*, 454 U.S. at 276. It is the rule on other government property. *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753 (1995); *Bd. of Airport Comm'rs v. Jews for Jesus*, *Inc.*, 482 U.S. 569 (1987); *Poulos v. N.H.*, 345 U.S. 395 (1953); *Fowler v. R.I.*, 345 U.S. 67 (1953); *Kunz v. New York,* 340 U.S. 290 (1951); *Niemotko v. Md.*, 340 U.S. 268 (1951). The Supreme Court has never found an exception to this rule in <u>any</u> context.

The essence of the Principals' argument is that they still reasonably believe that the Establishment Clause somehow limits the right of free speech with respect to religious subject matters and viewpoints. The Supreme Court has uniformly rejected this argument in a great variety of factual contexts for sixty years now—

ever since *Kunz*, *Niemotko*, and the other Jehovah's Witness cases. Public officials have some obligation to apply such a clearly established principle to their own situations. The Supreme Court has affirmed even criminal convictions, "despite notable factual distinctions between the precedents relied on and the cases then before the Court, so long as the prior decisions gave reasonable warning that the conduct then at issue violated constitutional rights." *United States v. Lanier*, 520 U.S. 259, 269 (1997). The unbroken, exception-free line of cases just summarized gives ample warning that government employees cannot censor religious speech on the basis of its viewpoint.

B. The Prohibitions on Speech Were Clearly Impermissible in the Challenged Situations

At the outset, this Court must reject the suggestion of the Principals that, because elementary schoolchildren are involved, there are no clear guiding principles. There are speech activities that occur on elementary school grounds that cannot reasonably be perceived to be school-sponsored or issued with the school's "imprimatur." *See Kuhlmeier*, 484 U.S. at 271; *Tinker*, 393 U.S. at 510-13. The incidents here fall into that category. None of the lower-court cases on which the Principals rely undermines that ready conclusion.

1. "Jesus Is the Reason for the Season" Pencils

Facts: Principal confiscates pencils with "Jesus Is the Reason for the Season" from "goodie bags" voluntarily provided by student to fellow students during non-curricular, "winter break" party

> because of their "religious" message. *Morgan*, 627 F.3d at 172.

This situation involved a voluntary exchange. Students were informed that they could, if they wished, bring gift bags to exchange with other students. The teachers did not provide the goodie bags or prescribe their contents. In this circumstance, there could be no conceivable implication that the school was sponsoring a religious message.

Because the conduct here was private and voluntary, it matters not that it occurred in a school building. The student in *Morse* was on a school-sponsored field trip, but that does not mean that his speech ("Bong Hits 4 Jesus") could be considered that of the school. *See* 551 U.S. at 405. Whether the school sponsored the student's speech is a separate question from whether the student was at school, whether he was at a school-sponsored event, or even whether the event was curricular. The Supreme Court has also made this distinction between government and private speech clear in school prayer situations, in which a school may not affirmatively sponsor prayer but "nothing in the Constitution as interpreted by this Court prohibits any public school student from voluntarily praying at any time before, during, or after the schoolday." *Santa Fe*, 530 U.S. at 313. Here, the goodie bags were gifts that could be offered or not by a student, could be accepted or not by fellow students, and could be discarded or not in whole or in part by any recipient (or by any recipient's parents) without consequence. The speech

involved here is actually less obtrusive than would be the same "Jesus Is the Reason for the Season" slogan printed on a T-shirt or armband worn by the student. *See Tinker*, 393 U.S. at 514 (upholding student's political speech via armband).

Walker-Serrano v. Leonard, 325 F.3d 412 (3rd Cir. 2003), a case heavily relied upon by the Principals, actually undermines their case. While the Third Circuit upheld a school district's restrictions on a third grader's disruptive attempt to circulate a petition protesting a class trip to the circus, *id*. at 418-19, it pointed out that the school had permitted the student "to distribute other materials to her fellow classmates − coloring books and stickers − expressing her views about the circus's alleged ill-treatment of animals." *Id.* at 419. Religious speech deserves no less protection than political speech.

2. Goodie Bags with "Legend of the Candy Cane" Cards

Facts: Third-grader was prohibited from passing out "goodie bags" to his fellow students because they contained, *inter alia*, a "religious" message about the legend of the candy cane. Each bag was individually addressed to a fellow student and labeled as being from their classmate. *Morgan*, 627 F.3d at 172-73.

This situation obviously does not involve school-sponsored speech, for the same reasons as the first. In addition, in this instance, Jonathan Morgan specified on each bag that it was a gift from him. Just as with the pencils, there could be no conceivable impression given to students that, instead of being from their

classmate, the "religious" message was advocated by the school and, thus, had the school's imprimatur.

Other students could voluntarily distribute goodie bags to willing fellow students. It was only the religious speech that was prohibited. This, then, is directly analogous to *Children Evangelism Fellowship of New Jersey, Inc. v. Stafford Township School District*, 386 F.3d 514 (3d Cir. 2004) (Alito, J.), in which the Third Circuit held that religious organizations have the same rights as non-religious organizations to have materials displayed on school bulletin boards and distributed to students. *Id.* at 535. *See also Child Evangelism Fellowship of Md., Inc. v. Montgomery County Pub. Schs.*, 457 F.3d 376 (4th Cir. 2006); *Rusk v. Crestview Local Sch. Dist.*, 379 F.3d 418 (6th Cir. 2004) (in case on which Principals rely, ruling that evenhanded placement of fliers from community organizations in mail boxes of elementary schoolchildren did not violate the Establishment Clause even though some fliers were religious). Indeed, under the Principals' reasoning, distribution of informational fliers to elementary students about Boy Scouts, a group that requires belief in God, would violate the Establishment Clause, a view sensibly rejected by the Seventh Circuit in *Sherman v. Community Consolidated School District,* 8 F.3d 1160 (7th Cir. 1993).

3. Tickets to Christian Play

Facts: Schoolchild during non-curricular times spoke to classmates about coming to a Christian play and gave free tickets to those

> interested in attending. Principal had the distributed tickets confiscated and discarded because they were religious. *Morgan*, 627 F.3d at 173-74.

The only time the school became involved in this incident was when the Principal had the teacher inject herself into the situation and confiscate the tickets solely because they were religious in nature. Obviously, there was no risk that the schoolchild's speech would be considered school-sponsored. The school freely allowed the schoolchild to invite classmates to the play orally. (Principals' En Banc Br. at 16.) There could be no rational distinction in allowing the same speech in written form. Nor was there any possible risk of untoward pressure in this situation. The invitation was given by a schoolchild, not a teacher or parent, and the tickets would be taken home by the recipient and shown to her parents or guardians, who would make the final decision about whether the child would attend the play.

Muller v. Jefferson Lighthouse School, 98 F.3d 1530 (7th Cir. 1996), one of the cases upon which the Principals rely, illustrates the bankruptcy of the defense of their conduct in this situation. In *Muller*, while the Seventh Circuit did not find the school district's regulations facially invalid under the First Amendment, the court did vindicate a fourth grader's constitutional right to hand out to classmates invitations to a religious meeting to be held at the church where his family attended. In reaching this result, the Seventh Circuit held,

> [W]e express our sympathy with the Mullers' frustration at the way school officials handled this whole affair. Andrew wanted to distribute a simple flier inviting friends to a church-sponsored activity. Regrettably, the principal's evasive reaction got in the way of an accommodating resolution. Nothing in the Supreme Court's Establishment Clause jurisprudence requires such a response, and indeed the Free Exercise and Free Speech Clauses forbid it.

Id. at 1545.

The Principals' argument that a child might assume school sponsorship of the tickets unless they were prohibited and confiscated – as ridiculous as that is on its face – also turns on itself. Even if, for the sake of argument, one entertained the notion that students might mistakenly perceive endorsement of religion when the school permits a student to distribute tickets to a church play, students would more certainly – and accurately – perceive hostility to religion if the school confiscates all religious items because they are religious. *See Good News Club,* 533 U.S. at 118. What the students were told loud and clear was that tickets to a religious play are something forbidden. This actual viewpoint discrimination by the state actors conveys a message of hostility that is far more real than any mistaken implication of endorsement that some student might draw from mere equal treatment. Any attempt to explain away that apparent hostility would depend on a First Amendment argument considerably more complicated than the simple proposition that the school does not endorse everything it fails to censor. *See Mergens*, 496

U.S. at 250 (plurality opinion). As the Supreme Court explained in response to a similar argument in *Good News Club*,

> [W]e cannot say the danger that children would misperceive the endorsement of religion [if religious speech were permitted] is any greater than the danger that they would perceive a hostility towards the religious viewpoint [if religious speech were excluded].

533 U.S. at 118. *See generally* Douglas Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 Nw. U.L. Rev. 1, 14-20, 48-52 (1987).

4. "Jesus Loves Me This I Know for for the Bible Tells Me So" Pencils

Facts: Schoolchild denied permission by Principal to distribute small gifts to classmates during her "half-birthday" party because they included pencils with "Jesus Loves Me This I Know for the Bible Tells Me So" imprinted on them. Later, Principal forbade distribution after school hours outside the school building. *Morgan*, 627 F.3d at 174.

Again, the speech on the birthday party pencils was unambiguously non-curricular and non-school-sponsored, with the decision of what gift to distribute, if any, being purely private and voluntary and its voluntary nature known to all, both students and their parents alike. This was even more obviously the case when the pencils were distributed by a schoolchild after school hours and outside the school building. And, again, the message given to the schoolchildren who viewed the Principal forbidding distribution of the pencils was not one of neutrality, but of

hostility to religion by a school official – a result antithetical to good educational values and our Constitution.

The Supreme Court in *Morse* recently reiterated that its free speech jurisprudence, including in a school setting, "should not be read to encompass [allowance of restriction of] any speech that could fit under some definition of 'offensive.' After all, much political and religious speech might be perceived as offensive to some." 551 U.S. at 409. *See also id.* at 422-25 (Alito, J., concurring); *Tinker*, 393 U.S. at 509. Ironically, the Principals attempt to justify their conduct on exactly these grounds, the last bastion of hope for a censor. (Principals' En Banc Br. at 41-42.) But this has never been permitted: "In our system students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate . . . . [S]chool officials cannot suppress 'expressions of feelings with which they do not wish to contend.'" *Tinker,* 393 U.S. at 511, quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966).

Private religious speech is constitutionally protected. State actors may not restrict it in a school setting as if it were of the same ilk as disruptive speech, lewd talk, or advocacy of illegal drug use. To do so is contrary to a long and proud history of religious freedom and tolerance enshrined both in our society's ethos and in our Constitution.

The Supreme Court has repeatedly cautioned that there is "no constitutional requirement which makes it necessary for government to be hostile to religion . . . ." *Zorach v. Clauson*, 343 U.S. 306, 314 (1952). Excluding private religious speech from public schools "would demonstrate not neutrality but hostility toward religion." *Mergens*, 496 U.S. at 248 (plurality opinion). The Establishment Clause does not create "a modified heckler's veto, in which a group's religious activity can be proscribed on the basis of what the youngest members of the audience might misperceive." *Good News Club*, 533 U.S. at 119. Religious speech without government sponsorship is constitutionally protected, and the Court has never held otherwise in any context.

School administrators have a vital duty to treat students' religious expression in a neutral manner. In doing so, they teach students an invaluable lesson about the First Amendment. As a sister circuit reasoned,

> Public belief that the government *is* partial does not permit the government to *become* partial . . . . The school's proper response is to educate the audience rather than squelch the speaker . . . . Schools may explain that they do not endorse speech by permitting it. If pupils do not comprehend so simple a lesson, then one wonders whether the . . . schools can teach anything at all.

Hedges v. Wauconda Cmty. Unit Sch. Dist., 9 F.3d 1295, 1299-300 (7th Cir. 1993) (italics in original).

CONCLUSION

> "Boards of Education . . . have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, 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." *Barnette*, 319 U.S. at 637.

To rule that the incidents of hostility to religious speech involved here were arguably licit would open the floodgates to the violation of the First Amendment freedoms of schoolchildren across the country. The Court should affirm.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to Rule 25 of the Federal Rules of Appellate Procedure, I certify that I have this 15th day of April 2011 electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/EDCF system. I certify that all participants in the case are registered CM/EDCF users and that service will be accomplished by the CM/EDCF system.

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Certificate of Compliance

I, Frederick W. Claybrook, certify that the foregoing Brief for Christian Legal Society, National Association of Evangelicals, and The Becket Fund for Religious Liberty – Amici Curiae complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) and contains 6,890 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

I further certify that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). The brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman, 14 point.

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