No. 06-278

IN THE
SUPREME COURT OF THE UNITED STATES

DEBORAH MORSE; JUNEAU SCHOOL BOARD,
Petitioners,

v.

JOSEPH FREDERICK,
Respondent

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

BRIEF OF *AMICI CURIAE* NATIONAL SCHOOL BOARDS ASSOCIATION, AMERICAN ASSOCIATION OF SCHOOL ADMINISTRATORS, AND NATIONAL ASSOCIATION OF SECONDARY SCHOOL PRINCIPALS IN SUPPORT OF PETITIONERS

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INTERESTS OF *AMICI CURIAE*[1]

The National School Boards Association (NSBA) is a non-profit federation of state associations of school boards, representing the 95,000 school board members who govern nearly 15,000 local school districts across the United States. These local public school districts serve more than 46.5 million public students, or approximately 90 percent of the elementary and secondary students in the nation. The NSBA Council of School Attorneys is the national professional association for attorneys who represent school districts.

The American Association of School Administrators (AASA) is a professional organization of over 14,000 educational leaders across the United States and in other countries. AASA supports school district leaders who are dedicated to quality public education in their communities.

The National Association of Secondary School Principals (NASSP) is the preeminent organization and the national voice for middle level and high school principals, assistant principals and aspiring school leaders. NASSP provides its members with the professional resources to serve as visionary leaders. NASSP promotes the intellectual growth, academic achievement, character development, leadership development, and physical well being of youth through its programs and student leadership services.

Amici share a commitment to supporting and encouraging school boards and hundreds of thousands of local administrators in their efforts to promote safe and effective learning environments that consistently reinforce the academic lessons and civic values it is their duty to impart. *Amici* strongly believe that local school boards and

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[1] This brief is submitted with the consent of all parties. Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* certifies that no counsel for a party authored this brief in whole or in part. No person or entity, other than *amici*, their members, or their counsel made a monetary contribution for the preparation or submission of this brief.

administrators, and not federal courts, are generally best situated to make and enforce reasonable and appropriate policy decisions for their schools in fulfilling this duty. At a time when schools are experiencing fiscal difficulties and challenges, a clear elucidation of how schools can regulate student speech under these principles will shift the focus away from litigation and more toward education.

SUMMARY OF ARGUMENT

Each day school administrators like Principal Morse must manage the conflict between maintaining a safe and effective learning environment for all students, and dealing sensitively and lawfully with student free speech issues. The conflict can arise in many ways, ranging from the expression of religious views,[2] to racially offensive statements,[3] to violent or provocative messages,[4] to promoting activities that are illegal or inappropriate for children.[5]

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[2] *E.g., Harper v. Poway Unified Sch. Dist*. 445 F.3d 1166 (9th Cir. 2006), *pet. for cert. filed*, 75 USLW 3248 (Oct. 26, 2006) (No. 06-595) (student T-shirt expressing religious objection to homosexuality); *Bannon v. Sch. Dist. of Palm Beach County*, 387 F.3d 1208 (11th Cir. 2004) (student mural with religious images); *Walz v. Egg Harbor Tp. Bd. of Educ.*, 342 F.3d 271 (3d Cir. 2003) (student distribution of holiday gift with religious message); *Lassonde v. Pleasanton Unified Sch. Dist*., 320 F.3d 979 (9th Cir. 2003) (salutatorian speech with proselytizing comments).

[3] *E.g., Scott v. School Bd. of Alachua County*, 324 F.3d 1246 (11th Cir. 2003) (display of Confederate flag); *West v. Derby Unified Sch. Dist. No.260*, 206 F.3d 1358 (10th Cir. 2000) (same).

[4] *E.g., Lovell v. Poway Unified Sch. Dist*., 90 F.3d 367 (9th Cir. 1996) (student threats of violence against school counselor); *Governor Wentworth Regional Sch. Dist. v. Hendrickson*, 421 F. Supp. 2d 410 (D.N.H. 2006) (student wearing "tolerance patch" in school polarized by pro- and anti-gay factions).

[5] *E.g., Boroff v.Van Wert City Bd. of Educ.*, 220 F.3d 465 (6th Cir. 2000) (student T-shirt promoting anti-social, destructive and inappropriate behavior); *McCann v. Fort Zumwalt Sch. Dist*., 50 F. Supp. 2d 918 (E.D. Mo. 1999) (band performance of song promoting illegal drug use).

This Court should fine tune the balance struck in its existing jurisprudence on this subject between the competing interests of student free speech and the need for orderly and effective "on-task" schools, by providing further guidance on the authority of public school officials to regulate student expressive activity when, in their reasonable professional judgment, it impinges on the learning environment. *Amici* urge the Court to clarify the standards as follows.

First, within the analytical framework of the *Tinker-Fraser-Hazelwood*[6] trilogy, the Court should confirm that *Fraser* is not limited solely to sexual speech or sexual innuendo, but also encompasses pro-drug and other messages inimical to a school's core educational mission and ability to instill fundamental civic values and appropriate behavior. Local school boards are best suited to establish policies limiting "plainly offensive" speech, inculcating values, and regulating expression and behavior that in the reasonable professional judgment of school officials is inconsistent with their core educational mission. School boards should be able to consistently promote and enforce that educational mission in all school-authorized and school-supervised settings, both on and off campus, since the 21st century teaching environment is not, and should not be, confined to books or to the four walls of a classroom.

Second, this Court should reaffirm that *Tinker* establishes a two-prong analysis, allowing schools to regulate speech causing a substantial disruption *or* intruding on the rights of other students. This will allow school boards and administrators to foster education-focused environments where students can learn free from messages that are threatening or hurtful to them or otherwise at odds with the academic and citizenship-building work of the schools.

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[6] *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988).

Third, this Court should clarify that the less a phrase like "Bong Hits 4 Jesus" conveys a particular message and the closer it approaches self-serving nonsense, the more leeway school officials have in regulating such expression, and the more deference their reasonable judgments in such matters should receive. Given the continuum of student speech arising from this Court's precedents, beginning with political "messages" and continuing through nonsensical statements,[7] low value speech approaching the nonsensical, such as Frederick's use of the phrase "Bong Hits 4 Jesus," should receive little or no First Amendment protection.

Finally, this Court should affirm that school administrators endeavoring to enforce school district policies governing the regulation of speech should be entitled to qualified immunity because student free speech jurisprudence has remained "unsettled water ... rife with rocky shoals and uncertain currents." *Guiles v. Marineau*, 461 F.3d 320, 321 (2d Cir. 2006). If allowed to stand, the Ninth Circuit's denial of qualified immunity may operate as a disincentive for administrators to effectively implement discipline for fear of personal liability, as a disincentive to serve as a school administrator, and as a disincentive for schools to broaden the venues for educational and learning opportunities beyond the four walls of the classroom.

ARGUMENT

I. Schools Must Be Able To Maintain Safe And Effective Learning Environments To Carry Out Their Educational Mission

School administrators are professional educators charged by their states and communities with day-to-day

[7] *See Fraser*, 478 U.S. at 680, 685 (distinguishing student's vulgar statements from political message at issue in *Tinker*.)

responsibility for educating the nation's children. This Court has described education as "perhaps the most important function of state and local governments…the very foundation of good citizenship, ... [and] a principle instrument in awakening the child to cultural values...." *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954) (quoted in *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. at 272).

To prepare students for work and citizenship, school administrators must carry out school board policies adopted to promote safe, orderly, and effective operation of our schools.[8] Based on longitudinal studies, for schools to accomplish their core educational mission, they must use not only the "best teaching technology to improve academic competence," but also "reduce the barriers to learning," such as "delinquency and drug use." Richard F. Catalano et al., *The Importance of Bonding to School for Healthy Development: Findings from the Social Development Research Group*, 74 J. Sch. Health 7, at 260 (Sept. 2004) (concluding that focusing solely on academic achievement is likely to leave children behind). This nexus is unsurprising, and schools' aim to reduce the use of drugs by students and the promotion of drug use in their student population makes sense in light of documented drug use by students in public education.[9] By developing and maintaining safe learning

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[8] As Justice Breyer noted in his concurring opinion in *Board of Educ. v. Earls*, 536 U.S. 822, 840 (2002) (citation omitted): "Today's public expects its schools not simply to teach the fundamentals, but 'to shoulder the burden of feeding students breakfast and lunch, offering before and after school child care services, and providing medical and psychological services,' all in a school environment that is safe and encourages learning."

[9] *See*, *e.g.*, National Center on Addiction and Substance Abuse at Columbia University, National Survey of American Attitudes on Substance Abuse XI: Teens and Parents (Aug. 2006) at 13-16 (7 out of every 10 seventeen-year olds (69%) have been offered marijuana in their lifetimes); Rodney Skager and Gregory Austin, Highlights, 11th Biennial California Student Survey Drug, Alcohol and Tobacco Use 2005-2006

environments, schools increase academic success and reduce health-compromising behaviors by students, including illegal drug use and violence. Robert Blum & Heather P. Libbey, *Executive Summary*, 74 J. Sch. Health 7 (Sept. 2004) (evidence supporting the relationship between "school connectedness" and lower incidence of emotional distress, violence, suicide attempts, and drug use in students).[10]

In addition to social science research on "school connectedness," which establishes the link between student success and student physical and mental wellbeing, there are state and federal laws recognizing the importance of supporting the physical and mental wellbeing of students and supportive learning environments. For example, the federal Safe and Drug Free Schools Act, 20 U.S.C. § 7101 *et seq.*, requires that school districts receiving funds under this law certify that their drug prevention programs "convey a clear and consistent message that ... illegal use of drugs is wrong and harmful." *Id.* at § 7114(d)(6).[11] To create safe and drug-

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(California Attorney General's Office Fall 2006) at 7-9 (finding nearly half of 11th grade students have used drugs).

[10] This theoretical and empirical focus on what has variously been labeled "school bonding," "school climate," "school engagement," or "school connectedness" relates to students' beliefs that teachers and administrators care about student learning and care about students as individuals. The studies emphasize the role of school connectedness in reducing health-compromising behaviors and increasing academic success. The studies indicate that students with high levels of school connectedness "report lower levels of emotional distress, violence, suicide attempts, and drug use." *Executive Summary*, 74 J. Sch. Health 7 at 231 (Sept. 2004). One of the critical components for increasing connectedness is students' experiencing both physical and emotional safety at school. *Wingspread Declaration on School Connections*, 74 J. Sch. Health 7 at 233 (citations omitted).

[11] State education departments have also established grants and other measures to promote safe and supportive learning environments. *See, e.g.*, Massachusetts Department of Education, Safe and Supportive Learning Environments, Competitive Grant Fund, http://finance1.doe.mass.edu/grants grants07/rfp/791B.html; Office of Superintendent of

free schools, the vast majority of school districts across the nation, like the Juneau School District, have adopted anti-drug policies ranging from drug education programs, bans on pro-drug messages on student apparel, drug testing of students, and mandatory discipline of students found in possession of or selling drugs on school grounds.[12] Also of relevance to schools efforts to create safe learning environments through regulation of student speech are state and federal laws mandating school districts to prohibit harassment directed at students. Failure to protect students from harassment can subject school districts to statutory and common law (tort) actions, as well as to suit for violation of federal constitutional rights redressable via 42 U.S.C. § 1983, and for violation of federal laws such as Title VI and Title IX.

II. School Districts May Lawfully Regulate Student Speech That Undermines Their Core Educational Mission Or Interferes With Maintaining A Safe And Effective Learning Environment

In deciding this case, *Amici* urge this Court to clarify that school districts may lawfully regulate student speech that undermines their core educational mission or interferes with maintaining a safe and effective learning environment. *Amici* believe that this proposition is supported by this Court's student free speech precedents and its acknowledgement that the daily operation of schools should largely be left to the reasonable professional judgment of local school officials.

In constructing the *Tinker-Fraser-Hazelwood* analytical scaffolding as the means to evaluate the

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Public Instruction, Washington, Supportive Learning Environment, http://www.k12.wa.us/SchoolImprovement /Environment.aspx.

[12] Pet. for Writ of Cert. at 17-21.

continuum of student free speech issues arising in the school context, this Court has steadfastly recognized that to fulfill their educational mission, schools must be able to maintain the safe and orderly environments necessary for effective learning to take place. So while students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," student free speech rights are not co-extensive with the rights of adults in other settings *Tinker*, 393 U.S. at 506; *Fraser*, 478 U.S. at 682. Instead, the First Amendment "must be applied in light of the special characteristics of the school environment." *Hazelwood*, 484 U.S. at 266 (internal citation and quotation marks omitted). The Court has repeatedly cautioned that the constitutional balance must be struck in a way which does not impair schools' ability to perform their core educational mission which includes instilling fundamental civic values. Schools do not need to "surrender control of the American public school system to public school students.'" *Id.*, at 272, n.4, quoting *Fraser* 478 U.S., at 686 (quoting Justice Black's dissent in *Tinker*, 393 U.S. at 526).

Applying these precedents, the lower federal courts have often lost sight of these fundamental underlying principles in developing a synthesis that uses *Tinker* in considering all student speech that is not (1) vulgar, lewd, indecent, or profane under *Fraser*, or (2) school-sponsored and subject to *Hazelwood*. As the Second Circuit Court of Appeals recently observed after reiterating this synthesis,

> Our articulation of the *Tinker-Fraser-Hazelwood* trilogy is in accord with how other circuits commonly understand these cases. *See, e.g.*, *Saxe v. State Coll. Area Sch. Dist.*, 240 F. 3d 200, 214 (3d Cir. 2001) (Alito, J.) ("To summarize: Under *Fraser*, a school may categorically prohibit lewd, vulgar or profane language. Under

> *Hazelwood*, a school may regulate school-sponsored speech… Speech falling outside of these categories is subject to *Tinker's* general rule…"); *Chandler v. McMinnville Sch. Dist.*, 978 F.2d 524, 529 (9th Cir. 1992) ("We conclude…that the standard for reviewing the suppression of vulgar, lewd, obscene, and plainly offensive speech is governed by *Fraser*, school-sponsored speech by *Hazelwood*, and all other speech by *Tinker*.")

Guiles v. Marineau, 461 F. 3d 320, 325-26 (2d Cir. 2006), *petition for cert. filed*, 2006 WL 3462961 (U.S. Nov. 28, 2006) (No.06-757). Yet, as the *Guiles* court admitted, it is not entirely clear that *Tinker* encompasses all student speech not sponsored by schools, subject to *Fraser*,[13] just as it is not certain what type and quantum of "substantial disruption" or "material interference with" school activities will remove a student's expressive activity from the scope of *Tinker* protection:

> Proceeding according to the understanding that *Tinker* applies to all non-school-sponsored student speech that is not lewd or otherwise vulgar, we note that if the "material and substantial interference" test is meant to describe vocal protest and disputes

[13] Indeed, this Court's elucidation—and limitation—of *Tinker* in *Fraser* came about as the result of the Ninth Circuit Court of Appeals' determination, based upon an overly broad reading of *Tinker*, that school officials could not penalize a student's lewd campaign oration at the school assembly. 478 U.S. at 680 (citation omitted) ("[I]n *Tinker*, this Court was careful to note that the case did 'not concern speech or action that intrudes upon the work of the schools or the rights of other students.'").

> of similar character and magnitude, schools must tolerate a great deal of speech that is not lewd or vulgar.

Id. at 326. Nonetheless, the Ninth Circuit appears to have proceeded on precisely that theory in this case, without considering how requiring schools to tolerate student speech at odds with core school values erodes a school district's ability to fulfill its mission. Recognition of that mission was at the heart of the course correction the Court effected in *Fraser*, to which we now turn.

A. Under *Fraser* Schools Can Regulate Messages Inimical To Fundamental School And Civic Mores, Such As Messages That Tout Or Trivialize Illegal Use Of Drugs In All School Authorized Settings

The *Fraser* Court prefaced its First Amendment analysis by pointing out—not for the first time—the centrality of public education to this country's particular form of social contract. *Fraser*, 478 U.S. at 681 (in preparing student for citizenship in the Republic, public education also "must inculcate the habits and manners of civility as values in themselves conducive to happiness and as indispensable to the practices of self-government in the community and the nation.") (quoting C. Beard & M. Beard, New Basic History of the United States 228 (1968)).

Although this Court said inculcation of fundamental values must include tolerance of even unpopular political and religious views, it emphasized that this imperative should not outweigh the educational goals of schools in ensuring that students gain knowledge and skills critical to their development into healthy and productive citizens:

> The undoubted freedom to advocate unpopular and controversial views in

> schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior. Even the most heated political discourse in a democratic society requires consideration for the personal sensibilities of the other participants and audiences.

Id.

Despite *Fraser*'s language focusing on the schools' ability to regulate student speech in a manner consistent with carrying out their educational mission, school districts, like Juneau-Douglas High School in this case, haled into court to defend their regulation of student speech often encounter courts that interpret *Fraser* too narrowly, with little focus on the schools' mission to inculcate values or teach socially appropriate behavior, but instead limiting *Fraser* to sexually explicit speech. The Ninth Circuit did so in the case at bar, restricting *Fraser* to cases involving sexual speech that may result in campus disorder among those "new to adult hormones." *Frederick*, 439 F.3d at 1119. Under such an interpretation, student speech must be "'plainly offensive' in the way sexual innuendo is," before it can be proscribed under *Fraser*, and a phrase about Jesus and drug use does not rise to that level. *Id.*. The Second Circuit has likewise wrongly confined *Fraser's* reach to student speech that is "lewd," "vulgar," "indecent," or "plainly offensive," meaning speech that "connote[s] sexual innuendo or profanity." *Guiles*, 461 F.3d. at 327.

These decisions ignore the fundamental principle underlying this Court's decision in *Fraser*. In acknowledging the profound role of schools in teaching "socially appropriate behavior" and "inculcating values," *Fraser* did not limit them to regulating only sexual speech. Rather, this Court declared a school district need not tolerate speech that is "inconsistent with its basic educational mission." 478 U.S. at 685.

Applying *Fraser* straightforwardly, other courts have cut a wider swath that properly allows schools to regulate speech that advocates, among other things, anti-social behavior, alcohol and drug use as antithetical to their educational mission. *E.g., Boroff v. Van Wert City Bd. of Educ.*, 220 F.3d 465, 471 (6th Cir. 2000) (upholding district's ban on Marilyn Manson T-shirts in light of school's dress code prohibiting clothing with offensive illustrations, or drug, alcohol, or tobacco slogans; and crediting school's contention that T-shirts interfered with school's basic educational mission by promoting anti-social and destructive conduct and demoralizing values, and by mocking a religious figure); *Nixon v. Northern Local Sch. Dist.*, 383 F.Supp.2d 965, 971 (S.D. Ohio 2005) (speech promoting suicide, drugs, alcohol, or murder can be regulated under *Fraser*); *Barber v. Dearborn Pub. Sch.*, 286 F.Supp.2d 847, 859 (E.D. Mich. 2003) (school officials may curtail speech related to alcohol or drugs); *Broussard v. Sch. Bd.*, 801 F.Supp. 1526, 1536 (E.D. Va. 1992) (speech "need not be sexual to be prohibited by school officials; speech that is merely lewd, indecent or offensive is subject to limitation"); *Gano v. Sch. Dist. No. 411*, 674 F. Supp 796, 798-99 (D. Idaho 1987) (T-shirt with caricature of three school administrators holding liquor and appearing drunk on school property was "clearly offensive"). These decisions recognized that absent political speech, schools may constitutionally regulate student messages promoting or trivializing drug use.[14]

[14] Application of First Amendment jurisprudence in the promotion of safe, drug-free schools is consistent with this Court's Fourth Amendment jurisprudence allowing schools to curtail student drug use. In *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 661 (1995), this Court recognized the schools' compelling interest in reducing student drug use. "That the nature of the concern is important—indeed perhaps compelling—can hardly be doubted ... School years are the time when the physical, psychological, and addictive effects of drugs are most severe." *Id.* With these concerns in mind, under the Fourth Amendment balancing test, and the legal and practical principle that schools have "custodial and tutelary"

By essentially equating a school's educational mission solely with classroom teaching, the Ninth Circuit also erroneously dismissed *Fraser*'s admonitions regarding schools' broad responsibility and its legal implications. 478 U.S. at 683 ("The process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; schools must teach by example the shared values of a civilized social order.")

Nonetheless, the Ninth Circuit confined the school district's educational mission to the narrowest precincts possible, calling the students' attendance at the Olympic Torch relay "a non-curricular activity that was only partially supervised by school officials" where presumably any student speech would be permissible because it would not interfere with the school's basic educational mission. *Frederick*, 439 F.3d at 1123.

In reality, today's teaching environment necessarily extends well beyond classroom walls to co-curricular and extra-curricular activities occurring in many settings, including cyberspace.[15] Yet under the Ninth Circuit's rationale, a school district may not carry forth its educational mission consistently across settings—the football game, the

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responsibility over students and "the duty to 'inculcate the habits and manners of civility'" (*id.* at 655-56 (citations omitted)), this Court upheld the school district's use of random drug testing of student athletes. *Id.* at 653. In *Board of Education v. Earls*, 536 U.S. 822 (2002), this Court noted that drug use by students had increased since its decision in *Acton*, and that "the necessity for the State to act is magnified by the fact that this evil is being visited not just upon individuals at large, but upon children for whom it has undertaken a special responsibility of care and direction." *Id.* at 834. In the end, the Court upheld the school district's random drug testing policy for students participating in extracurricular activities. *Id.* at 837.

[15] The Ninth Circuit's ruling also affects the ability of schools to be innovative and stay abreast of ever-advancing technology, such as e-learning and distance learning, by narrowly restricting settings in which schools can regulate speech.

field trip, the classroom, the school supervised activity—all situations where students remain under the custodial care and tutelage of the school.[16]

The Ninth Circuit's ruling unworkably limits district control over student speech and behavior in a manner inconsistent with the weight of authority manifest in student discipline cases. *See, e.g., Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608 (5th Cir. 2004) (student disciplined for off-campus creation of graphic and violent sketch depicting armed siege of school, later brought to school); *Layshock v. Hermitage Sch. Dist*., 412 F.Supp.2d 502 (W.D. Pa. 2006) (student disciplined for creating on an off-campus computer an online parody profile of his building principal); *Collins v. Prince William County Sch. Bd.*, 142 Fed.Appx. 144 (4th Cir. 2005) (unpublished) (student expelled under district policy allowing discipline of students for off-campus offenses). Schools should be entitled to regulate speech inconsistent with their educational mission and to maintain orderly, distraction-free teaching environments in all settings where students are entrusted to their care and tutelage.

If allowed to stand, the Ninth Circuit's ruling would severely hamper the ability of school officials to maintain

[16] Neither the federal district court nor the Ninth Circuit Court of Appeals deemed *Hazelwood* to be pertinent to Juneau school officials' right to control plaintiff Frederick's unfurled banner as an affront to the district's public position against use of illegal substances. But where students are across the street from their school, attending a school sponsored event, holding a pro-drug banner, witnesses of the event and TV viewers predictably may attribute the message—or at least school officials' nonchalance regarding the message—to Juneau-Douglas High School. In such a circumstance, a court could apply the *Hazelwood* rubric and grant greater latitude to the school in regulating the speech, which onlookers reasonably might perceive as bearing the imprimatur of the school. To the extent—and the record shows it was considerable—that school officials intended the students' witnessing of the Olympic Torch Relay to be an educational and historic experience, *Hazelwood* also would affirm their prerogative to act so as to ensure that the lesson intended was the lesson learned.

safe and effective learning environments and to accomplish their core educational mission except in the classroom or during strictly defined curricular activities. The Ninth Circuit's decision may cause schools to forego outside opportunities available in their communities or other locales because their ability to discipline students is severely constrained. This ultimately results in detriment to the students, who would lose out on a broad array of learning opportunities outside the classroom.[17]

B. Local School Boards Need Reasonable Latitude To Define Their Educational Mission, And School Officials Should Be Afforded Reasonable Professional Discretion To Determine When Speech Is Inconsistent With That Mission Or Interferes With Maintaining A Safe And Effective Learning Environment

The determination of whether student speech is at odds with schools' educational mission should be vested in school boards, which establish policies based on local community standards, and who are intimately familiar with the "facts on the ground" that may make an expression perceived as innocuous or unremarkable in one school community, so inflammatory and divisive in another one that it interferes with the educational process. As this Court has acknowledged, the "determination of what manner of speech

[17] This case presents a good example of an outside learning opportunity—how often do students have the opportunity to view an Olympic Torch Relay? Would the Juneau School District have allowed its students to attend the torch relay during school time if it knew it lawfully could not maintain order among its students? We believe the answer is no. Thus, courts should not establish legal obstacles that impair a school's ability to provide diverse learning opportunities that help them achieve the district's educational goals.

in the classroom or in a school assembly is inappropriate properly rests with the school board." *Fraser*, 478 U.S. at 683. Courts routinely defer to local school district definitions of their educational mission and priorities, and grant particular deference to school administrators in regulating speech inconsistent with that mission. *E.g.*, *Poling v. Murphy*, 872 F.2d 757, 761 (6th Cir. 1989) (deferring to decision of local elected school board the question of whether student discipline imposed for derogatory comments was appropriate); *Caudillo v. Lubbock Indep. Sch. Dist.*, 311 F.Supp.2d 550, 563 (N.D. Tex. 2004) (school district properly regulated speech inconsistent with school district's "abstinence-only" educational curriculum); *Broussard*, 801 F.Supp. at 1536 ("The federal courts, ill-suited as they are to second guess decisions of school authorities, should interfere only in the most stringent circumstances") (citations omitted).

As with the field of obscenity,[18] student speech that might not be plainly offensive to the educational mission in one community may in fact be plainly offensive speech in another community. *Sable Communications of Calif. v. Federal Communications Comm'n*, 492 U.S. 115, 125-26

[18] In the field of First Amendment obscenity jurisprudence, the test for whether the regulated purported speech is obscene is: "(a) whether 'the average person, *applying contemporary community standards*' would find that the work, taken as a whole, appeals to the prurient interest....; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." *Miller v. California*, 413 U.S. 15, 24 (1973) (emphasis added). The Court justifies such a framework, in part, based on the futility of applying a nationwide, as opposed to community standard, and instructs that it is "neither realistic nor constitutionally sound to read the First Amendment ..." to require the people of one state be bound by the standard of another state, where the "tastes and attitudes ..." may differ between the two. *Id.* at 33; *cf. Jenkins v. Georgia*, 418 U.S. 153, 157 (1974).

(1989). Since school officials handle day-to-day operations of their schools, and school board members are typically members of the local community, they are best situated to apply evolving community standards in their schools and to determine whether a student's speech is counter to or "plainly offensive" to their educational mission.[19]

This approach to First Amendment jurisprudence is consistent with this Court's longstanding recognition of the critical need for local control of public education. "No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process...." *Milliken v. Bradley*, 418 U.S. 717, 741-42 (1974); *see Dayton Board of Educ. v. Brinkman*, 433 U.S. 406, 410 (1977) ("local autonomy of school districts is a vital national tradition") (citations omitted). The tradition of local control in public education "affords citizens an opportunity to participate in decision-making, permits the structuring of school programs to fit local needs, and encourages 'experimentation, innovation, and a healthy competition for education excellence.'" *Milliken*, 418 U.S. at 741-42, quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 50 (1973).

Consistent with this proposition, "[t]he Court has long recognized that local school boards have broad discretion in the management of school affairs." *Board of Educ. v. Pico*, 457 U.S. 853, 863-64 (1982) (plurality

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[19] Interestingly, it has been noted that even if applying varying values and standards and the multitude of local school communities, "it is likely that many of the substantive values taught would be identical, including patriotism, racial and gender equality, and opposition to drugs and tobacco use." Martin H. Redish & Kevin Finnerty, *What Did You Learn in School Today? Free Speech, Values Inculcation, and the Democratic-Educational Paradox*, 88 Cornell L. Rev. 62, 87 (2002).

opinion) (citing *Meyer v. Nebraska*, 262 U.S. 390, 402 (1923); *Pierce v. Society of Sisters*, 268 U.S. 510, 534 (1925)). The Court's recognition in *Hazelwood* of the need to balance free speech concerns with educators' responsibility for children was "consistent with our oft-expressed view that the education of the Nation's youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges." 484 U.S. at 273 (citations omitted). "Local school boards must be permitted 'to establish and apply their curriculum in such a way as to transmit community values,' and [ ] 'there is a legitimate and substantial community interest in promoting respect for authority and traditional values be they social, moral, or political.... Of course, courts should not 'intervene in the resolution of conflicts which arise in the daily operation of school systems' unless '*basic constitutional values' are 'directly and sharply implicate[d]' in those conflicts*." *Pico*, 457 U.S. at 864, 867 (citing *Epperson v. Arkansas*, 393 U.S. 97 (1968) (emphasis added).

Under these principles and sensible traditions, school boards and school administrators are in the best position to determine whether student speech interferes with the particular school's educational mission. In no way does this mean that school officials have unbridled discretion to define and promote their educational mission in a manner that capriciously tramples on students' First Amendment rights. Indeed, local school officials experienced at establishing their schools' educational mission through adoption and implementation of district policies are trained to take many factors into consideration in developing school policies.[20] A

[20] For example, *Amicus* NSBA provides technical policy-making assistance to local community school boards, including a policy database, legislative updates, and guidance on federal law. *See* http://www.nsba.org. Further, over 45 state school board associations offer model policy services to assist local school boards in the development of research-based and legally supported policies.

school's educational mission as defined through its policies is constrained, and sometimes mandated, by voluminous and expanding legal rules and regulations; informed by scientific research, educational expertise, and community input; and ultimately subject to the censure of the ballot box. The resulting policies establish the controls that make the management of schools possible, also making school boards accountable to their local communities. *See generally* Frederick M. Hess, *School Boards at the Dawn of the 21st Century* (2002), http://www.nsba.org/site/docs/1200/1143.pdf (presenting data on both input from community on policy issues and mechanism for school board elections).

Thus, the Ninth Circuit's suggestion that school officials somehow might arbitrarily define their educational mission in a manner that would allow them to deprive students of free speech rights could not be further from reality. Certainly this Court in both *Fraser* and *Hazelwood* had little difficulty rejecting precisely this same concern. *Fraser,* 478 U.S. at 680 (noting Ninth Circuit's concern that granting school district "unbridled discretion" to determine what discourse is decent would "increase the risk of cementing white, middle-class standards"); *Hazelwood,* 484 U.S. at 280 (Brennan, J. dissenting) ("If mere incompatibility with the school's pedagogical message were a constitutionally sufficient justification for the suppression of student speech, school officials could censor students in each of… [several] hypotheticals, converting our public schools into 'enclaves of totalitarianism.'") (citing *Tinker*). Most recently, rather than either subjecting the principal's actions in *Hazelwood* to an excessively narrow *Tinker* standard or simply giving school officials *carte blanche*, this Court recognized the professional discretion that school officials must have and determined that each of the principal's disputed decisions was reasonable under the circumstances. *Id.* at 274-76. The nation's democratically governed schools hardly have descended into despotism as a result.

C. Allowing Schools To Regulate Student Speech That Undermines Their Educational Mission Or Interferes With Maintaining A Safe And Effective Learning Environment Is Supported By *Tinker's* Two-Part Standard

This Court's decision in *Tinker* established that school authorities may constitutionally regulate "conduct by the student, in class or out of it, which for any reason—whether it stems from time, place, or type of behavior—materially disrupts classwork or involves substantial disorder *or* invasion of the rights of others." *Tinker*, 393 U.S. at 513 (emphasis added). By using the word "or", this Court conveyed that *Tinker* permits school regulation of student speech in either of two scenarios. In the first, a public school can regulate student speech when it results in "substantial disruption of or material interference with school activities," or can reasonably be forecast to do so. *Tinker*, 393 U.S. at 514. In the second, a school can proscribe student speech that collides with the rights of other students to be "secure and to be let alone" or that would "impinge upon the rights of other students" without a showing of substantial disruption. *Id*. at 508, 509; *see also* Hazelwood, 484 at 273 n. 5 (determining that analysis of case under second prong of *Tinker* was unnecessary). In the second scenario, school officials need not show actual or potential disruption before they can regulate the student speech in question.

Despite *Tinker's* delineation of two separate and distinct circumstances justifying regulation of student speech, the Ninth Circuit decision conflated the two prongs of *Tinker* and focused exclusively on the asserted lack of substantial disruption. In *Frederick*, the court did not determine whether the student's banner interfered with the rights of others to be let alone and free from insulting or

derogatory remarks disrespectful of their religion. The phrase "Bong Hits 4 Jesus" might plausibly be interpreted as mocking Christianity's central religious figure and trivializing faith traditions or sincerely held religious beliefs in general. Although the school district in this case did not seek to justify its action against Frederick on the basis that his speech interfered with the religious rights of others, evidence in the record suggests that Frederick himself recognized that his banner might be offensive to devout Christian students. Despite this basis for invoking the second prong of *Tinker*, the Ninth Circuit instead incorrectly truncated *Tinker*'s holding into one prong and focused only on evidence of disruption.

Judicial disregard of the second part of the *Tinker* test has chilling and harmful consequences for schools and students. School officials accustomed to the sting and cost of summons and complaint may well hesitate to step in and regulate a student speaker's hurtful "opinion" message, which might conceivably implicate First Amendment interests, if they believe that the Constitution permits them to intervene only if they can prove actual or likely disruption (to the after-the-fact satisfaction of a federal judge). Yet hurtful messages by students feeling their free speech oats at the expense of others, even if the others suffer those messages in silence, can be toxic to a school's learning environment. *E.g.*, *Shore Regional High Sch. Bd. of Educ. v. P.S.*, 381 F.3d 194 (3d Cir. 2004) (finding that failure of school district's efforts to protect student from peer harassment constituted denial of free appropriate education for purposes of Individuals with Disabilities Education Act).

Other federal appellate decisions have properly treated interference with the rights of others as a separate and independent justification under *Tinker* for regulating student expressive activity. *E.g.*, *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166 (9th Cir. 2006) (upholding school intervention against derogatory and injurious expression

directed at student's minority status such as race, religion, and sexual orientation without showing of disruption and interpreting *Tinker* to encompass student's right to be secure not merely "from physical assaults but also from "psychological attacks that cause young people to question their self-worth and their rightful place in society); *accord West v. Derby Unified Sch. Dist. No. 260,* 206 F.3d 1358, 1366 (10th Cir. 2000) ("display of the Confederate flag might …interfere with the rights of other students to be secure and let alone"). *Harper* vividly illustrates the delicate balancing in which school officials engage, as the free speech dispute arose in a context that included a sizable recent jury verdict against the school district for failing to protect two former students from severe peer harassment based on sexual orientation. 445 F.3d at 1172 n.6.

This Court should take the opportunity presented by its review of *Frederick v. Morse* to underscore that the second part of the *Tinker* test stands independent of the first, and enables school officials to prohibit student speech that by its nature interferes with the rights of others in the school community without a showing of substantial disruption. To hold that schools can regulate student speech that undermines their basic educational mission—reasonably defined to include teaching against illegal use of drugs and palpably hurtful expressions of disrespect for others—comes nowhere near undoing *Tinker*. Students will continue to have a wide berth to be able to engage in political speech, protest school policies, and express personal viewpoints.[21] When student speech implicates First Amendment rights, school districts still will have, as they do now, the burden of showing that their regulation of the speech is allowed by this Court's precedents.

[21] The court in *Frederick* stated, "Under *Tinker*, a school cannot censor or punish students speech merely because the students advocate a position contrary to government policy." *Frederick*, 439 F.3d at 1118. We agree.

D. Low Value Speech Is Not Worthy Of First Amendment Protection, And The Lower Value Of The Speech, The More Discretion School Officials Must Be Afforded

The primary concern of the free speech guarantee is "that there be full opportunity for expression in all of its varied forms to *convey a desired message*." *Young v. American Mini Theatres*, 427 U.S. 50, 76 (1976) (citations omitted) (emphasis added). The First Amendment protects conduct, symbols, and non-verbal speech that attempts to express an idea or convey a message that will likely be understood by the viewer. *Clark v. Community for Creative Non-Violence* 468 U.S. 288, 296 (1984). Alleged expressive activity that lacks this communicative element falls outside the purview of First Amendment protection. *See Blau v. Fort Thomas Public Sch. Dist.*, 401 F.3d 381 (6th Cir. 2005) (dress code policy could not be challenged on First Amendment theory amounting to "nothing more than a generalized and vague desire to express…middle-school individuality); *Bivens v. Albuquerque Pub. Sch.*, 899 F. Supp 556, 560-61 (D.N.M. 1995) (dress code on sagging pants failed because court could not discern any "particularized message" that would be apparent to viewers, and "[n]ot every defiant act by a high school student is constitutionally protected speech"); *Olesen v. Board of Educ. of Sch. Dist No. 228*, 676 F. Supp. 820 (N.D. Ill. 1987) (male student's desire to wear an earring for asserted purpose of expressing his individuality, was not a "message" and was therefore subject to regulation by school authorities.)

When speech approaches the nonsensical, it receives little or no First Amendment protection, precisely because no intelligible message is being conveyed and it has little or no value in the school setting. To the extent the student's display of jabberwocky in this case may have been aimed at

drawing attention to himself by means of an eye-catching but inscrutable juxtaposition of drug slang with the word "Jesus," the First Amendment would not oblige Juneau school officials to indulge him. Such an ambiguous and low value "message" does not necessarily need or merit First Amendment protection. *See Salehpour v. University of Tennessee*, 159 F.3d 199, 208 (6th Cir. 1998) *cert. denied*, 526 U.S. 1115 (1999) ("Where the expression appears to have no intellectual content or even discernable purpose, and amounts to nothing more than expression of a personal proclivity designed to disrupt the educational process, such expression is not protected and does violence to the spirit and purpose of the First Amendment.").

Here, Frederick sought to grab attention at the Olympic Torch Relay by unfurling a banner containing words he admitted to be "just nonsense" and "designed to be meaningless and funny, in order to get on television." *Frederick*, 439 F.3d at 1116. Instead of treating the banner as an admitted publicity stunt, the Ninth Circuit infused the nonsensical words with a "degree of political salience," manufacturing a political connection to the legalization of marijuana never intended by the student and not one that could reasonably be perceived by a school administrator or the public as political speech.

Taking Frederick's own description of his message as "nonsense" at face value in no way diminishes the reasonableness of Principal Morse's view that the banner displayed a pro-drug message and thus was contrary to school district policy. Courts customarily defer to the judgment of school administrators in assessing the meaning and effect of student speech. *See Burnside v. Byars*, 363 F.2d 744, 748 (5th Cir. 1966) ("In formulating regulations, including those pertaining to the discipline of school children, school officials have a wide latitude of discretion."). Where a speaker does not intend to convey a specific message, the fact that some hearers attribute (rightly

or wrongly) a meaning to the message does not endow the expression with First Amendment protection. But also there was evidence that Frederick knew that bong hits referred to smoking marijuana, although he asserted he used the words playfully, not to advocate drug use. The more Frederick's characterization of his message is credited, the more latitude Principal Morse must be afforded in her response to it. Whether the banner was just nonsense or was a pro-drug message, her action in regulating Frederick's "speech" was constitutionally acceptable.

III. The Ninth Circuit's Startling Departure From Qualified Immunity Principles Must Be Corrected To Avoid Loss Of Educational Opportunities Outside Classrooms And Loss Of Effective School Leadership Due To Fear Of Personal Liability

Qualified immunity safeguards "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). The immunity inquiry acknowledges "reasonable mistakes can be made as to the legal constraints on particular [official] conduct," including mistakes of fact and mistakes of law. *Saucier v. Katz*, 533 U.S. 194, 205 (2001).

Qualified immunity also demands that the law be clearly established before its protections may be removed. *Saucier*, 533 U.S. at 202. A court must be satisfied that the right was so clearly established "that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). Indeed, as the Ninth Circuit has construed this Court's rulings, the "*specific* contours of the law" must be well developed or sufficiently clear. *Rudebusch v. Hughes*, 313 F.3d 506, 518 (9th Cir. 2002).

Student free speech jurisprudence is anything but

clear, with courts diverging widely in their application of this Court's precedents. *Compare Boroff* , 220 F.3d 465, 471 (upholding ban on T-shirts under *Fraser* based on the reasonable view that they promoted anti-social and destructive behavior, demoralizing values and disrespect of religious views of other students, all contrary to school's educational mission) and *Guiles*, 461 F.3d 328 (holding that *Fraser* applies solely to "speech containing sexual innuendo and profanity"). It is commonplace to read opinions in this genre in which courts remark on the "lack of clarity" in the Supreme Court's student speech cases, *id.* at 326, or that "[m]any aspects of the law with respect to students' speech…are difficult to understand and apply." *Hosty v. Carter*, 412 F.3d 731, 739 (7th Cir. 2005) *(en banc), cert. denied*, _U.S._, 126 S. Ct. 1330 (Feb. 21, 2006) (No. 05-377), also granting qualified immunity to defendant administrators in that case, in as much as "public officials need not predict, at their financial peril, how constitutional uncertainties will be resolved." *Id*.

The procedural history in this case alone demonstrates the unclear nature in the "*specific* contours of the law" and clearly shows that Principal Morse was not "plainly incompetent" and that she did not "knowingly violate the law." The federal trial judge, applying *Fraser*, ruled that she did not violate the student's First Amendment rights, reasoning that a school district is permitted to regulate speech that "might undermine the school's basic educational mission." The Ninth Circuit instead determined that Frederick's punishment for displaying his banner was "best reviewed under *Tinker*, rather than *Fraser*" and required the school district to show a "substantial disruption to its educational mission" to justify the discipline. *Frederick*, 439 F.3d at 1123. Even if the Ninth Circuit correctly applied *Tinker* rather than *Fraser*, and rightly found that the district failed to meet the substantial disruption bar, Principal Morse's "mistakes" on the law and the facts must be deemed

at least reasonable, thus entitling her to qualified immunity. The Ninth Circuit's determination that Principal Morse should have known that her actions were violating Frederick's "clearly established" free speech rights not only flies in the face of this Court's qualified immunity doctrine, but also is at odds with the determination of other courts that student free speech jurisprudence is "unsettled water ... rife with rocky shoals and uncertain currents." *Guiles*, 461 F.3d.at 321. *Accord Denno v. Sch. Bd. of Volusia County*, 218 F.3d 1267, 1274 (11th Cir. 2000)(granting qualified immunity to school administrators who disciplined a student for displaying a Confederate flag on school grounds, and stating "it would be inappropriate to hold government officials to a higher level of knowledge and understanding of the legal landscape than the knowledge and understanding displayed by judges whose everyday business it is to decipher the meaning of judicial opinions.").

Refusing to grant immunity to school administrators despite the lack of clarity over student free speech rights will have a deleterious impact on the more than 15,000 school districts and 225,000 school administrators across this nation. The fear of personal liability will deter administrators and school leaders from disciplining students in many situations in which regulation is proper and needed. A national survey, based on a random sample of middle and high school teachers and parents, shows almost unanimous support for the position that schools need good discipline and behavior to flourish and that part of a school's mission is to instruct students to follow the rules in order to become productive citizens. *Teaching Interrupted, Do Discipline Policies in Today's Public Schools Foster the Common Good?*, Public Agenda (2004), www.publicagenda.org. Both parents and teachers showed high levels of support for discipline commonly referred to as the "broken windows" approach in which schools strictly enforce little rules to create the right tone and to avoid larger problems. *Id*. at 5.

Allowed to stand, the Ninth Circuit's qualified immunity rationale will create a chilling effect for administrators following this approach and result in the discipline of students for inappropriate speech only in the most egregious circumstances.

So, too, will the fear of personal liability circumscribe student instructional venues, such as the Olympic Torch Relay, utilized by school districts to teach a variety of lessons that support their core educational mission because they are hampered in their ability to regulate and discipline students.

It is also foreseeable that the specter of personal liability will serve as a deterrent to qualified educators becoming school administrators. Given the current shortage of administrators in many areas of this county, the Ninth Circuit's decision will make it even more difficult to find qualified individuals to fill these positions. Del Stover, *Looking for Leaders, Urban districts find that the pool of qualified superintendents is shrinking*, Amer. Sch. Bd. J. (December 2002) www.asbj.com/specialreports/1202Special%20Reports/S2.html ("there are too few skilled administrators moving up the supply pipeline"; identifying that the most difficult position to fill in California is the high school principalship); Lynn Olson, *Principals Wanted: Apply Just About Anywhere*, Educ. Week (Jan. 12, 2000), www.edweek.org/ew/articles/2000/01/12/17leadside.h19.html?print=1 (indicating many teachers are disinterested in becoming administrators because position lacks appeal). Individuals who are taking these positions already do so at great personal sacrifice[22] and should not be burdened with

[22] *See, e.g.*, Philip A. Cusick, *The Principalship? No Thanks. Why teachers won't trade the classroom for the office*, Educ. Week (May 14, 2003), www.edweek.org/ew/articles/2003/05/14/36cusick.h22html?qs=principal shortages&print=1 (identifying time demands, compensation issues, longer hours, and increased responsibilities of principals, which include school improvement, annual reports, accountability, core

the fear of lawsuits and personal liability simply for carrying out their daily disciplinary duties.

Taken together, the ill effects of the Ninth Circuit's mistreatment of qualified immunity will undermine the ability of schools to maintain discipline and operate according to their core educational mission. This surely is not a result the Supreme Court intends.

CONCLUSION

This Court should clarify existing student free speech jurisprudence in this country. At the heart of this Court's prior precedents is the recognition that school districts should be permitted to regulate speech that, in the reasonable professional judgment of school officials, undermines their core educational mission or interferes with maintaining a safe and effective learning environment for all students. Such regulation should encompass messages inimical to fundamental school and civic mores as defined by local school boards, such as messages touting illegal drug use, messages causing a substantial or material disruption to the work of the schools, speech that intrudes upon the rights of other students, and school-sponsored speech.

Although the present trilogy provides some distilled standards, the contours of student free speech jurisprudence in this nation are far from clear. Qualified immunity demands that the law be clearly established before its protections may be removed.

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curriculum, student safety, gender and equity issues, and staff development; attributing increase in principal responsibilities to "the way Americans think about schools—that they can be all things to all students").

For the foregoing reasons, this Court should reverse the decision of the Ninth Circuit Court of Appeals in this matter.

Respectfully submitted,

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