No. 24-1608

**UNITED STATES COURT OF APPEALS**
**FOR THE SEVENTH CIRCUIT**

E.D., a minor by and through her parents and next friends MICHAEL DUELL and LISA DUELL; NOBLESVILLE STUDENTS FOR LIFE,

*Plaintiffs-Appellants,*

v.

NOBLESVILLE SCHOOL DISTRICT, et al.,

*Defendants-Appellees.*

On Appeal from the United States District Court
for the Southern District of Indiana
Case No. 1:21-cv-03075-SEB-TAB

# Brief of Amici Curiae States of Kansas, Georgia, Idaho, Indiana, Iowa, Louisiana, Mississippi, Missouri, Montana, Nebraska, Oklahoma, South Carolina, and South Dakota in support of Plaintiffs-Appellants and reversal.

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## Interests of Amici Curiae

Amici are the States of Kansas, Georgia, Idaho, Indiana, Iowa, Louisiana, Mississippi, Missouri, Montana, Nebraska, Oklahoma, South Carolina, and South Dakota who operate or oversee elementary, middle, and high schools and universities with thousands of students with different viewpoints. The States have an interest in ensuring that their students' speech—particularly political or religious speech in student-led organizations—is not silenced simply because a teacher or administrator disagrees with the speech. The States have an interest in ensuring that *Hazelwood* does not become a license to censor political or religious speech because of their students' point of view.

Accordingly, Amici States file this brief under Federal Rule of Appellate Procedure 29(a)(2).

## Introduction

The First Amendment has been a bedrock principle of our nation since its founding. Courts have held that these rights do apply in a school environment. The contours of that right have been debated within the legal system for decades. In particular, courts have wrestled with what type of discretion a school has to regulate speech that is

considered school sponsored. These issues are present in this case and the Amici States encourage this court to rule in favor of E.D. In doing so, the Amici States encourage the Court to adopt a position that any restriction on student speech should be viewpoint-neutral especially in the political arena. This approach strikes an appropriate balance between ensuring a school can achieve its pedagogical mission while preventing inappropriate censorship of political speech that may be unpopular.

## Background

"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). "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." *Keyishian v. Bd. of Regents of Univ. of State of N. Y.*, 385 U.S. 589, 6039 (1967) (internal quotation marks omitted). A "robust exchange" requires different viewpoints. Students cannot be exposed to a multitude of ideas if schools are given license to arbitrarily shut down unpopular viewpoints.

Doing so violates both the speakers' First Amendment rights and the rights of their listening classmates.

## I. Free Speech in Schools – Tinker through Hazelwood

Free speech in schools begins with the premise that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969). While the Supreme Court has found over the years that schools may restrict student speech for various reason, *see Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986), any analysis of such a restriction must begin with acknowledgement that students have First Amendment rights.

Thus, public schools may not restrict or censor student speech absent an appropriate justification. *See Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015). When the speech restriction is content-based on "the idea or message expressed" the justification must be "compelling" and the restriction must be narrowly tailored. *Id.* The Supreme Court has applied this standard to schools in three key cases.

First, in *Tinker*, the Supreme Court upheld students' rights to protest the Vietnam War by wearing black armbands. 393 U.S. at 514.

The Court held the "pure speech" was the protected because the school did not justify the restriction. A school may clamp down on speech that will "materially and substantially disrupt the work and discipline of the school." *Id.* at 513; *see also Morse v. Frederick*, 551 U.S. 393, 408 (2007) (school may also stop students from advocating drug use or other illegal activity). This is a high bar requiring specific facts, and the school had not met it. *Tinker*, 393 at 508 ("[U]ndifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression."). In addition to requiring schools to show the would-be speech will "materially and substantially" interrupt school discipline, the Supreme Court made two other relevant pronouncements. First, students' free-speech rights are not limited to the classroom. *Id.* at 512–13. Second, schools may not prevent a student from speaking his or her opinion because the opinion is "unpopular" or to "avoid [] discomfort and unpleasantness." *Id.* at 510. In addition to reasonable time, place, and manner restrictions, *Tinker* authorizes content-based restrictions student speech only if the facts support anticipation of material disruption.

The Court next addressed school speech in *Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n*, 460 U.S. 37 (1983). There, the Court addressed a school's restriction on use of its mail system, which the Court found was not a traditional public forum. *Id.* at 46–47; *id.* at 45 (identifying three types of public fora: the traditional public forum, the public forum created by government designation, and the nonpublic forum). In a limited public forum, the school could prevent a group from using the mail system to deliver their message because of the group's status. Id. at 50–52, 55. It could not have imposed restrictions based on the group's message. "When speakers and subjects are similarly situated, the state may not pick and choose." *Id.* at 55. So, even when the school can impose criteria before allowing a student or student group to speak in a forum, it cannot restrict speech because of the viewpoint of the speaker.

Finally, the Court distinguished between student speech and school speech in *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 270 (1988). In *Hazelwood*, the school published a newspaper with student-written articles. The paper had the school's name, was distributed by the school, and students were given school credit for their work. Before

publication, the teacher-editor cut several articles addressing divorce and teen pregnancy. The students sued over the omission, claiming the school violated their free-speech rights by declining to run their articles. The Supreme Court disagreed. It held the school did not violate the First Amendment because the newspaper was a school-sponsored speech. As such, the school had a prerogative to ensure the articles met academic standards (they arguably did not) and were appropriate for younger students to read.

These cases raise four instances where schools may limit student speech. First, as discussed in *Tinker*, the school may limit speech if it has a factual basis to believe the speech will cause a material and substantial disruption to the school day. 393 at 513. Second, the school may limit speech that materially and substantially undermines school discipline. *Id.*; *see also Morse*, 551 U.S. at 403. Third, the school may create a limited public forum (a hallway, for example), and set criteria—independent of the intended message—for who may speak there. *See Perry*, 460 U.S at 55. Finally, if the speech is truly school-sponsored, the school may impose content restrictions to avoid exposing students to material inappropriate for their level of maturity or to avoid

the appearance of taking a position on a divisive issue. *See Hazelwood*, 484 U.S. at 272. Nowhere did the Supreme Court bless viewpoint discrimination in schools.

E.D. has aptly argued that the district court applied the incorrect standard to determine whether Defendants violated her First Amendment rights under these set of facts. Aplt. Br. at 23 (arguing *Tinker*, not *Hazelwood*, applies). The Amici States agree. But regardless of which standard applies, the Court should reaffirm students' First Amendment rights by holding schools do not have a license to discriminate against particular viewpoints.

## II. The Circuit-split on "Viewpoint Neutrality"

The Supreme Court has not yet explicitly stated whether schools are required to have viewpoint neutrality when censoring student speech that is considered "school sponsored." Because of that, the Circuits who have decided the question have diverged. At least three, the Second, Ninth, and Eleventh, have held that the usual principles of First Amendment law apply just as much in this area as anywhere else and that school restrictions on speech must be viewpoint neutral. *See Peck ex rel. Peck v. Baldwinsville Cent. Sch. Dist.*, 426 F.3d 617, 633

(2d Cir. 2005); *Planned Parenthood of S. Nevada, Inc. v. Clark County Sch. Dist.*, 941 F.2d 817, 829 (9th Cir. 1991) (*en banc*); *Searcey v. Harris*, 888 F.2d 1314, 1319 n. 7 (11th Cir. 1989). All three are helpful here.

In *Peck*, a kindergarten class was tasked with creating posters about saving the environment. 426 F.3d at 621–22. The posters would be hung on the wall during a school assembly. *Id.* at 629. One student, with the help of his mother, included religious messages and symbols on his poster. *Id.* at 621–22 The school displayed the poster in a way that hid the religious symbols, and the student sued. *Id.*

The Second Circuit held the poster display was a non-public forum where the school could regulate speech "in a reasonable manner," and the "undisputed facts demonstrate that the poster assignment and the environmental assembly at which the posters were hung . . were indisputably part of the school curriculum . . . supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences." *Id.* at 629 (internal quotation marks omitted, second ellipsis in original). Thus, *Hazelwood* applied

and the school could restrict the religious message if it had a legitimate pedagogical concern. *Id.*

However, the Second Circuit held that even if the school could regulate the content of school-sponsored speech in a non-public forum, it could not discriminate based on viewpoint. *Id.* at 631–32. The court reasoned that "*Hazelwood* never distinguished the powerful holdings of [*Cornelius* and *Perry*] with respect to viewpoint neutrality, or, for that matter, even mentioned, explicitly, the question of viewpoint neutrality." *Id.* at 633. So, the court concluded, *Hazelwood* does not permit a school to restrict what may be an unpopular opinion. "[M]anifestly viewpoint discriminatory restriction on school-sponsored speech is, *prima facie*, unconstitutional, *even if* reasonably related to legitimate pedagogical interests." *Id.* (emphasis in original).

The Second Circuit cited approvingly the Eleventh Circuit case of *Searcey v. Harris*, 888 F.2d 1314 (11th Cir. 1989). There, a school board stopped an organization from discussing its views of a military program during career day. *Id.* at 1316–17. Like the Second Circuit, the Eleventh Circuit considered that, "[a]lthough *Hazelwood* provides reasons for allowing a school official to discriminate based on *content*,

we do not believe it offers any justification for allowing educators to discriminate based on viewpoint. The prohibition against viewpoint discrimination is firmly embedded in first amendment analysis." *Id.* at 1325 (emphasis in original); *see also Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829–30 (1995) (observing a distinction between content-based discrimination, "which may be permissible if it preserves the purposes of that limited forum," and viewpoint-based discrimination, "which is presumed impermissible when directed against speech otherwise within the forum's limitations."). The board was thus prohibited from excluding the group from career day simply "because it disagreed with its views about the military." *Id.*

Finally, the Ninth Circuit held the school could prohibit Planned Parenthood from placing ads in a student newspaper because, as in *Hazelwood*, the school "retain[ed] control over advertising in school-sponsored publications." *Planned Parenthood of S. Nevada, Inc.*, 941 F.2d at 824. While the school could discriminate based on the content of the advertisements, two things were clear. First, the school had established clear standards and a clear approval process for advertisements. *Id.* at 824. It was not left to one teacher's discretion

whether to allow the ads or not. Second, the school's regulations were viewpoint neutral. The school specifically decided not to take a side (or give the appearance of taking a side) specifically on the abortion debate. *Id.* at 829. The school did not look into the viewpoint of the speaker or try and enact a general ban on speech. *Id.* at 830.

On the other hand, the Tenth Circuit passively blessed viewpoint discrimination in *Fleming v. Jefferson Cnty. Sch. Dist. R-1*, 298 F.3d 918, 928–29 (10th Cir. 2002), *as amended on denial of reh'g and reh'g en banc* (Aug. 16, 2002). When a student sued because a teacher had rejected her paper—either because of the views expressed or the academic rigor of the paper depending who you ask—the Tenth Circuit concluded, "Given the types of decisions that the *Hazelwood* Court recognized face educators in awakening the child to cultural values and promoting conduct consistent with the shared values of a civilized social order, . . . *Hazelwood* does not require viewpoint neutrality. *Id.* at 928–29. The court reasoned that in the context of school-sponsored speech (such as speech in the classroom), a school's choice concerning which messages with which to associate itself, will "often will turn on viewpoint-based judgments." *Id.* at 928. *See also Ward v. Hickey*, 996

F.2d 448, 453–54 (1st Cir. 1993) (suggesting viewpoint discrimination is permissible if a decision to suppress speech was "based on existing regulations, policies, discussions, and other forms of communication between school administration and teachers").

All of these cases suggest that schools may place content-based restrictions on speech over which the school maintains editorial or academic control, such as a school newspaper or in the classroom. These decisions, however, must be based on clear standards published ahead of time. Teachers should not be permitted to exercise content-based control over student speech on the fly. The cases also suggest that if the school opens a forum up to student-led speech (even in a very limited way), the school cannot prohibit a student from speaking because of the student's viewpoint.

## ARGUMENT

This Court has not directly addressed the issue of viewpoint neutrality in school sponsored speech. This Court has, however, held that viewpoint discrimination is a form of content-based discrimination. *Brown v. Kemp*, 86 F.4th 745, 780 (7th Cir. 2023). In this Circuit, "[a] speech regulation is viewpoint-based when it goes beyond general

discrimination against speech about a specific topic and instead regulates one perspective within a debate about a broader topic." *Id.* A restriction is viewpoint-based if "it allow[s] people on one side of debates about religion and other topics to display their views freely while restricting the expression of those who disagreed." *Id.* Strict scrutiny applies to these restrictions. *Id.* at 783.

This court should apply viewpoint neutrality in the school context for the following reasons: (1) there is no legitimate pedagogical interest served by viewpoint discrimination, (2) viewpoint discrimination is unconstitutional, (3) viewpoint discrimination leads to arbitrary enforcement, and (4) schools can still have reasonable time, place, and manner restrictions while maintaining viewpoint neutrality.

## I. Legitimate Pedagogical Interests

To begin, schools may suppress their students' speech only when such suppression is "reasonably related to legitimate pedagogical concerns." *Hazelwood*, 484 U.S. at 273. Courts can—and should—give schools and school districts some deference when scrutinizing their pedagogical interests. *Id.* ("[T]he education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local

school officials, and not of federal judges."). But the Court should not allow "deference" to become a facade for school administrators to pick and choose which messages students should be allowed to deliver because of how that school official feels about the message. *Pinard v. Clatskanie Sch. Dist. 6J*, 467 F.3d 755, 767 (9th Cir. 2006).

As discussed, schools may limit speech over which they exercise editorial control, speech that is actually sponsored by the school, speech that school has reason to believe will lead to a material, substantial disruption. Each is a fact-specific inquiry, not a blanket get-out-of-jail-free card for the school to play any time is wishes to limit student speech. On the other hand, there is no legitimate pedagogical interest in the "mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint," or "an urgent wish to avoid the controversy which might result from the expression" a legitimate concern. *Tinker*, 393 U.S. at 509, 510; *see also M.C. Through Chudley v. Shawnee Mission Unified Sch. Dist. No. 512*, 363 F. Supp. 3d 1182, 1202 (D. Kan. 2019) (restriction not justified solely by the school's "the need to avoid association with a controversial topic"). Finally, there is a legitimate pedagogical interest in exposing students to a vide variety of

ideas. *Shelton*, 364 U.S. at 487 (1960); *Keyishian*, 385 U.S. at 6039 (1967).

Considering these, it is unlikely there will be a legitimate pedagogical interest in instituting a blanket ban on political speech (as was the case here). In fact, such a ban would likely have the opposite effect: restricting the marketplace of ideas to which children are exposed. While a school may have an interest in limiting some young children's exposure to certain topics, it does not have an interest in suppressing political ideas altogether. There is certainly no legitimate pedagogical interest in allowing one set of political viewpoints while not allowing others.

## II. Constitutional Concerns

Even if a desire to avoid disruption or to avoid being connected to a political message are legitimate pedagogical interests, viewpoint discrimination based on those interests still raises serious constitutional concerns. *Peck*, 426 F.3d at 633. "Viewpoint discrimination is [] 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." *Rosenberger*, 515 U.S. at 829. Indeed, "[t]he prohibition against viewpoint discrimination is firmly embedded in first amendment analysis." *Searcey*, 888 F.2d at 1325. "The First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others." *Matal v. Tam*, 582 U.S. 218, 234 (2017) (brackets omitted) (quoting *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384, 394 (1993)).

This protection extends to students. *Peck*, 426 F.3d at 627 ("[T]he First Amendment d[oes] not permit such silencing of student opinion."). Given the firm protection our Constitution gives to differing opinions, is will be difficult—if not impossible—for a school to show an interest strong enough to justify silencing one student from speaking on a topic if it allows others to speak on the same topic.

Allowing one student to share a popular political message—or a message with which school officials agree—while prohibiting another student from sharing an unpopular message does not further the academic mission of the school. Once a school "determines that certain speech is appropriate for its students, it may not discriminate between speakers who will speak on the topic merely because it disagrees with

their views." *Searcey*, 888 F.2d at 1324. This is especially a concern where the viewpoints being discriminated against involve someone's sincerely held religious beliefs. *See generally Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507 (2022).

### III. Arbitrary Enforcement

Third, a policy permitting viewpoint discrimination is susceptible to abuse and uneven application. As this case demonstrates, it is difficult for school administrators to determine what is and is not political speech in the first place. Many may confuse "popular" with "apolitical" and "unpopular" with "political." For example, one teacher may view a poster with raised fists as an expression of human rights and not a political idea. Another might find it political. Absent clear guidelines, students' First Amendment rights are at the mercy of individual administrators.

We also live in an era where politics is front and center of many aspects of life. No longer is politics merely a matter of what the tax rate should be. Modern political debates go toward what society should fundamentally look like. For example, there was recently earnest debate over the Supreme Court's decision in *Kennedy* that determined

whether a school can take adverse action against a coach who prayed in the middle of a football field after each game. Would discussion of that case be considered "political speech" that a school could prohibit? At a time when politics impacts every aspect of people's lives, it is almost impossible to determine when precisely speech becomes political.

Even if a policy banning all political speech could be created and narrowly tailored to serve a compelling justification, it is unlikely a viewpoint-based policy could be. Here, the school must determine ahead of time which side of any given debate it wishes to take inform all other students that their views are not welcome. It must have a legitimate, fact-based reason for the policy. And the policy must not unnecessarily trample on other protected rights, such as religious liberty rights. If such a policy can be written and found constitutional, the administrator who wrote it deserves a promotion. Otherwise, it is best for schools to remain viewpoint neutral. If they choose not to be, courts must step in to protect their students' rights.

## IV. Time, Place, Manner Restrictions

A policy of viewpoint neutrality does not stop schools from enacting reasonable time, place, and manner restrictions on student

speech. Schools may place "reasonable regulation[s] of speech-connected activities in carefully restricted circumstances." *Tinker*, 393 U.S. at 513. Schools may consider whether the time, place, and style of the speech will "materially and substantially disrupt the work and discipline of the school," taking into account the ages and maturity of the students. After all, "it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse." *Fraser*, 478 U.S. at 683.

This was done in *Planned Parenthood* that involved rejection of Planned Parenthood's advertisement of their services in school newspapers since "schools enacted guidelines excluding advertising that pertains to 'birth control products and information' in order to maintain a position of neutrality on the sensitive and controversial issue of family planning and avoid being forced to open up their publications for advertisements on both sides of the 'pro-life'-'pro-choice' debate." *Planned Parenthood*, 941 F.2d at 829. In addition, the advertisements had the effect of "implicating its statutorily prescribed sex education curriculum and sought to avoid conflict with the state requirements regarding the manner sex education is presented to students." *Id.*

There is little danger that viewpoint neutrality will prevent common sense time, place, and manner restrictions on speech from taking place. For example, it would be acceptable for a school to prohibit a raucous political debate during a commencement ceremony given the focus of that particular event. In addition, a school may censor speech that is not age appropriate for the students in the classroom. Common sense time, place, and manner restrictions in order to allow a school to perform its pedagogical mission will still exist and there is little danger that viewpoint neutrality will prohibit such restrictions.

## Conclusion

We live in a sensitive political climate and it may sometimes be more convenient for school administrators to simply censor speech that is not popular, as appears to be the case here. But the law should provide safeguards to ensure students don't lose their First Amendment rights in the process, especially when it comes to speech related to sincerely held religious beliefs. Thus, the Court should adopt the view of multiple circuits that viewpoint neutrality is required before a school can censor speech and rule in favor of E.D.

Dated: June 10, 2024

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a) and Cir. R. 32 , I certify that the attached amicus brief is proportionately spaced, has a typeface of 12 points or more, and contains 3,863 words.

Date: June 10, 2024.

*/s/ Anthony J. Powell*
Anthony J. Powell

## CERTIFICATE OF SERVICE

I hereby certify that on June 10, 2024, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

*/s/ Anthony J. Powell*
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