No. 06-278

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

PETITIONER'S REPLY MEMORANDUM

KENNETH W. STARR
Counsel of Record
RICK RICHMOND
ERIC W. HAGEN
KIRKLAND & ELLIS LLP
777 South Figueroa Street
34th Floor
Los Angeles, CA 90017
(213) 680-8400

Attorneys for Petitioners

October 9, 2006

Seeking to defend the Ninth Circuit's decision, respondent obfuscates the record and paints a misleading portrait of governing law. Although the pertinent facts in this case are straightforward, the law of the First Amendment in the setting of public education is in ever-cascading disarray. As for the record, respondent weaves a web of semantic quibbles, misleading factual characterizations, and record-barren assertions. Much of the caviling deals with disputed issues that both the district court and the Ninth Circuit pointedly determined to be immaterial. Indeed, the Ninth Circuit wholly agreed with Chief Judge Sedwick's bedrock conclusion that "[t]here is no genuine issue of fact material to the decision." App. 6a. Those undisputed findings include:

- "Frederick was a student, and school was in session." App. 6a; *accord* App. 35a.
- The viewing of the Olympic Torch Relay was a "school-authorized activit[y]." App. 7a; *accord* App. 33a-37a.
- District personnel, teachers, and administrators accompanied students at the relay event. App. 3a-4a; *accord* App. 34a.
- The student body, including Frederick, congregated along the street in front of school to watch the relay. App. 2a, 4a-6a; *accord* App. 24a-25a, 29a-30a, 35a.
- Frederick and other students unfurled a banner that "expressed a positive sentiment about marijuana use." App. 6a-7a; *accord* App. 28a-29a, 35a-38a.
- Principal Morse disciplined Frederick for violating the school district's policy against promoting illegal substances. App. 3a; *accord* App. 28a-29a.

When respondent's mosaic of wishful thinking is set aside, as it should be, we are left with a nationally significant ruling of immense practical importance in an arena of the law that is woefully underdeveloped and confused. This Court's review is urgently needed.

I. THIS CASE RAISES VITAL ISSUES OF PRACTICAL IMPORTANCE UNDER THE FIRST AMENDMENT IN THE RECURRING CONTEXT OF STUDENT SPEECH.

Principal Morse, an experienced, respected educator, made a perfectly reasonable, on-the-spot judgment to enforce a commonplace school conduct policy when respondent unfurled his pro-marijuana banner, during school hours, in full view of the student body assembled on and around school grounds to witness the Olympic Torch Ceremony.[1] In this setting, where the Juneau school district sought to have an educational moment outside the classroom, Frederick's pro-drug banner radically changed the focus to a decidedly different subject.

Petitioners consistently have asserted that Frederick's actions — besides disrupting the school activity at hand — disrupted the school's educational mission of maintaining a clear and consistent message that use of illegal substances is wrong and harmful. App. 3a; ER 32. The district court — following the lead of every prior court addressing this issue — rightly determined that this critical educational mission justified Principal Morse's enforcement of the policy against promoting illegal substances. App. 35a-37a.[2] Breaking new jurisprudential ground, the Ninth Circuit concluded that disruption to the educational mission was not enough. App. 18a. The Ninth Circuit's decision reveals a bold — and

---

[1] Respondent recasts the banner incident as involving himself and several non-students. *See* Opp'n at 11 (stating he was "joined with non-students to display a banner"). The record evidence only identified one non-student involved in the incident. App. 70a; ER 36, 40, 41.

[2] Prominent former-drug czars from both Democratic and Republican Administrations have joined with several of the nation's leading anti-drug organizations in urging this Court to carefully consider our nation's teen substance abuse problem and the need for schools to enforce policies such as the one enforced by Principal Morse. D.A.R.E. Am. *Amicus* Br.

unwarranted — judicial willingness to second-guess public school educators who operate on the front line.

This case presents an attractive vehicle for shaping the cacophonous body of First Amendment law in the context of school officials seeking to enforce policies against promoting illegal substances. The policies enforced by Principal Morse are similar to policies embraced by countless public school systems across the nation. Such policies apply — as they explicitly did in this case — to student conduct that occurs not only on school grounds but at school-related activities, whether on or off campus.

1. Respondent suggests that standing just off campus grounds during the banner display renders this case "idiosyncratic." This is baseless. School disciplinary rules have never been deemed unenforceable because a school activity moves beyond the precise metes and bounds of school property. *See* 3 James A. Rapp, *Education Law* § 9.03[5][b][i] (2006) ("Authority to discipline students for school related activities extends not only to those occurring on school property but also off school property."). To his credit, respondent does not pretend that this is somehow not a school speech case. Nor could he. Notwithstanding its circumlocution, the Ninth Circuit fully disarms respondent's attempted assault on the foundation of our submission. The Ninth Circuit concluded, simply but decisively: This is a "student speech case," not a "speech on a public sidewalk" case. App. 5a. That is the end of the matter.

So too, respondent attempts to divert attention to whether the relay itself was school-sponsored in an effort to suggest that student viewing of and participation in the event did not constitute a school-sponsored or authorized activity. Opp'n at i, 1-2 & n.2, 6, 11. The district court, however, concluded that "there is no issue of fact as to whether or not this was a school-sponsored activity." App. 34a. The district court alternatively referred to the event as "school-sponsored," "school-approved," and "school-sanctioned." App. 33a-37a.

The Ninth Circuit did not disturb this finding and similarly characterized the event as "school-authorized." App. 7a.[3]

The fact that the Olympic Torch Relay itself may have been supported by private, as well as public, sponsors can in no way mean that the school district's participation in the event ceases to be a school-sponsored activity. Surely, students on school trips to the Fujifilm Giant Panda Habitat at the National Zoo or the Lockheed Martin IMAX Theater at the National Air and Space Museum would still be subject to school jurisdiction despite the presence of corporate monikers and logos.

2. Respondent further claims that the event was not supervised by school personnel. Opp'n at i, 1 n.2. Although the Ninth Circuit characterized the event as "partially supervised," App. 17a, the court in no wise found clear error in the district court's detailed findings:

> [Principal Morse] authorized the teachers to take their classes to view the relay. . . . [T]eachers and administrative officials monitored students' actions. . . . The relay occurred during school hours, at a time when parents expected their children to be under school supervision.

App. 34a-35a; *see* SER 6, 70-80 (declarations detailing supervisory roles of administrators and teachers). Indeed, the court of appeals fully acknowledged that administrators, teachers, and staff were present and that the event occurred

---

[3] Without citation, respondent falsely states: "In the trial court, with different counsel, the Petitioners admitted the relay was not sponsored by the school but called student attendance 'school sanctioned.'" Opp'n at 1 n.2. Respondent provides no citation because there is no such "admission." The record in the lower courts is replete with examples of petitioners describing the school's relay participation as "school sponsored." In any event, in this context, the semantic difference between "school-sponsored" and "school-sanctioned" is insignificant.

during the school day. App. 3a-6a. The pivotal point remains, there was still official supervision.[4]

3. Respondent inventively states that "BONG HITS 4 JESUS" contained a "political message." Opp'n at 11. The record and findings are to the contrary. Frederick repeatedly testified that he intended no message whatsoever by the phrase. App. 6a; ER 23, 35; SER 92-93, 109. Nor is a political message reasonably apparent.[5] Frederick instead maintained that the statement was a meaningless publicity stunt. ER 23 ("Q: Were you reaching for some kind of phrase that would be controversial and yet ultimately meaningless? A: Yes."). This belated spin about the banner is of no consequence. The Ninth Circuit's decision is premised on the fact that the banner "expressed a positive sentiment about marijuana use." App. 6a-7a; *see also Guiles v. Marineau*, 461 F.3d 320, 328 (2d Cir. 2006) (describing Frederick's sign as a "clearly pro-drug banner").

II. THE INSTABILITY AND CONFUSION INFECTING THE LAW OF STUDENT SPEECH HAVE BEEN EXACERBATED IN RECENT WEEKS.

Two days after our petition was filed, the Second Circuit in *Guiles*, *supra*, reversed a district court decision that had fully comported with Chief Judge Sedwick's analysis and instead adopted the Ninth Circuit's destabilizing approach. The Second and Ninth Circuits are now squarely at odds on this important issue with the Fourth and Sixth Circuits. This development further compounds the unenviable dilemma of

---

[4] "[P]artially supervised" apparently means that some of the 1,000-plus Juneau Douglas High School students managed to sneak away from the event or were otherwise unruly. App. 4a, 34a.

[5] Marijuana use by minors has always been illegal and has never been part of the political debate in Alaska. And Frederick's audience was a high school student body, nearly all of whom were under 18 years old.

school officials who have lacked this Court's authoritative guidance for two decades.

1. Respondent trumpets the notion that *Frederick* is a narrow decision confined to its Olympian facts. He is wrong. Indeed, *Guiles* puts the lie to this law office pretense. In *Guiles*, the Second Circuit held that a school could not censor specific images of a martini glass, liquor bottles, and lines of cocaine on a student's t-shirt. 461 F.3d at 330. The t-shirt at issue contained an amalgam of images and text criticizing the President and accusing him of being a former substance abuser. The school allowed the student to wear the shirt but told him to cover the drug and alcohol images because such images violated the school's dress code. *Id.* at 321.

Whereas the district court, applying *Fraser*, had upheld the school's editing of the shirt, *see Guiles v. Marineau*, 349 F. Supp. 2d 871, 881 (D. Vt. 2004), the Second Circuit concluded that the school officials could only censor such images if they first satisfied the substantial disruption test under *Tinker*. 461 F.3d at 330. Following *Frederick*'s lead, the Second Circuit adopted a narrow view of *Fraser*'s "plainly offensive" standard. *Guiles* refused to extend *Fraser* — as several other courts have done, *see* Pet. at 15-16 — to the regulation of drug and alcohol images. 461 F.3d at 330.

2. In an exercise in willful blindness, respondent ignores the Fourth Circuit's decision in *Williams v. Spencer*, 622 F.2d 1200 (4th Cir. 1980), which was addressed in the petition and also by *amici*. Pet. at 16; NSBA *Amicus* Br. at 9; D.A.R.E. Am. *Amicus* Br. at 10, 14. In *Williams*, the Fourth Circuit held that a school can prohibit distribution of an underground newspaper that contained advertisements for drug paraphernalia. *Id.* at 1205. Although decided prior to *Fraser* and *Kuhlmeier*, *Williams* did not require school officials to demonstrate that the prohibited material would substantially disrupt school activities. *Id.* at 1205-06.

"[D]isruption," stated the court, "is merely one justification for school authorities to restrain the distribution of a publication; nowhere has it been held to be the sole justification." *Id.* at 1206. Instead of requiring such proof, the court took judicial notice that such messages endanger the health and safety of students and upheld the school's ban of the underground paper. *Id.* at 1205. No court has ever questioned *Williams*. Indeed, it has only been cited with approval, including by other circuits and in cases decided post-*Fraser* and *Kuhlmeier*.[6]

Likewise, in *Boroff*, the Sixth Circuit upheld a school's ban on t-shirts depicting a rock group known for promoting antisocial values such as illegal drug use. 220 F.3d 465, 471 (6th Cir. 2000), *cert. denied*, 532 U.S. 920 (2001). There again, the court did not require the school to prove substantial disruption of the academic program because the t-shirts fell into the category of "plainly offensive" speech under *Fraser*. *Id.* at 469. The court reasoned that *Fraser* gave local school officials wide discretion to regulate speech that is contrary to the basic educational mission of the school. *Id.* at 470. And although *Boroff* was not a unanimous opinion, even the dissent, citing the Fourth Circuit's *Williams* decision, agreed that a school could prohibit pro-drug messages. *Id.* at 472, 474 (Gilman, J., dissenting).

Respondent erroneously asserts that "*Boroff* was substantially limited by a later Sixth Circuit decision, *Castorina v. Madison County School Board*, 246 F.3d 536 (6th Cir. 2001)." Opp'n at 7. But *Castorina* nowhere

---

[6] *See, e.g.*, *Boroff v. Van Wert City Bd. of Educ.*, 220 F.3d 465, 472 (6th Cir. 2000) (Gilman, J., dissenting); *Bystrom v. Fridley High Sch., Indep. Sch. Dist. No. 14*, 822 F.2d 747, 758 (8th Cir. 1987) (Henley, J., concurring); *Dunagin v. City of Oxford, Miss.*, 718 F.2d 738, 747 (5th Cir. 1983); *Nicholson v. Bd. of Educ. Torrance Unified Sch. Dist.*, 682 F.2d 858, 863 (9th Cir. 1982); *Phillips v. Anderson County Sch. Dist. Five*, 987 F. Supp. 488, 492 (D.S.C. 1997).

mentions *Boroff*. *Castorina* does not even address the regulation of messages promoting illegal substances; it analyzes the censorship of a Confederate flag t-shirt.[7]

3. Respondent distorts the holdings of several other cases. Respondent claims that four federal appellate decisions "have rejected the notion that a student's expression can be suppressed or punished as 'offensive' under *Fraser* merely because it involves a reference to drugs." Opp'n at 8 (emphasis added) (citing *Newsom*, 354 F.3d at 256; *Castorina*, 246 F.3d 536; *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 214 (3d Cir. 2001) (Alito, J.); *Chandler v. McMinnville Sch. Dist.*, 978 F.2d 524, 529 (9th Cir. 1992)). Yet, none of these cases even addresses suppression or punishment of drug references under *Fraser*.

Respondent also fails to distinguish between the outcome of the case and the principle stated. Respondent claims that *Barber v. Dearborn Public Schools*, 286 F. Supp. 2d 847 (E.D. Mich. 2003), "holds the opposite of what Petitioners claim." Opp'n at 9. Petitioners cite *Barber* for the proposition that messages promoting drugs and alcohol may be curtailed under *Fraser*. Pet. at 15. Sure enough, *Barber* states: "*Fraser* is inapplicable as Barber's shirt did not refer to alcohol, drugs, or sex." 286 F. Supp. 2d at 856. If the t-shirt at issue in *Barber* had depicted a "bong" instead of political criticism of the President, the court would have viewed *Fraser* as applicable.

---

[7] If there were any lingering doubt that *Boroff* remains fully intact, post-*Castorina* decisions in the Sixth Circuit — and elsewhere — resolve that issue by consistently referring to *Boroff* as a case decided under *Fraser*'s "offensiveness" standard. *See, e.g.*, *Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 388 (6th Cir. 2005) (observing that *Boroff* allows a school district to enforce a dress code that bans "offensive illustrations" such as "nihilistic Marilyn Manson T Shirts"). No subsequent decision has recognized a limitation in *Boroff*'s holding.

Similarly, respondent claims that petitioners' citation of *McIntire v. Bethel School Board*, 804 F. Supp. 1415 (W.D. Okla. 1992), "directly rejects the Petitioners' main argument here." Opp'n at 9. But the outcome of *McIntire* boiled down to the school being unable to establish that the message on students' t-shirts — "[t]he best of the night's adventures are reserved for people with nothing planned" — advocated alcohol consumption. The *McIntire* court indeed recognized that *Fraser* — an opinion it described as "oblique at best and certainly less than clear" — offered no aid to the school officials because prohibiting the t-shirts was not "reasonably related to the expressed pedagogical concern of teaching students about the effects of alcoholic beverages and the illegality of consumption of them by minors." *Id.* at 1426-27. *McIntire* actually recognized the breadth of *Fraser*.

III. THE NINTH CIRCUIT'S QUALIFIED IMMUNITY ANALYSIS DEPARTS FROM THIS COURT'S JURISPRUDENCE IN A PROFOUNDLY UNSETTLING MANNER.

As the basis for the purported clearly established right to display a pro-drug banner at a school activity, respondent points only to the general legal principles stated in *Tinker*, *Fraser*, and *Kuhlmeier*. But for almost two decades now, courts have wrestled with the lack of clarity in these general principles, most recently in *Guiles*: "This case requires us to sail into the unsettled waters of free speech rights in public schools, waters rife with rocky shoals and uncertain currents." 461 F.3d at 321. Reliance on general principles, particularly where the principles are hazy, is insufficient to label a right "clearly established" and deny qualified immunity. *Saucier v. Katz*, 533 U.S. 194, 201 (2001).

Respondent further argues that Principal Morse, having learned the general principles of *Tinker*, *Fraser*, and *Kuhlmeier* in her academic training almost a decade before the incident, has forfeited any subsequent claim to qualified immunity in a student speech case. This faulty reasoning

only reiterates one of the Ninth Circuit's manifest errors. Ms. Morse's subjective beliefs, however respondent distorts them, are irrelevant in an "objective legal reasonableness" test. *Wilson v. Layne*, 526 U.S. 603, 614 (1999).

Respondent contends that petitioner is simply being "result-oriented." Opp'n at 12. One cannot take lightly the result in this case. A respected and caring educator faces harsh civil liability for carrying out a long-standing school policy. If qualified immunity can be so recklessly tossed aside, as it was in *Frederick*, then the tens of thousands of public school officials who support this petition will find themselves preoccupied with litigation risks when called upon to fulfill their vital role in maintaining school discipline and decorum.

* * *

For the foregoing reasons, this Court should grant the petition for writ of certiorari or summarily reverse.

Respectfully submitted,

KENNETH W. STARR
Counsel of Record
RICK RICHMOND
ERIC W. HAGEN
KIRKLAND & ELLIS LLP
777 South Figueroa Street
34th Floor
Los Angeles, CA 90017
(213) 680-8400
Attorneys for Petitioners

October 9, 2006