No. 06-278

IN THE

Supreme Court of the United States

DEBORAH MORSE; JUNEAU SCHOOL BOARD,

Petitioners,

v.

JOSEPH FREDERICK,

Respondent.

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

BRIEF FOR PETITIONER

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January 16, 2007

QUESTIONS PRESENTED

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

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

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The orders of the United States District Court for the District of Alaska (per Sedwick, C.J.) granting petitioners' summary judgment motion are reprinted at Pet. App. 23a-44a and are reported at 2003 WL 25274689 and 2003 U.S. Dist. LEXIS 27270. The Ninth Circuit's decision reversing the district court is reprinted at Pet. App. 1a-22a and is published at 439 F.3d 1114. The court of appeals' order denying rehearing and rehearing en banc is reprinted at Pet. App. 45a-46a and is not otherwise published.

JURISDICTION

The Ninth Circuit rendered its decision on March 10, 2006, and denied rehearing and rehearing en banc on April 18, 2006. Justice Kennedy extended the time to file a petition for a writ of certiorari to and including August 28, 2006. The petition for a writ of certiorari was filed on August 28, 2006, and was granted on December 1, 2006. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AND SCHOOL DISTRICT RULES INVOLVED

The First Amendment to the United States Constitution provides, in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech . . . .

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

Title 20, Sections 7101 *et seq.* of the United States Code, codifies the Safe and Drug-Free Schools and Communities Act, pertinent parts of which are reprinted at Pet. App. 47a-51a.

Title 42, Section 1983 of the United States Code provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . , subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

Juneau School Board Policy 5520, reprinted at Pet. App. 53a-54a, states, in pertinent part:

> The Board specifically prohibits any assembly or public expression that . . . advocates the use of substances that are illegal to minors . . . .

Juneau School Board Policy 5850, reprinted at Pet. App. 58a, states, 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.

STATEMENT OF THE CASE

A. Factual Background

1. January 24, 2002 marked the first time in Olympic history that the Olympic Torch Relay visited Alaska. Charles Bingham, *The Olympic Torch Relay comes to Juneau*, Juneau Empire, Jan. 16, 2004, available at http://juneauempire.com/stories/011602/spo_juneaurelay.shtml. In preparation, a local task force of approximately two dozen local civic leaders planned for Juneau's participation in the

international event—a ten-mile relay through Juneau. *Id.* Members of the city government, including the mayor's office and the Juneau Department of Parks and Recreation, lent their support. *Id.* Local businesses, as well as national sponsors of the torch relay, supported the event. *Id.* The torch ceremony involved a week of community festivities. *A weeklong celebration of the Olympic spirit*, Juneau Empire, Jan. 16, 2002, available at http://juneauempire.com/stories/011602/spo_calendar.shtml. Upon its arrival in Juneau, the Olympic flame was welcomed by Tlingit Clan dancers, transported in a native canoe around Gastineau Channel, and carried through several miles of Juneau's streets, including past the State Capitol and the Juneau-Douglas High School. *The torch's route through Juneau has 3 segments*, Juneau Empire, Jan. 16, 2002, available at http://juneauempire.com/stories/011602/spo_torchroute.shtml.

Believing that the Olympic Torch Relay had noteworthy educational value (as well as high significance to the community), the Juneau School District allowed students to observe and participate in the ceremony. Pet. App. 34a. In addition, the School District allocated funds to transport students from schools not along the relay route to locations where they could view this memorable event. Pet. App. 63a.

After classes convened on the morning of the event, Juneau-Douglas High School administrators and teachers accompanied students from their classrooms to view the relay as it passed on Glacier Avenue in front of the school. Pet. App. 24a-25a, 34a. Once outside the classroom, the students were allowed to be in only one place—in front of the school, either on campus or lined along either side of the street. J.A. 23-24, 47-56. At all times, the student body remained under the supervision of high school administrators, teachers, and staff. *Id.*

During the event, high school cheerleaders were out in uniform to greet the torchbearers. Pet. App. 34a. The high

school pep band played. *Id.* Four high school students, representing various segments of the student body, acted as torchbearers. J.A. 23. In that role, the student torchbearers carried the Olympic flame as a small part of the 11,500-person chain of torchbearers who transported the torch along the 65-day, 46-State, 13,500-mile relay route. Bingham, *supra.*

2. Joseph Frederick, a Juneau-Douglas High School student, and several of his schoolmates positioned themselves on the sidewalk opposite the campus to await the torch relay. Pet. App. 25a. Before the torch arrived, Principal Deborah Morse approached this group to investigate the throwing of snowballs and beverage bottles that originated from their vicinity. J.A. 24, 41, 43. As the torchbearers and television camera crews approached, Frederick and his friends unfurled a large banner emblazoned with the phrase "BONG HiTS 4 JESUS." Pet. App. 25a. Frederick's banner—which measured (by his estimation) 14 feet long—was clearly visible to the large number of students assembled on campus. J.A. 24; Pet. App. 70a; Opp'n to Pet. at 1 n.1.[1]

a. "Bong" is a slang term for drug paraphernalia commonly used for smoking marijuana. J.A. 24, 59-60, 117. A "bong hit" is slang for inhaling marijuana from such a device. Pet. App. 4a; J.A. 24, 60-61. The term "bong hits" is widely understood by high school students (and others) as referring to smoking marijuana. Pet. App. 38a, 61a-62a; J.A. 24, 60-61. Frederick himself testified that "[m]any people

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[1] At the certiorari stage, respondent attempted to recast the banner incident as involving himself and several non-students. *See* Opp'n to Pet. at 11 (stating he was "joined with non-students to display a banner"). The record evidence identified only one non-student who may have been involved in the incident. Pet. App. 70a; J.A. 29, 35, 36.

reference [the phrase 'bong hits'] to drugs." J.A. 63. He also conceded that he "knew it was a possibility" that people would "interpret . . . bong hits as related to drugs" and that "there is a general amount of people who can understand the meaning of it [as a drug reference]." J.A. 61, 64. The combination of the phrases "bong hits" and "4 Jesus," according to Frederick, was intended to be a publicity stunt—something "controversial and yet ultimately meaningless." J.A. 66-67. "Christian people," he explained, "I believe they are anti-drugs, so if you put that together, it's somewhat ironic." J.A. 67. He further acknowledged that "some people might have taken offense." J.A. 63.

b. Prior to displaying the banner, Frederick had been absent from school. Pet. App. 25a. Having skipped his first class of the day, Frederick later claimed that his car was stuck in the snow. Pet. App. 64a. Frederick neither called the school to report his absence, nor informed the office of his presence when he arrived. *Id.*; J.A. 72-73. Frederick made no secret of the fact that, in positioning himself near the school to await the relay, he was purposely avoiding going onto school grounds. J.A. 28-29, 73. Although he could have selected any number of locations to unfurl his banner along the Olympic Torch's ten-mile journey through Juneau, Frederick chose instead to position himself in front of the student body and to display the banner where it would be in full view of the assembled students.

c. Spotting the drug-related display, Principal Morse approached Frederick and his friends and asked them to drop the banner. Pet. App. 25a. While other students complied with the request, Frederick refused to take it down. *Id.* Frederick claimed he had a First Amendment right to display the banner because he was not physically on campus. J.A. 24-25. Principal Morse responded that Frederick was participating in a school activity and that the banner was inappropriate. Pet. App. 3a; J.A. 25. When Frederick

refused to put the banner down, Principal Morse began rolling it up and directed Frederick to accompany her to her office. Pet. App. 25a; J.A. 10, 16. Frederick let go of the banner and walked the other way. Pet. App. 25a.

Frederick did not meet with Principal Morse until he was later summoned out of class and escorted to her office. There, Ms. Morse again explained that the banner was inappropriate in that it violated the school's policy against displaying offensive material, including material that advertises or promotes the use of illegal drugs. Pet. App. 3a; J.A. 25. During the meeting, Frederick displayed a belligerent attitude and gave evasive and mocking answers to her questions. Pet. App. 65a. He told her, for example, that the banner was an acronym for "Better Olympic National Games – Head into Town 4 Jesus." Pet. App. 61a; J.A. 25-26; S.E.R. 35.[2]

After discussing the incident with a defiant and uncooperative Frederick, Principal Morse suspended him for ten days based on multiple infractions, including refusal to respond to a staff directive, truancy/skipping class, defiance/ disruptive behavior, and refusal to cooperate/assist in investigation, in addition to the underlying charge of displaying the offensive banner. Pet. App. 59a, 66a-67a. Ms. Morse provided Frederick with a written Notification of Suspension, which listed the grounds for his punishment and advised him that he had the right to appeal. J.A. 106-07.

Following the banner episode, school personnel reported several incidents of pro-drug graffiti in the halls and on school grounds, including references to and mimicry of Frederick's banner. Pet. App. 2a; J.A. 43.

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[2] "S.E.R." refers to the Appellees' (Petitioners') Supplemental Excerpts of Record in the Ninth Circuit.

3. The student conduct rules enforced by Principal Morse are published in the school district policies and the student handbook. Pet. App. 52a-58a; J.A. 80-105. In its policies, the Juneau School Board explicitly recognizes that students have "constitutionally guaranteed rights to assemble peaceably and to express ideas and opinions, privately or publicly." Pet. App. 53a (Juneau Sch. Bd. Policy 5520). In that context, forbidden expressive conduct includes activities "that interfere[] with the orderly operation of the educational program," such as "any assembly or public expression that . . . advocates the use of substances that are illegal to minors." *Id.* Messages promoting illegal drugs, alcohol, and tobacco are likewise prohibited on student clothing and in student publications because such messages are "inconsistent with the district's educational mission and disruptive to the district's educational program." Pet. App. 52a, 56a.

These policies are consistent with federal law, namely 20 U.S.C. § 7114(d)(6), which requires school districts receiving federal funds through the vehicle of the Safe and Drug Free Schools and Communities Act to certify periodically that their programs "convey a clear and consistent message that . . . illegal use of drugs [is] wrong and harmful." The Juneau School District receives funds through this statutory mechanism and has complied with federal certification requirements. *See* S.E.R. 52-63. Indeed, the School Board promulgated a district-wide health and safety curriculum emphasizing the dangers of illegal drug and alcohol use. J.A. 80, 83-84. The Board also established detailed policies for prevention, intervention, and discipline of students engaging in the illegal use or possession of drugs or alcohol. J.A. 84-96.

In addition, the Board policies more generally address disorderly and disruptive behavior. J.A. 81-83. Under the policies, Principal Morse was authorized "to take such means as may be reasonably necessary to control the disorderly

conduct of students in all situations and in all places where such students are within the jurisdiction of the school district." J.A. 96. Students are required, among other things, to "comply with the reasonable directives" of administrators and teachers when the students are under school authority. J.A. 82. The student handbook discipline plan enumerates infractions that may result in punishment, including all the infractions for which Frederick was suspended. J.A. 100-07.

These student conduct rules are not confined to activities in the classroom or on campus: "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 (Juneau Sch. Bd. Policy 5850); *see also* J.A. 100, 103 (defining infractions as including those committed "at school sponsored/sanctioned functions or activities").

The Board develops and periodically reviews these policies pursuant to a public, collaborative process that includes students, parents, teachers, and others responsible for student safety. J.A. 22, 98. In adopting standards for student behavior, the Board strives to "reflect community standards." J.A. 98.

B. Procedural History

1. Frederick appealed his suspension to Superintendent Gary Bader. Pet. App. 25a. Following a hearing in which Frederick was represented by counsel, Superintendent Bader issued a seven-page decision that upheld the principal's disciplinary actions. Pet. App. 59a-67a.

First, the superintendent concluded that Frederick violated the school policy against the display of offensive material. Pet. App. 63a. Specifically, Superintendent Bader determined that (i) Frederick was participating in a school activity; (ii) the banner "advocat[ed] the use of illegal drugs"

and Frederick was unable or unwilling to express any other credible meaning for the phrase; (iii) discouraging drug use is an important, longstanding component of the school's curriculum and is expressly incorporated into the district's student conduct policies; and (iv) the banner "was potentially disruptive to the event and clearly disruptive of and inconsistent with the school's educational mission to educate students about the dangers of illegal drugs and to discourage drug use." Pet. App. 61a-63a. The superintendent's opinion analyzed in detail this Court's student speech doctrine as articulated in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969); *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986); and *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988). Applying that body of law, Superintendent Bader concluded that Principal Morse's discipline of Frederick was consistent with controlling authority. Pet. App. 60a-62a.

Second, the superintendent determined that Frederick ran afoul of the school policy on truancy when he skipped class. Pet. App. 64a. Mr. Bader nonetheless noted that this unexcused absence, standing alone, likely would not have led to suspension. Pet. App. 67a. *Third*, the superintendent found that Frederick exhibited a "belligerent attitude" and "defiant" and "disruptive" behavior when he "set his own conditions for compliance" with Principal Morse's directive to accompany her to her office. Pet. App. 64a-65a. *Fourth*, he agreed that Frederick was uncooperative and evasive when the principal attempted to gather facts about the banner incident, but opined that great weight would not be placed on that particular infraction. Pet. App. 65a-66a. *Fifth*, Superintendent Bader found that Frederick refused to respond to a staff directive by withholding the banner when Principal Morse asked him to surrender it. *Id.*

The superintendent observed, *finally*, that Frederick "has a history of defiant behavior and has been suspended from

school for defiance before." *Id.* Mr. Bader concluded that Frederick's conduct warranted discipline and that the suspension was justified. Pet. App. 67a. In treating certain infractions with lenience, however, Superintendent Bader reduced Frederick's suspension to eight days. *Id.*

2. Frederick appealed to the School Board. Pet. App. 26a. Following a lengthy hearing with both witness testimony and legal argument, the School Board unanimously upheld the superintendent's decision. Pet. App. 26a, 69a.

3. Frederick filed a § 1983 action in the United States District Court for the District of Alaska. Frederick's complaint alleged that Principal Morse and the Juneau School Board violated his free speech rights under both the First Amendment and the Alaska Constitution. J.A. 12-13. Frederick sought injunctive relief, as well as compensatory and punitive damages. J.A. 13. He claimed that the seizure of the banner and subsequent disciplinary actions caused him "emotional distress, humiliation, loss of enjoyment of life, and mental anguish." J.A. 12.

On May 27, 2003, Chief Judge John W. Sedwick granted summary judgment in favor of petitioners. Pet. App. 23a-40a; *see also* Pet. App. 41a-42a. Shortly thereafter, on May 30, 2003, the court entered judgment dismissing the action. Pet. App. 43a-44a. In a detailed opinion, Chief Judge Sedwick concluded that the Juneau school officials did not in any fashion violate Frederick's First Amendment rights. From the outset, the district court emphasized that Frederick's complaint involved a student speech case:

> [T]here is no issue of fact as to whether or not this was a school-sponsored activity. . . . [Principal Morse] authorized the teachers to take their classes to view the relay. . . . [T]eachers and administrative officials monitored students' actions. . . . The relay occurred during school

> hours, at a time when parents expected their children to be under school supervision.
>
> . . . [T]he fact that Frederick joined his fellow classmates at the school-sponsored event meant that he was attending a school-sponsored activity.

Pet. App. 34a-35a.

Having determined that Frederick was a student subject to the school's authority during school hours, the court reasoned that the banner's message could be constitutionally prohibited under this Court's decision in *Fraser*, 478 U.S. 675. Pet. App. 33a-38a. *Fraser*, the district court explained, allows a public school to regulate speech that it reasonably interprets as "plainly offensive" because such speech "might undermine the school's basic educational mission." Pet. App. 36a. The court noted that Frederick's banner "directly contravened the Board's policies relating to drug abuse prevention" and thus interfered with the school's educational mission to deter illegal drug use. Pet. App. 35a-36a. The court highlighted readings of *Fraser*, such as in *Boroff v. Van Wert City Board of Education*, 220 F.3d 465 (6th Cir. 2000), where the Sixth Circuit concluded that a school could prohibit t-shirts depicting a rock band that promoted a drug-using lifestyle. Pet. App. 36a.

The district court further observed that *Tinker,* 393 U.S. 503, justified Principal Morse's actions. Pet. App. 35a-36a. In the trial court's view, *Tinker* allows schools to curtail speech that interferes with a school's work and, "[w]ithout a doubt, part of the school's work is to deter drug and alcohol abuse." Pet. App. 36a. Underlying the district court's First Amendment analysis was an acknowledgement of the importance of deferring to school administrators' reasonable judgments where, as here, Frederick chose to display his banner at a "school-sponsored" activity. Pet. App. 33a-38a.

Finally, the district court concluded, under both this Court's precedents and Alaska law, that petitioners were immune from claims for money damages. Pet. App. 27a-32a. The court noted that (i) no case law was on point to establish that Principal Morse's actions were unconstitutional; (ii) the cases cited by Frederick were all readily distinguishable; and (iii) Principal Morse's actions were not "so far-fetched as to make the illegality apparent." Pet. App. 27a-30a. Quite the contrary, the trial court observed that existing case law "shows that it was objectively reasonable for defendants to believe that their actions were proper." Pet. App. 28a.

4. The Ninth Circuit reversed. The court of appeals acknowledged that the banner incident occurred while "Frederick was a student, and school was in session." Pet. App. 6a-7a. Accordingly, in the Ninth Circuit's view, this case was not about "speech on a public sidewalk." Pet. App. 5a. To the contrary, this Court's student speech doctrine under *Tinker*, Fraser, and *Kuhlmeier* fully applied. Pet. App. 1a, 5a-6a. The court further assumed that Principal Morse correctly interpreted the phrase "BONG HiTS 4 JESUS" as "express[ing] a positive sentiment about marijuana use." Pet. App. 6a-7a.

The panel ruled, however, that the district court incorrectly applied *Fraser*'s "plainly offensive" standard. The court narrowly interpreted *Fraser* as allowing only prohibitions on student speech of a "sexual nature." Pet. App. 9a. Applying that circumscribed standard, the court concluded: "Frederick's speech was not sexual (sexual speech can be expected to stimulate disorder among those new to adult hormones)." *Id.* According to the panel, the school district's policy of suppressing pro-drug messages was, on the other hand, just one of any number of "social message[s] contrary to the one favored by the school." That being so, in the Ninth Circuit's view, a school district is "not

entitled to suppress speech that undermines whatever mission it defines for itself." Pet. App. 7a, 12a.

The court of appeals further determined that *Kuhlmeier*, which acknowledged schools' ability to regulate the content of school-sponsored speech, 484 U.S. at 273, was inapplicable. Pet. App. 10a-11a. The panel noted that, here, Frederick displayed the banner off school property, in what the court characterized as a "non-curricular activity" that was only "partially supervised."[3] Pet. App. 10a-11a, 17a. Thus, even though characterizing the relay as a "school authorized" activity, Pet. App. 7a, the court below did not view the banner as speech that was either sponsored or endorsed by the school. Pet. App. 10a.

Having eliminated *Fraser* and *Kuhlmeier* as bearing on the analysis, the Ninth Circuit concluded that the case was governed solely by *Tinker*. Under the rationale of that watershed decision, the court of appeals opined that petitioners could not punish Frederick for displaying his banner absent a showing that the banner "disrupts the good order necessary to conduct [the school's] educational function." Pet. App. 12a. The panel concluded that petitioners could not demonstrate the requisite element of

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[3] The Ninth Circuit did not identify any error in the district court's findings that teachers and administrators monitored and supervised students during the torch relay event. The court of appeals, however, described the event as "partially supervised" based on affidavits from a few of Frederick's friends who claimed that some of the 1,000-plus Juneau-Douglas High School students left the event or were otherwise unruly. Pet. App. 2a, 17a; J.A. 32, 36-38. As the district court observed, these student affidavits did not contradict evidence presented by the school district that set forth in detail the supervisory roles of administrators and teachers. Pet. App. 34a; *see* J.A. 23-24, 47-56. Notwithstanding the Ninth Circuit's circumlocution, it is undeniable that there was official school supervision at the relay event.

"disruption." In consequence, as the Ninth Circuit saw it, petitioners had violated Frederick's First Amendment rights. Pet. App. 18a.

The court of appeals further concluded that Principal Morse was not entitled to qualified immunity. In the panel's view, the case law "succinctly explained how to apply the various Supreme Court doctrines . . . , thus ensuring that opacity in this particular corner of the law has been all but banished." Pet. App. 20a. Having found a constitutional violation, the Ninth Circuit determined that Principal Morse violated Frederick's "clearly established rights." *Id.* The panel thus vacated the district court's judgment and remanded to determine Frederick's monetary damages. Pet. App. 22a.

5. The Ninth Circuit subsequently denied the petition for rehearing and rehearing en banc. Pet. App. 45a-46a. On August 28, 2006, the Juneau School Board and Ms. Morse filed a Petition for a Writ of Certiorari in this Court. On December 1, 2006, the Court granted the petition.

SUMMARY OF ARGUMENT

In reversing the district court's grant of summary judgment in favor of the Juneau School Board and Deborah Morse, the Ninth Circuit embraced an unduly narrow reading of this Court's teachings with respect to the free speech rights of public school students. To make very bad matters profoundly worse, the court below fashioned an approach to qualified immunity doctrine that conflicts with this Court's precedents and is dangerously unsettling to thousands of public school educators and administrators across the country. The Ninth Circuit was doubly wrong.

In its teachings with respect to student speech principles, this Court has consistently recognized that public educational institutions possess "special characteristics" that profoundly shape the contextually-sensitive contours of Free Speech

doctrine. From its watershed decision in *Tinker*, 393 U.S. 503, through its subsequent decisions in *Fraser*, 478 U.S. 675, and *Kuhlmeier*, 484 U.S. 260, this Court has both protected nondisruptive political speech by students, while respectfully deferring to school administrators' judgments in cabining expression that is inconsistent with the educational function of public schools.

In its First Amendment analysis, the Ninth Circuit fundamentally misconceived the nature and scope of the mission of public education in this country—as elucidated by this Court in both *Fraser* and *Kuhlmeier*—and, at the same time, wildly enlarged the ambit of purportedly political speech. In doing so, the court of appeals substituted its unforgivingly libertarian worldview for the considered judgment of school officials (and school boards) in seeking, consistent with Congress' statutory mandate, to foster and encourage a drug-free student lifestyle. Frederick's banner display not only radically changed the subject from the Olympic Torch Relay ceremony to illegality-promoting, distracting banter, his message itself lay far outside the province of *Tinker*-protected political expression.

To the contrary, as Chief Judge Sedwick rightly concluded, the banner's ambiguous but obtrusive message fell comfortably within the ambit of *Fraser*'s focus on promoting appropriate norms of discourse and civility. *Kuhlmeier* likewise supports the school authorities' decision to just say no to respondent's whimsically drug-focused message, inasmuch as the banner—if left undisturbed—could have told not only the high school student body but the larger community that drug-use promotion is openly tolerated within the local public high school. Nothing in law or logic, much less common sense, requires such an extravagant result.

The Ninth Circuit also strayed from this Court's qualified immunity jurisprudence, as embodied in decisions such as

Saucier v. Katz, 533 U.S. 194 (2001). The court of appeals' conclusion that Deborah Morse, a paradigmatic conscientious educator and administrator, should face a potentially ruinous award for money damages, by virtue of her enforcement actions directed against respondent, cries out for the Court's muscular disapprobation.

As a threshold matter, for reasons already adumbrated, the court of appeals fell into error as a matter of substantive First Amendment law. With that foundation removed, the edifice of potential personal liability for money damages entirely collapses. Even assuming arguendo, however, that Principal Morse was in constitutional error in enforcing the School Board's anti-drug-message policies, the Ninth Circuit was still mistaken in its articulation and application of qualified immunity principles. Under this Court's objective test, immunity doctrine provides a shield from civil damages suits unless "it is obvious that no reasonably competent officer would have concluded" that the actions at issue were constitutional at the time they were undertaken. *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

Principal Morse abundantly satisfies that objective standard. Responsible for maintaining order and proper decorum at a celebratory gathering of more than 1,000 high school students, the principal was confronted with a flagrant, inherently disruptive violation of a written school policy proscribing pro-illegal-drug messages. She responsibly took the appropriate action to ensure that the Olympic Torch Relay event was not further disrupted by Frederick's pro-drug banner. Nor does the fact that Frederick was not physically on school grounds at the time of the banner display exempt him from school discipline. At the pivotal moment when engaging in his expressive conduct, Frederick was a student participating in a school activity during school hours. A reasonable principal could well have believed that enforcing a well-established policy against promoting illegal

substances at a non-classroom school activity was entirely lawful, and indeed required by School Board mandate. By doing so, the principal acted entirely reasonably. Accordingly, her conduct should, under this Court's body of qualified immunity jurisprudence, be fully immunized from judicial condemnation.

ARGUMENT

Under challenge to address declining academic performance in the age of globalization, American public education finds itself—even at a time of war—as a vitally important subject in the unfolding democratic conversation about the Nation's future. The Ninth Circuit's destabilizing decision in this sensitive arena renders all the more daunting the vital task of teachers, administrators, and volunteer school board members in attending holistically to the needs of millions of students entrusted every school day to their charge. In reversing the district court's grant of summary judgment in favor of the Juneau School Board and Deborah Morse, the Ninth Circuit has dramatically altered the legal landscape of public education law in the United States. As to both the First Amendment and the law of qualified immunity, the court of appeals' uncompromisingly libertarian vision is deeply unsettling to public school educators across the country. The decision below is doubly—and dangerously—wrong. The judgment should be reversed.

I. THE JUNEAU SCHOOL OFFICIALS DID NOT VIOLATE FREDERICK'S FIRST AMENDMENT RIGHTS WHEN THEY DISCIPLINED HIM FOR VIOLATING SCHOOL POLICIES AGAINST PROMOTING ILLEGAL SUBSTANCES AT A SCHOOL ACTIVITY.

A. The "special characteristics" of the school setting require deference for school officials' actions.

Throughout the fifty States (and the District of Columbia), public education serves what this Court long ago described as "a principal instrument in awakening the child to cultural values." *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954). Through government-operated educational institutions, large and small, the vast majority of young Americans are prepared "for later professional training" and for "adjust[ing] normally to [their] environment." *Kuhlmeier*, 484 U.S. at 272 (quoting *Brown*, 347 U.S. at 493). Those who serve as teachers and administrators in this challenging environment are tasked with a weighty and delicate responsibility. In prescribing and controlling student conduct, public educators are inexorably required to balance students' constitutionally-guaranteed liberties with the bedrock duty to educate young minds, including fashioning "the boundaries of socially appropriate behavior." *Fraser*, 478 U.S. at 681. Pursuit of these goals inevitably requires authorities to regulate speech, symbolic and otherwise, in a manner impermissible outside the school setting. *Id.* at 682; *accord Bd. of Educ. v. Earls*, 536 U.S. 822 (2002) (upholding high school's random suspicionless drug testing policy); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995) (permitting random drug testing of high school student athletes).

In the First Amendment context, this Court has long emphasized that the rights of students in the public schools "are not automatically coextensive with the rights of adults in

other settings." *Fraser*, 478 U.S. at 682 (citing *New Jersey v. T.L.O.*, 469 U.S. 325, 340-342 (1985)). Thus, while students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," students' rights must be "applied in light of the *special characteristics* of the school environment." *Tinker*, 393 U.S. at 506 (emphasis added). The "uninhibited, robust, and wide-open" free speech in adult discourse, as ordained in *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964), is manifestly different from the latitude accorded to schoolchildren in a "custodial and tutelary" environment. *Vernonia*, 515 U.S. at 655.[4]

As this Court has acknowledged on numerous occasions, the resolution of conflicts arising in the daily operation of school systems "is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges." *Kuhlmeier*, 484 U.S. at 273 (citations omitted). Only when a decision to censor student expression has no valid educational purpose is the First Amendment so "*directly and sharply implicate[d]*" as to require judicial intervention to protect students' constitutional rights. *Id.* (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)). Thus, in discerning the proper doctrinal limitations upon the

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[4] So staunch a defender of the "marketplace of ideas" as John Stuart Mill saw this delineation in his theories on individual liberty:

> It is, perhaps, hardly necessary to say that this doctrine is meant to apply only to human beings in the maturity of their faculties. We are not speaking of children or of young persons below the age which the law may fix as that of manhood or womanhood. Those who are still in a state to require being taken care of by others must be protected against their own actions as well as against external injury.

John Stuart Mill, *On Liberty* 69 (Gertrude Himmelfarb ed., Penguin Books 1974) (1859).

baseline liberty guaranteed by the Free Speech Clause, a guiding principle unifying this Court's teachings is that "[a] school need not tolerate student speech that is inconsistent with its 'basic educational mission.'" *Id.* at 266 (citing *Fraser*, 478 U.S. at 685). Firmly embedded in this Court's student speech jurisprudence, that overarching principle is the beginning and end of this case.

1. *Tinker* protects speech that does not intrude upon the work of the schools.

The framework for student speech doctrine begins with *Tinker*. In that landmark case, the Court upheld the free speech rights of three students to wear anti-war armbands during the school day as a silent, passive political protest. 393 U.S. at 514. The Court reasoned that wearing black armbands, a traditional sign of mourning, was expressive conduct akin to pure speech, which is entitled to comprehensive protection. *Id.* at 505-06. At the same time, the *Tinker* majority recognized the unique characteristics of a public school and the unavoidable reality that administrators and teachers may suppress student speech, whether in class or out of it, that "intrudes upon the work of the schools or the rights of other students." *Id.* at 508. In the record before it, however, the Court could discern no evidence that the passive wearing of two-inch armbands disrupted school operations. *Id.*[5]

The *Tinker* Court had no occasion to spell out in detail the extent or nature of "disruption" necessary to trigger a

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[5] Justice Fortas' majority opinion described student reaction to the armbands as provoking "no threats or acts of violence" other than a "few . . . hostile remarks." *Id.* at 508. In dissent, Justice Black found, to the contrary, that the evidence did support a finding of disruption, namely, that, in addition to hostile comments, student attention was diverted in classrooms. *Id.* at 517-18 (Black, J., dissenting).