No. _____

IN THE
# Supreme Court of the United States

JUNEAU SCHOOL BOARD; DEBORAH MORSE,

*Petitioners,*

v.

JOSEPH FREDERICK,

*Respondent.*

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

## PETITION FOR WRIT OF CERTIORARI

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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 and Statutory Provisions**

**Other Authorities**

## TABLE OF APPENDICES

**Page**

## INTRODUCTION

In a case that has drawn the attention — and triggered the deep concern — of school boards and administrators nationwide, the Ninth Circuit has profoundly upset settled understandings of First Amendment and qualified immunity principles. The decision below subjects a public high school principal to personal liability for disciplining a student who displayed a banner expressing positive sentiments about illegal drug use at a school-sponsored and faculty-supervised event taking place on and adjacent to school grounds during school hours. Principal Deborah Morse was enforcing a school policy against displaying messages that promote illegal substances — a policy that is common in schools across the nation. For that entirely appropriate action, she faces the potential for ruinous liability.

School officials are now faced with a confusing, if not alarming, message. They are responsible for teaching students about the dangers of illegal drugs. But they also must tolerate pro-drug messages in the face of threats of draconian civil damages lawsuits. This is wildly wrong. And this Court should say so.

Not since *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), has the Court had occasion to provide guidance to public schools — and to parents and students — with respect to the delicate balance between students' constitutional rights, on the one hand, and the solemn duty of school administrators, on the other, to maintain order and instill fundamental values in the challenging context of public education. In light of the Ninth Circuit's double-barreled, destabilizing decision in this vital arena of our national life, this Court's authoritative guidance is badly needed.

## OPINIONS BELOW

The orders and judgment of the United States District Court for the District of Alaska (per Sedwick, C.J.) granting

petitioners' summary judgment motion are reprinted at App. 23a-44a and are not otherwise published. The Ninth Circuit's decision (per Kleinfeld, J., joined by Hall and Wardlaw, JJ.) reversing the district court is reprinted at App. 1a-22a and is published at 439 F.3d 1114. The court of appeals' order denying rehearing and rehearing en banc is reprinted at App. 45a-46a and is not otherwise published.

## JURISDICTION

The Ninth Circuit rendered its decision on March 10, 2006, and denied rehearing and rehearing en banc on April 18, 2006. Justice Kennedy subsequently extended the time to file this petition for a writ of certiorari to and including August 28, 2006. Petitioners invoke this Court's jurisdiction under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS AND SCHOOL DISTRICT RULES INVOLVED

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

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

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

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

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

> equity, or other proper proceeding for redress, . . . .

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

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

Juneau School Board Policy 5721, reprinted at App. 54a-57a, states, in pertinent part:

> The distribution on school premises of the following types of materials is prohibited: materials that . . . advocate the use by minors of any illegal substance or material . . . .

Juneau School Board Policy 5850, reprinted at App. 58a, states, in pertinent part:

> Pupils who participate in approved social events and class trips are subject to district rules for student conduct; infractions of those rules will be subject to discipline in the same manner as are infractions of rules during the regular school program.

## STATEMENT OF THE CASE

### A. Factual Background

1. Surveys of Juneau, Alaska teenagers indicate that at least 60% use marijuana before graduating from high school, which is above the national average. Julia O'Malley, *Students and officials discuss teen drug use*, Juneau Empire, Nov. 26, 2002.[1] In response to concerns about teenage

[1] This article was included in the Ninth Circuit record as part of Appellant's Excerpts of Record at 43 and Appellees' Supplemental Excerpts of Record ("SER") at 37-43.

substance abuse, the Juneau School Board promulgated a district-wide health and safety curriculum that emphasizes the dangers of illegal drug and alcohol use. SER 11, 18. The Board also established detailed policies for prevention, intervention, and discipline of students engaging in the illegal use or possession of drugs or alcohol. SER 19-26. In connection with these policies, the Board prohibits the display of materials that advertise or advocate the use of illegal drugs or alcohol on campus and at all school-sponsored events, whether on or off campus. App. 52a-58a. These policies are consistent with both state and federal law, including 20 U.S.C. § 7114(d)(6), which requires school districts receiving funds through the Safe and Drug Free Schools and Communities Act to certify periodically that their programs "convey a clear and consistent message that . . . illegal use of drugs [is] wrong and harmful." App. 49a.

2. Against this background, Principal Deborah Morse of the Juneau-Douglas High School was confronted with a flagrant violation of the school policies pertaining to pro-drug messages. The violation occurred during a school-sponsored and faculty-supervised event that took place on and adjacent to school grounds during school hours. The event was the Olympic Torch Relay, which came to Juneau on January 24, 2002.[2] Believing that the event had both

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[2] The Olympic Torch Relay is a long-standing Olympic tradition with roots in ancient Greece. *See generally* U.S. Olympic Comm., *Journey of the Olympic Flame: Igniting the Olympic Spirit* (2002). Every two years, in advance of the Olympic games, a ceremonial torch is ignited in Olympia, Greece and then travels to and throughout the country hosting the Olympic games. *Id.* at 9-10. The torch remains lit throughout its journey as thousands of torchbearers pass it from one to another until it reaches its final destination — the cauldron at the site of the opening ceremony for the Olympic games. *Id.* In 2002, the Winter Olympics took place in Salt Lake City, Utah. *Id.* at 123. January 24, 2002 marked

noteworthy educational value and high significance to the community, the Juneau School District allowed students to observe the relay. App. 34a. The district also allocated funds to transport students from schools not along the relay route to locations where they could view this memorable event. SER 4-5.

The Juneau-Douglas High School was located along the Olympic Torch Relay route. App. 24a. After classes started on the morning of the event, Juneau-Douglas High School administrators and teachers accompanied students from their classrooms to view the relay as it passed in front of the school. App. 24a-25a, 34a. While teachers were given the option of allowing their students to take part in this event on a class-by-class basis, Principal Morse was unaware of any teachers who declined to let their classes participate. SER 5-6, 70-77. Once outside the classroom, there was only one place where Juneau-Douglas High School students were allowed to be — in front of the school, either on campus or lined along either side of the street.[3] SER 6, 78-80.

During the event, high school cheerleaders were out in uniform to greet the torchbearers. App. 34a. The high school pep band played. *Id.* And four high school students, representing various segments of the student body, acted as

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the first time in Olympic history that the Olympic Torch Relay ever visited Alaska. *Id.* at 145. After landing in Juneau, the flame was welcomed by Tlingit Clan dancers, transported in a native canoe around Gastineau Channel, and then carried through several miles of Juneau's streets, including past the state Capitol, *id.*, and, as relevant here, the Juneau-Douglas High School.

[3] Because this event took place on and adjacent to school grounds, and because students remained under faculty supervision and were not otherwise released from school, the school did not require parental permission slips.

torchbearers, carrying the torch in front of the school as a small part of the 11,500-person chain of torchbearers who transported the torch along the 13,500-mile relay route. SER 5; U.S. Olympic Comm., *supra*, at 183.

3. Joseph Frederick, a Juneau-Douglas High School student, and several of his schoolmates positioned themselves on the sidewalk opposite the campus. App. 25a. As the torchbearers and television camera crews approached the school, Frederick and his friends unfurled a large banner emblazoned with the phrase "BONG HITS 4 JESUS." *Id.* "Bong" is a slang term for drug paraphernalia commonly used for smoking marijuana. App. 4a; SER 7, 126. A "bong hit" is slang for inhaling marijuana from such a device. App. 4a; SER 7. The term "bong hits" is widely understood by high school students and others as referring to smoking marijuana. App. 38a; SER 7. Frederick's banner, roughly 20-feet long,[4] was clearly visible to the large number of students on campus. App. 70a; SER 7.

Prior to displaying the banner, Frederick had been absent from school. App. 25a. And while Frederick might have selected any number of locations to unfurl his banner along the several-mile journey of the relay, Frederick chose instead to insert himself in front of the student body and to display the banner where it would be in full view of his fellow students.

Principal Morse approached Frederick and his friends and asked them to take down the banner. *Id.* While other students complied with the directive, Frederick continued to hold the banner and refused to take it down. *Id.* Frederick claimed he had a First Amendment right to display the

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[4] While Frederick's banner was not actually measured, a photograph taken of the incident shows approximately ten people standing shoulder-to-shoulder behind the banner. App. 70a.

banner because he was not physically on campus. App. 2a-3a; SER 7-8. Principal Morse responded to Frederick that he was participating in a school activity and that the banner was inappropriate. App. 3a. When Frederick still refused to put the banner down, Principal Morse confiscated it and instructed Frederick to accompany her to her office. App. 25a. Frederick walked the other way. *Id.*

Frederick was later removed from class and brought to the principal's office.[5] Principal Morse again explained that the banner was inappropriate in that it violated the school's policy against displaying offensive material, including material that advertises or promotes the use of illegal drugs. App. 3a; SER 8-9. After further discussing the incident with a defiant and uncooperative Frederick, Principal Morse suspended him for ten days based on multiple counts, including refusal to respond to a staff directive, truancy/skipping, defiance/disruptive behavior, and refusal to cooperate, in addition to the underlying charge of displaying the offensive banner.[6] App. 59a, 66a-67a.

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[5] The parties' versions of the events in question differ in that Frederick claims he went to Principal Morse's office on his own, whereas Principal Morse contends that she had to look up Frederick's schedule and remove him from class. *Id.* Neither the district court nor the court of appeals deemed it necessary to resolve this factual dispute.

[6] Frederick claims that his suspension was increased from five days to ten days because he quoted Thomas Jefferson in his (Frederick's) colloquy with Principal Morse. App. 3a. For her part, Principal Morse does not recall such a quote and denies punishing Frederick on such grounds. *Id.* Indeed, school records are devoid of any evidence that Frederick was suspended for quoting Mr. Jefferson. As noted by the district court, Frederick's own testimony was to the effect that his suspension was enhanced for his refusal to cooperate. App. 38a-39a. In any event, the Ninth Circuit ultimately concluded that any dispute over the purported punishment for quoting Mr. Jefferson was immaterial. App. 3a.

Following the banner episode, school personnel reported incidents of pro-drug graffiti in the halls and on school grounds. App. 2a; SER 68.

**B. Procedural History**

1. Frederick appealed his suspension to Superintendent Gary Bader. App. 25a. In a seven-page response analyzing Principal Morse's discipline of Frederick in view of school board policies and this Court's precedents, Superintendent Bader upheld the Principal's decision. App. 59a-67a. He did, however, reduce the suspension to time served (eight days). App. 25a, 67a.

2. Frederick appealed to the School Board. App. 26a. Following a lengthy hearing that included witness testimony and legal argument from counsel for Frederick and for the district administration, the School Board unanimously upheld Superintendent Bader's decision. App. 26a, 69a.

3. Frederick filed suit in the United States District Court for the District of Alaska. On May 27, 2003, following cross-motions for summary judgment, Chief Judge John W. Sedwick issued an opinion granting petitioners' motion. App. 23a-40a; *see also* App. 41a-42a. On May 30, 2003, the district court entered judgment dismissing the action. App 43a-44a.

Chief Judge Sedwick concluded that petitioners did not in any fashion violate Frederick's First Amendment rights. The district court reasoned that the banner's message could be constitutionally prohibited under this Court's ruling in *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986). App. 33a-38a. *Fraser*, the district court explained, allows a public school to regulate speech that it reasonably interprets as "plainly offensive" because such speech "might undermine the school's basic educational mission." App. 36a. The court noted that Frederick's banner "directly contravened the Board's policies relating to drug abuse

prevention" and thus interfered with the school's educational mission to deter illegal drug use. App. 35a-36a. The court highlighted the broad interpretations given to *Fraser*, such as in *Boroff v. Van Wert City Board of Education*, 220 F.3d 465 (6th Cir. 2000), where the Sixth Circuit concluded that a school could prohibit t-shirts depicting a rock band that promoted a drug-using lifestyle. App. 36a.

The district court further observed that *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), justified Principal Morse's actions. App. 35a-36a. In the court's view, *Tinker* allows schools to curtail speech that interferes with a school's work and, "[w]ithout a doubt, part of the school's work is to deter drug and alcohol abuse." App. 36a. Underlying the court's First Amendment analysis was an acknowledgement of the importance of deferring to school administrators' reasonable judgments where, as here, Frederick chose to display his banner at a "school-sponsored" activity. App. 33a-38a.

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

4. On appeal, the Ninth Circuit reversed. The court of appeals found that the incident occurred while Frederick was a student and school was in session and that, accordingly, the case was to be resolved by applying "student speech"

doctrine under *Tinker*, *Fraser*, and *Kuhlmeier*.[7] App. 1a, 5a-6a. The court further assumed that Principal Morse correctly interpreted the phrase "BONG HITS 4 JESUS" as "express[ing] a positive sentiment about marijuana use." App. 6a-7a. The panel ruled, however, that the district court incorrectly applied the "plainly offensive" standard from *Fraser*. In the court of appeals' view, *Fraser* was inapplicable. The court narrowly interpreted *Fraser* as only allowing prohibitions on student speech of a "sexual nature." App. 9a. Applying that circumscribed standard, the court stated: "Frederick's speech was not sexual (sexual speech can be expected to stimulate disorder among those new to adult hormones)." *Id.* According to the panel, the district's policy of suppressing pro-drug messages, on the other hand, was just one of any number of "social message[s] contrary to the one favored by the school," and a school district is "not entitled to suppress speech that undermines whatever mission it defines for itself." App. 7a, 12a.

The court of appeals further reasoned that *Kuhlmeier* was inapplicable. App. 10a-11a. Whereas *Kuhlmeier* allows regulation of school-sponsored speech, 484 U.S. at 273, the panel noted that, here, Frederick displayed the banner off school property, in what it characterized as a "non-curricular activity" that was only "partially supervised." App. 17a.

Having eliminated *Fraser* and *Kuhlmeier* as bearing on the issue at hand, the Ninth Circuit concluded that the case was governed solely by *Tinker*. Under the rationale of that

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[7] The court of appeals variously referred to the Olympic Torch Relay as a an event sponsored by "Coca-Cola" and other "private" companies. App. 2a, 11a, 12a. At the same time, the Ninth Circuit concluded that "[t]his is a First Amendment student speech case" with the First Amendment providing the operative jurisprudential framework for analysis. App. 1a, 5a-6a; *see also* App. 33a-35a (district court's finding that the Olympic Torch Relay was a "school-sponsored" activity).

watershed decision, the court opined that petitioners could not punish Frederick for displaying his banner absent a showing that the banner "disrupts the good order necessary to conduct [the school's] educational function." App. 11a. The panel concluded that petitioners could not demonstrate that requisite element of "disruption," and that they therefore violated Frederick's First Amendment rights. App. 18a. In short, the Ninth Circuit discerned no difference between Frederick's pro-drug message and the anti-war armband passively worn by John Tinker as a form of political expression. App. 8a, 11a.

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

5. The Ninth Circuit subsequently denied the petition for rehearing and rehearing en banc. App. 45a-46a.

## REASONS FOR GRANTING THE WRIT

The petition should be granted for two reasons. *First*, the Ninth Circuit's decision, as a practical matter, renders long-standing, commonplace school policies against pro-drug messages unenforceable. While lower courts throughout the country have struggled in applying this Court's student speech precedent, courts have nonetheless found their way to upholding *bans* on messages promoting illegal substances (because such messages are so antithetical to the learning environment). The Ninth Circuit has now profoundly disrupted this settled understanding.

This case presents the Court with a much-needed opportunity to resolve a sharp conflict among federal courts (and to eliminate confusion on the part of school boards, administrators, teachers, and students) over whether the First Amendment permits regulation of student speech when such speech is advocating or making light of illegal substances.

*Second*, the Ninth Circuit's qualified immunity analysis unsparingly allows no room for reasonable error on the part of public school officials. Indeed, in the Ninth Circuit, school officials are held to a higher standard than federal judges. When the Ninth Circuit opined that "no reasonable government official could have believed the censorship and punishment of Frederick's speech to be lawful," App. 21a, the court blinked at the telltale fact that a respected federal district court judge, in a thorough opinion, had upheld Principal Morse's actions as entirely proper under the First Amendment. To make bad matters worse, the Ninth Circuit precipitously jumped from its flawed First Amendment conclusion to an automatic finding that Principal Morse violated a "clearly established right" — even though no Ninth Circuit authority was on point; even though other courts have consistently upheld schools' curtailment of pro-drug messages; and even though Principal Morse was faithfully enforcing the school board policies as written. *Frederick*'s qualified immunity analysis creates a dangerous precedent, deeply alarming to school administrators throughout the country. The case cries out for this Court's review.

## I. THE COURT SHOULD CLARIFY WHETHER THE FIRST AMENDMENT REQUIRES PUBLIC SCHOOLS TO TOLERATE MIXED MESSAGES ABOUT ILLEGAL DRUG USE.

1. In the two decades since this Court last provided substantive guidance in the area of student speech, lower courts grappling with the First Amendment rights of public

high school students generally have analyzed disputes under the so-called *Tinker-Fraser-Kuhlmeier* trilogy.

Student speech cases start with the Vietnam War-era decision of *Tinker*. Recognizing that students do not shed their free speech rights at the schoolhouse gate, the *Tinker* Court upheld the right of students to wear anti-war armbands. 393 U.S. at 506. The Court found that passively wearing black armbands was akin to pure political speech, which is entitled to comprehensive protection. *Id.* at 505-06. On the other hand, the Court acknowledged the unique characteristics of a school and that administrators and teachers may suppress student conduct, whether in class or out of it, that would disrupt school operations. *Id.* at 511-13. In *Tinker*, however, there was no evidence that the silent, passive expression of opinion intruded upon the work of the school. *Id.* at 508.

Almost two decades later, the Court clarified in *Fraser* that schools may suppress vulgar, lewd, indecent, obscene, and plainly offensive student speech, even absent a showing of disruption. 478 U.S. at 683-84. Such speech, ruled the Court, "would undermine the school's basic educational mission" and "is wholly inconsistent with the 'fundamental values' of public school education." *Id.* at 685-86. Applying that principle, the *Fraser* Court upheld a school's right to discipline a student for delivering a sexually suggestive nominating speech for a student government candidate at a school assembly. *Id.*

Finally, almost two decades ago in *Kuhlmeier*, the Court acknowledged that school officials are entitled to exercise pervasive control over speech that reasonably might be perceived to bear the imprimatur of the school so long as the curtailment of such speech is reasonably related to "legitimate pedagogical concerns." 484 U.S. at 273. In the *Kuhlmeier* Court's view, a school properly exercised its discretion in refusing to publish student articles on pregnancy

and divorce in a school-funded student newspaper. *Id.* at 276.

2. In determining the constitutionality of a school's speech regulation under this "trilogy," many courts have tended to examine whether the proscribed speech is (i) disruptive of schoolwork and discipline under *Tinker*, (ii) vulgar, lewd, indecent, obscene, or plainly offensive under *Fraser*, or (iii) reasonably perceived as school-sponsored under *Kuhlmeier*. Unfortunately for local school officials tasked with keeping order and inculcating values, not all student speech falls neatly into these three categories. Adhering to a rigid categorical analysis, as manifested by the Ninth Circuit in this case, leads to a result that is utterly unfathomable to conscientious school officials and jurisprudentially baffling to judges.

Indeed, in a dissent in another recent Ninth Circuit student speech case, Judge Kozinski commented on the difficulties faced by courts in attempting to classify student speech under the appropriate category:

> Reconciling *Tinker* and *Fraser* is no easy task. The Supreme Court majority in *Fraser* seems to have been influenced by the indecorousness of Fraser's comments, which referred to a fellow student in terms that could be understood as a thinly-veiled phallic metaphor. The curious thing, though, is that Fraser used no dirty *words*, so his speech could only have been offensive on account of the ideas he conveyed — the ideas embodied in his elaborate double-entendre.

*Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1193 n.1 (9th Cir. 2006) (Kozinski, J., dissenting) (citations omitted). Judge Kozinski thus wonders whether "*Fraser* swallows up *Tinker*, by suggesting that some ideas can be excluded from the high school environment, even if they don't meet the *Tinker* standard." *Id.* This candid identification of doctrinal

fog infecting student speech jurisprudence is at stark odds with *Frederick*'s assertion that "opacity in this particular corner of the law has been all but banished." App. 20a.

a. In the context of regulating pro-drug messages in schools, courts have wrestled with the *Tinker-Fraser-Kuhlmeier* trilogy. Yet, the courts had reached a bottom-line consensus — at least prior to *Frederick*. Applying *Fraser*, several courts recognized that prohibitions on pro-drug messages are constitutional because such expression is offensive and inconsistent with the mission of schools to promote healthy lifestyles (including by seeking at every turn to combat substance abuse). *See, e.g.*, *Boroff*, 220 F.3d at 471 (upholding ban on Marilyn Manson t-shirts because singer promoted drug use),[8] *cert. denied*, 532 U.S. 920 (2001); *Nixon v. N. Local Sch. Dist.*, 383 F. Supp. 2d 965, 971 (S.D. Ohio 2005) ("Examples [of offensive speech under *Fraser*] are speech containing vulgar language, graphic sexual innuendos, or speech that promotes suicide, drugs, alcohol, or murder."); *Guiles v. Marineau*, 349 F. Supp. 2d 871, 881 (D. Vt. 2004) (accepting school's judgment that drug images on student's t-shirt were offensive under *Fraser*); *Barber v. Dearborn Pub. Sch.*, 286 F. Supp. 2d 847, 859 (E.D. Mich. 2003) ("[W]hen student speech is . . . lewd, obscene, or vulgar (including related to alcohol or drugs), school officials may curtail that speech."); *Gano v. Sch. Dist. No. 411*, 674 F. Supp. 796, 798-99 (D. Idaho 1987) (upholding prohibition of t-shirt depicting drunken

[8] Even the dissent in *Boroff* found agreement with the majority that a school could prohibit pro-drug messages. 220 F.3d at 474 (Gilman, J., dissenting) ("If the majority is suggesting that the School could have concluded that Marilyn Manson's apparent endorsement of, say, illegal drug use, makes his picture an unacceptable image for students to wear in high school, I would agree.").

administrators under *Fraser*, noting that schools have duty to teach about harmful effects of alcohol).

Other courts reached the same result in applying *Tinker*; those courts observed that there can be little dispute that messages promoting illegal substances cause disruption to schools. For example, the Fourth Circuit, in a pre-*Fraser* opinion, took judicial notice that messages promoting drug use endanger students' health and safety. The court held, accordingly, that a school could prohibit distribution of an underground newspaper containing advertisements for drug paraphernalia. *Williams v. Spencer*, 622 F.2d 1200, 1205-06 (4th Cir. 1980); *cf. McIntire v. Bethel Sch.*, 804 F. Supp. 1415, 1420-21, 1426 (W.D. Okla. 1992) ("Reasonable school officials could forecast that the wearing of clothing bearing a message advertising an alcoholic beverage would substantially disrupt or materially interfere with the teaching of the adverse effects of alcohol and that its consumption by minors is illegal and/or would substantially disrupt or materially interfere with school discipline.").

So too, in *Kuhlmeier*, this Court singled out pro-drug speech as a type of student expression that schools must have latitude in regulating: "A school must also retain the authority to refuse to sponsor student speech that might reasonably be perceived to advocate drug or alcohol use . . . ." 484 U.S. at 272; *see also Bannon v. Sch. Dist. of Palm Beach County*, 387 F.3d 1208, 1219 (11th Cir. 2004) (approving viewpoint discrimination in school-sponsored speech to forbid pro-drug messages); *Planned Parenthood of S. Nev., Inc. v. Clark County Sch. Dist.*, 941 F.2d 817 (9th Cir. 1991) (permitting school policy banning ads in school publications for tobacco and liquor products); *McCann v. Fort Zumwalt Sch. Dist.*, 50 F. Supp. 2d 918, 920 (E.D. Mo. 1999) (upholding prohibition against school band playing song "White Rabbit" because it might "reasonably be perceived" to advocate the use of illegal drugs).

b. Commentators likewise have acknowledged that schools enjoy the prerogative of proscribing student speech that supports drug, alcohol, or tobacco use. *See, e.g.*, 1 Ronna Greff Schneider, *Education Law: First Amendment, Due Process and Discrimination Litigation* § 2:3 (2006) ("The determination of what constitutes lewdness or vulgarity is within the role of the school board rather than the courts. . . . [C]ourts have upheld school prohibitions of wearing t-shirts that may . . . compromise the school's ability to teach substance abuse . . . ." (citations omitted)); Susannah Barton Tobin, Note, *Divining Hazelwood: The Need for a Viewpoint Neutrality Requirement in School Speech Cases*, 39 Harv. C.R.-C.L. L. Rev. 217, 238 (2004) ("[T]he Court seemed prepared to allow the school to censor viewpoint-based student speech that might appear to advocate the use of alcohol or drugs."); Perry A. Zirkel, *Censoring or Censuring Student Speech: A Checklist*, 121 Educ. L. Rep. 477, 479 (1997) (setting forth an annotated flowchart for education practitioners, which, among other things, asks: "Is the student's expression lewd or otherwise offensive — e.g., based on sex, alcohol/drugs, or violence? . . . If YES and you[] are sued, you're likely to win." (citations omitted)).

c. School board policies across the country are largely in accord with Juneau's. While daunting to quantify with precision the number of school districts that prohibit advertisements or depictions of illegal substances, available statistics indicate that the Ninth Circuit's ruling would call into question the enforcement of standard policies adopted by the vast majority of public schools across the nation.

For example, in Arizona, which has its individual school policies available online, at least 90% of schools have anti-substance dress code policies (e.g., "Obscene language or symbols, or symbols of sex, drugs, or alcohol on clothing are expressly prohibited."). *See* Arizona School Board

Association Manuals, http://lp.ctspublish.com/asba/public/lpext.dll?f=templates&fn=main-h.htm.[9] And the standard policy adopted by most Arizona schools further provides that such rules shall be in effect during school hours and at all school-related functions. *Id.*

Similarly, the California School Boards Association's model policies provide that "[c]lothing, jewelry and personal items (backpacks, fanny packs, gym bags, water bottles etc.) shall be free of writing, pictures or any other insignia . . . which bear drug, alcohol or tobacco company advertising, promotions and likenesses" and further states that such rule "shall apply to all regular school activities." CSBA Sample Administrative Regulation § AR5132 (2001).

School officials in Arizona and California, which are bound by *Frederick*'s rigid analytical framework, would face a vexing dilemma. As a practical matter, the Ninth Circuit's ruling eviscerates the enforcement of such policies as written, unless school officials are confident that they can prove substantial and material disruption to school operations. Though *Frederick* stopped short of opining whether a t-shirt emblazoned with "BONG HITS 4 JESUS" could be constitutionally prohibited, the rationale of *Frederick* is equally applicable to clothing. Whether on a banner or on a t-shirt, whether in school or at an off-campus school activity, *Frederick* tells schools that they can no longer rely on the fact that illegal drugs undermine the educational mission of the schools. Rather, they must be prepared to defend their

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[9] Of the 230 Arizona school district policies listed on this website, 207 have anti-substance dress code policies, 195 of which contain the State's standard language as quoted above and 12 of which have their own unique language. The other 23 schools do not have such policies, but, of these, 14 have school uniform policies that excuse the need for anti-substance dress code policies.

enforcement of such policies by producing substantial and material evidence of disruption in a court of law.

Meanwhile, outside the Ninth Circuit, school officials must consider whether they are willing to face the same fate as Principal Morse, in view of the underdeveloped (and now confused) state of the law. Again, the number of such officials who potentially could run afoul of the *Frederick* standard is extraordinarily high.

In Texas, for example, approximately 99% of public school districts have adopted the Texas Association of School Board's recommended policy language. That model policy prohibits clothing "advertising or depicting tobacco products, alcohol, or drugs" and applies during school and may be enforced during extracurricular activities.[10]

Published research examining such policies similarly shows that such regulations are widely prevalent. An empirical study on student handbooks in Illinois found that 83.75% of a sampling of schools prohibited messages promoting drugs or alcohol. Jane E. Workman & Beth Winfrey Freeburg, *Safety and Security in a School Environment: The Role of Dress Code Policies*, J. Fam. & Consumer Sci., April 1, 2006, at 19. Another study based on questionnaires of a randomly-selected national sample of principals found that the prohibition of expression related to illegal substances was one of the "most frequently" occurring

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[10] The Texas Association of School Boards Policy Service, which offers model local policies to school districts in Texas, also maintains the policy manuals (most of which are online or otherwise retrievable using search engines) for all 1,036 Texas school districts. *See* TASB Policy Service, http://www.tasb.org/services/policy/index.aspx; *see also* Tex. Educ. Agency, Texas Education Directory, http://askted.tea.state.tx.us/org-bin/school/SCHOOL_RPT?Y::All::DistDirectory. Approximately 1,025 of these districts have adopted TASB's recommended anti-substance dress code language (found at code "FNCA" in school policy manuals).

categories for student dress codes: "Statements, depictions, and/or advertisements for drugs, alcohol, and tobacco products were prominently banned." Todd A. DeMitchell et al., *Dress Codes in the Public Schools: Principals, Policies, and Precepts*, 29 J.L. & Educ. 31, 42-43 (2000).

Additionally, numerous state school board associations promulgate guidelines and model policies, which are illustrative of the policies typically found in schools in those States. The New York State School Boards Association, for instance, recommends that schools adopt a policy that "[a] student's dress, grooming and appearance, including hair style/color, jewelry, make-up, and nails, shall . . . [n]ot promote and/or endorse the use of alcohol, tobacco or illegal drugs and/or encourage other illegal or violent activities." NYSSBA Sample Policy § 5300.25 (2006). And that policy is prefaced by an admonition that "this code applies to all students, school personnel, parents and other visitors when on school property or attending a school function." § 5300.05.

Likewise, the Wisconsin Association of School Boards provided the following example of an acceptable implemented policy for regulating student dress: "[S]tudents are prohibited from wearing clothing that . . . promotes, depicts or advertises alcohol, drugs, [or] tobacco products . . . . The policy applies during the school day, in school buildings and vehicles, and at all school-sponsored activities." Wis. Ass'n Sch. Bds., *Regulating Dress and Grooming*, The Focus, Dec. 2003, at 5.

Examples of such school policies can be found in every federal judicial circuit. These policies illustrate a heretofore settled understanding that schools enjoy authority to proscribe student expression promoting illegal substances without any heightened evidentiary requirement (of showing disruption to school operations). The Ninth Circuit has dramatically altered the legal landscape. The *Frederick*

decision appears to be the first case in American jurisprudence that any court — federal or state — has denied public school officials the authority to proscribe pro-drug messages. At a minimum, the Ninth Circuit's opinion is the most far reaching limitation to date on the authority of school boards, principals, and teachers to regulate student expression advocating illegal substances.

3. Contrary to the Ninth Circuit's inflexible approach in *Frederick*, this Court repeatedly has acknowledged that school officials enjoy considerable deference in carrying out their demanding and sensitive responsibilities. The Court has recognized the importance of school officials' "comprehensive authority . . . , consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools," *Tinker*, 393 U.S. at 507; that schools should be accorded a "certain degree of flexibility," *Fraser*, 478 U.S. at 686 (quoting *New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985)); and that the First Amendment rights of public school students must be "applied in light of the special characteristics of the school environment." *Kuhlmeier*, 484 U.S. at 266 (quoting *Tinker*, 393 U.S. at 506). *See also Davis Next Friend LaShonda D. v. Monroe County Bd. of Educ.*, 526 U.S. 629, 646 (1999) ("We have observed, for example, 'that 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.'" (quoting *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 655 (1995))); *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.").

*Frederick*'s non-deferential approach is at war with this Court's pronouncements. It conveys a muddled message as to what constitutes permissible school speech, particularly in view of Congressional encouragement and the widespread

adoption of school policies restricting pro-drug speech. The time is ripe for this Court to clarify ambiguities infecting the law of schoolhouse speech over the last two decades. To that needed end, this case presents an appropriate vehicle for delineating the reach of the Free Speech Clause in proscribing messages promoting illegal substances.

Specifically, the Court can (and should) clarify the relevance, if any, of *Tinker* in situations that do not involve a specific evidentiary showing of disruption. The Court also can clarify the relevance, if any, of *Fraser* in categorizing pro-drug messages as plainly offensive. Finally, the Court can clarify the relevance, if any, of *Kuhlmeier* in situations where students broadcast messages during supervised school activities and where they are, in effect, representing their school to the public at large.

4. It is of central importance to our nation's school districts that they receive definitive guidance from this Court on the extent of their ability to regulate expression advocating drugs and other illegal substances. After all, fighting teenage substance abuse constitutes "a pressing concern in every school." *Bd. of Educ. v. Earls*, 536 U.S. 822, 834 (2002); *see also Vernonia*, 515 U.S. at 661-62 ("[T]he necessity for the State to [counter the effects of drugs in schools] 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.").

Messages matter. As Congress recognized in passing the Safe and Drug Free Schools and Communities Act, 20 U.S.C. § 7101 *et seq.*, drug use is a social phenomenon. To state the painfully obvious, impressionable adolescents face strong pressures to use drugs as they confront pro-drug messages from peers, adults, and the media. In view of the devastating impact illegal drug use has both on students and the learning environment, schools should be afforded significant latitude

in discouraging substance abuse. Part of maintaining a drug-free environment is ensuring that students are not confronted with inconsistent messages, particularly while school is in session.

5. Courts have recognized that speech promoting drugs, alcohol, and tobacco — particularly when targeting an audience of children — ought to be treated differently. *See, e.g., Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 599 (2001) (Souter, J., concurring in part and dissenting in part) ("[F]ew interests are more 'compelling,' than ensuring that minors do not become addicted to a dangerous drug before they are able to make a mature and informed decision as to the health risks associated with that substance . . . ."); *Anheuser-Busch, Inc. v. Schmoke*, 101 F.3d 325 (4th Cir. 1996) (upholding city ordinance banning outdoor alcohol advertising in certain areas where children are likely to be present). By refusing to differentiate the pro-drug message on Frederick's banner from the armbands in *Tinker*, the Ninth Circuit trivializes the drug crisis in our nation's schools. To make matters even worse, the court below ignores this Court's and Congress' support for efforts to eliminate drugs and pro-drug messages from the educational setting. Schools should not be required to tolerate pro-drug messages, particularly when they are under federal mandate to maintain a clear and consistent message that illegal drug use is wrong and harmful.

## II. THE DECISION BELOW RADICALLY DEPARTS FROM WELL-ESTABLISHED PRINCIPLES OF QUALIFIED IMMUNITY.

1. Principal Morse was in a situation all too familiar to school administrators. She was responsible for maintaining order at a gathering of hundreds of students and was suddenly confronted with a disruptive situation. Her response was to follow school board policies to the letter. Not only does Juneau School Board Policy 5520 "prohibit[]

any assembly or public expression that . . . advocates the use of substances that are illegal to minors," Policy 5850 explicitly states that a student such as Frederick who was "participat[ing] in [an] approved social event[]" is "subject to district rules for student conduct." App. 53a, 58a. As we have seen, such policies are commonplace in public school systems throughout the country. In addition, this Court has stated repeatedly that local school officials are to be accorded considerable deference in managing student conduct.

Not surprisingly, then, Principal Morse's decision to confiscate Frederick's banner and suspend him based on his cumulative infractions was sustained by Superintendent Bader. Following a full hearing, the School Board likewise upheld her actions without dissent. Principal Morse's decision was yet again tested and upheld by a federal district court judge who, in a fourteen-page summary judgment ruling, concluded that Principal Morse "had the authority, if not the obligation, to stop such messages at a school sanctioned activity." App. 37a.

The Ninth Circuit ultimately concluded that Principal Morse, Superintendent Bader, the Juneau School Board, and Chief Judge Sedwick all misapprehended the law. But when the Ninth Circuit further found that Principal Morse violated Frederick's "clearly established rights" (and is therefore liable for damages), the court departed from important guiding principles of the qualified immunity doctrine. Notably, "[i]f judges . . . disagree on a constitutional question, it is unfair to subject [governmental actors] to money damages for picking the losing side of the controversy." *Wilson v. Layne*, 526 U.S. 603, 618 (1999). Here, the Ninth Circuit holds Principal Morse to a higher standard on understanding the law than a highly respected federal district court judge with over a decade's experience on the bench. That should not be.

2. The Ninth Circuit's error stems from the manner in which it recast this Court's two-part qualified immunity test from *Saucier v. Katz*, 533 U.S. 194 (2001). In *Saucier*, this Court rejected the Ninth Circuit's qualified immunity test because it improperly fused the question whether a constitutional violation occurred with the question whether the defendant had qualified immunity. The Ninth Circuit's framing of the qualified immunity doctrine in *Frederick* suffers from the same analytical flaw.

*Frederick* fashions a three-part test from *Saucier*:

> First, we must determine whether the facts alleged show Morse's conduct violated a constitutional right. Second, we must determine whether the right was clearly established at the time of the alleged violation. Finally, we must determine whether it would be clear to a reasonable principal that her conduct was unlawful in the situation she confronted.

App. 18a-19a (citations and internal brackets and quotation marks omitted).

a. The Ninth Circuit began its qualified immunity analysis by restating its hindsight determination that Principal Morse violated Frederick's First Amendment rights — a determination that relied, in part, on case law decided after the January 24, 2002 incident, as well as a case still pending appeal at that time. *See* App. 9a n.14 (citing *Noy v. State*, 83 P.3d 545 (Alaska Ct. App. 2003)), 14a & n.32 (citing *Lavine v. Blaine Sch. Dist.*, 257 F.3d 981 (2001), *cert. denied*, 536 U.S. 959 (2002)), n.33 (citing *Newsome v. Albemarle County Sch. Bd.*, 354 F.3d 249 (4th Cir. 2003)), 15a & n.38 (citing *Scott v. Sch. Bd. of Alachua County*, 324 F.3d 1246 (11th Cir. 2003)); 15a-16a n.40 (citing *Sypniewski v. Warren Hills Reg'l Bd. of Educ.*, 307 F.3d 243, 257 (3d Cir. 2002))).

b. The court of appeals next determined that Frederick's right to display a large banner proclaiming "BONG HITS 4 JESUS" during schools hours at a school-sanctioned and supervised event was "clearly established." The panel conceded that there was "no Ninth Circuit authority precisely on point" and offered only that "what we do have is consistent with the above analysis." App. 12a. Finding precedent that may be "consistent with" a certain conclusion is emphatically not the test for determining a "clearly established right." Denial of a governmental actor's qualified immunity cannot rest on previously articulated general principles, but instead requires a greater degree of specificity that would put the government actor on notice. *Saucier*, 533 U.S. at 201. If no precedent is on point, there must at least be precedent finding "a constitutional violation under facts not distinguishable in a fair way from the facts presented in the case at hand." *Id.* at 202-03. No such case law existed. Prior to *Frederick*, no court had rejected the authority of public schools to regulate student speech promoting illegal drugs.[11]

The Ninth Circuit attempted to bolster its opinion that Principal Morse violated a "clearly established right" by making two irrelevant observations. *First*, the panel noted that Principal Morse admitted to being aware of this Court's opinions in *Tinker*, *Fraser*, and *Kuhlmeier* from her "advanced school law" course. App. 20a. That misses the analytical mark. Principal Morse's subjective beliefs do not matter in a test that turns on "objective legal reasonableness."

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[11] Alluding to *Frederick*, Judge Kozinski opined that whether a student's t-shirt was "plainly offensive" under *Fraser* was, "[u]ntil recently, . . . a closer question." *Harper*, 445 F.3d at 1193 (Kozinski, J., dissenting). Judge Kozinski candidly recognized that, at the time of the incident in *Frederick*, the parameters of "plainly offensive" speech under *Fraser* were still in flux.

*Wilson*, 526 U.S. at 614. In any event, her subjective belief was that she had correctly applied general principles of law. *Second*, the panel noted that "the only times other circuit courts have held that conduct like Morse's is not a constitutional violation, they have done so under facts 'distinguishable in a fair way from the facts presented in the case at hand.'" App. 19a. Whether case law supporting the constitutionality of Principal Morse's actions is "distinguishable in a fair way" may matter to the determination of whether there has been a constitutional violation, but it matters little in analyzing qualified immunity.

c. The Ninth Circuit turned, finally, to what it identified as the third part of its qualified immunity test, but which is actually the analysis that this Court requires for determining whether a right is "clearly established" — whether the unlawfulness of the scrutinized conduct would be clear to a reasonable public official in the specific circumstances at hand. *Saucier*, 533 U.S. at 202. In a pivotal move, the panel turned away from any substantive analysis under this critical step: "Once we have held that 'the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing [the official's] conduct.'" App. 21a (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818-19 (1982)). By this approach, the Ninth Circuit effectively eliminated the most important step in the qualified immunity analysis.

In sum, the Ninth Circuit's qualified immunity analysis in *Frederick* revives the cardinal sin committed in *Saucier*. The panel confused general propositions for a "clearly established right" and failed to make an appropriately particularized finding as to whether a reasonable principal in Ms. Morse's position would have concluded that her discipline of Frederick was unlawful.

3. The Ninth Circuit thereby set a perilous example for other courts to follow. Under the *Frederick* standard, governmental actors faced with legal uncertainty will have to predict the future course of constitutional law under penalty of harsh civil damages lawsuits. This disruptive jurisprudential development in the multi-State mega-Circuit of the Ninth threatens to compromise public school administration in the West — and beyond — in a fundamental way. A critical "goal of qualified immunity [is] to 'avoid excessive disruption of government.'" *Saucier*, 533 U.S. at 202 (quoting *Harlow*, 457 U.S. at 818). In our litigious culture, "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). This problem is especially pronounced here, where the law governing student speech is still relatively undeveloped, and manifestly so since this Court has not provided substantive guidance in almost twenty years. School administrators have a difficult enough job maintaining order without the daunting threat of liability for damages solely because their legal sophistication does not allow them to predict the future course of appellate jurisprudence.

4. In view of the manifest error infecting the Ninth Circuit's qualified immunity analysis, this Court may wish to consider summary reversal. At a minimum, the Court should grant review to provide much-needed guidance on (i) the meaning of a "clearly established right" and (ii) whether, in light of the broad latitude traditionally accorded public school officials in their day-to-day discretionary functions, the qualified immunity doctrine should be applied more flexibly in the sensitive context of public school education.

## CONCLUSION

For the foregoing reasons, this Court should grant the petition for writ of certiorari. The Court may also wish to consider summary reversal.

Respectfully submitted,

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