Appeal No. 03-35701

UNITED STATES COURT OF APPEALS FOR THE
NINTH CIRCUIT

JOSEPH FREDERICK,

Plaintiff-Appellant,

v.

DEBORAH MORSE; and JUNEAU SCHOOL BOARD,

Defendants-Appellees.

BRIEF OF *AMICI CURIAE* ASSOCIATION OF ALASKA SCHOOL BOARDS, CALIFORNIA SCHOOL BOARDS ASSOCIATION, NATIONAL SCHOOL BOARDS ASSOCIATION, ALASKA COUNCIL OF SCHOOL ADMINISTRATORS, AMERICAN ASSOCIATION OF SCHOOL ADMINISTRATORS, and FAIRBANKS NORTH STAR BOROUGH SCHOOL DISTRICT IN SUPPORT OF APPELLEES DEBORAH MORSE and JUNEAU SCHOOL BOARD

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RULE 26.1 DISCLOSURE OF AMICI

Pursuant to FRAP 26.1 and Local Rule 26.1, the Association of Alaska School Boards, National School Boards Association, Alaska Council of School Administrators, and American Association of School Administrators hereby make the following disclosures:

1. The Amici are not publicly held corporations or publicly held entities.

2. The Amici do not have parent corporations.

3. No public corporation holds more than 10% of stock in any of the Amici.

4. No publicly held corporation or publicly held entity has a direct financial interest in the outcome of this litigation.

5. The Amici are not a trade association.

INTERESTS OF AMICI

The **Association of Alaska School Boards** (AASB) is recognized in Alaska Statutes[1] as the organization representing the interests of school boards in Alaska. Formed in 1954 by four districts, AASB has expanded over the years to include fifty-four school boards in cities, boroughs, and Rural Education Attendance Areas, incorporating with nonprofit status in 1972. Today the AASB serves as a source of assistance, information, and liaison for school boards and the districts they represent. The mission of the AASB is to advocate for children by assisting school boards in providing quality public education, focused on student achievement, through effective local governance.

The **California School Boards Association** (CSBA) is a California nonprofit corporation duly formed and validly existing under the laws of the State of California. CSBA is a member-driven association composed of the governing boards of nearly 1,000 K-12 school districts and county boards of education throughout California. CSBA's Education Legal Alliance (Alliance) is composed of nearly 800 CSBA members dedicated to addressing public education legal issues of statewide concern to school districts and county offices of education. The purpose of the Alliance, among other things, is to ensure that local school boards retain the authority to fully exercise the responsibilities vested in them by law to

[1] See Alaska Statute § 14.14.150.

make appropriate policy decisions for their local educational agencies. The Alliance's activities have included, as in this appeal, joining in litigation where the interests of public education are at stake.

The **National School Boards Association** (NSBA) is a not-for-profit federation of state associations of school boards, including AASB and CSBA. NSBA believes local school boards are the ultimate expression of grassroots democracy. NSBA assists each school board – acting on behalf of and in close concert with the people of its community – to shape the future of education in its community, to establish a structure and environment that allow all students to reach their maximum potential, to provide accountability for the community on performance in the schools, and to serve as the key community advocate for children and their public schools. Founded in 1940, NSBA now represents 95,000 local school board members. These local officials govern 14,890 local school districts serving more than 47 million public school students.

The **Alaska Council of School Administrators** (ACSA) is a nonprofit organization dedicated to the advancement and excellence of professional school administration in the State of Alaska. ACSA represents the professional leaders of Alaska's schools. Members of ACSA include superintendents, business officers, and site administrators. ACSA has over 400 members throughout the State of Alaska.

The **American Association of School Administrators** (AASA), founded in 1865, is a professional organization representing over 14,000 educational leaders across America and in other countries. AASA's mission is to support and develop school district leaders who are dedicated to the highest quality public education for all children.

The **Fairbanks North Star Borough School District** is the second largest public school district in Alaska with over 15,000 students. Like appellee Juneau-Douglas School District, Fairbanks North Star Borough School District is dedicated to its mission of providing an excellent education to its students and fulfilling its role in the fight against student drug and alcohol use.

The Amici seek to participate in this litigation by submitting an *amicus curiae* brief because the decision in this case will have a significant impact on their members and will be binding on all school districts in states within the jurisdiction of the U.S. Court of Appeals for the Ninth Circuit, including California and Alaska. Schools in California, like the Juneau-Douglas High School, have as part of their educational mission deterrence of drug and alcohol abuse. This mission is vital to the schools' educational program. If Appellant Frederick's banner and its message of "Bong Hits 4 Jesus" must be tolerated based on constitutional interpretation, school districts and their schools throughout the Ninth Circuit will be forced to endure, during school time at school-sponsored activities with teachers

and other students attending, students who choose to openly flaunt the school's authority to maintain a learning environment consistent with its mission of deterring drug and alcohol abuse. Such an outcome would infringe on the authority of school boards and administrators to make and enforce reasonable and appropriate policy decisions for their schools regarding deterrence of drug and alcohol abuse consistent with both federal and state law.

I. PRELIMINARY STATEMENT

Public education has long been a key function of a democratic political system. "Public Education . . . under regulations prescribed by the government . . . is one of the fundamental rules of popular or legitimate government."[2] Although public education is nowhere mentioned in the United States Constitution, the United States Supreme Court has recognized the importance of public education in fostering a free, egalitarian society.[3] Responsibility for public education rests primarily with locally-elected school boards, although Congress has imposed increasing mandates on public education since the 1950's, recently culminating in the No Child Left Behind Act of 2001.[4] Locally-operated public schools are "a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him adjust normally to his environment."[5]

In addition to instructing students, schools are now mandated to combat student drug and alcohol use.[6] Now more than ever, school districts are responsible

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[2] *See* Jean Jacque Rousseau, A Discourse on Political Economy (1755).

[3] *See Brown v. Board of Education of Topeka*, 347 U.S. 483, 493 (1954) ("Education is perhaps the most important function of state and local governments….It is the very foundation of good citizenship.")

[4] Pub L. No. 107-110, January 8, 2002, 115 Stat. 1425 (codified in scattered sections of 20 U.S.C.)

[5] *See Brown*, 347 U.S. at 493.

[6] *See* Alaska Statute § 14.20.360(a) (encouraging schools to include drug and alcohol prevention in their curricula); Alaska Statute § 14.20.680 (mandating

for "inculcating fundamental values necessary to the maintenance of a democratic political system."[7] The selection of which values to emphasize and the means to enforce them properly lie with local school boards and administrators, subject to statutory and constitutional restrictions. While students do not shed their First Amendment rights at the proverbial school house gate, the role for the courts to play in overseeing the operation of public schools should be limited.[8] Student rights to free speech are not co-extensive with adult rights in general society[9] and student rights must be measured against the unique setting of the public school environment. Over the past thirty years the Court has consistently rejected student constitutional claims that would undermine the efficient operation of schools.[10]

The democratic values of virtue and good behavior are as important to the operation of the schools as they are to a student's later life. The public school

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teacher training regarding drug and alcohol disabilities); Safe and Drug-Free Schools and Communities Act of 1994, codified at 20 U.S.C. § 7101 *et seq.* (creating comprehensive grant program for drug use prevention).

[7] *See Ambach v. Norwick*, 441 U.S. 68, 76-77 (1979).

[8] Federal courts play a unique oversight role. The Amici note Judge Ponsor's observation that "no other court system in the world today, and none that has existed in the history of the world, would take so much time to address the concerns of two high school students sent home over their t-shirts." *Pyle v. South Hadley Sch. Comm.*, 824 F. Supp. 7, 11 (D. Mass. 1993).

[9] *See Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986).

[10] *See* Erwin Chemerinsky, Students Do Leave Their Constitutional Rights at the Schoolhouse Gates: What's Left of Tinker, 48 Drake L. Rev. 527, 528 (2000) ("[I]n the thirty years since *Tinker*, schools have won virtually every constitutional claim involving student rights.")

environment requires a degree of order and decorum to function effectively.[11] The real world of public schools "is a rough and tumble place where students practice newly learned vulgarities, erupt with anger, tease and embarrass each other, share offensive notes," and intentionally disrupt the school.[12] While the proponents of student speech rights downplay the impact of student misbehavior, one federal court has correctly observed that "it is easy to assume a tempest in a teapot is trivial, unless you happen to be in the teapot."[13]

Student conduct that disrupts the educational process, if left unchecked, would defeat the mission of public education. While Frederick attempts to frame the issue as one of free expression against the petty tyranny of narrow-minded school administrators, the real issue is whether schools must tolerate student expression that interferes with their orderly operation, especially when the speech is intended to disrupt the school environment. The First Amendment does not require school districts to tolerate mixed messages about drug use.

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[11] The Amici note that other governmental institutions, such as Congress and the Courts, maintain standards of decorum to ensure that their business is conducted effectively. *See Fraser*, 474 U.S. at 681 (Jeffersonian rules of debate); *see also* Alaska Code of Judicial Conduct, Canon 3(B)(3)("A judge shall take reasonable steps to insure order and decorum in proceedings before the judge." Order refers to "the level of regularity and civility required to guarantee that the business of the court will be accomplished in accordance with the rules governing the proceeding.").

[12] *See Hawkins v. Sarasota County Sch. Bd.*, 322 F. 3d 1279, 1288 (11th Cir. 2003) (quoting Amicus Brief of NSBA).

[13] *Pyle*, 861 F. Supp. at 158.

"Governmental constraints on individuals' communication of ideas must be measured against substantial and compelling societal goals such as safety, decency, individual rights of other citizens and the smooth functioning of government."[14] As the United States Supreme Court held in *Tinker*, *Fraser*, and *Kuhlmeier*, the proper balance in the schools is to allow student political expression so long as it does not create a reasonable likelihood of disruption in school, and to allow other student speech that does not interfere with the school district's basic educational mission. Courts should defer to the expertise and discretion of school administrators and locally elected school boards in formulating and enforcing the rules – even where the Court may disagree with their decision – except in cases where First Amendment freedoms are directly and sharply implicated.[15] That standard preserves the tradition of local control of schools and effective governance of the school environment while ensuring appropriate judicial protection of First Amendment rights.

[14] *Bivens v. Albuquerque Pub. Sch.*, 890 F. Supp. 556, 559 (D. N.M. 1995).
[15] *See Epperson v. State of Arkansas*, 393 U.S. 97, 104 (1968).

II. ARGUMENT

A. The District Court Correctly Found that Frederick's Nonpolitical Speech Violated School Rules and was Inappropriate for the School's Educational Setting

1. *Chandler* adopts the principles of the *Tinker* trilogy

The Ninth Circuit Court of Appeals addressed the First Amendment rights of high school students in *Chandler v. McMinnville School District,* .[16] *Chandler* presented the question whether the First Amendment rights of two students were violated by prohibiting them from wearing buttons and stickers containing the word "scab." Students had worn the buttons while replacement teachers worked in the school during a divisive teachers strike. In concluding that the students' claims should not have been dismissed, *Chandler* reviewed Supreme Court precedent in *Tinker*,[17] *Fraser*,[18] and *Kuhlmeier*.[19] In the course of its analysis, but outside the scope of its holding, *Chandler* observed "that the standard for reviewing the suppression of vulgar, lewd, obscene, and plainly offensive speech is governed by *Fraser*, school-sponsored speech by *Kuhlmeier*, and all other speech by *Tinker*."[20] More broadly, *Chandler* cited the *Tinker* trilogy for the propositions that: (1) vulgar, lewd, obscene and plainly offensive student speech can be suppressed

[16] 978 F.2d 524 (9th Cir. 1992).
[17] *Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503 (1969).
[18] *Bethel Sch. Dist. v. Fraser,* 478 U.S. 675 (1986).
[19] *Hazelwood Sch. Dist. v. Kuhlmeier,* 484 U.S. 260 (1988).
[20] *Chandler,* 978 P.2d at 529 (emphasis added).

without showing that the speech was school-sponsored or caused disruption; (2) school officials are entitled to pervasive control over speech that might reasonably be perceived to bear the imprimatur of the school; and (3) all other student speech can be suppressed only if school officials might reasonably forecast substantial interference with or disruption of school activities, although administrators need not await actual disruption before acting.[21] *Chandler* concluded that the buttons fell in the category of "all other speech."

Chandler first considered whether the word "scab" was "per se vulgar, lewd, obscene or plainly offensive" – *i.e., Fraser* speech – and concluded that it was not.[22] *Chandler* then observed that there was no basis for believing that the stickers could reasonably have been viewed as *Kuhlmeier* speech bearing the imprimatur of the school.[23] *Chandler*, therefore, concluded that the only valid basis for prohibiting students from wearing buttons containing the word "scab" was the *Tinker* standard. Therefore, *Chandler* was remanded for a finding of whether school officials reasonably anticipated a substantial disruption of school activities.[24]

Chandler's result is precisely correct: the buttons were political speech on a matter of public importance and did not convey any message contrary to the

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[21] *Chandler*, 978 F.2d at 529.
[22] *Chandler*, 978 F.2d at 530.
[23] *Chandler*, 978 F.2d at 530.

district's basic educational mission. *Chandler* did not address the type of speech at issue in this case: nonpolitical speech that, while not "vulgar" or sexually provocative, nonetheless runs contrary to the district's basic educational mission. Frederick and his Amici assert that, because his speech was neither "lewd" nor school sponsored, *Chandler* means the speech falls in the category of "all other speech" and the *Tinker* standard must apply.[25] *Chandler's* test should not be read to restrict *Fraser's* analysis to language which is sexually lewd or offensive, or to apply *Tinker* expansively where *Tinker's* analysis is inappropriate. While the three-element test articulated in *Chandler* does not specifically refer to the importance of a district's basic educational functions, *Chandler's* discussion embraced the *Fraser* court's holding that a school district has the right to suppress student speech inconsistent with its basic educational functions. [26] This concept at the core of *Fraser* should be read into *Chandler's* three-part test. As the Amici will demonstrate, an analysis akin to *Fraser* provides the proper balance in this case. Further, *Tinker* does not always set the appropriate standard for "all other speech."[27]

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[24] *Chandler,* 978 F.2d at 530-31.

[25] The Amici believe that, as illustrated in the district's brief, its regulation satisfies the *Tinker* test. However, the Amici do not believe this case should reach the *Tinker* analysis.

[26] *See Chandler,* 978 F.2d at 529.

[27] Even if the Court finds that *Chandler* limited *Fraser's* holding to sexually provocative speech, the Amici assert that an analysis akin to *Fraser* rather than

2. *Tinker* limits viewpoint regulation of political speech

Tinker begins every discussion of student speech rights. *Tinker* is widely cited for the propositions that students are "persons" under the Constitution, that they do not shed their First Amendment rights at the schoolhouse door, and that a student's right to expression may be suppressed only upon a showing that the speech would interfere with the operation of the school. The first two propositions are self-evident and were not novel when Tinker was decided.[28] The third proposition remains true, but *Tinker's* analysis should not be extended to speech which is fundamentally different from the political message considered in *Tinker*. *Tinker* was never intended to create a catchall category or apply to "all" student speech. [29]

In *Tinker*, a school district engaged in viewpoint discrimination by punishing students for expressing their political opposition to the war in Vietnam by wearing

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Tinker must apply to Frederick's speech. The Amici believe *Chandler* should not be read to expand *Tinker's* scope beyond political speech because *Chandler's* speech fell within *Tinker's* core interests. The Court, therefore, did not have to create a dicta category of "all other speech" ruled by *Tinker* to decide *Chandler*.

[28] While the First Amendment did not apply to state institutions until 1925, (*see Gitlow v. New York,* 208 U.S. 652, 667 (1925)), *West Virginia State Board of Education v. Barnette,* 319 U.S. 624, 637 (1943), established the proposition that the First Amendment applies to students enrolled in state public schools. *Tinker,* 393 U.S. at 505.

[29] Although some commentators lament the "retreat" from *Tinker,* there is little question that *Tinker* would be decided the same way today. The courts have not extended *Tinker's* analysis to different types of student speech or means of

black armbands, a practice that admittedly caused no disruption in school.[30] The district had not prohibited any other form of political expression.[31] The Court specifically recognized the traditional importance of local school administration and the deference to which boards and administrators are entitled,[32] but could not reconcile the district's conduct with the First Amendment because *Tinker's* speech was political speech at the core of the First Amendment, and the district's viewpoint discrimination was the precise evil the First Amendment was intended to avoid.[33] The Court was clear in stating the limited scope of its holding, noting that the facts before it did not involve dress or grooming codes, or "aggressive, disruptive action, or even group demonstrations. Our problem involves direct, primary First Amendment rights akin to pure speech."[34] The Court specifically disclaimed the proposition that *Tinker* should apply to all speech or student

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regulation, but that does not constitute a "retreat" from *Tinker's* holding, merely a refusal to extend *Tinker* to dissimilar fact patterns.

[30] *See Tinker*, 393 U.S. at 510.

[31] *Id.*

[32] *Id.* ("The court has repeatedly emphasized the need for affirming the comprehensive authority of the states and of school officials, consistent with fundamental Constitutional safeguards, to prescribe and control conduct in the schools.").

[33] "If there is a bedrock principle underlying the First Amendment, it is that government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989).

[34] *See Tinker,* 393 U.S. at 508. The Court referred to speech as "pure" speech because, although symbolic, it contained a clear intent to convey a political

conduct and repeatedly emphasized that Tinker's speech had been regulated because it expressed a specific political opinion.[35] The Amici believe *Tinker* establishes: (1) the importance of substantive, core, political speech; (2) the impermissibility of viewpoint discrimination; (3) the importance of local school administration; and (4) the ability of school boards to prevent even political speech from disrupting the educational process.[36]

3. *Fraser* permits school districts to regulate nonpolitical student speech inconsistent with the school's basic educational functions

Tinker was never intended to apply to all student speech, as illustrated by the Court's holding in *Fraser*. *Fraser* is widely known for the "elaborate, graphic, and explicit sexual metaphor" delivered by student Matthew Fraser in a speech delivered at a school assembly.[37] The Supreme Court labeled the speech as "obscene" "lewd" and "offensive" (although it fell well below the standards for "obscenity" established in other contexts)[38] and upheld the suppression of *Fraser's*

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message. This limitation in *Tinker's* holding should have made *Fraser* easy to forecast.

[35] *See Tinker*, 393 U.S. at 510 (noting that other political symbols, such as Nazi iron crosses, were not suppressed).

[36] In some respects, *Tinker* is remarkable for its language giving school administrators broad discretion to regulate political speech if a disruption is forecast.

[37] *See Fraser*, 478 U.S. at 677-78.

[38] *See, e.g., FCC v. Pacifica Found.*, 438 U.S. 726, 747 (1978)(the "seven dirty words"); *see also Kuhlmeier*, 484 U.S. at 266 (noting that the speech at issue in *Fraser* was not "obscene").

speech. It is clear that, at a minimum, *Fraser* established standards applicable to "obscene and offensive" speech. Frederick, therefore, asserts that *Fraser* establishes only a narrow "vulgarity" exception to *Tinker*. Frederick underestimates *Fraser's* reach. *Fraser's* analysis – embraced by the court in *Chandler* – reaches far more student speech than sexual vulgarity, and reaches the speech at issue here.[39]

The bawdy nominating speech that Fraser delivered at a "school sponsored educational program in self-government"[40] properly resulted in discipline because Fraser had been warned in advance that his material was inappropriate[41] and because his presentation interfered with the school's interest in "teaching students the boundaries of socially appropriate behavior."[42] *Fraser* noted schools' "interest in protecting minors from exposure to vulgar and offensive spoken language."[43] Finally, *Fraser* observed that the speech and its punishment were "unrelated to any political viewpoint" and that "[t]he First Amendment does not prevent . . . school officials from determining that to permit a vulgar and lewd speech such as

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[39] *Fraser* is sometimes regarded as an exception to *Tinker's* general rule. However, *Fraser* is as broad in its scope and intent as *Tinker*. Nothing in *Fraser* indicates that it should be a narrowly construed exception. Had the cases been decided in reverse chronological order, *Tinker* could just as easily be regarded as a "political speech" exception to *Fraser*.

[40] *See Fraser*, 478 U.S. at 677.

[41] *See Fraser*, 478 U.S. at 678.

[42] *See Fraser*, 478 U.S. at 681.

[43] *See Fraser*, 478 U.S. at 684.

[Fraser's] would undermine the school's basic educational mission."[44] *Chandler's* discussion of the *Tinker* trilogy specifically embraces this broad understanding of *Fraser*.[45]

To distinguish *Tinker,* the Court in *Fraser* emphasized the political nature of Tinker's armbands.[46] *Fraser* thus clarifies that viewpoint regulation, political speech, debate and the marketplace of ideas are *Tinker*'s hallmarks. At least one commentator has observed that in *Fraser* the Supreme Court apparently viewed *Tinker* as a viewpoint discrimination case.[47] "*Fraser* illustrates the deference the Court is willing to give school administrators when the speech is not considered purely political."[48]

Fraser affirmed that schools may properly inculcate values, regulate student expression, and prohibit speech inconsistent with the "basic educational mission" and "fundamental values" of public education, provided the decision is reasonable,

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[44] *See Fraser*, 478 U.S. at 685.
[45] *See Chandler*, 978 F.2d at 528.
[46] "Unlike the sanctions imposed on the students wearing armbands in Tinker, the penalties imposed in this case were unrelated to any political viewpoint." *Fraser,* 478 U.S. at 685. The *Fraser* court also noted "the marked distinction between the political 'message' of the armbands" and Fraser's speech. 478 U.S. at 680.
[47] *See* David Hudson, The Courts' Inconsistent Treatment of *Bethel v. Fraser* and the Curtailment of Student Rights, 36 J. Marshall L. Rev. 181, 190 (2002).
[48] W. David Watkins & John S. Hooks, The Legal Aspects of School Violence: Balancing School Safety with Students' Rights, 69 Miss. L.J. 641, 670 (1999).

even if there is no showing of actual disruption in the school.[49] This departure from *Tinker's* disruption analysis is particularly significant because the Court could have upheld the discipline based upon the disruption Fraser's speech caused in the assembly. While *Fraser* specifically involved sexually charged speech, Courts have properly found that other types of speech may also run contrary to a school's educational mission and, therefore, fall under *Fraser's* rubric.[50] *Fraser* focused on the unique needs of the school setting, not just lewdness or vulgarity, and *Chandler* should not be construed as reading such a limitation into *Fraser*.[51] A district's obligation to discourage drug use is at least as important as suppressing the mild vulgarity presented in *Fraser*. There is no reason to apply a more rigorous standard to speech encouraging drug use than to the mild vulgarity in *Fraser*.

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[49] *See Fraser*, 478 U.S. at 686 (emphasis added). The Seventh Circuit has affirmed this view. *See Muller v. Jefferson Lighthouse Sch.*, 98 F.3d 1530, 1542 (7th Cir. 1996)(holding that where a school deems student speech inconsistent with its basic educational mission, its actions will be evaluated under a reasonableness standard).

[50] *See Boroff v. Van Wert City Bd. of Ed.*, 220 F.3d 465 (6th Cir. 2000) (applying *Fraser* analysis to nonobscene Marilyn Manson T-shirts based upon overall negative message of shirts and performer); *Broussard v. School Bd. of the City of Norfolk*, 801 F. Supp. 1526, 1536 (E.D. Va. 1992)(lewd, indecent, or offensive speech is not limited to sexual speech).

[51] To apply a common First Amendment analogy – the pig in the parlor – sometimes the analysis focuses more on the parlor than on the pig. *See e.g. FCC v. Pacifica Found.*, 438 U.S. 726, 750-51 (1978)("a nuisance may be merely a right thing in the wrong place – like a pig in the parlor instead of the barnyard. We simply hold that when the commission finds that a pig has entered the parlor, the exercise of its regulatory power does not depend on proof that the pig is obscene.") *Fraser* was decided based upon the nature of the school "parlor," not just *Fraser's* "pig."

In addition to explicating *Tinker*, *Fraser* also demonstrates: (1) the importance of a school district's core educational mission, as defined by the locally elected school board and administration; and (2) that student speech contrary to that educational mission is *per se* disruptive of the school environment and may be regulated without a showing of real or anticipated disruption.[52]

4. *Kuhlmeier* provides greater latitude for regulating student speech where the student may appear to be speaking for the school

Kuhlmeier[53] also recognized the strong interests of public schools in shaping curricular activities and in protecting students both inside and outside of the classroom. *Kuhlmeier* emphasized the dual identity of student speakers and the discretion school district administrators have when students speak on behalf of the school.

In *Kuhlmeier*, the Court concluded that the First Amendment rights of high school students writing for a journalism class were not violated when a school administrator prevented publication of two articles that the administrator determined were inappropriate for the school setting. One article described the experiences of three pregnant students in terms that might have identified the students, and also included references to sexual activity and birth control that the

[52] The Amici will not address issues relating to the "identity" of the speaker in *Fraser* because the Ninth Circuit has already determined in *Chandler* that *Fraser* is not restricted to school-sponsored speech, which is the focus of *Kuhlmeier*.

school administrator believed were inappropriate for the school's younger students.[54] The other article dealt with the subject of divorce and identified a student quoted as complaining that her father did not spend enough time with the family and frequently argued with her mother.[55]

Kuhlmeier began by emphasizing *Fraser*'s message that the First Amendment rights of public school students are more limited than the rights of adults in other settings and that school boards and administrators may determine what speech is appropriate in the classroom or school assembly.[56] *Fraser* was not treated as a narrow exception to *Tinker*, but as establishing general rules about schools as a forum for speech. *Kuhlmeier* also emphasized the fact that the decision to prevent publication of the pages was based upon "legitimate pedagogical concerns."[57] The pedagogical concerns extended beyond classroom lessons and encompassed issues such as the privacy of the students discussed in the article, the nature of a student audience, and the journalistic lesson that newspaper articles should allow both sides an opportunity to present his side of the story.[58]

Kuhlmeier recognized not only public schools' interest in disassociating themselves from "speech that is . . . ungrammatical, poorly written, inadequately

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[53] 484 U.S. 260 (1988).
[54] *See Kuhlmeier*, 484 U.S. at 263.
[55] *See Kuhlmeier*, 484 U.S. at 263.
[56] *See Kuhlmeier*, 484 U.S. at 266-67.
[57] *See Kuhlmeier*, 484 U.S. at 273.

researched, biased or prejudiced, vulgar or profane,"[59] but also the obligation of schools to "disassociate" themselves from speech "unsuitable for immature audiences" and to "take into account the emotional maturity of the intended audience in determining whether to disseminate speech on potentially sensitive topics."[60] As an example, *Kuhlmeier* specifically observed that schools "must retain the authority to refuse to sponsor student speech that might reasonably be perceived to advocate drug or alcohol use[.]"[61] In a nutshell, *Kuhlmeier* allows school districts to decide what speech is educationally appropriate and what speech is not.[62] *Kuhlmeier* is not just a limited exception to *Tinker*, but rather amplifies *Fraser*'s observation that schools must be able to regulate inappropriate nonpolitical speech in the educational setting when its content is inconsistent with the tasks of educators.

Thus, the guiding principles of *Kuhlmeier* are: (1) the school's increased ability to regulate student speech where it appears the school is the speaker; (2) the school's duty to protect student listeners from certain messages; and (3) a reaffirmation of the importance of school district control over curriculum and educational functions.

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[58] *See Kuhlmeier*, 484 U.S. at 263.
[59] *See Kuhlmeier*, 484 U.S. at 272.
[60] *See Kuhlmeier*, 484 U.S. at 272.
[61] *See Kuhlmeier*, 484 U.S. at 272.
[62] *See Kuhlmeier*, 484 U.S. at 273.

5. The Court should apply the distilled principles of the *Tinker* trilogy to this case rather than lumping speech into categories

As described above, *Chandler* suggests that analysis of the First Amendment claims should begin by testing whether the speech at issue matches *Tinker*, *Fraser*, or *Kuhlmeier*. That approach was sufficient in *Chandler* because *Chandler's* button was so analogous to *Tinker's* armband. Not all speech, however, falls neatly into one of the three categories. *Tinker* is not the appropriate analysis for "all other speech" not clearly governed by *Fraser* and *Kuhlmeier*. This is particularly true if *Fraser* and *Kuhlmeier* are confined to their facts and construed as creating narrow exceptions to *Tinker*. [63] It would be more useful to analyze Frederick's claims not by forced analogy to *Tinker*, *Fraser*, or *Kuhlmeier*, but by consideration of the underlying principles of those cases. Consideration of Frederick's claim in light of those principles makes clear that Frederick's First Amendment rights were not violated.

[63] *Chandler's* category of "all other speech" governed by *Tinker* should not be construed, for instance, to include fighting words, libel, and student commercial speech. Similarly, the Amici believe *Tinker* is inapplicable to the apolitical, disruptive words "Bong Hits 4 Jesus."

B. By Applying the Principles of the *Tinker* Trilogy, Rather than Lumping Speech into Categories, it is Clear that the District's Regulation of Frederick's Speech was Proper.

1. Frederick's speech was not political speech and the district did not discriminate on the basis of viewpoint

Both *Tinker* and *Fraser* emphasized that the banned armbands at issue in *Tinker* constituted political speech, which was absent from Fraser's lewd nomination.[64] Frederick's words, "Bong Hits 4 Jesus" are enigmatic to the point of being meaningless. They do not convey a political message. Frederick himself stated that the banner was not intended to convey any particular message, other than, perhaps, to somehow obliquely symbolize his right to speech.[65] In contrast to *Tinker*, where students communicated without using words, Frederick has tried to explain that he used words without intending to communicate.[66] The First Amendment was intended to protect the communication of ideas, and the Amici believe that Frederick's admittedly non-communicative display is entitled to no more First Amendment protection than the "sagging" pants in *Bivens v.*

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[64] *Tinker*, 393 U.S. at 508; *Fraser*, 478 U.S. at 685.

[65] *See* SER 68, 98A: "Q: Were you saying that the First Amendment gave you the right to display signs that meant nothing? A: Yes Q: And your sign meant nothing? A: Yeah." It takes a substantial logical leap to conclude that Frederick's sign, which meant nothing, could convey the fact that he had a right to say nothing.

[66] One may wonder if Frederick's explanation of the statement is a *post hoc* attempt to distance himself from its apparent drug-themed message. To the extent his sign could be construed as having the "viewpoint" of advocating drug use, the Amici are aware of no authority that would preclude suppression of that viewpoint.

Albuquerque Public Schools,[67] wherein the court observed that "not every defiant act by a high school student is Constitutionally protected speech."[68] Even if the court finds that Frederick's banner's use of words falls under the protection of the First Amendment, Frederick's speech is nothing more than a sophomoric wisecrack about drugs containing no discernible message, and certainly no political message. There is nothing to support Frederick's weak and belated assertion in his appellant's brief that the speech addressed the ongoing public debate over the legalization of marijuana in Alaska.[69] Frederick admitted that the speech had no meaning and the court should resist this late attempt to imbue the banner with some political significance.

Not all speech is equal under the First Amendment, and content does matter.[70] Some speech is more worthy of protection than other speech, and the Court has recognized this by identifying categories such as political speech, commercial speech, libel of public figures, obscenity, and fighting words, all of which are entitled to different levels of protection.[71] In *Tinker*, the Court set aside

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[67] *See* 899 F. Supp. 556, 560 (D. N.M. 1995).
[68] *See id.*
[69] *See* Appellant Brief at 33-34.
[70] *See, e.g.,* Frederick Schauer, Categories and the First Amendment: A Play in Three Acts, 34 Vand. L. Rev. 265, 282-3 (1981) (arguing that in First Amendment analysis speech classification is inevitable).
[71] *See Roth v. U.S.*, 354 U.S. 476 (1957)(obscenity); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942) (fighting words); *Bates v. State Bar of Arizona*, 433 U.S. 350, 381 (1977)(commercial speech); *Gertz v. Robert Welch, Inc.*, 418

political speech as being entitled to special protection in the school forum. Applying the reasoning of *Tinker*, which protected core political communication, to Frederick's inane speech trivializes the First Amendment and *Tinker's* protection of political speech and dissent.

2. The district and its administrators properly exercised their discretion in making and enforcing school rules

Even while concluding that the prohibition on armbands violated the First Amendment rights of students, *Tinker* affirmed the central importance of local control over public education. This theme, which continues through *Fraser* and *Kuhlmeier*, is echoed in courts' reliance on the good faith use of discretion by school boards and administrators. Courts have respected and should respect the discretion of school administrators, even in cases where it may appear that the administrator overreacted to a disciplinary situation.[72] When addressing claims involving ambiguous speech, which could have either innocent or improper connotations, courts have deferred to the sound discretion of school officials to properly evaluate the significance of the speech and whether or not the speech is educationally appropriate and have reviewed the decisions of administrators with

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U.S. 323, 329 (1974)(treating libel claims differently if the subject of the libel is a public figure).

[72] *See LaVine v. Blaine Sch. Dist.*, 257 F.3d 981, 991 (9th Cir. 2001).

deference.[73] Deborah Morse's decision was precisely correct, and not an overreaction. The case law makes it clear that the courts should respect even those decisions with which, after the fact, they might disagree.

In this case, the Juneau-Douglas School District properly promulgated school rules governing student conduct. These rules prohibited, among other things, "public expression which advocates the use of substances that are illegal to minors."[74] When Frederick raised his banner while students were gathered to watch the Olympic torch relay pass their school, Ms. Morse was suddenly confronted with a sign proclaiming "Bong Hits 4 Jesus." Ms. Morse had to act quickly and correctly determined that the sign violated school rules and was inappropriate for the school environment. Ms. Morse did not have an opportunity to consult a dictionary or a linguist before she acted. Ms. Morse's decision was made all the more difficult by the fact that teenage culture often contains references and in-jokes which may not be immediately obvious to adult observers, but which may

[73] *See, e.g., LaVine*, 257 F. 3d at 991; *McCann v. Ft. Zumwalt High Sch.*, 50 F. Supp.2d 918, 924 (E. D. Mo. 1999) (upholding decision to prohibit the playing of the song "White Rabbit" when school officials believed its drug overtones were inappropriate, over student objections that the song "may have other interpretations, including an anti-drug theme or a satire of a literary work"); *see also Boroff v. Van Wert City Bd. of Educ.*, 220 F.3d 465 (6th Cir. 2000) (upholding decision to prohibit student's wearing Marilyn Manson T-shirts due to administrator's conclusion that the t-shirts' negative message was inappropriate for school).

[74] *See* Juneau Board Policy 5520.

nonetheless disrupt the educational environment.[75] Further, current sociological theory (called "broken windows" theory) provides ample support for the proposition that even small disruptions, if left unchecked, can lead to deeper erosion of respect for authority and social mores.[76] In other words, small problems can become big problems. While courts could engage in *de novo* reconsideration of such decisions, parsing the etymological roots and evolution of the words "bong" and "hit" and taking expert testimony on the sociological significance of the phrase as a whole,[77] precedent requires the court to uphold Ms. Morse's assessment so long as it is supported by a reasonable basis. There is ample evidence in the record to support Ms. Morse's conclusion that the banner was inappropriate.

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[75] *See, e.g., Johnson v. Independent Sch. Dist.*, 194 F. Supp. 939, 942 (D. Minn. 2002)(Student brought Title IX action against district for failure to prevent harassment which began with apparently innocuous references to "one time at band camp", which referred to a crude joke in the teen movie American Pie. The Court took judicial notice that American Pie was not directed at an adult audience.)

[76] *See, e.g.*, George Kelling and Catherine M. Coles, Fixing Broken Windows, Restoring Order and Reducing Crime in Our Communities (1996)("Broken windows" is used as a metaphor for public community disorder. The authors argue that community policing focused on apparently minor quality of life crimes, such as vandalism and turnstile-jumping, pays exponential dividends by fostering respect for public order).

[77] For an illustration of what this analysis might look like, the Amici direct the Court's attention to *Broussard v. School Board of Norfolk*, 801 F. Supp. 1526, 1533-34 (E.D. Va. 1992)(three expert witnesses testifying regarding the transitive versus the intransitive use of the verb "suck" in a student's T-shirt proclaiming "drugs suck.").

3. Discouraging drug use is an important part of the district's basic educational mission

Fraser establishes that schools have broad authority to regulate speech inconsistent with their basic educational mission. In *Fraser*, the student's speech was "vulgar and sexually explicit," and, therefore, held contrary to the district's educational mission.[78] The "basic educational mission" articulated in *Fraser* must extend beyond the suppression of profanity or vulgarity. Between vulgarity and drug use, there is no question that drug use poses a greater problem for schools.

School districts are obligated to prevent and discourage drug use. Federal law identifies student drug use as a pressing national concern.[79] State law encourages schools to include drug and alcohol education in their curricula and requires that teachers be trained in handling drug and alcohol abuse.[80] Juneau school board policy clearly identifies the prevention of drug use as an important district goal and case law authorizing student drug testing emphasizes the public importance of preventing drug use.[81] Frederick's speech, insofar as it may have been interpreted as advocating drug use, or making light of its consequences, was disruptive to a core part of the district's program of education and values. There is no reason to apply a standard which requires the school to prove or forecast

[78] *See Fraser*, 478 U.S. at 685.
[79] *See* 20 U.S.C. 7101 *et seq.*
[80] *See* Alaska Statutes § 14.20.680; Alaska Statutes § 14.30.360(a).

disruption when Frederick's message was *per se* disruptive to the school's anti-drug mission.

4. Frederick's speech was intermingled with school-sponsored expression

Unlike the newspaper at issue in *Kuhlmeier*, Frederick's banner was not sponsored by the school. But to bystanders Frederick's banner may have appeared to be school-sponsored. Frederick was across the street from the school, among other students, where other students (cheerleaders, the pep band, and torch bearers) were representing the school at a prominent public event. While schools should not be deemed to sponsor every message they do not suppress, Frederick's noxious banner was intermingled with school sponsored activities and implicated the school's reputation and credibility as a public entity. Combined with the banner's lack of political content and its inconsistency with the school's mission of discouraging drug use, the fact that Frederick's banner was intermingled with school-sponsored public activities provides additional grounds for its regulation.

C. Frederick's Speech was Within the Scope of School Jurisdiction

The facts surrounding Frederick's banner provide an ample basis for the school to regulate his conduct. The sole basis appellant offers to assert the school lacked "jurisdiction" over his banner is the fact that Frederick was on the sidewalk

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[81] *See*, *e.g.*, *New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985)("Drug use and violent crime in the schools have become major social problems.").

across the street from the school. This geographical fact is not legally significant. Frederick was in the presence of faculty and students. He unfurled his banner during the regular school day. The school had authorized and supervised student participation in watching the torch relay. The school, its personnel, and students were pervasively involved in watching the torch relay. Although there are miles of public streets in Juneau where Frederick could have unfurled his banner, Frederick chose his location expressly to defy school authority.[82] There is no reason for the court to distinguish this case from the universally accepted rule that school authority extends beyond campus boundaries where students are engaged in a field trip, athletic contest, or other school activity.[83] The result cannot turn on whether the torch relay was an "official" school activity. If that were the standard, then the students in the pep band and cheerleaders would be subject to school rules, while Frederick and the other observers would not. There is no authority for such an absurd result. In fact, *Pirschell* specifically rejected such a "bifurcated" system for off-campus conduct where some students are more officially involved than others

[82] *See* Appellant's Brief at 1-2. (Frederick's conduct was prompted by his alleged concern over the school's suppression of student speech.)

[83] *See*, *e.g.*, James A. Rapp, Education Law, § 9.03(5)(b)(i)("Authority to discipline students for school related activities extends not only to those occurring on school property but also off school property.") *citing Pirschell v. Sorrell*, 2 F. Supp.2d 930, 936 (E.D. Ky. 1998)(student may be disciplined for drinking while present as spectator – not participant – at off-campus athletic contest).

in a school activity.[84] It is widely accepted that schools may discipline students for off-campus conduct outside the scope of school activities where the conduct affects other students or faculty, or where there is an impact on campus.[85] The impact of Frederick's speech delivered off-campus was no different from its impact had it been delivered on-campus.

Cases governing school district liability also may be instructive in defining the scope of school district authority. Authority and responsibility are two sides of the same coin. Schools are potentially responsible for student safety off campus while students are in school-related activities.[86] While each case is fact-specific, the circumstances of this case could easily have led to liability for the district had Frederick been injured as a result of negligent supervision while under the district's authority. It is undisputed that the District properly assumed a

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[84] *See Pirschell*, 2 F. Supp.2d at 935.

[85] *See Id. citing Fulton v. Stear*, 423 F. Supp. 767 (W.D. Pa. 1976)(Student may be suspended for audibly saying "He's a prick" when the teacher passed group of students in shopping mall parking lot.)

[86] *See, e.g., Thomas v. City Lights Sch.*, 124 F.Supp.2d 707, 710 (D.D.C. 2000) ("A school's duty to supervise its students to guard against a foreseeable harm continues to exist in the context of a field trip."); *Sharp v. Fairbanks N. Star Borough*, 569 P.2d 178, 181 (Alaska 1977) ("[A] school district may be held liable for failing to supervise activities held off school premises."); *Morris v. Douglas County Sch. Dist. No. 9*, 403 P.2d 775 (Oregon 1965); *Chappel v. Franklin Pierce Sch. Dist. No. 402*, 426 P.2d 471 (Wash. 1967); *Scott v. Blanchet High Sch.*, 747 P.2d 1124 (Wa. Ct. App. 1987) ("The liability of schools is not limited to situations involving school hours, property, or curricular activities; Extra-curricular activities under the auspices of the school also fall within a school's duty to supervise.")

responsibility to supervise students during the passing of the torch.[87] It is widely held that where a school district has assumed the responsibility to supervise students – even if the conduct is during vacation periods and off-campus – a school may be liable for failure to exercise ordinary care in supervision.[88] Because the District had sanctioned student participation in watching the torch during the school day, and because the District had appropriately assumed responsibility for overseeing its students, the Court should acknowledge the district's reciprocal ability to enforce its rules. Otherwise, districts would be saddled with responsibility, and potential liability, but not control.

[87] *See generally* Appellee Brief at 5-6.

[88] *See e.g. Rhea v. Grandview Sch. Dist.*, 694 P.2d 666, 668 (Wash. App. 1985)(holding that the "nexus between the assertion of the school district's authority and potential tort liability springs from the exercise or assumption of control over the organization and its activities by the school district."); *see also Verbel v. Indep. Sch. Dist. No. 709*, 359 N.W.2d 579, 586 (Minn. 1984)("The issue is not whether the school district is liable for the safety of all students while in transit to or from a school activity; clearly it is not so liable. A school district may be held liable, however, when it had undertaken to provide supervision.")

III. **CONCLUSION**

The Amici represent institutions and individuals responsible for the heavy burden of administering this nation's public schools. The Amici recognize the benefit of substantive public debate in the schools. The Amici do not advocate a standard which would squelch public debate. However, the Amici recognize that good conduct and decent behavior are important goals of public education and necessary prerequisites to an orderly and effective public educational system. The Supreme Court has held that some types of speech can be inherently disruptive to public school administration. Where a district's core values are implicated, the Constitution does not require the public schools to permit mixed messages. The Amici do not believe that a student has any constitutionally protected interest in promoting drugs or alcohol use, whether seriously or in jest. Frederick chose to publish a message which school administration reasonably believed promoted drug use or made light of its dangers. While Frederick can cite numerous cases protecting student political speech, Frederick offers no authority which would require a district to tolerate "Bong Hits 4 Jesus." Frederick's speech is not entitled to the protection he urges. There was no political message and no viewpoint discrimination. Instead, there was obnoxious speech which disrupted the District's educational mission, and a reasonable exercise of judgment by the District. The Court should uphold the District Court's decision.

DATED: December __, 2003.

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CERTIFICATION PURSUANT TO CIRCUIT RULE 32(e)(4)

Pursuant to Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(C) and Ninth Circuit Rule 32(e)(4), I certify that the attached Brief of *Amici Curiae* is proportionately spaced, has a typeface of 14 points or more, and contains 6,995 words (based on the word processing system used to prepare the brief).

DATED: December __, 2003.

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