No. 07-35867

In the United States Court of Appeals For the Ninth Circuit

KATHRYN NURRE, PLAINTIFF-APPELLANT

v.

DR. CAROL WHITEHEAD,
DEFENDANT-APPELLEE

On Appeal from the United States District Court for the Western District of Washington at Seattle
The Honorable Robert S. Lasnik, District Judge
U.S.D.C Case No. C06-0901RSL

Brief of *Amici Curiae* National School Boards Association, American Association of School Administrators, Arizona School Boards Association, California School Boards Association, Idaho School Boards Association, Montana School Boards Association, and Oregon School Boards Association
In Support of Defendant-Appellee

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[FILED WITH CONSENT OF ALL PARTIES]

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STATEMENT OF INTEREST

The National School Boards Association represents the 95,000 school board members who govern our nation's local school districts. The American Association of School Administrators is composed of 14,000 school system leaders. The Arizona School Boards Association, California School Boards Association, Idaho School Boards Association, Montana School Boards Association, and Oregon School Boards Association comprise the governing boards of school districts in states located in this Circuit. As representatives of school boards and administrators, *Amici* have an interest in ensuring that First Amendment law is clear so that school officials are able to adopt and implement policies that respect the constitutional rights of students while protecting educators and children alike from wasteful litigation and distraction from the academic mission.

This brief is filed with the consent of both parties pursuant to Federal Rule of Appellate Procedure 29(a).

SUMMARY OF ARGUMENT

This case features many legal uncertainties at the intersection of the Free Speech and Establishment Clauses in public schools. The costs of litigation and the fear of litigation typified by this case have predictable and negative effects on education. These realities highlight the critical need to afford school officials some

room to maneuver between competing legal requirements. They also make this the quintessential case in which qualified immunity is called for.

ARGUMENT

I. The intersection of the Free Speech and Establishment Clauses in public schools has been problematic for courts and attorneys, let alone for school officials.

Few areas of law confront public school officials with more legal and political minefields than disputes involving freedom of expression—especially disputes that also involve freedoms of religion. The courts themselves have acknowledged the confusion their rulings have created and "have described the tests these cases suggest as complex and often difficult to apply,"[1] with one federal appeals court lamenting the "unsettled waters of free speech rights in public schools, waters rife with rocky shoals and uncertain currents."[2] This Court itself has observed that Establishment Clause doctrine "undoubtedly suffers from a sort of jurisprudential schizophrenia…."[3]

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[1] *Morse v. Frederick*, 127 S.Ct. 2618, 2641 (2007) (Breyer, J., concurring in part and dissenting in part) (citations omitted).
[2] *Guiles v. Marineau*, 461 F.3d 320, 321 (2d Cir. 2006), *cert. denied*, 127 S.Ct. 3054 (2007).
[3] *Thomas v. Anchorage Equal Rights Comm'n*, 165 F.3d 692, 717 (9th Cir. 1999) *reh'g granted, opinion withdrawn by,* 192 F.3d 1208 (9th Cir. 1999), *on reh'g*, 220 F.3d 1134 (9th Cir. 2000).

If these questions present such difficulty for courts, they are more perplexing to those whose business is educating children. School personnel not only must develop policies consistent with dynamic and at times conflicting principles but also must implement these policies on a daily basis, at a moment's notice, and usually without the luxury of extended legal consultation.[4]

Adding to the legal confusion and complexity over the requirements of the U.S. Constitution as construed by federal courts is the need for school officials to navigate the results of increasing forays into these questions by other levels and branches of government. These include federal statutes;[5] state constitutions; state statutes[6]; administrative and regulatory guidelines[7]; and nonregulatory guidance.[8]

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[4] *Morse*, at 2639 (Breyer, J., concurring in part and dissenting in part) ("Teachers are neither lawyers nor police officers; and the law should not demand that they fully understand the intricacies of our First Amendment jurisprudence.").

[5] *E.g.*, Equal Access Act, 20 U.S.C.A. §§ 4071-4074 (2007) (governing access to school fora by school-recognized, noncurriculum related student organizations); No Child Left Behind Act, 20 U.S.C.A. § 7904 (2008) (directing Secretary of Education to issue guidance on prayer in public schools and conditioning federal aid to schools on compliance).

[6] *E.g.*, WASH. REV. CODE § 28A.600.025 (2008) (forbidding school personnel from grading student work based on religious expression or penalizing student religious expression in school); CAL. EDUC. CODE § 48950 (2008) (establishing statutory rights to free speech of high school students on and off campus); TEX. EDUC. CODE ANN. §§ 25.151 *et seq.* (2008) (requiring that school district adopt policy establishing limited public forum at all school events at which student is to speak and providing "safe harbor" model policy stipulating that student speakers shall introduce all football games, other athletic events designated by district, opening announcements for school day, and additional designated events such as assemblies and pep rallies).

From this complex landscape, the range of legal questions that arise in schools—particularly as disputes and successive impact litigation strategies originating in the nation's culture wars visit themselves on educators—is formidable.[9] The "astounding numbers"[10] of resulting free speech lawsuits in the

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[7] *E.g.*, WASH. ADMIN. CODE 392-400-245 (2007) (granting students right to freedom of speech "subject to reasonable limitations upon the time, manner, and place of exercising such right"); 2001 Nev. Op. Att'y Gen. No. 27 (2001) (discussing legality of school district regulation authorizing student-initiated school prayer at commencement).

[8] *E.g.*, Assistant Sec'y, Office for Civil Rights, U.S. Dep't of Educ., First Amendment: Dear Colleague Letter, *available at* http://www.ed.gov/about/offices/list/ocr/firstamend.html; U.S. Dept. of Educ., Guidance on Constitutionally Protected Prayer in Public Elementary and Secondary Schools, 68 Fed. Reg. 9645 (Feb. 28, 2003).

[9] *E.g.*, *Guiles*, 461 F.3d 320 (involving T-shirt with message criticizing President Bush and featuring drug- and alcohol-related images); *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, *reh'g denied*, 455 F.3d 1051 (9th Cir. 2006), *vacated as moot*, 127 S.Ct. 1484 (2007), on remand, 485 F.3d 1052 (9th Cir. 2007) (involving T-shirt expressing religious condemnation of homosexuality); *Governor Wentworth Regional Sch. Dist. v. Hendrickson*, 421 F.Supp.2d 410 (D.N.H. 2006), *rev'd*, 201 Fed. Appx. 7 (1st Cir. 2006) (involving "tolerance" arm band); *Child Evangelism Fellowship of Md. v. Montgomery County Pub. Sch.*, 457 F.3d 376 (4th Cir. 2006) (involving policy limiting teacher distribution of materials from outside groups); *Walz v. Egg Harbor Twp. Bd. of Educ.*, 342 F.3d 271 (3d Cir. 2003) (involving prohibition of gifts with religious messages at classroom party).

[10] Reynolds Holding, *Fighting for Free Speech in Schools*, TIME, May 10, 2007, *available at* http://www.time.com/time/magazine/article/0,9171,1619549,00.html (noting 94 cases reached appellate courts in one year). A recent Westlaw search by *Amici* yielded approximately 800 federal and state cases involving student free speech claims since the U.S. Supreme Court's decision in *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969), a figure that excludes disputes resolved prior to a decision.

nation's schools are a costly distraction from their educational mission.[11] As one researcher explained:

> The decisions [the Supreme Court] *has* handed down tend to be narrowly tailored to the facts of the specific cases, and the lower courts are far from consistent in interpreting and applying these Supreme Court precedents. This complex judicial situation would be confusing enough, but when the contradictory advice disseminated by warring advocacy groups is added to the mix, it is no wonder that education officials have become desperate for definitive information.[12]

The same researcher interviewed representatives of the ever increasing number of litigation groups, on both sides, that target public schools on issues of church and state and found that these otherwise contentious respondents tended to agree on at least one thing. In roughly one-third of the controversies over religion in public schools, they said, nothing school officials could do would stave off litigation—their only choice is in which side will sue them.[13]

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[11] *See generally* Sarah Redfield, *The Convergence of Education and Law: A New Class of Educators and Lawyers*, 36 IND. L. REV. 609, 614-15 (2003) (noting that number of overall suits published by education law reporters rose from about 300 in 1960 to over 1,800 by 2000; that reported jury verdicts and judgments against schools showed similar increases; that "these numbers do not begin to encompass unreported case and settlements, or the far greater number of other legal issues resolved in law offices every day"; and that "virtually all sources of law in this area [of education] are subject to substantial, if not constant, change.").

[12] JOAN DELFATTORE, THE FOURTH R: CONFLICTS OVER RELIGION IN AMERICA'S PUBLIC SCHOOLS 284 (2004).

[13] Joan DelFattore, Bowen Lecture in Education Policy, George Mason University (April 27, 2004).

The case currently before this Court exemplifies these problems. The school district has been the subject of complaints from both directions on the issue of religious music at graduation. The directive from school personnel that all music performed at graduations be entirely secular and the dispute that gave rise to this case occurred against a backdrop of complaints and negative publicity in 2005 about the performance of a religious song at graduation.[14]

The case raises several issues as to which there is considerable legal uncertainty. These include what legal framework is appropriate for reviewing the case, whether selection of an instrumental piece of music constitutes speech giving rise to First Amendment liability, and how the limited available precedent dealing with related but different factual considerations should apply.

As an initial matter, it is not clear that forum analysis necessarily provides the correct standard for evaluating a case such as this. The U.S. Supreme Court and this Court thus far have evaluated disputes involving religious expression through the Establishment Clause.[15] This is consistent with decisions in other courts.[16]

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[14] *Nurre v. Whitehead*, 520 F. Supp.2d 1222, 1234 (W.D. Wash. 2007) (noting complaints over performance of song at prior commencement). As the District Court observed, "In cases like this one, school administrators run the risk of being whipsawed by the First Amendment's Free Speech and Establishment Clauses." *Id.* at 1239.

[15] *E.g., Lee v. Weisman*, 505 U.S. 577 (1992); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290 (2000); *Lassonde v. Pleasanton Unified Sch. Dist*., 320 F.3d 979 (9th Cir. 2003); *Cole v. Oroville Union High Sch. Dist*., 228 F.3d 1092 (9th Cir. 2000)

Appellant's attempt to define as a limited public forum the specific practice of allowing the students to choose the music, subject to school approval, rather than considering the graduation ceremony as a whole, is inconsistent with these decisions. Where a student's speech remains subject to final school approval, this Court has not considered a graduation speaker's choice of message in isolation, outside of the overall context of the commencement ceremony as a whole.[17] Even where the school goes out of its way expressly to disavow any endorsement of the speech, this Court has held, the overall context of the school-sponsored event can render the disclaimer irrelevant.[18]

Assuming for argument's sake that this Court's approach in its prior decisions is inapplicable to the facts of this case because the Establishment Clause concern here is less pronounced than in a prayer case, the appropriate standard to

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(deeming it unnecessary to determine whether graduation was public or limited public forum and focusing on Establishment Clause).

[16] *E.g., Adler v. Duval County Sch. Bd.*, 250 F.3d 1330 (11th Cir. 2001); *ACLU v. Black Horse Pike Reg. Bd. of Educ.*, 84 F.3d 1471 (3d Cir. 1996) (*en banc*); *Ingebretsen v. Jackson Pub. Sch. Dist.*, 88 F.3d 274 (5th Cir. 1996).

[17] *Lassonde*, 320 F.3d at 981, 984 (evaluating district's "plenary control" over graduation ceremony, rather than valedictorian's selection of message); *Cole*, 228 F.3d at 1101-04 (finding that where school maintained control of ceremony, neither election of speaker to deliver invocation nor selection of valedictorian rendered speech private). *See also Doe v. Santa Fe Indep. Sch. Dist.,* 168 F.3d 806, 822 (5th Cir. 1999), *aff'd* 530 U.S. 290 (2000) (rejecting school district argument that graduation was limited public forum, given tight control by school over ceremony); *Brody v. Spang,* 957 F.2d 1108, 1119-20 (3d Cir. 1992) (noting that school control over commencement exercises would make them nonpublic fora).

[18] *Lassonde*, 320 F.3d at 984-85. *Accord Black Horse*, 84 F.3d at 1482.

apply to a school-sponsored function controlled by school officials arguably is that set forth in *Hazelwood v. Kuhlmeier*.[19] Although this Court is among those that have interpreted *Hazelwood* to require viewpoint neutrality even in a nonpublic school-sponsored or imprimatur forum,[20] the degree of judicial scrutiny in a nonpublic forum is less than that applied to a limited public forum.[21]

How the law should apply to the particular facts of this case is unclear as well. No U.S. Supreme Court decision has directly considered the question of religious music in public schools. Those lower courts that have weighed the issue have not opined as to how the First Amendment may apply to instrumental pieces. Such case law as can be found generally has addressed religious music not in graduation ceremonies but in other performance settings or in schools generally.[22]

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[19] 484 U.S. 260, 271 (1988) (weighing "expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school"). *See Brody,* 957 F.2d at 1119-20 ("The process for setting the format and contents of a graduation ceremony are more likely to resemble the tightly controlled student newspaper policies at issue in *Hazelwood* than the broad group access policies in *Widmar* and *Gregoire*.").

[20] *Downs v. Los Angeles Unified Sch. Dist*., 228 F.3d 1003, 1010-11 (9th Cir. 2000) (noting circuit court split on this point).

[21] *Faith Center Church Evangelistic Ministries v. Glover,* 480 F.3d 891, 907 (9th Cir. 2007) ("Restrictions governing access to a limited public forum are permitted so long as they are viewpoint neutral and reasonable in light of the purpose served by the forum," whereas "Regulation of speech in a nonpublic forum is subject to less demanding judicial scrutiny … 'The challenged regulation need only be reasonable, as long as the regulation is not an effort to suppress the speaker's activity due to disagreement with the speaker's view.'") (citations omitted).

[22] *Bauchman v. West High Sch.*, 132 F.3d 542, 546 (10th Cir. 1997) (evaluating choir repertoire); *Doe v. Duncanville Indep. Sch. Dist*., 70 F.3d 402 (5th Cir. 1995)

How to apply the general admonition frequently distilled from limited case law—that sacred music "should not predominate" in a school performance—to a function in which only *one* piece may be played is less than self-evident. Courts have noted the special nature of a graduation ceremony that may distinguish it in legally significant ways from other school functions.[23] In light of this, there is little wonder that the directive requiring secular music in this case distinguished between music performed at concerts and at graduations.[24]

Also at least debatable is whether the selection of a musical composition for final approval by school authorities constitutes protected speech at all—*i.e.*, whether it represents a constitutionally protected viewpoint against which school officials *could* have discriminated. It is unclear how selection of an instrumental piece of music is covered by the free speech guarantee "that there be full

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(upholding inclusion of spiritual song as theme song sung often and carried over from year to year); *Stratechuk v. Board. of Educ.*, 200 Fed. Appx. 91 (3d Cir. 2006) (addressing procedural issue in challenge to blanket policy prohibiting religious music in schools).

[23] *Supra* at nn. 17-18.

[24] *Nurre*, 520 F. Supp.2d at 1232 (quoting e-mail declaration: "[Commencement] is not a music concert. Musical selections should add to the celebration and should not be a separate event. Invited guests of graduates are a captive audience. I understand that attendance maybe [sic] voluntary, but I believe that few students (and their invited guests) would want to miss the culminating event of their academic career. And lastly there is insufficient time at graduation to balance comparable artistic works.").

opportunity for expression in all of its varied forms to *convey a desired message*"[25] or is the kind of conduct, symbol, and non-verbal speech that attempts to express an idea or convey a message that will likely be understood by others.[26] In other school contexts, such as dress codes, courts often have found that alleged expressive activity lacking this communicative element falls outside the purview of First Amendment protection.[27] At a minimum, there is considerable tension between the assertion that the instrumental music in this case conveys a sufficiently particularized message as to trigger First Amendment protection and the argument that no reasonable school official could have imagined that the piece might pose any Establishment Clause issue. This is an intriguing debate for legal theorists, but not for school administrators.

Other sources of guidance, of varying degrees of formality, likewise reflect uncertainty as to the particular questions posed by this case. The nonregulatory guidance on constitutionally protected prayer adopted by the U.S. Department of Education pursuant to the No Child Left Behind Act does not address music but emphasizes that whether student expression at school functions can be attributed to

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[25] *Young v. American Mini Theatres*, 427 U.S. 50, 76 (1976) (citations omitted) (emphasis added).
[26] *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 296 (1984).
[27] *E.g., Blau v. Fort Thomas Public Sch. Dist*., 401 F.3d 381 (6th Cir. 2005) (dress code policy could not be challenged on First Amendment theory amounting to "nothing more than a generalized and vague desire to express…middle-school individuality").

the school, and therefore restricted, turns on whether students "retain control over the content of their expression" or "school officials determine or substantially control the content of what is expressed."[28] A 1998 iteration of federal guidance to schools is silent on the question.[29] Many of the model school board policies provided to member school districts by state school boards associations are silent as to religious music at graduation ceremonies.[30] "Frequently Asked Questions" documents and the like issued by advocacy groups of varying stripes also tend to focus on vocal music or, more often, on concert performances involving multiple musical selections, and are silent as to the questions posed by this case.[31]

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[28] U.S. Dep't of Educ., Guidance on Constitutionally Protected Prayer, *supra* n. 8.
[29] U.S. Dep't of Educ., Religious Expression In Public Schools (revised May 1998), *available at* http://www.ed.gov/Speeches/08-1995/religion.html (last visited Feb. 25, 2008).
[30] *E.g., Religious-Related Activities and Practices*, Model policy 2340 (Wash. State Sch. Directors' Ass'n 2008) ("This restriction does not preclude the presentation of choral or musical assemblies which may use religious music or literature as a part of the program or assembly."); *Graduation Ceremonies and Activities*, Sample board policy 5127(a) (Calif. Sch. Boards Ass'n 2008) (omitting mention of music at graduation but noting that question of student-initiated, student-led prayer at graduation ceremonies has not yet been authoritatively resolved."); *Religion in Curricular or School Sponsored Activities*, Model policy IKD (Kan. Ass'n of Sch. Boards 2008) ("Music, art, literature and drama having a religious theme or basis are permitted as part of the curriculum or as part of a school activity if they are presented in a balanced and objective manner and are a traditional part of the cultural and religious tradition of a particular holiday or field of study," but, "School ceremonies shall be secular in nature. While recognizing the significance of tradition, the board requires that graduation exercises and dedication ceremonies be secular in nature."). These model policies are on file with *Amicus* NSBA.
[31] *E.g.,* Am. Civil Liberties Union of Wash. State, Know Your Rights: A Guide For Public School Students In Washington 22-23 (June 2007) ("[I]f the school allows

The legal uncertainty over these matters is highly relevant to the disposition of the case. *Amici* urge this Court to avoid shrinking either the already narrow path school officials must tread between competing potential litigants or the qualified immunity safeguards they are afforded as they attempt to do so.[32]

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student expression on the basis of genuinely neutral criteria *and* students have primary control over the content of their expression, students individually may choose to express religious beliefs" and "[i]ncluding a few religious songs in a school concert among mostly non religious songs would likely be okay."); Christian Legal Society, Religious Holidays & Public Schools: Questions and Answers, http://www.clsnet.org/clrfPages/pubs/pubs_holida5.php (last visited Feb. 25, 2008) ("Sacred music may be sung or played as part of the academic study of music. School concerts that present a variety of selections may include religious music. Concerts should avoid programs dominated by religious music, especially when these coincide with a particular religious holiday."); Anti-Defamation League, Religion in the Public Schools, http://www.adl.org/religion_ps_2004/teaching.asp, (last visited Feb. 25, 2008) (stating that "in school assemblies or special events … a school's choral group can sing songs that are religious in nature but may only do so if the song is part of a larger program of music which is secular."); Charles C. Haynes and Oliver Thomas, FINDING COMMON GROUND: A FIRST AMENDMENT GUIDE TO RELIGION AND PUBLIC SCHOOLS 48 (2007) ("School concerts that present a variety of selections may include religious music. Concerts should avoid programs dominated by religious music…."); Music Educators Nat'l Conf., Music With a Sacred Text, http://www.menc.org/publication/books/relig0.html, (last visited Feb. 25, 2008) (offering suggestions for sensitivity in selection of music but warning that position statement "cannot hope to answer all specifics").

[32] *Amici* do not here address Appellant's Equal Protection "class of one" claim. The application of this relatively new theory to new legal contexts, as proposed in this case, is the subject of uncertainty and a pending case before the U.S. Supreme Court, *Engquist v. Oregon Dep't of Agriculture*, 478 F.3d 985 (9th Cir. 2007), *cert. granted*, 128 S.Ct. 977 (2008). For purposes of the qualified immunity inquiry, *Amici* deem it unlikely that reasonable school administrators confronting the question posed by this case even would view it through an equal protection frame of reference.

II. The threat of litigation, including in situations like that presented by this case, has negative impacts on education, on educators, and on the children they serve.

The legal realities confronting school officials constitute a highly relevant policy backdrop against which any discussion of competing legal provisions and qualified immunity should be considered. "School personnel often approach the law with anxiety and fear and view it as a trap to ensnare any educator who makes an innocent mistake."[33] In a 2003 survey, 53% of responding teachers and 55% of principals reported that they were either very or somewhat concerned about the risks of lawsuits.[34] Fifty-five percent of teachers and 51% of principals indicated that their concern had increased since they became a teacher or principal.[35] Tellingly in this era of high stakes testing, 72% of teachers and 49% of principals indicated their concerns about potential legal challenges were the same or greater than their concerns with the federal No Child Left Behind Act.[36] Half of Colorado teachers and administrators participating in 2007 focus groups, including 85% of

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[33] Philip H. Wagner, An Evaluation of the Legal Literacy of Educators and the Implications for Teacher Preparation Programs (Nov. 16, 2007) (unpublished paper, *available at* http://www.educationlaw.org/2007%20Conference/Papers/A7Wagner.pdf?PHPSESSID=9e1dd0efa5f755206e321b58c3359ba7) (last visited Feb. 25, 2008).

[34] Harris Interactive, *Evaluating Attitudes Toward the Threat of Legal Challenges in Public Schools* (March 2004); Public Agenda, *Teaching Interrupted: Do Discipline Policies in Today's Public Schools Foster the Common Good?* 23-24 (May 2004).

[35] *Id.* at 23, 25.

[36] *Id.* at 26-28.

the administrators, reported having been threatened with a lawsuit.[37] Over 60% of the respondents reported living "with a modest to high degree of legal fear."[38]

Decisions that have the effect of subjecting education officials to litigation and personal liability, even for erroneous decisions rendered in good faith, complicate the challenge school boards face in recruiting and retaining qualified personnel.[39] Individuals who take these positions already do so at great personal sacrifice[40] and should not be burdened with the fear of lawsuits and personal liability simply for carrying out their duties.

Fear of litigation also reportedly results in defensive behavior that is not in the best interest of children. According to the 2003 survey, four out five teachers

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[37] Common Good Colorado, *The New Three R's: Rules, Regulations, and More Rules*, Oct. 2007, at 23-24.

[38] *Id.*

[39] Redfield, *supra* n. 11, at 623 (quoting Pennsylvania school district attorney as saying, "educators feel as though they are under attack; the veterans with experience and expertise are fleeing to retire and many bright young people are not entering the field of education at all."); Del Stover, *Looking for Leaders, Urban districts find that the pool of qualified superintendents is shrinking*, AMER. SCH. BD. J. (December 2002) ("there are too few skilled administrators moving up the supply pipeline"; identifying that the most difficult position to fill in California is the high school principalship); Lynn Olson, *Principals Wanted: Apply Just About Anywhere*, EDUC. WEEK (Jan. 12, 2000), (indicating many teachers are disinterested in becoming administrators because position lacks appeal).

[40] *See*, *e.g.*, Philip A. Cusick, *The Principalship? No Thanks. Why teachers won't trade the classroom for the office*, EDUC. WEEK (May 14, 2003) (identifying time demands, compensation issues, longer hours, and increased responsibilities of principals, which include school improvement, annual reports, accountability, core curriculum, student safety, gender and equity issues, and staff development; attributing increase in principal responsibilities to "the way Americans think about schools—that they can be all things to all students").

and three out of four principals, across urban, suburban, and rural settings, reported having engaged in "defensive teaching" out of fear of litigation.[41] Majorities of respondents also expressed the belief that educators sometimes avoid making sound decisions where the threat of a potential lawsuit lurks.[42] Educators also suggest that, to them, what lawyers may approvingly consider preventive law behavior often equates to excessive bureaucratization. About nine in ten educators reported that the imperative to avoid legal challenges leads to unnecessary paperwork.[43]

When preventive law proves unsuccessful, the actual merits of the case may be of secondary importance to educators who are stretching budgets. "When public moneys are paying for litigation, the expedient settlement is attractive, even if it is at the expense of pedagogical wisdom or student welfare."[44] Moreover, "[s]ettlements themselves are, of course, often costly."[45]

When litigation is not settled, the potential costs to school budgets are significant. According to one recent report by an advocacy group, in fiscal year 2005 alone, three of California's five largest school districts collectively paid $32.8 million in litigation costs—$8.0 million in verdicts and settlements and $24.8

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[41] Harris Interactive, *supra* n. 34, at 21-22.
[42] *Id.* at 32 (acknowledging that most respondents denied having done so themselves).
[43] Harris, *supra* n. 34, at 31.
[44] Redfield, *supra* n. 11, at 622 & n.78.
[45] *Id.*

million to outside counsel.[46] Cases alleging constitutional violations can be even more damaging owing to the potential award under 42 U.S.C. § 1988 of attorney's fees to a plaintiff. All of this, of course, exerts upward pressure on insurance premiums and engenders a concern on the part of many educators that they need additional liability coverage to do their jobs.[47]

Although all of these reports address a wider range of legal risks than those posed by First Amendment disputes, the dynamics are similar regardless of the substantive area of law. Even if it is true, as some commentators have suggested, that fears expressed by educators sometimes are disproportionate to the reality,[48] their impact on schools and children is no less real. In addition, even those who argue that the steady growth in school-related litigation is less drastic than some

[46] Citizens Against Lawsuit Abuse, The Fourth 'R' of California's School Districts: 'Ripped off by Litigation' 4 (January 2008).

[47] Wagner, *supra* n. 33, at 3 (citations omitted) (noting that "[o]fficials at Forrest T. Jones and Company, Inc., the nation's third largest insurance provider to teachers, reported that the number of teachers purchasing liability insurance increased 25% between 1995 and 2000," and that member survey by American Federation of Teachers revealed that liability insurance was the most important union benefit, after only healthcare benefits and handling of grievances); Jessica Portner, *Fearful Teachers Buy Insurance Against Liability*, EDUC. WEEK 1 (Mar. 29, 2000).

[48] Wagner, *supra* n. 33 (arguing that educators need much more legal education, including as to their liability protections); Perry Zirkel, *Paralyzing Fear? Avoiding Distorted Assessments of the Effect of Law on Education*, 35 J.L. & EDUC. 461 (Oct. 2006).

reports reflect, acknowledge that one important exception is the significant increase in lawsuits related to religion.[49]

At the very least, all of these arguments reinforce the importance of affording school personnel some discretion and some measure of protection from personal liability by correctly applying qualified immunity safeguards. Even if it is true, as Appellant asserts, that the facts of this case represent an overreaction by school officials, such overreactions result directly from the fear of the litigation—from all sides—typified by this very suit.

Finally, lawsuits like this one frequently lead to ironic results. Paradoxically but predictably, litigation ostensibly intended to defend freedom of expression in schools often has the opposite effect. In the aftermath of *Hazelwood v. Kuhlmeier* and its application by lower courts, for example, the understandable preventive law response by many school districts has been to minimize potential liability by formally declaring all student publications to be curricular offerings subject to greater review by school officials. Similarly, if allowing students to make an initial selection of music is to be construed as opening a limited open forum and exposing school officials and the public fisc to greater potential liability─even where, as

[49] Marjorie Coeyman, *Are schools more afraid of lawsuits than they should be?,* CHRISTIAN SCIENCE MONITOR, May 27, 2003, at 21 (reporting findings by Lehigh University professor Perry Zirkel that, although courts appear increasingly to resolve lawsuits in favor of schools, one important exception to the trend is disputes involving religion, and that many schools probably settle even meritless claims to minimize legal costs and distraction from the academic mission).

here, the selection required final approval by school officials—*Amici* fully expect that the prudent if regrettable response will be to avoid the question in the future by having school officials alone make every such selection.

III. This case epitomizes the need to preserve the "play in the joints" between competing constitutional provisions.

While schools would welcome greater judicial clarity as to the questions presented by this case, *Amici* urge this Court in rendering its answers to be conscious of the need to recognize the "play in the joints" necessary between the demands of the Establishment Clause and that of the Free Speech Clause.[50] Just as the courts have "struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other," so attorneys and school officials struggle to reconcile these requirements with those of the Free Speech Clause.[51] Indeed, as the litigation battleground in cases involving religious expression has shifted decidedly to the Free Speech Clause, the "complementary values" but "conflicting pressures" that require courts to preserve some play in the joints as to the Religion Clauses make this an even greater imperative as to Free

[50] *Walz v. Tax Comm'n*, 397 U.S. 664, 669 (1970) (observing that, short of "governmentally established religion or governmental interference with religion," First Amendment allows some "room for play in the joints productive of a benevolent neutrality").
[51] *Id.* at 668-69.

Speech questions.[52] Just as there is "some space for legislative action neither compelled by the Free Exercise Clause nor prohibited by the Establishment Clause," so there must be a range of school actions neither compelled by the Free Speech Clause nor prohibited by the Establishment Clause.

The Free Speech/Establishment zero-sum nightmare most earnestly to be avoided is court decisions that confront educators with situations in which any expression that is constitutional also is constitutionally protected, or in which any expression not constitutionally protected also is unconstitutional. In this case, assuming the playing of the instrumental "Ave Maria" at graduation would not have violated the Establishment Clause, it need not automatically follow that the decision to disallow the piece gave rise to school liability. Similarly, assuming that there is no constitutional right to play the piece, it need not automatically follow that allowing it to be played would have violated the Establishment Clause.

Directly related to this concern for preserving some minimal room for maneuver, it also is vitally important that this Court affirm that—subject to the test of reasonableness—a school district's interest in avoiding a potential Establishment Clause violation provides a defense to a claim of viewpoint

[52] *Cutter v. Wilkinson*, 544 U.S. 709, 719-20 (2005).

discrimination.[53] This Court's own precedents already make clear that "[g]overnmental actions taken to avoid potential Establishment Clause violations and litigation have a valid secular purpose…."[54] Again, as the Free Speech Clause figures more centrally in these disputes, there is a corresponding urgency to recognize a similar escape route from a similar litigation "Catch 22." Indeed, courts including this one have suggested that under certain circumstances the need to avoid divisiveness can weigh favorably in evaluating the reasonableness of denying access to a limited public forum and, conversely, can constitute an acceptable secular purpose.[55]

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[53] *Nurre*, 520 F. Supp. at 1237, n. 20 ("If the Establishment Clause "defense" is to provide any meaningful shelter for a school district, however, the defense should not depend on a hindsight determination by the court, but rather on the reasonableness of the school district's belief at the time that an activity would violate the Establishment Clause.").

[54] *Vasquez v. Los Angeles County*, 487 F.3d 1246, 1255-56 (9th Cir. 2007) (citing *Vernon v. City of Los Angeles*, 27 F.3d 1385 (9th Cir. 1994)). As this and other courts have pointed out, "For this court to hold that the removal of objects to cure an Establishment Clause violation would itself violate the Establishment Clause would result in an inability to cure an Establishment Clause violation…." *Id.* at n. 8 (citations omitted and alterations to original). *See also Skoros v. City of New York,* 437 F.3d 1, 27-28 (2d Cir. 2006) (when "government endeavors to police itself and its employees in an effort to avoid transgressing Establishment Clause limits, it must be accorded some leeway, even though the conduct it forbids might not inevitably be determined to violate the Establishment Clause.") (citations omitted).

[55] *E.g.*, *Faith Center Church Evangelistic Ministries*, 480 F.3d 891, 910-11 (9th Cir. 2007) (holding that county reasonably could conclude "that *controversy* and distraction of religious worship within library meeting room may alienate patrons and undermine the library's purpose of making itself available to the whole community") (emphasis added) (citing *Di-Loreto v. Downey Unified Sch. Dist. Bd. of Educ.,*196 F.3d 958, 966, 968 (9th Cir. 1999), in which, "a school district policy

These things being so, the school officials' actions in this case were not unreasonable. As both a factual and a legal matter, mischaracterizing their public responsibility to try to avoid political and legal peril as evidence of "hostility to and bias against religion in violation of the Establishment Clause" is grossly unfair and flatly incorrect.[56] It is belied by the district's policies and practices embracing religious music in other school programs.[57] This Court should reject the conflating of responsible and nefarious motives.

IV. This case epitomizes the need to provide school officials with qualified immunity safeguards.

Even if reasonable minds can differ over the school officials' decisions in this case, their actions hardly cause them to fall into the categories of "the plainly incompetent or those who knowingly violate the law," which the U.S. Supreme

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excluded subject matter that was deemed too sensitive or controversial from advertisements on a high school's baseball fence. … 'The District's concerns regarding disruption and potential controversy' were found reasonable in light of the circumstance of having a limited forum…."); *Selman v. Cobb County Sch. Dist*., 390 F.Supp.2d 1286, 1303-05 (N.D. Ga. 2005) *vacated and remanded on other grounds*, 449 F.3d 1320 (finding that reducing offense to persons whose beliefs may conflict with teaching of evolution was acceptable secular purpose of biology textbook disclaimer sticker).

[56] *Nurre*, 520 F. Supp.2d at 1233, Brief of Appellant, 29-39. *Cf.* Vasquez, 487 F.3d at 1255 (rejecting claim that county was "motivated by hostility toward Christianity" and agreeing with district court's conclusion that "it is more plausible the County was seeking to avoid the expense associated with defending a threatened lawsuit.").

[57] Brief of Appellant at 23-24.

Court has denoted as the narrow exceptions to qualified immunity safeguards.[58] The immunity inquiry acknowledges that "reasonable mistakes can be made as to the legal constraints on particular [official] conduct," including mistakes of fact and mistakes of law.[59]

In light of the legal uncertainties detailed above,[60] this case does not involve remotely the kind of "clearly established" law of which a public servant should be aware before the protections of qualified immunity may be denied.[61] To deny qualified immunity, a court must be satisfied that the legal right in question was so clearly established "that a reasonable official would understand that what he is doing violates that right."[62] As this Court has indicated, the "*specific* contours of the law" must be well developed or sufficiently clear.[63] Not only did Appellee have "no on-point decision to rely on," but this case "does not involve the mere application of settled law to a new factual permutation."[64]

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[58] *Malley v. Briggs*, 475 U.S. 335, 341 (1986).
[59] *Saucier v. Katz*, 533 U.S. 194, 205 (2001).
[60] *Supra* at I.
[61] *Saucier*, 533 U.S. at 202.
[62] *Anderson v. Creighton*, 483 U.S. 635, 640 (1987).
[63] *Rudebusch v. Hughes*, 313 F.3d 506, 518 (9th Cir. 2002). *See also Hosty v. Carter*, 412 F.3d 731, 739 (7th Cir. 2005) *(en banc)*, *cert. denied*, 126 S. Ct. 1330 (2006) (noting that "[m]any aspects of the law with respect to students' speech…are difficult to understand and apply" and concluding that "public officials need not predict, at their financial peril, how constitutional uncertainties will be resolved.").
[64] *Porter v. Bowen*, 496 F.3d 1009, 1026 (9th Cir. 2007). *Cf. Preschooler II v. Clark County Sch. Bd. of Trustees*, 479 F.3d 1175, 1181-83 (9th Cir. 2007)

Amici recognize that courts decide constitutional questions narrowly, if at all,[65] and that the law relating to freedom of expression, especially where religion is a factor, inherently is governed by fact-specific inquiries.[66] Indeed, Justice Breyer has gone so far as to argue that in this area "one will inevitably find difficult borderline cases" and "no exact formula can dictate a resolution to such fact-intensive cases," adding that "in such cases, I see no test-related substitute for the exercise of legal judgment."[67]

Inherent in the narrow and contextual approach take by the courts, however, is that the guidance provided in this area will be significantly less systematic and predictable for attorneys—let alone for educators. That being the case, *Amici* submit that in virtually no other context is an expansive approach to qualified immunity—and a forgiving standard for what constitutes a "reasonable" mistake by

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(denying qualified immunity where many court decisions plainly prohibited physical abuse of schoolchildren and established that teacher's abuse and failure of education officials to address conduct, are grounds for liability); *Phillips v. Hust*, 477 F.3d 1070, 1079-80 (9th Cir. 2007) (citing "numerous prior and subsequent cases").

[65] *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11 (2004) ("Always we must balance 'the heavy obligation to exercise jurisdiction,' against the 'deeply rooted' commitment 'not to pass on questions of constitutionality" unless adjudication of the constitutional issue is necessary.") (citations omitted).

[66] *Van Orden v. Perry*, 545 U.S. 677, 700 (2005) (Breyer, J., concurring in judgment) (observing that in Establishment Clause cases, "the Court has found no single mechanical formula that can accurately draw the constitutional line in every case.").

[67] *Id.*

a public official—more appropriate than in a case involving student expression in public schools.

Such an expansive reading is very much in keeping with the most recent U.S. Supreme Court decision in a case involving student freedom of expression. In *Morse v. Frederick,*[68] not a single justice on the divided court expressed any doubt that the school principal named as a defendant in the case was entitled to qualified immunity.[69] During oral argument, Justice Souter suggested that the argument itself was strong evidence that a reasonable school official could not have been expected to divine the correct answer.[70] The questioning by Chief Justice Roberts and Justice Kennedy made the case for qualified immunity with some vehemence.[71]

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[68] 127 S.Ct. 2618, 2629 (2007).

[69] *Id.* at 2638-43 (Breyer, J. concurring in part and dissenting in part) (arguing that "Court need not and should not decide this rather difficult First Amendment issue on the merits" but "simply hold that qualified immunity bars the student's claim…."); *Id.* at 2643 (Stevens, J., dissenting) ("I agree with the Court that the principal should not be held liable….").

[70] Transcript of Oral Argument at 49-50, *Morse v. Frederick*, 127 S.Ct. 2618 (2007) (No. 278) ("JUSTICE SOUTER: We've been debating this in this courtroom for going on an hour, and it seems to me however you come out, there is reasonable debate. Should the teacher have known, even in the, in the calm deliberative atmosphere of the school later, what the correct answer is?").

[71] *Id.* at 29-30. ("CHIEF JUSTICE ROBERTS: It's a case about money. Your client wants money from the principal personally for her actions in this case. … JUSTICE KENNEDY: Well, would you waive damages against this principal who has devoted her life to the school, and you're seeking damages from her for this sophomoric sign that was held up? … CHIEF JUSTICE ROBERTS: But there's a broader issue of whether principals and teachers around the country have to fear

Were the facts reversed in this case and had a different plaintiff sued the superintendent for having violated the Establishment Clause by permitting the playing of "Ave Maria"—a thoroughly plausible scenario[72]—she would be no less entitled to qualified immunity.

CONCLUSION

This case entails precisely the kind of contextual line-drawing that would be made less perilous by locating the question within the "play in the joints" between constitutional protections. It clearly demonstrates why school officials are entitled to qualified immunity when called upon to attempt to draw such lines. For these reasons the judgment of the District Court should be affirmed.

Respectfully submitted,

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that they're going to have to pay out of their personal pocket whenever they take actions pursuant to established board policies that they think are necessary to promote the school's educational mission.").

[72] *See McCreary County v. ACLU of Ky*., 545 U.S. 844, 869-74 (2005) (rejecting state attempts to "cure" Establishment Clause violation and evaluating secular purpose with reference to entire history of complaint and reaction).