No. 06-278

IN THE
Supreme Court of the United States

DEBORAH MORSE, ET AL., PETITIONERS,

v.

JOSEPH FREDERICK, RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE STUDENT PRESS LAW CENTER, FEMINISTS FOR FREE EXPRESSION, THE FIRST AMENDMENT PROJECT, THE FREEDOM TO READ FOUNDATION, AND THE THOMAS JEFFERSON CENTER FOR THE PROTECTION OF FREE EXPRESSION AS *AMICI CURIAE* SUPPORTING RESPONDENT

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QUESTIONS PRESENTED

1. Whether the First Amendment protects off-campus student expression from viewpoint-based censorship by public school officials when the speech is not disruptive, plainly offensive or school-sponsored.

2. Whether the court of appeals properly denied qualified immunity to a public high school principal who violated clearly established law under the First Amendment by suspending a student for constitutionally protected, off-campus, non-disruptive speech simply because of the school's disagreement with the viewpoint of his message.

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IDENTITY AND INTEREST OF AMICI CURIAE[1]

This brief, in support of respondent Joseph Frederick, is submitted to the Court with the consent of the parties to the case. As detailed below, *amici curie* are committed to protecting the free speech and free press rights of students and journalists. Because of the potential impact this litigation could have on the First Amendment rights of students, *amici* have a strong interest in the outcome of this case.

Student Press Law Center (SPLC) is a national, non-profit, non-partisan organization established in 1974 to perform legal research and provide information and advocacy for the purpose of promoting and preserving the rights of student journalists. As the only national organization in the country devoted exclusively to defending the legal rights of the school-sponsored and independent student press, the SPLC collects information on student press cases nationwide and produces a number of publications on student press law, including its book, LAW OF THE STUDENT PRESS (2d ed. 1994) and its thrice-yearly magazine, the *SPLC Report*. SPLC provides legal help and information to more than 2,500 SPLC student journalists and journalism educators each year.

Feminists for Free Expression (FFE) is a national not-for-profit organization of diverse feminist women and men who share a commitment both to gender equality and to preserving the individual's right and responsibility to read, view and produce expressive materials free from government intervention. Since 1992 FFE has worked actively to oppose the misapprehension that censorship may sometimes be in the interest of women and others who feel unequally treated by society, believing that the goal of equality is inextricably

[1] No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amici* or their counsel, make a monetary contribution to the preparation or submission of this brief.

linked with the values enshrined in our Constitution's free speech clause.

The First Amendment Project is a nonprofit organization dedicated to protecting and promoting freedom of information, expression, and petition. It provides advice, educational materials, and legal representation to its core constituency of activists, journalists, and artists in service of these fundamental liberties.

The Freedom to Read Foundation is a not-for-profit organization established in 1969 by the American Library Association to promote and defend First Amendment rights, foster libraries as institutions that fulfill the promise of the First Amendment for every citizen, support the right of libraries to include in their collections and make available to the public any work they may legally acquire, and establish legal precedent for the freedom to read of all citizens.

The Thomas Jefferson Center for the Protection of Free Expression is a nonprofit, nonpartisan organization located in Charlottesville, Virginia. Founded in 1990, the Center's sole mission is the protection of free speech and press. The Center has pursued that mission in various forms, including the filing of *amicus curiae* briefs in this and other federal courts, and in state courts around the country. A particular focus of the Center's litigation and program efforts has been the relationship between the First Amendment and academic freedom.

STATEMENT

Respondent Joseph Frederick was eighteen years old when the Olympic torch relay came through his hometown of Juneau, Alaska. J.A. 9, 15. The torch relay, which was sponsored by Coca-Cola and other private groups, was part of the build-up to the 2002 Winter Olympic Games in Salt Lake City. Pet. App. 2a. The event drew a great deal of

attention in Juneau: citizens lined the streets to watch, the public high school released its students, and national television cameras were on hand to record the festivities. *Id*.

Frederick and his friends joined the crowd that gathered on a public sidewalk and waited peacefully for the torch to arrive. *Id*. As the torch passed, they unfurled a banner that read "Bong Hits 4 Jesus." J.A. 10, 16. The display of the banner, according to Frederick, was an attempt to assert his First Amendment rights. *Id*. at 28. The message was selected to be humorous, ambiguous, and provocative enough to make a statement about the freedom of speech. *Id*.

Frederick, a senior at Juneau-Douglas High School, had not set foot on school property that morning, but he was standing across the street from the school when he unrolled his banner. *Id*. at 9-10, 15. Petitioner Deborah Morse, the school's principal, spotted the banner and left school grounds. She crossed the street to the public sidewalk and demanded that Frederick put the banner down. *Id*. at 24. Frederick asked her about his First Amendment rights, and Morse replied that the banner was not appropriate for display. *Id*. at 24-25. When he refused to take his banner down, Morse grabbed it and crumpled it up. *Id*. at 25, 30. Morse suspended Frederick for ten days. *Id*. at 26.

Frederick unsuccessfully appealed his suspension to the school superintendent and the school board. Pet. App. 26a. He then filed a lawsuit under 42 U.S.C. §1983 alleging a violation of his First Amendment rights. *Id*. The District Court granted summary judgment to the Petitioners. *Id*. at 40a. On appeal, a panel of the Ninth Circuit Court of Appeals unanimously reversed and held that the school's actions were unconstitutional under this Court's decision in *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503 (1969). *Id*. at 7a. The court of appeals found Petitioners had conceded that Frederick was punished for the viewpoint

of his message and not out of any concern of a likelihood of disruption to the school's mission, and it therefore concluded that Morse had violated Frederick's First Amendment rights. *Id*. at 18a. The court explained, "a school cannot punish students' speech merely because the students advocate a position contrary to government policy." *Id*. at 8a. Based on this clearly established law, the court of appeals held that Morse did not have qualified immunity. *Id*. at 21a. Petitioners' request for rehearing en banc was unanimously rejected. *Id*. at 46a.

SUMMARY OF ARGUMENT

This case involves significant constitutional issues about the right of public school students to engage in independent speech free from official censorship or punishment. In this case, Frederick peacefully displayed a banner with a message of his choice on public property and at a public event. Had the other Juneau residents standing around him on that crowded public sidewalk engaged in this simple act, the First Amendment would have protected them.

But unfortunately for Frederick, two facts were used against him. First, he was a public high school student. And, second, he chose to express himself during traditional school hours (although students from his school had been released and he was not in attendance at school that morning). In Petitioners' view, these two facts strip Frederick of his constitutional freedom of expression and empower Petitioners with the authority to censor Frederick simply because they disagree with his message (or at least their personal interpretation of his message). Basic constitutional rights do not slip away so easily, however, and this Court's decisions do not invest school officials with such sweeping power over the entirety of students' lives.

The planning, creation and display of Frederick's speech occurred completely off school grounds and without school resources. Thus it was the school principal—not Frederick—who quite literally crossed the line between a non-public and public forum when she left school property, marched across the street, and grabbed Frederick's banner. And because Petitioners censored Frederick based on their disagreement with the content of his message, this was not a "time, place, or manner" restriction. Rather, this is a case of unconstitutional viewpoint discrimination.

Petitioners nonetheless contend that the commercially sponsored torch relay was a "school sanctioned" event, thus freeing them to censor and punish Frederick. This unique argument is unsupported by this Court's precedents, which do not give schools the ability to "sanction" a public or community event and thereby give themselves censorship powers over their students. There is likewise no constitutional exception, as Petitioners argue, for "subject-changing" speech that diverts the audience's attention away from the school's preferred message. Contrary to Petitioners' arguments, student expression outside of school is appropriately regulated by parents and the First Amendment—not by school officials.

Even under this Court's precedents regarding student speech while at school, however, Petitioners' argument should fail. Frederick's speech was not school-sponsored nor was it lewd or vulgar speech at a school assembly. And there was no evidence that it substantially disrupted the work of the school. Petitioners contend that Frederick is without constitutional protection because his speech allegedly was not political. But *Tinker* does not protect only overtly political speech. Frederick, meanwhile, consistently and repeatedly has stated that by asserting his First Amendment rights he was making a statement about the role of free speech in America's schools. There is furthermore no

evidence that he intended it to be a pro-drug message or that any student who saw his banner interpreted it as such.

Because Petitioners' actions violated clearly established law, they are not entitled to qualified immunity.[2] A ruling in favor of Petitioners, moreover, could chill a range of student speech and undermine the constitutional safeguards ratified by this Court for almost forty years.

This nation entrusts public schools with the vital task of teaching their students about the rights and responsibilities of living in a democracy. Yet many of these students face a common problem: the difficult task of speaking out and being heard despite the opposition of their school administrators. For this reason, the Constitution prohibits school officials from censoring students except in narrowly limited circumstances. Because none of those circumstances is present in this case, *amici curiae* respectfully request that this Court rule in favor of Respondent.

ARGUMENT

I. RESPONDENT'S SPEECH WAS NOT SCHOOL SPEECH, BUT RATHER INDEPENDENT EXPRESSION THAT IS FULLY PROTECTED BY THE FIRST AMENDMENT

A. Outside Of the School Environment, Respondent's Constitutional Right To Be Free From Government Censorship Is No Different From That Of Any Other United States Citizen

This Court unambiguously has held that restraints on free expression are among the most disfavored acts in our constitutional system. See, e.g., *United States* v. *Playboy*

[2] *Amici curiae* respectfully submit that Petitioners' actions were unconstitutional under clearly established law. This brief does not otherwise address the second question presented to this Court in this case.

Entm't Group, Inc., 529 U.S. 803, 817 (2000) ("It is through speech that our convictions and beliefs are influenced, expressed, and tested. It is through speech that we bring those beliefs to bear on Government and on society. It is through speech that our personalities are formed and expressed.").

An individual's status as a public high school student, moreover, does not destroy these basic rights. As this Court held in *Tinker*, "[s]tudents in school as well as out of school are 'persons' under our Constitution." 393 U.S. at 511. And this constitutional personhood entitles them to "fundamental rights which the State must respect." *Id*.[3] Foremost among these is the freedom of expression.

While finding that Petitioners clearly violated Frederick's constitutional rights, the court of appeals nonetheless analyzed this case under this Court's school speech precedents for two simple reasons: "Frederick was a student, and school was in session." Pet. App. 6a. Petitioners have adopted this position with little additional argument. But Frederick's status as a public school student does not convey to Petitioners such broad powers of censorship.

This Court repeatedly has noted that its student speech framework does not apply when the speech occurs outside of school. As Justice Brennan explained in his concurrence in *Bethel School District No. 403* v. *Fraser*, 478 U.S. 675 (1986), "[i]f respondent had given the same speech outside of the school environment, he could not have been penalized simply because government officials considered his language to be inappropriate; the Court's opinion does not suggest

[3] Petitioners cite to John Stuart Mill to make an argument that even such a strong defender of staunch free speech rights as Mill, did not extend this right to "'children or [y]oung persons below the age which the law may fix as that of manhood or womanhood.'" Pet. Br. 19 n.4. In this "as applied" challenge, however, it is important to repeat that Frederick at the time was an 18-year-old adult citizen of the state of Alaska.

otherwise." 478 U.S. 675, 688 (1986) (citations omitted). Similarly, in *Hazelwood School District* v. *Kuhlmeier*, 484 U.S. 260 (1988), this Court recognized limited circumstances where schools could suppress student speech "even though the government could not censor similar speech outside the school." 484 U.S. 260, 266 (citations omitted); see also *Porter* v. *Ascension Parish Sch. Bd.*, 393 F.3d 608, 615 & n. 22 (5th Cir. 2004) (holding that a student drawing was not "student speech on the school premises" because it "was composed off-campus and remained off-campus for two years"); *Thomas* v. *Bd. of Educ., Granville Cent. Sch. Dist.*, 607 F.2d 1043, 1050-52 (2d Cir. 1979) (refusing to apply *Tinker* to student newspaper published and distributed off-campus); *Bystrom* v. *Fridley High Sch.*, 822 F.2d 747, 750 (8th Cir. 1987) (stating that burden of high school officials to justify censorship or punitive authority over off-campus student speech would be "much greater, perhaps even insurmountable" than over on-campus speech); Clay Calvert, *Off-Campus Speech, On-Campus Punishment: Censorship of the Emerging Internet Underground*, 7 B.U.J. SCI. & TECH. L. 243, 269-272 (2001) (noting that *Tinker* is ill-suited to deal with off-campus student expression).

In this case Frederick's speech occurred on public property during a commercially sponsored community event that was open to the public. J.A. 9-10, 15-16. The planning, creation and display of Frederick's message occurred entirely off of school property. *Id*. at 28. Frederick's speech was not part of a school class or extra-curricular project and he used no school resources for its creation. Nothing about Frederick's speech carried the name, insignia or other imprimatur of the school.

On the day at issue, moreover, Frederick had not set foot on school property. Rather, he drove to the event, parked away from the school and walked several blocks to join the public on the sidewalk. *Id*. at 28-29. School had been in

session earlier that day but Frederick had not attended, because, he claimed, he had been detained by snow in his driveway. *Id*. at 28. The school principal and superintendent, however, both admitted that any possible truancy by Frederick was not the reason for his suspension. Pet. App. 67a. Thus while the school certainly had the authority to punish Frederick for any unexcused absence, it is undisputed that it was his speech—not possible truancy—that led to his suspension. By the time of the torch passing, furthermore, the school had released the students. *Id*. at 2a. The court of appeals found that any supervision of the students by the school at the torch relay was "minimal or non-existent," and the record shows that attendance was neither mandated nor enforced. *Id*. at 5a.

In this case it was the school principal, not Frederick, who crossed the line—both physically and legally—between the school and non-school environment. While Frederick remained on public property at all times, Morse left school grounds, marched across the street, and grabbed Frederick's banner. For this reason, her actions should be analyzed under this Court's precedents regarding content-based restrictions on speech in a public forum.

This analysis is straightforward. Public sidewalks, where Frederick was standing, "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague* v. *CIO*, 307 U.S. 496, 515 (1939); see also *Carey* v. *Brown*, 447 U.S. 455, 460 (1983) (holding that access to sidewalks "for the purpose of exercising such rights cannot constitutionally be denied broadly and absolutely") (quoting *Hudgens* v. *NLRB*, 424 U.S. 507, 515 (1976)); *Valentine* v. *Chrestensen*, 316 U.S. 52, 54 (1942) ("This court has unequivocally held that the streets are proper places for the

exercise of the freedom of communicating information and disseminating opinion.").

Furthermore, Petitioners have made it apparent that it was the viewpoint of Frederick's message that led to his punishment. See J.A. 25 (affidavit of Morse) ("During the interview in my office, I told Frederick that I had asked him to drop the banner because I thought the reference to 'bong hits' would be construed as advocating drug use."); *id.* at 17 (Petitioners admitting "Morse stated that she probably would not have seized the banner if it had contained a political statement, including a statement advocating legalizing drug use."); see also Pet. App. 18a (holding by the court of appeals that Petitioners "conceded that the speech in this case was censored only because it conflicted with the school's 'mission' of discouraging drug use"). Therefore, this is a case of viewpoint-based discrimination by the government, which "is ordinarily subject to the most exacting First Amendment scrutiny," *Saxe* v. *State Coll. Area Sch. Dist.*, 240 F.3d 200, 207 (3d Cir. 2001). As this Court has explained, "[t]he point of the First Amendment is that majority preferences must be expressed in some fashion other than silencing speech on the basis of content." *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 392 (1992); see also *Rosenberger* v. *Rector and Visitors of the Univ. of Va.*, 515 U.S. 819, 828 (1995) ("Discrimination against speech because of its message is presumed to be unconstitutional.").

Petitioners attempt to draw their actions as a mere "time, place or manner" restriction on Frederick's speech. Pet. Br. 31 (arguing that regulating "the time, place, or manner of a student's expressive conduct in no wise [sic] offends the First Amendment"). But because this case involves content-based censorship, this Court has held that "time, place or manner" analysis is inapposite. *Pac. Gas & Elec. Co.* v. *Pub. Util. Comm'n*, 475 U.S. 1, 20 (1986) (holding that "for a time, place, or manner regulation to be

valid, it must be neutral as to the content of the speech"); *Reno* v. *ACLU*, 521 U.S. 844, 879 (1997) (holding that "time, place and manner" analysis is not applicable when statute "regulates speech on the basis of its content"); *Consol. Edison Co.* v. *Pub. Serv. Comm'n*, 447 US. 530, 536 (1980) ("[A] constitutionally permissible time, place, or manner restriction may not be based upon either the content or subject matter of speech."); see also *Saxe*, 240 F.3d at 209 ("Nor do we believe that the restriction of expressive speech on the basis of its content may be characterized as a mere 'time, place and manner' regulation.").

The facts in this case are simple: A young adult peacefully exercised his freedom of speech at a public event and while on public property. In these circumstances, the Constitution protects him from being punished solely because the government disagrees with the viewpoint of his message. For the same reasons that a school cannot punish a student for the books he reads at home, the art he produces at a community center or the letters to the editor he writes to a newspaper, Frederick's speech is constitutionally protected.

B. Petitioners Cannot Give Themselves Power To Censor Student Speech Simply By Declaring That A Public Or Community Event Has Been "School Sanctioned"

If Frederick and his banner are found to be outside of the school's realm, as argued above, a First Amendment analysis of content-based restrictions is fatal to Petitioners' argument. Petitioners attempt, therefore, to broaden their authority over students so that it includes public property and public events.

They start by insisting that the Olympic Torch Relay—a commercially sponsored, international, public event—was in some way "school-sponsored." See Pet. Br. 33 (stating that

"Frederick's banner was unfurled in the midst of a highly important 'school-sponsored' activity"). This argument conflicts with the facts and this Court's precedents. First, the facts are undisputed that the torch relay was commercially sponsored and not organized, financed, planned or backed by the school. Pet. App. 2a, 10a. It did not carry the name, insignia or other imprimatur of the school in any way. J.A. at 9, 22-23. And it took place on public property. *Id*. at 10, 16.

The constitutional test established by this Court, moreover, is not whether the event or activity was school-sponsored, but whether the *speech* at issue was school-sponsored. Students, for example, "cannot be punished merely for expressing their personal views on the school premises—whether 'in the cafeteria, or on the playing field, or on the campus during the authorized hours'" unless the school shows that the speech would substantially interfere with the work of the school. *Hazelwood*, 484 U.S. at 266 (quoting *Tinker*, 393 U.S. at 512-13 (citations omitted)). And as is discussed further in Part II.C., it is clear that the Olympic Torch Relay does not fall in the category of "school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school." *Id*. at 271.

Because the torch relay was clearly not "school-sponsored," Petitioners and their *amici* resort to the more muted and legally meaningless phrase—"school-sanctioned activity." See, e.g., Pet. Br. 31 (contending that Frederick's banner interfered "with a school-sanctioned activity"). But this Court has never used, defined or endorsed the concept of a "school-sanctioned activity" as it relates to student speech rights. Petitioners also fail to define the term. They further cite no legal support for the claim that public schools may "sanction" a community or public event, and they do not explain the limits of this alleged power. This is an overly

broad and vague power grab by Petitioners that has no support in the Constitution or the precedents of this Court.

According to Petitioners' argument, public schools apparently possess the power simply to declare or "sanction" any commercial, private, public or community event they choose. By pronouncing an event to be "school-sanctioned," the school allegedly has invested itself with the authority to suppress, censor and punish speech by any of its students at the event. There appears, moreover, to be no limit to the number or types of events a school can "sanction" and thus confer upon itself censorship powers. It does not matter if the event, as in this case, is commercially sponsored, open to the public, and occurs on public property. It makes no difference if, as in this case, the event does not bear the school's name or insignia. Judging from this case, the school need not require attendance by the students or permission from the students' parents. And the school has no obligation to effectively supervise the students during the event it has "sanctioned." It further appears that the school need not formalize its "sanctioning" through a vote of the school board or by giving notice to the students and parents prior to the event. All that matters, it can be deduced from Petitioners' argument, is that at some point after the event, the school declares it was "sanctioned."

Public schools do not possess the power to "sanction" events. The potential consequences of such authority would be overbroad, unacceptably vague, and in direct contrast to the First Amendment protections recognized by this Court.

C. Petitioners Cannot Determine The Sole Message Of A Commercially Sponsored, Public Event And Then Punish Any Student Speech That Attempts To "Change The Subject" And To Reach A Large Audience

Petitioners' novel view of their power over outside events continues with their argument that they have the authority to determine the sole message or purpose of community events. Any student speaker, they argue, who attempts to divert the audience's attention from the school's "purpose" to the speaker's message is subject to punishment. The infraction is worsened, according to Petitioners, if the student speaker is successful at reaching a large audience.

Petitioners argue that Frederick deserved punishment for his speech because he "changed the subject" and "distract[ed] from the purpose that the Juneau School District sought to serve in sanctioning this event." Pet. Br. 32; see also *id*. at 15 (claiming Frederick's "distracting" banner "radically changed the subject"). They further accuse Frederick of reaching too large of an audience, complaining that he did not express his message "in a classroom or hallway," but rather he waited for the television cameras to unfurl his "*subject-altering* banner for the community (and the world) to see." *Id*. at 33 (emphasis added).

There is, of course, no constitutional exception for "subject-altering" speech. The government "may not select which issues are worth discussing or debating in public facilities." *Carey*, 447 U.S. at 463. The First Amendment, rather, "command[s] that the Government has no power to dictate what topics its citizens may discuss." *McConnell* v. *Fed. Election Comm'n*, 540 U.S. 93, 328 (2003) (Kennedy, J., concurring in the judgment in part and dissenting in part). While in this case Frederick's rights are equal to those of all United States citizens, students while at school also "may not

be confined to the expression of those sentiments that are officially approved." *Tinker*, 393 U.S. at 511.

The First Amendment's protections of a speaker's rights are also not lessened because he aimed to reach a large audience. Petitioners complain that Frederick directed his speech beyond his fellow students in "a classroom or hallway" and instead focused on the much larger television-watching audience of "the community (and the world)." Pet. Br. 33. The freedom of speech, however, guarantees the right to "reach the minds of willing listeners and to do so there must be opportunity to win their attention." *Kovacs* v. *Cooper*, 336 U.S. 77, 87 (1949). Furthermore, this Court has noted that other than in limited circumstances, students also enjoy "the otherwise absolute interest of the speaker in reaching an unlimited audience." *Fraser*, 478 U.S. at 684.

Not only does this objection by Petitioners to Frederick's speech have no constitutional basis, it also undermines their position that it was concern for their students—rather than a concern for public relations—that motivated their punishment of Frederick. It seems Petitioners would have preferred it if Frederick had kept his speech to "a classroom or hallway" with an all-student audience rather than have him speak to the general public via national and international television coverage.

This is a case about an adult United States citizen who chose to speak peacefully at a commercially sponsored, community event while on a public sidewalk. Petitioners did not have the authority to censor him or to punish him for his speech. It does not matter that they disagreed with the perceived viewpoint of his message. It does not matter if his message "changed the subject" and reached a large audience. And it does not matter that they "sanctioned" the event.

II. EVEN IF RESPONDENT'S SPEECH IS DEEMED TO BE SCHOOL SPEECH, PETITIONERS' ACTIONS WERE UNCONSTITUTIONAL UNDER CLEARLY ESTABLISHED LAW

Although Frederick's independent speech took place entirely off-campus and at a public event, Petitioners argue that this case should be analyzed as a school speech case. As the court of appeals found, however, even under this Court's student speech cases Petitioners' censorship of Frederick was unconstitutional under clearly established law.

This Court has decided three important cases regarding student speech at public secondary schools: *Tinker*, 393 U.S. 503 (finding school censorship of non-disruptive student expression while at school to be unconstitutional); *Fraser*, 478 U.S. 675 (upholding a school's punishment of a student who used lewd and vulgar language during a school assembly); and *Hazelwood*, 484 U.S. 260 (holding that schools may regulate some "school-sponsored" speech).

It is unclear from Petitioners' brief which of these decisions—*Tinker*, *Fraser* or *Hazelwood*—they submit controls this case. Rather, they conflate the three and argue that the school's censorship of Frederick "fits comfortably within the framework of the school speech trilogy." Pet. Br. 25. Closer analysis, however, establishes that Petitioners did not have the constitutional authority under this Court's precedents to censor Frederick because his speech was not substantially disruptive, lewd or vulgar, or school-sponsored.

A. Petitioners' Censorship of Respondent's Speech Was Unconstitutional Under *Tinker*

Almost forty years after this Court handed down the decision, *Tinker* remains the dispositive statement on the constitutional protections of independent student speech at school. It was in *Tinker* that this Court famously held that

students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," *Tinker*, 393 U.S. at 506. While this Court has addressed narrow issues related to student speech since *Tinker*, it has never retreated from this basic principle.

1. Petitioners' actions were unconstitutional because Respondent's speech did not materially or substantially disrupt school activities.

In *Tinker* this Court solidified the significant First Amendment rights of students, but it also recognized the need for school officials "to prescribe and control conduct in the schools." 393 U.S. at 507. This Court resolved these sometimes-conflicting interests by holding that school officials may prohibit some student speech at school if they can show that "the forbidden conduct would materially and substantially interfere with the requirements of appropriate discipline in the operation of the school." *Id.* at 509 (quotation omitted); see also *Saxe*, 240 F.3d at 212 (stating that under *Tinker*, a restriction on student speech will be upheld only "if a school can point to a well-founded expectation of disruption—especially one based on past incidents arising out of similar speech").

At the same time, however, this Court rejected the notion that schools may censor student speech based purely on "undifferentiated fear or apprehension of disturbance." *Tinker*, 393 U.S. at 508. Similarly, school officials may not confine speech "to the expression of those sentiments that are officially approved" in order "to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Id.* at 509.

Tinker involved a school's attempt to prohibit students from wearing black armbands in protest of the conflict in Vietnam. In this case, as in *Tinker*, "the record does not

demonstrate any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities, and no disturbance or disorders on the school premises in fact occurred." *Id*. at 514. In fact, the Juneau School Board admitted that Frederick's speech resulted in no disruption to school operations at all—let alone created a "material and substantial" interference. Pet. Br. 6a; J.A. 108.

2. Respondent did not lose his free speech rights under *Tinker* simply because Petitioners concluded that his speech was not overtly "political."

Petitioners attempt to distinguish this case by suggesting that *Tinker* protects only political speech and that Frederick's speech was not political. See, e.g., Pet. Br. 15 (arguing that Frederick's speech "lay far outside the province of *Tinker*-protected political expression"). Their argument hinges on an unsupported view of *Tinker* and their questionable interpretation of Frederick's message.

This Court has declared that the "guarantees for speech and press are not the preserve of political expression." *Time, Inc.* v. *Hill*, 385 U.S. 374, 388 (1967). Nothing in *Tinker*, moreover, suggests that students' First Amendment rights extend only to "political" speech. Rather, as then-Judge Alito writing for the Third Circuit, recently explained: "Speech falling outside of [the *Hazelwood* and *Fraser*] categories is subject to *Tinker*'s general rule: It may be regulated only if it would substantially disrupt school operations or interfere with the right of others." *Saxe*, 240 F.3d at 214. In other words, *Tinker* functions as the catchall for student speech at school that has not been established to be either school-sponsored or lewd and vulgar. It is not exclusive to political speech. The student speech may be artistic, religious, scientific, commercial, provocative, humorous, or ambiguous and still fall under *Tinker*'s protective umbrella.

This Court, moreover, has never offered a definition of what is or is not "political" speech. Legal commentators likewise have not reached a consensus on this issue. Professor Erwin Chemerinsky, for example, has discussed the struggle to define political speech and noted, "[v]irtually everything from comic strips to commercial advertisements to even pornography can have a political dimension." Erwin Chemerinsky, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 897 (2002).[4]

While the definition of "political" speech has perplexed courts and legal commentators for decades, Petitioners allege certainty. Although they admit that Frederick's banner was "ambiguous," Pet. Br. 15, they nonetheless insist that his message advocated illegal drug use and was not political. See *id*. at 30 (referring to banner as "pro-drug"); *id*. at 25 (distinguishing *Tinker* because Frederick's speech did not involve "the passive expression of political viewpoint").

The true meaning of Frederick's cryptic message—if there is a true meaning—is certainly debatable. But it is not as obvious as Petitioners suggest that Frederick's message was pro-drug or not political. According to Frederick, he held up the banner to make a statement about First Amendment freedoms. As he explained:

> I had been disappointed in my civil rights at the school. . . . [School officials] didn't feel that they had to give students rights when they actually do. And everywhere it seems like people don't realize how important, like, our—like the First Amendment is. We wanted to just, like, say something like . . . how should I say this? Like, I

[4] See also Paul Finkelman, Book Review, *Cultural Speech and Political Speech in Historical Perspective*, 79 BOSTON U.L. REV. 717, 720 (1999) (observing that speech about cultural issues "may at the same time address political issues").

> figured that if people didn't think we should be allowed to do that, then we weren't in America anymore. It's changing.

J.A. 66. Frederick, in fact, has a history of taking a stand for his convictions on civil liberties. Earlier that school year, for example, Frederick claims he was threatened with punishment for refusing to stand for the Pledge of Allegiance. While he was not suspended, a report was created about the incident. *Id*. at 64; cf. *W. Va. State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 642 (1943) (holding it violated the First Amendment to force students to salute the American flag).

While Frederick stated that his reason for holding up a banner was to make a statement about free speech, he claimed the message itself was chosen to be humorous and to grab the attention of the television cameras. He stated that he and his friends wanted a message "that could be controversial or funny or whatever you wanted it to be, or nothing if you don't." J.A. 66. But, he admitted, it needed to be provocative enough "to where you are testing something." *Id*. Frederick explained that "[i]f we held up a banner that said 'Hi,' or 'Hello,' … that's not really testing free speech at all." *Id*. The message, he said, could not be one where "of course they would let us do it." *Id*. at 69.

Adding the phrase "bong hits" to another phrase "4 Jesus" was "somewhat ironic," Frederick said. *Id*. at 66. But he "didn't expect people to see it as advocating drugs." *Id*. at 70. "I don't see how it's advocating anything," he stated. *Id*. Frederick stressed repeatedly that the words on the banner itself were secondary to his statement about First Amendment freedoms. *Id*. at 69. "I could have used another phrase and still been going for the same message," he explained. "I was trying to assert my right to free speech." *Id*. at 68-69. Another time Frederick stated, "[w]e thought we

had a free speech right to display a humorous saying, and that's all we were doing. The content of the banner was less important to us than the fact that we were exercising our free speech rights to do a funny parody." *Id*. at 28.

Frederick was consistent from the beginning that his purpose was to make a statement about his freedom of speech—not to advocate drug use. From the moment Morse confronted him, Frederick responded by asking about his First Amendment rights. *Id*. at 10, 25. Later, in Morse's office, Frederick again protested his suspension by asking about his civil liberties. *Id*. at 30. At the hearing before the superintendent of schools, Frederick stated that his banner was not intended to advocate drug use but rather to exercise his First Amendment rights. *Id*. at 11, 17. Throughout his affidavits and depositions in this case, Frederick has maintained that his intent was to assert his freedom of speech and not to advocate drug use.

Notably none of the students represented in the record interpreted Frederick's banner as promoting illegal drug use; at most, they seemed baffled at the meaning. See *id*. at 33 (declaration of Madsen) ("I didn't think the message on the banner promoted illegal drug use. I'm not sure what it meant, but I didn't think it was suggesting drug use."); *id*. at 34 (declaration of Field) ("I don't know any students who took it to have a drug meaning."); *id*. at 37 (declaration of M. Croteau) ("I am not sure what Joe meant by the saying on the banner. … [N]o one took it seriously as saying anything about drugs."); *id*. at 39 (affidavit of S. Croteau) ("None of us really knew what he meant by the banner.").

Frederick might be guilty of not being a particularly effective communicator, but it is far from clear that he intended to advocate drug use. And Petitioners offer no evidence to doubt him. Accepting Frederick's explanation, he was indeed engaged in political expression because

"expression of dissatisfaction with the policies of this country [is] situated at the core of our First Amendment values." *Texas* v. *Johnson*, 491 U.S. 397, 411 (1980).

In discussing the impact of the *Tinker* decision, the Fourth Circuit Court of Appeals explained that a "student's freedom to express peaceful dissent on campus is more than a privilege; *Tinker* tells us that it is a basic right guaranteed by the first amendment." *Saunders* v. *Va. Polytechnic Inst*., 417 F.2d 1127, 1130 (4th Cir. 1969). Petitioners violated that basic right when they suppressed Frederick's speech and punished him for exercising his constitutional rights.

B. Petitioners' Censorship of Frederick's Speech Was Unconstitutional Under *Fraser*

1. Petitioners violated the First Amendment because Frederick's speech was not "offensively lewd and indecent."

While it is not entirely apparent which of this Court's decisions Petitioners submit controls in this case, it seems they rely most heavily on *Fraser*. See Pet. Br. 33 (stating that *Fraser* "closely fits the facts at hand"). *Fraser*, however, does not apply to Petitioners' censorship of Frederick, because that decision "rested on the 'vulgar,' 'lewd,' and 'plainly offensive' character of a speech delivered at an official school assembly." *Hazelwood*, 484 U.S. at 272, n. 4 (citations omitted).

In *Fraser*, the Court upheld the school's suppression of a student's speech during a school-sponsored assembly that was "offensively lewd and indecent," *Fraser*, 478 U.S. at 685, and included "pervasive sexual innuendo" and "vulgar and offensive terms," *id*. at 683. The focus of this Court's decision in *Fraser* was on the sexual vulgarity of the student's speech during a school assembly. *Id.* at 680. This Court stated that schools could limit "the otherwise absolute

interest of the speaker in reaching an unlimited audience [if] the speech is sexually explicit and the audience may include children." *Id*. at 684.

The courts of appeals, moreover, have consistently interpreted *Fraser* as applying to sexual content. Recently the Second Circuit concluded that images of drugs and alcohol on a student's t-shirt were not "plainly offensive" under *Fraser*. *Guiles* v. *Marineau*, 461 F.3d 320, 328 (2d Cir. 2006); see also *Saxe*, 240 F.3d at 213 ("*Fraser* permits a school to prohibit words that 'offend for the same reason vulgarity offends.'"); *LaVine* v. *Blaine Sch. Dist*., 257 F.3d 981, 989 (9th Cir. 2001) (concluding a student poem was not "vulgar, lewd, obscene or plainly offensive" under *Fraser* because it was not "an elaborate, graphic, and explicit sexual metaphor as was the student's speech in *Fraser*, nor does it contain the infamous seven words that cannot be said on the public airwaves") (quotation omitted).

None of the words on Frederick's banner meets this standard. The only way in which Frederick's message could be deemed "offensive" would be because the message itself expressed a viewpoint with which others might disagree and find controversial—not because it is vulgar and indecent in the sense the Court described in *Fraser*.

2. Petitioners cannot suppress student speech solely because it is controversial or contrary to the school's "message."

Independent student speech may not be censored merely for its controversial message. This Court in *Fraser* noted that the role of schools must include "a tolerance of divergent political and religious views, even when the views expressed may be unpopular." 478 U.S. at 681. As the Fifth Circuit explained, "it should be axiomatic at this point in our nation's history that in a democracy 'controversy' is, as a matter of constitutional law, never sufficient in and of itself

to stifle the views of any citizen." *Shanley* v. *Northeast Indep. Sch. Dist.*, 462 F.2d 960, 971 (5th Cir. 1972) (holding school's suppression of an underground student newspaper was unconstitutional).

Petitioners in this case, however, argue that students' free speech rights must give way whenever their speech is perceived to be interfering with the school's "drug-free-lifestyle message." Pet. Br. 27. This argument has been rejected by the courts of appeals. The Second Circuit, for example, recently refuted the argument that a school may censor all images of drugs and alcohol "because they undermine the school's anti-drug message." The Second Circuit explained the phrase "plainly offensive" can not be

> so broad as to be triggered whenever a school decides a student's expression conflicts with its "educational mission" or claims a legitimate pedagogical concern. . . . [I]f schools were allowed to censor on such a wide-ranging basis, then *Tinker* would no longer have any effect.

Guiles, 461 F.3d at 330. Similarly, the Fourth Circuit also rejected a public school's argument that it could ban all images of weapons by students because it conflicted with the school's message that "'Guns and School Don't Mix.'" *Newsom* v. *Albemarle County Sch. Bd.*, 354 F.3d 249, 260-261 & n.10 (4th Cir. 2003) (applying *Tinker* and finding that because there was no evidence of a substantial disruption of school operations, the district court erred in denying the student a preliminary injunction against the school).

The court of appeals in this case also rejected Petitioners' argument that an alleged conflict with the school's "educational mission" gives the school free reign to censor student speech. The court of appeals stated:

> All sort of missions are undermined by legitimate and protected speech—a school's anti-gun mission would be undermined by a student passing around copies of John R. Lott's book, *More Guns, Less Crime*; a school's anti-alcohol mission would be undermined by a student e-mailing links to a medical study showing less heart disease among moderate drinkers than teetotalers.

Pet. App. 11a.

In this case the Juneau School Board disagreed with the topic and alleged viewpoint of Frederick's chosen speech. The message itself, however, was not "offensively lewd and indecent" or "plainly offensive" as *Fraser* describes and thus the decision is inapplicable.

C. Petitioners' Censorship of Frederick's Speech Was Unconstitutional Under *Hazelwood*

1. This case does not fall under *Hazelwood* because Respondent's speech was not school-sponsored.

Almost twenty years after deciding *Tinker*, this Court addressed the related, but distinct, issue of school-sponsored student speech in *Hazelwood*. The facts in *Hazelwood* involved the ability of high school officials to remove articles from the school-sponsored student newspaper regarding teen-age pregnancy and divorce. This Court reaffirmed the important constitutional protections of *Tinker*, 484 U.S. at 266, but then went on to address "when a school may refuse to lend its name and resources to the dissemination of student expression" in a non-public forum. *Id*. at 272-73.

This Court thus created two distinct categories of student speech. The first includes "a student's personal expression that happens to occur on the school premises"

while the second covered "school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school." *Id*. at 271. This latter category, the Court explained, included activities that "may fairly be characterized as part of the school classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences." *Id*. This Court in *Hazelwood* held that speech in the first category—speech that was not part of a school-sponsored activity and not "disseminated under [the] auspices" of the school—was entitled to a high level of First Amendment protection. 484 U.S. at 271-72.

Frederick's speech in this case was clearly not school-sponsored under *Hazelwood*. The school did not supply any of the resources involved in the making or display of his banner. And Frederick's speech was not overseen by a faculty member who exercised "a great deal of control" and was the "final authority" on the speech. *Id.* at 268. Similarly, the banner was not produced in connection with a class or school project and Frederick did not receive a grade or credit for the speech. The speech also occurred off-campus during a public event. In other words, the school did not "lend its name and resources to the dissemination of [the] student expression," *id.* at 272, and the speech was not "disseminated under [the] auspices" of the school, *id*. For these reasons, no reasonable observer could conclude that the school had somehow endorsed Frederick's message on the banner.

Contrary to Petitioners' argument, the question before this Court is not whether the school allowed student attendance at a public event, but rather whether there was school sponsorship of the student's *speech*. The limitations of *Hazelwood* apply only when the student speaker occupies a platform that has been provided and sponsored by the school.

Yet under Petitioners' reasoning, any student speech that occurs over lunch, at a football game, during after-school play practice, or wherever the school might allow students to go would be fair game for censorship. (Petitioners would also include any private, public or community event that the school has "sanctioned.") This is in direct violation of this Court's mandate that students cannot be punished for non-disruptive independent speech whether it occurs "in the cafeteria, or on the playing field, or on the campus during the authorized hours." *Tinker*, 393 U.S. at 512-13.

2. Petitioners may not censor Respondent based on a fear that others will infer that the school endorses any speech it fails to censor.

Petitioners contend that Morse had a "responsibility to 'disassociate' the school from the banner" because if she "had been insouciantly indifferent to Frederick's drug-related banner, many in the community might well have wondered what they are teaching at taxpayer-supported Juneau-Douglas High School." Pet. Br. 33. This argument—that by failing to censor student speech, school administrators were putting their seal of approval on it—has been repeatedly rejected by this Court and many lower courts.

As this Court has explained, "[t]he proposition that schools do not endorse everything they fail to censor is not complicated." *Bd. of Educ. of Westside Cmty. Sch.* v. *Mergens*, 496 U.S. 226, 250 (1990) (plurality). Rather, this Court has held that "secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis." *Id*; accord *Rumsfeld* v. *Forum for Academic and Institutional Rights, Inc.*, 126 S.Ct. 1297, 1307 (2006) (holding that by accommodating military recruiters on campus, law schools would not be "viewed as sending the message that they see nothing wrong with the military's

policies, when they do"); *Rosenberger*, 515 U.S. at 841 (holding that concern that student message would be attributed to the school was "not a plausible fear").

Here, Petitioners appear more concerned that members of the general public—as opposed to their students—would believe the school was endorsing Frederick's message by failing to censor it. See Pet. Br. 33 (referring to what "many in the community" might be thinking and complaining that Frederick's banner was on television "for the community (and the world) to see"). This makes their argument weaker. Courts already accept that secondary school students "can appreciate the difference between speech a school sponsors and speech the school permits because legally required to do so," *Rumsfeld*, 126 S.Ct. at 1310, thus the proposition that adults possess this ability is even stronger. See, e.g., *PruneYard Shopping Ctr.* v. *Robins*, 447 U.S. 74, 87 (1980) (finding that the public would not attribute to a shopping center owner the expressive views of others who are allowed to speak on the property).

Courts have held that in an effort to avoid the appearance of school sponsorship of a student's speech, a school may not "throw up its hands, declaring that because misconceptions are possible it may silence its pupils, that the best defense against misunderstanding is censorship." *Hedges* v. *Wauconda Cmty. Sch. Dist. No. 118*, 9 F.3d 1295, 1299 (7th Cir. 1993); accord *Saxe*, 240 F.3d at 214. Rather, as the Seventh Circuit explained, "[t]he school's proper response is to educate the audience rather than squelch the speaker." *Id.*; see also *Burch* v. *Barker*, 861 F.2d 1149, 1159 (9th Cir. 1988) (finding that an underground newspaper distributed on school grounds at a school picnic could not reasonably be viewed as school-sponsored); *Rivera* v. *East Otero Sch. Dist.*, 721 F. Supp. 1189, 1194 (D. Colo. 1989) (holding that a school "cannot completely muzzle the students to save itself the difficulty of determining which speech it may constitutionally proscribe"). Instead the school must err on the

side of allowing the student speech to flow freely and suppress it only after meeting strict and established limitations.

This is a case about the Juneau School District suppressing Frederick's "personal expression that happen[ed] to occur" during school hours. *Hazelwood*, 484 U.S. at 271. Even if the Court accepts that Frederick's off-campus speech constitutes campus expression, because it "was voluntary, student-initiated, and free from the imprimatur of school involvement[,] *Tinker* provides the standard." *Clark* v. *Dallas Indep. Sch. Dist.*, 806 F. Supp. 116, 120 (N.D. Tex. 1992). The mere fact that the Olympic relay occurred during school hours and that students were allowed to leave their classes to watch the event did not convert Frederick's independent speech at that public event into school-sponsored speech.

III. PROTECTING STUDENTS' CONSTITUTIONAL RIGHTS TO FREE SPEECH IS FUNDAMENTAL TO THEIR EDUCATION ON CITIZENSHIP

Robust independent student speech is fundamental in a democratic society. Not only is it constitutionally safeguarded, but it also provides students with a powerful and vital civics lesson.[5] This Court has stated repeatedly that the fact that schools "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." *Barnette*, 319 U.S. at 637; see also *Shanley*, 462 F.2d at 972 ("It is most important that our

[5] Recent research suggests First Amendment appreciation by high school students is severely lacking. In a 2006 nation-wide survey, high school students were asked whether "[t]he First Amendment goes too far in the rights it guarantees." Forty-five percent of the students agreed with that statement and 19 percent had no opinion. John S. and James L. Knight Foundation, *Future of the First Amendment: 2006 Follow-Up Survey*, http://www.firstamendmentfuture.org/report91806_student.php.

young become convinced that our Constitution is a living reality, not parchment preserved under glass.").

If accepted, Petitioners' wide-sweeping view of school power over independent, off-campus student speech has the potential to chill all types of student expression. It could be used to justify punishment of a student for attending a public rally against illegal immigration that school officials deem "insensitive" or for writing a letter to the editor of a community newspaper condemning gay marriage that the school decides is "intolerant." A student distributing leaflets in the public park urging the legalization of marijuana for medical purposes could find himself subject to punishment as could a student who wears an athletic jersey with a beer company logo on a weekend trip to the supermarket with his parents. This result contradicts this Court's holdings in *Tinker* that "[u]nder our Constitution, free speech is not a right that is given only to be so circumscribed that it exists in principle but not in fact." 393 U.S. at 513.

The question of constitutional protections for independent student speech should not be seen as a battle between students on one side and school administrators on the other. Instead the goal should be a diverse and respectful environment of free expression. As former Justice Clark, sitting by designation on the Fourth Circuit, explained: "We have both compassion and understanding of the difficulties facing school administrators, but we cannot permit those conditions to suppress the First Amendment rights of individual students." *Nitzberg* v. *Parks*, 525 F.2d 378, 384 (4th Cir. 1975).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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FEBRUARY 20, 2007