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.

Appeal from the United States District Court
For the Eastern District of Texas, Sherman Division

EN BANC BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES URGING AFFIRMANCE OF THE DISTRICT COURT'S DENIAL OF DEFENDANTS' MOTIONS TO DISMISS

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CONSENT OF PARTIES

Pursuant to Fed. R. App. P. 29(a), this brief is filed with the consent of all parties.

/s/ David L. Horan

CERTIFICATE OF INTERESTED PARTIES

Pursuant to Fifth Circuit Rule 29.2, a supplemental statement of interested parties is not necessary to fully disclose all those with an interest in this amicus brief. The Cato Institute is not financially interested in the outcome of this litigation, *see* Fifth Circuit Rule 28.2.1.

No party or parties' counsel has authored any part of this brief or paid any costs associated with its preparation, and no person—"other than the amicus curiae, its members, or its counsel—contributed money that was intended to fund preparing or submitting the brief." Fed. R. App. P. 29(c)(5)(A)-(C).

/s/ David L. Horan

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INTEREST OF *AMICUS CURIAE*

The Cato Institute was established in 1977 as a non-partisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore limited constitutional government and secure those constitutional rights, both enumerated and unenumerated, that are the foundation of individual liberty. Toward those ends, the Center publishes books and studies, conducts conferences and forums, publishes the annual *Cato Supreme Court Review*, and files *amicus curiae* briefs with the courts. Cato's interest here lies in addressing the limited scope of qualified immunity in the face of well-established law prohibiting viewpoint-based discrimination against student speech.

INTRODUCTION

The panel's holding in this case is as important as it is unremarkable: school officials in the Fifth Circuit have fair warning that viewpoint-based discrimination against student speech during non-curricular activities and at non-curricular times violates the First Amendment of the United States Constitution. Indeed, if the First Amendment means anything, it means that the government cannot suppress speech based solely on its content. The government certainly cannot do so simply because speech happens to be religious. Given this firm constitutional principle and the procedural posture of this case, Appellants take the extreme position that no clearly established law gave them fair warning that elementary school children in the Fifth Circuit have First Amendment rights. *See* Supplemental En Banc Br. of Appellees at 5-6. Fifty years of Supreme Court precedent refutes any such notion.

Unable to erase the prohibition of viewpoint-based discrimination against student speech, Appellants instead implicitly ask this Court to rewrite the standard for qualified immunity. Whereas public officials properly enjoy qualified immunity in the absence of "fair notice" that their conduct is unconstitutional, Appellants now seek to use immunity as a sword to sanction their anti-religious orthodoxy so long as they can point to any distant concurrence, dissent, or other selectively culled authority, however remote, that does not explicitly and

unequivocally say that the First Amendment protects students from viewpoint-based discrimination.

Not only are Appellants wrong, but their proposed approach to qualified immunity is dangerous to the extent it permits public school officials to maintain ignorance or manufacture ambiguity regarding the fact that students of all ages have at least some measure of constitutional rights. If government officials are permitted to draw from the furthest and murkiest corners of non-precedential constitutional jurisprudence and academic speculation to render an otherwise well settled law "unclear" and thus invoke qualified immunity, no law—especially no constitutional law—could ever be clearly established. No matter how clearly the Supreme Court and Fifth Circuit define a law, a government official could always identify some authority, somewhere, that disagrees. Because personal liability is often "the only realistic avenue for [the] vindication of constitutional guarantees," this could render the law effectively unenforceable.

The en banc Court should reaffirm both the established scope of qualified immunity law and the unbroken chain of authority recognizing that students have First Amendment rights by affirming the district court's order.

ARGUMENT

THE PANEL CORRECTLY HELD THAT APPELLANTS ARE NOT ENTITLED TO QUALIFIED IMMUNITY BECAUSE APPELLEES ALLEGED A VIOLATION OF CLEARLY ESTABLISHED LAW.

The panel correctly recognized that the Supreme Court answered the First Amendment question in this case—whether elementary school students have First Amendment speech rights—over half a century ago. The precedents from the Supreme Court and this Court are unambiguous in their holdings: school administrators cannot suppress the religious speech of students while authorizing similarly situated secular speech. Because the Supreme Court and the Fifth Circuit provided ample fair warning to Appellants that their alleged conduct violates the First Amendment, Appellants must answer for their conduct, at least at this stage of litigation. To hold otherwise would cut off "the only realistic avenue for vindication of constitutional guarantees" in this case—personal liability. *Anderson v. Creighton*, 483 U.S. 635, 638 (1987) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982) (internal quotation marks omitted)).

A. WHETHER A LAW IS "CLEARLY ESTABLISHED" FOR PURPOSES OF QUALIFIED IMMUNITY TURNS ON THE CONCEPT OF "FAIR WARNING," NOT THE EXISTENCE OF "MATERIALLY SIMILAR" PRECEDENT.

While pleas of qualified immunity often require courts to delve into unsettled areas of the law, the contours of qualified immunity itself are bright as day. Two inquiries are required to resolve claims of qualified immunity. First, a

court must determine whether the alleged facts state a violation of a constitutional right. *Pearson v. Callahan*, 129 S. Ct. 808, 815-16 (2009). Second, the court must decide whether "the right at issue was 'clearly established' at the time of defendant's alleged misconduct." *Id.* at 816. This appeal implicates only the second prong of that analysis and asks whether it was clearly established during the relevant period that the First Amendment prohibits school officials from discriminating against student speech based on the viewpoint of that speech.

Qualified immunity has a very limited purpose: to ensure that government officials have "'notice their conduct is unlawful'" before they are subjected to suit. *Hope v. Pelzer*, 536 U.S. 730, 739 (2002) (quoting *Saucier v. Katz*, 533 U.S. 194, 206 (2001)); *Bush v. Strain*, 513 F.3d 492, 501-02 (5th Cir. 2008) (stating the central issue is whether the law gave "fair warning" or "reasonable warning" that the conduct at issue violated constitutional rights). Accordingly, qualified immunity is just that—*qualified*. If the law provides "fair warning" that government officials' actions are unconstitutional, they are held personally responsible for their constitutional violations. Government officials are thus protected "from liability for civil damages [only] insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson*, 129 S. Ct. at 815 (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (internal quotation marks omitted)); *see also*

McClendon v. City of Columbia, 305 F.3d 314, 329 (5th Cir. 2002) (en banc) ("[T]he 'salient question' under the second prong of the *Siegert* test is 'whether the state of the law at the time of the state action gave [the state actors] fair warning that their alleged treatment of the plaintiff was unconstitutional.'").

It is also well established that notice exists even if a court has not yet ruled on the exact or similar facts at issue. *Hope*, 536 U.S. at 736 (holding the fair notice analysis of qualified immunity does not entitle government officials to warning that is "preexisting, obvious and mandatory, and established, not by abstractions, but by cases that are materially similar to the facts in the case [at hand]" (internal quotation marks and citation omitted)). A directly on-point precedent is unnecessary, and, in fact, the Supreme Court has rejected such a "rigid gloss on the qualified immunity standard" as "not consistent" with its cases and refused "to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful." *Id.* at 739; *Safford Unified Sch. Dist. No. 1 v. Redding*, 129 S. Ct. 2633, 2643 (2009) ("To be established clearly, however, there is no need that 'the very action in question [have] previously been held unlawful.'" (citation omitted)).

Instead of limiting "fair notice" to situations where the specific underlying issues have already been litigated and resolved, the Supreme Court and this Court have emphasized that "general statements of the law are . . . []capable of giving

fair and clear warning, and . . . a general constitutional rule . . . may apply with obvious clarity to the specific conduct in question, even though the very action in question has [not] previously been held unlawful." *Hope*, 536 U.S. at 741 (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987) (internal quotation marks omitted)); *McClendon*, 305 F.3d at 331 (Officials receive fair warning after the "right has been defined with sufficient clarity to enable a reasonable official to assess the lawfulness of his conduct," not when previous cases are "fundamentally similar" or "materially similar."). Because courts presume that reasonable officials have a basic understanding of the constitutional limitations to which they are subject, the contours of a constitutional right are clearly established and qualified immunity does not apply when it is "sufficiently clear" or "apparent" that an official's actions violate that right. *Hope*, 536 U.S. at 739; *Anderson v. Creighton*, 483 U.S. 635, 640 (1987); *see also Kinney v. Weaver*, 367 F.3d 337, 350 (5th Cir. 2004) (en banc) ("The central concept is that of 'fair warning': The law can be clearly established '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.'").

The panel in this case correctly recognized that fair notice for public school officials in Texas comes from the decisions, when available, of the Supreme Court and the Fifth Circuit. *Morgan v. Swanson*, 627 F.3d 170, 180-81 (5th Cir. 2010);

accord Hope, 536 U.S. at 741 (finding right clearly established in the Eleventh Circuit when Supreme Court's cases and binding Eleventh Circuit precedent provided "fair warning that [official] conduct violated the Constitution."). This local approach to qualified immunity makes perfect sense given that this Court and/or a district court following its precedent—not other courts in far-flung parts of the country—will ultimately decide Appellants' liability.

To the extent Appellants contend that they are entitled to dilute the clear notice they received from the Supreme Court and this Court regarding the scope of students' speech rights by looking to purported contrary law of other circuits, they are plainly wrong. As the panel correctly noted, the Fifth Circuit has recognized this sound principle for nearly a decade. *Morgan*, 627 F.3d at 181. Where, as here, the Fifth Circuit has "adopted or rejected [a constitutional liability] theory prior to [official action] that . . . of course . . . end[s] [the clearly established] inquiry." *McClendon v. City of Columbia*, 305 F.3d 314, 327 n.10 (5th Cir. 2002) (en banc).

Indeed, the Supreme Court recently recognized that public officials such as Appellants should consider non-binding decisions for purposes of determining whether the contours of a constitutional right are clearly established only where the Supreme Court—or, here, the Fifth Circuit—have failed to provide sufficient guidance. *Pearson v. Callahan*, 129 S. Ct. 808, 823 (2009) (holding officers were "entitled to rely on [other federal appellate court or state supreme court] cases

[only when] their own Federal Circuit had not yet ruled on [the question.]"); *see also Wilson v. Layne*, 526 U.S. 603, 615 (1999) ("Petitioners have not brought to our attention any cases of controlling authority in their jurisdiction at the time of the incident which clearly established the rule on which they seek to rely, nor have they identified a consensus of cases of persuasive authority."). And, of course, "the fact that a single judge, or even a group of judges [from any circuit], disagrees about the contours of a right does not automatically render the law unclear if [the Supreme Court] ha[s] been clear." *Safford Unified Sch. Dist. No. 1 v. Redding*, 129 S. Ct. 2633, 2644 (2009).

Qualified immunity is not a hollow protection, and no party in this appeal is asking this Court to limit its traditional application. The generality provided in the text of the Constitution, for instance, could not provide Appellants with fair warning that their actions violate the First Amendment. *See* U.S. CONST. amends. I & XIV. It would likewise be unfair to hold Appellants liable on a theory that "any violation of the [First] Amendment is 'clearly established,' since it is clearly established that the protections of the [First] Amendment [reach] the actions of [school officials]." *Wilson*, 526 U.S. at 615. But Appellants' proposed qualified immunity analysis exists on the far end of the spectrum, consisting of a convoluted half-page "test" with 10 separate subparts that must be exhaustively examined before this Court can make the seemingly straightforward assessment that the

rights at issue in this case were clearly established. *See* Supplement En Banc Br. of Appellants at 43. Appellants' test cannot be reconciled with the established qualified immunity principles discussed above. The relevant question is actually much simpler: was it clearly established that the First Amendment prohibited school officials from engaging in viewpoint-based discrimination of elementary students' speech?

As discussed more fully below and as recognized by the panel, the Supreme Court and the Fifth Circuit have clearly held that absent specific, limited exceptions not applicable here, school officials may not discriminate on the basis of elementary students' speech. This Court's inquiry must begin and end there. Because Appellants had fair warning their actions violated the Constitution, they cannot seek qualified immunity protection.

B. SUPREME COURT AND FIFTH COURT PRECEDENT "CLEARLY ESTABLISH" THE PROHIBITION AGAINST VIEWPOINT-BASED DISCRIMINATION IN SCHOOLS.

The panel in this case recognized that both the Supreme Court and this Court have ruled, in the most unmistakable terms, that viewpoint-based discrimination in schools is *per se* unconstitutional. Indeed, Appellants' plea of qualified immunity, if adopted, would require this Court to explain how school officials can censor students—who indisputably retain their First Amendment rights even within the

schoolhouse gates—based on the viewpoint of the students' speech during the most peripheral aspect of the school day: non-curricular activities at non-curricular times.

A reasonable school official in Appellants' position would have, or at the very least should have, been aware of the following: it has been clearly established for more than sixty years that students in public schools enjoy First Amendment rights. Indeed, the protection of speech rights—even for elementary-aged children—is among the brightest of all bright line rules:

> 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 . . . .

W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) (ascribing First Amendment rights to elementary school-aged children). The Supreme Court has stated in unmistakable terms that the "'[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.'" *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967) (quoting *Shelton v. Tucker*, 364 U.S. 479, 487 (1960)). This is because schools—and the administrators who run them—are tasked with "educating the young for citizenship" and to deny speech rights would be "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.

With its 1969 decision in *Tinker v. Des Moines Independent Community School District*, the Supreme Court made clear that students enjoy First Amendment rights and that students' speech cannot be suppressed on the basis of viewpoint absent a showing that the speech will "materially and substantially disrupt" the educational process. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969) ("Clearly, the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible."). Over 40 years later, *Tinker* remains the touchstone of students' First Amendment speech rights.

To be sure, the Supreme Court has, since issuing its *Tinker* decision, established—in equally clear terms—a handful of limited exceptions to the substantial disruption test whereby students' rights must yield to the unique needs of the education environment. Thus, school officials may restrict student speech that officials reasonably believe will "materially and substantially disrupt the work and discipline of the school," *id*. at 513, that is "lewd" or "vulgar," *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986), or that may be reasonably viewed as advocating unlawful drug use, *Morse v. Frederick*, 551 U.S. 393, 410 (2007).[1] The Supreme Court has also recognized that school officials have a heightened

[1] Because *Morse* was decided several years after the conduct at issue, Appellants could not have relied on this exception, even if it were relevant.

interest in regulating student speech whenever that speech carries the imprimatur of the school itself. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988). This Court has also decided that school officials may, consistent with *Tinker*, engage in content-neutral regulation of speech, at least under limited circumstances. *Canady v. Bossier Parish Sch. Bd.*, 240 F.3d 437, 443 (5th Cir. 2001). But none of these "exceptions" are relevant in this case.

Appellees' pleaded facts do not leave room for any of these exceptions, and Appellants have never claimed that students' religious speech created a risk of material and substantial disruption. Neither do Appellants' arguments give support to any such inference. The Court is thus left with only the most basic application of *Tinker*'s oft-repeated pronouncement—that students do not shed their constitutional rights at the schoolhouse gate—and its unambiguous denunciation of viewpoint-based discrimination by school officials absent circumstances not at issue here. The Supreme Court has repeated this same core principle time and again in cases such as *Barnette* and *Keyishian,* all of which hold that all students enjoy at least some measure of First Amendment rights. The mere existence of those rights clearly establishes the prohibition of viewpoint-based discrimination in elementary schools, because, at its core, the First Amendment means the government cannot regulate speech based on its "substantive content or the message it conveys." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S.

819, 828-29 (1995) ("Viewpoint discrimination is thus an egregious form of content discrimination."). Indeed, in *Chiu v. Plano Independent School District*, this Court unambiguously recognized the clearly established link between the existence of First Amendment rights and the prohibition on viewpoint-based discrimination, holding that school officials violate a clearly established right if they discriminate "on the basis of the views espoused." *Chiu v. Plano Indep. Sch. Dist.*, 260 F.3d 330, 350-51 (5th Cir. 2001) ("It is axiomatic that the government may not regulate speech based on its substantive content or the message it coveys." (internal quotation marks and citation omitted)); *see also Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 106 (2001) ("The restriction must not discriminate against speech on the basis of viewpoint"); *Rosenberger*, 515 U.S. 819, 828 (1995) ("Discrimination against speech because of its message is presumed to be unconstitutional.").

The First Amendment's prohibition of viewpoint-based discrimination operates like many other constitutional doctrines on the basis of which, absent specific, limited exceptions, a government action is constitutionally prohibited. For example, the Fourth Amendment's proscription of warrantless searches operates similarly. In the context of qualified immunity, the Supreme Court has recognized that "[n]o reasonable officer could claim to be unaware of the basic rule, well established by our cases, that, absent consent or exigency, a warrantless

search of the home is presumptively unconstitutional." *Groh v. Ramirez*, 540 U.S. 551, 564 (2004); *see also Bush v. Strain*, 513 F.3d 492, 502 (5th Cir. 2008) (finding framework for excessive force claim clearly established because the "permissible degree of force depends on [specific, articulated circumstances]" that were not at issue in the case). Accordingly, when the law declares certain actions constitutionally prohibited except in specific, limited circumstances, the law is clearly established in the absence of those narrow circumstances. Similarly, while the scope of students' First Amendment rights—and perhaps especially those of elementary school children—can be debated, their mere existence cannot.

Appellants have chosen to stake out the extreme position throughout this litigation that the First Amendment does not protect elementary school students. Supplemental En Banc Br. of Appellees at 5-6. Because any reasonable school administrator knows that not to be true, the district court's order denying Appellants' motion to dismiss on qualified immunity grounds must be affirmed.

C. SUPREME COURT AND FIFTH CIRCUIT PRECEDENT "CLEARLY ESTABLISH" THAT THE FIRST AMENDMENT DOES NOT DISCRIMINATE ON THE BASIS OF STUDENTS' AGE.

Appellants' contention that the age of their students justifies their suppression of religious speech likewise fails. The Supreme Court and the Fifth Circuit have *never* imposed a minimum age-requirement on the exercise of student speech rights. To the contrary, both Courts have repeatedly protected the rights of

even the youngest of students. *See, e.g., Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 103 (2001) (applying First Amendment Free Speech Clause to students "ages 6 to 12"); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993) (holding "'the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others'" without distinguishing on the basis of age (citation omitted)); *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 74 (1976) ("Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights."); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 626 (1943) (involving a board of education resolution governing "all teachers and pupils"); *Chiu v. Plano Indep. Sch. Dist.*, 260 F.3d 330, 350-51 (5th Cir. 2001) (applying First Amendment Free Speech Clause to activities at a middle school without distinguishing on the basis of age).

The refusal of these courts to limit First Amendment speech rights to only those who reach a "state-defined age," *Danforth*, 428 U.S. at 74, is hardly surprising since the Supreme Court has consistently recognized that public education is "the very foundation of good citizenship," *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954); *see also Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 866-68 (1982); *Barnette*, 319 U.S. at 637. Indeed, "[t]he

vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967) (citing *Shelton v. Tucker*, 364 U.S. 479, 487 (1960) (internal quotation marks omitted)). This is because the "process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the . . . class." *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986). Instead, teachers and administrators "influence the attitudes of students toward government, the political process, and a citizen's social responsibilities," *Ambach v. Norwick*, 441 U.S. 68, 79 (1979), as well as "inculcate the habits and manners of civility," *Fraser*, 478 U.S. at 681.

Accordingly, it is vital that the First Amendment applies in elementary schools. When schools teach constitutional freedoms in theory but fail to honor them in practice, they "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. The fact that Appellants have violated the very rights that they are supposed to be modeling does not make the rights at issue any less clearly established.

CONCLUSION

For these reasons, the Cato Institute respectfully urges the Court to affirm the district court's denial of qualified immunity here.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 14, 2011, a copy of the foregoing Amicus Brief was served upon all counsel of record via the Fifth Circuit's Electronic Case Filing (ECF) system.

/s/ Richard Salgado

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation for amicus briefs in Fed. R. App. P. 29(d) because this brief contains 4047 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft® Office Word 2003 in 14-point font Times New Roman type (with the exception of footnotes, which pursuant to Local Rule 32.1, are in a proportionally spaced typeface in 12 point Times Roman).

/s/ Richard Salgado

Dated: April 14, 2011