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MAKING *HAZELWOOD* AGE-APPROPRIATE: HOW VIEWPOINT NEUTRALITY AND RECONTEXTUALIZING THE AGE-APPROPRIATE STANDARD MIGHT SAVE SCHOOL-SPONSORED LGBT SPEECH

Rebecca Girardin*

INTRODUCTION

Wrapped in the rainbow pride flag, a valedictorian of a New Jersey high school was less than a minute into his graduation speech when his microphone cut out.[1] The valedictorian began his speech by discussing his isolation after coming out as queer (a broad term for identifying as not exclusively heterosexual) his freshman year and his school's lack of support.[2] The school's principal was seen going behind the stage just before the audio cut out and then walking to the stage's podium to remove the microphone and paper copy of the student's speech.[3] While the student eventually continued his speech from memory, the principal's action indicated a refusal to give the student a platform to describe his experience as a "formerly suicidal, formerly anorexic queer" student while speaking at a school event.[4] This interaction at a high school graduation highlights a mounting tension between certain forms of student speech: when students use school platforms to discuss queer issues.[5] The moment was politically charged beyond the commentary from the graduation crowd, with even Governor Phil Murphy tweeting his support for the student for "speaking truth to power" and for the student's "resilience and courage."[6]

Younger people are identifying as lesbian, gay, bisexual, or transgender (henceforth "LGBT") more than any previous generation.[7] Likewise, there has been a

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[1] Alyssa Lukpat, *When a Valedictorian Spoke of His Queer Identity, the Principal Cut Off His Speech*, N.Y. TIMES, https://www.nytimes.com/2021/06/27/nyregion/new-jersey-valedictorian-lgbtq-speech.html [https://perma.cc/8DCZ-KU5E] (last updated June 28, 2021).

[2] *Id.*

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] Jeffrey M. Jones, *LGBT Identification Rises to 5.6% in Latest U.S. Estimate*, GALLUP (Feb. 24, 2021), https://news.gallup.com/poll/329708/lgbt-identification-rises-latest-estimate.aspx [https://perma.cc/E9LR-HHZW] (finding that 15.9% of Generation Z, born between

proliferation of free-speech litigation involving student speech that discusses LGBT issues.[8] Beyond just LGBT speech in school, there has been a recent resurgence in the discussion around the relationship between parents, students, school administrators, and school boards when it comes to regulating school-sponsored speech.[9]

Besides the growing number of students identifying as LGBT, protecting LGBT speech in school is of particular importance because the manner in which a school deals with LGBT speech directly influences the mental health and safety of LGBT students.[10] Furthermore, LGBT students face heightened levels of marginalization that manifests through discrimination and harassment from other classmates, school administrators, and educators during school.[11]

This Note will argue that, when dealing with school-sponsored speech, the standard of "age-appropriateness" can be used to wrongfully silence and condemn LGBT student speech and content.[12] Specifically, the Supreme Court should (1) read a requirement of viewpoint neutrality into school-sponsored speech decisions; (2) find that LGBT student speech is not presumptively age-inappropriate; and (3) find that suppression of school-sponsored LGBT speech is presumptively viewpoint discrimination, requiring strict scrutiny analysis, and as such is likely unconstitutional infringement on student speech.

1997 and 2002, identify as LGBT in comparison to 9.1% of Millennials, 3.8% of Generation X, and 2.0% of Baby Boomers).

[8] *See, e.g.*, Robertson v. Anderson Mill Elementary Sch., 989 F.3d 282 (4th Cir. 2021) (involving a student essay on society accepting transgender individuals); Associated Press, *Pendleton Heights High School Sued Over Treatment of LGBT Student Group*, 13 WTHR, https://www.wthr.com/article/news/local/pendleton-heights-high-school-sued-over-treatment-of-lgbt-student-group/531-c865319f-4148-49d0-89d9-9251bf2ba719 [https://perma.cc/GG6Y-899L] (last updated Sept. 23, 2021, 5:24 AM).

[9] *See, e.g.*, Emily Crane, *Virginia Parents Say They Should Tell Schools What to Teach, Poll Shows*, N.Y. POST, https://nypost.com/2021/10/15/virginia-parents-say-they-should-tell-schools-what-to-teach-poll/ [https://perma.cc/6TNT-SENZ] (last updated Oct. 15, 2021, 10:30 AM) ("The majority of Virginia parents say they should be able to tell schools what to teach their children . . . .").

[10] *Lesbian, Gay, Bisexual, and Transgender Health: LGBT Youth*, CDC, https://www.cdc.gov/lgbthealth/youth.htm [https://perma.cc/8UF3-GTMD] (last visited Oct. 18, 2022) (providing information on "What Schools Can Do" because "[f]or youth to thrive in schools and communities, they need to feel socially, emotionally, and physically safe and supported. A positive school climate has been associated with decreased depression, suicidal feelings, substance use, and unexcused school absences among LGB students.").

[11] *See* Orly Rachmilovitz, *No Queer Child Left Behind*, 51 U.S.F. L. REV. 203, 204 (2017) ("LGBT students are highly marginalized, struggling through discrimination, harassment, limits to free speech, exclusionary curricula and school activities, unwanted outing, and other infringements on their rights and threats to their wellbeing.").

[12] *See generally* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988) (finding that school faculty can censor school-sponsored speech to ensure that "readers or listeners are not exposed to material that may be inappropriate for their level of maturity.").

Part I will work through background information on seminal free speech cases for student speech, with a particular focus on the history that led to the introduction of the age-appropriate standard when discussing student school-sponsored speech.[13] Part I will then look at the current protections offered to LGBT speech and expression in schools.[14] In Part II, this Note will provide an overview of viewpoint and content neutrality when analyzing free speech cases as well, as a current circuit split on whether school administrators need to use content or viewpoint neutrality when determining whether or not to suppress student speech.[15] Part III will then make an argument for requiring viewpoint neutrality in student speech litigation and take into account the counterarguments and challenges that could arise in reading viewpoint neutrality into *Hazelwood* and student speech cases.[16] Finally, Part IV will argue that LGBT speech is not presumptively age inappropriate and address counterpoints that viewpoint neutrality could increase anti-gay speech in schools.[17] Part IV will then re-examine *Robertson v. Anderson Mill Elementary* under the standard the Note suggests and discuss how this approach could prevent further harm to LGBT students.[18]

I. BACKGROUND ON FIRST AMENDMENT REQUIREMENTS IN SCHOOLS

A. A Brief History of Constitutional Cases on School Speech Generally

Tinker v. Des Moines Independent Community School District famously held that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[19] Permissible student speech is not limited to that which is "officially approved," and students are largely entitled to freedom of expression.[20] This seminal student free speech case mentions speaker viewpoints in the majority opinion and provides that schools must demonstrate something beyond a "desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."[21] In order for a school's suppression of speech to be determined constitutional, the school must demonstrate that the speech would infringe

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[13] *See infra* Part I.

[14] *See infra* Part I.

[15] *See infra* Part II.

[16] *See infra* Part III.

[17] *See infra* Part IV.

[18] *See infra* Part IV.

[19] 393 U.S. 503, 506 (1969) (finding that the school violated the Plaintiff's First Amendment right to expression when it suspended students for wearing armbands in protest of America's involvement in Vietnam).

[20] *Id.* ("In our system, state-operated schools may not be enclaves of totalitarianism . . . [Students] may not be confined to the expression of those sentiments that are officially approved.").

[21] *Id.* at 509.

upon the school's educational operation or impede upon the rights of other students to learn.[22]

Seventeen years after *Tinker*, the Supreme Court took up another student speech case in which a student was sanctioned for using sexually explicit and lewd language during his speech at a student government assembly.[23] Importantly, the student's lewd and graphic speech occurred as part of a school-sponsored educational program on self-government where the student delivered the speech in front of nearly six hundred students.[24] Therefore, the school had an added responsibility to the student attendees as the school had given the student a platform to speak.[25] Subsequently, *Bethel School District v. Fraser* began the Supreme Court's process of limiting and distinguishing *Tinker* by providing more power to the school to limit student speech.[26]

The biggest limitation to students' free speech emerged in *Hazelwood School District v. Kuhlmeier*, in which the Supreme Court introduced an allowance for schools to limit expression based on whether the speech was reasonably related to a "legitimate pedagogical concern."[27] Rather than the student deferential test in *Tinker*, the Court placed more authority in school administration to regulate speech.[28] The Court placed specific focus on school-sponsored speech, such as student newspaper publications or when a school lends "its name and resources to the dissemination of student expression," rather than expression primarily controlled by students, such as the protest armbands worn in *Tinker*.[29] In distinguishing *Hazelwood* from *Tinker*, the Court "noted that the students protesting Vietnam were expressing their individual view and were not using a school-sponsored entity to do so."[30] Finally, *Hazelwood* also framed "age-appropriateness" as a legitimate pedagogical concern since schools could determine whether or not the students were mature enough for certain content.[31]

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[22] *Id.* (finding that school authorities would need to show that the Plaintiff's armbands would "substantially interfere with the work of the school or impinge upon the rights of other students.").

[23] Bethel Sch. Dist. v. Fraser, 478 U.S. 675, 675 (1986).

[24] *See id.*

[25] *See id.* at 680.

[26] *See* Jordan Blair Woods, Morse v. Frederick*'s New Perspective on Schools' Basic Educational Missions and the Implications for Gay-Straight Alliance First Amendment Jurisprudence*, 18 COLUM. J. GENDER & L. 281, 285 (2008).

[27] 484 U.S. 260, 273 (1988) ("Educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.").

[28] *Id.* at 261.

[29] *Id.* at 272–73 (quoting *Tinker*).

[30] *See* Gilio v. Sch. Bd. of Hillsborough, 905 F. Supp. 2d 1262, 1269 (M.D. Fla. 2012) (granting Plaintiff's motion for an injunction preventing the School Board from applying a broad policy that prohibits "proselytizing speech" and requiring the School Board to apply *Tinker* analysis rather than its broad policy).

[31] *Hazelwood*, 484 U.S. at 271 ("Educators are entitled to exercise greater control over

A more recent crucial free speech case involving school-sponsored speech and expression is *Morse v. Frederick*.[32] In *Morse,* the Court determined that schools are allowed to restrict student expression that the school faculty reasonably regards as promoting illegal drug use.[33] Still, the Court acknowledged that the mode of analysis in previous student speech cases is not always clear and admitted that a key factor in contemporary student speech litigation is deference to the school board.[34] The Court presumes a distinct difference between permissible regulations of "political" messages and "sexual" or lewd content.[35] Overall, the standards in determining student speech regulation have been narrowed by the Court in the fifty years post-*Tinker*.

Hazelwood, in particular, provided the grounding precedent for the recent Fourth Circuit Court decision, and the trigger for this Note's focus, in *Robertson v. Anderson Mill Elementary School*.[36] In *Robertson*, a principal determined that a fourth grader's essay on transgender acceptance would not be included in a booklet with the other fourth-grade student's essays that would be sent home to students' families.[37] The court held that a principal was protected from the plaintiff's civil lawsuit through qualified immunity because he did not violate the student's constitutional right to free speech.[38]

B. Speech and Expression About LGBT Issues in Schools

Beyond just the *Robertson* case, speech and expression that involve LGBT issues or identity in schools has received its own attention within the broader category of student speech litigation.[39] As a result, there are some protections that are currently offered to LGBT speech and expression.[40]

Certain LGBT support organizations provide direct information to faculty on how to best stop student harassment based on sexual orientation or gender identity

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this second form of student expression [school-sponsored speech] to assure that participants learn whatever lessons the activity is designed to teach, *that readers or listeners are not exposed to material that may be inappropriate for their level of maturity*, and that the views of the individual speaker are not erroneously attributed to the school.") (emphasis added).

[32] *See* 551 U.S. 393, 397, 409 (2007) (finding that a suspension for waiving a banner stating "BONG HiTs 4 JESUS" was not a constitutional violation since the student promoted illegal drug use at a school-sponsored event).

[33] *See id.*

[34] *See id.* at 404 ("The mode of analysis employed in *Fraser* is not entirely clear . . . [b]ut the Court also reasoned that school boards have the authority to determine 'what manner of speech in the classroom or in school assembly is inappropriate.'").

[35] *See id.*

[36] 989 F.3d 282, 288–89 (4th Cir. 2021) ("This case falls neatly within the *Hazelwood* framework.").

[37] *Id.* at 285, 289.

[38] *Id.* at 288.

[39] *See infra* Section I.B.

[40] *See id.*

and how to craft policy that promotes and respects the free expression rights of their students based on *Tinker*.[41] Additionally, there are also free resources for students to be aware of their rights in a class when it comes to LGBT expression.[42]

These free resources educate students and school faculty based on holdings in federal litigation and federal legislation. The Equal Access Act applies to secondary schools, including middle schools, and as a result, Equal Access Act and Section 1983 litigation established a right for students to form a Gay-Straight Alliance ("GSA").[43] Schools also cannot argue that establishing a GSA would interfere with an abstinence only sex education policy.[44] Given GSA's goals of promoting tolerance and equality, the typical organization would not inherently disrupt a school environment.[45] Nor may schools impose "no protest" policies on campuses in order to quell student led LGBT protests.[46]

While safety of their students is a legitimate concern for school faculty, school administrators cannot use fear of harm to LGBT students as a blanket excuse for prohibiting types of LGBT expression.[47] Furthermore, federal courts have determined that LGBT speech is not presumptively disruptive.[48] Even though *Morse*

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[41] *Preventing Harassment and Protecting Free Speech in School*, ACLU, https://www.aclu.org/other/preventing-harassment-and-protecting-free-speech-school [https://perma.cc/G99U-MZBK] (last visited Oct. 18, 2022) ("[S]tudents have the right to voice the opposition to civil rights for LGBT people in a classroom discussion as long as its relevant to the topic. Regardless of their point of view, however, students do not have a right to express themselves if such expression substantially interferes with the rights of a classmate.").

[42] *See, e.g.*, *Your Speech Rights at School*, LAMBDA LEGAL, https://www.lambdalegal.org/know-your-rights/article/youth-speech-rights [https://perma.cc/D75L-G6YG] (last visited Oct. 18, 2022) (describing ways that "your public school would be violating the First Amendment" and a focus on educating a student audience).

[43] *See* Gay-Straight All. of Okeechobee High Sch. v. Sch. Bd. of Okeechobee Cnty., 483 F. Supp. 2d 1224, 1230 (S.D. Fla. 2007) (ordering a school board, under the Equal Access Act, to grant official recognition and all privileges given to other clubs to the school's Gay-Straight Alliance); *see also* Carver Middle Sch. Gay-Straight All. v. Sch. Bd. of Lake Cnty., Fla., 842 F.3d 1324, 1331 (11th Cir. 2016) (finding that the Equal Access Act applies to Carver Middle School and, as such, the school board violated the Equal Access Act when it denied the application to form a Gay-Straight Alliance student club).

[44] Gay-Straight All. of Okeechobee High Sch., 483 F. Supp. 2d at 1228.

[45] *See id.* at 1226 ("The GSA's originally stated purposes include, *inter alia* 'promot[ion of] tolerance and equality among students, regardless of sexual orientation and/or gender identities through awareness building and education'").

[46] *See* Hatcher v. Desoto Cty. Sch. Dist. Bd. of Educ., 939 F. Supp. 2d 1232, 1239 (M.D. Fla. 2013) (finding that a school could not use its "unwritten practice" of banning all "protest" speech as an excuse for treating students who participated in the National Day of Silence differently than those who did not participate.).

[47] *See generally* Fricke v. Lynch, 491 F. Supp. 381 (D.R.I. 1980).

[48] *See, e.g.*, Gillman v. Sch. Bd. Holmes County, 567 F. Supp. 2d 1359, 1377 (N.D. Fla. 2008) (finding that a student's sticker, with phrases such as "I Support Gays," was not inherently sexually suggestive).

acknowledges the Court's differentiation between a school's regulation of political and sexual speech, LGBT speech cannot be classified as presumptively sexual in nature and therefore can only be regulated through the political analysis test as set forth in cases such as *Tinker* and *Hazelwood*.[49]

C. Failures to Protect LGBT Speech Under Current Student Speech Standards

While student speech and expression related to LGBT issues, as well as access to LGBT history and resources in school, have vast protection under current First Amendment student speech law, there is a gap in protection under *Hazelwood* for school-sponsored speech and expression.[50] Like in *Robertson*, school faculty can use the pedagogical concern of "age-appropriateness" to remove LGBT speech, particularly speech that is supportive or promotes inclusivity.[51] In *Robertson*, the principal was quoted as telling the plaintiff that "it was not age-appropriate to discuss transgenders, lesbians, and drag queens outside of the home."[52] The principal also strengthened his concern with the content of the student's essay by arguing that "due to the type of school this is . . . the topic would be disagreeable."[53] Therefore, school faculty and administration, like the principal in *Robertson*, can use *Hazelwood* to suppress LGBT content and student speech.[54]

II. CONTENT AND VIEWPOINT NEUTRALITY

Free speech litigation concerns the concepts of viewpoint and content neutrality; however, the extent to which the two concepts apply to student speech litigation is highly contested among circuits.[55] Before exploring the circuit split on the issue, this section provides some background on viewpoint neutrality, content neutrality, and discrimination.

A. Content and Viewpoint Neutrality Under Qualified Immunity

When a private person, such as a student or parent, sues a faculty member at a school for actions committed while working as a government official, the faculty member can typically avoid liability under qualified immunity.[56] However, there are two requirements for the government official to be protected under the qualified

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[49] *See* 551 U.S. at 404.
[50] *See infra* Section I.B.
[51] *See* Robertson v. Anderson Mill Elementary Sch., 989 F.3d 282, 285–86 (4th Cir. 2021).
[52] *Id.* at 286.
[53] *Id.*
[54] *See id.* at 289–90.
[55] *See infra* Section II.B.
[56] Brickey v. Hall, 828 F.3d 298, 303 (4th Cir. 2016).

immunity doctrine: (1) the allegations in the lawsuit cannot substantiate a violation of a federal statutory or constitutional right; and (2) the violation cannot have been of a clearly established right of which a reasonable person would have known.[57] A school official would not be covered under the doctrine of qualified immunity if the official violated a student's First Amendment right and the violation was one a school official should reasonably have known was a free speech violation.[58]

However, a government official can violate a constitutional right to free speech if the government official limits speech based upon viewpoint discrimination.[59] Viewpoint discrimination is committed when a government official "targets not subject matter, but particular views taken by speakers on a subject."[60] Content discrimination would be a blanket censorship of a particular subject matter, while viewpoint discrimination is encompassed under content discrimination and determines the level of censorship based upon the particular stance the speaker makes on the subject matter.[61] Viewpoint discrimination often leads to a *per se* violation of a person's First Amendment rights giving rise to strict scrutiny analysis.[62]

Scholars debate how much government officials should remain neutral when limiting content. Some, like Erwin Chemerinsky, find content neutrality to be a central problem of free speech since it would mean that the government cannot regulate speech based on the ideology of the message.[63] However, requiring viewpoint and content neutrality also ensures that schools are free from governments driving certain ideas or viewpoints from the marketplace of ideas.[64]

B. Viewpoint Discrimination in the Context of Student Speech

The Supreme Court has peripherally addressed content discrimination in the context of some student speech.[65] However, the Court has not addressed whether or not *Hazelwood* requires school administration to make viewpoint neutral decisions when evaluating school-sponsored speech.[66] The silence by the Court on this issue has led to a circuit split on the viewpoint neutrality requirement.[67]

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[57] *Id.*

[58] *See id.*

[59] Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995).

[60] *Id.*

[61] *Id.*

[62] *See, e.g.*, Lackland H. Bloom, Jr., *The Rise of the Viewpoint-Discrimination Principle*, 72 SMU L. REV. F. 20 (2019).

[63] *See* Erwin Chemerinksy, *Content Neutrality as a Central Problem of Freedom of Speech: Problems in the Supreme Court's Application*, 74 S. CAL. L. REV. 49, 51 (2000).

[64] *See id.* at 50.

[65] *See, e.g.*, Mahanoy Area Sch. Dist. v. B. L., 141 S. Ct. 2038, 2050 (2021).

[66] *See infra* Section II.B.

[67] *See infra* notes 68–84 and accompanying text.

There has been a resurgence of free speech litigation, particularly under the Roberts Court.[68] Even within school speech litigation, the majority in *Mahanoy Area School District V. B. L.* reaffirmed a school's concern to regulate student speech under *Tinker* and *Hazelwood* and extended the school's reach to include some speech that takes place off-campus.[69] Justice Alito, joined by Justice Gorsuch, wrote a concurring opinion in *Mahanoy* in which the pair described how administrators and teachers can regulate on-premises student speech by imposing "content-based restrictions in the classroom."[70] Given the current Supreme Court's willingness to address student speech issues, the Court could take up issues of student speech in the future and focus on viewpoint or content discrimination even if the Court has declined to take up the issue in the past before Chief Justice Roberts was appointed to the Court.[71]

Currently, federal circuit courts are split on whether or not *Hazelwood* establishes a content or viewpoint neutrality requirement.[72] Even the court in *Robertson* acknowledged that the Supreme Court has not decided whether restrictions on school-sponsored student speech must be viewpoint neutral under the *Hazelwood* standard.[73] The hesitation in the application of viewpoint neutrality largely comes from the Supreme Court's recognition that schools have "special characteristics."[74] Therefore, some circuit courts have not presumed that content or viewpoint neutrality applies to speech regulation in schools.[75]

The Eleventh, Ninth, and Sixth Circuits currently require schools to be viewpoint neutral under *Hazelwood*.[76] In *Planned Parenthood v. Clark County School District*, the Ninth Circuit determined that a school's decision not to include advertisements for Planned Parenthood in a school-sponsored publication was viewpoint neutral and a permissible policy.[77] In *Planned Parenthood*, the Ninth Circuit concluded that controlling the content of a school-sponsored publication so as to maintain the appearance of neutrality on a controversial issue is within a reserved pedagogical mission of a school.[78]

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[68] *See, e.g.*, Morse v. Frederick, 551 U.S. 393 (2007); *see also Mahanoy*, 141 S. Ct. at 2043.

[69] *Mahanoy*, 141 S. Ct. at 2043 (finding that, while the school violated a student's First Amendment right when it suspended her for an off-campus social media post, a school can have a legitimate interest in regulating off-campus student speech).

[70] *Id.* at 2050 (Alito, J., concurring) (focusing the concurrence on the theory that by enrolling a child in public school, parents' consent on behalf of the child to the relinquishment of some of the child's free-speech rights).

[71] *See* Fleming v. Jefferson Cty. Sch. Dist. R-1, 298 F.3d 918 (10th Cir. 2002), *cert. denied*, 537 U.S. 1110 (2003).

[72] *See* Robertson v. Anderson Mill Elementary Sch., 989 F.3d 282, 290 (4th Cir. 2021).

[73] *Id.*

[74] *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).

[75] *Id.*

[76] Susannah Barton Tobin, *Divining* Hazelwood*: The Need for a Viewpoint Neutrality Requirement in School Speech Cases*, 39 HARV. C.R.-C.L. L. REV. 217, 231 (2004).

[77] 941 F.2d 817, 829 (9th Cir. 1991).

[78] *Id.*

The Eleventh Circuit has also read viewpoint neutrality into student speech litigation.[79] Even though *Hazelwood* placed an emphasis on the special circumstances of a school setting, the Eleventh Circuit still expressed doubts that the Supreme Court intended to "drastically rewrite First Amendment law to allow a school official to discriminate based on a speaker's views."[80] The Eleventh Circuit also vowed to continue to require school officials to make decisions relating to speech which are viewpoint neutral.[81] Furthermore, the Eleventh Circuit adopted an expansive definition of "school-sponsored," including school murals, indicating that the *Hazelwood* standard can be applied in a large number of circumstances.[82]

On the other hand, the First, Third, and Tenth Circuit have found that schools can make viewpoint based determinations about speech.[83] In a Tenth Circuit case, school faculty put forth a policy where the plaintiffs could not submit artwork for a school-sponsored construction project that had religious symbols, anything obscene or offensive, or referenced the shooting that had occurred in the school.[84] This Tenth Circuit case held that (1) school-sponsored speech means "activities that might reasonably be perceived to bear the imprimatur of the school and that involve pedagogical concerns";[85] and (2) that *Hazelwood* allows educators to make viewpoint-based decisions about school-sponsored speech.[86] The Tenth Circuit based its reasoning on the emphasis that the *Hazelwood* Court placed on the uniqueness of the public school setting and the deference the Court gave to educators.[87] Finally, the Tenth Circuit reasoned that schools could "advocat[e] against drug use, without being obligated to sponsor speech with the opposing viewpoint."[88] The Court concluded that the policy did not violate the student's free speech given the

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[79] *See* Searcey v. Harris, 888 F.2d 1314, 1319 n.7 (11th Cir. 1989) (finding in favor of a peace organization that brought suit against a school board for the board's denial of their request to present certain information to public high school students during "career day").

[80] *Id.*

[81] *Id.* at 1325.

[82] The Eleventh Circuit held that a high school did not violate the First Amendment by prohibiting students from including religious messages in student-painted murals on school grounds. *See* Bannon v. Sch. Dist., 387 F.3d 1208, 1214 (11th Cir. 2004) (finding that with the location of the mural, including near the school's main office, suggested that the murals had the imprimatur of the school).

[83] Tobin, *supra* note 76, at 231.

[84] *See* Fleming v. Jefferson Cnty. Sch. Dist. R-1, 298 F.3d 918, 921–22 (10th Cir. 2002), *cert. denied*, 537 U.S. 1110 (2003). In *Fleming*, the Columbine school faculty began a project in which students and community members could submit tiles that would be installed throughout the school. The purpose of the project was to get students more comfortable re-entering the building and give students a chance in reconstructing the school. *Id.*

[85] *Id.* at 924.

[86] *Id.* at 926.

[87] *Id.* at 928.

[88] *Id.* at 928.

sensitive nature and goals of the construction project and the fact that the limitations were intended to protect the wellbeing of the student population.[89]

However, this reading argues that viewpoint neutrality requires the school to provide the opposing side of an issue. This interpretation could mean that schools would have to provide harmful opposing viewpoints if they presented information in one manner, rather than focusing on the tests set out in *Tinker* and *Hazelwood*.

III. READING VIEWPOINT NEUTRALITY REQUIREMENTS INTO STUDENT SPEECH

When taking into consideration the arguments made by both sides in the circuit split, as well as the language of the seminal student speech cases, *Hazelwood* should be read to require viewpoint neutrality.[90]

A. A Close Reading of the Language in Tinker *and* Hazelwood

Before getting into the language of *Hazelwood*, courts can deduce a viewpoint neutrality requirement through the majority opinion from *Tinker*, where the Supreme Court found that "the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork of discipline, is not constitutionally permissible."[91] Based on the Court's emphasis of "one particular opinion," it appears the Court has a sensitivity not just to the content of the expression but the opinion of the speaker.[92] The Court does not make viewpoint discrimination a *per se* violation, but rather requires satisfying strict scrutiny by providing evidence that the decision was to avoid the "material and substantial interference" with the school.[93]

Tinker's test can be easily read to contain a requirement of viewpoint neutrality.[94] *Tinker*'s substantial disruption test actually contains two questions.[95] The first is "whether the school acted with the impermissible purpose of suppressing disfavored ideas."[96] If the answer is yes, then the speech decision is viewpoint discrimination and, following general First Amendment standards, the school official's behavior is unconstitutional.[97] If the answer is no, then the court determines whether "the state's legitimate interest in preventing disruption to the education environment is sufficiently weighty to justify the harm to free speech values imposed by the speech

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[89] *Id.*
[90] *See infra* Part IV.
[91] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 511 (1969).
[92] *Id.*
[93] *Id.*
[94] John E. Taylor, Tinker *and Viewpoint Discrimination*, 77 UMKC L. REV. 569, 575 (2009).
[95] *Id.* at 578.
[96] *Id.*
[97] *Id.*

restriction."[98] This reading of *Tinker* demonstrates how viewpoint discrimination can permeate the substantial disruption test and works efficiently to prevent impermissible viewpoint discrimination while also taking into account the concerns and interests of a school.

Bethel School District v. Fraser, which was decided only two years before *Hazelwood*, drew a distinction between the political message of *Tinker*'s armband and the sexual content of the student's speech.[99] However, as the Court in *Morse* would argue, "the mode of analysis employed in [*Bethel*] is not entirely clear."[100] *Bethel* was relying on previous doctrine that recognized an interest in protecting minors from exposure to vulgar and offensive language.[101] Justice Stevens dissent in *Bethel* also feared unclear standards within the free speech in school case.[102] Because of the unclear standard, and *Bethel*'s break from *Tinker* to start segmenting student speech because of the type of speech (sexual versus political), the Court was able to further segment the types of speech in *Hazelwood*.[103] While *Hazelwood* never explicitly mentions viewpoint discrimination, the majority opinion does conclude that school faculty must have the authority to refuse to sponsor speech that appears inconsistent with the "shared values of a civilized social order or to associate the school with any position other than *neutrality* on matters of political controversy," a reference to *Bethel*.[104]

Even though *Hazelwood* distinguishes *Tinker*, the majority still relies on the precedent; therefore, *Hazelwood* cannot be viewed in isolation.[105] *Tinker* still informs the requirements for student speech in *Hazelwood*.[106] In *Hazelwood,* the Court found that *Tinker*'s standard does not have to be the standard for determining when a school may "refuse to lend its name and resources to the dissemination of student expression."[107] The Court appears to give more deference in the school's decision to promote material, valuing the "name and resources" of a school.[108] *Hazelwood* starts to go beyond just protecting the student's exposure to potential age-inappropriate content but even allows the principal to take into consideration that the school publication

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[98] *Id.*

[99] 478 U.S. 675, 680 (1986).

[100] Morse v. Frederick, 551 U.S. 393, 404 (2007).

[101] *Bethel*, 478 U.S. at 684.

[102] *Id.* at 695 (Stevens, J., dissenting) (arguing that the important question in this case should be whether the speech was so obviously offensive that an intelligent high school student must be presumed to have realized that he would be punished for giving it, in order to apply the correct social setting boundaries to the speech).

[103] *Id.* at 680.

[104] Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 272 (1988) (emphasis added) (citing *Bethel*, 478 U.S. at 683).

[105] *Id.* at 270–71 (distinguishing *Tinker* by framing the question in *Hazelwood* as "whether the First Amendment requires a school affirmatively to promote particular student speech.").

[106] *Id.* at 274.

[107] *Id.*

[108] *Id.*

would presumably be "taken home to be read by students' even younger brothers and sisters."[109] This concern seems to go beyond the limitations of its own test—within the confines of the school building and into the homes of the students—and broadly expands the definition of "age appropriateness," which can then be further used by school administrators to limit student speech with broad strokes.[110]

Justice Brennan's dissent in *Hazelwood* argues that "[i]f mere incompatibility with the school's pedagogical message were a constitutionally sufficient justification for the suppression of student speech, school officials could censor each of the students or student organizations" for minor protests turning a school into an "enclave[] of totalitarianism."[111] The dissent emphasizes concerns with viewpoint discrimination more so than the majority.[112] Justice Brennan argues that "potential topic sensitivity" is a broad consideration that "invites manipulation to achieve ends that cannot permissibly be achieved through blatant viewpoint discrimination."[113] Justice Brennan further preempts the ways that the "age-appropriate" standard will be used to suppress student speech by arguing that *Hazelwood* "aptly illustrates how readily school officials (and courts) can camouflage viewpoint discrimination as the 'mere' protection of students from sensitive topics."[114] While Justice Brennan predicts the problems for student speech and expression that *Hazelwood* brings, his dissent might suggest a reading of *Hazelwood* that requires viewpoint neutrality by school administrators.[115]

Similarly, in his dissent in *Morse*, Justice Stevens argues that the test developed by the majority "trivializes the two cardinal principles" of *Tinker* and invites "stark" viewpoint discrimination.[116] Justice Breyer's concurrence echoed some of those same fears, arguing that the majority's holding that "schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use" is based on its viewpoint restrictions.[117]

Therefore, under a close reading of the language of *Tinker* and *Hazelwood*, *Hazelwood* should be read as requiring viewpoint neutrality when censoring school-sponsored content.

IV. PROTECTING LGBT STUDENT SPEECH THROUGH SPEECH DISCRIMINATION LITIGATION

While there may be a larger need for viewpoint neutrality in school, the need to protect LGBT student speech is of particular importance. In recent years, the Supreme

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[109] *Id.* at 274.
[110] *Id.* at 275–76.
[111] *Id.* at 280 (Brennan, J., dissenting).
[112] *Id.* at 287 (Brennan, J., dissenting).
[113] *Id.*
[114] *Id.* at 288.
[115] *Id.*
[116] Morse v. Frederick, 551 U.S. 393, 437 (2007).
[117] *Id.* at 426 (Breyer, J., concurring).

Court has viewed LGBT individuals as a protected class.[118] Therefore, schools are not able to discriminate against LGBT students and have added responsibilities in caring for the student population.[119] Congress even updated the Elementary and Secondary Education Act (ESEA) to prohibit elementary and secondary schools from discrimination against students based on their actual or perceived sexual orientation or gender identity or their association with someone who identifies as LGBT.[120] Schools, even as young as elementary schools, are where young people begin to formulate their identity and shape their views of societal norms.[121] While the Courts have protected the rights of LGBT individuals in recent years, schools are still able to silence speech and expression under the doctrine of *Hazelwood* and the age-appropriate standard for accessing student speech.[122]

This section will recommend how reading a viewpoint neutrality requirement into *Hazelwood* and finding LGBT speech as presumptively age-appropriate will protect school-sponsored speech on LGBT issues.[123] This section will also revisit the issues in *Robertson v. Anderson Mill Elementary* and use viewpoint neutrality and content neutrality to suggest a holding that would have protected the student's speech.[124]

Hazelwood's test narrowly applies to "school-sponsored" content; however, as *Morse* gestures towards, what can be determined as "school-sponsored" could shift in an ever-expanding digital world.[125] In *Morse*, the student displayed the infamous "BONG HiTS 4 JESUS" sign in the midst of the school watching the Olympic Torch Relay pass through the school's town.[126] There were a tremendous number of cameras

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[118] *See* Bostock v. Clayton Cnty., 140 S. Ct. 1731 (2020) (holding that individuals who suffer an adverse employment action because of their sexual or gender identity can sue under Title VII as a member of a protected class). *See generally* Obergefell v. Hodges, 576 U.S. 644 (2015).

[119] *See, e.g.*, *Know Your Rights: Students & LGBTQ Rights at School*, S. POVERTY L. CTR., https://www.splcenter.org/know-your-rights-students-lgbtq-rights-school [https://perma.cc/BJY4-X2AK] (last visited Oct. 18, 2022) (providing information for students such as student rights regarding school dress codes, right to form GSAs or Gender & Sexuality Alliances, and right to be free from religious-based discrimination).

[120] *See* Mudasar Khan, et al., *Challenges Facing LGBTQ Youth*, 18 GEO. J. GENDER & L. 475, 532–33 (2017).

[121] Rachmilovitz, *supra* note 11, at 210–11 ("Though identity development is most central in adolescence, it builds on foundations laid earlier in life . . . [d]uring adolescence . . . teens consider the impacts of political ideologies and values on their identities.").

[122] *See infra* Part III.

[123] *See infra* Part IV.

[124] *Id.*

[125] *But cf.* Brad Dickens, Comment, *Reclaiming* Hazelwood*: Public School Classrooms and A Return to the Supreme Court's Vision for Viewpoint-Specific Speech Regulation Policy*, 16 RICH. J.L. & PUB. INT. 529, 550 (2013) (arguing that *Hazelwood*'s holding only applies to a specific set of circumstances that bear the school's name and resources and schools must have complete authority to regulate that type of speech regardless of any reading of viewpoint neutrality).

[126] 551 U.S. 393, 397 (2007).

and news around the event.[127] While the Court found that the school-sponsored standard of *Hazelwood* did not apply since no one could "reasonably believe that Frederick's banner bore the school's imprimatur," the Court still allowed for the application of the school's anti-drug policy outside the course of a normal classroom.[128]

The Court decided *Morse* in 2007 and the expansion of cell phones and online schooling can change the scope of what the Court could consider school-sponsored speech.[129] While the limits of a school's reach in enforcing censorship is not the issue of this Note, there has not been litigation yet to suggest that, in the ever-growing online and digital environment, what can encompass school-sponsored speech can grow and potentially broaden the alleged narrow application of *Hazelwood*'s test.

A. LGBT Speech Should Be Presumptively Age-Appropriate

On top of requiring viewpoint neutrality to be read into *Hazelwood*, another important step towards protecting school-sponsored LGBT speech would include removing the school official's shield of "age-appropriateness." This section argues that LGBT speech should not be automatically classified as age-inappropriate but rather courts should require administrators to articulate something beyond the mere presence of LGBT individuals to constitute the speech as age-inappropriate.[130] Since Courts find that LGBT speech is not automatically categorized as sexually suggestive,[131] administrators should have to provide objective evidence to support their reasoning instead of relying on the Court's deferential standard.[132]

1. LGBT Speech Is Not Automatically Categorized as Sexually Suggestive

If the speech is school-sponsored, educators may censor student speech so long as the censorship is connected to legitimate pedagogical concerns, like age-appropriateness or whether the speech falls within the parameters of the school assignment or event.[133] If the speech is not lewd, indecent, or plainly offensive—under *Fraser*—then the rule of *Tinker* applies, and as such schools can only censor the speech if it would "materially and substantially disrupt classwork and discipline in the school."[134] By finding that LGBT speech is not presumptively age inappropriate, school officials who suppress school-sponsored LGBT speech would have to demonstrate through strict scrutiny that the content is not permissible and not viewpoint discrimination.

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[127] *Id.*
[128] *Id.* at 405.
[129] *Id.* at 393.
[130] *See infra* Section IV.A.
[131] *See infra* Section IV.A.1.
[132] *See infra* Section IV.A.2.
[133] Guiles *ex rel.* Guiles v. Marineau, 461 F.3d 320, 325 (2d Cir. 2006).
[134] *Id.*

A Florida district court considered the intersections of student speech and LGBT issues in *Gillman ex rel. Gillman v. School Board for Holmes County, Florida*.[135] In *Gillman*, the Plaintiff sued for violation of her First Amendment right stemming from a ban on wearing or displaying symbols or slogans advocating the fair treatment of queer people.[136] Not only did the Florida court find that the ban was a violation of the student's free speech, but the Court also held that the school had engaged in viewpoint discrimination.[137] The Court rejected the principal's argument that the student's stickers—including phrases such as "I Support Gays" and "Gay? Fine By Me"—were sexually suggestive as being an obvious "mis-characterization of the speech."[138] However, in this case, the issue was not school-sponsored speech or expression but rather student expression within the school environment.[139]

A Missouri district court found in favor of publishers of a website that provided supportive resources to LGBT youth and students against a school district that used internet filtering software that blocked the plaintiff's website.[140] The school used software that filtered out sexuality related materials, which primarily targeted pornographic material but also systematically blocked positive viewpoints towards LGBT issues by categorizing them as "sexuality," while allowing websites with a negative view towards LGBT issues by categorizing them as "religion."[141] The Missouri court found that this filter resulted in viewpoint discrimination.[142] The Court recognized potential injuries to the students by writing how the "board has used its official power" to indicate which ideas are "unacceptable and should not be discussed or considered."[143] The Judge wrote that the "message is not lost on students and teachers, and its chilling effect is obvious."[144] An ACLU staff attorney said that the Court "correctly recognized the constitutional rights of all students to viewpoint-neutral access of information."[145] Therefore, courts have found that LGBT content is not presumptively sexually suggestive.[146]

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[135] 567 F. Supp. 2d 1359, 1359 (N.D. Fla. 2008).

[136] *Id.*

[137] *Id.* at 1375–76 (citing Texas v. Johnson, 491 U.S. 397, 414 (1989)) ("[I]f there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.").

[138] *Id.* at 1377.

[139] *Id.* at 1376–77.

[140] Parents, Fams., & Friends of Lesbians & Gays, Inc. v. Camdenton R-III Sch. Dist., 853 F. Supp. 2d 888, 891 (W.D. Mo. 2012).

[141] *Id.* at 892.

[142] *Id.*

[143] *Id.* at 897 (citing Pratt v. Indep. Sch. Dist. No. 831, 670 F.2d 771, 779 (8th Cir. 1982).

[144] *Id.*

[145] *Judge Says Missouri School District Can't Block Gay-Friendly Websites*, 25 WESTLAW J. SOFTWARE L. 6 (2012). ACLU Attorney Block added that it is "absolutely possible to protect children from sexually explicit content while also protecting their First Amendment rights." *Id.*

[146] *See, e.g.*, Gillman v. Sch. Bd. for Holmes Cnty., 567 F. Supp. 1359, 1377 (N.D. Fla. 2008). By finding that the lower court could not characterize the phrase the student was wearing,

2. The Standard's Unclear Evidentiary Burden and Problematic Deference

Another issue with the age-appropriate standard is its unclear evidentiary burden and procedural deference to educators and administrators.[147] Under *Tinker*, the Supreme Court established a "material and substantial interference" test.[148] However, when determining whether censorship meets the *Tinker* test or, in the case of school-sponsored speech, whether censorship has a legitimate pedagogical purpose, courts give tremendous deference to the principals or educators involved.[149] This deference is commonplace within First Amendment litigation within the school setting.[150]

Schools may wish to expose students only to values and goals that the state, or individual principal, deems appropriate.[151] When courts view the decisions of school administrators and school boards, they use judicial deference and a presumption of validity for the actions of the school board.[152] This presumption can work as a "substitute for an inquiry into the intentions of government officials."[153] Justice Stevens questioned the deferential standard in *Morse* in his dissent, writing "it is hard to understand why the Court would so blithely defer to the judgment of a single school principal."[154]

The underlying presumption in *Morse* allows for principals to make subjective decisions and insert personal bias against LGBT students into deciding whether to allow certain speech or expression.[155] Even if courts usually take into account whether the restriction was made in "good faith," the standard in accessing the good

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"I Support Gays," as sexually explicit, the Florida district court implies that merely the term "Gay" is not sexually suggestive. *Id.*

[147] *See infra* Section IV.A.

[148] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 511 (1969).

[149] *See* Bernard James & Joanne E. K. Larson, *The Doctrine of Deference: Shifting Constitutional Presumptions and the Supreme Court's Restatement of Student Rights After* Board of Education v. Earls, 56 S.C. L. REV. 1, 8 (2004).

[150] *See* Clay Calvert, *Mixed Messages, Muddled Meanings, Drunk Dicks, and Boobies Bracelets: Sexually Suggestive Student Speech and the Need to Overrule or Radically Refashion* Fraser, 90 DENV. U. L. REV. 131, 155–56 (finding that the "First Amendment does not require the court to substitute its own judgment on these issues for that of the defendants, but only to determine based on the record whether their concerns are reasonable" and how this logic reflects the type of "broad deference" that courts "consistently" give to the decisions of school officials in today's First Amendment litigation).

[151] *See* Rachmilovitz, *supra* note 11, at 204 (arguing that, in order to improve the lives of LGBT youth and ending their struggles in forming their identities, the LGBT rights movement should devote more effort and resources into fighting the battles in schools and out of home care).

[152] *See* Bernard James, Tinker *in the Era of Judicial Deference: The Search for Bad Faith*, 81 UMKC L. REV. 601, 607 (2013).

[153] *Id.*

[154] Morse v. Frederick, 551 U.S. 393, 443 n.6 (2007) (Stevens, J., dissenting).

[155] *See id.*

faith intentions is still deferential and viewed in conjunction with the educator's claim that there is an educational mission.[156] Besides removing access to LGBT-friendly material, the deferential standard would allow principals to censor student speech that address LGBT issues using the language of "age appropriateness," even if there does not appear to be psychological evidence to support a blanket restriction on LGBT issues for being age inappropriate.[157]

As the rates of individuals identifying as LGBT increases with each generation, so does the number of elementary-aged children who identify as transgender.[158] Furthermore, over a hundred thousand same-sex couples are raising children.[159] If a student within this population engages with expression or speech about their lived reality, the current standard allows a school administrator to label their speech as age inappropriate without any additional objective support. For example, if a student creates a project depicting an LGBT family member in a positive light, under *Hazelwood*, the school district could refuse to put the student's work on the school wall and potentially harm the student's mental health in the process.[160]

Besides LGBT speech, courts have also deferred to school administrators when regulating a student's violent speech, which helps understand the larger issue with judicial deference to school administrators.[161] In the incidents of violent speech, courts like the Second Circuit have determined that "it is not for courts to determine how school officials should respond. School administrators are in the best position to assess the potential for harm and act accordingly."[162] Furthermore, the Supreme

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[156] *See* James & Larson, *supra* note 149, at 33.

[157] *See* Elizabeth Meyer, *LGBTQ Inclusion in Elementary Schools: What Teachers Can Do*, PSYCH. TODAY (Dec. 7, 2018), https://www.psychologytoday.com/us/blog/gender-and-schooling/201812/lgbtq-inclusion-in-elementary-schools-what-teachers-can-do [https://perma.cc/FT8A-M3L7] (providing resources to elementary school teachers on how to create a welcoming classroom and LGBTQ inclusive classroom).

[158] *See* Jennifer Altmann, *Psychology Study Seeks to Understand Transgender Youth*, PRINCETON ALUMNI WKLY. (Jan. 2022), https://paw.princeton.edu/article/psychology-study-seeks-understand-transgender-youth [https://perma.cc/5TNC-HCMV].

[159] *See* Shoshana Goldberg & Kerith Conron, *How Many Same-Sex Couples in the US are Raising Children?*, UCLA SCHL OF L.: WILLIAMS INST. (July 2018), https://williamsinstitute.law.ucla.edu/publications/same-sex-parents-us/#:~:text=Based%20on%202016%20household%20counts,sex%20couples%20(not%20shown) [https://perma.cc/Y57J-UA9V] (finding that, as of 2016, there were an estimated 114,000 same-sex couples raising children).

[160] *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988). *See generally* Robertson v. Anderson Mill Elementary Sch., 989 F.3d 282, 284 (4th Cir. 2021). This example pulls from the student speech in the *Robertson* case and provides another example of how the reasoning in *Robertson*, specifically the application of the age-appropriate standard from *Hazelwood*, could be further used to censor student speech.

[161] *See* William Nevin, *Neither* Tinker*, Nor* Hazelwood*, Nor* Fraser*, Nor* Morse*: Why Violent Student Assignments Represent a Unique First Amendment Challenge*, 23 WM. & MARY BILL RTS. J. 785, 785 (2015).

[162] *Id.* at 787 (citing Cuff *ex rel.* B.C. v. Valley Cent. Sch. Dist., 677 F.3d 109, 113 (2d Cir. 2012)).

Court focused on the "reasonableness" of the administrator's response when assessing the school's reaction to student speech.[163] However, when it comes to violent speech or regulating student expression on violence, the testimony of administrators can include the testimony of school psychologists who act as an expert, testify to the reasonableness behind the administration's actions, and provide a broader context to the student's speech.[164]

Courts should require more than just a principal's subjective belief to conclude that LGBT content is not age-appropriate. When challenged, the principal should be required to produce psychological or sociological evidence to support the decision that the speech is not age-appropriate. Courts should at least require the corroborative testimony from school psychologists, like in the violent speech example,[165] or other child development experts who can testify and define a standard for age-appropriateness. In the case of school-sponsored speech that emphasizes the pedagogical concerns of the classroom, there should be expert testimony that demonstrates how certain content cannot meet that goal.[166]

When courts are weighing claims for free speech discrimination, the standard this Note argues for would require the defendant to assert why age-appropriateness justified the censorship. By finding that LGBT issues are presumptively age-appropriate, this would in turn shift the burden to the defendant to demonstrate an alternative reason to why the content was not age-appropriate.[167]

B. Protecting LGBT Students Against Anti-Gay Speech and Expression

A criticism against a reading of viewpoint neutrality—besides that it is impossible to eradicate viewpoint discrimination completely from state action or it is necessary for the normal course of operation within a school—is that viewpoint neutrality might enable anti-gay rhetoric within schools that could harm students with LGBT identities.[168] However, viewpoint neutrality in conjunction with some important case

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[163] *Id.* at 788. Even when focusing on the reasonableness of the administrator's response, the court still shows how "unreasonable and reactionary" the response was by the administrators. *Id.* Particularly how the administrators in the *Cuff* case felt compelled to punish the ten-year-old's drawing so that other students would not copy his expression to such an extent that the students could be distracted and "prone to violent acts." *Id.* at 789.

[164] *See* Cuff *ex rel.* B.C. v. Valley Cent. Sch. Dist., 677 F.3d 109, 114 (2d Cir. 2012) (discussing how the school psychologist testified to the student's violent drawings).

[165] *See, e.g.*, *id.*

[166] *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 272 (1988).

[167] *See infra* Section IV.A. If the school administrator wishes to continue arguing under *Hazelwood*, the official would need to provide an alternative reason that the school-sponsored speech is not age-appropriate. For example, arguing that, while the speech discusses LGBT issues, the speech is also lewd, indecent, or plainly offensive and therefore age-inappropriate and allowed to be censored.

[168] *See* Maura Douglas, *Finding Viewpoint Neutrality in Our Constitutional Constellation*, 20 U. PA. J. CONST. L. 727, 761 (2018).

law and laws against bullying and harassment in school can protect LGBT youth from anti-gay speech while also maintaining political viewpoint neutrality.[169]

Two cases emerge to demonstrate how courts have dealt with anti-gay speech within school: *Harper v. Poway Unified School District* and *Nuxoll v. Indian Prairie School District #204*.[170] In *Nuxoll*, the Seventh Circuit Court of Appeals found in favor of a sophomore who wore a "Be Happy, Not Gay" T-shirt, holding that the slogan on the shirt is not "derogatory" or "demeaning" enough to constitute a violation of the school's policy or infringe on other student's rights or safety.[171] On the contrary, the Ninth Circuit Court of Appeals found against a student for wearing an anti-gay T-shirt with religious connotations in *Harper*.[172] Here, the Ninth Circuit limited the religious expression because (1) the Constitution does not "authorize one group of persons to force its religious views on others or to compel others to abide by its precepts" and (2) the harmful language of the T-shirt could reasonably disrupt the educational process or cause physical or psychological injury to other students.[173]

These two cases provide some insight into some of the reasoning that courts use when determining whether to allow certain types of anti-gay expression. *Nuxoll*, for instance, while allowing the student to wear the "Be Happy, Not Gay" shirt, might have been decided differently if the slogan was expressed by a student during a school-sponsored event or assignment where the school would have used the *Hazelwood* standard to determine if the speech had a legitimate pedagogical concern.[174]

When determining whether speech should be allowed in the context of anti-gay expression, not all verbal assaults are alike as "some have particularly devastating effects for members of vulnerable groups."[175] In *Harper*, the Ninth Circuit found that students who may be attacked on the "basis of a core identifying characteristic" like sexual orientation have a right "to be free from such attacks while on school campus."[176] By viewing LGBT students as a protected class within a vulnerable group, the school has constitutional basis to protect the students and limit school-sponsored speech that can be constituted as a verbal assault on other LGBT students.[177] Currently,

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[169] *See infra* Section IV.B.

[170] *See generally* 445 F.3d 1166 (9th Cir. 2006), *cert. granted, judgment vacated sub nom.* Harper *ex rel.* Harper v. Poway Unified Sch. Dist., 549 U.S. 1262 (2007); 523 F.3d 668 (7th Cir. 2008).

[171] 523 F.3d at 676.

[172] 445 F.3d at 1192 (finding against a student who wore a shirt that read "BE ASHAMED, OUR SCHOOL EMBRACED WHAT GOD HAS CONDEMNED" written on the front and "HOMOSEXUALITY IS SHAMEFUL" handwritten on the back).

[173] *Id.* at 1188.

[174] *See Hazelwood*, 484 U.S. 260 at 272.

[175] *See* Luke A. Boso, *Anti-LGBT Free Speech and Group Subordination*, 63 ARIZ. L. REV. 341, 386 (2021).

[176] *Id.* ("Some [verbal assaults] have particularly devastating effects for members of a vulnerable group.").

[177] *See id.* Protecting student populations from targeted hate speech or offensive content

every state has enacted some form of antibullying statute, which could further protects LGBT youth from being subjected to certain forms of anti-gay speech.[178]

C. Resolving Robertson v. Anderson Mill Elementary

By reading a requirement of viewpoint neutrality into *Hazelwood* and reassessing the standards of "age appropriateness," as well as the procedural issues around proving age-appropriateness, *Robertson* would have been decided in a manner that protected the student's speech.[179]

Under *Tinker*, the *Robertson* Court should not have allowed the principal's argument that he was concerned with the topic being "disagreeable"[180] because of the "type of school this is"[181] as this language is just a defense of avoiding the "discomfort and unpleasantness" that accompany an unpopular viewpoint.[182] Had the principal been limited by this previous Supreme Court precedent, the principal would have had to demonstrate something beyond a mere "desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."[183] However, the appellate court's opinion emphasizes how the principal relied upon that "discomfort" and "unpleasantness" when he wanted to avoid parental reaction to something that he believed would not go over well in his district.[184]

The Court gave deference to the principal's belief that "it was not age appropriate to discuss transgenders, lesbians, and drag queens outside of the home."[185] The principal's belief was never backed up by any psychological or sociological evidence that it was not age-appropriate to discuss LGBT individuals "outside of the home."[186] Without any empirical evidence to suggest otherwise, the principal's assertion that LGBT individuals should not be discussed "outside of the home" appears to be his own personal viewpoint. Organizations can provide an opposing viewpoint with at least minimal empirical evidence and argue that discussing LGBT individuals in school can improve young people's lives and relationships.[187] Since there are

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that targets the student's identity as a member of a protected class likely always constitutes a protected action particularly under *Tinker*.

[178] *See Developments in the Law—Sexual Orientation and Gender Identity*, 127 HARV. L. REV. 1698, 1699 (2014).

[179] *See infra* Section IV.C.

[180] *Robertson*, 989 F.3d at 286.

[181] *Id.*

[182] *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).

[183] *See id.*

[184] *Id.; see Robertson*, 989 F. 3d at 286.

[185] *See Robertson*, 989 F.3d at 286.

[186] *See generally id.*

[187] *See, e.g.*, *Learning about LGBT Issues in Primary Schools*, THESCHOOLRUN.COM, https://www.theschoolrun.com/learning-about-lgbt-issues-primary-schools [https://perma.cc/F445 -XHG3] (last visited Oct. 18, 2022) (arguing that learning about LGBT issues is as

readily available opposing arguments to the principal's contention that LGBT individuals should not be discussed "outside of the home," the courts should not take it for certain that the principal is correct in his definition of age-appropriateness.[188] Therefore, the age-appropriate standard would require administrators or principals to objectively demonstrate how an expression is age-inappropriate when dealing with LGBT issues.

If the *Robertson* Court reevaluated the standard of deference, the court would have required the principal to provide more substantive evidence to his assertion that the student's content was not age-appropriate.[189] Since the student's assignment was to write an "essay to society," the fact that the elementary student wrote about transgender acceptance was well within the parameters of the assignment.[190] Therefore, the student's assignment falls within the first test of *Hazelwood* and reasonably relates to a legitimate pedagogical concern.[191]

The principal also provides no evidence that the principal would have removed content that was critical of LGBT individuals.[192] The quotation provided by the plaintiff suggests that the principal was concerned about the original paper making "other parents upset" and creating "an undesirable situation at the school" because of the "type of school this is, the people that work here and the students and families of the students that go here."[193] While the Court could interpret the language of the principal to be viewpoint neutral, the principal clearly was concerned with the political ramifications of releasing an essay that was accepting of transgender individuals.[194] Under *Planned Parenthood*, the Nine Circuit concluded that controlling the content of a school-sponsored publication so as to maintain the appearance of neutrality on a controversial issue is within a reserved pedagogical mission of a school, therefore maintaining the required viewpoint neutrality.[195] Even if one viewed *Robertson* through this reasoning, the principal's argument would fail since not publishing the student's essay was not intended to maintain neutrality but rather was a reactionary move to avoid a feared backlash from the families at this "type of school."[196] The decision made by the principal in *Robertson* arguably falls outside of viewpoint neutrality and would therefore further be barred under this revised reading of *Hazelwood.*

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important as "learning about LGBT issues, as well as other types of diversity, has the power to transform all young people's lives" and "it's also important for children to learn that families come in different shapes and sizes, including those with same-sex parents.").

188 *Robertson*, 989 F.3d at 286.

189 *See* Calvert, *supra* note 150, at 155.

190 *Robertson*, 989 F.3d at 285.

191 *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988).

192 *See generally id.* at 285.

193 *Robertson*, 989 F.3d at 286.

194 *Hazelwood*, 484 U.S. at 285.

195 *See* Planned Parenthood v. Clark Cnty Sch. Dist., 941 F.2d 817, 829 (9th Cir. 1991).

196 *See Robertson*, 989 F.3d at 286.

Just as reading viewpoint neutrality into *Hazelwood* and reforming the procedural issues with the age-appropriateness standard would have protected the student in *Robertson*, the standard would help protect LGBT speech in schools, which would in turn help protect LGBT students and help students develop their identities in an informed and safe manner.[197]

D. Looking Forward: How This Approach to Hazelwood *Could Prevent Further Harm to LGBT Students*

Viewing LGBT speech as not inherently age-inappropriate content and requiring viewpoint neutrality in school administrators' decisions to silence school-sponsored speech creates a judicial hurdle that could prevent school-sponsored LGBT speech from being unjustifiably silenced.[198] Specifically, the concept of "age-appropriateness" has been used as grounds to sponsor and endorse certain legislation that can silence LGBT speech, including school-sponsored LGBT expression.[199] For example, one proposed Florida bill would prohibit school districts from encouraging "classroom discussion about sexual orientation or gender identity in primary grade levels or in a manner that is not age-appropriate or developmentally appropriate for students."[200] Since teachers cannot "encourage classroom discussion about sexual orientation or gender identify" a bill like Florida's would extend to school-sponsored speech since teachers would have to silence students that mention LGBT issues during classroom discussions.[201] Some contend that the bill's motivations seem misguided if not primarily motivated by silencing student pro-LGBT speech overall.[202]

This type of bill directly invokes *Hazelwood*'s age-appropriate standard.[203] Since the bill uses the same language of "age-appropriateness" that appears within *Hazelwood*, the bill appears to be using *Hazelwood* and subsequent Supreme Court

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[197] *See supra* Section IV.C.

[198] *See supra* Part III.

[199] *See* Kirby Wilson, *Florida's 'Don't Say Gay' Bills, Explained*, TAMPA BAY TIMES, https://www.tampabay.com/news/florida-politics/2022/02/08/floridas-don't-say-gay-bills-explained/ [https://perma.cc/VR7S-PWXT] (last updated Feb. 8, 2022) ("[Prevent] educating young children about gender or sexual orientation before they are *mature enough to handle it* . . . [the legislation] would apply to any policies that are *not 'age-appropriate' or 'developmentally appropriate.* "') (emphasis added).

[200] *Id.*

[201] *Id.* President Biden referred to this bill as one that is "designed to target and attack the kids who need support the most," which references the potential harm that this kind of legislation and thinking can do to vulnerable LGBT students. *Id.*

[202] *See id.* ("Nadine Smith, executive director of the LGBTQ rights group Equality Florida, which opposes the bills, said the measures attempt to solve a nonexistent problem. There is no developmentally inappropriate curriculum about sexual orientation or gender identity being taught to young kids, she contended.").

[203] *Id.*

cases as the basis for its constitutionality.[204] These types of bills rarely demonstrate a standard of what qualifies as age-appropriate discussion or who decides what age-appropriate means in each individual context, opening the door for the courts to continue to use the deferential standard that allows school administrators to decide age-appropriateness without empirical or non-subjective evidence.[205]

This bill is one example of a larger trend in politics that works to take LGBT issues out of a classroom and prevent school-sponsored expression about LGBT under the guise of "age-appropriateness"—particularly in elementary classrooms.[206] Given the increasing trend towards legislation that would prevent school-sponsored student expression of speech discussing and supporting LGBT individuals, the Supreme Court should not only interpret *Hazelwood* as requiring viewpoint neutrality but also assert that LGBT issues are not presumptively age-inappropriate, requiring legislation like the bills addressed above to survive strict scrutiny rather than the deferential standard currently used.[207]

CONCLUSION

Currently, *Hazelwood* can act as a shield for administrators' censorship of student-created speech about LGBT issues. By adopting a broad and deferential standard, *Hazelwood* permits otherwise impermissible viewpoint discrimination under the guise of a fluid and incredibly deferential "age-appropriate" standard. In order to prevent this standard from being weaponized against LGBT speech or expression in school-sponsored events, *Hazelwood* should not only be read as requiring viewpoint neutral decisions, but LGBT speech also should not be presumptively age inappropriate. This reading would force administrators to provide enough evidence to show that the content is not age-appropriate, that the expression violates the *Tinker* test, or that the restriction meets the burden of strict scrutiny.

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[204] *Id.*

[205] *See* Ryan Thoreson, *Florida Advances 'Don't Say Gay' Bill*, HUMAN RTS. WATCH (Feb. 17, 2022, 6:22 PM), https://www.hrw.org/news/2022/02/17/florida-advances-don't-say-gay-bill# [https://perma.cc/3FW8-72US] ("However, [the bill] does not specify what would be considered age-appropriate, or who decides.").

[206] *See* Monthly Roundup, *Educational Gag Orders Target Speech About LGBTQ+ Identities with New Prohibitions and Punishments*, PEN AM. (Feb. 15, 2022), https://pen.org/educational-gag-orders-target-speech-about-lgbtq-identities-with-new-prohibitions-and-punishments/ [https://perma.cc/7GGA-LW5K] (providing information on how there are currently fifteen bills under consideration in nine states that discuss silencing speech about LGBTQ+ identities in school and how one, in South Carolina, forbids teachers from subjecting students to "controversial and age-inappropriate topics" like "gender identity or lifestyles"); see *also* Robertson v. Anderson Mill Elementary Sch., 989 F.3d 282 (4th Cir. 2021) (providing a recent example of how school administrators can use *Hazelwood* to prevent a student from expression opinions about transgender issues).

[207] *See supra* Part IV.

School-sponsored LGBT speech should be protected expression in school to protect LGBT students and allow students to research and write about LGBT issues that might affect them or their families. Under this standard, censoring LGBT content during school-sponsored assignments or events would constitute viewpoint discrimination, and qualified immunity would no longer protect school faculty from liability when they engaged in discriminatory behavior against student speech. This interpretation would allow the Courts to be a reasonable option for students attempting to litigate free speech claims and help prevent unreasonable legislation that works to silence academic, affirming, and appropriate student discussion of LGBT issues.