No. 24-1608

IN THE
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.

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* the States of Kansas, Alabama, Alaska, Florida, Georgia, Idaho, Indiana, Iowa, Louisiana, Missouri, Montana, Nebraska, Oklahoma, South Carolina, South Dakota, Utah, and West Virginia, and the Arizona Legislature Supporting Plaintiffs-Appellants' Petition for Rehearing *En Banc* and Reversal

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INTRODUCTION AND INTEREST OF *AMICI CURIAE*

Because educational institutions have historically served as pathways to new ideas, schools today should be free from viewpoint discrimination. Reality, however, stands in stark contrast with this ideal, as administrators, instructors, students, and even outsiders routinely minimize or outright silence unpopular speech. Thus, it too often falls to the judiciary to ensure schools comply with constitutional and statutory free speech guarantees—and to hold accountable those who silence students.

Instead of forcefully rejecting viewpoint discrimination, a panel of this Court tacitly blessed it, allowing school administrators to hide behind a broad speech policy, so long as the policy furthers even broader goals. In other words, schools now have a playbook to engage in viewpoint discrimination; they just cannot use that term. The full Court should rectify this error.

Amici Curiae the States of Kansas, Alabama, Alaska, Florida, Georgia, Idaho, Indiana, Iowa, Louisiana, Missouri, Montana, Nebraska, Oklahoma, South Carolina, South Dakota, Utah, and West Virginia, and the Arizona Legislature operate and oversee schools, colleges, and universities full of students with differing viewpoints. *Amici* have a strong interest in ensuring student speech—particularly non-disruptive political or religious speech by student-led organizations—is not silenced by disagreement or arbitrary decision-making. *Amici* urge the full Court to protect the free speech rights of

students by granting the petition for rehearing *en banc* and reversing the district court. *See* Fed. R. App. P. 29(b)(2).

ARGUMENT

Not every extracurricular flyer in a school can qualify as school-sponsored speech. Nor can every topic be set aside as too controversial. Yet the panel's opinion permits both. As detailed in Plaintiffs' merits briefing and rehearing petition, a simple flyer promoting a club meeting cannot (and should not) rise to the level of school-sponsored speech. *Tinker*, not *Hazelwood*, thus guides this Court's analysis. But even if *Hazelwood* applies, it is imperative that viewpoint discrimination does not.

The panel punted on "whether [*Hazelwood*] requires viewpoint neutrality in school-sponsored speech," despite acknowledging the disagreement among courts on this issue. Slip op. at 16–17. Rather than affirm the constitutional guarantee of free speech, which in itself facilitates student learning through exposure to new ideas, the panel made censorship easier by upholding a speech policy that could not be designed to have a broader, more arbitrary sweep. The full Court should now grant rehearing to correct this error.

I. This Court should join other circuits that rightly prohibit viewpoint discrimination in schools.

The Supreme Court has not yet expressly held that schools must employ viewpoint neutrality when regulating school-sponsored student speech. But at least three circuits, the Second, Ninth, and Eleventh, have held that traditional First Amendment principles still apply in schools, so speech restrictions must be viewpoint neutral even when *Hazelwood* applies. *See Peck ex rel. Peck v. Baldwinsville Cent. Sch. Dist.*, 426 F.3d 617, 633 (2d Cir. 2005); *Planned Parenthood of S. Nev., Inc. v. Clark Cnty. 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). This Court should join them.

The Second Circuit confronted a situation in *Peck* where a kindergarten class was tasked with creating posters about saving the environment to be hung on the wall during an assembly. 426 F.3d at 621–22, 629. One student, with help from his mother, included religious messages and symbols that the school hid in displaying the poster. *Id.* at 621–23.

The court held that the poster display was a non-public forum where the school could regulate speech "in a reasonable manner" and "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 627, 629 (internal quotation marks omitted). Thus, the school could restrict the religious messages if it had a legitimate pedagogical concern. *Id.* at 629.

However, the court 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 631–33. The court reasoned that "*Hazelwood* never distinguished [relevant precedent] 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. The court recognized "that a manifestly viewpoint discriminatory restriction on school-sponsored speech is, prima facie, unconstitutional, *even if* reasonably related to legitimate pedagogical interests." *Id.*

In another relevant case, the *en banc* Ninth Circuit held schools could prohibit Planned Parenthood from advertising in student newspapers when, as in *Hazelwood*, the schools "retain[ed] control over advertising in school-sponsored publications." *Planned Parenthood*, 941 F.2d at 824. While the schools could discriminate based on the content of the advertisements, they did so through clear, established standards and an approval process that ensured one teacher's discretion was never determinative. *Id.* And the regulations were viewpoint neutral; the schools specifically decided not to

take a side (or appear to take one) on abortion. *Id.* at 829. There was no attempt to examine the speaker's viewpoint or enact a general ban on speech. *See id.* at 830.

And in an Eleventh Circuit case, a school board had stopped an organization from discussing its views of a military program during a career day. *Searcey*, 888 F.2d at 1316–17. The court recognized that *Hazelwood* did not "offer[] any justification for allowing educators to discriminate based on viewpoint" and that "[t]he prohibition against viewpoint discrimination is firmly embedded in [F]irst [A]mendment analysis." *Id.* at 1325. The board could not exclude the group from career day simply "because it disagreed with its views about the military." *Id.*

These circuits rightly recognize that a school 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, only by using *clear standards published ahead of time*. School staff cannot be permitted to exercise discretionary content-based control over student speech. And 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. This Court should now likewise prohibit schools from engaging in viewpoint discrimination.

a. Viewpoint discrimination does not serve legitimate pedagogical interests.

The Supreme Court has afforded schools some leeway in regulating student speech. *See Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988). But "deference" cannot become a facade for school administrators to pick and choose which messages are permissible based on their personal feelings. *See Pinard v. Clatskanie Sch. Dist. 6J*, 467 F.3d 755, 767–68 (9th Cir. 2006). Otherwise, a wide array of viewpoints and ideas may be kept out of a school simply because one administrator finds them distasteful. Here, the panel endorsed this approach by upholding a policy against flyers containing political speech, which was apparently implemented to promote a neutral and stable environment, *i.e.*, avoid controversial viewpoints. *See* slip op. at 14–15.

But the "mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint" is not a legitimate pedagogical interest. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969); *see also M.C. Through Chudley v. Shawnee Mission Unified Sch. Dist. No. 512*, 363 F. Supp. 3d 1182, 1202 (D. Kan. 2019) (finding restriction not justified solely by a school's "need to avoid association with a controversial topic"). To the contrary, there is a legitimate pedagogical interest in exposing students to a wide variety of ideas. *See Shelton v. Tucker*, 364 U.S. 479, 487 (1960). Indeed, "[t]he 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 N. Y.*, 385 U.S. 589, 603 (1967) (internal quotation marks and brackets omitted).

There is no legitimate pedagogical interest in instituting a blanket ban on political speech. A policy like the one here provides a choice vehicle for viewpoint discrimination, given the myriad topics that could fall under "political." And the policy undermines the core mission of schools by restricting exposure to new ideas and learning opportunities. While a school may have an interest in limiting young children's exposure to certain topics, it does not have an interest in suppressing political ideas altogether.

b. Viewpoint discrimination raises constitutional concerns.

Even if a school's desire to avoid disruption or an apparent, attenuated connection with a political message are legitimate pedagogical interests, there are serious constitutional concerns with permitting viewpoint discrimination to further those interests. *See Peck*, 426 F.3d at 632–33. The panel's opinion heightens these concerns by making it easier for an administrator to silence certain views simply by calling them "political." *See* slip op. at 14–15.

"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 v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995). Indeed, "[t]he prohibition against viewpoint discrimination is firmly embedded in [F]irst [A]mendment analysis." *Searcey*, 888 F.2d at 1325; *see also Matal v. Tam*, 582 U.S. 218, 234 (2017) ("The First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others." (quotation marks and brackets omitted)).

Viewpoint discrimination is not acceptable simply because it occurs in a school. *See Peck*, 426 F.3d at 627 ("[T]he First Amendment d[oes] not permit such silencing of student opinion."). "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Shelton*, 364 U.S. at 487. The First Amendment protects the right to hold a different, even unpopular, opinion. It would 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.

Viewpoint discrimination does not further a school's academic mission. It instead impedes the mission by limiting the ability of students to debate—and learn from—different ideas. And it does so while undermining the First Amendment.

c. Broad speech policies inevitably lead to viewpoint discrimination.

A broad speech policy like the one here is readily susceptible to abuse and uneven application, and it will inevitably result in viewpoint discrimination. *See Turning Point USA at Ark. State Univ. v. Rhodes*, 973 F.3d 868, 881 (8th Cir. 2020) (Loken, J., concurring) ("[I]t is all too common for *petits fonctionnaires*, arbitrarily enforcing broad rules and policies, to take action that may be politically correct but is not viewpoint neutral.").

This case exemplifies the dangers of arbitrary enforcement. It is difficult for anyone, let alone school administrators dealing with the differing opinions of students, to determine what qualifies as political speech in the first place. Some will inevitably take the easy way out and conflate "popular" with "apolitical," and "unpopular" with "political." Opinions will vary widely from person to person. One administrator may view a poster with raised fists as an expression of human rights and therefore not political. Another might find it political, and therefore impermissible. And innocuous religious activities could be caught up as "political." For example, a flyer advertising a student group's special prayer session in honor of Respect Life Month may

wind up banned solely because of an administrator's near-unfettered discretion.[1]

Absent clear guidelines, the First Amendment rights of students are at the mercy of individual administrators who apply vague policies that sweep broadly. *See Rhodes*, 973 F.3d at 881 (Loken, J., concurring). The panel's opinion blesses this situation because a policy that categorically prohibits "political" speech is a powerful tool that can, intentionally or not, capture just about any remotely controversial topic.

Politics is front and center in many aspects of life, readily extending into just about every facet of society, including how schools are run. A policy against "political" speech is tantamount to a policy against "controversial" or "unpopular" speech, or even "speech that an administrator does not want to deal with." This is an untenable standard.

A policy banning all political speech will inevitably lead to arbitrary enforcement, the end result being viewpoint discrimination. This Court should not permit school administrators to broadly suppress speech. Instead, it should hold "accountable" those "responsible" for "trampl[ing] a student's constitutionally protected right of free speech." *Id.*

[1] *See generally* U.S. Conf. of Cath. Bishops, *Respect Life Month Action Guide*, https://www.usccb.org/resources/respect-life-month-action-guide (last visited Sept. 10, 2025).

d. Viewpoint neutrality can coexist with reasonable time, place, and manner restrictions.

Mandating viewpoint neutrality does not prevent schools from enacting reasonable time, place, and manner restrictions on speech. *See Tinker*, 393 U.S. at 513 (recognizing that schools may impose "reasonable regulation[s] of speech-connected activities in carefully restricted circumstances"). Schools may consider whether the time, place, and style of the speech will "materially and substantially disrupt the work and discipline of the school," in light of the age and maturity of the students. *Id.* After all, "it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse." *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986).

Planned Parenthood aptly demonstrates that schools may impose reasonable, viewpoint-neutral restrictions for school-sponsored speech. There, the schools refused to permit advertisements in school newspapers that would have violated narrow, preexisting guidelines on prohibited speech and that could have "conflict[ed] with the state requirements regarding the manner sex education is presented to students." *Planned Parenthood*, 941 F.2d at 829. Schools may thus limit speech that would be inappropriate for the forum and would violate preexisting, specific guidelines.

Viewpoint neutrality does not prevent common sense time, place, and manner restrictions on speech in schools. A school may still prohibit a raucous political debate during a commencement ceremony just as it may limit speech that is not age appropriate for students in a particular classroom. Restrictions that allow a school to perform its pedagogical mission will still exist even with viewpoint neutrality. The only difference is more robust constitutional protection for students.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for rehearing *en banc* and ultimately reverse the district court.

Dated: September 18, 2025

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing complies with Federal Rules of Appellate Procedure 29 and 32 and Seventh Circuit Rule 32 because it has been prepared in a proportionally spaced typeface—13-point Century Schoolbook—using Microsoft Word, and it contains 2,417 words, excluding the parts exempted by Federal Rule of Appellate Procedure 32(f), as calculated by the word-counting function of Microsoft Word.

/s/ Anthony J. Powell
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CERTIFICATE OF SERVICE

I hereby certify that on September 18, 2025, 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, which transmitted the foregoing to all counsel of record.

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