12-753

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

A.M., a minor, by her Parent and next Friend, JOANNE MCKAY,

Plaintiff-Appellant,

v.

TACONIC HILLS CENTRAL SCHOOL DISTRICT,

Defendant-Appellee.

On Appeal from the United States District Court
for the Northern District of New York

APPELLANT'S PETITION FOR PANEL REHEARING
AND FOR REHEARING EN BANC

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INTRODUCTION

A.M., as co-president of her eighth-grade class, gave a speech at her middle school graduation ceremony that she wished to end with the following words:

> As we say our goodbyes and leave middle school behind, I say to you, may the Lord bless you and keep you, make His face shine upon you and be gracious to you; lift up His countenance upon you, and give you peace.

Despite the fact that graduation speakers regularly express good wishes for graduating students and hope for their future, the Taconic Hills Central School District (the "District") deemed A.M.'s viewpoint to be "too religious." And it prohibited her expression of good will from a religious perspective.

A.M. complied with the District's instructions and subsequently filed suit to vindicate her right to freedom of speech. The district court granted summary judgment in the District's favor, *see A.M. v. Taconic Hills Cent. Sch. Dist.*, No. 1:10-CV-20, 2012 WL 177954 (N.D.N.Y. Jan. 23, 2012), and a panel of this Court affirmed in a summary order spanning less than ten pages, *see A.M. v. Taconic Hills Cent. Sch. Dist.*, No. 12-753, slip op. (2d Cir. Jan. 30, 2013) ("Op.").

Panel rehearing or en banc review is necessary to reconcile the conflict between the panel opinion and, among other precedents, the Supreme Court's decisions in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969); *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988);

and *Morse v. Frederick*, 551 U.S. 393 (2007), as well as this Court's recent opinion in *Bronx Household of Faith v. Board of Education.*, 650 F.3d 30 (2d Cir. 2011).

This case also involves many issues of exceptional importance, including, but not limited to, the legal standard applicable to students' graduation speech, the content or viewpoint-based nature of discrimination against a religious expression of good will and hope for the future, the extent of a school's "pedagogical" interests in censoring such expression, and the Establishment Clause's application to students' graduation speech. Any one of these issues would warrant review by the full court; together, the need for an en banc hearing is unmistakable.

ARGUMENT

I. *Bronx* Did Not Characterize Restrictions on Religious Speech as Content Based, Rather Than Viewpoint Based, Distinctions.

In characterizing the District's censorship of A.M.'s religious speech as content based discrimination, the panel opinion misinterprets and radically expands this Court's holding in *Bronx*. *See* Op. at 7-8 ("In the context of religious speech, content discrimination would entail excluding speech for which 'there is no real secular analogue.'" (quoting *Bronx Household of Faith v. Cmty. Sch. Dist. No. 10*, 127 F.3d 207, 221 (2d Cir. 1997) (Cabranes, J., concurring in part and dissenting in part)). The *Bronx* majority went to great pains to explain that it was not considering a ban on religious *speech* because the "[e]xpression of all points of view [was] permitted." *Bronx*, 650 F.3d at 39. At issue was "the conduct of a

certain type of *activity*—the conduct of worship services—and not … the free expression of religious views associated with it." *Id.* (emphasis added). The complete quotation briefly alluded to in the panel opinion makes this point clear:

> Unlike religious instruction, there is no real secular analogue to religious services, such that a ban on religious services might pose a substantial threat of viewpoint discrimination between religion and secularism.

Id. at 38 (quotation omitted).

In this case, the District has never contested that the excised portion of A.M.'s graduation speech constitutes religious expression, not some form of purely religious activity. Nor could it do so with a straight face. Even the panel opinion recognizes that the good wishes A.M. desired to express to her classmates "constituted … religious *speech*." Op. at 8 (emphasis added). Consequently, the holding in *Bronx*, which related to an *activity* the Court regarded as purely religious, does not apply here. The panel opinion's opposite conclusion is simply unsupportable as a matter of law or fact, as it entirely ignores the unique and widely different circumstances involved in the *Bronx* case.

Unlike in *Bronx*, censorship of A.M.'s religious expression of goodwill to her classmates clearly implicates "a substantial threat of viewpoint discrimination between religion and secularism." *Bronx*, 650 F.3d at 38 (quotation omitted). The District does not contend that it would have banned A.M.'s secular expression of hope for her classmates' peace, prosperity, and happiness. If it had, there would be

little point to allowing graduation speeches at all. For the very point of such exercises is to congratulate students on their accomplishments, perhaps give some useful advice, and wish the students well in their future endeavors. That A.M.'s good wishes took a religious rather than a secular form does not make them *sui generis*, or as the panel opinion indicated "purely religious."[1] Op. at 8; *see also id.* (stating that A.M.'s speech did not "offer[] a religiously-informed viewpoint on an otherwise secular subject matter"). To the contrary, it proves the District "refused to allow [expressions of good will] from a religious perspective, while permitting [such expressions] from a secular perspective." *Bronx*, 650 F.3d at 39 (citing *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 107-08 (2001)).

This conclusion is supported—not undermined—by *Bronx*, which specifically noted that "[p]rayer, religious instruction, expression of devotion to God, and the singing of hymns" were "not excluded" by the policy at issue. *Id.* at 36. The same is obviously not true of the District's embargo here. Instead of "solely" prohibiting "the conduct of a particular type of event," *id.* at 37, the District censored A.M.'s religious expression of good will for her classmates because it feared controversy. In so doing, the District prevented A.M. from

[1] The fact that A.M.'s words paraphrased a portion of the Old Testament, *see* Op. at 8, is clearly beside the point. Literature and speeches in this country are chock full of biblical allusions like "Good Samaritan" and "Goliath." That is hardly surprising given that the Bible is—by far—the bestselling and most culturally influential book in the Western world.

expressing the same sentiments as other graduation speakers—hopes for the eighth grade class's bright future—based on her "religious point of view." *Id.* at 38; *see also id.* at 39 (acknowledging the First Amendment forbids school officials from prohibiting speech because it "promote[s] or manifest[s] a particular belie[f] in or about a deity or an ultimate reality" (quotation omitted)).

II. The District's Censorship of A.M.'s Graduation Speech Constitutes Viewpoint-Based, Not Content-Based, Discrimination.

Although the panel opinion erred in applying *Hazelwood* to A.M.'s non-curricular speech, *see infra* Part IV, it correctly held that the District could not engage in viewpoint discrimination unless it could overcome strict scrutiny. *See* Op. at 7 ("Even under the deferential standard articulated in *Hazelwood*, viewpoint discrimination can only be justified by an 'overriding' state interest." (quoting *Peck v. Baldwinsville Cent. Sch. Dist.*, 426 F.3d 617, 633 (2d Cir. 2005)). That principle is alone sufficient to compel reversal in this case because the District's censorship of A.M.'s religious speech constitutes viewpoint-based, not content-based, discrimination. *But see id.* at 8 (holding the District's exclusion of A.M.'s speech qualified as "content-based discrimination").

The First Amendment generally prohibits government "[d]iscrimination against speech because of its message." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995). At its heart, this mandate of ideological neutrality ensures that government does "not favor one speaker over another." *Id.*

When the government's rationale for a speech restriction implicates "the specific motivating ideology or the opinion or perspective of the speaker" the First Amendment's mandate of viewpoint neutrality is breached. *Id.* at 829. "Religion may be a vast area of inquiry, but it also provides … a specific premise, a perspective, a standpoint from which a variety of subjects may be discussed and considered." *Id.* at 831. Consequently, "speech discussing otherwise permissible subjects cannot be excluded … on the ground that the subject is discussed from a religious viewpoint." *Good News Club*, 533 U.S. at 112.

The only reason the District gave for censoring A.M.'s expression of good will for her classmates was that it "sounded 'too religious.'" Op. at 4. Importantly, the District has never said that expressions of good wishes and hope for the future were forbidden. Nor has it indicated that aspirations of peace and prosperity were disallowed. Consequently, the District's critique of the religiosity of A.M.'s viewpoint is clearly impermissible. There is no indication that A.M.'s expression of good will was "denied for any reason other than the fact that the presentation would have been from a religious perspective." *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 393-94 (1993). The District's favoritism of secular "viewpoints or ideas at the expense of" their religious counterparts violates the First Amendment. *Id.* at 394 (quotation omitted).

In short, there is no legal or factual support for the panel opinion's

conclusion that the blessing A.M. used to express goodwill for her classmates lacks a "secular analogue." Op. at 8 (quoting *Bronx*, 650 F.3d at 38). *Bronx*, as previously explained, disclaims any application to pure speech and recognizes that government cannot proscribe expression based on its religious character. *See supra* Part I. And everyone who has ever browsed the racks of a Hallmark store knows that both secular and religious expressions of good will abound in our society. That is why separate sections for religious and non-religious cards exist. Both varieties wish newlyweds well in their life together, offer hope for the future of a new child, and express wishes that a friend's broken body will mend quickly. Religious cards simply refer to God, while secular cards do not.[2]

There is nothing inherently religious about a "blessing," which simply involves "approval" and "encouragement," or the expression of hope for a future "conducive to [another's] happiness or welfare." Merriam-Webster Online Dictionary (last visited Feb. 7, 2013). Even blessings in nations with a strong religious heritage have a secular strain.[3] A classic example is the Irish blessing:

> May love and laughter light your days, and warm your heart and home. May good and faithful friends be yours, wherever you may roam. May peace and plenty bless your world with joy that long endures. May all

[2] Indeed, secularizing a religious expression of good will is generally simply a matter of excising all references to God and substituting the passive voice.

[3] For some modern examples of secular blessings for weddings, funerals, baby namings, and various other occasions, see the American Humanist Organization's "Secular Seasons: Secular Celebrations & Humanist Ceremonies," *available at* http://www.secularseasons.org/celebrations/index.html (last visited Feb. 8, 2013).

life's passing seasons bring the best to you and yours.

The District has never suggested, in any form or fashion, that it would have barred students from repeating such words. But when A.M. offered the same hope for "bless[ings]" in the form of "shin[ing]" light, "gracious" days, and a "peace[ful]" life from a religious perspective, her speech was banned.

Thus, contrary to the panel opinion's holding, A.M.'s speech "offer[ed] a religiously-informed viewpoint on an otherwise [permissible] subject matter." Op. at 8. It is black letter law that government may not exclude speech because it is "'quintessentially religious' or 'decidedly religious in nature.'" *Good News Club*, 533 U.S. at 111 (quotation omitted). The Supreme Court established long ago that religious principles do not "taint[]" expressions of good will "in a way that other foundations for thought or viewpoints do not." *Id.* Accordingly, the District's censorship of A.M.'s speech represents impermissible viewpoint discrimination.[4]

III. No Valid Justification Exists for Censoring A.M.'s Private Religious Speech Under *Tinker*, *Hazelwood*, or the Establishment Clause.

As in *Tinker*, A.M.'s religious expression "involves direct, primary First Amendment rights akin to 'pure speech.'" 393 U.S. at 508. Justifying censorship of A.M.'s "particular expression of opinion" thus requires the District to show that its actions were "caused by something more than a mere desire to avoid the

[4] Viewpoint discrimination would still occur even if the District banned all speech of a "religious" and "antireligious" nature. *See Rosenberger*, 515 U.S. at 831.

discomfort and unpleasantness that always accompany an unpopular viewpoint." *Id.* at 509. To be precise, the District must demonstrate that its deletion of one non-sectarian and non-proselytizing sentence from A.M.'s remarks was calculated "to avoid material and substantial interference" with school activities. *Id.* at 511. This it cannot do. Nothing in the record suggests that A.M.'s expression of good will to her classmates would have interfered, in any respect, with the graduation ceremony, let alone introduced a material and substantial disruption. *Tinker* thus offers no shelter for the District's embargo on A.M.'s religious speech.

The District's censorship fares no better under *Hazelwood*. Contrary to the panel opinion's holding, "violating the Establishment Clause" does not represent a "'pedagogical concern,'" legitimate or otherwise. Op. at 9. The term "pedagogical," which means "of, relating to, or befitting a teacher or education," can only bear so much weight. Merriam-Webster Online Dictionary (last visited Feb. 8, 2013). Its scope does not extend to purely legal considerations, such as the Establishment Clause, which is clearly not violated by A.M.'s private speech. What is more, an actual Establishment Clause violation is necessary to even consider censoring student expression, *see Widmar v.* Vincent, 454 U.S. 263, 271 (1981); a mere legal "concern" is clearly insufficient. Otherwise, such "concerns" would constitute a "get-out-of-jail-free card" that would render the Supreme Court's Establishment Clause analysis in *Widmar*, *Rosenberger*, etc. completely

unnecessary. *See also Good News Club*,, 533 U.S. at 13 (determining whether a "valid Establishment Clause interest" exists).

Nor did the District's censorship of A.M.'s speech insulate the school from a "matter[] of political controversy." Op. at 9 (quotation omitted). Expressing well wishes for a graduating class is not a controversial endeavor. The only factor suggesting otherwise is A.M.'s religious viewpoint, which even the panel opinion admitted was not a valid pedagogical basis for exclusion. *Id.* at 7.

That leaves the Establishment Clause, which the Supreme Court has never applied to private religious conduct or found to justify viewpoint discrimination. *See Good News Club*, 533 U.S. at 113, 115. No reasonable observer aware of all the relevant facts and circumstances, including school officials' trenchant opposition to A.M.'s religious blessing, would believe that her speech was attributable to the District. *Cf. Doe v. Sch. Dist. of City of Norfolk*, 340 F.3d 605, 612-13 (8th Cir. 2003). A.M.'s speech is thus protected as private religious expression, not condemned as government-sponsored speech. *See Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 302 (2000) (recognizing the "crucial difference" between protected "*private* speech endorsing religion" and forbidden "*government* speech endorsing religion"). *But see* Op. at 8 (citing precedent applicable to the "government … and its employees"). Besides, the coercion test, rather than an endorsement analysis, should govern this case, *but see* Op. at 6, and no religious

activity is implicated—let alone compelled—by A.M.'s good wishes.

IV. *Hazelwood* Does Not Apply to Extracurricular Student Speech, Including Individual Student Expression at Graduation Ceremonies.

For the first time in the Second Circuit, the panel opinion holds that a student graduation speech falls under the rubric of *Hazelwood*. *See* Op. at 6. But the Supreme Court has never applied *Hazelwood* to such extracurricular speech despite many opportunities to do so.[5] And the vast majority of circuits have followed suit, analyzing the religious aspects of students' graduation speeches under traditional free speech and Establishment Clause principles.[6] This Court should adhere to that longstanding trend and refuse to countenance a dramatic expansion of *Hazelwood's* reach.

Indeed, just a few years ago the Supreme Court considered a school's ability to regulate student expression under conditions similar to A.M.'s graduation

[5] *See, e.g.*, *Adler v. Duval Cnty. Sch. Bd.*, 531 U.S. 801 (2000) (granting *cert.* and remanding in light of *Santa Fe*); *Chandler v. Siegelman*, 530 U.S. 1256 (2000) (same); *Santa Fe Indep. Sch. Dist. v. Doe*, 528 U.S. 1002 (1999) (granting *cert.* on football game prayer, not graduation prayer); *Jones v. Clear Creek Indep. Sch. Dist.*, 505 U.S. 1215 (1992) (granting *cert.* and remanding in light of *Lee v. Weisman*, 505 U.S. 577 (1992)).

[6] *See, e.g.*, *Lassonde v. Pleasanton Unified Sch. Dist.*, 320 F.3d 979, 983-85 (9th Cir. 2003) (relying upon *Lee* and distinguishing *Good News Club*); *Adler v. Duval Cnty. Sch. Bd.*, 206 F.3d 1070, 1075-78 (11th Cir. 2000) (en banc), *reinstated by* 250 F.3d 1330 (11th Cir. 2001) (distinguishing *Lee* and analogizing to *Widmar* and *Bd. of Educ. of Westside Cmty. Sch. v. Mergens*, 496 U.S. 226 (1990)); *ACLU of N.J. v. Black Horse Pike Reg'l Bd. of Educ.*, 84 F.3d 1471, 1478-86 (3d Cir. 1996) (analyzing under *Lee* and *Lemon v. Kurtzman*, 403 U.S. 602 (1971)); *Jones v. Clear Creek Indep. Sch. Dist.*, 977 F.2d 963, 966-72 (5th Cir. 1992) (distinguishing *Lee* and analogizing to *Mergens*).

ceremony. *Morse* involved expression at a school-sponsored outing that was unrelated to the school's curriculum and was clearly attributable to an individual student. *See* 551 U.S. at 400-01, 405. Students in *Morse* attended a "school-sanctioned and school-supervised event" at which they viewed or participated in a once-in-a-lifetime ceremony—the 2002 Olympic Torch Relay. *Id.* at 396; *see also id.* at 400-01 (explaining the event was "an approved social event or class trip," "occurred during normal school hours," and that "[t]he high school band and cheerleaders performed" (quotation omitted)). "Teachers and administrators were interspersed among the students and charged with supervising them." *Id.* at 401. Frederick attempted to gain notoriety by displaying a large banner that read "BONG HiTS 4 JESUS," which the principal demanded that he take down. *Id.* at 397-98. Frederick refused and was suspended for ten days. *See id.* at 398.

Rather than applying *Hazelwood* to gauge the school's censorship of Frederick's speech, the Supreme Court decided the case by reference to *Tinker*. *See Morse*, 551 U.S. at 408-09. The Court explained that the principal's actions were permissible because she did not seek "to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Id.* at 408. Her only concern was "to prevent student drug abuse," a compelling goal enshrined in school policy that "extend[ed] well beyond an abstract desire to avoid controversy." *Id.* at 408-09; *see also id.* at 409 (recognizing the "concern [was] not

that Frederick's speech was offensive"). Moreover, countervailing free speech considerations were slim to none, as Frederick did not contend that his "banner convey[ed] any sort of political or religious message." *Id.* at 403.

In a pointed limiting concurrence, Justices Alito and Kennedy not only highlighted this fact, but also emphasized the centrality of the *Tinker* rule and characterized *Hazelwood* as a narrow holding applicable only to "what is in essence the school's own speech, that is, articles that appear in a publication that is an official school organ." *Id.* at 423. These justices rejected any First Amendment rule that would allow school officials to censor "student speech that interferes with a school's 'educational mission,'" thus permitting school authorities to suppress speech "based on disagreement with the viewpoint expressed." *Id.* And they indicated a clear unwillingness to accept any further limitations on *Tinker's* scope. *See id.* at 422, 425.

No meaningful factual distinction exists between this case and *Morse*, which the Supreme Court tacitly acknowledged would fall under *Tinker* but for Frederick's promotion of illegal drugs. *See id.* at 405-06, 408-09. Graduation ceremonies, like the 2002 Olympic Torch Relay, are "school-sanctioned and school-supervised event[s]." *Id.* at 396. They often involve active participation by a few individual students, like A.M., and student groups, such as "[t]he … school band," while the majority of students predominantly observe. *Id.* 401. As with

many other school-related functions, teachers and administrators are present in a supervisory role and actively monitor student conduct. *See id.* But like the torch relay, and unlike other school events, graduation ceremonies are extracurricular in nature. Indeed, the very point of such rites of passage is to celebrate students' successful *completion* of their school's curricular requirements. Students who fail to meet these educational objectives in advance are barred from participating in the graduation ceremony, as their coursework is incomplete.

It is thus plainly disingenuous for the District to claim that the graduation ceremony forms part of its curriculum. There is no enduring question in America about whether the "chicken" of course completion or the "egg" of graduation comes first. Every child from kindergarten to college knows that students' classes are completed and their grades tabulated *before* graduation. Only those whose final transcripts demonstrate a mastery of the requisite course material climb to the next rung of the educational ladder. Presenting a speech at the ceremony is simply an honor or award that recognizes students' *prior* achievement. If such speeches formed part of the curriculum, every student would be required to participate. But only A.M and her co-president were given the opportunity to express their individual thoughts to the class they led. "[N]o one would reasonably believe that [their speeches] bore the school's imprimatur." *Id.* at 405.

What the panel opinion fails to appreciate is that *Hazelwood* does not cover

any school activity that could teach a life lesson. If it did, *Tinker* would cease to exist. The "curriculum" the Supreme Court had in mind was a formal course, *i.e.*, Journalism II, which entitled students to "grades and academic credit." *Hazelwood*, 484 U.S. at 268. Enrollment in that course was "designed to impart *particular* knowledge or skills to student participants." *Id.* at 271 (emphasis added). In fact, the *Hazelwood* Court approved of cutting several student articles because the authors failed to comprehend a specific lesson Journalism II was designed to teach: "the legal, moral, and ethical restrictions imposed upon journalists within [a] school community." *Id.* at 276 (quotation omitted). No similar interests are at play here. A.M.'s graduation speech was not a course presentation, she received no academic credit for preparing or delivering it, and her neutral award of an opportunity to speak was almost wholly unsupervised and was obviously not designed to impart any *particular* knowledge or skills. For example, A.M. drafted her remarks entirely on her own without any input from school officials regarding their content. *See* Op. at 3. It should thus be clear that A.M.'s graduation speech falls outside of *Hazelwood's* ambit.

CONCLUSION

This Court should grant panel rehearing or en banc review to correct the panel opinion's misapplication of binding Supreme Court and circuit precedent and to vindicate A.M.'s fundamental right to freedom of speech.

Respectfully submitted this 12th day of February, 2013.

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CERTIFICATE OF COMPLIANCE

This brief complies with the page limitation established by Federal Rule of Appellate Procedure 35(b)(2) in that is contains 15 pages, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii). This brief also complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) & (a)(6), as it has been prepared in Word 2007 using a proportioned spaced typeface, specifically 14-point Times New Roman font.

Dated: February 12, 2013

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CERTIFICATE OF SERVICE

I hereby certify that on February 12, 2013, I electronically filed the foregoing Petition for Panel Rehearing and for Rehearing En Banc with the Clerk of Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system. The following participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system:

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ADDENDUM

Description

A.M. v. Taconic Hills Cent. Sch. Dist., No. 12-753, slip op. (2d Cir. Jan. 30, 2013)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 30th day of January, two thousand thirteen.

PRESENT: DENNY CHIN,
CHRISTOPHER F. DRONEY,
Circuit Judges,
JOHN GLEESON,
District Judge.[*]

A.M., a minor, by her Parent and Next Friend, JOANNE MCKAY,

Plaintiff-Appellant,

v. 12-753-cv

TACONIC HILLS CENTRAL SCHOOL DISTRICT,[**]

Defendant-Appellees.

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* The Honorable John Gleeson, United States District Judge for the Eastern District of New York, sitting by designation.

** The Clerk of the Court is respectfully directed to amend the caption to conform with the above.

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FOR APPELLEES:	Patrick J. Fitzgerald and Scott P. Quesnel, Girvin & Ferlazzo, P.C., Albany, NY (on submission).
FOR AMICUS:	Ayesha N. Khan and Alex J. Luchenitser, Americans United for Separation of Church and State, Washington, DC, *for Americans United for Separation of Church and State as* amici curiae *in support of Appellees* (on submission).

Appeal from a judgment of the United States District Court for the Northern District of New York (Sharpe, *C.J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the District Court is AFFIRMED.

Plaintiff-Appellant A.M., by and through her mother, Joanne McKay, appeals from the January 23, 2012, decision and order of the district court granting summary judgment to Defendant-Appellee Taconic Hills Central School District (the "School District") on all claims.[1] On appeal, A.M. seeks declaratory relief and damages from the School District under 42 U.S.C. § 1983 to redress violations of A.M.'s rights under the First and Fourteenth Amendments of the United States Constitution and Article I, Section 8 of the New York Constitution. We assume the parties' familiarity with the underlying facts and procedural history of this case, which we reference only as necessary to explain our decision to affirm.

I. Background

The following facts, contained in the record on the Defendants' motion for summary judgment, are recounted in the light most favorable to A.M. They are undisputed unless otherwise indicated.

[1] The district court had previously granted a motion to dismiss with respect to Defendants Dr. Mark Sposato, in his official capacity as Superintendent of the School District, and Dr. Neil Howard, in his official capacity as Principal of Taconic Hills Middle School. *See* ECF No. 22.

Taconic Hills Middle School (the "Middle School") is part of the School District, which is a public school system organized under the laws of the State of New York. During the 2008-09 academic year, A.M. was a student in the eighth grade at the Middle School, and had been elected class co-president of the student council with fellow student A.S. By virtue of this position, both A.M. and A.S. were each permitted to deliver a "brief message" at the annual Moving-Up Ceremony (the "Ceremony"), which was scheduled for June 25, 2009, in the Middle School's auditorium.

Several days before the Ceremony, A.M. asked her English and Language Arts teacher, Jamie Keenan, to review her draft speech for "punctuation and grammar." Upon reading the speech, Keenan became concerned regarding the appropriateness of the final sentence in the speech, which read: "As we say our goodbyes and leave middle school behind, I say to you, may the LORD bless you and keep you; make His face shine upon you and be gracious to you; lift up His countenance upon you, and give you peace."[2] On June 24, 2009, Leanne Thornton, the faculty advisory of the student council, also reviewed the speech. Thornton expressed concerns similar to Keenan and recommended that Principal Neil Howard review the speech as well.[3] Howard then scheduled a meeting for the morning of June 25, 2009, with A.M. and A.S. to review their speeches for the Ceremony.[4]

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[2] A.M. later described this language as a "blessing" and indicated that she was "taught to give blessings and it was good to receive blessings from God."

[3] The parties appear to dispute whether Principal Howard had a policy of reviewing the students' speeches for the Ceremony beforehand, or whether he only did so in this case because A.M.'s speech was brought to his attention and so instituted a policy of review only after the events in the instant case. However, the parties do not dispute that the Middle School's principals typically heard the students' speeches during a rehearsal the morning of the Ceremony. The parties also do not dispute that Keenan, Thornton, and Howard all reviewed A.M.'s speech in this case and shared concerns regarding its appropriateness for the Ceremony.

[4] Neither Keenan, Thornton, nor Howard knew the precise source of the language in the final sentence of A.M.'s speech, which is a quotation from verses 24-26 of chapter 6 of the Book of Numbers of the Old Testament.

At the meeting on June 25, after approving A.S.'s speech, Howard requested that A.M. remove the last sentence of her speech because it sounded "too religious" and because it could be perceived as an endorsement of one religion over another. A.M. refused to remove the lines and gave Howard pamphlets she and her mother had found on the internet describing the rights of public school students under the Free Speech Clause of the First Amendment. Howard then called A.M.'s mother, who objected to the removal of the language as well and requested that Howard speak with Superintendent Sposato. Howard spoke with Sposato and the School District's legal counsel, who agreed that allowing A.M. to deliver the speech as written could violate the Establishment Clause. Sposato then called A.M.'s mother and informed her that A.M. would not be permitted to speak at the Ceremony unless she removed the last sentence from her speech. A.M. and her mother agreed to comply with this request.

Later that evening at the Ceremony, A.M. delivered her speech without the final sentence. The Ceremony was entirely funded and insured by the School District, held in the Middle School's auditorium, and publicized on materials bearing the School District's letterhead.[5] The Ceremony also featured banners and signs decorated with the Middle School's mascot and insignia, and the students received "diplomas" signifying their ascent to high school. The Ceremony was attended by the students and their families, the Middle School's faculty, and various School District administrators.

Shortly after the Ceremony, A.M. commenced this suit alleging violations of her rights under the Free Speech Clause of the First Amendment of the United States Constitution and under Article I, Section 8 of the New York Constitution.[6] On January 25, 2011, the district court granted the Defendants' motion to dismiss with respect to Sposato

[5] A.M. argues that the student council runs the Ceremony, but otherwise concedes that the Middle School funds and generally organizes the Ceremony.

[6] A.M. cites to several Establishment Clause cases in her brief, but does not otherwise raise an Establishment Clause claim. In addition, the district court decided this case solely on Free Speech Clause grounds. We therefore restrict our analysis to the Free Speech Clause.

and Howard as duplicative of the claims against the School District, but denied the motion to dismiss with respect to the School District. On January 23, 2012, the district court granted the School District's motion for summary judgment.

II. Discussion

A. Legal Standard

This Court reviews *de novo* a district court's grant of summary judgment. *See, e.g.*, *Easterling v. Collecto, Inc.*, 692 F.3d 229, 232 (2d Cir. 2012). A grant of summary judgment should be affirmed "only where there is no genuine issue of material fact to be tried, and the facts as to which there is no such issue warrant the entry of judgment for the moving party as a matter of law." *Kaytor v. Electric Boat Corp.*, 609 F.3d 537, 545 (2d Cir. 2010) (citing Fed. R. Civ. P. 56(c)(2)). In making its determinations, the court deciding summary judgment should "view the facts and draw reasonable inferences in the light most favorable to the party opposing the summary judgment motion." *Scott v. Harris*, 550 U.S. 372, 378 (2007) (internal quotation marks and alteration omitted).

B. Free Speech Claim

To determine whether the Defendants abrogated A.M.'s free speech rights, it is necessary first to determine the appropriate governing standard. If A.M.'s address for the Ceremony constituted "school-sponsored expressive activities," then the standard is given by *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988). Under *Hazelwood*, educators may exercise editorial control over student speech "so long as their actions are reasonably related to legitimate pedagogical concerns." *Id.* at 273. If, on the other hand, A.M.'s address constituted "a student's personal expression that happens to occur on the school premises," *id.* at 271, then the standard is given by *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969). Under *Tinker*, school officials may exercise editorial control over student speech only if the speech at issue would "materially and substantially interfere with the requirements of appropriate

discipline in the operation of the school." *Tinker*, 393 U.S. at 509 (internal quotation marks omitted).[7]

We agree with the district court's determination as a matter of law that A.M.'s address for the Ceremony constituted "school-sponsored expressive activities" and that *Hazelwood* thus provides the governing standard.[8] Student speech constitutes a "school-sponsored expressive activity" if observers, such as "students, parents, and members of the public[,] might reasonably perceive [the speech] to bear the imprimatur of the school." *Morse v. Frederick*, 551 U.S. 393, 405 (2007) (quoting *Hazelwood*, 484 U.S. at 271). In the instant case, the Ceremony was set to occur "at a school-sponsored assembly, to take place in the school [auditorium], to which parents of the [students] were invited." *Peck* ex rel. *Peck v. Baldwinsville Cent. Sch. Dist.*, 426 F.3d 617, 629 (2d Cir. 2005). In addition, the School District funded and managed the Ceremony, and the Middle School's name and insignia appeared prominently on banners, signs, and programs prepared specifically for the Ceremony. *See R.O.* ex rel. *Ochshorn v. Ithaca City Sch. Dist.*, 645 F.3d 533, 541 (2d Cir. 2011). In light of the School District's involvement in directing the Ceremony and in reviewing the speeches before they were delivered, we believe as a matter of law that a reasonable observer would perceive A.M.'s speech as being endorsed by the

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[7] The Supreme Court has also articulated two other standards governing restrictions on student speech not relevant to the instant case. *See Morse v. Frederick*, 551 U.S. 393 (2007) (addressing student speech that promotes illegal drug use); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986) (addressing vulgar, lewd, obscene, or offensive student speech).

[8] The parties did not substantively address the question of the type of forum represented by the Middle School auditorium at the Ceremony. We nonetheless assume without deciding that the district court correctly accepted the School District's "conclusory assertion that the school auditorium was a non-public forum." *A.M.*, 2012 WL 177954, at *3 n.4. In a non-public forum, "[r]estrictions on speech . . . need only be reasonable and viewpoint neutral" to survive constitutional scrutiny. *Peck* ex rel. *Peck v. Baldwinsville Cent. Sch. Dist.*, 426 F.3d 617, 626 (2d Cir. 2005) (internal quotation marks omitted).

Middle School, and that *Hazelwood* thus provides the governing standard for determining the appropriateness of the Defendants' conduct.[9]

The operative question under *Hazelwood* is whether the Defendants' actions were "reasonably related to legitimate pedagogical concerns." 484 U.S. at 273. To determine whether the Defendants acted "reasonably," it is necessary to ascertain whether the Defendants' request that A.M. remove the final sentence of her speech constituted content-based or viewpoint-based restrictions on speech. Even under the deferential standard articulated in *Hazelwood*, viewpoint discrimination can only be justified by an "overriding" state interest. *Peck*, 426 F.3d at 633. Viewpoint discrimination occurs when the government seeks to regulate "speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819, 829 (1995). In the context of religious speech, viewpoint discrimination would include making a forum accessible to speakers expressing "all views about [secular] issues . . . except those dealing with the subject matter from a religious standpoint." *Id.* at 830 (quoting *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 393 (1993)).

By contrast, content discrimination entails the exclusion of a "general subject matter" from a forum, rather than a "prohibited perspective." *Bronx Household of Faith v. Bd. of Educ.*, 650 F.3d 30, 39 (2d Cir.) (quoting *Rosenberger*, 515 U.S. at 831), *cert. denied*, 132 S.Ct. 816 (2011). In the context of religious speech, content discrimination

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[9] *See also Corder v. Lewis Palmer Sch. Dist. No. 38*, 566 F.3d 1219, 1228 (10th Cir. 2009) ("[I]n order to determine whether challenged speech is school-sponsored and bears the imprimatur of the school, a reviewing court should appraise the level of involvement the school had in organizing or supervising the contested speech . . . ."); *Lassonde v. Pleasanton Unified Sch. Dist.*, 320 F.3d 979, 985 (9th Cir. 2003) ("The graduation ceremony was a school-sponsored function that all graduating seniors could be expected to attend."); *Brody* ex rel. *Sugzdinis v. Spang*, 957 F.2d 1108, 1119 (3d Cir. 1992) ("The process for setting the format and contents of a graduation ceremony are more likely to resemble the tightly controlled school newspaper policies at issue in *Hazelwood* . . . .").

would entail excluding speech for which "there is no real secular analogue." *Id.* at 38 (quoting *Bronx Household of Faith v. Cmty. Sch. Dist. No. 10*, 127 F.3d 207, 221 (2d Cir. 1997) (Cabranes, *J.*, concurring in part and dissenting in part)). Where the government engages in content-based discrimination in the context of school-sponsored speech, the "*Hazelwood* standard does not require that the [government-imposed restrictions] be the *most* reasonable or the *only* reasonable limitations, only that they be reasonable." *Peck*, 426 F.3d at 630 (internal quotation marks omitted); *see also Marchi v. Bd. of Coop. Educ. Servs. of Albany*, 173 F.3d 469, 476 (2d Cir. 1999) ("[W]hen government endeavors to police itself and its employees in an effort to avoid transgressing Establishment Clause limits, it must be accorded some leeway, even though the conduct it forbids might not inevitably be determined to violate the Establishment Clause . . . .").

We believe that the final sentence in A.M.'s speech constituted purely religious speech and that the Defendants, in requesting that she remove it from her address, were thus engaged in content-based discrimination. The final sentence in A.M.'s speech consisted of a direct quotation from the Old Testament calling for a divine blessing of the audience, rather than a statement offering a religiously-informed viewpoint on an otherwise secular subject matter. *See Rosenberger*, 515 U.S. at 830; *see also Bronx Household*, 650 F.3d at 39 (noting that a public school may lawfully exclude "the conduct of a certain type of activity – the conduct of worship services – and not . . . the free expression of religious views associated with it"). Statements of this nature have "no real secular analogue." *Bronx Household*, 650 F.3d at 38 (internal quotation marks omitted).[10] Our understanding of A.M.'s speech is confirmed by her own characterization of the

[10] *Cf. Lee v. Weisman*, 505 U.S. 577, 603 (1992) (Blackmun, *J.*, concurring) ("There can be 'no doubt' that the 'invocation of God's blessings' . . . is a religious activity. In the words of *Engel*, the . . . prayer 'is a solemn avowal of divine faith and supplication for the blessings of the Almighty. The nature of such a prayer has always been religious.'" (quoting *Engel v. Vitale*, 370 U.S. 421, 424 (1962))).

sentence as a "blessing" motivated by her desire to deliver "blessings from God." *See id.* at 46 (examining the subjective intent of the speaker to determine the nature of the speech (citing *Christian Legal Soc'y v. Martinez*, 130 S.Ct. 2971, 2982-84 (2010)). We therefore conclude that the Defendants acted reasonably in requiring that A.M. remove the final sentence from her speech.

In addition to determining that the Defendants were engaged in content-based discrimination, we agree with the district court that the Defendants' desire to avoid violating the Establishment Clause represented a "legitimate pedagogical concern." "There is no doubt that compliance with the Establishment Clause is a state interest sufficiently compelling to justify content-based restrictions on speech." *Id.* at 40 (quoting *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 761-62 (1995) (plurality opinion)).[11] In the context of student speech, a "school must also retain the authority to refuse to sponsor student speech that might reasonably be perceived . . . to associate the school with any position other than neutrality on matters of political controversy." *Hazelwood*, 484 U.S. at 272 (internal citation omitted). As a result, we conclude that the Defendants were motivated by "legitimate pedagogical concerns" and that their actions thus complied with the *Hazelwood* standard. Accordingly, we affirm the district court's grant of summary judgment to the School District on A.M.'s free speech claim.

Because we affirm the district court's judgment with respect to A.M.'s federal cause of action, we correspondingly affirm the district court's dismissal of A.M.'s claim grounded in the New York State Constitution as an inappropriate exercise of supplemental jurisdiction. *See* 28 U.S.C. § 1367(c).

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[11] *See also Corder*, 566 F.3d at 1228-29 (holding that so long as the *Hazelwood* test for whether speech bears a school's imprimatur is met, the "[legitimate] pedagogical [concern] test may be satisfied 'simply by the school district's desire to avoid controversy within a school environment'" (quoting *Fleming v. Jefferson Cnty. Sch. Dist. R-1*, 298 F.3d 918, 925-26 (10th Cir. 2002))); *Webster v. New Lenox Sch. Dist. No. 122*, 917 F.2d 1004, 1008 (7th Cir. 1990) (finding a school board's "legitimate concern with possible establishment clause violations" to be a sufficient reason to prohibit "the teaching of creation science to junior high school students").

We have considered all of A.M.'s other arguments and conclude that they are without merit. For the foregoing reasons, the judgment of the district court is AFFIRMED.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk of Court