No. 09-09-671 DEC 7 - 2009

In The Supreme Court of the United States

KATHRYN NURRE,

Petitioner,

v.

DR. CAROL WHITEHEAD,
in her individual and official capacity as
Superintendent of Everett School District No. 2,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the censorship of a student-selected, instrumental-only performance of "Ave Maria" within a limited public forum at a high school graduation ceremony violate the First Amendment's Free Speech Clause?

PARTIES TO THE PROCEEDINGS

Petitioner in this case is Kathryn Nurre. Respondent is Dr. Carol Whitehead, in her individual and official capacity as Superintendent of Everett School District No. 2, a governmental entity created, existing and operating under the laws of the State of Washington.

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OPINIONS BELOW

The divided panel opinion of the United States Court of Appeals for the Ninth Circuit is reported as *Nurre v. Whitehead*, 580 F.3d 1087 (9th Cir. 2009), and is set forth in the Appendix beginning at 1a. The opinion of the district court is reported as *Nurre v. Whitehead*, 520 F. Supp. 2d 1222 (W.D. Wash. 2007), and is set forth in the Appendix beginning at 32a.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on September 8, 2009. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment to the United States Constitution provides as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for redress of grievances.

Everett School District No. 2 School Board Procedure 2340P titled "Religious-Related Activities and Practices" provides, in relevant parts, as follows:

> I. Religious services, programs or assemblies shall not be conducted in school facilities during school hours or in connection with any school sponsored orschool related activity. Speakers and/or programs that convey a religious or devotional message are prohibited.

This restriction does not preclude the presentation of choral or musical assemblies, which may use religious music or literature as a part of the program or assembly.

Musical, artistic and dramatic presentations, which have a religious theme maybe included in course work and programs on the basis of their particular artistic and educational value or traditional secular usage. They shall be presented in a neutral, non-devotional manner, be related to the objective of the instructional program, and be accompanied by comparable artistic works of a non-religious nature.

Since a variety of activities are included as part of a holiday theme, care must be exercised to focus on the historical and secular aspects of the holiday rather than its devotional meanings. Music programs shall not use the religious aspect of a holiday as the underlying message or theme. Pageants, plays and other dramatic activities shall not be used to convey religious messages. Religious symbols such as nativity scenes, if used, shall be displayed in conjunction with a variety of secular holiday symbols so that the total presentation emphasizes the cultural rather than religious significance if the holiday.

STATEMENT OF THE CASE

Petitioner Kathryn Nurre brought this action seeking relief under 42 U.S.C. § 1983, alleging that Respondent, Superintendent Carol Whitehead, had engaged in unjustified censorship of expression and had taken actions exhibiting hostility toward religion, all in violation of Nurre's rights under U.S. Const. amend. I. The United States District Court for the Western District of Washington granted Respondent summary judgment on all the claims. 71a. A divided panel of the Court of Appeals for the Ninth Circuit affirmed that judgment. 2a.

In June 2006, Nurre was a student at Henry M. Jackson High School ("JHS"), a secondary school operated by the Everett, Washington, School District No. 2. She received her high school diploma at graduation ceremonies held in the Everett Events Center on June 17, 2006.

During her senior year and for the two previous school years, Nurre was a member of the JHS Wind Ensemble, an instrumental music group that is the most advanced instrumental group at JHS (ER at 117)[1]. She played alto saxophone in the Wind Ensemble and, like other members, was selected based upon merit after auditioning. The Director of the Wind Ensemble was Lesley Moffat, JHS's Director of instrumental music since the 2002-2003 school year (ER at 115-16).

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[1] "ER" references are to the Excerpts of Record filed in the appeal to the Court of Appeals.

As in previous years, the Wind Ensemble was expected to perform at the 2006 JHS graduation ceremonies. Part of this traditional performance by the Wind Ensemble included the selection by the Ensemble's graduating seniors of an instrumental work to be performed at graduation (ER at 118, 245). In May of 2006, the Wind Ensemble seniors, including Nurre, met with Moffat about selecting a piece to play at graduation. During this meeting, the members noted that the previous three senior classes had all chosen the same piece, "On a Hymnsong of Phillip Bliss" (ER at 122-24, 125-26). Nurre and her fellow seniors wanted to select and play a different song. The only serious choice that emerged from this discussion was a piece the Ensemble had performed earlier in the year: Franz Biebl's "Ave Maria" (ER at 125, 127, 251). The choice of Biebl's 1964 composition was unanimous.[2] (ER at 128, 251).

The seniors chose to play Biebl's "Ave Maria" because of its beauty, its suitability to the Ensemble's sound, and the memory of the song from previous performances (ER at 126, 264). The performance of "Ave Maria" would be wholly instrumental with no singing or lyrics. Nurre and the other seniors did not choose the piece because of

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[2] Biebl's 1964 rendition of *Ave Maria* is completely different from the more familiar Franz Schubert version, Op. 25, No. 6, composed in 1825. *Compare* the Biebl version sung by the Cornell Glee Club at http://www.youtube.com/watch?v=wCXnhYgoHDw&feature=related (last viewed November 18, 2009), with the Schubert version sung by Luciano Pavarotti at http://www.youtube.com/watch?v=2uYrmYXsujI (last viewed November 18, 2009).

any religious message it might convey (ER at 128, 258-59). The Ensemble had previously performed Biebl's "Ave Maria" at a winter concert; the Latin title was listed in the program for that concert. (ER at 126, 246).

Music Director Moffat sent copies of the music to Terry Cheshire, Principal of JHS, and Karst Brandsma, the District's Associate Superintendent for Instruction. Moffat wrote in an accompanying note that the senior members chose "Ave Maria" as their instrumental selection for the ceremony (ER at 150). On the top of the musical score she forwarded, Moffat wrote in bold "Not sung," indicating there would be no vocal parts or lyrics (ER at 175).

Principal Cheshire took note of the selection because of an alleged controversy that arose relating to the 2005 JHS graduation ceremony. A student choir had performed a song titled "Up Above My Head". The song contained references to "God" and "angels", but did not contain references to any particular religion.[3] School officials stated during

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[3] As set forth at http://www.mp3lyrics.org/k/kirk-franklin/up-above-my-head/, the lyrics are:

Up above my head I hear music in the air
Up above my head there's a melody so bright
And fair
I can hear when I'm all alone
Even in those times when I feel all hope is gone
Up above my head I hear joybells ringing
Up above my head I hear angels singing
There must be a God somewhere
There must be a God somewhere

I hear music in the air
I hear music everywhere

deposition that they received complaints about the religious nature of "Up Above My Head," but the *only* specifically documented complaint about the earlier 2005 graduation that Respondent admitted to the record was a single letter to the editor of a local paper mocking the educational competence of the Superintendent and her subordinates:

> I would like to express my puzzlement over how. . .[the] superintendent, south area executive director, principal and choir director can justify classroom civics instruction on the importance of our national and state constitutions specifically relating to policy regarding religious activity, while willfully disregarding the same by sponsorship of nonsecular entertainment during a public graduation ceremony. . . . Is that the final lesson of our students' education? If, in fact, the lesson was to demonstrate the meaning of hypocrisy, an "A" grade should be awarded. . . .

(ER 287). Principal Cheshire contacted District Executive Director Lynn Evans, who in turn contacted Superintendent Carol Whitehead to discuss the students' selection of "Ave Maria" (ER at 222). Whitehead then convened a meeting with Evans and Brandsma to discuss the students' selection.

There must be a God somewhere

There must be a God somewhere
There must be a God somewhere
There must be a God somewhere

Without student input or involvement, the administrators unilaterally decided to prohibit the seniors from playing "Ave Maria" at the graduation (ER at 223). Whitehead testified that "we made the decision that because the title of the piece would be on the program and it's 'Ave Maria' and that many people would see that as religious in nature, that we would ask the band to select something different" (ER at 223-24). Her sole concern and that of those attending the meeting was the listing of the two-word title in the program (ER at 216, 228), though no one at the meeting admitted to knowing what the words "Ave Maria" meant, other than it seemed to have a religious connotation (ER at 229). Whitehead stated that it would not have been "appropriate" to allow the students to play "Ave Maria" without listing the title in the program, even though titles to numerous other instrumental pieces played at the beginning of the graduation ceremonies by the Jazz Combo were not identified in the printed program except under the more general heading "Prelude Concert." (ER at 225-26).

Following the meeting, Associate Superintendent Brandsma sent an e-mail at Whitehead's direction, to high school principals concerning musical selections for the respective high school graduations (ER at 148). After requesting that the principals provide a copy of the selections to be played or sung with copies of any lyrics, Brandsma noted that School Board Policy 2340 and Procedure 2340P allowed for musical presentations with religious themes if the selections are based upon their artistic and educational value and are

accompanied by comparable works of a non-religious nature. Brandsma nevertheless insisted that

> music selections for graduation be entirely secular in nature. My rationale is based on the nature of the event. It is a commencement program in celebration of senior students earning their high school diploma. It is not a music concert. Musical selections should add to the celebration and should not be a separate event. Invited guests of graduates are a captive audience. I understand that attendance is voluntary, but I believe that few students (and their invited guests) would want to miss the culminating event of their academic career. And lastly there is insufficient time at graduation to balance comparable artistic works.

(ER at 148).

After receiving a copy of Brandsma's e-mail, and a discussion with Principal Cheshire, Moffat asked for clarification and suggested that the program simply list the piece as "A selection by France [sic] Biebl" (ER at 130). But Cheshire told her that this would not be "ethical," although he did not elaborate as to how this would be unethical (ER at 131).

The Respondent's decision upset Nurre and the other Ensemble seniors particularly because every previous year seniors had selected their own music without censorship. (ER at 131-32, 254) The censorship was difficult to understand because the Ensemble had previously performed it earlier in a school concert (ER at 260). Rather than boycott the ceremony, the seniors performed a movement from Holst's "Second Suite for Military Band," at the June 17, 2006, graduation ceremony (ER at 132, 236).

The graduation program included numerous other student-performed instrumental and vocal selections, as well as student speakers from the Class of 2006. The JHS Jazz Combo opened the graduation program with six separate *instrumental* works: "Freedom Jazz Dance," "Day by Day," "Let's Fall in Love," Unforgettable," "Un Poco Loco," and "Traveling Light." (ER 225) Next followed the instrumental-only processional to the tune of Elgar's "Pomp and Circumstance," which was also used for the recessional. (ER 146) Once in, the assembled graduates stood to the "National Anthem," sung by Aubrey Logan of the Class of 2006. (ER 146). Following opening remarks and a speech entitled "New Beginnings" by a Class Speaker, the JHS Choir performed "Mother Africa." *Id.*[4] Two more

[4] There are also lyrics to "Pomp and Circumstance" which include repeating twice the following phrase: "God who made thee mighty, Make thee mightier yet." See 85a. The 2006 performances of Elgar's "Pomp and Circumstance" at the JHS graduation and the censorship of Biebl's "Ave Maria" also contrasts with the first performance of "Pomp and Circumstance" in the United States at Yale University's 1905 graduation, which was preceded by *'Seek Him that maketh the seven stars'* from Elgar's *Light of Life (Lux Christi),* and Martin Luther's *Eine Feste Burg (A Mighty*

Class Speakers followed with speeches on "Echos" and "Joy, Peace, Love, Happiness" before the graduating class was formally presented for graduation. *Id.* Thus, despite the School policy permitting music with religious themes to be performed at school programs when accompanied by works of a non-religious nature, Superintendent Whitehead interpreted that policy as permitting *only* secular music in the face of potential controversy at graduation.

Nurre filed this action against the Respondent Superintendent in her individual and official capacities and requesting relief under 42 U.S.C. § 1983. The Complaint alleged that the Respondent's action in refusing to allow the solely instrumental performance of "Ave Maria" at the graduation deprived Nurre of her rights under (1) the Free Speech Clause of the First Amendment, (2) the Establishment Clause of the First Amendment, and (3) the Equal Protection Clause of the Fourteenth Amendment. After discovery, the parties filed cross-motions for summary judgment. On those motions, the District Court granted the Respondent's motion and denied Nurre's motion (71a), and Nurre appealed.

A divided panel of the Court of Appeals for the Ninth Circuit affirmed the judgment. Addressing Nurre's First Amendment free speech claim, the panel majority noted that the Respondent did not

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Fortress). Sir Edward received an Honorary Doctor of Music from Yale at the exercise. *See* Elgar, *His Music – Pomp and Circumstance,* http://www.elgar.org/3pomp-b.htm (last viewed November 17, 2009).

challenge Nurre's claim that a limited public forum existed within the context of the JHS graduation ceremony, allowing senior wind ensemble members such as Nurre to engage in expression by choosing a piece to perform at the ceremony (11a). However, the panel majority found the restriction on Nurre's expression to be reasonable because "the District was acting to avoid a repeat of the 2005 controversy by prohibiting any reference to religion at its graduation ceremonies. District administrators recognized the evident religious nature of 'Ave Maria' and took into consideration the compulsory nature of the graduation ceremony." (12a).

In dissent, Judge Milan Smith declared that Nurre's First Amendment free speech rights were violated and warned that the majority's opinion would have the practical effect of causing school administrators to purge student artistic presentations of works of fundamental importance to our cultural heritage. Assessing the reasonableness of the restriction, Judge Smith wrote that "[i]n my view, purging such a ceremony of all vestiges of religiously inspired art and culture-including those works with even the most attenuated connections to religion-did not advance the purpose of recognizing and providing a forum for student achievement." (26a-27a).

REASONS FOR GRANTING THE WRIT

The censorship in this case involves political correctness run amuck, with art and student expression sacrificed to a heckler's veto that seeks to sanitize even the remotest vestige of religion from

public life. As the dissenting judge below warned, the practical effect of the panel majority's opinion "will be for public school administrators to chill—or even kill—musical and artistic presentations by their students in school-sponsored limited public fora where those presentations contain any trace of religious inspiration[.]"(23a). The majority's view legitimizes and endorses discriminatory decision-making keyed to "avoidance of controversy" and appeasement of narrow-minded social sensitivities banning all religious viewpoints. It also blinks at a clear record showing that the performance was permissible under existing School policy that permits the balancing of musical works to advance student expression and legitimate educational objectives. By misapplying the captive audience doctrine and perpetuating the legal fiction that expression with "religious connotations" may be proscribed at high school graduation ceremonies to avoid controversy (notwithstanding the absence of any legitimate Establishment Clause concern), the decision below sanctions censorship of artistic expression without any legitimate reason.

The Ninth Circuit's decision places at great risk countless opportunities for students nationwide to perform selected musical works of religiously-inspired origin. It also threatens important pedagogical interests forming the backbone of Western Art and Culture. In doing so, the underlying rationale for decision poses a significant challenge to principles set forth in the decisions of this Court and other circuit courts. And because it stands for the proposition that school administrators and other public officials may with impunity

sacrifice individual student expression to avoid offending the too easily offended, it warrants plenary review by this Court.

I.

A.

In *Tinker v. Des Moines,* 393 U.S. 503, 510 (1969), this Court made clear that student speech may not be censored based simply on "an urgent wish to *avoid the controversy* which might result from the expression." Writing for the Court, Justice Fortas declared that the "mere desire to avoid the *discomfort* and *unpleasantness* that always accompany an unpopular viewpoint" is simply not sufficient without more to censor student speech. *Id.* at 510. The protection afforded student speech by the First Amendment is plainly implicated here in light of the Respondent's concession in the lower courts that a limited public forum for expression existed under the established policies and practices for JHS graduation ceremonies. (11a) School officials admittedly opened the graduation ceremony for expression by the senior wind ensemble members by allowing them to choose a piece to perform at their graduation. *See Rosenberger v. Rector and Visitors of Univ. of Va.,* 515 U.S. 819, 829 (1995) (limited public forum is created when the government opens a forum for expression by certain groups on certain topics).[5]

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[5] There is also no serious dispute about whether Biebl's "Ave Maria" was constitutionally-protected expression. Both the district and circuit courts found that the music, even if performed without lyrics, constituted expression for purposes of the First Amendment. (9a, 43a).

The panel majority's decision in this case runs counter to the principles established in *Tinker* and *Rosenberger*. The majority transparently admits that "the District was acting to avoid a repeat of the 2005 controversy by prohibiting any reference to religion at its graduation ceremonies."(12a). In upholding this action, the majority rolls back the clock to sanction pre-*Tinker* standardless censorship of student speech simply to avoid official discomfort with controversy. Here, Superintendent Whitehead admittedly stopped the seniors-selected performance of "Ave Maria" "because it is a religious piece"(ER 227), and because she wanted to avoid complaints like those received after the 2005 graduation about the religious nature of a song, not because of any compelling state interest or constitutional mandate. (ER 86, 217-218). The Superintendent's motivation for the censorship was a desire to placate the anti-religious views of the writer of a solitary critical editorial about a song sung at the prior year's graduation, as well as other irrational misconceptions discussed below. Her decision to exclude all religious speech, in effect, excluded all

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"[A] narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a 'particularized message,' *cf. Spence v. Washington*, 418 U.S. 405, 411 (1974) (per curiam), would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll." *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 569 (1995) (emphasis added). Likewise, the school and district officials had opened the graduation ceremony for expression by the senior wind ensemble members (11a). Nurre and her wind ensemble classmates thus had a First Amendment interest in their choice to perform Biebl's "Ave Maria."

religious viewpoints and was undertaken with the intent to eliminate those viewpoints *en masse*.[6]

In approving this censorship, the Ninth Circuit panel employed forum analysis and a low-threshold view of what constitutes a "reasonable" basis for censorship. However, the "reasonableness" standard for adjudging a restriction on First

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[6] Although the panel majority held that "this is not a case of viewpoint discrimination" because "Nurre concedes that she was not attempting to express any specific religious viewpoint, but that she sought only to 'play a pretty piece,'" (relying on selected language from *Rosenberger*), Superintendent Whitehead's decision to exclude all religious viewpoints did run afoul of *Rosenberger*, where this Court not only stated that "[d]iscrimination against speech because of its message is presumed to be unconstitutional (515 U. S. at 828) but also *rejected* the argument that government was permitted to "discriminate against an entire class of viewpoints." That argument was deemed to be flawed because it was found to rest on "an insupportable assumption that all debate is bipolar and that anti-religious speech is the only response to religious speech." The Court continued: "[o]ur understanding of the complex and multifaceted nature of public discourse has not embraced such a contrived description of the marketplace of ideas. If the topic of debate is, for example, racism, then exclusion of several views on that problem is just as offensive to the First Amendment as exclusion of only one. It is as objectionable to exclude both a theistic and an atheistic perspective on the debate as it is to exclude one, the other, or yet another political, economic, or social viewpoint." *Rosenberger*, 515 U.S. at 832. Here, Whitehead's rejection of all religious music in favor of the performance of only secular music for graduation constitutes viewpoint discrimination because it was based on a "suspect" classification that acts to exclude multiple religious viewpoints, and permits all secular viewpoints. In both *Rosenberger*, and in *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 508 U.S. 384 (1993), the Court found the exclusion of all speech with religious perspectives was impermissible viewpoint discrimination.

Amendment freedoms is not "toothless." *Thornburgh v. Abbott*, 490 U.S. 401, 414 (1989); *cf. City of Cleburne, Texas v. Cleburne Living Center, Inc.*, 473 U. S. 432, 449 (1985) (No rational basis for governmental action taken in deference to the fears, wishes or objections of some faction of the body politic). Indeed, this Court held in *Tinker*, 393 U.S. at 509, that censorship of student speech is not reasonable if based upon an undifferentiated fear of controversy. A fear of controversy was precisely the basis identified by the Respondent and the decision below as justification for prohibiting the performance of "Ave Maria." As such, justification for the censorship of the performance was constitutionally inadequate and Nurre's right to Free Speech was patently violated.

The Ninth Circuit's ruling in this case is also unreasonable in its reliance on the legal fiction that anything having "religious connotations" must be excised from culminating school events. The majority's rationale was as follows:

> [W]e confine our analysis to a narrow conclusion that when there is a captive audience at a graduation ceremony which spans a finite amount of time, and during which the demand for equal time is so great that comparable non-religious musical works might not be presented, it is reasonable for a school official to prohibit the performance of an obviously religious piece.

(13a). This holding is contrary to this Court's precedents on several counts.

First, Superintendent Whitehead disclaimed knowing what the words *Ave Maria* even meant, though she viewed it as having a "religious connotation." (ER 229). It should be apparent that guesswork about "religious connotations" ought not override precious rights secured under the First Amendment's Free Speech Clause.

Second, this Court's seminal decision outlining the boundaries of religion in school graduation ceremonies is *Lee v. Weisman,* 505 U. S. 577 (1992). In *Lee*, the Court found a clear Establishment Clause violation arising from the principal's direct and active involvement in prescribing graduation prayer, thereby coercing a captive audience to participate in the *religious exercise* of prayer. Here, there was no religious exercise such as a sermon, prayer or worship. Nor was there any religious message. The song was to be performed instrumentally, with no lyrics. School officials did not select the song, the seniors did, as they had in years before, by custom and tradition. In doing so, they had no religious motivation. The rendition of the song was the Franz Biebl melody, not the familiar Franz Schubert melody which might otherwise conjure up a sense of religious familiarity. Thus, the constitutional injury in *Lee* --- forcing participants to participate in a state-prescribed religious exercise--- is entirely missing in this case and the music and its selection, and manner of performance, could not be more disparate in terms of constitutional consequences. The fact that some

expression might have "religious connotations," i.e., some suggestion of religious meaning (even if accurate in this case), does not translate into coercing someone to participate in a "religious exercise." The Superintendent's arbitrary extension of the law to stop the Wind Ensemble's performance, in light of the boundaries established by *Lee v. Weisman,* is thus arbitrary and unreasonable, and certainly not mandated by the Establishment Clause.

Third, the Ninth Circuit panel's captive audience justification also does not withstand analysis under either *Lee* (for the reasons stated above), or the Court's other principal captive audience case, *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974). That case involved "car card" advertising in a bus line run by the City in its proprietary capacity. The court rejected a constitutional challenge based on the captive audience theory finding that protections for speech in commercial venues had historically been less robust and more subject to regulation or restriction than other speech. More importantly, this Court has recognized the reality that "[t]he plain, if at times disquieting, truth is that in our pluralistic society, constantly proliferating new and ingenious forms of expression, 'we are inescapably captive audiences for many purposes.' . . . . Much that we encounter offends our esthetic, if not our political and moral, sensibilities. Nevertheless, the Constitution does not permit government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or

viewer." *Erznoznik v. City of Jacksonville,* 422 U.S. 205, 210 (1975).

Fourth, the panel's unreasonable conclusion that "the demand for equal time is so great that comparable non-religious musical works might not be presented" at graduation is wholly belied by the record. Fully eight secular-oriented instrumental works were presented during the graduation program, six at the beginning and two for the processional and recessional. (ER 146, 225) In addition, two musical works were sung by class members, along with three student-delivered speeches. This panoply of "senior" speech fully mitigated any impact that an instrumental performance of Biebl's "Ave Maria" might have had on the ceremony. Whitehead's skewed interpretation of School policy (that otherwise permits religious songs in a balanced environment) was unreasonable in light of the purpose of the forum and the remaining musical performances that occurred. Far from being seen for religious connotations, the performance would, as Judge Smith recognized, advance the very purpose of the graduation ceremony to "acknowledge the achievements of the Jackson High students" and provide them with "the opportunity to express themselves through speech and music." (26a). Its censorship completely undermined these purposes and was unreasonable in light of those purposes.

In sum, Superintendent Whitehead's decision to censor amounted to pristine censorship of all religious viewpoints and unreasonable on several counts. It was based on guesswork and an

undifferentiated fear of controversy. The performance did not require attendees to participate in a religious exercise because there was no religious exercise. Accordingly, the audience was no more "captive" to the performance than it was in listening to the other music (some with, and more without, lyrics) and numerous speeches at the event, which some may have considered equally offensive. There was no Establishment Clause violation. To the contrary, Whitehead's decision flew in the face of established school policy that permitted religiously-inspired works to be performed when they could be balanced with comparable non-religious musical works. Finally, Whitehead's action was contrary to the very purposes of the graduation ceremony in recognizing student expression and achievement without viewpoint discrimination

B.

Although school officials maintained Nurre's group was censored based on "complaints" from the 2005 graduation, they were able to substantiate only one complaint in the record, a letter to the local newspaper (ER 287). The author of that letter exhibited an extreme notion of the requirements of the Establishment Clause, arguing that all religious "entertainment" must be excluded from government supported venues or events. But as this Court and others have pointed out, the Establishment Clause is not violated by the display of art and other memorials containing religious themes or images in

publicly-supported venues.[7] Nor does government necessarily violate the Establishment Clause by simply facilitating the opportunity for individuals to participate in religious education, or by providing public school venues for religious meetings or activities, or adopting other programs that indirectly benefit religion.[8]

In like manner, school officials do not have an absolute and cavalier right to quash student speech simply because of selective public dissatisfaction with the expression. In *Good News Club v. Milford Cent. School*, 533 U.S. 98, 119 (2001), the school district argued that it prevented religious organizations from using school facilities because of the danger that children and other members of the public would view such access as an endorsement of religion. The Court refused to accept this "modified heckler's veto" based on perceptions of certain members of the public. In *Reno v. American Civil*

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[7] *See Lynch v. Donnelly*, 465 U.S. 668, 683 (1984) ("display of the crèche is no more an advancement or endorsement of religion than the Congressional and Executive recognition of the origins of the Holiday itself as "Christ's Mass," or the exhibition of literally hundreds of religious paintings in governmentally supported museums."); *Van Orden v. Perry*, 545 U.S. 677 (2005); *Doe v. Duncanville Indep. Sch. Dist.*, 70 F.3d 402, 407 (5th Cir. 1995) ("the Establishment Clause does not prohibit . . . choirs from singing religious songs as part of a secular music program[.]").

[8] *See Widmar v.Vincent*, 454 U.S. 263 (1981); *Witters v. Svcs. for the Blind*, 474 U.S. 481, 489 (1986); *Muller v. Allen*, 463 U. S. 388 (1983); *Mergens v. Westside School District*, 496 U.S. 226 (1990); *Lamb's Chapel, supra*; *Good News Club v. Milford Cent. School*, 533 U.S. 98, 106 (2001); *Zobrest v. Catalina Foothills School District*, 509 U.S. 1 (1993).

Liberties Union, 521 U.S. 844, 880 (1997), this Court likewise struck down a provision of the Communications Decency Act which had the effect of "confer[ing] broad powers of censorship, in the form of a "heckler's veto," upon any opponent of indecent speech.

To silence patently unobjectionable, constitutionally-protected expression merely because of the possibility that extremists may consider it objectionable is simply not reasonable. There must be "a specific showing of constitutionally valid reasons to regulate [the] speech" in question, *Tinker, supra,* 393 U. S. at 510-11, or a showing "that substantial privacy interests are being invaded in an essentially intolerable manner. . . . *Cohen v. California*, 403 U.S. 15, 21 (1971). "A less stringent analysis would permit a government to slight the First Amendment's role 'in affording the public access to information, discussion, debate, and enlightening ideas.'" *Consolidated Edison Co. of New York, Inc. v. Public Service Commission of New York,* 447 U.S. 530, 541 (1980) (*quoting First National Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978)). A contest of letter writing campaigns to newspapers ought not dictate whether expression is subject to censorship under our constitutional jurisprudence.

Indeed, because of the absence of a demonstrable Establishment Clause violation, which the panel majority notably failed to find in this case (20a-21a), it is axiomatic that "the purported state interest asserted here--in achieving *greater separation* of church and State than is already

ensured under the Establishment Clause of the Federal Constitution--is *limited* by the Free Exercise Clause and in this case by the Free Speech Clause as well." *See Widmar v. Vincent*, *supra*, 454 U. S. at 276. Undifferentiated fear of "religious connotations" does not create an Establishment Clause violation, nor does it permit arbitrary censorship of student speech.

C.

The Ninth Circuit's determination that it is reasonable to bow to unreasonable views of a vocal few puts it in direct conflict not only with the principles of *Tinker*, *Rosenberger*, *Widmar* and *Good News*, but also principles established and followed in decisions from other circuits. For example, in *Americans United for Separation of Church and State v. City of Grand Rapids*, 980 F.2d 1538 (6th Cir. 1992), the court rejected an Establishment Clause challenge to the placement of a menorah in a public park to celebrate Chanukah. In applying the endorsement test, the court warned against the danger that religious expression will be suppressed in response to those who look upon religion with a "jaundiced eye." Summing up this principle, the court wrote:

> This case presents another challenge to the right of free speech from those who do not like the message at issue or the manner in which it is presented. We believe that the plaintiffs' argument presents a new threat to religious speech in the concept of the

> "Ignoramus's Veto." The Ignoramus's Veto lies in the hands of those determined to see an endorsement of religion, even though a reasonable person, and any minimally informed person, knows that no endorsement is intended, or conveyed, by adherence to the traditional public forum doctrine. . . . We refuse to rest important constitutional doctrines on such *unrealistic legal fictions*.

Id. at 1553 (emphasis added).

Similarly, in *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252 (11th Cir. 2004), the court rejected the claim of school officials that they were justified in disciplining a student for engaging in an symbolic protest during the classroom recitation of the Pledge of Allegiance because the student's expression disturbed other students. The court cited *Tinker* for the principle that school officials may not justify silencing expression on the basis that the expression causes discomfort. The student's expression was not "removed from the realm of constitutional protection simply because [other] students cloaked their disagreement in the guise of offense or disgust. Holloman's behavior was not directed 'toward' anyone or any group and could not be construed by a reasonable person (including a high school student) as a personal offense or insult." *Holloman*, 370 F.3d at 1275.

II.

The signal sent by the Ninth Circuit's ruling in this case will likely, as predicted in Judge Smith's dissenting opinion, have a profound and unnecessarily adverse, potentially nationwide, impact upon student artistic expression. The panel majority's decision effectively instructs school districts around the country that it is in their best interest to err on the side of censorship, not only in situations that actually violate the Establishment Clause, but whenever school administrators themselves believe that the "religious connotations" *might* come into play "in light of [their] past experience and [their] understanding of the law." (21a). This grievously misguided message requires correction lest the culture be irreparably impoverished and innocent student expression vanquished by a judicially-sanctioned tyranny of the intolerant ignoramus.

Without the guidance of this Court, there is every reason to believe that school administrators nationwide will conclude that the "reasonable", safer course is simply to sacrifice student rights to expression and the right to receive information, *i.e.*, exposure to art with religious themes or inspiration. From an administrator's point of view, a blanket ban on religious works is much easier to implement than a policy that carefully balances legitimate Establishment Clause concerns with student freedoms in the particular situation. A blanket ban may be "reasonably perceived as an attempt to avoid conflict with the Establishment Clause," and thus be approved by the courts. (18a). The Ninth Circuit

decision creates a perverse incentive for administrators to take the safe route and avoid potential liability by infringing student rights. And because under the Ninth Circuit's decision administrators need only act with the desire to avoid controversy, there is no substantial limitation on official censorship.[9]

The effect of such a blanket ban on arts education would be dramatic. Major works that are obviously religiously inspired, such as Handel's *Messiah* and Mozart's *Requiem*, would be at immediate risk for removal from the music curriculum. Other less obvious classical works would also need to be avoided. Indeed, it may be impossible to compile a complete catalog of significant religiously inspired music. Johan Sebastian Bach,[10] Joseph Haydn,[11] Ludwig van

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[9] Superintendent Whitehead attempts to hide behind the cloak of qualified immunity on grounds that there is no clearly established law. However, once a school has opened up a limited forum, it "must respect the lawful boundaries it has itself set." *Rosenberger,* 515 U.S. at 832; *Good News Club*,, 533 U.S. at 109-10; *see also Lamb's Chapel*, 508 U.S. at 393-94 (1993). Moreover, not only is the case law on unlawful viewpoint discrimination settled, one need only read the contemporaneous e-mail from Choir Director Hunt sent to school administrators pointing out the obvious censorship and Free Speech violation arising from their ban on religiously-inspired music and the unreasonableness of that ban. See Hunt E-mail, 84a-86a.

[10] List of Bach's Works,
http://jsbach.org/completecategory.html

[11] List of Haydn's Works,
http://www.classicalarchives.com/haydn.html

Beethoven,[12] Franz Schubert,[13] Felix Mendelssohn,[14] Johannes Brahms,[15] and many others drew upon Christian themes for inspiration; Richard Wagner borrowed from Norse mythology for his famous opera cycle *Der Ring des Nibelungen*[16]; still others found inspiration in the divine pantheon worshipped by ancient Greeks and Romans. None are "entirely secular," and all are therefore subject to censorship by school officials under the Ninth Circuit's rationale for decision here.

More recent musical compositions are also at risk. Indeed, as Judge Smith notes, even "current popular music comprises a significant number of works that, though originally inspired by religion, have since become largely secularized."(26a). The piece at issue in this case—Franz Biebl's *Ave Maria*—was composed in 1964.[17] Students who perform rock-and-roll or pop tunes are likely to encounter problems. The Beatles sang about "Mother Mary" in *Let it Be*. *Stairway to Heaven* by Led Zeppelin, *The Prayer* by Celine Dion, and *Livin'*

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[12] List of Beethoven's Works, http://www.lvbeethoven.com/Oeuvres/ListOpus.html

[13] List of Schubert's Sacred Works, http://www.franzschubert.org.uk/works/sacred.html

[14] List of Mendelssohn's Sacred Works, http://www.classical.net/music/composer/works/mendelssohn/stage.php#sac

[15] List of Brahms' Works, http://w3.rz-berlin.mpg.de/cmp/brahms_works.html

[16] Der Ring des Nibelungen, http://www.economicexpert.com/a/Der:Ring:des:Nibelungen.htm

[17] Franz Biebl Biography, http://www.classiccat.net/biebl_f/biography.htm

on a Prayer by Jon Bon Jovi all contain allusions to religion in their titles. *Survivor* by Destiny's Child could be banned for the line "I'm not gonna compromise my Christianity." Rufus Wainwright's *Hallelujah*, which uses stories of King David from the Hebrew Bible as an allegory for the pitfalls of romance, would surely be rejected. References to Christianity are prominent in country music as well, as evidenced by Carrie Underwood's number-one hit *Jesus Take the Wheel*, Lee Greenwood's *God Bless the U.S.A.*, and even The Charlie Daniels Band's *The Devil Went Down to Georgia*. The extent of potential censorship is tremendous and touches every musical genre from every time period.

Musical theater works are similarly threatened. Many popular pieces for the stage lifted their plots from stories of the Bible; see, for example, *Joseph and the Amazing Technicolor Dreamcoat* and *Jesus Christ Superstar*, both by seven-time Tony winner Andrew Lloyd Webber, and *Godspell* by six-time Tony award nominee Stephen Schwartz. Other works, such as Jerry Brock and Sheldon Harnick's *Fiddler on the Roof*, are not based upon scripture but could be stricken simply for their emphasis on religious concepts and cultures. *Fiddler on the Roof* is the seventh most frequently performed musical in American high schools.[18] And the performance of Rogers and Hammerstein's *Sound of Music* might be barred in light of the Roman Catholic context and religious themes throughout the musical.

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[18] Richard Zoglin, *Bye Bye, Birdie. Hello, Rent*, TIME, May 15, 2008, at 51.

Nothing in the Ninth Circuit's opinion indicates that its rationale is to be limited solely to the musical context. The creep of precedents, in response to unrelenting assaults of disgruntled hecklers, may be expected to reach out to the visual arts or musical theatre works as well. Students could be deprived of the opportunity to study pieces of widely recognized artistic merit, such as Leonardo da Vinci's famous *The Last Supper*, simply because they contain religious themes. Michelangelo's paintings on the Sistine Chapel ceiling and his sculptures *David* and *Pietà* would also be candidates for removal. Even the slimmest connection to religion is sufficient to justify censorship under the decision below. Biebl's *Ave Maria* was rejected merely because its title sounded religious to school administrators, even though the song itself had no religious content since it was an unfamiliar piece performed without lyrics. (9a, n. 4). Sculptures like *God*, by Morton Schamberg, could meet a similar fate. Its title is clearly religiously inspired, which is enough to get it banned from schools, but the work actually depicts a twisted pipe on a wooden block.[19] Similarly, Francis Bacon's abstract series would probably not have any religious implications for most viewers, except for those who knew the title he gave them: *Three Studies for Figures at the Base of a Crucifixion*.[20]

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[19] Image available at http://www.nga.gov/exhibitions/2006/dada/artwork/von.shtm

[20] Image available at http://www.tate.org.uk/britain/exhibitions/francisbacon/roomguide/4.shtm

A purely secular educational system, purged of any reference to any religion, threatens to deprive American youth of a rich and diverse cultural heritage. Art, music, literature, and history show us where we have come from and bring meaning to our lives. As Judge Smith put it, "[t]he taking of such unnecessary measures by school administrators will only foster the *increasingly* sterile and hypersensitive way in which students may express themselves [...] and hasten the retrogression of our young into Philistines, who have little or no understanding of our civic and cultural heritage." (emphasis added) (24a). The judiciary's complicity in restricting the range and diversity of voices in American education cannot be ignored or minimized. By granting school administrators standardless power to censor anything with even the slightest connection to religion, the Ninth Circuit's decision has done a great disservice to public school students around the country, restricting rights of free expression, jeopardizing academic freedom, and narrowing tenets encouraging a broad-based education. Unless this Court intervenes, school administrators will have every legal incentive under such mistaken decisions to continue their reaction to controversy by purging altogether religiously inspired works of music, art, and literature from public education.

CONCLUSION

For the reasons stated above, this Court should grant certiorari in this case to provide much-needed guidance to government and school officials

who, at the expense of constitutionally-protected expression, choose to yield to hecklers seeking the extirpation of even trace allusions to religion at publicly-supported events.

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