No. 06-278

Supreme Court of the United States

DEBORAH MORSE; JUNEAU SCHOOL BOARD,

Petitioners.

v.

JOSEPH FREDERICK,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF FOR AMICUS CURIAE LIBERTY COUNSEL IN SUPPORT OF RESPONDENT

Erik W. Stanley
Mary E. McAlister
David M. Corry
LIBERTY COUNSEL
Suite 2775
100 Mountain View Rd
Lynchburg, VA 24502
(434) 592-7000

Mathew D. Staver
(Counsel of Record)
Anita L. Staver
LIBERTY COUNSEL
Second Floor
1055 Maitland Ctr Commons
Maitland, FL 32751
(800) 671-1776

Attorneys for Amicus Curiae

QUESTIONS PRESENTED

1. Whether the First Amendment allows public schools, at school-sponsored, faculty-supervised events, to prohibit students from displaying messages promoting the use of illegal substances.

2. Whether the Ninth Circuit departed from established principles of qualified immunity in holding that a public high school principal was liable in a damages lawsuit under 42 U.S.C. § 1983 when, pursuant to the school district's policy against displaying messages promoting illegal substances, she disciplined a student for displaying a large banner with a slang marijuana reference at a school-sponsored, faculty-supervised event.

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INTEREST OF AMICUS CURIAE[1]

Liberty Counsel is a national nonprofit litigation, education and policy organization dedicated to advancing religious freedom, the sanctity of human life and the traditional family. Founded in 1989 by Mathew Staver, who also serves as the Dean of Liberty University School of Law, Liberty Counsel has offices in Florida, Virginia and Washington, D.C., and has hundreds of affiliate attorneys in all fifty states. A significant part of Liberty Counsel's work involves representing students and organizations whose First Amendment rights have been violated by school districts and other governmental entities.

Subjective and overly broad regulation of speech, such as the suspension ordered by Petitioners, significantly undermines bedrock First Amendment freedoms. It is critically important that students' free speech rights not be sacrificed under the guise of avoiding governmental discomfort, but that this Court strike the proper balance between school discipline and free expression.

Liberty Counsel does not endorse the message contained in Mr. Frederick's banner. However, Liberty Counsel supports individuals' rights to make such statements without the risk of censure, suspension or expulsion. Liberty Counsel is extremely concerned about the effects this case could have

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[1] Liberty Counsel files this brief with the consent of all parties. Petitioners have a consent letter on file with this Court. The letter granting consent of Respondent is attached hereto with the filing of this brief. Counsel for a party did not author this brief in whole or in part. No person or entity, other than *Amicus Curiae* or its counsel made a monetary contribution to the preparation and submission of this brief.

on the free speech rights of individuals and organizations who interact with public school officials, and seeks to ensure that this Court has the information necessary to review this case in the broader context.

SUMMARY OF ARGUMENT

As this Court said forty years ago, "[t]he Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, (rather) than through any kind of authoritative selection.'" *Keyishian v. Bd. of Regents,* 385 U.S. 589, 603 (1967)(citation omitted). The Ninth Circuit fully embraced this concept when it found that Petitioners had violated Joseph Frederick's First Amendment rights when they suspended him for ten days for standing on a public sidewalk at a community-wide event silently holding a banner that said "Bong Hits 4 Jesus."

The Ninth Circuit properly applied this Court's precedents, in particular *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), and restored the proper balance between students' free speech rights and schools' pedagogical interests that was lost when Petitioners very publicly punished Mr. Frederick for the content of his speech. The Ninth Circuit's decision properly recognized that students like Mr. Frederick are "persons under our Constitution." *Id.* at 393 U.S. at 511. As this Court once said,

> [Students] are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State. In our system, students may not be regarded as closed-circuit

> recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved.

Id. Furthermore, the Ninth Circuit's characterization of Mr. Frederick's actions as "non-disruptive, off-campus speech," *Frederick v. Morse*, 439 F.3d 1114, 1118 (9th Cir. 2006), more accurately portrays the situation than does Petitioners' unsubstantiated proclamation that Mr. Frederick's actions along the Olympic torch route was "school-sponsored," "school-sanctioned" speech. The Ninth Circuit's portrayal also implicitly recognizes that Mr. Frederick was on a public sidewalk – a quintessential traditional public forum – and not within a school's designated public forum or nonpublic forum when he unfurled his banner. That detail is significant because it sets this case apart from this Court's other student speech cases and far outside the deferential review undertaken in *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986) and *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988) and sought by Petitioners. Examining Mr. Frederick's actions in the public forum context reveals how far Petitioners have strayed from this Court's student speech jurisprudence when they punished Mr. Frederick. This Court should decline Petitioners' invitation to validate their actions.

The case is about more than a high school student's publicity stunt. It is about how tomorrow's leaders will regard the First Amendment. Will they see it as Justice Brennan did, "The First Amendment ... gives us this society. The other provisions of the Constitution really only embellish it."?[2] Or

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[2] David L. Hudson, Jr., *Brennan's Struggle with the Detestable Was the Truest Mark of His First Amendment*

will they see it as a mere platitude, something that has no meaning if you are a public school student and say something that the administration does not like? If Petitioners have their way, the First Amendment will be little more than a hollow shell and schools will become the very "enclaves of totalitarianism" that this Court warned against. *See Tinker*, 393 U.S. at 511. Upholding the Ninth Circuit's ruling will prevent that devastating consequence and will preserve the balance between students' free speech rights and schools' legitimate concerns about preserving a safe educational environment.

ARGUMENT

I. THE NINTH CIRCUIT STRUCK THE PROPER BALANCE BETWEEN STUDENTS' FREE SPEECH RIGHTS AND SCHOOL DISTRICTS' INTEREST IN MAINTAINING A SAFE EDUCATIONAL ENVIRONMENT.

Professor Chemerinsky has provided a cogent answer for the question before this Court: "Schools cannot teach the importance of the First Amendment and simultaneously not follow it."[3] Professor Chemerinsky's statement illustrates the importance of balancing students' free speech rights and school districts' interests in maintaining a safe and effective

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Devotion, FIRST AMENDMENT NEWS, 8 (First Amendment Center August 1997) .

[3] Erwin Chemerinsky, *Students Do Leave Their First Amendment Rights at the Schoolhouse Gates: What's Left of Tinker?* 48 DRAKE L.REV.527, 545 (2000).

learning environment.

> The simple fact is that there are two strongly competing interests at stake in student speech cases. On the one hand, free speech must be respected in schools because schools must teach students the values of democracy, and it would be hypocritical to conclude that the very institutions that teach the value of free speech would simultaneously prohibit its exercise. Conversely, no one could question that schools must be able to maintain a safe educational environment in order to facilitate learning.[4]

As First Amendment scholar David Hudson wrote:

> If students are to learn the lessons of democracy, such as the importance of exercising the right to freedom of speech, they must live in an environment that fosters the free exchange of ideas. Many free-speech experts believe that students will not learn the lessons of democracy if they cannot experience firsthand the freedom to make their own choices. Therefore, school officials, politicians, teachers and parents should balance legitimate safety concerns with the constitutional right of freedom of speech.[5]

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[4] Justin T. Peterson, *School Authority v. Students' First Amendment Rights: Is Subjectivity Strangling the Free Mind at Its Source?*, 3 MICH. ST. L. REV. 931, 940 (2005).

[5] David L. Hudson, Jr., THE SILENCING OF STUDENT VOICES: PRESERVING FREE SPEECH IN AMERICA'S SCHOOLS 6 (First Amendment Center 2003).

Professor Chemerinsky points out that the judiciary plays a significant part in maintaining the proper balance.

> School officials – like all government officials – often will want to suppress or punish speech because it makes them feel uncomfortable, is critical of them, or just because they do not like it. The judiciary has a crucial role in making sure that this is not the basis for censorship or punishment of speech.[6]

The Ninth Circuit assumed that role and restored the balance that was lost when Petitioners punished Mr. Frederick for creating a banner with a message with which district officials were uncomfortable. Displeased with the balance struck by the Ninth Circuit, Petitioners are asking this Court to institute a double standard that would teach students like Mr. Frederick that the First Amendment does not apply to those Americans who happen to be public school students.

Petitioners and their Amici are asking this Court to give school officials carte blanche to regulate and restrict student speech anytime, anywhere based upon nothing more than a notion that the speech or conduct in question somehow conflicts with what the school defines as its"basic educational mission." Petitioners' proposal would not only slam the door on student expression, but also contradict this Court's longstanding admonition that governmental officials cannot be given unbridled discretion to regulate First Amendment activities.

The Ninth Circuit correctly concluded that "[t]here has to be some limit on the school's authority to define its mission" in order to honor "the bedrock principle of *Tinker* that

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[6] Chemerinsky at 545.

students do not 'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.'" *Morse v. Frederick*, 439 F.3d 1114, 1120 (9th Cir. 2006).

> All sorts 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; and a school's traffic safety mission would be undermined by a student circulating copies of articles showing that traffic cameras and automatic ticketing systems for cars that run red lights increase accidents. Public schools are instrumentalities of government, and government is not entitled to suppress speech that undermines whatever missions it defines for itself."

Id. The Ninth Circuit observed that the standard sought by Petitioners would mean that "distributing photocopies of the Alaska Supreme Court decision in *Ravin v. State* [537 P.2d 494 (Alaska 1975)], in which it declared that there is 'no adequate justification for the state's intrusion into the citizen's right to privacy by its prohibition of possession of marijuana,' . . , would also undermine the school's anti-drug mission." *Id.* at 1122 n.44. Actually, under the regulatory scheme sought by Petitioners, handing out copies of *Ravin* on the sidewalk across the street from the school while students were released from classes could be punished.

Such an absurd result violates the "bedrock principle underlying the First Amendment" – "that the government may

not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989). This Court has consistently upheld that bedrock principle against precisely the type of unbridled discretion sought by Petitioners and has firmly established that the exercise of First Amendment rights cannot be contingent upon the uncontrolled will of a government official. *Shuttlesworth v. Birmingham*, 394 U.S. 147, 151 (1969). Governmental authorities cannot dispense or withhold "permission to speak, assemble, picket, or parade according to their own opinions regarding the potential effect of the activity in question on the 'welfare,' 'decency,' or 'morals' of the community," *Id.* at 153, or in this case, on whatever the school district decides is part of its basic educational mission.

Earlier, in *Thornhill v. Alabama*, 310 U.S. 88, 104 (1940), this Court noted that "[e]very expression of opinion on matters that are important has the potentiality of inducing action in the interests of one rather than another group in society." However, "the group in power at any moment may not impose penal sanctions on peaceful and truthful discussion of matters of public interest merely on a showing that others may thereby be persuaded to take action inconsistent with its interests." *Id.* at 104-105. "Abridgment of the liberty of such discussion can be justified only where the clear danger of substantive evils arises under circumstances affording no opportunity to test the merits of ideas by competition for acceptance in the market of public opinion." *Id.* As this Court established in *Tinker*, that is no less true in the school context, where students' First Amendment rights can be suppressed only if authorities "reasonably forecast substantial disruption of or material interference with school activities." *Tinker v. Des Moines*

Indep. Cmty. Sch. Dist., 393 U.S. 503, 514 (1969).

Petitioners are asking this Court to turn *Tinker* on its head and to sanction the very kind of standardless, subjective and unbridled discretion that this Court has repeatedly held is prohibited by the First Amendment. *See Forsyth County v. The Nationalist Movement*, 505 U.S. 123, 133 (1992) (striking down county's assembly and parade ordinance)."Broad prophylactic rules in the area of free expression are suspect." *NAACP v. Button*, 371 U.S. 415, 438 (1963). "Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." *Id. "*Where First Amendment freedoms are at stake we have repeatedly emphasized that precision of drafting and clarity of purpose are essential." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212-213 (1975).

Petitioners' and Amici's proposal – that schools be permitted to prohibit speech that is "inconsistent" with their "core educational mission" – does not meet the constitutional touchstone. What is the district's "core educational mission?" Who decides what the mission is? What standards are applied to make the determination? Does the mission change over time? What aspects of the mission are sufficiently important so as to be deemed "core" under the Constitution? By what standard may courts review such determinations? Petitioners and their Amici do not answer those questions. In the words of William Shakespeare, "Ay, there's the rub."[7] Petitioners and their Amici imply that those questions need not be answered, because the Court should simply defer to the judgment of school administrators. "As a practical matter, whether such student speech is protected will depend on

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[7] William Shakespeare, THE TRAGEDY OF HAMLET, PRINCE OF DENMARK, Act 3, sc. 1.

context, and courts should defer to the reasonable judgment of school administrators on such contextual evaluations." (Brief of the United States as Amicus Curiae in Support of Petitioners, at 27). To do so would convert schools into "enclaves of totalitarianism, that strangle the free mind at its source." *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 280 (1988)(Brennan, J., dissenting). Justice Brennan's conclusions in *Kuhlmeier* provide an apt response to Petitioners' request:

> The First Amendment permits no such blanket censorship authority. While the "constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings," *Fraser, supra*, 478 U.S., at 682, 106 S.Ct., at 3164, students in the public schools do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," *Tinker, supra,* 393 U.S., at 506, 89 S.Ct., at 736. Just as the public on the street corner must, in the interest of fostering "enlightened opinion," *Cantwell v. Connecticut*, 310 U.S. 296, 310, 60 S.Ct. 900, 906, 84 L.Ed. 1213 (1940), tolerate speech that "tempt[s] [the listener] to throw [the speaker] off the street," *id.*, at 309, 60 S.Ct., at 906, public educators must accommodate some student expression even if it offends them or offers views or values that contradict those the school wishes to inculcate.

Kuhlmeier, 484 U.S. at 280. As Justice Brennan said, "in *Tinker*, this Court struck the balance**."** *Id.* The Ninth Circuit retained that balance and the critical role of public schools as "laboratories of democracy where students learn that they

have freedom of thought, belief, and speech,"[8] instead of "enclaves of totalitarianism."*See Tinker*, 393 U.S. at 511. This Court should reject Petitioners' request to upset the balance in favor of unbridled regulatory discretion.

II. STUDENT SPEECH IN GENERAL, AND MR. FREDERICK'S SPEECH IN PARTICULAR, MUST BE ANALYZED UNDER THE PUBLIC FORUM DOCTRINE BEFORE BEING SUBJECTED TO THE *TINKER-FRASER-KUHLMEIER* TESTS.

As is true in all First Amendment free speech cases, the critical initial consideration in this case must be the type of forum at which Mr. Frederick unfurled his banner. In this case, forum analysis is particularly important because it sets this case apart from the other student speech cases Petitioners rely upon. Petitioners evade the forum question by concluding, without substantiation, that Mr. Frederick participated in a "school-sponsored," or "school-sanctioned" event. (Brief of Petitioners at 32-33). Amici United States goes a step further and proclaims that the forum issue is "of no moment." (Brief of Amici United States at 22). To the contrary, the forum issue is of critical importance, both for illustrating the propriety of the Ninth Circuit's ruling and for demonstrating the dangers inherent in Petitioners' proposed regulatory scheme.

This Court has utilized the public forum doctrine as "a means of determining when the Government's interest in

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[8] Aaron H. Caplan, *Public School Discipline for Creating Uncensored Anonymous Internet Forums,* 39 WILLAMETTE L. REV. 93, 134-135 (2003).

limiting the use of its property to its intended purpose outweighs the interest of those wishing to use the property for other purposes."*Cornelius v. NAACP*, 473 U.S. 788, 800 (1985). "Accordingly, the extent to which the Government can control access depends on the nature of the relevant forum."*Id.* Therefore, before determining whether a government official can exclude (or in this case punish) certain activities, the Court must first identify the relevant forum and then categorize the forum as public, nonpublic or designated. *Id.*

In this case, the forum is not a journalism class as in *Hazelwood School District. v. Kuhlmeier*, 484 U.S. 260 (1988), nor a mandatory school assembly as in *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986), nor even a high school campus as in *Tinker v. Des Moines Independent Community School District,* 393 U.S. 503 (1960). Mr. Frederick unfurled his banner on a public sidewalk, which has "immemorially been held in trust for the use of the public, and, time out of mind, ha[s] been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."*Perry Educ. Ass'n. v. Perry Local Educators' Ass'n.* 460 U.S. 37, 45 (1983) (citing *Hague v. CIO*, 307 U.S. 496, 515 (1939)). When Mr. Frederick and his friends unrolled the "Bong Hits 4 Jesus" banner, they were standing on a public sidewalk among hundreds of people who had assembled along the Olympic torch route through Juneau. *See Frederick v. Morse*, 439 F.3d 1114, 1115-1116 (9th Cir. 2006). Despite Petitioners' claim this was a "school-sponsored" or "school sanctioned" event, in fact it was a community-wide "Winter Olympics Torch Relay" organized by Coca-Cola and other private sponsors. *Id.* The sidewalk upon which Mr. Frederick stood was not controlled by school district officials, limited to students or

school employees nor otherwise restricted from use by any member of the public attending the torch relay. Therefore, the sidewalk retained its character as a "quintessential public forum" *See Perry*, 460 U.S. at 45, and was not transformed into an extension of the high school regardless of its proximity to the campus.

Since Mr. Frederick unfurled his banner in a traditional public forum, the school district's rights to limit his expression or punish him for his expressive conduct were "sharply circumscribed."*See id.* Petitioners could only justify their actions if they could demonstrate that destroying Mr. Frederick's banner and suspending him from school were necessary to serve a compelling state interest and were narrowly tailored to achieve that goal. *See id.*

Clearly, that is not the case. Assuming that the "compelling state interest" at issue is discouraging the use of illegal drugs, destroying a poster that says "Bong Hits 4 Jesus" does nothing to further that cause. Even assuming, as Petitioners did, that the term "bong hits" in the poster referred to smoking marijuana, merely having those words on the poster, without more, did not contradict any anti-drug abuse message that Petitioners might be promoting. The poster did not say that marijuana should be legalized, that readers should smoke marijuana, nor otherwise send a message that could be construed as "promoting" the use of illegal drugs. Ripping the poster out of Mr. Frederick's hands did nothing to further any state interest in drug abuse prevention. Petitioners' actions in suspending Mr. Frederick are even more attenuated. Had Mr. Frederick been caught on campus using illegal drugs, then suspending him from school would further the school's interests. However, suspending him for holding up a banner while standing on a public street at a public event is neither necessary to Petitioners' anti-drug abuse message nor

narrowly tailored to address only that interest and not some other, such as avoiding controversy.

The fact that Mr. Frederick's activity occurred on a public sidewalk at a public event is significant to this Court's analysis of Petitioners' actions. This Court cannot accurately determine whether Petitioners violated Mr. Frederick's First Amendment rights unless it can determine whether Mr. Frederick's actions were compatible with the purpose of the property upon which he was conducting them. *See Cornelius*, 473 U.S. at 800. It is the nature of the forum, not Petitioners' categorization of the activity, that is determinative. Unlike the students in *Kuhlmeier, Fraser* and *Tinker*, Mr. Frederick was standing off campus, on a public sidewalk, at a public event, holding a sign that in no way identified him or the message as having any affiliation with Petitioners. Unlike the nonverbal expression engaged in by the students in *Tinker*, Mr. Frederick's message did not involve a contentious, on-going social and political event that had sparked protests and even violence throughout the country. If the *Tinker* students' anti-Vietnam War armbands worn on campus during the school day did not warrant school censure, then Mr. Frederick's nonverbal, admittedly nonsensical banner displayed off campus during a public event cannot warrant punishment. If Petitioners can punish Mr. Frederick for the content of his nondisruptive speech expressed off campus in a traditional public forum, then the power of the school district is plenary and the First Amendment is pointless. The implications of such a holding is breathtaking and poses a significant threat to free speech.

III. THE NINTH CIRCUIT CORRECTLY FOUND *TINKER* IS THE APPROPRIATE STANDARD TO APPLY TO MR. FREDERICK'S CONDUCT AND, UNDER *TINKER,* PETITIONERS COULD NOT CENSOR MR. FREDERICK'S CONDUCT.

Proper application of the public forum doctrine further illustrates the wisdom of the Ninth Circuit's approach to this case. Petitioners attempt to cast Mr. Frederick's conduct in the mold of the on-campus, school-sponsored student speech addressed in *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986) and *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988) in order to rationalize their actions. However, the Ninth Circuit more accurately summarized the true nature of this action:

> Thus the question comes down to whether a school may, in the absence of concern about disruption of educational activities, punish and censor non-disruptive, off-campus speech by students during school-authorized activities because the speech promotes a social message contrary to the one favored by the school.

Frederick v. Morse, 439 F.3d 1114, 1118 (9th Cir. 2006)."The answer under controlling, long-existing precedent is plainly 'No.'" *Id.* "Frederick argues that his rights were violated as the regulations were applied to him. Under *Tinker v. Des Moines Independent Community School District,*[393 U.S. 503 (1960)] they plainly were."*Id.* The Ninth Circuit rightly concluded that *Tinker*, not *Fraser* or *Kuhlmeier*, provides the most appropriate standard by which to analyze Petitioners' conduct. This Court made clear in *Fraser* and *Kuhlmeier* that

the greater deference afforded to school authorities in those decisions were limited to student speech in a setting wholly controlled by the school.

As Chief Justice Burger stated in *Fraser*: "The determination of what manner of speech **in the classroom or in school assembly is inappropriate properly rests with the school board.**." 478 U.S. at 683 (emphasis added). "A high school assembly or classroom is no place for a sexually explicit monologue directed towards an unsuspecting audience of teenage students."*Id.* at 685. In *Fraser*, the speech was given on campus at an assembly which students were required to attend as part of an educational program on self government. *See id.* at 677.

As Justice Brennan said in his concurrence in *Fraser*:

> The Court today reaffirms the unimpeachable proposition that students do not "'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.'" Ante, at 3163 (quoting *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 506, 89 S.Ct. 733, 736, 21 L.Ed.2d 731 (1969)). **If 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**, see *Cohen v. California*, 403 U.S. 15, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971);the Court's opinion does not suggest otherwise.

Fraser at 688 (Brennan, J., concurring)(emphasis added). Consequently, *Fraser* cannot be used to justify Petitioners' actions in punishing Mr. Frederick's off-campus conduct at a

community-wide event.

Similarly, in *Kuhlmeier*, this Court emphasized that its deference to school authorities was based upon the authorities' control over curriculum. 484 U.S. at 270-271.

> The question whether the First Amendment requires a school to tolerate particular student speech – the question that we addressed in *Tinker* – is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech. The former question addresses educators' ability to silence a student's personal expression that happens to occur on the school premises. The latter question concerns educators' authority over 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. These activities may fairly be characterized as part of the school curriculum, whether or not they occur in a traditional 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. The student newspaper at issue in *Kuhlmeier* was in the latter category over which "[e]ducators are entitled to exercise greater control" over content. *See id.*

"This concern for the integrity of the school's imprimatur" underlying the decisions in *Fraser* and *Kuhlmeier* "should not arise with off-campus speech by students," such as Mr.

Frederick's conduct.[9] "In recent Establishment Clause cases, the Supreme Court has held that school buildings themselves do not lend the imprimatur of state sponsorship to religious groups that meet on the premises after the close of business."[10] "Certainly a student who has left the building should not have her speech regulated for fear that it will be mistaken for the school's message."[11] Moreover, a student like Mr. Frederick, who is not even on campus nor part of a group identifiable with the school, should not be punished for conduct school officials fear might be attributed to them and might be seen as a statement against school policy. "Schools have no substantial interest in regulating communications which no one could associate with school sponsorship or endorsement." [12]

Consequently, Petitioners have no substantial interest in regulating, let alone punishing, Mr. Frederick's conduct. Mr. Frederick and the others who held the sign were standing on a public sidewalk among hundreds of other people at a privately sponsored community-wide event. There is no evidence that Mr. Frederick or his associates were identifiable as high school students, or that the banner could in any way

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[9] *See* Caplan at 150.

[10] *Id.* (referencing *Good News Club v. Milford Cent. Sch. Dist.*, 533 U.S. 98 (2001); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Board of Education of Westside Cmty. Sch. v. Mergens*, 496 U.S. 226 (1990)).

[11] *Id.*

[12] *Id.* at 150.

be identified as affiliated with the school. The only people who might have known that Mr. Frederick or others were students were school administrators and fellow students. Ironically, it likely that no one would have associated Mr. Frederick and his banner with the school if Petitioners had simply left it alone. By very publicly ripping the banner out of Mr. Frederick's hands and suspending him for ten days, Petitioners created the very controversy which they claim was caused by Mr. Frederick. Petitioners cannot justify a complete reversal of nearly forty years of student speech precedent based upon this self-inflicted injury.

IV. THE CONSEQUENCES OF THIS COURT'S RULING WILL HAVE FAR-REACHING EFFECTS ON FREE SPEECH RIGHTS.

The potential reach of this case goes far beyond the streets of Juneau or the campus of its high school. This Court's decision could dramatically affect how the First Amendment is perceived by those who will be leading our country in the future. If Petitioners' viewpoint is adopted, then students will learn that the First Amendment's guarantee of freedom of speech is little more than a platitude, something available only to those who are not public school students. School districts will be able to silence any expression by any student or organization with whom district officials disagree, no matter where it occurs, so long as the district can claim that the expression conflicts with its self-defined core educational mission.

> Public school students subject to school discipline for off-campus speech will find themselves constantly monitoring their thoughts and statements. Students

> would have to watch their words when in traditional public forums like parks or sidewalks, when publishing in newspapers or on the Internet, and when speaking to friends in the privacy of their own homes.[13]

Under the regulatory framework proposed by Petitioners, students could face punishment for engaging in any number of activities long protected by the First Amendment. Justice Brennan summarized some of these possibilities in his dissent in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988):

> Other student speech, however, frustrates the school's legitimate pedagogical purposes merely by expressing a message that conflicts with the school's, without directly interfering with the school's expression of its message: A student who responds to a political science teacher's question with the retort, "socialism is good,"subverts the school's inculcation of the message that capitalism is better. Even the maverick who sits in class passively sporting a symbol of protest against a government policy, *cf. Tinker v. Des Moines Independent School Dist*., 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969), or the gossip who sits in the student commons swapping stories of sexual escapade could readily muddle a clear official message condoning the government policy or condemning teenage sex. Likewise, the student newspaper that, like Spectrum, conveys a moral position at odds with the school's official stance might

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[13] Caplan at 148-149.

> subvert the administration's legitimate inculcation of its own perception of community values.
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> If mere incompatibility with the school's pedagogical message were a constitutionally sufficient justification for the suppression of student speech, school officials could censor each of the students or student organizations in the foregoing hypotheticals, converting our public schools into "enclaves of totalitarianism," *id*., at 511, 89 S.Ct., at 739, that "strangle the free mind at its source," *West Virginia Board of Education v. Barnette,* 319 U.S. [624], 637, 63 S.Ct.[1178], 1185[(1943)].

Kuhlmeier, 484 U.S. at 279-280 (Brennan, J., dissenting). Furthermore, under Petitioners' expansive view, students who engage in expressive conduct off campus could face similar censorship. For example, a student who is satisfying a community service requirement by volunteering at a crisis pregnancy center could face punishment if he holds a sign saying "Abortionists are Murderers," or a poster depicting an aborted baby while picketing outside an abortion clinic. Students would have to think twice before participating in events such as the "Walk for Life" for fear of being suspended or otherwise punished if they express an opinion that makes school administrators uncomfortable. Under Petitioners' extra-deferential standard, school officials could define their core educational mission to ensure that unpopular, controversial, non-majority viewpoints are restricted or excluded with impunity, so long as the school could say that the message was incompatible with the mission.

The Third Circuit addressed just such a policy and its ramifications in *Saxe v. State College Area School District,* 240 F.3d 200 (3d Cir. 2001). In *Saxe*, the Third Circuit struck

down a district's "anti-harassment" policy as facially unconstitutional. The policy stated that "disrespect among members of the school community is unacceptable behavior which threatens to disrupt the school environment and well being of the individual." *Id.* at 202. The policy broadly defined harassment as including any unwelcome verbal or physical conduct which offends, denigrates or belittles someone because of that person's actual or perceived race, religion, color, national origin, sexual orientation, disability or other personal characteristic. *Id.* at 202-203. The policy applied to the school community, which, by the policy's terms, "includes, but is not limited to, all students, school employees, contractors, unpaid volunteers, school board members, and other visitors." *Id.* at 203 n.2. The policy at issue in *Saxe* followed the standards requested by Petitioners here – it prohibited a wide range of speech and conduct by virtually anyone who was involved with the school in virtually any setting. Such broad language is constitutionally impermissible in that it sweeps too broadly and chills protected First Amendment activities. *Id.* at 216-217. The consequences of such a sweeping regulation were aptly described by Justice Alito in his majority opinion:

> By prohibiting disparaging speech directed at a person's "values," the Policy strikes at the heart of moral and political discourse – the lifeblood of constitutional self government (and democratic education) and the core concern of the First Amendment. That speech about "values" may offend is not cause for its prohibition, but rather the reason for its protection: "a principal 'function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it

> induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.'" Texas v. Johnson, 491 U.S. 397, 408-09, 109 S.Ct. 2533, 105 L.Ed.2d 342 (1989) (quoting Terminiello v. Chicago, 337 U.S. 1, 4, 69 S.Ct. 894, 93 L.Ed.1131 (1949)).

Saxe, 240 F.3d at 211.

> Because the Policy's "hostile environment" prong does not, on its face, require any threshold showing of severity or pervasiveness, it could conceivably be applied to cover any speech about some enumerated personal characteristics the content of which offends someone. This could include much "core" political and religious speech: the Policy's "Definitions" section lists as examples of covered harassment "negative" or "derogatory" speech about such contentious issues as "racial customs," "religious tradition," "language," "sexual orientation," and "values." Such speech, when it does not pose a realistic threat of substantial disruption, is within a student's First Amendment rights.

Id. at 217. One commentator noted that viewpoints on topics included in the *Saxe* policy (and in Mr. Frederick's banner) "that relate to live political debates in the adult community are entitled to stronger protection."[14] "Not allowing debate among students over these issues, by silencing those who dissent at an early age, presents the danger of skewing the

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[14] Peterson at 953.

debate toward one side or the other in the adult community."[15] "One must also take account of the fact that most high school students will be of voting age before many of these issues are resolved."[16] In fact, in this case, Mr. Frederick was already of voting age when the incident occurred.

Adoption of Petitioners' proposed "subjective approach of allowing public schools to suppress any student speech which conflicts with a school's basic educational mission leaves the student's right to free expression vulnerable to the particular likes or dislikes of public school officials. The result of this subjective approach is a move toward orthodoxy."[17] That is precisely what this Court has steadfastly refused to permit.

> The Supreme Court has long held that the First Amendment means that, "above all else, the . . . government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." In other words, the government cannot regulate speech simply because it does not like the viewpoint being expressed. Throughout the history of expression in this country, the First Amendment has protected the minority from being suppressed by the majority. [18]

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[15] *Id.*

[16] *Id.*.

[17] *Id.* at 977.

[18] *Id.* at 960-961 (citing *Chicago Police Dep't v. Mosley*, 408 U.S. 92, 95 (1972)).

That protection has been extended to public school students so long as their speech is not vulgar or lewd and does not cause a material and substantial disruption. *Tinker*, 393 U.S. at 514. Petitioners are asking this Court to overturn *Tinker* and to place the future of free speech for public school students under the unbridled discretion of school administrators. The danger of this viewpoint is apparent, for "[i]f minority views can be permanently suppressed because the majority disagrees with them, the First Amendment has been flipped on its head."[19] If, as Petitioners propose, a school can automatically ban an expression simply because it is controversial or inconsistent with its self-defined goals, and not because it causes material and substantial disruption, then *Tinker* has no significance. In the larger context, "[i]f the government is allowed to begin drawing some lines based on the content of speech (the very thing the First Amendment is meant to protect), the government will not be stopped from drawing other lines based on the content of speech."[20] "There is a serious risk of this because, under a movement that bans unpopular expression, the only way to determine whether a certain viewpoint is no longer worth protecting will depend on whether the majority of society believes its basic premise to be false."[21]

In the context of student speech, as elsewhere,"[f]ree speech is not a privilege that the majority can give to those whose message they like and deny to others whose words

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[19] *Id.* at 954.

[20] *Id.* at 961

[21] *Id.*

offend."[22] "Free speech is a right given to every citizen of the United States and it is the government's duty to protect that right for every person, whether they agree with their views or not,"[23] rather than to seek to expand government censorship under the guise of preserving an undefined educational mission, as Petitioners did here.

"Public high school students deserve to have the First Amendment protection that was given to them in *Tinker v. Des Moines Independent Community School District.* Students should have the right to express their viewpoints on controversial political subjects such as sexuality, religion, and race without the interference of school officials – as long as students do not do so in a vulgar manner or cause material and substantial disruption." [24] That is particularly true when

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[22] *Id.* at 963.

[23] *Id.*

[24] Peterson at 977. While the term "material and substantial disruption" has not been precisely defined by this Court, examples from student speech cases provides some guidance and show that Mr. Frederick's conduct could in no way qualify. For example, in *Tinker*, the record showed that the armbands caused comments, warnings by other students, the poking of fun at them, and a warning by an older football player that other, non-protesting students had better let them alone. There was also evidence that a teacher of mathematics had his lesson period practically 'wrecked' chiefly by disputes with Mary Beth Tinker. *See Tinker*, 393 U.S. at 517 (Black, J., dissenting). Nevertheless, the majority found that the armbands did not create a material and substantial disruption sufficient to justify the district's actions. Consequently, Mr.

the student makes his expression on a public sidewalk at a public event in a manner that does not explicitly or implicitly carry the imprimatur of the school.

Whether Mr. Frederick's banner is regarded as a "pro drug" message, an "anti-religion" message or none of the above, it is protected First Amendment speech under this Court's long-standing precedents. Petitioners' very public censorship and punishment of Mr. Frederick violated the bedrock principles underlying the First Amendment. No amount of post-hoc rationalization can or should be permitted to change that conclusion.

CONCLUSION

The Ninth Circuit correctly followed this Court's longstanding precedents when it decided that Petitioners violated Mr. Frederick's First Amendment rights when they

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Frederick's off-campus conduct which did not even cause comments, warnings or a disruption of class time cannot justify Petitioners' actions.

ripped the banner out of his hands and suspended him for ten days. Petitioners' request that this Court overturn that determination must be rejected.

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Erik W. Stanley
Mary E. McAlister
David M. Corry
LIBERTY COUNSEL
Suite 2775
100 Mountain View Rd
Lynchburg, VA 24502
(434) 592-7000

Mathew D. Staver
(Counsel of Record)
Anita L. Staver
LIBERTY COUNSEL
Second Floor
1055 Maitland Ctr Commons
Maitland, FL 32751
(800) 671-1776

Attorneys for Amicus Curiae