

No. 09-

IN THE SUPREME COURT OF THE UNITED STATES

ANTONIO PECK, a minor by and through his
parents and next friends, JO ANNE PECK and
KENLEY LESTER PECK,

Petitioner,

v.

BALDWINSVILLE CENTRAL SCHOOL
DISTRICT, CATHERINE MCNAMARA
ELEMENTARY SCHOOL, MARY R. SCHILZ, in
her official capacity as Principal of Catherine
McNamara Elementary School, JEANNE DANGLE
in her official capacity as Superintendent for
Baldwinsville Central School District,

Respondents.

**PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

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QUESTIONS PRESENTED

1. Whether a student can be denied standing to continue his challenge of school officials' censorship of religious viewpoint in the student's work when the student remains enrolled in the school district and subject to the district-wide policy which results in viewpoint discrimination.
2. Whether a court of appeals can effectively overrule *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969) by holding that a student must show that a school district regularly violates students' free speech rights in order to maintain a challenge of school censorship of religious viewpoint in the student's work.
3. Whether a court of appeals can use a procedural rule specifying the requirements for an appellate brief to find that a First Amendment claimant involuntarily waived his right to seek damages for deprivation of his free speech rights when he failed to mention damages in his brief.

PARTIES

The Petitioner is Antonio Peck, a minor, who is bringing this action through his parents and next friends JoAnne Peck and Kenley Lester Peck.

Respondents are the Baldwinsville Central School District, the Catherine McNamara Elementary School and Mary R. Schilz and Jeanne Dangle, the principal and superintendent, respectively, of the Baldwinsville Central School District.¹

¹ Robert Crème and Theodore Gilkey were originally named Defendants in their capacities as principal of Catherine McNamara Elementary School and Superintendent of the Baldwinsville Central School District, respectively. Both parties no longer work for the district, and the Second Circuit substituted the present principal, Mary R. Schilz, as a Defendant in her official capacity and the present superintendent, Jeanne Dangle, as a Defendant in her official capacity, and the caption has been changed to reflect the substitutions.

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The Second Circuit Court of Appeals' denial of rehearing or rehearing *en banc* is unpublished and is reproduced at Appendix p. 42a. The Second Circuit Court of Appeals' summary order is unpublished, but can be found at 2009 WL 3425215 and beginning at p. 1a of the Appendix. The District Court's order is unpublished, but is available at 2008 WL 4527598 and beginning at p. 8a of the Appendix.

JURISDICTION

The judgment of the Court of Appeals was filed on October 26, 2009. The order of the Court of Appeals denying rehearing or rehearing *en banc* was filed on December 11, 2009. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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

U.S. Const. amend. I.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983.

STATEMENT OF THE CASE

For more than ten years Petitioner Antonio Peck (“Antonio”) has been traversing procedural hurdles and enduring years of pending decisions while continuing his studies in the Baldwinsville Central School District beneath a cloud of chilled First Amendment speech. Just as he was nearing the end of the journey in the form of an appellate determination of the merits of his viewpoint discrimination claim, the Second Circuit slammed the courthouse door in his face. The court claimed that he had suddenly lost standing even though he remains a student in the district susceptible to the same district-wide policy that caused the censorship which is the subject of his complaint. The Second Circuit also created a new impossibly high standard for maintaining free speech challenges—that students must show that there is a “policy or custom (or an equivalent) suggesting that any defendant regularly violates students’ free speech rights.” (App., p. 6a). Finally, the Second Circuit used F. R. App. P. 28, which lists the requirements for appellate briefs, to deprive Antonio of his right to seek damages for Respondents’ censorship of Antonio’s work. (App., p. 5a n.1).

The extra-judicial rulings by the Second Circuit contravene this Court’s clear precedent that students who remain under the auspices of school officials do not lose standing to challenge officials’ actions. Furthermore, the Second Circuit’s new

“policy of regular violations” burden of proof effectively overrules *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969) so that student free speech challenges will be nearly impossible to maintain.

While a kindergartner in 1999, Antonio created posters in response to an assignment requesting artwork on ways to “save our environment.” (App., pp. 14a-20a). Antonio’s first poster was rejected because school officials found it to be clearly a religious picture with religious overtones. (App. p. 16a). Antonio submitted a second poster, which retained one feature from the initial poster, a figure of a kneeling man with hands pointed to the sky, in the lower left corner. (App., p. 19a). Antonio’s teacher, Susan Weichert, and the school principal, Robert Crème, saw the kneeling figure as clearly religious and agreed to display the poster along with others at a school assembly to be attended by parents, but to fold over the figure of the kneeling man. (App., p. 20a). Notably, Mrs. Weichert was not concerned about the effect of the “clearly religious” figure on the kindergarten students since she displayed the complete poster in front of the kindergarten class without folding over the picture of the kneeling man. (App., p. 19a).

Mrs. Weichert and Mr. Crème said that they were concerned that *adults* viewing the poster on display with about 80 others would believe that they were teaching religion in kindergarten unless

the figure of the kneeling man was censored. (App., p. 20a) (emphasis added). Mrs. Weichert explained that she folded the picture of the kneeling man because she “felt that other *parents* could look at this poster and think, and make the leap that I was, in fact teaching religion in the classroom, which I was not.” (App., pp. 20a, 23a) (emphasis added). She indicated that she would not have folded over other images such as a manatee because: “I can't imagine that there would have been any *parent* that would have objected to a manatee because they wouldn't have construed it as anything other than an animal ... Because it had no religious significance, ... therefore I wouldn't have had to worry about anybody being offended by-no strike, not be offended, anyone would surmise that I may have been teaching religion in kindergarten.” *Peck v. Baldwinsville School Bd.*, 426 F.3d 617 (2d Cir. 2005) (“Peck II”)(emphasis added). Superintendent Theodore Gilkey said that officials were concerned that by displaying the poster they would communicate to the *people at the assembly* that the school was endorsing religion or Jesus. (App., p. 21a). Principal Creme said that he also believed “that some people would have felt that we were teaching religion” if the picture of the kneeling man were displayed on one of 80+ posters on display. (App., p. 23a).

On November 1, 1999, Antonio filed a Complaint under 42 U.S.C. §1983 alleging that Respondents violated his rights to free speech, freedom of religion, equal protection and freedom

from hostility to religion under the Establishment Clause when they censored the religious viewpoint in Antonio's poster. Defendants immediately filed a motion to dismiss under Rule 12(b)(6). (App., p. 9a). The district court converted the motion into a Rule 56(b) motion *sua sponte* and granted summary judgment on all counts to Respondents. (App., p. 10a). The Second Circuit vacated that judgment and remanded the case to the district court for discovery and further decision. *Peck v. Baldwinsville School Bd. of Educ.*, 7 Fed.Appx. 74 (2d Cir. 2001)("Peck I").

Once discovery was completed, Respondents moved for summary judgment. (App., p. 10a). The matter remained fully briefed and under submission for twenty-two months until the district court granted Respondents' Motion for Summary Judgment and dismissed Antonio's complaint. (App., pp.10a, 44a).

Antonio again appealed to the Second Circuit, which reversed the district court's dismissal of Antonio's free speech claim. *Peck II*, 426 F.3d 617. The Second Circuit found that the facts of the case implicated a "troubling concern: the viewpoint neutrality of The District's decision with respect to Antonio's poster." *Id.* at 630. The Second Circuit found that:

The district court overlooked evidence that, if construed in the light most favorable to Pecks, suggested that Antonio's poster was censored not

because it was unresponsive to the assignment, and not because Weichert and Creme believed that JoAnne Peck rather than Antonio was responsible for the poster's content, but because it offered a religious perspective on the topic of how to save the environment.

Id. The court found that there were disputed facts as to whether Antonio's poster offered a "religious viewpoint," and whether, if the poster had depicted a purely secular image that was equally outside the scope of the environmental lessons it would similarly have been censored. *Id.* at 631. The Second Circuit acknowledged that the district's censorship of Antonio's work might have a legitimate pedagogical basis. *Id.* However,

We think that it is also possible to interpret the testimony of Weichert and Creme as indicating that they were particularly disposed to censor Antonio's poster because of its religious imagery and that they would not necessarily have similarly censored secular images that were equally non-responsive. Were these facts ultimately proved, The District's actions might well amount to viewpoint discrimination.

Id. The court concluded "that a manifestly viewpoint discriminatory restriction on school-sponsored speech is, *prima facie*, unconstitutional, even if reasonably related to legitimate pedagogical

interests.” *Id.* at 633. In remanding the viewpoint neutrality question, the Second Circuit directed the district court to ascertain whether Respondents’ actions were necessary to avoid an Establishment Clause violation, and if so, whether avoidance of that violation was a sufficiently compelling state interest to justify viewpoint discrimination by Respondents. *Id.* The Second Circuit emphasized that:

What is a compelling state interest is certainly informed by the fact of a school context and the presence of minor children. In gauging whether there is a compelling state interest though, *courts must be exceedingly careful to be sure that the asserted compelling state interest is directly concerned with the state's desire to protect the children in the school and is not motivated by the wish to suppress speech the school and the state do not like.*

Id. at 633 n.11 (emphasis added). That admonition from the Second Circuit was particularly important in light of the fact that Respondents testified that their concern was not the effect of Antonio’s poster on the other students, but on adults who might view the poster and believe that Mrs. Weichert was teaching about religion. (App., pp. 20a-24a).

The District Court held a bench trial on January 29, 2007 on the free speech claim. (App., p.

10a). Respondents again testified that they censored Antonio's poster because they were concerned that adult observers would believe that they were teaching religion in kindergarten. (App., pp. 23a-27a). Respondents again made it clear that their concern was *not* how the religious image would affect Antonio's fellow kindergarteners, who had already seen the uncensored poster. (App., pp. 23a-27a). In other words, Respondents established that their concern was not to protect the children in the school, but to protect themselves from possible adult misperception about religion being taught in school. (App., pp. 23a-27a).

Twenty months after trial, on September 30, 2008, the District Court entered judgment in favor of Respondents. (App., pp. 40a-41a). Despite the Second Circuit's admonition to the district court to be exceedingly careful to ensure that "the asserted compelling state interest is directly concerned with the state's desire to protect the children in the school and is not motivated by the wish to suppress speech the school and the state do not like," the district court acknowledged that the Respondents' interest was not in protecting children, but in protecting themselves from the misperceptions of adult visitors. (App., pp. 38a-39a). Nevertheless, the district court found that the interest was legitimate so that there was no impermissible viewpoint discrimination. (App., pp. 38a-39a). Based upon that finding, the district court dismissed the free speech claim. (App., pp. 38a-39a).

Antonio appealed again to the Second Circuit. Instead of ruling on the merits, however, the appellate panel determined that Antonio no longer had standing, based upon *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983) and other criminal procedure cases. (App., pp. 6a-7a). On October 26, 2009, the Second Circuit issued a summary order vacating the district court order and remanding the case to the district court for dismissal based upon lack of subject matter jurisdiction. (App., pp. 6a-7a). The Second Circuit further held that Antonio lacked standing because: “He points to no policy or custom (or an equivalent) suggesting that any defendant regularly violates students’ free speech rights. *See Shain[v. Ellison]*, 356 F.3d [211,] at 216 [(2d Cir. 2004)]. Nor has he offered a reason to believe that he faces a ‘reasonable likelihood’ of future harm. *Id.* at 215.” (App., p. 6a). In a footnote the Second Circuit held: “In his original complaint, Antonio also sought damages. In his brief to this Court, however, he asks for declaratory and injunctive relief only. He has therefore waived any claim for damages. *See Norton v. Sam’s Club*, 145 F.3d 114, 117-18 (2d Cir. 1998).” (App., p. 5a n.1).

The court did not provide any analysis to support its new burden of proof. Nor did the court explain its conclusion that Antonio, who is still enrolled in the district, does not face a reasonable likelihood of again having his work censored to prevent adult observers from believing that the school teaches religion.

Antonio sought rehearing, or, alternatively, rehearing *en banc*, arguing that the Second Circuit's conclusion conflicted with this Court's ruling in *Honig v. Doe*, 484 U.S. 305 (1988) and student free speech precedents. The Second Circuit denied rehearing on December 11, 2009. (App., pp. 42a-43a).

REASONS FOR GRANTING THE PETITION

I. THE SECOND CIRCUIT CONTRAVENED THIS COURT'S PRECEDENTS WHEN IT RULED THAT A STUDENT WHO IS STILL ENROLLED IN A SCHOOL DISTRICT AND SUBJECT TO A DISTRICT-WIDE POLICY THAT RESULTS IN VIEWPOINT DISCRIMINATION HAS LOST STANDING TO CHALLENGE THE DISTRICT'S CENSORSHIP.

The Second Circuit's conclusion that Antonio does not have standing to continue with his challenge of Respondents' censorship directly conflicts with this Court's rulings which establish that a party retains standing if there is a reasonable expectation that he will again suffer the kind of injury which precipitated the lawsuit. *Honig v. Doe*, 484 U.S. 305, 318-321 (1988). The burden of proving that there is no reasonable expectation that the wrong will be repeated is "a heavy one." *United States v. W. T. Grant Co.*, 345

U.S. 629, 633 (1953) Statements that a policy has been changed or that the challenged conduct will not be repeated are not sufficient. *Id.* Instead, it must be “absolutely clear that, absent the protective action of a court, the allegedly wrongful behavior could not reasonably be expected to recur.” *Vitek v. Jones*, 445 U.S. 480, 487 (1980).

In *Honig*, this Court held that there was a reasonable expectation that a student would again face discriminatory conduct by a school district even though he was not enrolled in school at the time of the decision. *Honig*, 484 U.S. at 320. The disabled student remained eligible for public school services under the Education of the Handicapped Act (“EHA”) until he completed high school or turned 21. *Id.* Until that time, he faced the possibility that he would enroll in public school and be subject to the same impermissible conduct that precipitated the lawsuit. *Id.* The fact that he was not presently enrolled in school and had moved to another school district within the state did not affect his continued standing to assert claims against state education officials. *Id.*

In this case, Antonio is still enrolled in the same school district which is the subject of this action and therefore remains susceptible to the same kind of religious censorship that precipitated his lawsuit. This is particularly true in light of the fact that Respondents censored Antonio’s artwork because of their concern that adults would misperceive that Respondents were teaching religion in school, not because they were concerned

that the students would be exposed to religious doctrine. The concern about adults misperceiving student speech remains throughout a student's tenure in a school district. It does not disappear when a student progresses from kindergarten to grade school or grade school to high school. So long as Antonio remains a student in the Baldwinsville district he remains subject to the district's policy that because adults might misperceive that the school teaches religion the district will censor religious viewpoints in student work. Therefore, so long as Antonio remains a part of the district, there is a reasonable expectation that he will again face censorship of religious viewpoint in his school work. Under *Honig* he still has standing to pursue his claims for injunctive relief, declaratory relief and damages.

Instead of following the controlling precedent in *Honig*, the Second Circuit relied upon criminal procedure cases to conclude that Antonio no longer has standing to seek injunctive and declaratory relief. (App., pp. 5a-6a, citing *City of Los Angeles v. Lyons*, 461 U.S. 95, 105-06 (1983); *DeShawn v. Safir*, 156 F.3d 340 (2d Cir. 1998); *Shain v. Ellison*, 356 F.3d 211, 216 (2d Cir. 2004)). However, as this Court explained in *Honig*, the standing principles in criminal procedure cases are not analogous to principles applied in students' rights cases. *Honig*, 484 U.S. at 320. "[F]or purposes of assessing the likelihood that state authorities will reinflct a given injury, we generally have been unwilling to assume that the party seeking relief will repeat the

type of misconduct that would once again place him or her at risk of that injury,” e.g., being stopped and resisting arrest, as in *Lyons*. *Id.* However, when the challenged act does not require that the claimant engage in misconduct, this Court is more willing to assume that the plaintiff will again face a deprivation of rights at the hand of the defendant. *Id.* Therefore, a student who still has the right to a free and appropriate public education retains standing to challenge impermissible denials of that right regardless of whether he is currently enrolled in a public school. *Id.*

In contravention of this Court’s explanation of the differential analysis between criminal procedure and student rights cases, the Second Circuit relied upon *Lyons*, a criminal procedure case, to conclude that Antonio did not have standing. In *Lyons*, the defendant could not establish standing for injunctive relief against a police chokehold policy unless he could demonstrate that he was going to be stopped by police, resist arrest and be placed in an illegal chokehold. *Lyons*, 461 U.S. at 110-111. That series of unlikely events, beginning with engaging in a criminal act, was too speculative to confer standing to seek injunctive relief. *Id.* Similarly, in the other cases cited by the Second Circuit, the criminal defendants were denied standing because there was nothing more than speculation that they might engage in criminal activity and be subjected to improper police techniques in the future. *Shain*, 356 F.3d at 216 (challenging policy of strip searching arrestees); *Curtis v. City of New Haven*, 726 F.2d

65, 68 (2d Cir.1984) (challenging the use of mace against arrestees).

Unlike the criminal defendants in *Lyons*, *Shain* and *Curtis*, students like Antonio do not need to prove a series of unlikely events, such as being stopped by police, resisting arrest and being placed in a choke hold, in order to have standing to challenge school officials' censorship. Instead, as this Court said in *Honig*, students need only establish that they remain subject to the school policy that led to the censorship of their work so that there is a reasonable expectation that the discriminatory act will recur. *See Honig*, 484 U.S. at 318. In cases such as this, in which school officials censor student work out of fear of adult misperceptions instead of concern for effects upon other students, it is particularly likely that a student will be susceptible to further censorship so long as he is under the auspices of the school district. Under these circumstances, the Second Circuit's conclusion that a student can lose standing due to the passage of time is particularly troubling and would sanction the chilling of student speech any time a school official is worried that some third party observer might mistakenly believe that the school teaches religion. This would grant school districts a broad power of censorship and create the kind of "heckler's veto" that this Court has warned against. *Reno v. ACLU*, 521 U.S. 844, 880 (1997).

In *Honig*, this Court specifically stated that the standing principles in *Lyons* do not apply to

student rights cases. *Honig*, 484 U.S. at 320. The Second Circuit directly contravened *Honig* when it used *Lyons* to deprive Antonio of standing for his student rights claim. The Second Circuit's reliance upon *Lyons* to dismiss Antonio's declaratory relief and damages claims even contravenes *Lyons*, which held that the petitioner lacked standing for injunctive relief but still had standing to seek damages for prior injuries. *Lyons*, 461 U.S. 105-106.

The Second Circuit heard two prior appeals in the case, and implicitly recognized that Antonio had standing at least through 2005 when it issued its opinion in *Peck II*. However, according to the court, at some point between 2005 and 2009 Antonio lost standing to pursue his claims. There was no change in his status as a student in the district nor any other reason offered for closing the courthouse door. Consequently, under the Second Circuit's ruling, students can lose standing to challenge free speech violations for unknown reasons at some unspecified time after they file their complaint but before they stop being a student. That arbitrary standard contravenes this Court's protection of freedom of speech as one of the fundamental personal rights and liberties accorded to all citizens. *Schneider v. State*, 308 U.S. 147, 161 (1939). Students are unable to remedy violations of their free speech rights if the courthouse door is slammed in their face prematurely and without notice.

The procedural history of this case makes the Second Circuit's ruling all the more egregious. Antonio filed this action in 1999, and even before discovery was commenced the district court attempted to grant summary judgment in favor of the school district. (App., pp. 9a-10a). Antonio had to appeal that decision while continuing as a student in the Baldwinsville district. Following remand from the first appeal, the parties completed discovery and Respondents filed a motion for summary judgment. (App., p. 10a). The motion was fully briefed and taken under submission by the court on October 16, 2002. (App., p. 44a). The motion remained under submission for nearly two years until the district court issued its decision on August 16, 2004. (App. p. 44a). Throughout that time, Antonio continued his studies in the Baldwinsville district, susceptible to having his schoolwork censored. After remand from the second appeal, the district court conducted a trial in January 2007. (App., p. 10a). Another twenty months went by before the district court issued its decision on September 30, 2008. (App., pp. 40a-41a). For nearly four years, Antonio's claims were stalled in the district court while Antonio progressed through the Baldwinsville district, susceptible to further censorship. Antonio finally received a judgment on the merits from the district court and could move toward further resolution from the Second Circuit. However, instead of resolving the case, the Second Circuit told Antonio it was too late and slammed the door.

In so doing, the Second Circuit punished Antonio for delays that were entirely outside of his control. Furthermore, by ruling that Antonio lost standing while awaiting rulings from the district court, the Second Circuit rewarded dilatory conduct. If the ruling remains unchallenged, then delay will become a new weapon against students seeking to uphold their free speech rights. Students' rights will be chilled while motions remain under submission for months or years, and then courts will decide it is too late to address the violation. Since the deprivation of First Amendment rights for "even minimal periods of time, unquestionably constitutes irreparable injury," *Elrod v. Burns*, 427 U.S. 347, 373 (1976), the Second Circuit's sanctioning of delay and dismissal is potentially devastating for any First Amendment plaintiff whose speech will be chilled -- possibly forever.

This Court should grant certiorari to overturn the Second Circuit's ruling and clarify that the standing principle in *Honig* must be followed when free speech rights are at stake.

II. THE SECOND CIRCUIT CONTRAVENED ITS OWN AND OTHER CIRCUITS' PRECEDENTS WHEN IT RULED THAT A STUDENT WHO IS STILL ENROLLED IN A SCHOOL DISTRICT AND SUBJECT TO A DISTRICT-WIDE POLICY THAT RESULTS IN VIEWPOINT DISCRIMINATION HAS LOST STANDING TO CHALLENGE THE DISTRICT'S CENSORSHIP.

The Second Circuit panel contradicted its own and sister circuits' precedents when it held that Antonio, who remains a student in the District, no longer has standing to pursue his claims against the District's censorship of his artwork. Other Second Circuit panels, as well as other circuit courts, have consistently followed *Honig* to reject attempts to deny standing to parties who show a reasonable expectation that wrongful conduct would recur.

A. The Second Circuit's Determination That Antonio Lacks Standing Directly Conflicts With Rulings From Other Second Circuit Panels.

The most glaring example of the intra-circuit conflict the panel decision created can be seen by comparing the decision below with another Second

Circuit panel's decision in *Heldman v. Sobol*, 962 F.2d 148, 157 (2d Cir. 1992). In a case with facts substantially similar to those in *Honig*, the Second Circuit correctly found that a student who was not presently enrolled in school but still qualified for services from the school still had standing to pursue his claims that the school violated his statutory rights. *Id.* Notably, the Second Circuit found that the student's claims were not moot even though he was **not** presently enrolled, while in this case the Second Circuit found that Antonio's case was moot even though he **is** presently enrolled. (App., p. 6a).

Antonio's status also resembles that of the plaintiffs in *McCormick v. School District of Mamaroneck*, 370 F.3d 275, 285 (2d Cir. 2004), in which the Second Circuit found that students could still pursue their claims because they were still enrolled and could still participate in the challenged program. The students in *McCormick* were juniors in high school and therefore could still benefit from the court's decision regarding the sports program. *Id.* Like the students in *McCormick*, Antonio is still enrolled in the District and still has standing. The panel's contrary conclusion contradicts its own as well as this Court's precedents.

The Second Circuit has similarly followed *Honig* in non-school contexts where the petitioner's status changed during the course of the litigation, but there was a reasonable expectation that the challenged conduct would recur. *See, e.g., Fulani v.*

League of Women Voters Educ. Fund, 882 F. 2d 621, 628 (2d. Cir. 1989) (finding that the party's claims were not moot despite the conclusion of an election since the same effects on minor party candidates would persist in future elections); *Seibert v. Sperry Rand Corp.*, 586 F.2d 949, 951 (2d Cir. 1978) (finding that a party's claim was not moot despite a referendum having occurred because there was a reasonable expectation that he would be subject to an identical order if another referendum were scheduled). Each of these Second Circuit cases, like *Heldman*, are notable because the status of the parties at issue, *e.g.*, a disabled child enrolled in school, a minor party candidate, had changed, while Antonio's status as a student enrolled in the District has not changed. That makes the Second Circuit's conclusion that Antonio lacks standing to proceed all the more egregious and the intra-circuit conflict all the more serious.

B. The Second Circuit's Determination That Antonio Lacks Standing Conflicts With Other Circuits' Decisions That Properly Rely Upon *Honig* To Analyze Standing.

The Second Circuit's conclusion that Antonio lacks standing to proceed with his free speech claims also conflicts with other circuit courts which have followed *Honig* and concluded that plaintiffs in circumstances similar to Antonio's have standing to pursue their claims.

The Seventh Circuit's use of *Honig* to analyze a student rights claim and find that the student did not have standing particularly illustrates the conflict between the Second Circuit's ruling and other circuit precedents which correctly apply and follow *Honig. Bd. of Educ. of Downers Grove Grade School Dist. v. Steven L.*, 89 F.3d 464, 467-68 (7th Cir. 1996). In *Steven L.*, the Seventh Circuit properly relied upon *Honig* to determine that the student did not have standing. *Id.* The facts in *Steven L.* were distinguishable from *Honig* (and from this case) in that the student had received the services necessary to meet his needs throughout his tenure in grade school so that there was no reasonable expectation that he would be denied services by the grade school district at issue. *Id.* The grade school district defendants no longer had authority over the student's educational program and so could not deprive him of services again. *Id.* Therefore, under *Honig*, that student no longer had standing against the named grade school district. *Id.*

By contrast, in this case, the district consists of schools from kindergarten through grade 12, so it still has authority over Antonio's educational program and there is a reasonable expectation that Antonio will face censorship of religious viewpoint in his schoolwork. The Baldwinsville district's policy of censoring religious viewpoint to avoid adults' misperceptions about the teaching of religion remains a threat to Antonio's First

Amendment rights. Consequently, there is a reasonable expectation that he will again suffer censorship at the hands of school officials. Under the Seventh Circuit's analysis of *Honig*, Antonio has standing to pursue his claims. The Second Circuit's contrary conclusion, as well as its refusal to rely upon *Honig*, places it in conflict with the Seventh Circuit.

The Second Circuit's ruling also conflicts with a similar student rights case in which the First Circuit found that a student could still face denial of rights from the school district and therefore had standing under *Honig*. *Caroline T. v. Hudson School Dist.*, 915 F.2d 752, 757 (1st Cir. 1990). The decision also conflicts with decisions in the Third and Sixth Circuits which applied *Honig* to find that those seeking elective office had standing to pursue their claims despite the fact that the challenged election had concluded. *Reich v. Local 30, Int'l Brotherhood Of Teamsters*, 6 F.3d 978, 984-985 (3d Cir. 1993) (finding that union member had reasonable expectation of being declared ineligible for office under union rule that remained in effect, even though the challenged election was over). *Lawrence v. Blackwell*, 430 F.3d 368, 371 (6th Cir. 2006) (finding that independent candidate and voter in recently completed election could reasonably expect to suffer same alleged harm from state election law in future elections).

The Second Circuit's failure to rely upon the controlling precedent in *Honig* and its conclusion

that Antonio does not have standing both conflict with other circuits' decisions which have consistently held that *Honig* is the proper standard for analyzing questions of standing in civil rights claims, and that under *Honig* civil rights plaintiffs do not lose standing merely by the passage of time or a change in status. This Court should grant certiorari to resolve the conflict and clarify that *Honig*, not criminal procedure precedents, is to be utilized to determine whether civil rights plaintiffs still have standing.

III. THE COURT OF APPEALS EFFECTIVELY OVERRULED *ELROD*, *TINKER* AND OTHER FREE SPEECH PRECEDENTS WHICH FIRMLY ESTABLISH THAT THE GOVERNMENT BEARS THE BURDEN OF PROVING THAT RESTRICTIONS ON SPEECH ARE JUSTIFIED.

The Second Circuit's newly minted burden of proof for maintaining a free speech challenge effectively overrules *Elrod*, *Tinker* and other free speech precedents by creating a new rule that no challenge may proceed unless a student can prove that any school official "regularly violates students' free speech rights." (App., p. 6a). The Second Circuit's standard contradicts this Court's precedents that school officials, not students, bear the burden of proof when free speech rights are affected and that single acts of censorship are sufficient to bring a First Amendment challenge.

Tinker, 393 U.S. at 506; *Board of Educ., Island Trees Union Free School Dist. No. 26 v. Pico*, 457 U.S. 853, 864-865 (1982).

A. The Second Circuits' Requirement That Students Prove Regular Violations Of First Amendment Rights Impermissibly Shifts The Burden Of Proof From The School District To the Student.

This Court has recognized that the special characteristics of the school environment warrant some regulation of student speech in the context of school-sponsored activities, curriculum and extra-curricular activities. *Bethel School Dist. v. Fraser*, 478 U.S. 675 (1986), *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260 (1988), *Morse v. Frederick*, 551 U.S. 393 (2007). However, it has emphasized that “the discretion of the States and local school boards in matters of education must be exercised in a manner that comports with the transcendent imperatives of the First Amendment.” *Pico*, 457 U.S. at 864-865. “Boards of Education ... have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to

discount important principles of our government as mere platitudes.” *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 637 (1943).

In each of these cases, as in *Tinker*, this Court has emphasized that it is up to school officials to justify restrictions on student speech, not the burden of students to prove that school officials regularly violate student rights. In the context of student speech that happens to occur on campus, this Court explained that:

In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. Certainly where there is no finding and no showing that engaging in the forbidden conduct would “materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,” the prohibition cannot be sustained.

Tinker, 393 U.S. at 509. In the absence of a specific showing by school officials of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views. *Tinker* 393 U.S. at 511.

While *Bethel*, *Kuhlmeier* and *Morse* recognized that school officials have more control over school-sponsored speech in various contexts, they retained the underlying principle that school officials have the burden of proving that actions which affect student free speech rights are justified by compelling state interests. See *Elrod*, 427 U.S. at 362 (when governmental conduct interferes with First Amendment expression, the *burden is on the government* to prove that its action advances an interest that is paramount and of vital importance) (emphasis added). In *Bethel*, this Court found that the district had met its burden of showing that its discipline of a student was justified by the school's interest in protecting students against vulgar and offensive language. *Bethel*, 478 U.S. at 685. In *Kuhlmeier*, this Court held that school officials could exercise control over the content of a school newspaper, but emphasized that officials had to show that "their actions are reasonably related to legitimate pedagogical concerns." *Kuhlmeier*, 484 U.S. at 273. In *Morse*, this Court held that the school had met its burden of showing that its actions against the student were reasonably related to the district's responsibility to restrict speech that promotes use of illegal drugs. *Morse*, 551 U. S. at 408. The *Morse* court acknowledged that "undifferentiated fear or apprehension of disturbance" or "a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint" is not enough to justify deprivation of students' First Amendment

rights, and that the district's concern about not promoting the use of illegal drugs was more than that. *Id.* (quoting *Tinker*, 393 U.S. at 508).

The same is not true here. The only justifications that Respondents offered for censorship of the religious viewpoint in Antonio's work were fear of disturbance in the form of potential parental misperception that religion is taught in the school and a desire to avoid the discomfort that might arise if parents thought that the district was teaching religion. (App., p. 20a-24a). Those concerns are not sufficient to trump Antonio's free speech rights under *Tinker*. Respondents did not meet the burden of proof under any of this Court's student speech precedents.

This Court's protection of student free speech rights in *Tinker*, even as tempered by *Kuhlmeier*, *Bethel* and *Morse*, should have led the Second Circuit to find that school officials failed to meet their burden of justifying restrictions upon Antonio's speech. Instead, the court attempted to overrule *Tinker* by shifting the burden of proof from the school to the student and then making the burden so onerous as to effectively prevent any student from satisfying it. It is unlikely, even improbable, that an elementary or secondary school student would be able to establish that school officials regularly violate students' First Amendment rights. Furthermore, placing the burden on the students is a derogation of the

federal courts' duty "to apply the First Amendment's mandate in our educational system where essential to safeguard the fundamental values of freedom of speech and inquiry." *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968).

The Second Circuit's adoption of a student-based burden of proof conflicts with the holdings and the underlying constitutional tenets of *Tinker*, *Kuhlmeier*, *Bethel* and *Morse*. This Court should grant certiorari to resolve the conflict and solidify the foundational First Amendment principles upon which student free speech rights are grounded.

B. The Second Circuit's Ruling That Students Must Prove Regular Violations Of Students' Free Speech Rights Contradicts Core Free Speech Principles.

The Second Circuit further undermined core First Amendment principles when it concluded that standing to challenge censorship of religious viewpoint required proof that Respondents regularly violated students' rights. (App., p. 6a). Requiring multiple violations of free speech rights to acquire standing contravenes the fundamental nature of First Amendment freedoms by forcing citizens to tolerate repeated violations before seeking judicial relief. This Court's determination that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably

constitutes irreparable injury,” *Elrod*, 427 U.S. at 373, necessarily means that plaintiffs need not wait for a pattern of violations before filing suit. In fact, in *Elrod*, this Court found that demonstrated threats of infringement of free speech rights were sufficient to support a First Amendment claim. *Id.*

The federal courts’ duty to safeguard the fundamental values of freedom of speech as described in *Epperson* necessarily includes the duty to safeguard student free speech rights. *See Epperson*, 393 U.S. at 104 (describing the courts’ duty in school speech cases). That means that when students allege a single incident of censorship, as in this case, or a demonstrable threat of censorship, as did the workers in *Elrod*, it should be sufficient to support a First Amendment claim. This Court’s student speech precedents have reflected that principle by deciding free speech challenges based upon single incidents, not only upon proof of a pattern of violations. *See Tinker*, 393 U.S. at 511 (finding a First Amendment violation in disciplinary action following one incident of silent protest); *Bethel*, 478 U.S. at 685 (finding that the student had standing from a single incident of discipline following a speech, but finding no First Amendment violation); *Kuhlmeier*, 484 U.S. at 273 (finding that the students had standing after a single incident of censorship but finding no violation); *Morse*, 551 U.S. at 408 (finding standing following a single incident of discipline following display of a banner but finding no violation).

Under the Second Circuit's standard, none of the students in this Court's seminal student speech cases would have been permitted to pursue their claims. The students in *Tinker* would have lacked standing because there was no evidence that Des Moines school officials had regularly censored students' silent protests. The speaker in *Bethel* would have not been able to challenge censorship of his speech without proof that the school regularly disciplined students who gave speeches during school assemblies. The student journalists in *Kuhlmeier* would not have been permitted to test the limits of school censorship of student newspapers unless and until there was evidence of a pattern of censorship. Mr. Morse would not have been able to assert his rights without evidence that the school regularly confiscated banners and suspended students for conduct during extra-curricular events. In other words, if the Second Circuit's standard were to prevail, students who have had their speech censored or prohibited would have to conduct forensic investigations, possibly spanning years, in order to compile sufficient evidence to perhaps satisfy the court that officials "regularly"(whatever that means) censor or prohibit student speech before the student can even enter the courthouse. Meanwhile, the initial opportunity for free speech would be long gone and any other plans for free expression chilled.

Far from fulfilling its duty to safeguard First Amendment freedoms in the school setting, the Second Circuit has set student free speech back at

least forty years. The Second Circuit's new "pattern of violations" prerequisite for standing effectively overrules *Tinker* and its progeny by giving school officials permission to violate student speech rights once or even a few times before being liable for First Amendment violations. This will embolden school officials who will see a new way to circumvent the rights established in *Tinker* and control student speech. This Court should grant certiorari to resolve the conflict with *Tinker* and to clarify the appropriate burden of proof in student free speech cases.

IV. THE SECOND CIRCUIT CONTRAVENED THIS COURT'S AND OTHER CIRCUITS' PRECEDENTS PROTECTING THE FULL RANGE OF REMEDIES FOR FIRST AMENDMENT VIOLATIONS WHEN IT HELD THAT ANTONIO WAIVED HIS CLAIM FOR DAMAGES.

This Court's zealous protection of First Amendment freedoms includes protection of the full range of remedies to redress deprivations of those fundamental rights. *Citizens United v. Federal Election Commission*, 130 S.Ct. 876, 893 (2010). Federal Rule of Civil Procedure 54(c) provides that final judgments should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings. In contravention of these principles, the Second Circuit concluded that Antonio was barred from

seeking damages under Fed. R. App. P. 28(a), because he did not mention damages in his opening brief. (App., p. 5a n.1).

That parenthetical dismissal of Antonio's damages claim directly conflicts with this Court's ruling that remedies cannot even be voluntarily waived when a First Amendment challenge remains viable. *Citizens United*, 130 S.Ct. at 893. . As this Court said in *Citizens United*, once a federal claim is properly presented, a party can make any argument in support of that claim; it is not limited to arguments raised below. *Id.* "The parties cannot enter into a stipulation that prevents the Court from considering certain remedies if those remedies are necessary to resolve a claim that has been preserved." *Id.* If the parties cannot voluntarily agree to waive certain remedies, then they cannot be compelled to indirectly and involuntarily waive them by failing to specifically mention them in a brief, as the Second Circuit claims.

Furthermore, the Second Circuit and other circuits have interpreted Fed.R. Civ. P. 54(c) as permitting the granting of whatever relief the court deems appropriate in accordance with its findings regarding liability, regardless of whether the relief was specifically sought in the complaint. *Columbia Nastri & Carta Carbone, S/p/A v. Columbia Ribbon & Carbon Manufacturing Co., Inc.*, 367 F.2d 308, 312 (2d Cir. 1966). In the *Columbia* case, the Second Circuit held that the district court could award damages even though the party did not seek monetary relief in its counterclaim. *Id.* Similarly,

the First Circuit held that a district court properly awarded damages even though the complaint sought only declaratory relief and “such other and further relief as is equitable in the premises.” *United States v. Marin*, 651 F.2d 24, 31 (1st Cir. 1981). Citing *Columbia*, the *Marin* court said that Rule 54(c) has been liberally construed, “leaving no question that it is the court’s duty to grant whatever relief is appropriate in the case on the facts proved.” *Id.* The Fourth Circuit held that there are only two principles which could justify a waiver of damages or other relief not explicitly requested: 1) That a remedy not desired by either party should not be thrust upon them and 2) The failure to ask for certain relief prejudiced the other party. *Robinson v. Lorillard Corp.*, 444 F.2d 791, 803 (4th Cir. 1971). Since Antonio specifically sought damages in his Complaint, neither of these principles apply, so the liberal construction adopted by the Second Circuit in *Columbia* governs this case, contrary to the Second Circuit’s conclusion below that Antonio somehow waived his damages claim by failing to reference damages in an appellate brief.

The Second Circuit’s conclusion also directly conflicts with its earlier rejection of the use of Rule 28 to preclude remedies not mentioned in an opening brief. *Tabbaa v. Chertoff*, 509 F.3d 89, 96 (2d Cir. 2007). In *Tabbaa*, defendants argued that the plaintiffs abandoned their demand for expungement by not raising it in their opening brief. *Id.* Rejecting that argument, the Second Circuit panel found that plaintiffs met the

requirements of Rule 28 when they requested that this Court “reverse the District Court ruling granting summary judgment to the defendants.” *Id.* “This request incorporates the demand for expungement that plaintiffs made below because a reversal of the grant of summary judgment would necessarily revive that demand. Nothing more is required.” *Id.* Similarly, Antonio requested that the Second Circuit “reverse the District Court’s dismissal of Antonio’s free speech claim,” which would necessarily include the available remedies of declaratory relief, injunctive relief and damages sought in the Complaint. Nothing more is required.

The Second Circuit’s conclusion that Antonio waived his claim for damages contradicts its own precedent regarding Fed.R. App. P 28 and its own and other circuits’ precedent regarding Fed.R.Civ. P. 54(c). It also directly contradicts this Court’s holding in *Citizens United* under which Antonio could not have involuntarily waived a remedy while preserving a First Amendment challenge. This Court should grant Antonio’s petition to overturn the Second Circuit’s improper use of procedural requirements to preclude substantive relief for deprivation of First Amendment rights.

CONCLUSION

The Second Circuit’s summary dismissal of Antonio’s free speech claim conflicts with this Court’s precedents providing that a plaintiff continues to have standing if there is a reasonable expectation that he will again suffer deprivation of

First Amendment rights. The court effectively overruled *Tinker* and other student speech precedent. Finally, the court's conclusion that Antonio somehow waived his right to damages for deprivation of First Amendment rights conflicts with this Court's precedent, Second Circuit precedent, other circuits' precedent and statute.

For these reasons, Antonio respectfully requests that the Court grant his Petition for a Writ of Certiorari.

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