No. 16-988

# In the Supreme Court of the United States

JOELLE SILVER,

*Petitioner*,

v.

CHEEKTOWAGA CENTRAL SCHOOL DISTRICT, DENNIS KANE, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS SUPERINTENDENT OF SCHOOLS, CHEEKTOWAGA CENTRAL SCHOOL DISTRICT,

*Respondents*.

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

## REPLY BRIEF FOR THE PETITIONER

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### I. Denial of Certiorari in Prior Public School Teacher Speech Cases Is No Basis to Deny Certiorari Here.

Respondents' observation that this Court denied certiorari in each of the principal cases cited by Petitioner for the proposition that there is "no uniform approach" for addressing "the scope of a public school teacher's First Amendment rights within the special characteristics of a school environment," Resp'ts Br. at 7, is not a reason to deny review. Rather, this observation illustrates that litigants are seeking clarification from this Court with regard to important issues involving the First Amendment and that these issues are recurring. In other words, this is a case that this Court should review in order to provide the necessary guidance and clarity on the application of the law. *See* Sup. Ct. R. 10 (considering for review a case in which "a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court").

Respondents place great weight on the fact that the Court denied certiorari in these other cases, making the impertinent comment that "Petitioner offers no reason to believe that the eleventh time is the charm." Resp'ts Br. at 11. However, Respondents appear to be unaware of this Court's longstanding and repeated admonition regarding the weight that should be given to denials of certiorari. As stated by Justice Frankfurter:

> Inasmuch, therefore, as all that a denial of a petition for a writ of certiorari means is that

> fewer than four members of the Court thought it should be granted, this Court has rigorously insisted that such a denial carries with it no implication whatever regarding the Court's views on the merits of a case which it has declined to review. The Court has said this again and again; again and again the admonition has to be repeated.

*Md. v. Balt. Radio Show, Inc.*, 338 U.S. 912, 919 (1950) (opinion of Frankfurter, J., respecting denial of the petition for certiorari).

Indeed, a review of U.S. District Court Judge Roger T. Benitez's decision granting summary judgment in favor of a public school teacher—a decision which the Ninth Circuit reversed in *Johnson v. Poway Unified School District*, 658 F.3d 954 (9th Cir. 2011) (one of the cases in which this Court denied certiorari)—and Senior Circuit Judge James Emmett Barrett's dissent in *Roberts v. Madigan*, 921 F.2d 1047 (10th Cir. 1990) (another such case), in which he would have ruled in favor of the teacher, and it is evident that there is a different approach to resolving the issues presented—an approach that is consistent with this Court's precedent and *not* hostile to religion.

In his decision granting the teacher's motion for summary judgment in *Johnson*, Judge Benitez made the following relevant observation:

> Public schools play an important role educating and guiding our youth through the marketplace of ideas and instilling national values. One method used by the Poway Unified School District to accomplish this task is to permit

> students to be exposed to the rich diversity of backgrounds and opinions held by high school faculty. In this way, the school district goes beyond the cramped view of selecting curriculum and hiring teacher speech to simply deliver the approved content of scholastic orthodoxy. By opening classroom walls to the non-disruptive expression of all its teachers, the district provides students with a healthy exposure to the diverse ideas and opinions of its individual teachers. Fostering diversity, however, does not mean bleaching out historical religious expression or mainstream morality. By squelching only Johnson's patriotic and religious classroom banners, while permitting other diverse religious and anti-religious classroom displays, the school district does a disservice to the students of Westview High School and the federal and state constitutions do not permit this one-sided censorship.

*Johnson v. Poway Unified Sch. Dist.*, No. 07cv783 BEN (NLS), 2010 U.S. Dist. LEXIS 25301, at *3-4 (S.D. Cal. Feb. 25, 2010), *rev'd*, 658 F.3d 954 (9th Cir. 2011).

While the Ninth Circuit did not agree with Judge Benitez, Petitioner contends that he was correct. And his observation is fully applicable here: Respondents' one-sided censorship is not permitted by the U.S. Constitution. Indeed, viewpoint discrimination is the most egregious form of content discrimination under the First Amendment. *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995); *R.A.V. v. St. Paul*, 505 U.S. 377, 386-92 (1992). It is prohibited in every forum and in virtually every situation

involving the First Amendment.[1] *See id*.; *see also Peck v. Baldwinsville Cent. Sch. Dist.*, 426 F.3d 617, 633 (2d Cir. 2005) ("[W]e conclude that a manifestly viewpoint discriminatory restriction on school-sponsored speech is, *prima facie*, unconstitutional, *even if* reasonably related to legitimate pedagogical interests."). And this principle applies to restrictions on religious viewpoints as well. *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist*., 508 U.S. 384, 393 (1993) (holding that the challenged restriction was viewpoint based and unconstitutional even though "all religions and all uses for religious purposes [were] treated alike").

Similarly applicable is Senior Circuit Judge Barrett's observations in his dissent in *Roberts*, in which he stated:

> The United States Supreme Court has made it abundantly clear that the Constitution does not require complete separation of church and state and that it "affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any. *See,*

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[1] This case undoubtedly implicates Petitioner's First Amendment rights. *Marchi v. Bd. of Coop. Educ. Servs. of Albany*, 173 F.3d 469, 475 (2d Cir. 1999) ("The directive is unquestionably a restraint on [the plaintiff teacher's] First Amendment rights."). And Respondents' efforts to rewrite the record regarding the fact that Petitioner's items were displayed pursuant to Respondents' policy of permitting teachers in the School District to engage in such personnel, non-curricular speech must be rejected. (*See* JA-134) (admitting existence of policy in Answer). Consequently, this case directly involves viewpoint discrimination and whether Respondents' unfounded fear of violating the Establishment Clause justifies such discrimination.

*e.g., Zorach v. Clauson*, 343 U.S. 306-314(1952); *Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203, 211 (1948)." *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984). I believe that those mandates were violated by Principal Madigan and the School District in this case. Their actions forbidding Mr. Roberts from reading his Bible during his fifth grade class' 15-minute silent reading period and ordering the removal of the two challenged books from his classroom library were acts of intolerance, lack of accommodation and hostility toward the Christian religion.

* * *

It is a far cry from tolerance and accommodation toward Christianity to interpret the practices in Mr. Roberts' classroom as "teaching" or "endorsement" of Christianity in violation of the Establishment Clause. I observe that such *findings* by the district court, which the majority here upholds under either the clearly erroneous standard or the *de novo* standard, have no basis in *any* aggrieved testimony of fifth grade students or their parents, past or present. The only "live" complainant in this case was Principal Madigan, whose views on separation of church and state are absolute. She applied a "bright line" approach. The district court's "findings" are really legal conclusions. There is no basis, other than speculation, for implying, as does the majority opinion, that the practices in Mr. Roberts' classroom constituted religious indoctrination. . . . Presumably, such would not

> have been the case had Mr. Roberts read the books on Buddhism or Indian religions. Principal Madigan did not object to them. Thus, it seems that any concern that elementary children are "vastly more impressionable than high school or university students," . . . cannot be a serious defense. In this case, it was Principal Madigan and the School District who violated the Establishment Clause.
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> * * *
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> I would hold that Principal Madigan's actions were constitutionally unwarranted and that the district court was clearly erroneous. Principal Madigan insisted on the *obliteration* of all Christian books from the school premises. Her extreme stance would convert the "primary effect" prong of the Establishment Clause into governmental disapproval, disparagement and hostility toward the Christian religion.

*Roberts*, 921 F.2d at 1059-63 (Barrett, J., dissenting) (internal citations omitted).

Here, Respondents insisted on the *obliteration* of all Christian references no matter how obscure, remote, or discreet. Indeed, Respondents demanded the removal of small "sticky notes" that Petitioner had affixed to the back of her desk because these notes contained religious content and viewpoints. Pet. at 8-9. Respondents' "extreme stance" converts "the Establishment Clause into governmental disapproval, disparagement and hostility toward the Christian religion." *See id*.

This Court should grant review of this case and reverse this disturbing trend of hostility toward religion in our public schools.

## II. This Case Is the Ideal Vehicle to Address the Constitutional Rights of Public School Teachers.

Respondents argue that this petition "presents a poor vehicle to review the myriad issues raised by Petitioner," claiming that she "ignores this Court's governing rule under its decisions in *Garcetti* and *Connick*." *See* Resp'ts Br. at 21-30. Respondents are mistaken, and their arguments demonstrate the need for this Court to grant the petition and resolve the questions presented.

To begin, the principal case relied upon by the Second Circuit in its ruling against Petitioner below was *Marchi v. Board of Cooperative Educational Services of Albany*, 173 F.3d 469 (2d Cir. 1999)—a case involving the constitutional rights of a public school teacher. Yet, the court in *Marchi* did not rely upon (or even cite) *Connick v. Myers*, 461 U.S. 138, 142 (1983) or *Pickering v. Board of Education*, 391 U.S. 563 (1968) (*Garcetti v. Ceballos*, 547 U.S. 410 (2006) was decided in 2006). However, the court did cite and rely upon *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969) and *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988)—two cases that Respondents criticize Petitioner for referencing. As stated by Respondents: "[Petitioner], however, points to cases that neither implicated the Establishment Clause nor involved classroom speech by a teacher: *Tinker*, *Hazelwood Sch. Dist.*, and *Pickering*. In other words, she cites cases that do not

involve classroom speech by teachers and argues that these cases do not establish a clear standard for cases involving classroom speech by teachers." Resp'ts Br. at 23-24.

Respondent proceeds to state that Petitioner "overlooks this Court's precedents that do address a public school teacher's classroom speech rights," claiming that "the circuit courts have uniformly applied *Garcetti / Connick / Pickering* and concluded that school districts may proscribe teacher speech in the classroom." Resp'ts Br. at 24. However, as noted above, the Second Circuit did *not* apply these cases in *Marchi*. Indeed, the Second Circuit did not rely upon "*Garcetti / Connick / Pickering*" in *this* case. *See* App. 1-5. Respondents' claim is inaccurate.

Respondents proceed to make the following accusation: "The fact that [Petitioner] does not even cite, let alone address, either *Garcetti* or *Connick* shows that her entire petition is based upon a willful refusal to acknowledge the controlling authority. [Petitioner] offers no reason to think that this case presents an issue that was not raised in any of the previous teacher speech cases in which this Court has denied *certiorari*." Resp't Br. at 25. However, neither *Garcetti* nor *Connick* involved the free speech rights of a public school teacher—they both involved employment decisions arising in district attorneys' offices. And neither case involved the Establishment Clause. Consequently, Respondents' criticism simply highlights the need for clarity from this Court.

As noted by Petitioner, the lower courts have applied variations of *Tinker*, *Hazelwood* and *Pickering* when evaluating free speech claims of public school

teachers. *See* Pet. at 15-21. But there is no uniform approach. Indeed, both *Tinker* and *Hazelwood* involved restrictions on student speech. And *Pickering* involved a teacher who was punished for writing and publishing a letter in a local newspaper that was critical of the school board. None of these cases (including *Connick* and *Garcetti*) involved the Establishment Clause, and none of these cases involved the question of whether a forum analysis should apply, as the circumstances of this case warrant (or at least strongly suggest). In sum, this case is the perfect vehicle for resolving the questions presented.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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