No. 11-804

IN THE

Supreme Court of the United States

JONATHAN MORGAN, by and through his parents and legal guardians, DOUG MORGAN and ROBIN MORGAN, ET AL.,

Petitioners,

v.

LYNN SWANSON, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF FOR CATO INSTITUTE AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

For purposes of qualified immunity, is it clearly established that school officials cannot discriminate against private student-to-student speech during non-curricular activities and at non-curricular times solely on the basis of the religious viewpoint of that speech?

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute was established in 1977 as a nonpartisan 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 the principles of limited constitutional government and secure those constitutional rights, both enumerated and unenumerated, that are the foundation of individual liberty. Toward those ends, Cato publishes books and studies, conducts conferences and forums, publishes the annual *Cato Supreme Court Review*, and files *amicus* briefs. 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.

SUMMARY OF THE ARGUMENT

School officials in this country—particularly those in the Fifth Circuit—have fair warning that view-point based discrimination against student speech during non-curricular activities and at non-curricular times violates the First Amendment. Indeed, at a minimum, the First Amendment prohibits government officials from suppressing speech based solely on its content. Government officials certainly

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[1] The parties have consented to the filing of this brief. Counsel of record for all parties received notice at least ten days prior to the due date of the intention of *amicus curiae* to file this brief. Pursuant to Supreme Court Rule 37.6, counsel for *amicus curiae* certify that this brief was not written in whole or in part by counsel for any party and that no person or entity other than *amicus curiae*, its members, and its counsel has made a monetary contribution to its preparation and submission.

cannot suppress speech simply because speech is religious or made on a school campus.

Despite this firm constitutional principle, the Fifth Circuit found that the law was not clearly established because there was no "specific and factually analogous" precedent defining the constitutional right with a "high degree of particularity." But, for purposes of qualified immunity, that is not the standard for determining whether a law is clearly established. Instead, a law is clearly established when government officials receive "fair warning" that their actions are unconstitutional. This Court has repeatedly made clear that "fundamentally similar" or "materially similar" cases are not required and that general statements of the law can give fair warning.

The Fifth Circuit erred by broadly discounting all general statements of law as incapable of providing fair warning. When the law declares certain actions constitutionally prohibited except in specific, limited circumstances, the law is clearly established in the absence of those narrow exceptions. In this case, general statements of law provide fair warning because the deprivation of a student's First Amendment rights is unconstitutional unless it falls within one of the narrowly-tailored, specifically enumerated exceptions that this Court has established. Because none of those enumerated exceptions apply to the pleaded facts in this case, it was and is beyond debate that the school officials' actions violated the Constitution.

The Fifth Circuit's requirement of a perfect case renders the clearly established law standard irrelevant. It is unlikely that the precise

constitutional issue in any given case was previously decided on analogous facts by a court capable of establishing binding precedent.

The Fifth Circuit also improperly looked to non-precedential opinions from other circuits to find that the law was not "clearly established." The court was not entitled to look to authority from non-binding sources unless its own case law and that of this Court failed to provide "fair warning" to government officials that their conduct was unconstitutional. But it did. Courts cannot consider non-binding precedent—when binding precedent offers sufficient guidance—simply because the binding precedent is not "specific and factually analogous."

Government officials cannot plead ignorance and invoke qualified immunity because the exact same case has not already been litigated. Neither can they scour the furthest and murkiest corners of constitutional jurisprudence to render otherwise well settled law "unclear." If they could, no law—particularly no constitutional law—could ever be clearly established.

ARGUMENT

I. THE FIFTH CIRCUIT'S DECISION RENDERS IT VIRTUALLY IMPOSSIBLE FOR ANY CONSTITUTIONAL LAW TO BE "CLEARLY ESTABLISHED" FOR QUALIFIED IMMUNITY PURPOSES

The standards for clearly established law and the doctrine of collateral estoppel are worlds apart. Nevertheless, according to the Fifth Circuit's *en banc* decision here, the law can be clearly established for purposes of qualified immunity only in those rare cases in which substantially the same facts have

already been fully and conclusively litigated. *Morgan v. Swanson*, 659 F.3d 359, 372, 374 (5th Cir. 2011) (*en banc*) (requiring prior cases that were "specific and factually analogous" and defined with a "high degree of particularity"). By tossing aside broad constitutional prohibitions and instead demanding prior litigation based on virtually identical facts, the Fifth Circuit has effectively contorted the "clearly established" standard into a deformed version of collateral estoppel.

But there are endless variations on how any given constitutional principle or prohibition could be violated, and most constitutional violations are never fully litigated. The chance that any particular constitutional violation has already been fully litigated before a court capable of establishing precedent—and on identical or highly analogous facts—is infinitesimally small. Thus, under, the Fifth Circuit's new standard, constitutional law will rarely, if ever, be "clearly established," and qualified immunity will always apply. That is not what this Court's qualified immunity law dictates.

A. General Statements Can Clearly Establish Constitutional Law

The Fifth Circuit's heightened standard for what it takes for a law to be "clearly established" directly contradicts this Court's precedent. The result is a turbo-charged version of qualified immunity that would virtually always apply to shield government officials from liability for even the most glaring constitutional violations, rendering an important protection of individual constitutional rights—the threat of personal liability—toothless.

Unfortunately, the Fifth Circuit's misstep is hardly novel: the court instead followed the errors of the Sixth and Eleventh Circuits. In *United States v. Lanier*, 73 F.3d 1380, 1393 (6th Cir. 1996) (*en banc)*, the Sixth Circuit held there was a lack of "fair notice" because the constitutional right allegedly violated had not been identified in any earlier case involving a factual situation "fundamentally similar" to the one at issue. And in *Hope v. Pelzer*, 240 F.3d 975, 981 (11th Cir. 2001), the Eleventh Circuit held "the federal law by which the government official's conduct should be evaluated must be preexisting, obvious and mandatory" and established, not by "abstractions," but by cases that are "'materially similar' to the facts in the case in front of us." The Eleventh Circuit thus permitted qualified immunity in a case alleging an Eighth Amendment violation because the facts in the two precedents on which the plaintiff primarily relied "[t]hough analogous," were not "'materially similar' to [the plaintiff]'s situation." *Id.* In both cases, this Court granted certiorari and reversed. *See United States v. Lanier,* 520 U.S. 259, 272 (1997); *Hope v Pelzer*, 536 U.S. 730, 741 (2002).

The key holding in both cases was "that officials can still be on notice that their conduct violates established law even in novel factual circumstances." *Hope*, 536 U.S. at 741. As this Court has explained:

> [I]n *Lanier*, we expressly rejected a requirement that previous cases be "fundamentally similar." Although earlier cases involving "fundamentally similar" facts can provide especially strong support for a conclusion that the law is clearly established, they are not

> necessary to such a finding. The same is true of cases with "materially similar" facts.

Id. Thus, the law can be "clearly established" despite "notable factual distinctions between the precedents relied on and the cases then before" a court, "so long as the prior decisions gave reasonable warning that the conduct . . . violated constitutional rights." *Lanier,* 520 U.S. at 269.

The Fifth Circuit's approach here runs roughshod over not only this Court's *Lanier* and *Hope* decisions, but also other similar rulings.

For instance, the Fifth Circuit's rule that general statements can never clearly establish the law directly contradicts this Court's holding that, in some circumstances, such statements *can* do exactly that. *See Hope*, 536 U.S. at 741 (quoting *Lanier*, 520 U.S. at 270-71 ("[G]eneral statements of the law" can give "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.") (citation and internal quotation marks omitted)).

Likewise, the Fifth Circuit's demand for a hyper-fact-specific precedent directly contradicts this Court's repeated admonition that, for the law to be clearly established, a case does *not* need to be "directly on point." *Ashcroft v. al-Kidd,* 131 S. Ct. 2074, 2083 (2011) ("We do not require a case directly on point."); *see also Hope,* 536 U.S. at 739 (rejecting such a "rigid gloss on the qualified immunity standard" as "not consistent" with prior cases and refusing "to say that an official action is protected by

qualified immunity unless the very action in question has previously been held unlawful"); *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 [be] previously . . . held unlawful.'" (citation omitted)).

The level of specificity that the Fifth Circuit now demands for "fair warning" is also unworkable. In addition to requiring cases that were "specific and factually analogous" and defined with a "high degree of particularity," the *en banc* Court of Appeals suggested that precedent must match the facts of the present case on multiple points. The court explained that "[n]either the Supreme Court nor this Court has explained whether *Tinker* or *Hazelwood* governs students' ***dissemination*** of ***written religious*** materials ***in*** public ***elementary*** schools, whether at ***official parties, after*** school ***on the 'lawn and sidewalk,'*** or at ***unspecified times*** and ***in unspecified places during*** the school day." *Morgan*, 659 F.3d at 376 (emphasis added). But requiring precedent to describe whether the official action took place in music class or during show-and-tell, or whether the official action involved pencils or bookmarks, does not assist with the fair warning inquiry. School officials in Plano, Texas had ample fair warning that the general prohibition of viewpoint discrimination in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), controls in schools, absent specific exceptions that do not apply to the pleaded facts. A "specific and factually analogous" case is not required.

Because cases will rarely be as "specific and factually analogous" as the Fifth Circuit requires,

officials operating under that standard will almost always be able to claim that the law was not clearly established. *See Safford Unified Sch. Dist.*, 129 S. Ct. at 2643 ("[T]he easiest cases don't even arise.") (citation and internal quotation marks omitted). The Seventh Circuit has further explained this problem:

> It begins to seem as if to survive a motion to dismiss a suit on grounds of immunity the plaintiff must be able to point to a previous case that differs only trivially from his case. But this cannot be right. The easiest cases don't even arise. There has never been a section 1983 case accusing welfare officials of selling foster children into slavery; it does not follow that if such a case arose, the officials would be immune from damages liability because no previous case had found liability in those circumstances.

K.H. v. Morgan, 914 F.2d 846, 851 (7th Cir. 1990).

It is critical that this Court clarify—yet again—that specific, directly-on-point, factually analogous precedent is not required to clearly establish the law. Government officials should not be able to cut off "'the only realistic avenue for vindication of constitutional guarantees'"—personal liability—by claiming that prior precedent is not specifically analogous. *Anderson v. Creighton*, 483 U.S. 635, 638 (1987) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982)).

B. Rather Than Being Established Only "At A High Level Of Generality," Students' Speech Rights Have Been Established With Specificity Through General Statements.

The Fifth Circuit's heavy reliance on this Court's statement in *al-Kidd* that clearly established law should not be defined at a "high level of generality" is misplaced. *Morgan*, 659 F.3d at 373. Far from a referendum on the Court's prior holding in *Hope*—which neither the majority nor concurring opinions in *al-Kidd* even mentioned—this Court's statement in *al-Kidd* was merely an admonishment of the Ninth Circuit for stating legal principles with such a high level of generality so as to render them meaningless. 131 S. Ct. at 2084 ("We have repeatedly told courts—and the Ninth Circuit in particular . . . not to define clearly established law at a high level of generality . . . . The general proposition, for example, that an unreasonable search or seizure violates the Fourth Amendment is of little help in determining whether the violative nature of particular conduct is clearly established.").

While the circular statement that an "unreasonable search" is unconstitutional means nothing without additional guidance on what is "unreasonable," no such ambiguity exists as to students' speech rights. When public officials restrict students' speech, their actions are unconstitutional unless they fall within one of the specifically enumerated exceptions that this Court has established. By demanding a perfectly on-point, factually analogous precedent, the Fifth Circuit turns the operation of this principle on its head.

When the law declares certain actions constitutionally prohibited except in specific, limited circumstances, the law is clearly established in the absence of those narrow exceptions. With its 1969 decision in *Tinker v. Des Moines Independent Community School District*, this 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. 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.").

Since issuing its *Tinker* decision, this Court has established—in equally clear terms—only 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 only restrict student speech that officials reasonably believe:

(1) will "materially and substantially disrupt the work and discipline of the school," *id.* at 513;

(2) is "lewd" or "vulgar," *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986); or

(3) may be reasonably viewed as advocating unlawful drug use, *Morse v. Frederick*, 551 U.S. 393, 410 (2007).[2]

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

The Court has also recognized that school officials have a heightened interest in regulating student speech whenever that speech carries the imprimatur of the school itself—the "school-sponsored speech" exception. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988).

In short, under *Tinker*, all viewpoint-based discrimination in public schools violates the Constitution, absent a handful of narrow exceptions. Here, Petitioners' pleaded facts do not leave room for any of the narrow exceptions to the general rule. Moreover, because Respondents have never claimed that the students' religious speech created a risk of material and substantial disruption, this Court is 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. Accordingly, it is "beyond debate" that the facts alleged here violate the First Amendment.

The decision below acknowledged that "'[d]iscrimination against speech because of its message is presumed to be unconstitutional.'" *Morgan*, 659 F.3d at 378 (citation omitted). But the Fifth Circuit reasoned that "this rule is far too general to clearly establish the law in this case." *Id.* Not so. As explained above, this is exactly the type of rule that is capable of providing fair warning to government officials that view-point based discrimination against private student-to-student speech during non-curricular activities and at non-curricular times violates the First Amendment.

II. COURTS CANNOT LOOK TO NON-BINDING OPINIONS TO FIND THAT THE LAW WAS NOT "CLEARLY ESTABLISHED" SIMPLY BECAUSE BINDING PRECEDENT IS NOT "SPECIFICALLY AND FACTUALLY ANALOGOUS" TO THE INSTANT CASE

It is a fundamental principle that circuit courts must look first to their own binding precedent and that from this Court before turning to non-binding rulings from other courts to determine whether a law is clearly established. Yet the Fifth Circuit cast aside this Court's precedent because it did not specifically involve "elementary-student speech—at school, during the school day," and looked instead to non-binding decisions from other circuits, including a decision out of the Third Circuit that it believed to be "practically on all fours" with this case. *Morgan*, 659 F.3d at 380. By elevating factual similarity over precedential value, the Fifth Circuit erred.

As described above, 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. This, too, is the standard that should be used to determine whether binding precedent has provided sufficient guidance or if non-binding precedent may be considered.

Fair notice for public school officials in Texas derives from the decisions, when available, of this Court and the Fifth Circuit. *Hope*, 536 U.S. at 741 (finding a right clearly established in the Eleventh Circuit when this 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 because local courts will ultimately decide Respondents' liability. Justice Kennedy's recent concurrence in *Ashcroft v. al-Kidd* similarly stated that, when officials "perform their functions in a single jurisdiction, say within the confines of one State or one federal judicial district," they are "expected to adjust their behavior in accordance with local precedent." *al-Kidd*, 131 S. Ct. at 2086 (Kennedy, J., concurring).

Respondents are not entitled to dilute the clear notice they received from this Court and the Fifth Circuit regarding the scope of students' speech rights by looking to purported contrary law of other circuits. Indeed, the Fifth Circuit has recognized this sound principle for nearly a decade. *See McClendon v. City of Columbia*, 305 F.3d 314, 329 (5th Cir. 2002) (*en banc*).

When the Fifth Circuit "adopt[s] or reject[s] [a constitutional liability] theory prior to [official action,] that . . . end[s] [the clearly established] inquiry." *Id.* at 327 n.10. This Court recently confirmed that public officials such as Respondents should consider non-binding decisions for purposes of determining whether the contours of a constitutional right are clearly established *only* where the relevant court has failed to provide *sufficient guidance*. *al-Kidd*, 131 S. Ct. at 2083-84 (stating that a "district-court opinion['s suggestion], in a footnoted dictum devoid of supporting citation" is not "'controlling authority' in any jurisdiction" and "falls far short of what is necessary absent controlling authority: a robust 'consensus of cases of persuasive authority'"); *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, 617 (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).

The decision below correctly stated that clearly established law comes from "controlling authority—*or* a robust consensus of persuasive authority." *Morgan*, 659 F.3d at 371-72 (emphasis added) (internal quotation marks omitted). However, the Court of Appeals incorrectly required that controlling authority to "*specifically* prohibit[] a defendant's conduct." *Id.* at 372 (emphasis added).

As explained above, this Court and the Fifth Circuit provided fair warning to Plano public school officials that the First Amendment does not permit viewpoint-based discrimination of private student-to-student speech during non-curricular activities and at non-curricular times. Because binding precedent provided sufficient guidance, the Fifth Circuit was not entitled to look to non-binding precedent to determine whether the law was clearly established—and then decide that it was not.

CONCLUSION

For the forgoing reasons, the Cato Institute respectfully urges the Court to grant the petition.

Respectfully submitted,

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