No. 06-278

In The 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 OF THE RUTHERFORD INSTITUTE, AMICUS CURIAE, IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

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

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]

The Rutherford Institute is an international civil liberties organization headquartered in Charlottesville, Virginia. Founded in 1982 by its President, John W. Whitehead, the Institute specializes in providing legal representation without charge to individuals whose civil liberties are threatened or infringed upon and in educating the public about constitutional and human rights issues. Attorneys affiliated with the Institute have represented parties before the U.S. Supreme Court in numerous cases involving student rights in the public education setting, including Good News Club v. Milford Cent. Sch. Dist., 533 U.S. 98 (2001), and Owasso Indep. Sch. Dist. v. Falvo, 534 U.S. 426 (2002), as well as in other cases with significant First Amendment issues such as Frazee v. Dep't of Employment Sec., 489 U.S. 829 (1989), and Arkansas Educational Television Comm'n v. Forbes, 523 U.S. 666 (1998). The Institute has also filed *amicus curiae* briefs in this Court on numerous occasions in cases raising First Amendment issues of the type raised in this case. Institute attorneys currently handle over one hundred cases nationally, including many cases that concern the interplay between the government and its citizens.

One of the purposes of The Rutherford Institute is to work to preserve the maximum freedom for citizens to petition government, to express opinions in public forums without fear of repression or discrimination, and to enhance respect and protection for free speech rights guaranteed by the First Amendment. The Institute works diligently to promote a society where the free marketplace of ideas can predominate. The Rutherford Institute is furthermore

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[1] Counsel of record to the parties in this case has consented to the filing of this brief, and letters of consent have been filed with the Clerk pursuant to Rule 37. No counsel to any party authored this brief in whole or in part.

dedicated to assuring that all citizens, including students, teachers, and school administrators, appreciate the delicate balance between the First Amendment's protection of free expression and the need for students to be well-educated, productive citizens of our democratic republic with a healthy respect for, and tolerance of, differing opinions and viewpoints and an understanding of rights granted under the Bill of Rights.

STATEMENT OF FACTS[2]

Respondent Joseph Frederick received a ten-day suspension from Petitioner Deborah Morse (the principal of Juneau-Douglas High School) as a result of Frederick's display of a banner at the Olympic Torch Relay procession as it passed through the streets of Juneau, Alaska, on January 24, 2002. The Notification of Suspension signed by Morse informed Frederick of the following violations set forth in the Student Handbook:

> *1.12 - Display of Offensive Material*
> *2.07 - Refusal to respond to staff directive regarding behavior*
> *2.17 - Truancy/Skipping*
> *2.05 - Defiant/Disruptive Behavior*
> *2.08 - Refusal to cooperate/assist in investigation*

(J.A. 107). The school disciplinary grid for these offenses permitted discipline if they occur on "other [than school] property during normal school hours or at school sponsored/sanctioned functions or activities outside of such hours." J.A. 22, 100, 103.

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[2] To the extent not stated below, *amicus* incorporates by reference the statement of facts set forth in the brief of Respondent Joseph Frederick.

Undisputed Facts. The Ninth Circuit properly recognized that Fed.R.Civ.P. Rule 56 permits summary judgment *only* when "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law."[3] A number of factual contentions in this case are disputed, but the *undisputed* facts include the following:

- The Olympic Torch Relay was commercially sponsored by the Coca-Cola Company (J.A. 27).
- The Torch Relay promoted the upcoming international Winter Olympics, was open to the general public, and was conducted on the public streets of Juneau (J.A.9).
- A wide variety of speech activity occurred during the Torch Relay, including signs, yelling, singing, cheering, musical fanfare, banners, etc. (J.A. 23).

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[3] *Frederick v. Morse*, 439 F.3d 1114, 1116 (9th Cir. 2006). Petitioners' Brief mistakenly blends conflicting versions of disputed and undisputed material facts to reach a desired legal end. For example, the Brief states that "the student body remained under the supervision of high school administrators, teachers, and staff." Brief for Petitioners at 3. This assertion, however, is directly contradicted (i.e., disputed) by several student declarations indicating that many students were unruly throughout the event, with little control or meaningful supervision by school staff, and that some students left the event altogether. J.A. 32, 38. Likewise, while Petitioners argue that there were disruptions in school as a consequence of Respondent's display of the banner, Respondent submits that no such disruptions occurred. J.A. 37. Moreover, the nature of the disruptions suggests that it was Petitioner Morse's actions that caused any so-called disruptions, not the display of Frederick's banner. J.A. 43. Numerous other significant "disputed facts" that are identified in the following text above should be recognized as such and not relied upon as the basis for the Court's decision in this case. Otherwise, the case should be remanded for trial of these disputed issues.

- Respondent Frederick unfurled his banner on a sidewalk across the street from the school (J.A. 28-29) [4]
- The message on the banner read "Bong Hits 4 Jesus" (J. A. 10, 16, 24).
- Frederick had not attended school that day, but went directly from home to the Torch Relay (J.A. 28, 107, Frederick Declaration) (J.A. 42, Morse Declaration).
- Petitioner Morse imposed the previously described sanctions based on her decision that Frederick was participating in a school-sponsored event (J.A. 22, 100, 103, 107).

Petitioners also admitted that the banner caused no disruption in classroom work and that the censorship was justified primarily on grounds that it conflicted with the school system's anti-drug message (Petitioners' verified responses to Respondent's Interrogatories No. 4 and 5 (J.A. 108-09)). When asked in Interrogatory No. 4 to "[d]escribe all ways in which the display of the banner by the plaintiff and others during the Torch Relay disrupted classroom work at any school of the Juneau School District, the Petitioners replied simply: "Defendants do not contend that display of the banner disrupted classroom work." J.A. 108. And in response to Interrogatory No. 5, where Petitioners were asked to "[d]escribe all ways in which the display of the banner by the plaintiff and others during the Torch Relay disrupted the non-classroom educational process in any school of the Juneau School District," they responded:

> Display of a banner that would be construed by many, including students, district

[4] The location where Frederick displayed the banner along the street is disputed. *Cf.* J.A. 28 (Frederick --- near swimming pool) with J.A. 41 (Morse --- in front of residences along the street).

> personnel, parents, and others witnessing the display of the banner, as advocating or promoting illegal drug use is inconsistent with the district's basic educational mission to promote a healthy, drug free life style. Failure to react to the display of such a banner at a school sanctioned event would appear to give the district's imprimatur to that message and would be inconsistent with the district's responsibility to teach students the boundaries of socially appropriate behavior. Federal and state law require the district to keep the school environs drug free and to educate students on the dangers of using drugs and alcohol. The district's policies and strategic plan emphasize healthy, drug free lifestyles. The district's approved health curriculum teaches the dangers of using illegal substances. District policies and the JDHS student handbook prohibit the display of offensive materials, including materials that promote or advocate the use of illegal substances. The district's responsibilities as in loco parentis also require that messages advocating, or promoting use of illegal substances be removed, to the extent possible, from the learning environment, including the environment at school-sanctioned activities.

Notably, Petitioners' Interrogatory 5 Response is almost exclusively based on the school system's disagreement with the conflict between the content of Frederick's banner and the school system's viewpoint that any message by students making light of illegal drugs should be censored. The response does not document any actual disruption or disorder

in the school's educational functioning or mission as a result of the display of the banner. J.A. 109.[5]

Disputed Facts. Petitioner Morse's assertion that the Olympic Torch Relay was a "school sponsored/sanctioned" function or activity is disputed. She contends that she "decided to permit staff and students to participate in the Torch relay as an *approved social event or class trip.*" J.A. 22, 100, 103 (emphasis added).[6] Morse's assertions are disputed by several students who were released from school to attend the event. Student Micaela F. Croteau asserts in her Declaration that "the school allowed students to go out to the street to watch it. It was not a field trip, as no field trip form had to be filled, and parental consent was not required." J.A. 36. Student Sara Croteau likewise states that "when the torch relay was being run near our school, the teacher announced that we could go watch it. Some students did, others did not, and the teacher made no effort to keep those of us who did go out together." J.A. 38. She also declares that "[m]any people got bored and left. The school administrators weren't stopping any of the people who left." *Id.* Student Melinda Madsen declares that "my teacher released us to go see the relay, but we did not have to stay together or stay with the teacher. The area outside the school was crowded and chaotic.... I saw some of my classmates go to their cars. It was easy to slip away. I noticed a few other students did not come back to class after the relay was over, and the teacher noticed their absence but they didn't get into trouble." J.A. 32. Respondent Frederick was not in class

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[5] Petitioner Morse described a subsequent protest of the school's censorship of Frederick's message but did not allege any direct disruption of school order arising *solely* from the display of Frederick's message, as opposed to protest of the censorship. J.A. 43.

[6] This wording is notably different from the school disciplinary code which permits punishment for offensive speech "at *school sponsored/sanctioned functions or activities* outside of such hours." *Id.*

prior to the event and disputes that it was a school-sponsored event (J.A. 55). These student assertions are disputed by Petitioner Morse. J.A. 55-56.[7]

The meaning of Frederick's message, "Bong Hits 4 Jesus," is also disputed. Morse interpreted that it "would be widely understood by high school students and others as referring to smoking marijuana" and "advocating drug use." J.A. 24, 25. Frederick indicated it had a more light-hearted meaning, having seen it being used by a Mardi Gras group opposing religious fundamentalists picketing that event. J.A. 28. Student Micaela Croteau said she was "not sure what Joe meant by the saying on the banner. I just took it to be an attempt by Joe to be outrageous or funny, but no one took it seriously as saying anything about drugs or about religion." J.A. 37. Student Melinda Madsen didn't know what it meant but didn't think it promoted illegal drug use. J.A. 33. Fellow student Makana Field, who helped select the phrase, said the following:

> My friend Joe Frederick and I got the idea of displaying a banner when the runners came by. I'm not sure where we got the phrase, "Bong Hits 4 Jesus," but I know we thought it was funny, so that's why we used it. It didn't have any particular meaning. It definitely wasn't meant to say anything encouraging

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[7] Seeking to refute the student contentions, Petitioners also submitted to the District Court four *completely identical* Declarations from several teachers (subordinate to Morse), contending with respect to each of the students who provided affidavits that "I elected to let my students go out to observe the passing of the Olympic Torch as a *school sponsored* and *supervised* event." J.A. 47-53. The Joint Appendix has been printed and does not contain the original affidavits, but the originals filed with the District Court were each the same prepared form with blanks filled in for the names of the students and signed by each teacher. *See* Respondents' Supplemental Excerpts of Record filed with the United States Court of Appeals for the Ninth Circuit, No. 03-35701, pp. 70-77.

> drug use or to say anything about religion. I don't know any students who took it to have a drug meaning, though there was one student who thought we were making a comment about religion.

J.A. 34. Indeed, in the context of the event, Frederick's message might even be interpreted as a protest against Olympic ideals which, though viewed widely as meritorious, are no less subject to critique than any other societal event or endeavor.

Summary. The only *undisputed* facts in the record, and the only facts that should be relied upon for decision under Fed.R.Civ.P. Rule 56, are the following: (1) Respondent Joseph Frederick displayed a banner containing the message "BONG HITS 4 JESUS." (2) The display occurred on a public sidewalk across the street from Juneau-Douglas High School, the school in which he was enrolled as a student. (3) Frederick had not gone to school prior to the event. (4) The display occurred during the 2002 Olympic Torch Relay during which citizens, including students released from class, observed the procession and expressed themselves in a variety of ways as runners carried the torch through the streets of Juneau, Alaska. (5) Petitioner Morse suspended Frederick ten days from school for displaying an offensive banner (and for related offenses) at what she viewed as an approved social event or class trip.

SUMMARY OF ARGUMENT

This case will have a critical impact on the First Amendment rights of student-citizens expressing their views off school property. Student speech occurring away from school property should not be made subject to rote application of school rules based on an administrator's perception of what is and is not a "school-approved activity." Rather, unless the student is formally representing the

school, restrictions on off-campus student speech should be determined according to the reasonable and principled standards that apply to the forum where the speech occurs.

Just as students do not forfeit their First Amendment rights upon entering the schoolhouse gate, so too, schools cannot censor student speech uttered in quintessential public forums solely based on rules that otherwise might be proper within the school. Moreover, a school system's desire to advance an anti-drug point of view does not require students to forfeit the right to oppose that viewpoint outside the schoolhouse gates. In most instances, schools must be required to justify restrictions on off-premises student speech by demonstrating a compelling governmental interest that is narrowly tailored to achieve a legitimate governmental objective. *See Perry Education Association v. Perry*, 460 U.S. 37, 45 (1983). In other words, unless students are on school property, or formally representing the school system, student speech outside the schoolhouse gates cannot be restricted any more than the legitimate restriction of utterances by adult members of the community in the same forum. Restrictive school policies, designed to maintain order in the classroom or on school premises, are not necessarily appropriate for student speech in public places adjacent to schools which by long tradition have been devoted to assembly and debate, such as streets, sidewalks, and parks. *See Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972); *Grayned v. City of Rockford*, 408 U. S. 104 (1972). Likewise, punishment for off-campus expression of a viewpoint that conflicts with the school system's preferred message constitutes unlawful viewpoint discrimination.

Finally, Petitioners' misguided attempt to obtain unprecedented control over off-campus student speech, if sustained, will greatly undermine First Amendment values and send the wrong message to upcoming citizens. Student speech has often prompted, and even produced, broad cultural and political change. If administrators were accorded the power to censor and punish students for off-

campus speech or protest, including civil disobedience such as that seen during the Civil Rights and Vietnam Eras, the Nation and its political dialogue would suffer indescribable loss. It would create a constitutional double standard that would destroy the public school system's credibility among America's youth and cripple its role in educating students about the importance, as well as the prudent and proper exercise, of constitutional freedoms.

ARGUMENT

I. Frederick's Speech Is Not Governed By The *Tinker* Trilogy Because The Speech Did Not Occur At School Or In A Manner Reasonably Believed To Constitute Representation Of The School.

In *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969) ("*Tinker*"), this Court declared the vital importance of student speech and the protection it deserves, even on school campuses:

> Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk, *Terminiello v. Chicago*, 337 U.S. 1, 69 S.Ct. 894, 93 L.Ed. 1131 (1949); and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.

While school officials have greater latitude in regulating the speech of students occurring within the context of the educational environment, *Tinker* also made clear at the same time that "state-operated schools may not be ***enclaves*** of totalitarianism." *Id.* at 511. *Tinker* and its progeny dealt with student speech that either occurred within the metes and bounds of the school, at school assemblies, or in school curriculums. *Id.*; *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986) ("*Bethel*"); *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988) ("*Kuhlmeier*"). This Court should, therefore, carefully scrutinize Petitioners' attempt to expand disciplinary powers to student speech uttered *beyond* the schoolhouse gates.

The Court's opinions in *Tinker*, *Fraser*, and *Kuhlmeier* clearly applied to speech that occurred *within* the physical boundaries of the school campus. For example, the majority opinion in *Tinker* confined its rationale to "[a]ny word spoken, ***in class, in the lunchroom,***" *Id.*, and "in ***the cafeteria, or on the playing field, or on the campus*** during the authorized hours. . . ." *Id.* at 512-13 (emphasis added). Likewise, the *Fraser* case was decided on the basis that "[a] ***high school assembly or classroom*** is no place for a sexually explicit monologue directed toward an unsuspecting audience of teenage students." *Bethel*, 478 U.S. at 685 (emphasis added). And in *Kuhlmeier*, which involved censorship of sexual material in a student newspaper prepared as part of the school's journalism curriculum, the Court stated that "[a] school need not tolerate student speech that is inconsistent with its 'basic educational mission'...*even though the government could not censor similar speech outside the school.*" *Kuhlmeier*, 484 U.S. at 266 (emphasis added). Significantly, the *Kuhlmeier* Court viewed the geography of speech uttered in schools as different from that in other forums, recognizing that "[t]he public schools do not possess all of the attributes of streets, parks, and other traditional public forums that 'time out of

mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.'" *Id.* at 268 (citing *Hague v. CIO*, 307 U.S. 496 (1939)).

In contrast to *Tinker* and its progeny, the venue in the present case *does* contain the "attributes of streets, parks, and other traditional public forums" and few, if any, of the "special characteristics" of the school environment or any disruption of that environment that would be inconsistent with the normal functioning of the school. The speech not only occurred off school property, but in a traditional public forum independent of Frederick's status as a student at Juneau-Douglas High School. Unlike the previous cases, Frederick did not attend school prior to the Relay event and was not released from class. At the moment he was punished for his speech, he was on a public sidewalk off school grounds and was simply one individual among many attending a public event and, as such, had the same freedom to express his own opinions as anyone else attending the event.

This was not an event involving participants in a school-sponsored athletic event or extracurricular activity involving other schools. Moreover, Frederick clearly was not representing the school, for example, as a cheerleader or band member. He displayed no indicia of the school. He was not wearing a school uniform. If so, the underlying principles of *Tinker* might reasonably apply by virtue of his formal representation of the school or because of conduct on another school campus. In such instances, Frederick would be participating and identified as formally representing the school, and/or conducting himself on another school campus in that capacity and would, therefore, be governed by restrictions aimed at preventing any material disruption that could be perceived as occurring in the name of the school. In those circumstances, the *Tinker* interests in preventing disruption of the academic environment or avoiding substantial disorder, or invasion of the rights of others might

be appropriately extended beyond the schoolhouse gates and into the broader community.

Because the interests of the school are more highly attenuated in a public forum and are highly dependent on the context of student action in such a forum, this Court's prior holdings in *Tinker* and subsequent cases fail to provide the complete framework in which to adjudicate the facts at issue in this case. This Court should, therefore, reject Petitioners' contention that the *Tinker* progeny mandate affirmance of the Petitioners' discipline of Frederick. Instead, the Court should consider the material facts in the light of this Court's precedents dealing with speech in a public forum immediately adjacent to a school facility. *See Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972); *Grayned v. City of Rockford*, 408 U. S. 104 (1972).

II. Frederick's Speech Occurred In A Traditional Public Forum And Therefore Should Have Been Afforded The First Amendment Protections For Such Forums Regardless Of The Fact That He Was A Student.

A. Frederick's Status As A Citizen Speaking On The Public Sidewalk Adjacent to a School Entitled Him To the Full Protections of The First Amendment.

The place and geography where speech occurs is a critical factor in determining the level of protection afforded under the First Amendment. *Frisby v Schultz*, 487 U.S. 474 (1988); *Cornelius v. NAACP Legal Defense & Educational Fund*, 473 U.S. 788, 802 (1985). This Court has stated that "[i]n places which by long tradition or by government fiat have been devoted to assembly and debate, the rights of the state to limit expressive activity are sharply circumscribed." *Perry Education Association v. Perry*, 460 U.S. 37, 45 (1983). "At one end of the spectrum are streets and parks

which '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." *Id.*, citing *Hague v. CIO*, 307 U.S. 496, 515 (1939). "A speaker who takes to the street corner to express his views...[is] free from interference by the State based on the content of what he says." *Hurley v. South Boston Allied War Veterans Council*, 515 U.S. 557, 579 (1995) ("Hurley").

Frederick's speech occurred on a public sidewalk during the Olympic Torch Relay parade conducted on a public street across from a public school in the midst of a large group of citizens expressing themselves within and without the Relay. The only difference between Frederick's speech and that of other spectators at the event is that school officials disapproved of Frederick's message. While other spectators observed the parade and expressed themselves without limitation, when Frederick displayed his banner, Petitioner Morse crossed the street, shaking her head, and told him, "not here." J.A. 29-30. When Frederick asked about the Bill of Rights and freedom of speech, Morse tore the banner from him because she "felt that it violated the policy against displaying offensive material, including material that advertises or promotes use of illegal drugs." *Frederick v. Morse*, 439 F.3d 1114, 1116 (9th Cir. 2006). While Frederick's choice of words may have been distasteful to many and contrary to the school's desire to promote anti-drug messages, the school is not free to censor Frederick's speech in a traditional public forum without a compelling state interest. As this Court stated in *United States v. Grace*, 461 U.S 171, 177 (1983), which involved the exercise of free speech on the sidewalk of this Court:

> In such places, the government's ability to permissibly restrict expressive conduct is very limited: the government may enforce reasonable time, place, and manner

> regulations as long as the restrictions "are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." *Perry Education Assn.*, supra, at ----, 103 S.Ct., at 955. See e.g., *Heffron v. International Society of Krishna Consciousness*, 452 U.S. 640, 647, 654, 101 S.Ct. 2559, 2563, 2567, 69 L.Ed.2d 298 (1981); *Grayned v. City of Rockford*, 408 U.S. 104, 115, 92 S.Ct. 2294, 2302, 33 L.Ed.2d 222 (1972); *Cox v. Louisiana* (Cox II), 379 U.S. 559, 85 S.Ct. 476, 13 L.Ed.2d 487 (1965). Additional restrictions such as an absolute prohibition on a particular type of expression will be upheld only if narrowly drawn to accomplish a compelling governmental interest. See, e.g., *Perry Education Assn.*, supra, at ----, 103 S.Ct., at 955; *Widmar v. Vincent*, 454 U.S. 263, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981).

Moreover, as this Court made clear in the *Hurley* case (which involved a St. Patrick's Day parade on a public street), "[w]hile the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government." *Hurley*, 408 U.S. at 579. Even in *Tinker*, the Court made clear that "[i]n order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Tinker*, 393 U.S. at 509. Although Frederick's message was not popular and even of

questionable appropriateness at such an event, it was presented in a traditional public forum where speech and messages were not only expected but, in fact, occurred, and without disruption of the normal functioning of the school. Consequently, Frederick's speech was protected under the First Amendment and could not be censored merely because the school disapproved of the message or its content.

B. The School System Is Not Free To Engage In Content-Based Regulation Of Frederick's Speech In A Traditional Public Forum Without Demonstrating A Compelling State Interest.

Courts are typically reluctant, for obvious reasons, to interfere with the administration of school discipline. The traditional "willingness to defer to the schoolmaster's expertise in administering school discipline rests, in large measure, upon the supposition that the arm of authority does not reach beyond the schoolhouse gate." *Id.* When it is suggested, however, that school disciplinary authority should reach beyond the schoolhouse gates, traditional judicial deference is no longer appropriate. Barring extraordinary circumstances, ordinary constitutional principles apply just the same as they do to all citizens. Those principles require the following inquiry: Was the speech of a type protected by the First Amendment? What is the nature of the forum where the speech occurred? Was the speech proscribed or regulated based on content? Was the state seeking to advance a legitimate and compelling interest? And, if so, were the means narrowly tailored to achieve that state objective, and did it provide for ample alternative channels of communication? *See Perry Education Assn v. Perry Local Educators Assn*, 460 U.S. 37, 45 (1983); *Cornelius v.*

NAACP Legal Defense and Educational Fund, Inc., 473 U.S. 788, 797-99 (1985).[8]

As previously indicated, there can be no question that the display of Respondent Frederick's banner on a public sidewalk during a public parade was protected speech in a traditional public forum or that it was censored based on the content of its message. The Petitioners' unlawful discrimination based on the content/viewpoint of Frederick's banner is itself enough to invalidate the Petitioners' action. Likewise, the asserted state interest in preventing the disruption of school is insufficient in the circumstances of this case to justify the censorship that occurred. And, in any event, the school's action was clearly not narrowly tailored in the circumstances of this case to reach only speech that would potentially disrupt school.

Two cases decided by this Court govern demonstrations on public sidewalks adjacent to public school buildings: *Police Department of City of Chicago v. Mosley*, 408 U.S. 92 (1972), and *Grayned v. City of Rockford*, 408 U.S. 104 (1972). In each case, this Court considered the speech in question, the nature of the forum, whether speech was censored based on content, and whether the state had advanced a legitimate interest in censoring the speech. In both cases, the Court took into account *Tinker*'s concern with school disruption in analyzing whether demonstrations or picketing by students and others on public sidewalks

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[8] "In [traditional] public forums, the government may not prohibit all communicative activity. For the state to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. *Carey v. Brown*, 447 U.S. 455, 461, 100 S.Ct. 2286, 2290, 65 L.Ed.2d 263 (1980). The state may also enforce regulations of the time, place, and manner of expression which are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication." *Perry Education Assn v. Perry Local Educators Assn*, 460 U.S. at 45.

adjacent to schools could be prohibited or censored based on content.

In *Police Department of City of Chicago v. Mosley*, 408 U.S. 92 (1972) ("*Mosley*"), Earl Mosley challenged a Chicago ordinance that would have prevented him during school hours from "*walk[ing] the public sidewalk adjoining the school*, [and] carrying a sign that read: 'Jones High School practices black discrimination. Jones High School has a black quota.'" *Id.* at 93 (emphasis added). Citing *Tinker*, the Court indicated that the City had a legitimate interest in "preventing school disruption" but found that "[p]redictions about imminent disruption from picketing involve judgments appropriately made on an individualized basis, not by means of broad classifications, especially those based on subject matter."[9] In the context of Chicago's determination that "peaceful labor picketing during school hours is not an undue interference with school," the Court found that the ordinance proscribing other picketing was not "tailored to a substantial governmental interest" and that "the discrimination among pickets is based on the content of their expression." Id. at 99, 102. In doing so, the Court made clear that "above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Id.* at 95. The Court said:

> To permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, *free from government censorship.* The essence of this forbidden censorship is

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[9] Citing *Tinker*, the Court noted that "'(I)n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression.' *Tinker v. Des Moines Independent Community School District*, 393 U.S. at 508, 89 S.Ct. at 737."

> content control. Any restriction on expressive activity because of its content would completely undercut the "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan, supra*, 376 U.S. at 270, 84 S.Ct. at 721.
>
> Necessarily, then, under the Equal Protection Clause, not to mention the First Amendment itself, *government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favored or more controversial views. And it may not select which issues are worth discussing or debating in public facilities. There is an "equality of status in the field of ideas," and government must afford all points of view an equal opportunity to be heard.* Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone.

Id. at 96 (emphasis added). The essence of the *Mosley* decision was, therefore, unlawful content discrimination in a public forum, a principle that is directly applicable in this case. Surely Joseph Frederick's rights to free speech in that forum (when he was not formally representing the school) should be no less than those of any adult who chose to protest the Olympic Relay or to advance a message contrary to the school system's preferred message in that forum.

In *Grayned v. City of Rockford*, 408 U.S. 104, 105 (1972) ("*Grayned*"), Richard Grayned, a student, was one of 200 demonstrators in front of West Senior High School in Rockford, Illinois, who:

> marched around *on a sidewalk* about 100 feet from the school building, which was set back from the street. Many carried signs which summarized the grievances: "Black cheerleaders to cheer too"; "Black history with black teachers"; "Equal rights, Negro counselors." Others, without placards, made the "power to the people" sign with their upraised and clenched fists.

Id. (emphasis added). Grayned was convicted of violating an anti-picketing ordinance virtually identical to the Chicago ordinance in the *Mosley* case and for violating an anti-noise ordinance proscribing "any noise or diversion which disturbs or tends to disturb the peace or good order of such school session or class thereof." *Id.* at 108. The Court reversed the conviction under the anti-picketing ordinance based on *Mosley*'s anti-content discrimination ruling *(Id.* at 107), but sustained Grayned's conviction under the anti-noise ordinance. It recognized that *Tinker* was the "touchstone" for determining whether restrictions on speech "around a school" are constitutional. *Id.* at 117. Referring to *Tinker*, the Court said:

> But we nowhere suggested that students, teachers, or anyone else has an absolute constitutional right to use all parts of a school building or its immediate environs for his unlimited expressive purposes. Expressive activity could certainly be restricted, but *only if* the forbidden conduct "materially disrupts classwork or involves substantial disorder or

> invasion of the rights of others." *Id.* at 513, 89 S.Ct. at 740.

Grayned v. City of Rockford, 408 U.S. at 117-118 (emphasis added). The Court concluded that expressive conduct like "[n]oisy demonstrations that disrupt or are incompatible with normal school activities...next to a school, while classes are in session, [ ] may be prohibited." *Id.* at 120. Accordingly, after careful analysis of the facts and circumstances, Grayned's conviction was upheld specifically because (1) the noise ordinance "punishes *only conduct which disrupts or is about to disrupt normal school activities*," and (2) "Rockford's modest restriction on some peaceful picketing represents *a considered and specific legislative judgment* that some kinds of expressive activity should be restricted *at a particular time and place*, here in order to protect the schools." *Id.* at 119, 121 (emphasis added). At the same time, the *Grayned* Court also recognized that any disciplinary decision must be made "on an individualized basis, given the particular fact situation," and that "[d]ifferent considerations, of course, apply in different circumstances." *Id.* at 119, 120, n. 45. It further made clear that "[p]eaceful picketing which does not interfere with the ordinary functioning of the school is permitted" and that the "ordinance gives no license to punish anyone because of what he is saying." *Id.* at 119.

The facts in *Grayned* are different from the present case. Obviously, the present case does not involve a noise ordinance as applied to the specific situation near the school. Likewise, the school's authority to interfere with Frederick's speech was not, as in *Grayned*, specifically limited to a particular time or place. Most importantly, there was no disruption, and no potential disruption, of any classroom or of "the ordinary functioning of the school." In addition, Petitioner Morse admittedly censored Frederick's speech *because* of its content. In sum, Morse's censorship of Frederick's message not only failed to advance a compelling

state interest as applied to the context of the event, it impermissibly discriminated against the content and viewpoint of Frederick's speech. The principles of *Mosley* and *Grayned* thus require affirmance of the judgment below.

Though clearly not binding on this Court, the Second Circuit's decision in *Thomas v. Board of Education, Granville Central School District*, 607 F.2d 1043, 1048 (2nd Cir. 1979) ("Thomas"), is also instructive since it was decided upon directly analogous facts. *Thomas* involved the suspension of students for producing the off-campus publication of a magazine called *Hard Times*—a sophomoric newspaper containing sexual satire emulating the *National Lampoon*. Calling the First Amendment "the ultimate safeguard of popular democracy," the Court declared that "[w]hen an educator seeks to extend his dominion beyond [the schoolhouse gate]...he must answer to the same constitutional commands that bind all other institutions of government." *Id.* at 1043. The court distinguished the case from *Tinker* based on the location of the speech, noting that "[w]hile prior cases involved expression within the school itself, all but an insignificant amount of relevant activity in this case was deliberately designed to take place beyond the schoolhouse gate." *Id.* at 1050. The Court ruled that "because school officials have ventured out of the school yard and into the general community where the freedom accorded expression is at its zenith, their actions must be evaluated by the principles that bind government officials in the public arena." *Id.* Those principles invalidated the students' suspensions in *Thomas*.[10]

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[10] Although there are federal cases finding that school officials have the authority to punish students for speech occurring off campus, unlike *Thomas* and the case at hand, the students' written and published speech in those cases was brought onto the school grounds. See *Boucher v. School Board of the Sch. Dist. of Greenfield*, 134 F.3d 821 (7th Cir. 1998); *Bystrom v. Fridley High Sch.*, 686 F. Supp. 1387 (D. Minn. 1987), aff'd 855 F.2d 855 (8th Cir. 1988); *Sullivan v. Houston Independent Sch. Dist.*, 475 F.2d 1071 (5th Cir. 1973).

Sound public forum principles govern off-campus student speech and take full account of the forum, the speech in question, the context of the event and the participants, and the governmental interests involved in regulating speech. Like that of the Granville students in the *Thomas* case, Frederick's speech clearly occurred outside the metes and bounds of the school in a quintessential public forum—a public sidewalk during a publicly-viewed parade promoted by a commercial sponsor, commemorating an international public event, surrounded by people who themselves were engaged in various types of expression. There was admittedly no disruption of school. It was in this context that Frederick unfurled his banner with a message expressing disdain for the event, in effect mocking it with a silly message. This does not disqualify it as protected speech under the First Amendment, nor does it permit the school system to censor it because of embarrassment or because it otherwise disagrees with its message.[11]

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[11] The Solicitor General attempts to transform this case into a referendum on society's effort to eliminate the scourge of illegal drugs and, in effect, to impose the school system's anti-drug orthodoxy on students throughout the community. Brief of the United States As *Amici Curiae* Supporting Petitioners, pp. 11-14. He argues, in essence, that censorship of dissident student speech relating to drugs—whether on, or off, school grounds—is an essential part of the cure of the drug problem. Petitioners' incursion on Frederick's speech, he argues, should be permitted because "student advocacy of illegal drug use at a school event is manifestly inconsistent with a public school's educational mission." *Id.* at 11. Not only does this argument beg the question as to the context of Frederick's speech, it reduces First Amendment values to the level of a public policy debate and ignores the fact that governments have other far more diverse, and extensive, means and resources of addressing the problems surrounding illegal drug usage. The question of whether drug use should be legal or illegal is a substantial social question that is the subject of extensive societal debate. Indeed, this Court has recently decided cases in which drug use has been legalized by the vote of more than one State legislature. *Gonzales v. Raich*, 545 U.S. 1 (2005). The remedy for solutions to such questions is more, not less, speech. The virtually unlimited censorship powers advanced by the Solicitor General would not only result in grossly overbroad and unprecedented violation

C. The School System's Anti-Drug Message Is Not A Permissible Compelling State Interest In A Traditional Public Forum. And Even If It Were, It Was Not Drawn In The Least Restrictive Means Available.

In traditional public forums, government may not prohibit all communicative activity. Nor may it enforce a content-based exclusion of speech without demonstrating a compelling state interest that is narrowly drawn to achieve that end. *Carey v. Brown*, 447 U.S. 455, 461 (1980). "Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone."

While the school arguably has a compelling interest in insuring a drug-free environment within the school and in proscribing pro-drug messages on campus or where students

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of the First Amendment by unwitting school officials, it would disserve students and the body politic.

Likewise remarkable is the Solicitor General's appalling distortion of the *Tinker* progeny to advance these ends. He argues that schools may censor student speech if it is "inconsistent with their basic educational mission in order to disassociate themselves from such speech." *Id.* at 19. But *Tinker* permitted student speech to be restricted *only* if it "materially disrupts classwork or involves substantial disorder or invasion of the rights of others." *Tinker*, 393 U.S. at 513. And *Kuhlmeier* and *Fraser* only permitted censorship of student expression in school programs integrally related to their mission; that is, during an in-school, student assembly (*Fraser*) and in a school newspaper written and edited by a journalism class as part of its journalism curriculum (*Kuhlmeier*). Those circumstances are not even remotely close to this case. The Solicitor General's attempt to recast *Fraser* and *Kuhlmeier* into what is, in effect, "zero tolerance" rhetoric with application throughout the community, in order to squelch speech about drugs, is astounding and should be rejected as wholly inconsistent with those precedents and the Bill of Rights.

formally represent the school system in academics, athletics, or extracurricular activities or on other school properties, that interest ceases when students leave the schoolhouse grounds to participate in a public event on public streets and sidewalks. At that time, a student's right to advocate a particular point of view cannot be disturbed by government based on the arbitrary predilections of school administrators about the message conveyed. When students leave school property (whether authorized or not) and assimilate themselves into the day-to-day flow of ordinary society, policies designed to contribute to enforcing compulsory attendance and the educational process on school property are significantly less compelling. Indeed, this Court has held that the student's right to privacy and to make individual decisions while away from school, and even from parents, is significant and involves much higher-stakes issues than speech. *Cf., e.g., Roe v. Wade*, 410 U.S. 113 (1973); *Eisenstadt v. Baird*, 405 U.S. 438 (1972). However much the school may be permitted to act *in loco parentis* within the school grounds, it may not do so without the schoolhouse gates where important free speech interests are involved. Unless there is demonstrable disruption of the normal functions of the school, student speech on issues of public importance uttered off school premises in public forums is no more subordinate in terms of the constitutional protections than that afforded to other speech. Outside school, student speech has had important and significant impacts in our local and national political life. During the Civil Rights movement and the Vietnam War era (as *Tinker* itself demonstrates within the school environment), student speech was central in raising questions about the conduct of public policy. Here, the school system's attempt to silence messages voiced outside school premises contrary to its own is nothing less than classic viewpoint discrimination.[12]

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[12] If school administrators are granted authority to punish speech occurring off school grounds, the effects are potentially dire. As Judge Kaufman warned in the *Thomas* case:

It is also clear that there were significantly more limited and appropriate ways that Principal Morse could have addressed the issue of Frederick's off-campus speech. Rather than indulge the undiscriminating instinct to punish contrarian off-campus speech, Principal Morse, and other teachers in the school system, could have used the occasion for an educational moment, i.e., to cause students to analyze the situation, to ask them what they thought the message was, why it was published, why it should have been permitted, whether it should have been removed, and then, in that context, reaffirm the dangers of drug abuse, the possible inappropriateness of the message at the event, and the importance of the right to free speech outside school.

This Court noted in *West Virginia Bd. Of Educ. v. Barnette*, 319 U.S. 624, 637 (1943), "[E]ducating 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

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> It is not difficult to imagine the lengths to which school authorities could take the power they have exercised in the case before us. If they possessed this power, it would be within their discretion to suspend a student who purchases an issue of National Lampoon...at a neighborhood newsstand and lends it to a student friend. And, it is conceivable that school officials could consign a student to a segregated study hall because he and a classmate watched an X-rated film on his living room cable television. While these activities are certainly the proper subjects of parental discipline, the First Amendment forbids public school administrators and teachers from regulating the material to which a child is exposed after he leaves school each afternoon. Parents still have their role to play in bringing up their children, and school officials, in such instances, are not empowered to assume the character of *Parens patriae.*

Thomas, 607 F.2d at 1051.

platitudes." This warning was echoed by Judge Frank Easterbrook fifty years later in another public school Free Speech case where he wrote, "Far better to teach [students] about the first amendment, about the difference between private and public action, about why we tolerate divergent views. Public belief that the government is partial does not permit the government to *become* partial." *Hedges v. Wauconda Community Unit School Dist. No. 118*, 9 F.3d 1295, 1299 (7th Cir. 1993). As Judge Easterbrook explained, when challenging or offensive ideas are raised in schools under the umbrella of free speech, "[t]he school's proper response is to educate the audience rather than squelch the speaker." *Id.*

Educating students on the importance and history of the First Amendment and free speech, along with the dangers and perils of drug use, would have served the students of Juneau-Douglas High School far better than the disruption created by the misguided suspension of Joseph Frederick. No matter what state interest the school sought to advance in punishing Frederick, it clearly was not the least restrictive means available, nor the most effective.

CONCLUSION

The public schools cannot be expected to cure all of America's social ills. There is, and must remain, a line over which school administrators cannot transgress into the views and daily lives of students and parents. That line is the schoolhouse gate, or where students cease to act as formal representatives of the school system. Absent the direct and substantial disruption of the normal functioning of the school, the discipline of students away from school is the job of parents and law enforcement officers, not school officials. This Court should, therefore, affirm Respondent Frederick's First Amendment right to free speech off-campus and affirm the Ninth Circuit's ruling.

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