No. 06-278

In the Supreme Court of the United States

JUNEAU SCHOOL BOARD, DEBORAH MORSE, PETITIONERS

v.

JOSEPH FREDERICK, RESPONDENT

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR D.A.R.E. AMERICA, DRUG FREE AMERICA FOUNDATION, INC. NATIONAL FAMILIES IN ACTION, SAVE OUR SOCIETY FROM DRUGS, HON. WILLIAM J. BENNETT, AND GENERAL BARRY R. MCCAFFREY AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

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

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES:

CONSTITUTIONAL PROVISIONS:

MISCELLANEOUS:

Alaska Dep't of Health & Social Services and Alaska Dep't of Educ. & Early Development, *Alaska Youth Risk Behavior Survey 2003*, available at http://www.epi.hss.state.ak.us/pubs/YRBS/2003/YRBS%202003.pdf. 6

Centers for Disease Control & Prevention, *Youth Risk Behavior Surveillance—United States 2005*, 55 MMWR Surveillance Summaries No. SS-5 (June 9, 2006), available at http://www.cdc.gov/mmwr/ PDF/SS/SS5505.pdf. 5, 6

L.D. Johnston, *et al.*, *Monitoring the Future National Results on Adolescent Drug Use: Overview of Key Findings, 2005* (NIH Pub. No. 06-5882), available at http://www.monitoringthefuture.org/pubs/monographs/overview2005.pdf. 5, 7

L.D. Johnston, *et al.*, *Monitoring the Future National Survey Results on Drug Use, 1975-2005. Vol. I: Secondary School Students* (NIH Pub. No. 06-5883), available at http://www.monitoringthefuture.org/pubs/monographs/vol1_2005.pdf 7, 8

Julia O'Malley, *Students and officials discuss teen drug use*, Juneau Empire, Nov. 26, 2002.....6

Substance Abuse & Mental Health Services Admin., *Results from the 2005 National Survey on Drug Use & Health: National Findings* (Office of Applied Studies, NSDUH Series H-30, DHHS Pub. No. SMA 06-4194), available at http://www.oas.samhsa.gov/nsduh/2k5nsduh/2k5Results.htm 5, 8

INTRODUCTION AND INTERESTS OF *AMICI CURIAE*

The decision below warrants review because the Ninth Circuit's tortured application of the rules governing student speech will severely undermine our schools' ability to protect students from the grave dangers of drug abuse. In holding Principal Morse personally liable for stopping a student from advocating that his classmates engage in illegal drug use, the Ninth Circuit failed even to consider the health and safety concerns underlying policies like the Juneau School Board's, or the magnitude of the drug problem in our schools. But the susceptibility of teens to pro-drug messages is evidenced by the fact that *half* of American secondary school students have used drugs illegally by graduation, often on school property.

The Ninth Circuit's failure to give *any* consideration, much less proper weight, to the school's interest in fighting illegal drug use led it to misapply this Court's student speech decisions. The court's attempt to limit *Bethel School District No. 403* v. *Fraser*, 478 U.S. 675 (1986), to its facts is particularly troubling: pro-drug messages are every bit as "plainly offensive" to a school's educational mission as are messages containing sexual innuendo. But regardless of the proper balance between expression and the public interest, it simply is not possible for a court properly to evaluate a student's free speech rights without taking into account school authorities' countervailing interests. This Court's intervention is needed to make that clear, before the decision below undermines the ability of school officials to combat illegal drug use by our nation's teens.[1]

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[1] The parties have consented to the filing of this brief, and their letters of consent are on file with the Clerk. In accordance with Rule 37.6, *amici* state that no counsel for any party has authored this brief in whole or in part, and no person or entity, other than the *amici*, has made a monetary contribution to the preparation or submission of this brief.

Amici curiae—consisting of two former directors of the White House Office of National Drug Control Policy and leading national nonprofit organizations dedicated to fighting substance abuse (described more fully in Appendix A)—believe that strong anti-drug policies in our schools are vital to addressing illegal drug use by teens. *Amici* further believe that preventing schools and school officials from prohibiting pro-drug displays under the aegis of the First Amendment not only endangers our children, but it is also inconsistent with settled First Amendment law. School officials bear the weighty responsibility of fighting illegal drugs and sending students a clear message that drug use will not be tolerated. At a minimum, those officials need clear guidance regarding the circumstances when it is constitutional to enforce standard school policies prohibiting students from advocating illegal drug use.

STATEMENT

The Ninth Circuit's decision, if applied nationally, would wreak havoc on anti-drug policies in public schools across the country. Without considering the nature or seriousness of the problems posed by drug use in our schools, the court below held a high school principal personally liable for stopping a student from advocating illegal drug use in the midst of a school event. See Pet. App. 1a-22a.

Standing across from his high school, in the midst of the assembled student body—which had turned out to take part in the Olympic Torch Relay—Joseph Frederick and several of his classmates unfurled a twenty-foot banner reading "BONG HITS 4 JESUS." The principal asked the students to take down the banner because it violated the school district's policy prohibiting messages that advocate the use of illegal drugs. Frederick refused, so Principal Morse confiscated his banner and gave him a ten-day suspension for that and other misconduct. See *id.* at 2a-4a.

The school district superintendent and the Juneau School Board upheld Frederick's suspension (though the superintendent reduced it to time served, which was eight days). *Id.* at 4a. The District Court too held that Principal Morse and the Juneau School Board had not violated Frederick's constitutional rights, and that, in any event, they were protected by qualified immunity. *Ibid.*; see also *id.* at 23a-44a.

The Ninth Circuit reversed, however, holding that the Constitution gives students the right to advocate—during a school event—that their classmates use illegal drugs. As far as the court was concerned, Frederick's message was more like the anti-war armbands in *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503 (1969), than the sexual innuendo running through the nomination speech in *Fraser*. See Pet. App. 8a-9a. In addition, the court held that *Hazelwood School District* v. *Kuhlmeier*, 484 U.S. 260 (1988), which recognized the right of school authorities to restrict objectionable content in a school newspaper, was entirely irrelevant because "no sponsorship or curricular activity was involved" in Frederick's display of a 20-foot banner, in front of school property, during a school event, to the student body. Pet. App. 10a-11a.

To make matters worse, notwithstanding the fact that the superintendent, the school board, and Chief Judge Sedwick all agreed that Frederick's conduct was not constitutionally protected, the Ninth Circuit held Principal Morse personally liable because "no reasonable government official could have believed the censorship and punishment of Frederick's speech to be lawful." *Id.* at 21a.

REASONS FOR GRANTING THE PETITION

Teenage drug abuse is an enormous national problem. It endangers the health and well-being of millions of children and undermines the educational mission of our schools. As we explain below, however, the decision below threatens to make anti-drug policies unenforceable in the

nation's public schools. By requiring a case-by-case evaluation of pro-drug speech, and prohibiting any action unless a message causes an immediate and palpable disturbance, the Ninth Circuit's decision makes it difficult, if not impossible, for schools to address the cumulative effects of pro-drug advocacy. Worse still, because of the Ninth Circuit's delusion that "opacity in this particular corner of the law has been all but banished," Pet. App. 20a, school officials face personal liability if a federal judge disagrees with their assessment of any given situation.

Contrary to the Ninth Circuit's decision, the First Amendment does not require school officials to remain neutral when faced with pro-drug messages in the midst of a school activity. Such speech is "plainly offensive" under this Court's decision in *Fraser*, and schools are entitled to take steps to prohibit it. Moreover, as *Fraser* and several other decisions of this Court recognize, courts must defer to decisions of school officials like those at issue here. And, again contrary to the holding below, they must do so whether the advocacy occurs in "curricular" or "non-curricular" settings.

In sum, this case provides the Court an opportunity to clarify the rules governing student speech cases, and to remind the lower courts that the primary responsibility for regulating our public schools lies with school authorities and local communities, not the federal courts.

ARGUMENT

I. Teenage Drug Abuse Is A Problem Of Enormous Proportions Requiring An Array Of Policy Solutions And The Full Involvement Of School Officials.

The Ninth Circuit's opinion gave no consideration to the particular context in which this case arises or the depth and breadth of teenage drug abuse. In 2005, 2.9 million Americans tried drugs for the first time, and more than half (56%) of those new drug users were under the

age of 18.[2] Twenty-one percent of eighth-graders have used drugs—which means that 6 students in a classroom of 30 children, each about fourteen years old, have already used at least one illicit drug.[3] By tenth grade, another 17% of students have used drugs, bringing the total up to 38%. And "exactly *half* of American secondary school students today have tried an illicit drug by the time they near high school graduation."[4]

Unfortunately the problem is deeper than students experimenting once or twice. Thirty-eight percent of high school seniors have used drugs within the last year, and 23% *within the last month*.[5] Particularly alarming for school officials, 4.5% of high school students reported that they had used marijuana in the last month *on school property*,[6] and 25% reported that drugs had been offered to them (or by them) at school in the past year.[7]

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[2] Substance Abuse & Mental Health Services Admin., *Results from the 2005 National Survey on Drug Use & Health: National Findings* ("*2005 NSDUH*") at 46 (Office of Applied Studies, NSDUH Series H-30, DHHS Pub. No. SMA 06-4194), available at http://www.oas.samhsa.gov/nsduh/2k5nsduh/2k5Results.htm.

[3] L.D. Johnston, *et al.*, *Monitoring the Future National Results on Adolescent Drug Use: Overview of Key Findings, 2005* ("*2005 MTF Overview*") at 5 (NIH Pub. No. 06-5882), available at http://www.monitoringthefuture.org/pubs/monographs/overview2005.pdf. Monitoring the Future is an ongoing study of the behavior and attitudes towards drug use of American secondary school students, college students, and young adults. Begun in 1975, the study is funded by research grants from the National Institute on Drug Abuse, which is part of the National Institutes of Health. The 2005 study was conducted by researchers at the University of Michigan's Institute for Social Research.

[4] *Id.* (emphasis added).

[5] *Id.* at 48, 52. The national incidence of marijuana use is 44.8% by twelfth grade. *Id.* at 44.

[6] Centers for Disease Control & Prevention, *Youth Risk Behavior Surveillance—United States 2005*, 55 MMWR

In Alaska, the drug problem is particularly severe, and especially with marijuana. Sixty percent of Juneau students have used marijuana by the time they graduate from high school.[8] And, in a 2003 survey of Alaska high school students, 6.5% reported using marijuana on school property within the last thirty days,[9] and 13.1% reported that they had used marijuana for the first time *before* they turned 13.[10]

This Court has recognized the troubling implications of drug use at such an early age:

> "School years are the time when the physical, psychological, and addictive effects of drugs are most severe. Maturing nervous systems are more critically impaired by intoxicants than mature ones are; childhood losses in learning are lifelong and profound; children grow chemically dependent more quickly than adults, and their record of recovery is depressingly poor. And of course the effects of a drug-infested school are visited not just upon the users, but upon the entire student body and faculty, as the educational process is disrupted."

Veronia Sch. Dist. 47J v. *Acton*, 515 U.S. 646, 661-62 (1995) (internal citations and quotation marks omitted).

Surveillance Summaries No. SS-5 at 19 (June 9, 2006), available at http://www.cdc.gov/mmwr/ PDF/SS/SS5505.pdf.

[7] *Id.*

[8] *See* Pet. at 3 (citing Julia O'Malley, *Students and officials discuss teen drug use*, Juneau Empire, Nov. 26, 2002).

[9] Alaska Dep't of Health & Social Services and Alaska Dep't of Educ. & Early Development, *Alaska Youth Risk Behavior Survey 2003* at 21, available at http://www.epi.hss.state.ak.us/ pubs/YRBS/2003/YRBS%202003.pdf.

[10] *Id.* at 20.

As the Court noted just four years ago, moreover, "[t]he drug abuse problem among our Nation's youth has hardly abated since *Vernonia* was decided in 1995. In fact, evidence suggests that it has only grown worse. . . . [T]he nationwide drug epidemic makes the war against drugs a pressing concern in every school." *Bd. of Educ.* v. *Earls*, 536 U.S. 822, 834 (2002).

In the fight against student drug use, norm-reinforcing messages matter. Students are more likely to use drugs if they don't think they are dangerous, and when students' collective perception of the risks of drug use change—for better or for worse—rates of student drug use quickly follow.[11] When it comes to illegal drugs, it is no surprise that a high school senior is more likely to share the attitudes of his peers than those of his parents.[12] At the same time, while they are susceptible to their peers' opinions about drugs, students *do* respond to anti-drug messages from their schools and their parents. Drug and alcohol use is less pervasive among students who report being exposed to drug or alcohol prevention messages at school than it is for those who do not recall being exposed

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[11] *2005 MTF Overview*, *supra* note 3, at 12 (a change in high school students' perception of the risk of marijuana use predicts a change in actual use in subsequent years); *see also* L.D. Johnston, *et al.*, *Monitoring the Future National Survey Results on Drug Use, 1975-2005. Vol. I: Secondary School Students* ("*2005 MTF*") at 391-92, (NIH Pub. No. 06-5883), available at http://www.monitoringthefuture.org/pubs/monographs/vol1_2005.pdf. Student drug use has been on a gradual decline the past several years, though there is an ominous indication in the 2005 data suggesting that this trend may be changing. *See 2005 MTF Overview*, *supra* note 3, at 5 ("The 8th graders have been the first to show turnarounds in illicit drug use: they were the first to show the upturn in use in the early 1990s and the first to show the decline in use after 1996; they now appear to be the first to show an end to the declines observed in recent years.").

[12] *2005 MTF*, *supra* note 11, at 390, 425-27.

to anti-drug messages.[13] And marijuana use in particular is *far* less severe among youths who perceive strong disapproval from their parents.[14]

II. The Decision Below Forces Schools To Tolerate Student Advocacy Of Illegal Drug Use At School Events.

Without so much as considering the scope of teenage drug abuse, the Ninth Circuit concluded that the First Amendment requires a school to tolerate student speech advocating illegal drug use. The court is wrong. Such speech interferes with the school's duty to protect and educate our children, including teaching them "the shared values of a civilized social order," and is "plainly offensive" within the meaning of *Fraser*. See 478 U.S. at 683.

Accordingly, this Court's review is warranted to confirm that courts must defer to a school's decision to prohibit pro-drug speech—or at the very least, consider the interests underlying such policies. School policies prohibiting conduct like Frederick's are an essential part of combating the drug problem facing our schools and our children. Because adolescents are particularly impressionable and susceptible to drug use, a message of tolerance is not acceptable. The Ninth Circuit's ignorance of the student drug use problem, or its willingness to tolerate that problem, should not be allowed to hamstring our school authorities and endanger the health and safety of our children.

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[13] *2005 NSDUH*, *supra* note 2, at 65 (past month use of illicit drugs for youths ages twelve to seventeen, 9.2% vs. 13.2%).

[14] *Id.* at 62 ("Current marijuana use [*i.e.*, within the last 30 days] also was much less prevalent among youths who perceived strong parental disapproval for trying marijuana or hashish once or twice than for those who did not (*4.6 vs. 27.0 percent*).") (emphasis added).

A. Schools Need Not Tolerate Student Speech That Is Plainly Offensive To The Educational Mission.

In holding that the First Amendment gives a student the right to advocate drug use by unfurling a twenty-foot banner reading "BONG HITS 4 JESUS" at a school event, the Ninth Circuit failed to recognize the school's interest in enforcing a zero-tolerance policy for pro-drug student messages. Further, the court violated the fundamental principle running through this Court's student speech cases that "[a] school need not tolerate student speech that is inconsistent with its 'basic educational mission.'" *Kuhlmeier*, 484 U.S. at 266. If allowed to stand, the decision below threatens to undermine the principle that the First Amendment does not protect "plainly offensive" messages that promote disruption and diversion in our public schools. See *Fraser*, 478 U.S. at 683.

Ignoring these principles, the Ninth Circuit observed that "[t]he phrase 'Bong Hits 4 Jesus' may be funny, stupid, or insulting, depending on one's point of view, but it is not 'plainly offensive' the way sexual innuendo is." Pet. App. 9a. Not so. Advocating that one's classmates engage in illegal drug use—which is what Principal Morse and the Ninth Circuit believed Frederick's banner was doing, see *id.* at 6a-7a—is *at least* as offensive to the school's educational mission and the health of Frederick's classmates as the phallic metaphor at issue in *Fraser*. In fact, the decision below itself exemplifies the perception that the Juneau School Board policy is designed to combat: that illegal drug use by high school students is no big deal.[15]

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[15] Even if Alaska law were as "complicated" as the Ninth Circuit thought, Pet. App. 6a n.4—and it is not—the "issue of 'illegal' drug use" is *not* complicated under federal law. Cf. *Gonzales* v. *Raich*, 545 U.S. 1 (2005). Frederick has never claimed that he was making a political statement about legalization. Rather, he

To be sure, the Ninth Circuit recognized that *Fraser* permits the restriction of "plainly offensive" speech that prompts disruption of the educational process, particularly for adolescents. See Pet. App. 16a-17a n.44. But the court effectively limited *Fraser* to its facts, holding that it only permits schools to prohibit sexually lewd or vulgar messages. *Id.* at 9a. That was error. This strict cabining of the "offensive" speech category, which the Second Circuit has likewise endorsed, *Guiles* v. *Marineau*, __ F.3d __, No. 05-0327, 2006 WL 2499083, at *7-8 (2d Cir. Aug. 30, 2006), is flatly contrary to the rationale of *Fraser*, and to decisions of the Fourth and Sixth Circuits. See *Boroff* v. *Van Wert City Bd. of Educ.*, 220 F.3d 465, 471 (6th Cir. 2000); see also *Williams* v. *Spencer*, 622 F.2d 1200, 1205-06 (4th Cir. 1980) (pre-*Fraser* decision holding that disruption was not necessary for school to ban advertisement encouraging drug use).

Fraser is not about social *sensibilities*; it is about the unique needs and *susceptibilities* of minor students. That is, under *Fraser* the First Amendment permits schools to restrict speech simply because it poses more of a danger to immature students than to mature adults. See *Fraser*, 478 U.S. at 683 ("The speech could well be seriously damaging to its less mature audience, many of whom were only 14 years old and on the threshold of awareness of human sexuality.").

That is true here. Pro-drug speech is distracting to students. When it comes from their peers, it is the kind of speech that students are likely to heed. If left unanswered by school officials, moreover, such speech may be the *only* speech other students hear. And speech advocating illegal drug use is every bit as harmful to teenagers as sexually suggestive remarks. At a minimum, public school officials are entitled to think so.

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was trying to cause a disturbance and get attention by advocating illegal drug use.

In short, given the threat to teens posed by pro-drug messages, a school official has every right—indeed, an obligation—not to look the other way when a student advocates illegal drug use during a school-sponsored, faculty-supervised event. This Court's intervention is needed to clarify that the First Amendment does not require schools to remain neutral when pro-drug messages are displayed at school functions.

B. A School Official's Decision To Prohibit Pro-Drug Speech Is Entitled To Great Deference From The Courts.

The Ninth Circuit's crabbed reading of *Fraser* and its non-deferential review of Principal Morse's analysis of what constitutes "plainly offensive" speech is also contrary to this Court's repeated admonition that the responsibility for educating our children lies with school officials. The decision below oversteps the limited role that courts ought to play in the administration of public school education. The court's opinion does not even *mention* the deference owed to school board policies and to the decisions of the school officials who apply those policies. If allowed to stand, the decision will send the message that courts, rather than schools, have the exclusive say on what manner of speech is "plainly offensive" to the educational functions of the public schools.

The difference between school authorities and other government instrumentalities escaped the Ninth Circuit's notice. "Public schools," the court wrote, "are instrumentalities of government, and government is not entitled to suppress speech that undermines whatever missions it defines for itself." Pet. App. 12a. But this simplistic analysis ignores the fact that school authorities act *in loco parentis* and must be permitted enough discretion to fulfill that function. As this Court observed in *Davis Next Friend LaShonda D.* v. *Monroe County Board of Education*, "'the nature of [the State's] power [over public schoolchildren] is custodial and tutelary,

permitting a degree of supervision and control that could not be exercised over free adults.'" 526 U.S. 629, 646 (1999) (quoting *Veronia*, 515 U.S. at 655). Indeed, "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." *Veronia*, 515 U.S. at 662.

The Court recognized in *Fraser* that school authorities must be allowed "to protect children—especially in a captive audience—from exposure to sexually explicit, indecent, or lewd speech." 478 U.S. at 684. The same is true for student speech advocating the use of illegal drugs. This amount of control is essential for our schools to fulfill their role as "a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment." *Kuhlmeier*, 484 U.S. at 272 (quoting *Brown* v. *Bd. of Educ.*, 347 U.S. 483, 493 (1954)); see also *Fraser*, 478 U.S. at 686 ("I wish therefore, . . . to disclaim any purpose . . . to hold that the Federal Constitution compels the teachers, parents, and elected school officials to surrender control of the American public school system to public school students.") (quoting *Tinker*, 393 U.S. at 526 (Black, J., dissenting)).

Here, had Principal Morse failed to react to Frederick's inappropriate display, she would have foregone an opportunity to teach her students—including Frederick—that they should be law-abiding citizens. And she would have failed to protect her students from further exposure to a harmful message.

As these *amici* know from first-hand experience, the legitimacy of the anti-drug imperative is by now beyond question. Drugs are highly destructive to the learning environment and, as discussed above, social norms are vital to combating drug use, particularly at the high school level. Preventing student drug use—what the decision

below wrongly dismissed as "a vaguely-defined 'educational mission,'" Pet. App. 16a—is embodied in concrete policies in place at most public schools, and in federal anti-drug and educational funding laws. These laws were enacted, and the policies of the Juneau School Board adopted, to deal with the very real and substantial drug problem facing our schools and our children. Review is needed to confirm, once and for all, that these types of interests—and public school officials' assessment of them—are a necessary part of the First Amendment analysis in these types of cases.

III. The Decision Below Is Unworkable In Practice And Threatens To Make Anti-Drug Policies Unenforceable In Our Nation's Public Schools.

The Ninth Circuit's failure to give proper weight to the school's interest in fighting illegal drug use threatens to make anti-drug policies nationwide unenforceable. The sweeping holding—that pro-drug messages are neither offensive nor inherently disruptive—combined with an unworkable disruption standard, and the threat of personal liability for any misstep, will chill enforcement of anti-drug policies far beyond the requirements of the First Amendment. If left unreviewed, the decision below will compromise the ability of our public schools to promote a drug-free environment.

1. The Ninth Circuit utterly failed to grasp the real scope of its decision. The court asserted that it was not necessary to decide whether school officials may prohibit students from wearing pro-drug t-shirts to class. Pet. App. 16a. But the decision effectively does just that—contrary to the Sixth Circuit's decision in *Boroff*—by concluding that pro-drug messages are neither offensive nor inherently disruptive.

Indeed, nothing in the court's rationale keeps it from applying in a biology class or a school hallway. Under the decision below, school officials may not enforce anti-drug

policies anywhere or in any way unless student speech poses an imminent threat of disrupting school activities.

The fact that the Ninth Circuit found no disruption to school activities in this case establishes that the court's standard is completely unworkable. In contrast to *Tinker*, where "the wearing of armbands . . . was entirely divorced from actually or potentially disruptive conduct by those participating in it," 393 U.S. at 505, Frederick's display of the banner here caused an immediate disturbance that Principal Morse was fully justified in stopping. The court's search for an additional disruption beyond the banner itself was unnecessary. As this Court has held, "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 is, of course, not immunized by the constitutional guarantee of freedom of speech." *Tinker*, 393 U.S. at 513.

Even if the display of the banner was not sufficient *actual* disruption, moreover, schools are not required to tolerate "interference, *actual or nascent*, with the schools' work or of collision with the rights of other students . . . ." *Tinker*, 393 U.S. at 508 (emphasis added). Here, the school's well-founded fear of increased student drug use is ample justification for the school's policy of not tolerating any student speech like Frederick's. The risk of increased drug use makes such advocacy a "material and substantial interference with schoolwork or discipline." *Id.* at 511; see also *Williams*, 622 F.2d at 1205 (concluding that judicial notice should be taken that "encouraging the use of drugs encourages actions which in fact endanger the health or safety of students").

The decision below is unworkable for another reason as well: it threatens to require school officials to evaluate each instance in which a student advocates breaking the law to determine whether *that* particular speech is likely to substantially disrupt the school's educational mission.

This requirement makes it impossible for school officials to adopt and enforce policies to address the cumulative effect of pro-drug messages. If permitting such messages would disrupt the work of schools in educating our children and protecting their health—and these *amici* can attest that it would—then public schools must be allowed to act even where the disruptive effect of a single incident is not palpable. This need could hardly be clearer than it is here, where Frederick's "BONG HITS" banner was at least temporally, and perhaps causally, linked to incidents of pro-drug graffiti in the high school after the Relay.

Worse still, the decision below adopts a totally unworkable standard for determining whether a particular disciplinary measure is appropriate. Here the Ninth Circuit concluded that confiscating Frederick's banner was not necessary because his speech caused no *further* disruption (beyond the pro-drug graffiti, of course). But that is simply because Principal Morse took action immediately, before further disruptions occurred. It cannot be the case that, by taking effective measures to prevent or halt a disruption, a school official proves that the intervention was unnecessary.

Principal Morse was not required to wait for Frederick or one of his classmates to take a "bong hit" before she could confiscate Frederick's banner. Nor was she required to wait and see whether his fellow classmates would start a ruckus. Constitutional rights should not turn on whether a group of teenagers is well-behaved at a given moment—especially when school officials are precluded from predicting what will happen and acting preemptively, and *especially* when (as discussed below) they can be held personally liable for any misstep.

2. The decision below also creates an untenable distinction between activities that are "educational and curricular," and activities that are not. The court wrote, "One can hypothesize off-campus events for which the students might be released that would be educational and

curricular in nature and would be disrupted by school speech such as Frederick's. . . . But a Coca Cola promotion as the Olympic torch passed by on a public street was not such an event." Pet. App. 12a. However, distinguishing school activities in this way conflicts with this Court's understanding of the educational process: "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." *Fraser*, 478 U.S. at 683. If an activity is school-sponsored and faculty-supervised, it should not matter that it is held across the street from the school and is fun for the students.

In addition, neither the schools nor the courts can fairly administer the Ninth Circuit's line. Schools cannot be expected to determine whether a particular field trip or activity is or is not "curricular." Where do "extra-curricular" events fall? Are the free speech rights of the students in the math club different from those of students on the traveling basketball team? What about student participants as compared to student spectators? Can officials treat a visit to an amusement park the same as a trip to a national monument? If not, is a trip to the zoo more like the park or the monument?

Even if some sort of classification system is conceivable, it makes no sense to require school officials to refrain from enforcing standard school policies if they determine—or fear that a *court* would determine—that an activity is more recreational than educational. Advocating illegal drug use is no less serious because a school-sponsored, faculty-attended event falls on one side or the other of this line.

The impossibility of administering such a distinction is further demonstrated by the Ninth Circuit's treatment of the Olympic Torch Relay, a major international event. Contrary to the court below, Coca Cola's support for that event did not diminish its scholastic value. Corporate

sponsorship is ubiquitous for sporting events and cultural activities of all sorts, from the Olympics, to a city's concerts-in-the-park program.

In all events, overseeing a typology of school-related activities is not the proper role for the courts. This Court has repeatedly stated 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." *Kuhlmeier*, 484 U.S. at 273 (citing cases); see also *Fraser*, 478 U.S. at 683 ("The determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board."); *Bd. of Educ.* v. *Pico*, 457 U.S. 853, 863 (1982) ("The Court has long recognized that local school boards have broad discretion in the management of school affairs."). As this Court observed in *Tinker*, "the Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools." 393 U.S. at 507.

The Ninth Circuit's arbitrary isolation of "curricular activities"—not to mention its decision that a newly-proclaimed judicial gestalt is "clearly established" constitutional law—inappropriately shifts authority from school officials to the federal courts. This Court's intervention is needed to remind the lower courts that regulating student conduct is a task for our schools, school officials, and the parents and citizens who operate the school boards, not the federal courts.

3. Perhaps the most startling aspect of the decision below is the court's cavalier assertion that the free speech rights it strained to recognize were "clearly established." Last month, considering a student's right to wear an *anti*-drug t-shirt, the Second Circuit cautiously "sail[ed] into the unsettled waters of free speech rights in public schools, waters rife with rocky shoals and uncertain

currents." *Guiles*, 2006 WL 2499083, at *1. This caution clearly was warranted.

The Ninth Circuit's opinion, however is not cautious, and its conclusion that "opacity in this particular corner of the law has been all but banished," Pet. App. 20a, is frankly absurd. The Second Circuit in *Guiles* openly acknowledged a "lack of clarity in the Supreme Court's student-speech cases," stating that "the exact contours of what is plainly offensive are not so clear to us as the star Arcturus is on a cloudless night." 2006 WL 2499083, at *6, *11. Judge Kozinski has expressed a similar sentiment, noting that "[r]econciling *Tinker* and *Fraser* is no easy task." *Harper* v. *Poway Unified Sch. Dist.*, 445 F.3d 1166, 1193 n.1 (9th Cir. 2006) (Kozinski, J., dissenting).

The incoherence of the standard applied below is particularly threatening to school anti-drug policies because of the Ninth Circuit's decision to impose personal liability on Principal Morse. It is obvious that "permitting damages suits against government officials can entail substantial social costs, including the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties." *Anderson* v. *Creighton*, 483 U.S. 635, 638 (1987). A school official faced with personal liability for misapplying the Ninth Circuit's ill-defined standards will walk on dangerous ground if she prohibits a student, not just from displaying a pro-drug banner at a football game, but from wearing or carrying pro-drug paraphernalia to biology class.

For all these reasons, *amici* urge this Court to grant review to authoritatively address these issues in a sensible manner—a manner that preserves our schools' ability to enforce anti-drug policies and protect the safety of their students.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX A

D.A.R.E. America is a nonprofit organization that supports the drug resistance efforts of communities nationwide. The D.A.R.E. (Drug Abuse Resistance Education) program is a police officer-led series of classroom lessons that teaches children from kindergarten through 12th grade how to resist peer pressure and live productive drug and violence-free lives. The D.A.R.E. program is implemented in 75% of our nation's school districts and more than 43 countries worldwide. D.A.R.E. America provides officer training and student educational materials, and supports the development, implementation, and evaluation of the D.A.R.E. curriculum.

Drug Free America Foundation, Inc. ("DFAF") is a nonprofit drug prevention and policy organization committed to policies and laws that will reduce illegal drug use, drug addiction, drug-related injury, and death. DFAF has formed several divisions to further this goal, including the *International Science and Medical Forum on Drug Abuse*, which reviews current articles and published research and provides the public with scientific knowledge about narcotics in an understandable form; the *Institute on Global Drug Policy*, an alliance of physicians, scientists, attorneys and drug specialists who advocate public policies to curtail the illegal use of alcohol or harmful drugs; and *Students Taking Action Not Drugs*, a DFAF division comprised of college students concerned about drug and alcohol abuse at college campuses who provide information to their peers about the dangers of drugs, and help direct young people into treatment.

National Families in Action is a nonprofit organization whose mission is to help families and communities prevent drug abuse among children by promoting strategies based on science and law. With Wake Forrest University School of Medicine, the organization co-sponsors the Addiction Studies Program for Journalists and the Addiction Studies Program for State Legislatures. In 2003, it began the Parent Corps,

patterned after the Peace Corps, which recruits, trains, employs, and supervises Parent Leaders. Each Parent Leader works out of his or her child's school to educate and mobilize the school's parents into preventing the use of alcohol, tobacco, and illegal drugs among students. In the pilot program, 20 Parent Leaders in 19 schools in nine states have recruited 11,500 members: 6,500 parents in the Parent Corps and 5,000 students in the Youth Corps, founded at the request of students.

Save Our Society From Drugs ("S.O.S.") is a nonprofit organization committed to establishing, encouraging and enabling drug laws and drug policies that reduce illegal drug use and abuse, drug-related injury, and death. S.O.S. has been involved in opposing and educating citizens about state ballot initiatives and legislative measures to legalize drugs.

Hon. William J. Bennett served as United States Secretary of Education from 1985-1988 and he was the first Director of the White House Office of National Drug Control Policy, serving in that post from 1989-1990. Dr. Bennett also served as chairman of the National Endowment for the Humanities from 1981-1985. He has written and edited 16 books, including *The Book of Virtues*, *The Children's Book of Virtues*, and the first of a two-volume history, *America: The Last Best Hope*. Dr. Bennett is also the host of a nationally broadcast radio show, "Bill Bennett's Morning in America."

General Barry R. McCaffrey served as Director of the White House Office of National Drug Control Policy from 1996-2001, a tenure longer than any of his predecessors. He was confirmed for this position by unanimous vote by the U.S. Senate. For this period of public service, General McCaffrey received many honors including: the United States Department of Health and Human Services' Lifetime Achievement Award for Extraordinary Achievements in the Field of Substance Abuse Prevention, the United States Coast Guard

Distinguished Public Service Award, the Norman E. Zinberg Award of the Harvard Medical School, the Federal Law Enforcement Foundation's National Service Award, and the Community Anti-Drug Coalitions of America Lifetime Achievement Award. Prior to serving as the nation's Cabinet Officer for U.S. drug policy, General McCaffrey served in the United States Army for 32 years and retired as a four-star General. At retirement he was the most highly decorated serving General, having been awarded three Purple Heart medals for wounds received in his four combat tours, as well as twice awarded the Distinguished Service Cross, the nation's second highest award for valor. He also twice was awarded the Silver Star for valor.