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

RESPONDENT'S BRIEF

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QUESTIONS PRESENTED

1. Whether the First Amendment allows public schools to punish students for displaying messages off school property, at events not sponsored by the school or supervised by the school, when a school official deems the message contrary to school policy even though there is no disruption of the educational process.

2. Whether the court of appeals properly denied qualified immunity to a public high school principal who violated clearly-established law under the First Amendment by suspending a student for constitutionally protected speech, off-campus, that Petitioners admit did not disrupt or interfere with school activities.

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STATEMENT OF THE CASE

On January 24, 2002, Joseph Frederick, an eighteen-year-old resident of Juneau, Alaska, stood among a crowd of students and adults on a public sidewalk in front of private homes and awaited the arrival of the Olympic Torch Relay. J.A. 9-10, 15-16. When the Olympic torch neared, he and several others held up a banner that read, "Bong Hits 4 Jesus," in the hopes of attracting the attention of television crews covering the event. J.A. 27-28, 67. Immediately thereafter, Juneau-Douglas High School ("JDHS") Principal Deborah Morse approached Frederick, then a high-school senior, and demanded that he and his compatriots lower the sign. J.A. 24, 29. Frederick refused to comply and protested that his First Amendment rights protected his speech while standing off campus. J.A. 24-25, 29. Principal Morse disagreed, grabbed and crumpled the banner, and later suspended Frederick from school for ten days. J.A. 25-26, 30. That disagreement along Glacier Avenue gave rise to this constitutional case.

1. Prior to the 2002 Olympic Winter Games in Salt Lake City, Utah, the United States Olympic Committee announced plans for an Olympic Torch Relay that would include Juneau along its route. J.A. 22, 27. The arrival of the Olympic torch attracted a great deal of local attention. J.A. 28-29. A television crew followed the Olympic torch through Juneau. J.A. 22, 29. Coca-Cola and local businesses sponsored the relay. J.A. 27. Teachers at JDHS were permitted to release their students from class to witness the Olympic flame travel past the high school. J.A. 23, 32, 36, 38.

Nearing his graduation, Frederick sought to use the Olympic Torch Relay to make a statement about First Amendment rights. J.A. 66-68. During his senior year, he had been increasingly bothered by the lack of attention to the issue of freedom of speech in the United States generally and

at JDHS in particular.[1] J.A. 66-68. Frederick, along with several friends, decided to put a saying that was humorous and could be controversial on a banner and to display it as the television crews covering the Olympic Torch Relay passed their position. J.A. 61-62, 66-67. He had seen the phrase they ultimately chose on a snowboard, but it was not selected to make a statement about drug use or religion.[2] J.A. 28, 65. As Frederick succinctly explained: "I wasn't trying to spread any idea. I was just trying to assert my right." J.A. 68.

On the morning of the Olympic Torch Relay, Frederick had trouble getting to school – his car got stuck in his driveway due to a recent snowstorm. J.A. 28, 34. As a result, Frederick missed his first-period class. J.A. 28, 71. After driving into town, Frederick parked his car on a public street, several blocks away from JDHS. J.A. 28. From there, he proceeded on foot along Glacier Avenue until he reached a spot across the street from several public buildings, including the municipal pool and the high school.[3] J.A. 72. Frederick did not report to school, did not enter the school building, and did not set foot on school property prior to viewing the Olympic Torch Relay. J.A. 28-29, 72-73.

By the time Frederick arrived, a crowd that included students and non-students had already assembled along both sides of Glacier Avenue. J.A. 28. Some individuals in the

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[1] Frederick was particularly disturbed by an earlier incident in which an assistant principal threatened him with suspension because he did not stand during the Pledge of Allegiance. Frederick asserted that it was his right to refuse to stand. J.A. 64.

[2] After the banner was displayed, Frederick learned that a group calling itself "Bong Hits for Jesus" performed an annual parody at Mardi Gras in New Orleans in which it imitated religious groups who protest against the revelry. Frederick explained in his affidavit that he intended the same sort of humorous, ironic expression. J.A. 28.

[3] Frederick testified that he chose this particular location, in part, because he recognized a friend and recent JDHS graduate in the crowd and stopped to speak with him. J.A. 72.

crowd were unruly. J.A. 29. Some students threw snowballs and plastic soda bottles, which had been handed out in anticipation of the arrival of the Olympic torch. J.A. 29, 32. Some students got into fights, while others left the crowd and headed downtown. J.A. 29, 32, 38. One student described the scene as "chaos." J.A. 38. Frederick and the other members of his group, however, were calm and orderly. J.A. 29. Principal Morse testified that Frederick remained respectful to her at all times. J.A. 58.

When the Olympic torch and the television cameras drew near, Frederick and his friends raised their banner so it would be viewed by the television audience. J.A. 29. At least one non-student was among those holding the banner, an adult on leave from duty in the U.S. Army. J.A. 36, 65. Principal Morse, watching the event from the school grounds, saw the banner, immediately crossed the street, and confronted Frederick and the others holding it. J.A. 24, 29. When Frederick questioned her authority by pointing out that he was not standing on school grounds, Principal Morse seized and confiscated the banner. J.A. 24-25, 29-30. Though Frederick remained respectful at all times, Principal Morse ordered Frederick to her office. J.A. 25, 30.

2. When he arrived at the principal's office, Frederick was informed that he had been suspended for five days for displaying the banner and then refusing to relinquish it. J.A. 30. According to Frederick, Principal Morse then added five days to his suspension because he protested the penalty by quoting Thomas Jefferson on free speech.[4] J.A. 30, 73-74. Principal Morse justified Frederick's punishment, in part, on her belief that the banner encouraged marijuana

[4] There is a question whether Frederick quoted Jefferson on the sidewalk when the banner was seized or later in Principal Morse's office. J.A. 30, 41. Regardless of where it was uttered, Frederick contends that it was the reason for the doubling of his suspension. The only other student punished for holding the banner did not quote Jefferson and received only a five-day suspension. J.A. 30, 42, 73.

use and, therefore, violated school policy prohibiting any public expression that advocates the use of illegal substances. J.A. 25. By its express terms, Juneau School Board Policy 5520 applies only to conduct occurring on campus. Pet. App. 53a. Principal Morse, however, claimed that allowing students to watch the Olympic Torch Relay made the event the equivalent of a class trip.[5] J.A. 24. She further claimed that Frederick was participating in that "class trip" even though he had not yet set foot on school grounds that day. J.A. 24-25. Frederick appealed his suspension to Superintendent Gary Bader, who upheld Principal Morse's decision but reduced the suspension to eight days. Pet. App. 67a; J.A. 11, 17. The Juneau School Board affirmed Frederick's suspension "for the reasons given in the Superintendent's decision." Pet. App. 69a.

3. Frederick filed suit in the U.S. District Court for the District of Alaska pursuant to 42 U.S.C. § 1983. J.A. 8-13. In response, Petitioners admitted that the display of the banner did not disrupt any classroom work, J.A. 108, that it was not obscene or offensive to minorities, and that it did not advocate violence. J.A. 17. Principal Morse also admitted that she did not receive even a single complaint alleging that Frederick's banner promoted drug use. Deposition of D. Morse at 59-60, 77, Exhibit F to Plaintiff's Opposition to Cross-Motion for Summary Judgment. Several students submitted declarations explaining that they thought the banner was funny but had no idea what it meant, and did not understand it to be a reference to drug use. J.A. 33, 37, 38. Frederick explained that his banner was not intended to promote drug use and was not directed at students. J.A. 28, 67. According to an assistant principal, drug use at JDHS is about average, is decreasing, and there is not a drug crisis.

[5] Juneau School Board Policy No. 5850 explains, in pertinent part: "Pupils who participate in approved social events and class trips are subject to district rules for student conduct; infractions of those rules will be subject to discipline in the same manner as are infractions of rules during the regular school program." Pet. App. 58a.

J.A. 112.

Both sides submitted motions for summary judgment. The district court ruled in favor of Petitioners. It found that Frederick had a clear expressive intent – both to be humorous and to affirm his First Amendment rights, Pet. App. 33a – but it held that the First Amendment did not prohibit school officials from disciplining Frederick because his "statements directly contravened the Board's policies relating to drug abuse prevention." Pet. App. 36a.

4. The court of appeals reversed. It ruled that Petitioners' actions were unconstitutional under *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), given the absence of any evidence of actual disruption and the fact that Principal Morse "did not rip down the sign at the rally because she anticipated or was concerned about [disruptive] consequences." Pet. App. 2a. Writing for the panel, Judge Kleinfeld noted that, under the school district's theory of free speech, a student could be punished for handing out copies of an Alaska Supreme Court decision on the right to use marijuana.[6] Pet. App. 17a. The court also concluded that Principal Morse was not entitled to qualified immunity because her actions violated Frederick's constitutional rights under clearly established law that she had studied in graduate school. Pet. App. 20a.

A motion to reconsider was denied unanimously by the panel. A request for en banc rehearing was denied. This Court granted a writ of certiorari on December 1, 2006.

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[6] At the time of the banner display, the ongoing validity of the Alaska Supreme Court's ruling that there was a constitutional right to possess marijuana in the home, *Ravin v. State*, 537 P.2d 494 (Alaska 1975), was being challenged before the Alaska Court of Appeals and had been challenged through an initiative re-criminalizing personal possession (Alaska 1990 Initiative No. 2, eff. 3/3/91).

SUMMARY OF ARGUMENT

This case raises fundamental First Amendment issues about the ability of school officials to censor speech solely because that speech disagrees with the school's own, preferred message. There is no dispute that schools have an important message to deliver regarding the perils of drug abuse. But the First Amendment recognizes a critical distinction between delivering that message to students and imposing an enforced orthodoxy that tramples on free speech.

While the record in this case raises serious doubts about whether this case should be analyzed as a student speech case at all, *see* Point I.D, *infra*, Petitioners' actions were clearly unconstitutional under this Court's existing student speech jurisprudence. *See Tinker*, 393 U.S. 503; *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988). There is no evidence that Frederick's speech was disruptive within the meaning of *Tinker*. It was not lewd or vulgar within the meaning of *Fraser*. And it was not part of a school-sponsored expressive activity within the meaning of *Kuhlmeier*.

Petitioners' claim that Frederick was properly punished because his speech was "offensive" is irreconcilable with this Court's long-held view that speech cannot be banned as "offensive" merely because of the ideas being expressed. Likewise, Petitioners' view that Frederick's speech "undermine[d] the school's basic educational mission" is inconsistent with this Court's holding that "[students] may not be confined to the expression of those sentiments that are officially approved." *Tinker*, 393 U.S. at 511.

Students should, of course, be taught respect for the law. But teaching respect for the law does not entitle school officials to ban any speech that they believe could be construed, rightly or wrongly, to promote violations of the law but that falls far short of traditional incitement rules by

any measure. A discussion of civil disobedience during the civil rights era, for example, might encourage students to think about opposing other unjust laws, but it is inconceivable that school officials could therefore ban student discussions of the lunch counter sit-ins.

In this case, Frederick has consistently denied that his speech was intended to promote any illegal behavior, and Petitioners have not seriously rebutted that position except to assert that the banner he displayed "expressed a positive sentiment about marijuana use." Both in Alaska and elsewhere, marijuana laws have been and remain a subject of intense political debate.

The court of appeals correctly applied this Court's well-settled law in ruling that Frederick's suspension violated the First Amendment. And, because that law was so clearly established at the time that Frederick was punished for his speech – both by this Court's precedent and in controlling decisions from the Ninth Circuit – the court of appeals also correctly held that the school principal who ordered his punishment is not entitled to qualified immunity.

ARGUMENT

I. PETITIONERS' ACTIONS VIOLATED THE FIRST AMENDMENT PROTECTIONS THIS COURT HAS LONG AFFORDED TO STUDENT SPEECH

This case is not about drugs. This case is about speech. For nearly twenty years, the free speech rights of public school students have been defined through a trilogy of cases. Consistent with this Court's holdings in *Tinker*, *Fraser*, and *Kuhlmeier*, the court of appeals correctly held that Petitioners violated Frederick's First Amendment rights when they punished his non-disruptive speech because they objected to its perceived message.

What Petitioners describe as a disagreement with the decision below is, in reality, a disagreement with the student speech jurisprudence that this Court has developed and applied over the past four decades. By seeking a ruling that students have no First Amendment rights against school censorship unless "a decision to censor student expression has no valid educational purpose," Pet. Br. 19, Petitioners ask this Court to return to a pre-*Tinker* world. The rule they propose would open the door to an enforced orthodoxy that this Court has consistently condemned, and would effectively immunize all but irrational school censorship from constitutional scrutiny. Absent a fundamental change in the law, Petitioners' actions cannot be upheld.

Petitioners have acknowledged from the outset that the decision to suspend Frederick from school was precipitated by their belief that the banner he displayed at the Olympic Torch Relay "expressed a positive sentiment about marijuana use."[7] Pet. Br. 25. Having chosen to respond to Frederick's non-disruptive speech with disciplinary action – despite the fact that the speech occurred on a public sidewalk at a public event and before Frederick had even arrived at school for the day – Petitioners crossed the line between legitimately conveying their own message promoting a healthy, drug-free lifestyle and unlawfully suppressing what they perceived to be Frederick's contrary opinion.[8]

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[7] Although Frederick was ultimately found to have violated several disciplinary rules, J.A. 106, Petitioners have never claimed that he would have been suspended "but for" his speech, *see Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274 (1977), and have defended his suspension throughout this litigation solely by reference to his speech.

[8] In fact, there is a dispute in the record about the actual message that Frederick was trying to express with his banner. Frederick has consistently maintained that the banner was intended as a humorous parody motivated by his desire to promote his own free speech rights rather than the use of drugs. J.A. 28, 67-68. Others found the message to be confusing. J.A. 37, 38.

In Petitioners' view, there can be only one approved message about drugs and disagreement with that message, or perceived disagreement with that message, is sufficient by itself to justify student discipline. This Court, however, has taken a different approach since *Tinker*. School officials undeniably have an important role in promoting civic values, including respect for the law. But that lesson is undermined when school officials themselves ignore the Constitution. As Justice Brandeis observed many years ago, the government teaches by example. *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting). Unfortunately, the example set by school officials in this case confused order with orthodoxy in violation of the First Amendment.

A. Under This Court's Well-Established Rules, School Officials Cannot Punish Non-Disruptive Student Speech Merely Because They Disagree With The Ideas Expressed

This Court's framework for adjudicating student speech claims is long established and does not permit the censorship that occurred here. Before addressing Petitioners' suggestion to cast aside nearly forty years of student speech jurisprudence, it is important to recall why this Court has held that the First Amendment provides robust protection for student speech rights. The rule of *stare decisis* requires that entrenched legal principles not be abandoned without a compelling reason. *Randall v. Sorrell*, 126 S. Ct. 2479, 2489 (2006) (explaining that "*stare decisis* promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process") (internal quotation marks and citation omitted). As discussed below, Petitioners have not provided any such compelling justification.

1. *Tinker* Established That Student Speech Is Entitled to First Amendment Protection and Generally Cannot Be Suppressed Absent Evidence of Disruption

In *Tinker*, this Court upheld the right of public school students to wear armbands protesting the Vietnam War. 393 U.S. at 514. At a time of profound student and political unrest throughout the country, the Court began its opinion in *Tinker* by observing that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[9] *Id.* at 506. The Court acknowledged "the special characteristics of the school environment" by permitting school officials to prohibit student speech if that speech "would substantially interfere with the work of the school or impinge upon the rights of other students." *Id.* at 509. But, the Court was equally conscious of the need to prevent that exception from swallowing the rule. Thus, the Court cautioned that, "in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." *Id.* at 508. In addition, the Court held that student speech cannot be suppressed based on the "mere desire [of school officials] to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Id.* at 509.

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[9] The *Tinker* Court did not claim to be breaking new ground in recognizing that the Constitution applies to students. To the contrary, it described that principle as the "unmistakable holding of this Court for almost 50 years." 393 U.S. at 506 (citing *Meyer v. Nebraska*, 262 U.S. 390 (1923); *Bartels v. Iowa*, 262 U.S. 404 (1923); *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925); *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943); *Illinois ex rel. McCollum v. Bd. of Educ. of Sch. Dist. No. 71*, 333 U.S. 203 (1948); *Wieman v. Updegraff*, 344 U.S. 183, 195 (1952) (concurring opinion); *Sweezy v. New Hampshire*, 354 U.S. 234 (1957); *Shelton v. Tucker*, 364 U.S. 479, 487 (1960); *Engel v. Vitale*, 370 U.S. 421 (1962); *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967); *Epperson v. Arkansas*, 393 U.S. 97 (1968)).

The principle that school officials may not suppress even controversial student speech in the absence of disruption was essential to the Court's holding in *Tinker*. The Court, therefore, rejected the notion that student speech could be regarded as disruptive simply because it conflicted with a message that the school was trying to present to its student audience. As the *Tinker* Court explained:

> [S]tudents 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. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views.

Id. at 511.

To be sure, there is a risk that student speech that deviates from the school's officially approved message may create intellectual unrest. "Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea." *Terminiello v. City of Chicago,* 337 U.S. 1, 4 (1949). But, as *Tinker* makes clear, "our Constitution says we must take this risk," 393 U.S. at 508 (citation omitted), even in school and, perhaps, most essentially in school.

In a series of decisions spanning many decades, this Court has repeatedly noted that educational values and constitutional values are mutually reinforcing, and that the former necessarily embrace the latter in our democratic society.[10] Reviewing those holdings in *Tinker*, the Court wrote:

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[10] Both the First Amendment and public education are grounded in the common assumption that, as Justice Brandeis once explained, "freedom to think as you will and to speak as you think are means indispensable to

> The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools. The classroom is peculiarly the marketplace of ideas. The 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.

393 U.S. at 512 (quoting *Keyishian v. Bd. of Regents,* 385 U.S. 589, 603 (1967)) (internal quotation marks and citation omitted). Thus, the First Amendment prohibits the state from imposing a "pall of orthodoxy" on faculty and students, whether inside or outside the classroom. *Keyishian*, 385 U.S. at 603.

The rule announced in *Tinker* is solidly grounded in bedrock First Amendment doctrine. Long before *Tinker*, this Court held that students could not be compelled to recite the Pledge of Allegiance in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943). Writing in the midst of World War II, Justice Jackson observed that "[s]truggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as by evil men." *Id.* at 640. He then succinctly explained the constitutional objection to such "coerce[d] uniformity" in one of this Court's most frequently quoted passages: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Id.* at 642.

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the discovery and spread of political truth." *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring). *See also Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

The holding in *Tinker* reflects the same constitutional understanding.

2. *Fraser* Did Not Disturb the Central Holding of *Tinker* and Does Not Provide School Officials with a General License to Censor Student Speech Because They Disagree with its Message

In *Fraser*, this Court permitted a school to punish a student for a speech that: (i) was filled with sexual innuendo; (ii) was delivered at a school-sponsored assembly before a captive audience, and (iii) caused actual disruption. 478 U.S. at 686. The school officials in *Fraser* did not act based on disagreement with the student speaker's message, and *Fraser* did not purport to disturb this Court's condemnation of such censorship in *Tinker*. *Id.* at 685.

In short, the student speaker in *Fraser* was reprimanded not because of what he said but how and where he said it. *Id.* at 682-83. School officials did not object to the candidate he endorsed but to how he chose to express his endorsement, and the disruption it caused. *Id.* It was not Fraser's message but his language that exceeded "the boundaries of socially appropriate behavior," *id.* at 681, and justified the discipline that school officials imposed.[11]

Fraser's emphasis on the form of the expression, not its content, is apparent throughout the Court's opinion. *Id.* at 682 ("It does not follow, however, that simply because the use of an offensive *form* of expression may not be prohibited to adults making what the speaker considers a political point, the same latitude must be permitted to children in a public

[11] The *Fraser* Court used at least three different phrases when summarizing the speech schools may censure: "lewd, indecent, or offensive speech," *id.* at 683, "sexually explicit, indecent, or lewd speech," *id.* at 684, and "offensively lewd and indecent speech," *id.* at 685. Given these variations in wording, it is apparent that understanding *Fraser* does not hinge on a fine parsing of the meaning of these individual words, but rather on the more general principles set out in the opinion.

school."); *id.* at 683 ("Nothing in the Constitution prohibits the states from insisting that certain *modes of expression* are inappropriate and subject to sanctions."); *id.* ("The determination of what *manner of speech* in the classroom or in school assembly is inappropriate properly rests with the school board.") (emphasis added throughout).

As further support for its decision, the Court stressed the fact that Fraser made his remarks at a school-sponsored event before a captive audience. The Court observed that: "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. The Court underscored that concern by noting that students in the audience "hooted and yelled," and others simulated the sexual activities suggested by Fraser's language. *Id.* at 678. Subsequent to the assembly, one teacher was forced to interrupt her scheduled lesson plan to discuss the speech with her students. *Id.* Other students were "bewildered and embarrassed" by the speech and the disruptive reaction it caused. *Id.* at 678, 683-84.

By emphasizing the disruption and embarrassment caused by Fraser's speech, the Court demonstrated that Fraser's punishment might well have been justifiable under the test established in *Tinker*. By emphasizing the sexually suggestive content of Fraser's speech and its presentation at a school-sponsored event, the Court offered additional reasons for upholding the school's disciplinary action. Whether viewed as an application or extension of *Tinker*, *Fraser* did not disturb the central holding of *Tinker* and does not provide school officials with unconstrained authority to censor student speech based on disagreement with its message. To the contrary, the *Fraser* Court carefully limited its decision by explaining that "[u]nlike the sanctions imposed on the students wearing armbands in *Tinker*, the penalties imposed

in this case were unrelated to any political viewpoint."[12] 478 U.S. at 685. *See also id.* at 689 ("In the present case, school officials sought only to ensure that a high school assembly proceed in an orderly manner. There is no suggestion that school officials attempted to regulate respondent's speech because they disagreed with the views he sought to express.") (Blackmun, J., concurring).

3. *Kuhlmeier* Only Applies to the Regulation of School-Sponsored Speech

In *Kuhlmeier*, this Court upheld the authority of a high school principal to bar the school's newspaper from publishing articles about divorce and teenage pregnancy. 484 U.S. at 266. The Court held that where a school sponsors student speech or where student speech might reasonably be seen as bearing the "imprimatur of the school," *id.* at 271, restrictions on student speech are permissible so long as they are "reasonably related to legitimate pedagogical concerns," *id.* at 273.

The school newspaper in *Kuhlmeier* was a paradigmatic example of such speech. It was part of the curriculum, it carried the school's name on its banner, it was predominantly funded by the school district, articles were subject to pre-publication review, and the principal could fairly be regarded as its publisher. *Id.* at 262-63. Under these circumstances, the Court reasoned that the school needed greater latitude to exercise editorial control to ensure "that the views of the individual speaker are not erroneously attributed to the school," *id.* at 271, and to enable schools to

[12] Significantly, the *Fraser* Court agreed with *Tinker* that one of "the objectives of public education [is] the 'inculcat[ion of] fundamental values necessary to the maintenance of a democratic political system.' " 478 U.S. at 681 (quoting *Ambach v. Norwick*, 441 U.S. 68, 76-77 (1979)). The *Fraser* Court further recognized that one of these "fundamental values" is "tolerance of divergent political and religious views, even when the views expressed may be unpopular." *Id.*

dissociate themselves from student speech they might reasonably be perceived as promoting, *id.* (citing *Fraser*, 478 U.S. at 685).

Nothing in *Kuhlmeier* limited or called into question the Court's earlier reasoning in *Tinker* and *Fraser*. As the Court recognized, the issue presented by *Kuhlmeier* was "whether the First Amendment requires a school affirmatively to promote particular student speech," 484 U.S. at 270-71, and not, as in *Tinker*, whether the First Amendment requires schools to "tolerate particular student speech," *id.* at 270.

The distinction between government-sponsored speech and private speech is a familiar one in First Amendment law. *Compare Rust v. Sullivan*, 500 U.S. 173 (1991) (upholding government's right to limit the abortion-related speech of Title X providers who are subsidized to deliver the government's prescribed message), *with Rosenberger v. Rector and Visitors of the Univ. of Virginia*, 515 U.S. 819 (1995) (striking down viewpoint-based restriction on student speakers who were delivering their own message rather than that of the government).

It is not surprising, therefore, that the *Rosenberger* Court cited *Kuhlmeier* as support when it stated: "A holding that the University may not discriminate based on the viewpoint of private persons whose speech it facilitates does not restrict the University's own speech, which is controlled by different principles." 515 U.S. at 834 (citations omitted).

B. Frederick's Suspension Cannot Be Upheld Without Altering The Balance That This Court Has Struck Between Student Speech Rights And The School's Legitimate Interest In Maintaining An Environment Conducive To Learning

Hedging their bets, Petitioners argue that Frederick's suspension can be justified whether it is analyzed under *Tinker*, *Fraser*, or *Kuhlmeier*. Fairly read, however, none of

those decisions supports the sanction on speech imposed by Petitioners in this case.

1. The Record Does Not Support a Showing of the Substantial Disruption Required Under *Tinker*

As a threshold matter, Petitioners argue that *Tinker*'s required showing of disruption does not apply because Frederick's "message itself lay far outside the province of *Tinker*-protected political expression." Pet. Br. 15. This Court has never limited protection of student speech to "political speech." To the contrary, the Court has consistently recognized the value of speech irrespective of its connection to political matters of the day. *See, e.g., Time, Inc. v. Hill*, 385 U.S. 374, 388 (1967) ("The guarantees for speech and press are not the preserve of political expression or comment upon public affairs, essential as those are to healthy government."); *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940) ("Freedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period.").

Moreover, Frederick's expression satisfies any understanding of political speech, whether it is characterized as Principal Morse interpreted it or as Frederick intended it. Principal Morse interpreted Frederick's banner to convey a "positive sentiment about marijuana use." Pet. Br. 25. There has been and continues to be a serious debate in this country generally, and in Alaska specifically, about whether use of marijuana should be legalized. As the court of appeals observed, voters in Alaska have repeatedly considered the question whether to legalize marijuana through referenda. Pet. App. 6a n.4. So have at least six other states – Arizona, Colorado, Montana, Nevada, Oregon, and South Dakota. Additionally, Frederick has consistently denied any intention to promote drug use and, instead, has characterized the banner as an effort to assert his ability to exercise his First

Amendment rights. J.A. 28, 66-68. Speech meant to inspire a discourse on the proper scope of First Amendment protection is inherently political.

Petitioners' effort to show that Frederick's speech caused actual disruption under *Tinker* is equally flawed and unpersuasive, as the court of appeals found. At various points, Petitioners suggest that Frederick participated in the generally chaotic activities – the throwing of snowballs and plastic soda bottles by students and non-students alike – that occurred while the crowd awaited the Olympic torch and before he unfurled his banner. However, aside from Petitioners' half-hearted assertion, there is no evidence in the record that Frederick engaged in such activity, he denies it, and, in any event, it was not the basis for his school suspension. Alternatively, Petitioners suggest that Frederick's banner may have encouraged others to act out, but again that claim is unsubstantiated by anything in the record.

Petitioners also suggest that Frederick's speech was disruptive within the meaning of *Tinker* because his banner "radically changed the subject from the Olympic Torch Relay ceremony to illegality-promoting, distracting banter. . . ." Pet. Br. 15. The notion that JDHS students were quietly awaiting the Olympic Torch with undivided attention until Frederick unfurled his banner is belied by the record and Petitioners' own emphasis on the rampant horseplay that took place at the event. There is no evidence in this record that it distracted anyone except Principal Morse who objected to its message for reasons that had little or nothing to do with its potential to distract. In any event, the First Amendment does not permit school officials to treat speech more harshly than other activities that were at least equally distracting and far less expressive. *See, e.g., Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd.*, 502 U.S. 105, 116 (1991) (striking down a statute that "singles out income derived from expressive activity for a burden the State places on no other income").

Lacking any evidence that Frederick's banner disrupted the actual event at which it was displayed, Petitioners next argue that its lingering effects were disruptive and interfered with the school's work. Because Petitioners have already conceded that Frederick's speech did not disrupt any classroom work, J.A. 108, their claim of actual disruption ultimately rests on some isolated graffiti that appeared at the school in the days following the Olympic Torch Relay. Assuming, *arguendo*, that the graffiti can be attributed to Frederick's speech, it is indistinguishable in any meaningful way from the handful of hostile comments to students wearing armbands that this Court found insufficient to justify the suppression of speech in *Tinker*.[13] 393 U.S. at 508. Under *Tinker*, it is not enough to show *any* interference with the work of the school. Only *substantial* interference is sufficient to justify the abridgement of First Amendment rights. *Id.* at 509. That showing was not made in *Tinker*, and it has not been made here.

Most sweepingly, Petitioners contend that Frederick's speech was disruptive simply because what Petitioners construed to be its pro-drug message was inconsistent with the anti-drug message the school was trying to inculcate. *Tinker*, however, expressly rejects the broad definition of disruption that Petitioners now propose. As then-Judge Alito explained in striking down a school's anti-harassment policy on overbreadth grounds: "Although [the school district] correctly asserts that it has a compelling interest in promoting an educational environment that is safe and conducive to learning, it fails to provide any particularized reason as to why it anticipates substantial disruption from the broad swath of student speech prohibited under [its] Policy." *Saxe v.*

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[13] Principal Morse conceded that the isolated graffiti might well have been a response to her actions rather than Frederick's banner. Deposition of D. Morse at 76, Exhibit F to Plaintiff's Opposition to Cross-Motion for Summary Judgment. Several students recalled that Principal Morse's actions, not the message on Frederick's banner, prompted discussion among their classmates. J.A. 33, 37, 38.

State Coll. Area Sch. Dist., 240 F.3d 200, 217 (3d. Cir. 2001).

The Court in *Tinker* conceived of public school education as a marketplace of ideas.[14] 393 U.S. at 512. By allowing school officials to regulate disruptive behavior, *Tinker* assured the orderly working of that marketplace. *Tinker* does not equate disruptive behavior with disruptive ideas, as previously noted, nor does it permit school officials to characterize a speaker as disruptive merely because the speaker's ideas disagree (or are perceived to disagree) with the school's own preferred views. Thus, it would not have changed the outcome in *Tinker* had the Des Moines School Board enacted a policy supporting the Vietnam War, instead of simply prohibiting symbolic armbands.[15]

The reference in *Tinker* to a "material interference with school activities," *id.* at 514, must be understood in context. *Tinker* is a landmark First Amendment case. The rule it announced was intended to limit the discretion of

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[14] Quoting *Keyishian*, *Tinker* referred to the classroom as "peculiarly the 'marketplace of ideas.' " 393 U.S. at 512 (quoting *Keyishian*, 385 U.S. at 603). Given the public forum doctrine, it would be paradoxical to assert that students have fewer free speech rights while attending a public rally on the public streets than in the classroom. *See Hague v. CIO*, 307 U.S. 496, 515-16 (1939) (public streets are a quintessential public forum). Petitioners, wisely, do not make that claim.

[15] This precise example was discussed in *Tinker* itself, when the Court said:

> If a regulation were adopted by school officials forbidding discussion of the Vietnam conflict, or the expression by any student of opposition to it anywhere on school property except as part of a prescribed classroom exercise, it would be obvious that the regulation would violate the constitutional rights of students, at least if it could not be justified by a showing that the students' activities would materially and substantially disrupt the work and discipline of the school.

393 U.S. at 513 (citations omitted).

school officials to suppress student speech, not expand it. *Tinker* appropriately recognized that school officials have a duty to maintain an environment in which teachers can teach and students can learn. *See, e.g., Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999) (school board can be held liable when it knows of student-on-student sexual harassment and fails to address it). The armbands in *Tinker* did not cause a "material interference" with that environment and Petitioners cannot credibly claim that Frederick's banner did either.

2. Frederick's Speech Was Not "Offensive" Within the Meaning of *Fraser*

Petitioners also argue that Frederick's speech was punishable under *Fraser*. They contend that the school needed to sanction Frederick in order to preserve decorum because "[h]is message was trebly wrong. It was the wrong message, at the wrong time, and in the wrong place." Pet. Br. 32.

Petitioners' argument might have more force if their decision to sanction Frederick for his banner could reasonably be described as a time, place, or manner regulation. It cannot. Frederick was suspended because school officials believed that his banner expressed a pro-drug message. Petitioners have never given any indication throughout this litigation that they would have found his purported message any less objectionable had it been delivered at any other time or in any other place or in any other manner.[16] That assessment must be made within the

[16] Put in different but related First Amendment terms, it is impossible to describe the school's interest in this case as "unrelated to the suppression" of Frederick's expression. *United States v. O'Brien*, 391 U.S. 367, 377 (1968). Moreover, Petitioners' actions were not reasonable even if they could somehow be characterized as a time, place, or manner regulation. Any asserted interest in decorum is undermined by the boisterous setting in which Frederick's speech occurred. There was no disruption of any teaching because no teaching was taking place. These circumstances make Petitioners' censorship very different than a prohibition on

school context itself to have any analytic coherence. Otherwise, a total ban on student speech could always be re-characterized as a time, place, or manner regulation. Presumably, the school administrators in *Tinker* would not have objected if the student plaintiffs in that case had worn their black armbands at home or on the weekend. If *Fraser* permits school officials to achieve that result simply by invoking the school's general interest in decorum, then *Fraser* has effectively overruled *Tinker*. This Court certainly did not say so in *Fraser* and it has not said so since.

In similar fashion, Petitioners place far too much weight on the statement in *Fraser* that schools need not tolerate "lewd, indecent, or offensive speech" by student speakers. 478 U.S. at 683. Emphasizing this Court's use of the disjunctive, Petitioners argue that Frederick's speech could properly be characterized as "offensive" even if it was neither "lewd" nor "indecent." The terms "lewd" and "indecent," however, are often used as synonyms when referring to sexual speech, and the term "offensive" is frequently applied to both. *See, e.g., Reno v. American Civil Liberties Union*, 521 U.S. 844, 871-72 (1997). Thus, despite the use of the disjunctive, it is entirely plausible that the reference to "lewd, indecent, or offensive speech" was simply meant to describe the sort of sexual innuendo at issue in *Fraser*. Given the Court's sensitivity to insulating minors from sexually explicit speech, *see FCC v. Pacifica Found.*, 438 U.S. 726 (1978), it is also plausible that *Fraser*'s reference to "offensive speech" was an allusion to what *Tinker* described as speech "colliding with the rights of others," 393 U.S. at 513.

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discussing literature in math class, for example. And, there was little or no risk that a reasonable observer would attribute Frederick's speech to the school for all the same reasons that *Kuhlmeier* does not apply. *See* Point I.B.3, *infra*.

What is not plausible is that the *Fraser* Court meant to grant school officials broad discretion to label speech as "offensive" based on disagreement with the content of the speech rather than the manner of its expression. Like all other government officials, school administrators must exercise their discretion "within the limits of the Bill of Rights." *Tinker*, 393 U.S. at 507 (quoting *Barnette*, 319 U.S. at 637). And, as this Court has repeatedly held, "if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection . . . ." *Texas v. Johnson*, 491 U.S. 397, 409 (1989) (quoting *Pacifica Found.*, 438 U.S. at 745). *See also Carey v. Population Servs. Int'l*, 431 U.S. 678, 701 (1977) ("[T]he fact that protected speech may be offensive to some does not justify its suppression.") (citation omitted).

It is not surprising, therefore, that this Court's subsequent citations to *Fraser* have not mentioned the possibility that schools can punish students for "offensive" speech that is not vulgar, obscene, or sexual in content. *See Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls*, 536 U.S. 822, 840 (2002) (Breyer, J., concurring); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 325 (2000) (Rehnquist, C.J., dissenting); *Bd. of Regents of the Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 239 n.4 (2000) (Souter, J., concurring in judgment); *Nat'l Endowment for the Arts v. Finley*, 524 U.S. 569, 584 (1998); *Denver Area Educ. Telecomms. Consortium, Inc. v. FCC*, 518 U.S. 727, 775 n.2 (1996) (Souter, J., concurring); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 655-56 (1995); *Lee v. Weisman*, 505 U.S. 577, 597 (1992); *Bd. of Educ. of the Westside Cmty. Schs. v. Mergens*, 496 U.S. 226, 240-41 (1990); *Kuhlmeier*, 484 U.S. at 266-67, 271-72; *Edwards v. Aguillard*, 482 U.S. 578, 583-84 (1987).

Unable to rely on authority from this Court, Petitioners cite *Boroff v. Van Wert City Bd. of Educ.*, 220 F.3d 465 (6th Cir. 2000), as support for their view that

Frederick's speech was "offensive" within the meaning of *Fraser* and could therefore be censored without a showing of disruption under *Tinker*. *Boroff*, however, has not been followed by other courts. Like the Ninth Circuit in this case, the Second Circuit rejected its reasoning in *Guiles v. Marineau*, 461 F.3d 320, 329 (2006), *cert. pending*, Dkt. No. 06-757 (filed Nov. 28, 2006), and the Sixth Circuit itself subsequently concluded that *Fraser* does not apply when it is "the content of speech, not the manner" that triggers school censorship. *Castorina v. Madison County Sch. Bd.*, 246 F.3d 536, 542 (6th Cir. 2001).[17]

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[17] The other lower court cases that Petitioners have cited also fail to support the sweeping authority they claim in this case. Three involve the fundamentally different context of school-sponsored speech. *Bannon v. Sch. Dist. of Palm Beach County*, 387 F.3d 1208 (11th Cir. 2004); *Planned Parenthood of S. Nev., Inc. v. Clark County Sch. Dist.*, 941 F.2d 817 (9th Cir. 1991); *McCann v. Fort Zumwalt Sch. Dist.*, 50 F. Supp. 2d 918 (E.D. Mo. 1999). Indeed, only *McCann* involved speech about drugs. Two are post-*Boroff* district court opinions within the Sixth Circuit that reference, but do not apply, *Boroff*'s language permitting the censorship of pro-drug speech under *Fraser*. *Nixon v. N. Local Sch. Dist. Bd. of Educ.*, 383 F. Supp. 2d 965, 970-71 (S.D. Ohio 2005); *Barber v. Dearborn Pub. Schs.*, 286 F. Supp. 2d 847, 853 (E.D. Mich. 2003). *Gano v. Sch. Dist. No. 411 of Twin Falls County, State of Idaho*, 674 F. Supp. 796 (D. Idaho 1987), does not support Petitioners' position because it concerned the ability of schools to proscribe defamatory speech. *Id.* at 798. *Williams v. Spencer*, 622 F.2d 1200 (4th Cir. 1980), predates both *Fraser* and *Kuhlmeier*. Its holding that a school could forbid the distribution of an underground student newspaper that contained a drug-related advertisement was based in part on its conclusion that the speech at issue was commercial in nature and in part on its conclusion that the speech had no literary value because it was not a serious discussion of drugs and drug use. *Id.* at 1206. In *McIntire v. Bethel Sch., Indep. Sch. Dist. No. 3*, 804 F. Supp. 1415 (W.D. Okla. 1992), the court held that that there was a material issue of disputed fact regarding whether a student's t-shirt violated the school's dress code. *Id.* at 1419. It then concluded that *Kuhlmeier* and *Fraser* were inapplicable, analyzed the case under *Tinker*, and held that the school failed to meet the *Tinker* disruption standard. *Id.* at 1426. It declined to reach the school's argument that *Fraser* permitted the school to punish students for

Petitioners are equally mistaken when they point to the *Fraser* Court's reference to speech that "undermine[s] the school's basic educational mission," 478 U.S. at 685, as justification for the school's actions in this case. A school's "educational mission" cannot be so broadly defined that it prohibits any speech that is at odds with the school's official message or instructional goals. This Court did not go nearly so far in *Fraser*. Read in context, *Fraser*'s reference to speech that "undermine[s] the school's basic educational mission" cannot be divorced from the immediately preceding reference to Fraser's "vulgar and lewd speech," or the immediately following reference to the fact that the speech took place in "[a] high school assembly . . . directed towards an unsuspecting audience of teenage students." *Id.*

Earlier in the same paragraph, moreover, the Court reiterated that "the penalties imposed in [*Fraser*] were unrelated to any political viewpoint." *Id.* On this point, therefore, *Tinker* and *Fraser* are easily reconciled. Speech that "substantially interfere[s] with the work of the school," *Tinker*, 393 U.S. at 509, can be prohibited because it "undermine[s] the school's basic educational mission," *Fraser*, 478 U.S. at 685. Absent evidence of actual disruption or vulgar language, speech that expresses a controversial message neither "undermine[s] the school's basic educational mission," nor "substantially interfere[s] with the work of the school."

Petitioners suggest that this Court "respectfully defer[] to school administrators' judgments in cabining expression that is inconsistent with the educational function of public schools." Pet. Br. 15. *Fraser* does not, however, mandate the sweeping deference to school officials that Petitioners read into it. Whatever discretion Petitioners are entitled to when *Fraser* or *Kuhlmeier* apply, Petitioners are not entitled to redefine the scope of those decisions or grant

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messages inconsistent with its anti-alcohol educational mission. *Id.* at 1427.

themselves greater power to sanction student speech than this Court has determined the First Amendment permits. Petitioners' discretion is necessarily limited by the First Amendment as this Court has defined it.

In short, *Fraser* is a case about lewd speech that caused actual disruption in a school-sponsored assembly containing a captive audience of adolescent students. None of those factors is present here. Frederick's speech was not lewd or sexually suggestive. It did not cause actual disruption, and it did not take place in a school-sponsored speech forum. In light of these differences, the court of appeals understandably concluded that *Fraser* was not controlling on these facts and evaluated the constitutionality of Frederick's suspension under *Tinker* instead.[18]

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[18] Petitioners' suggestion that the decision below threatens to undermine school dress codes around the country is a red herring. Courts have routinely applied *Tinker* when student dress codes have been used to censor student speech because of its actual or perceived message. *See, e.g., Chalifoux v. New Caney Indep. Sch. Dist.*, 976 F. Supp. 659, 666-67 (S.D. Tex. 1997) (holding that school policy barring students from wearing the rosary, due to its identification as gang-related apparel, could not be enforced against a devout Catholic student absent evidence of actual disruption or a substantial reason to anticipate disruption). *Accord Newsom v. Albemarle County Sch. Bd.*, 354 F.3d 249, 259-60 (4th Cir. 2003); *Sypniewski v. Warren Hills Reg'l Bd. of Educ.*, 307 F.3d 243, 254-58 (3d Cir. 2002); *Castorina*, 246 F.3d at 541-44; *West v. Derby Unified Sch. Dist. No. 260*, 206 F.3d 1358, 1365-66 (10th Cir. 2000). Those decisions are entirely consistent with the approach followed by the court of appeals here. Likewise, nothing in the decision below is inconsistent with those courts that have relied on *Fraser* to analyze student dress codes that have targeted sexually suggestive speech. *See, e.g., Pyle v. South Hadley Sch. Comm.*, 861 F. Supp. 157, 168-70 (D. Mass. 1994) (applying *Fraser* to uphold portion of dress code banning sexually suggestive apparel); *Broussard v. Sch. Bd. of the City of Norfolk*, 801 F. Supp. 1526, 1535-37 (E.D. Va. 1992) (applying *Fraser* to uphold suspension of student for wearing t-shirt stating "Drugs Suck," where school concluded that "suck" was sexually suggestive). As in *Tinker*, however, it is unnecessary for the Court to consider the issue of student dress codes in order to resolve the discrete student speech issue presented by these facts. 393 U.S. at 507-08.

3. Frederick's Speech Was Not School-Sponsored Within the Meaning of *Kuhlmeier*

Finally, Petitioners argue that Frederick's speech should be considered "school-sponsored" under *Kuhlmeier* because the school district "unwittingly provided Frederick a bully pulpit for his publicity stunt" by "lending its resources to the event and sanctioning student observance [of the event] during school hours." Pet. Br. 33. The flaw in Petitioners' analysis is that *Kuhlmeier* applies only when the school sponsors the expressive activity itself. The fact that student speech occurs at or near school during the school day does not, without more, make it school-sponsored speech. And the fact that the school allowed some students to observe the event did not, without more, convert the Olympic Torch Relay into a school-sponsored expressive activity.

According to Petitioners, had Principal Morse decided not to remove the banner, the message would have acquired "the school's imprimatur" causing "many in the community" to wonder "what they are teaching at taxpayer-supported Juneau-Douglas High School." Pet. Br. 33-34. The syllogism that any student speech that is not disavowed by the school will be attributed to the school is entirely circular and, if followed by this Court, and would strip *Kuhlmeier*'s distinction between school-sponsored and private student speech of any meaning.[19] Accordingly, this Court has

[19] The lower courts have correctly understood and consistently applied this limitation on *Kuhlmeier*. *See, e.g.*, *Guiles,* 461 F.3d at 327 (concluding *Kuhlmeier* was not applicable to review of suspension based on student's t-shirt parody of President George W. Bush, because *Kuhlmeier* "comes into play only when the student speech is 'school-sponsored' or when a reasonable observer would believe it to be so sponsored"); *Child Evangelism Fellowship v. Stafford Township Sch. Dist.*, 386 F.3d 514, 524-25 (3d Cir. 2004) (declining to apply *Kuhlmeier* to analyze school's refusal to permit distribution of religious group's materials, where materials were "obviously not official [school] documents"); *Newsom*, 354 F.3d at 257 ("no reasonable observer could conclude that [the school] somehow endorsed the [NRA] t-shirt worn by Newsom . . ."); *Castorina*, 246 F.3d at 543 (concluding that *Kuhlmeier*

repeatedly rejected the argument that students or others can or will reasonably believe that schools endorse "everything they fail to censor." *Mergens*, 496 U.S. at 250 ("secondary students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis"). *See also Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001) (rejecting concern that elementary school students would perceive religious club's use of school building as endorsement of religion); *Rosenberger*, 515 U.S. at 850 (O'Connor, J., concurring) ("Given this wide array of nonreligious, antireligious and competing religious viewpoints in the forum supported by the University, any perception that the University endorses one particular viewpoint would be illogical").[20]

The link between Frederick's speech and the school is especially attenuated in this case. The banner was unfurled on a public sidewalk at a public event where students intermingled with members of the general community. At least one non-student joined Frederick in holding up the banner, which was not on school grounds. Frederick had not been in school that day and never entered the school building until after the incident that gave rise to this lawsuit. Unless

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was not applicable because "the students' actions were not school sponsored, the school did not supply any of the resources involved in the wearing of the [Confederate flag] t-shirts, and no reasonable observer could conclude that the school had somehow endorsed the students' display").

[20] There is a circuit split on whether *Kuhlmeier* permits viewpoint discrimination when the school is the speaker, but *Kuhlmeier* has no application where it is the student that is speaking, not the school. *Peck v. Baldwinsville Cent. Sch. Dist.*, 426 F.3d 617, 631-32 (2d Cir. 2005) (explaining that "[w]hether [*Kuhlmeier*] represents a departure from the long-held requirement of viewpoint neutrality in any and all government restriction of private speech is an issue that has been the subject of much debate among Circuit Courts, which have reached conflicting conclusions") (internal citation omitted).

someone knew Frederick personally, there was nothing that connected Frederick and his banner to the school. In fact, he was an eighteen-year-old senior at the time, but he could just as easily have been a recent graduate.

Under all of these circumstances, it is highly unlikely that any reasonable observer would have concluded that Frederick was speaking on behalf of the school or with its approval. Indeed, that is not even Petitioners' claim. Their primary concern was that school officials would be criticized for a lack of discipline if they did not respond to Frederick's banner. Frederick was not suspended because he was carrying the school's message but because he was contradicting it in the view of school officials.

C. There Is No Need To Create A New *Per Se* Rule Defining A Previously Unrecognized Category Of Unprotected Student Speech

Since *Tinker,* this Court's approach to student speech has been balanced and contextual. Petitioners cannot prevail under that approach. Accordingly, they propose a blanket rule that would prohibit any student speech that advocates illegal conduct or, alternatively, any student speech that promotes drug or alcohol use, or that is contrary to what the school defines as its "mission."

Faced with a similar request to bend First Amendment rules in favor of a popular cause in *Barnette*, Justice Jackson wrote: "The case is made difficult not because the principles of its decision are obscure but because the flag involved is our own." 319 U.S. at 641. "Nevertheless," he went on, "we apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization." *Id.* In this case, the rallying cry is drugs rather than patriotism. But the insistence that our commitment to free speech must be sacrificed to serve some larger value is equally false and should be similarly rejected.

To some, Frederick's speech will undoubtedly seem adolescent and trivial. Petitioners saw it as evidence of Frederick's disrespect for the law. The cure they propose, however, is worse than the disease. Under our constitutional system, respect for the law cannot be compelled through censorship.

A *per se* rule prohibiting students from engaging in speech that "promotes" unlawful conduct undermines the values it is designed to protect. In constitutional terms, it lacks the fit between means and ends that the First Amendment requires, as a bare minimum, even from content-neutral laws. *See, e.g., Ward v. Rock Against Racism,* 491 U.S. 781, 798 (1989). In addition, it is fatally overbroad and would allow schools to prohibit a great deal of speech that is currently protected by the First Amendment. In the 1960's, for example, it would have allowed school officials to punish speech urging support for the civil rights sit-ins. Such speech is not inherently disruptive and does not undermine the school's basic educational mission – unless that mission is inappropriately defined as preservation of the status quo under all circumstances.

In a slightly more focused version of the same argument, Petitioners contend that school officials should, at the least, be allowed to prohibit any speech promoting illegal drug use. Attempting to draw an analogy to this Court's student drug testing cases,[21] Petitioners contend that deterring student drug use is an important and federally-mandated element of the school's educational mission, that peer pressure can be a powerful inducement to student drug use, that schools do not have to wait until a drug epidemic erupts to take preventive action, and that prohibiting any student speech deemed to contain a pro-drug message is as constitutionally unobjectionable as drug testing students who voluntarily participate in extracurricular activities. Pet. Br. 26-30. At every step of the analysis, however, the analogy

[21] *See Earls*, 536 U.S. 822; *Acton*, 515 U.S. 646.

breaks down. The student drug testing cases involve conduct, not speech. They were analyzed under the reasonableness standard of the Fourth Amendment rather than the more stringent standards of the First Amendment relevant here. They were also subject to significant limitations that are not present in this case. Only students who volunteered to participate in extracurricular activities were subject to drug testing and, in the Court's view, those students had relinquished their full privacy rights. *Earls*, 536 U.S. at 831. In addition, students who failed the challenged drug tests were not subject to any disciplinary action other than exclusion from extracurricular activity. *Id.* at 833. By contrast, nothing about Frederick's status distinguished him from any other student and he received a ten-day suspension for his allegedly pro-drug message. Most fundamentally, perhaps, there is a substantial constitutional gulf between a drug testing program premised on the assumption that undetected drug use in school will lead to further drug use, and an official school policy to penalize speech because it allegedly encourages behavior that the school is trying to discourage. *See Bartnicki v. Vopper*, 532 U.S. 514, 529 (2001) ("The normal method of deterring unlawful conduct is to impose an appropriate punishment on the person who engages in it.").

The dangers of Petitioners' approach are evident in the Solicitor General's brief, which argues that even speech advocating reform of the drug laws can properly be subject to school discipline. U.S. Br. 27. As the court of appeals pointed out, that would mean that a student in Alaska could be disciplined for distributing copies of the Alaska Supreme Court decision recognizing a state constitutional right to possess small amounts of marijuana. Pet. App. 16a-17a n.44. Similarly, it would mean that students in school could not argue in favor of a ballot initiative to legalize medical marijuana in their state and could, perhaps, even be barred

from discussing cases now pending in this Court that challenge the crack/cocaine disparity in federal sentencing.[22]

Petitioners have fallen woefully short of justifying such a severe intrusion into First Amendment rights and such a radical departure from this Court's current jurisprudence. In an attempt to fill that vacuum, Petitioners devote several emotionally fraught pages to propounding an argument that no party to this case has ever disputed: schools have a role to play in preventing drug abuse by minors.

Schools may devote classroom time to counseling against the use of illegal drugs and, indeed, Juneau schools offer a health education program that teaches students about alcohol and drug abuse prevention. J.A. 80. Schools may plaster their hallways with posters conveying the same messages. Schools also have a variety of non-speech means to combat drug use. They may notify parents when students appear to be under the influence of drugs. They may notify law enforcement when students are found selling drugs in school. They may ban and punish drug use and possession in school. And they may suspend or expel drug-addicted students.

The existing policies of the Juneau School Board already provide for all of these options. J.A. 84-94. What school officials may not do is punish students who question by word, not deed, the wisdom and efficacy of those school policies or the prevailing social attitude toward the use of drugs. Here, as elsewhere, the solution lies in "more speech, not enforced silence." *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

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[22] Moreover, carving out a content-based subset of this sort raises additional First Amendment problems under *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992).

D. The Record Supports A Finding That This Is Not A Student Speech Case Because Frederick Was Not Subject To The School's Authority When He Was Told To Take Down His Banner

To justify the regulation of student speech under *Tinker*, school officials must show that the speech "materially and substantially disrupt[ed] the work and discipline of the school." 393 U.S. at 513. The *Tinker* standard represents an effort to accommodate the free speech rights of students and the "special characteristics" of the school. As a consequence of that accommodation, *Tinker* provides less protection than traditional First Amendment rules applicable outside the school environment. For that reason, however, school officials seeking to invoke *Tinker* (or any other student speech case) must establish as a threshold matter that there is, in fact, some nexus between the speech and the school.

In the typical case, that nexus is not disputed because the speech occurs inside the school, during the school day, and as part of a faculty-controlled, school-sponsored event. At the opposite end of the spectrum, the lower courts have generally held that school officials may not punish student speech that occurs outside the school, unless the speech causes substantial disruption inside the school. *See, e.g., Mahaffey v. Aldrich*, 236 F. Supp. 2d 779, 786 (E.D. Mich. 2002) (semester-long suspension for contributions to student website violated First Amendment due to lack of evidence of disruption within school); *Thomas v. Bd. of Educ., Granville Cent. Sch. Dist.*, 607 F.2d 1043, 1050 (2d Cir. 1979) (school could not punish students for contents of "morally offensive, indecent, and obscene" off-campus publication because activity within school was *de minimis*); *Klein v. Smith*, 635 F. Supp. 1440, 1441-42 (D. Me. 1986) (enjoining suspension of student who made insulting gesture toward teacher after school hours and off school grounds).

Because Petitioners cannot satisfy even the less stringent *Tinker* standard applicable to student speech cases,

it is unnecessary for this Court to resolve whether Frederick was actually subject to school discipline when he was told to take down his banner. If Frederick's suspension violated his free speech rights as a student then, *a fortiori*, it violated his free speech rights if he was speaking as a citizen entitled to the full protections of the First Amendment.

There is, nonetheless, ample basis in this record to conclude that this is not a student speech case at all.[23] As previously noted, Frederick had never even arrived at school when he unfurled his banner. He intentionally positioned himself across from the school so that he was not standing on school property. J.A. 28. The Olympic Torch Relay was a public event on a public street that was jointly sponsored by Coca-Cola and local businesses. J.A. 27-28. Students who were attending class on the morning of the Olympic Torch Relay were released from class so that they could see the Olympic torch. J.A. 23. Frederick, however, was not among those students released from class because he went directly from home to the parade. J.A. 28-29. Even those students who had been in class were, at best, only loosely supervised on the streets. J.A. 36. Except for members of the school pep band, cheerleaders, and one gym class, students were not required to remain together and some students apparently took advantage of the occasion to leave for the day. J.A. 23, 36.

Petitioners claim that Frederick was subject to their disciplinary authority rests on several assertions, none of which is persuasive. First, Petitioners argue that Frederick was supposed to be in school before the Olympic Torch Relay and the fact that he was late should not exempt him from school discipline. The difficulty with that argument is

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[23] Although both courts below analyzed this as a student speech case, Pet. App. 5a-6a, 34a-35a, their determinations are subject to *de novo* review by this Court whether they are characterized as conclusions of law, findings of fact, or some combination of the two. *See Bose Corp. v. Consumers Union*, 466 U.S. 485, 499 (1984).

that this case is about Frederick's speech, not his tardiness. Had he unfurled the banner in the window of his home, he might still have been guilty of an unexcused absence but he would not otherwise have been subject to school disciplinary proceedings, nor should he be here.

Second, Petitioners contend that the Olympic Torch Relay was analogous to a field trip and students on a field trip are subject to school discipline as a matter of logic and Juneau School Board policy. Pet. Br. 34. The contention is flawed in both its major and minor premises. Petitioners have not demonstrated how the act of releasing students from class to watch a public event on a public street extends the school's jurisdiction over a person who was not released from a class, had not even been on school grounds, and was in a public area for his own, non-school purpose. The question of whether a release of students to watch the Olympic Torch Relay was like a field trip is separate and distinct from the question of whether Frederick was part of any class's field trip. Third, Petitioners suggest, without citing any evidence, that Frederick's speech was aimed at students. Frederick testified that he directed his speech at the news cameras and supports that claim by noting that he did not unfurl his banner until the Olympic torch was approaching and the cameras were turned on. At a minimum, adults were clearly part of the audience and this Court has never upheld a restriction on speech occurring in public because it was accessible to children. *See, e.g., Lorillard Tobacco Co. v. Reilly,* 533 U.S. 525, 561-562 (2001); *Erznoznik v. City of Jacksonville,* 422 U.S. 205, 213 (1975).

Applying traditional First Amendment principles to Frederick's speech as an adult attending a public event on the public streets, there is no doubt that the judgment below must be affirmed. Just as the government cannot prohibit speech that is critical of a foreign government within 500 feet of that government's embassy, *Boos v. Barry*, 485 U.S. 312 (1988), it cannot prohibit speech on a public street near a public

school simply because it disagrees with the message the school is trying to convey on the same subject.

II. PRINCIPAL MORSE IS NOT ENTITLED TO QUALIFIED IMMUNITY FOR SUPPRESSING FREDERICK'S SPEECH MERELY BECAUSE SHE DISAGREED WITH THE OPINION HE EXPRESSED

Officials whose conduct violates "clearly established" constitutional rights are not shielded from liability by qualified immunity. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). Instead, qualified immunity shelters officials who make reasonable mistakes. *Malley v. Briggs*, 475 U.S. 335, 341 (1986). In order to determine whether an official is entitled to the defense, this Court has prescribed a two-part inquiry. *Hope v. Pelzer*, 536 U.S. 730, 736, 739 (2002). First, a court must determine "whether plaintiff's allegations, if true, establish a constitutional violation." *Id.* (citing *Saucier v. Katz*, 533 U.S. 194, 201 (2001)). Second, a court must decide whether the violated right was "clearly established" at the time of the relevant action. *Saucier*, 533 U.S. at 201; *see also Will v. Hallock*, 126 S. Ct. 952, 959 (2006) (explaining that officials are entitled to qualified immunity if "the law on point was not clear when the official took action, and the action was reasonable in light of the law as it was").

If a right is "clearly established," then a reasonable officer can perceive a clear difference between lawful and unlawful conduct in the particular circumstances. *Saucier*, 533 U.S. at 202 (citing *Wilson v. Layne*, 526 U.S. 603, 615 (1999)). Such clarity does not require a pre-existing court decision specifically on point. *Anderson v. Creighton*, 483 U.S. 635, 640 (1987) (citing *Mitchell v. Forsyth*, 472 U.S. 511, 535 n.12 (1985)). Instead, general principles from prior decisions are sufficient to make a right "clearly established" so long as they provide "fair and clear warning" that the officials' actions were unconstitutional. *Hope*, 536 U.S. at

741; *see also United States v. Lanier*, 520 U.S. 259, 271 (1997) ("a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though 'the very action in question has [not] previously been held unlawful'") (quoting *Anderson*, 483 U.S. at 640). The determination of whether a right was clearly established hinges on "the level of generality at which the relevant 'legal rule' is to be identified." *Anderson*, 483 U.S. at 639. The question is whether a reasonable official would know that "his conduct was unlawful in the situation he confronted." *Brosseau v. Haugen*, 543 U.S. 194, 199 (2004) (per curiam) (citation and internal quotations omitted). If "the contours of the right [are] sufficiently clear," qualified immunity is not an available defense. *Anderson*, 483 U.S. at 640.

Principal Morse is not entitled to qualified immunity because she violated Frederick's clearly established constitutional rights. First, none of the justifications for restricting student speech discussed by this Court in *Tinker*, *Fraser*, or *Kuhlmeier* applies to these facts, and even Petitioners do not claim that their actions can be justified under the First Amendment if Frederick was not subject to school supervision when he unfurled his banner. Second, Frederick's rights were clearly established at the time of the incident.

Under this Court's jurisprudence, the appropriate inquiry is whether a reasonable official could have believed that the First Amendment permitted the suppression of speech that was not disruptive, not school-sponsored, and not sexually suggestive, merely because of disagreement with the opinion expressed. The answer is plainly no. Binding Supreme Court and Ninth Circuit precedent clearly established at the time of the incident that such speech, particularly when uttered in the non-curricular setting, could not be suppressed absent evidence of disruption or impingement of the rights of others. Petitioners have not

demonstrated either. Instead, they have maintained that Frederick's banner was suppressed because its message was inimical to the school's anti-drug policies. Based on this asserted justification, Principal Morse's conduct ran afoul of clearly established First Amendment principles.

A. Controlling Law Clearly Established That Principal Morse Violated Frederick's First Amendment Rights When She Punished Him For His Speech

In analyzing whether a right is "manifestly apparent," courts search "the decisions of the Supreme Court, [the relevant] court of appeals, and the highest court of the state in which the case arose."[24] *Owens ex rel. Owens v. Lott*, 372 F.3d 267, 279 (4th Cir. 2004) (quoting *Edwards v. City of Goldsboro*, 178 F.3d 231, 251 (4th Cir. 1999) (internal alterations and quotation marks omitted)). *See also Hope*, 536 U.S. at 741-42 (reviewing Supreme Court precedent, Eleventh Circuit cases, and Alabama Department of Corrections regulations). If there are no such decisions from courts of "controlling authority," the court of review looks to determine whether there is "a consensus of cases of persuasive authority" from other jurisdictions. *Wilson*, 526 U.S. at 617.

Here, there is controlling and binding authority from both this Court and the relevant court of appeals. Simply stated, school officials cannot suppress speech merely because of disagreement with the viewpoint expressed. *Tinker*, 393 U.S. at 514. That is, however, precisely what occurred in this case. Neither *Fraser* nor *Kuhlmeier* undercuts this core tenet of *Tinker* and neither is applicable on these facts.

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[24] In *Breese v. Smith*, 501 P.2d 159 (Alaska 1972), the Alaska Supreme Court struck down hair-length restrictions for students. *Breese* is the only Alaska Supreme Court decision that is arguably pertinent to the qualified immunity analysis.

The Ninth Circuit's decisions in *Burch v. Barker*, 861 F.2d 1149 (9th Cir. 1988), and *Chandler v. McMinnville Sch. Dist.*, 978 F.2d 524 (9th Cir. 1992), further establish general principles that "apply with obvious clarity to the specific conduct in question." *Lanier*, 520 U.S. at 271. In *Burch*, the Ninth Circuit struck down as overbroad a school policy that required administrative approval of all student writings prior to their distribution on campus. 861 F.2d at 1159. The court explained that "control over the educational curriculum requires control by administrators over the content of what is taught" but that "no similar content control is justified for communication among students which is not part of the educational program." *Id.* at 1157. The Ninth Circuit also made clear that "[i]nterstudent communication does not interfere with what the school teaches; it enriches the school environment for the students." *Id.* at 1159.

Four years later, in *Chandler*, the Ninth Circuit established a clear framework for the categorical analysis of student speech: "the standard for reviewing the suppression of vulgar, lewd, obscene, and plainly offensive speech is governed by *Fraser*, school-sponsored speech by *Kuhlmeier*, and all other speech by *Tinker*." 978 F.2d at 529 (internal citations omitted). The *Chandler* Court concluded that buttons emblazoned with the word "scab" were not plainly offensive within the meaning of *Fraser* even though "the word is most often used as an insult or epithet." *Id.* at 530 (quoting *Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin*, 418 U.S. 264, 283 (1974)).[25] Derogatory and disrespectful statements about replacement teachers

[25] The *Chandler* court's formulation of Supreme Court student speech precedent has been repeatedly followed. *See Guiles*, 461 F.3d 320; *Saxe*, 240 F.3d 200; *Pyle*, 861 F. Supp. 157. *See also Griggs v. Fort Wayne Sch. Bd.*, 359 F. Supp. 2d 731, 739-40 (N.D. Ind. 2005) (noting that eight of the circuits agree that "*Tinker* provides the default rule for suppression of student speech, and *Fraser* and [*Kuhlmeier*] create narrow exceptions to that rule").

stand in opposition to the school's mission. Yet, in 1992, the Ninth Circuit clearly rejected the application of *Fraser* to circumstances similar to those in which Principal Morse found herself.

Further clarification on the scope of *Fraser* was provided in *LaVine v. Blaine Sch. Dist.*, 257 F.3d 981 (9th Cir. 2001). In that case, the Ninth Circuit upheld a high school principal's decision to expel a student based in part on a graphically violent poem that described an attack on a classroom of students. *Id.* at 990. The *LaVine* Court concluded that, due to the poem itself and evidence of previous disruption, the school's actions were justified under *Tinker*. *Id.* at 989-90. Expulsion was not permissible under *Fraser* because the student's poem was not vulgar, lewd, obscene, or plainly offensive speech. *Id.* at 989. *See also Hatter v. Los Angeles City High Sch. Dist.*, 452 F.2d 673 (9th Cir. 1971) (reversing lower court's dismissal of student's First Amendment claim where student was suspended for distributing leaflets critical of school's dress code while standing across the street from school); *Emmett v. Kent Sch. Dist. No. 415*, 92 F. Supp. 2d 1088, 1090 (W.D. Wash. 2000) (explaining that *Fraser* was based on "prior findings that there is a government interest in protecting children from sexually explicit materials, and that obscene speech is entirely unprotected by the First Amendment").[26]

Given this extensive and consistent precedent, the law provided Principal Morse with clear notice that her conduct "was unlawful in the situation [she] confronted." *Saucier*, 533 U.S. at 202. In fact, the Ninth Circuit specifically explained the "opacity in this particular corner of the law has

[26] Petitioners also rely on *Gano*, 674 F. Supp. 796, to provide support within the Ninth Circuit for their position that Frederick's right was not clearly established. As explained in n.17, *supra*, *Gano* pertains to a school's authority to regulate defamatory speech.

been all but banished . . . ."[27] Pet. App. 20a. For Principal Morse's conduct to have been reasonable, Frederick's speech had to substantially interfere with the work of the school, be lewd, vulgar, or plainly offensive in form or manner, or be sponsored by the school. Because none of those conditions was met, Principal Morse's conduct violated clearly established and controlling law.[28]

B. The Existence Of A School Board Policy That Prohibits Students From Advocating The Use Of Illegal Drugs Does Not Immunize Principal Morse From Personal Liability

Petitioners rely on this Court's opinion in *Wilson* as support for their argument that the existence of a Juneau School Board policy prohibiting student expression that

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[27] Amicus United States argues that the Ninth Circuit's reliance on "the unique facts of this case" constitute "precisely the types of subtle distinctions, unresolved in existing precedents, upon which school administrators' personal liability ought not turn." U.S. Br. 30. This position turns the Ninth Circuit's rationale on its head. While acknowledging that different facts might have led to a different outcome, the court of appeals properly analyzed *this* case on *these* facts and concluded that Principal Morse had violated clearly established law.

[28] Petitioners assert that Frederick's First Amendment right was not clearly established based, in part, on the fact that the Ninth Circuit cited case law decided after January 2002. Pet. Br. 44. Petitioners' argument is unavailing. *Noy v. State*, 83 P.3d 545 (Alaska Ct. App. 2003), simply supports the Ninth Circuit's assertion that the legalization of marijuana is an oft-debated topic in Alaska. Pet. App. 6a. *Newsom*, 354 F.3d 249 (images of weapons on clothing), *Scott v. School Board of Alachua County*, 324 F.3d 1246 (11th Cir. 2003) (Confederate flag), and *Sypniewski*, 307 F.3d 243 (Jeff Foxworthy redneck t-shirt), each apply *Tinker* and examine the record for evidence of disruption. These cases represent a reiteration of the clearly established rule. Finally, Petitioners' objection to the Ninth Circuit reference of *LaVine* is that both the request for rehearing en banc and the petition for certiorari were denied subsequent to this incident. Neither of those facts, however, undermines the fact that the Ninth Circuit's decision in *LaVine* was good law in January 2002.

advocates the use of illegal drugs immunizes Principal Morse from personal liability. Pet. Br. 38-40. In *Wilson*, this Court concluded that police officers were entitled to qualified immunity because it was not unreasonable for them to have believed that bringing media observers along during the execution of an arrest warrant was lawful at the time of the incident. 526 U.S. at 615. Reliance on the policy was reasonable because "the state of the law as to third parties accompanying police on home entries was at best undeveloped." *Id.* at 617.

Here, by contrast, Principal Morse applied Juneau School Board Policy 5520 to a developed and settled area of the law that plainly barred the action she took. The contours of the right specifically at issue had been clearly established at time of the Olympic Torch Relay. Suppression of student speech merely because of disagreement with the opinion expressed has been clearly unlawful since 1969. And there is nothing distinct or novel about Frederick's speech that made reliance on the Juneau School Board Policy 5520 reasonable in light of clearly established case law.[29] Moreover, by her own admission, she was well aware of that law at the time she acted and, indeed, had studied it in a graduate-level course.[30] J.A. 76-77.

Petitioners also argue that reliance on this specific policy is more compelling than the police officers' reliance in

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[29] Juneau School Board Policy 5520 prohibits "any . . . expression that . . . advocates the use of substances that are illegal to minors . . . ." Pet. App. 53a. By contrast, the policies referenced by Petitioners in their brief in support of their Petition for Certiorari pertain to restrictions on apparel only. The sheer breadth of the Juneau School Board policy makes Principal Morse's reliance even more objectively unreasonable.

[30] Principal Morse testified that her graduate course in school law covered "*Tinker*, *Hazelwood*, *Fraser*, *Bethel*, all of the pertinent case law related to student rights or school." J.A. 77.

Wilson (where the policy was more focused on public relations), because the Juneau School Board policy had been enacted in accordance with the Alaska Administrative Code and in the context of a Congressional mandate. Pet. Br. 42. These provisions, however, do not require the Juneau School Board to suppress student expression that arguably promotes the use of marijuana. For example, Petitioners repeatedly cite 20 U.S.C. § 7114(d)(6), which demands that schools "convey a clear and consistent message that . . . illegal use of drugs [is] wrong and harmful." *Id.* Speech uttered by students, whatever its position, does not preclude schools from developing and communicating their own consistent message.

C. Petitioners' Reliance On Non-Binding Case Law And Dicta Suggesting Ambiguity In The Jurisprudence Fails To Undermine The Conclusion That Frederick's Rights In These Circumstances Were Clearly Established

Petitioners seek to undermine the conclusion that Principal Morse's actions violated clearly established and binding law by citing cases from other jurisdictions in an effort to develop a "consensus" of persuasive authority that supports the curtailment of student speech promoting the use of illegal drugs. Pet. Br. 29-30. Petitioners also rely on dicta and sweeping generalizations made in the legal scholarship in an effort to paint a picture of a confused and unsettled jurisprudence. Pet. Br. 40-42. While the contours of certain areas of student speech rights are not precisely defined, this is a straightforward case. Moreover, the cases relied upon by Petitioners neither create a compelling consensus nor rebut clearly established binding precedent.

Petitioners' reference to the alleged ambiguity of student speech jurisprudence is unpersuasive, given the particular right at issue in this case. Courts have repeatedly emphasized that neither *Fraser* nor *Kuhlmeier* undercut the guiding principle in *Tinker* that schools cannot censor student

speech merely because they disagree with the student's message. *See, e.g., Castorina*, 246 F.3d at 540 (explaining that *Tinker*'s holding is "consistent with a number of later Supreme Court decisions signaling that viewpoint-specific speech restrictions are an egregious violation of the First Amendment"); *East High Gay/Straight Alliance v. Bd. of Educ. of Salt Lake City Sch. Dist.*, 81 F. Supp. 2d 1166, 1193 (D. Utah 1999) ("*Fraser* speaks to the form and manner of student speech, not its substance. It addresses the mode of expression, not its content or viewpoint.").

Additionally, courts analyzing the second prong of qualified immunity look to other jurisdictions only when there are no relevant decisions with binding authority. *Wilson*, 526 U.S. at 617. Because binding Supreme Court and Ninth Circuit case law provides the guiding principles in this case, there is no need to look beyond it.[31]

In sum, the Ninth Circuit followed this Court's prescribed analysis in concluding that Principal Morse violated Frederick's clearly established First Amendment rights. The court of appeals reviewed binding Supreme Court and Ninth Circuit precedent and distilled from this case law the contours of the right at issue. Moreover, Petitioners' reliance on Juneau School Board Policy 5520 and their efforts to create a consensus of persuasive authority fall short. In the end, Petitioners cannot hide from the fact that Principal Morse seized Frederick's banner and punished him because she disagreed with the position he advocated. That action contravenes the First Amendment, and Principal Morse should be held accountable.

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[31] Petitioners' efforts to demonstrate legal uncertainty outside the Ninth Circuit is thus legally irrelevant for these purposes and unpersuasive. *See* nn.17 & 18, *supra*. While there may not have been total uniformity, there was certainly a consensus in the lower courts that *Tinker* established the governing standard absent evidence that the censored speech was school-sponsored, lewd and vulgar, or commercial in nature.

CONCLUSION

For the reasons stated above, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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