No. 06-278

IN THE
SUPREME COURT of the UNITED STATES

DEBORAH MORSE, JUNEAU SCHOOL BOARD,

Petitioners,

v.

JOSEPH FREDERICK,

Respondent.

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

BRIEF OF AMICUS CURIAE CENTER FOR INDIVIDUAL RIGHTS IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS CURIAE

The Center for Individual Rights ("CIR") is a public interest law firm. It has participated in the litigation of numerous cases concerning issues related to the First Amendment, especially those involving students in college and high school, including *Rosenberger v. Rectors and Visitors of the University of Virginia*, 515 U.S. 819 (1995), *Sypniewski v. Warren Hills Regional Bd. of Educ.*, 307 F.3d 243 (3d Cir. 2002) and *McConnell v. Le Moyne College*, 808 N.Y.S.2d 860 (App. Div. 2006).

CIR believes that the standard set forth by petitioners and their amici on the underlying First Amendment question, *viz.*, speech that interferes with a school's basic educational mission is unprotected by the First Amendment, is far too expansive and vague. It submits this amicus brief to point out the dangers of adopting such a standard.[1]

STATEMENT OF THE CASE

The incident in question took place as the Olympic torch relay passed through Juneau. Students at Juneau High School were let out of class to watch the relay. According to several witnesses, it was left to each individual student's discretion to watch, or not watch, the relay. Students were permitted to remain inside the school, even if the teacher of their scheduled class was outside, and their only obligation was to return to the school for their next class. Joint Appendix

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[1] Pursuant to Rule 37.6, amicus curiae CIR affirms that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

CIR understands that all parties have consented to the filing of amicus briefs on the merits. *See* Sup. Ct. Rule 37.3(a).

("J.A.") 36, 38.

When the relay passed, respondent and others unfurled a banner with the words "Bong Hits 4 Jesus" across the street from the school. He was subsequently suspended from school for ten days by the school principal, Deborah Morse, and that suspension was affirmed following an administrative appeal.

Respondent Frederick filed suit in federal district court against Morse and the Juneau School Board (sometimes referred to herein collectively as the "School"). The district court considered various motions for summary judgment from both parties. Petition Appendix ("Pet. App.") 24a. It granted the School's motion for summary judgment on all counts, and denied Frederick's motion for summary judgment. Pet. App. 41a-42a. The district court apparently granted both Morse *and* the school board qualified immunity from damages under Section 1983, although it cited no authority for the proposition that such qualified immunity is even available to entities like school boards. Pet. App. 29a-30a. Indeed, the district court believed that qualified immunity was appropriate for both defendants, even if the viewing of the torch relay was *not* a school sponsored event, so long as Morse believed that Frederick's statement was "directed at students on campus." Pet. App. 30a. *But compare* Pet. App. 35a ("The fact that Frederick was participating in a school-approved event is significant in dictating the degree to which the school could control the content of his speech or his expressive conduct"). The clerk entered final judgment on May 29, 2003, and Frederick appealed.

The Ninth Circuit vacated the district court's judgment dismissing the action, and remanded. The Ninth Circuit

believed that Frederick had not raised a genuine issue of material fact over whether the incident in question took place at a school-sponsored event (Pet. App. 6a), although it placed some importance on the fact that the event took place outside of school at an event that was weakly supervised (Pet. App. 17a & n.45). It held that the case was governed by *Tinker v. Des Moines Ind. Community Sch. Dist.*, 393 U.S. 503 (1969), and that defendants' concession that they had no basis for believing that Frederick's speech would be disruptive to the educational process precluded them from punishing or censoring Frederick for it. Pet. App. 6a-7a.

Despite these holdings, however, the Ninth Circuit did *not* reverse the denial of Frederick's motion for summary judgment.[2] Nor did it remand the case with instructions to award him damages. Rather, its judgment only vacated the judgment of the district court dismissing plaintiffs' case, which dismissal had been based on its granting of defendants' various summary judgment motions. In short, the Ninth Circuit did nothing more than vacate the grant of summary judgment to defendants. Pet. App. 22a.

SUMMARY OF ARGUMENT

The School and its amici agree with the now-hoary proposition that students in public schools do not "shed their constitutional rights to freedom of speech or expression at the

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[2] Frederick had moved for summary judgment only with respect to his claims for declaratory and injunctive relief. Pet. App. 24a. Since Frederick had graduated Juneau Douglas High School, and was attending Stephen F. Austin State University at the time that the summary judgment motions were being litigated (J.A. 31, ¶ 14), the Ninth Circuit may well have questioned his right to such relief. *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983).

schoolhouse gate," *Tinker v. Des Moines Ind. Community School Dist.*, 393 U.S. 503, 506 (1969) -- but only because (according to the School) they apparently shed them across the street, before they even get to the schoolhouse gate. The School and its amici perform this feat of legerdemain by taking two previous ideas in this Court's student speech jurisprudence and stretching them where they have never gone before: "basic educational mission" and "school-sponsored activity."

Under the School's version of its "basic educational mission," the term can be defined in any way it likes. Thus, if a school believes that patriotism and/or sexual chastity are important values to inculcate in high school students, any speech deemed inimical to those values can be punished. *Cf.* Brief of Nat'l School Bd. Ass'n, *et al.* ("NSBA Br.") 17 n.19 (patriotism is a widely held value that likely is taught by many schools). Moreover, in its view, a school's determination that speech is inimical to its fundamental values must be given deference. Under this theory, if a school determines that a student's failure to salute the American flag undermines the school's message of loyalty to our country and its values, it can punish the student for his refusal to do so. *Compare West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). After all, a school board can reasonably conclude that exemptions to the general requirement "`might introduce elements of difficulty into the school discipline, might cast doubts in the minds of the other children which would themselves weaken the effect of the exercise.'" *Id.* at 636 n.16 (*quoting Minersville School Dist. v. Gobitis*, 310 U.S. 586, 599-600 (1940), *overruled in West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943)).

This broad discretion to punish speech on any matter a

school board deems inimical to its self-defined goals is justified by the School and its amici as needed because (1) we must influence youth to make right choices and (2) a full and open debate about such choices -- or for that matter, any debate at all -- might lead them to make bad choices. CIR believes that they grossly underestimate the intelligence and overestimate the malleability of today's high school student. Those students understand the "depth" of such statements as "Bong Hits 4 Jesus"; they also understand the hypocrisy of those who teach the Bill of Rights only to deny those rights in practice. *Barnet te*, 319 U.S. at 637 ("That [school boards] are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes."); *id.* at 641 ("Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard."); *Tinker v. Des Moines Ind. School Dist.*, 393 U.S. 503, 511 (1969) ("In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They many not be confined to the expression of those sentiments that are officially approved."); *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260, 280 (1988) (Brennan, J., dissenting) ("If mere incompatibility with the school's pedagogical message were a constitutionally sufficient justification for the suppression of student speech, school officials could . . . convert[] our public schools into `enclaves of totalitarianism.'") (*quoting Tinker v. Des Moines Ind. School Dist.*, 393 U.S. 503, 511 (1969)).

As for "school-sponsored activity," the other key phrase for the School and its amici, they argue that any and all activity related in any way to a school can be deemed a "school-

sponsored activity," and, thus, an activity during which student speech can be regulated. That, of course, is the only way that the activity in question here can be deemed a "school-sponsored activity," at least if full weight is given (as it should be) to the evidence submitted by Frederick on the School's motions for summary judgment. Even if one does not give full weight to that evidence, it cannot be disputed that the pedagogic nature of the event was rather low, and, accordingly, the school's interest in quelling speech inimical to its goals was similarly low.

No one argues that the School could have punished Frederick for distributing leaflets with the phrase "Bong Hits 4 Jesus" on the same sidewalk after school hours, regardless of how inimical to the school's "basic educational mission" such speech was deemed to be. The speech here was not much, if at all, different in its connection to any pedagogic event at the school. Moreover, there is an issue of fact as to whether this was a "school event" at all. If it was not, the School had no right to interfere with Frederick's exercise of free speech regardless of its effect on the School's "mission."

Ultimately, the School and its amici focus on the scourge of illegal drugs and the need to take drastic action to prevent their spread. *E.g.*, Brief for D.A.R.E. America, *et al.* ("DARE Br.") 5-12. To be sure, there have been many casualties, on both sides, in the war on drugs. The First Amendment need not be among them.

ARGUMENT

I. The School And Its Amici Err In Arguing That Frederick's Speech Was Not Protected By The First Amendment.

The School and its amici are compelled to invest Frederick's flippant speech with great import in order to justify the School's obvious overreaction to it. It was, they say, speech designed to, or with the effect of, promoting illegal drug use, which is contrary to the School's basic educational mission of preventing such use. Even granting them the questionable premise of interpreting Frederick's speech in this way, their argument that the School can punish any speech inconsistent with its "basic educational mission" during any "school-sponsored activity" is not supported by this Court's cases.

1. The School and its amici rely heavily on *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986) in arguing that a school may punish speech inconsistent with its "basic educational mission." But *Fraser* hardly stands for the proposition that a school can define its "mission" in any way it chooses. Rather, *Fraser* focusses on the *means* that the student there chose to communicate his point, rather than the substance of it:

> [T]he penalties imposed in this case were unrelated to any political viewpoint. The First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech such as respondent's would undermine the schools' basic educational mission. A high school assembly or classroom is no place for a sexually explicit monologue

> directed towards an unsuspecting audience of teenage students.

Id. at 685. This Court analogized rules for appropriate means of communication to the rules for the conduct of debates promulgated in each house in Congress. *Id.* at 681-82. This Court never held that there were certain topics that would be off-limits -- or worse, that student expression on certain topics is permissible only if one agrees with the school's own viewpoint. *Kuhlmeier*, 484 U.S. at 287 (Brennan, J., dissenting) (in *Fraser*, in holding that the school board had discretion to determine the propriety of certain speech, "the Court was referring only to the appropriateness of the *manner* in which the message is conveyed, not of the message's *content*") (emphasis in original).

That is a rather large and significant step. It moves the school's *pedagogic* interest from punishing anti-social behavior (speech must comply with rules of decorum in a civilized society) to conformity of opinion (speech must not disagree with the school's own belief system). Perhaps such a step might be justified where the school's message is an actual pedagogic topic. If a student refuses to learn evolution in his high school biology class and answers all questions on an exam related to that topic with "the theory of evolution is contrary to the Bible," a school can give him a failing grade without violating the First Amendment. But the School's pedagogic interest here is far more remote than that. It is concerned that students will take messages like Frederick's seriously, smoke marijuana, and thus be less able to learn.[3]

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[3] The School and its amici also claim that Frederick's message interfered with the "school-sanctioned activity" by (continued...)

The School and its amici do not bother to explain how their "contrary to the basic educational mission" theory is consistent with *Barnette*, where this Court held that a school district could not compel students to salute the flag. The school district's goal in *Barnette* was to inculcate loyalty to our country and its values, and the district reasonably believed that granting exemptions to the requirement that all schoolchildren salute the flag each day would undermine that goal. *Barnette*, 319 U.S. at 640-41. The school's mission, however, was inadequate to override the students' free speech rights. While *Barnette* involved compelled speech rather than punishment for actual speech, the school district's interest in its self-defined "mission" or "work" was identical to the interest claimed here and was insufficient. (While *Barnette* also involved the students' religious convictions, this Court has made clear that it is a free speech case. *Id.* at 634-35 ("many citizens who do not share these religious views hold such a compulsory rite to infringe constitutional liberty of the individual"); *Employment Division, Dep't of Human Resources of Oregon v. Smith*, 494 U.S. 872, 881-82 (1990) (describing *Barnette* as a case where First Amendment barred application of neutral, generally applicable law to religiously-motivated action because it involved "the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech . . .").)

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[3](...continued)
"radically changing the subject." Petitioner's Brief ("Pet. Br.") 32. *See also* DARE Br. 13-14 (banner itself was the "disruption"). Of course, one could say the same thing about John Tinker's black arm band worn in, for example, his math class. The lesson of *Tinker* is that the speech itself cannot be deemed to "interfere" with the school's work -- if it did, *Tinker* would be meaningless -- and that apprehension of actual interference cannot be based upon sheer speculation.

Moreover, if a school can define its "basic educational mission" -- or, as the School and its amici put it when discussing *Tinker* (Pet. Br. 20, Brief of United States ("U.S. Br.") 17), the "work of the school" -- as broadly as it wishes and punish speech inconsistent with that "mission" or "work," it is hard to envision what a school cannot regulate. Surely, any speech that might encourage an activity harmful to health can be regulated under this theory. Obesity, for example, is an increasing problem for students of all ages, and it apparently has significant deleterious effects on related health problems and resulting absenteeism. *E.g.*, Child Nutrition And WIC Reauthorization Act of 2004, Pub. L. 108-265, § 401, 118 Stat. 729, 788 (2004) (Congress finds that "childhood obesity in the United States has reached critical proportions" and "is associated with numerous health risks"); Stacey L. Fabros, *A Cry For Health: State And Federal Measures In The Battle Against Childhood Obesity*, 7 J. L. & Fam. Stud, 447, 447 (2005) ("The fearsome effects of childhood obesity are many, including . . , type 2 diabetes, high cholesterol, high blood pressure, and sleep apnea"); Oregon School Board Ass'n, *The High Cost of Childhood Obesity* (available at http://www.osba.org/hotopics/atrisk/obesity/highcost.htm). Bad eating habits have been linked to poorer academic performance. *Id.*; Carol Torgan, *Childhood Obesity On The Rise*, The NIH Word On Health (June 2002) (available at http://www.nih.gov/news/WordonHealth/jun2002/childhoodobesity.htm) ("One of the most severe problems for obese children is sleep apnea (interrupted breathing while sleeping). In some cases this can lead to problems with learning and memory."); A. Datar & R. Sturm, *Childhood Overweight And Elementary School Outcomes*, 30 Int'l J. of Obesity 1449 (2006) (available at http://www.nature.com/ijo/journal/v30/n9/pdf/0803311a.pdf) (change in overweight status is significant risk factor for reduction in learning and behavioral outcomes for girls in early elementary school years). Under the expansive notion of "basic educational mission" proffered by the School

and its amici, a school can define its basic educational mission to include inculcating healthful eating habits in its students. An invitation to a birthday party at which sweets and birthday cake will be consumed can be speech inimical to that mission, and punished. *Cf.* Petition for Writ of Certiorari ("Petition") at 15 (pro-drug messages are "inconsistent with the mission of schools to promote healthy lifestyles"); U.S. Br. 11 ("The health and safety mission of our public schools is especially pronounced in the context of this case."); *id.* 16 (schools must "protect students' health, safety, and ability to learn").

In an effort to confine such a dangerously expansive notion of school authority over student speech, the School and its amici also argue that Frederick's speech promoted an *illegal* activity. *But cf.* U.S. Br. 27 (speech could have been sanctioned even if banner had read "legalize marijuana").[4] But this gambit costs the theory whatever coherence it might have had. Why should a school's mission be defined only by *external* goals set in society at large? One might think that failing to

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[4] The School and its amici generally insist that this Court invest the phrase "Bong Hits 4 Jesus" with significant meaning, regardless of how Frederick intended it. But then it is not at all clear that it promotes illegal activity, even if we incorrectly assume that a bong can only be used with marijuana. As the Ninth Circuit noted, Alaska has cast doubt on whether laws against smoking marijuana are consistent with that state's constitution. Pet. App. 6a n.4. And, to the extent that Frederick's ambiguous speech promotes marijuana use as part of a sincere religious practice, such conduct is most likely protected under the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb-1. *Gonzales v. O Centro Espirita Beneficente Uniao Do Vegetal*, 546 U.S. 418 (2006) (affirming preliminary injunction under RFRA precluding federal government from using Controlled Substances Act to prosecute religious sect for using hallucinogen as part of communion ritual). *Compare* U.S. Br. 26 n.5 ("no question . . . that federal law prohibits marijuana possession"); DARE Br. 18 n.32.

devote time to homework is even more detrimental to a high school student's ability to succeed than driving five miles per hour over the speed limit, even though the broader society has rules against the latter but not the former. Why should speech discouraging homework be protected while "Go Speed Racer" t-shirts, which might encourage student-drivers to exceed the speed limit, are not?

In any event, the drop in coherence does not even buy much of a reduction in the theory's expansiveness. For example, sexual intercourse and other kinds of sexual acts between high school students are illegal, and often felonious, in many states.[5] Moreover, it obviously can lead to conditions, such as teen-age pregnancy or sexually-transmitted diseases, inimical to students' education. Even under the narrower version of the "basic educational mission" theory, every statement in the locker room or hallway deemed to "promote" such crimes can be prohibited.

None of this speech restriction is at all necessary. Schools have the ability to speak themselves to send a message to their students. Both the schools and society itself have the means to combat actual illegal activity. If there is speech that school officials reasonably believe will *directly* disrupt the

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[5] *E.g.*, Ariz. Rev. Stat. § 13-1405 (1997) ("sexual conduct with a minor" includes sexual intercourse or oral sex with anyone under eighteen); Conn. Gen. Stat. § 53a-71(a)(1) (1999) ("second degree sexual assault" would include intercourse between a 17 year old and a 15 year old); Ga. Code Ann. § 16-6-3 (2006) ("statutory rape" includes intercourse with any person under 16); Kan. Stat. Ann. § 21-3522(a) (2005) ("unlawful voluntary sexual relations" includes sex between a 15 year old and a 16 year old); Minn. Stat. § 609.344 (2006) ("criminal sexual conduct in the third degree" includes sex between a 15 year old and a 17 year old); Mont. Code Ann. §§ 45-5-501, *et seq.* (2003) (sex with anyone under 16 constitutes "sexual assault").

educational process, by causing illegal or other activity undermining the educational process in a way both temporally near and reasonably likely to occur, it can be punished under *Tinker*. By seeking an expansion of *Fraser* to cover this situation, the School and its amici ask here for bludgeon to kill a flea.

2. The School and its amici tie the expansive notion of "basic educational mission" with an equally broad concept of "school-sponsored activity" at which the School's full speech-suppressing authority is available. Although the Ninth Circuit agreed that the observation of the Olympic torch relay was a school event, and declined to analyze it as a "sidewalk speech" case (Pet. App. 5a-6a), its analysis gave some weight to the fact that it was an event occurring partly off-campus and with minimal school supervision. Pet. App. 17a ("Frederick's banner . . . was displayed outside the classroom, across the street from the school, during a non-curricular activity that was only partially supervised by school officials").

The School and its amici assail this nuanced approach, and insist that the school's full speech-suppressing authority should be available at anything that can be called a "school event." *E.g.*, U.S. Br. 23 ("Nor is there any basis in the First Amendment for applying different levels of scrutiny to student conduct or expression at different off-campus school events."); DARE Br. 15-17. Contrary to the impression they seek to give, though, the Ninth Circuit did not invent the nuanced approach. *Fraser*, 478 U.S. at 689 (Blackmun, J., concurring) ("Respondent's speech may well have been protected had he given it in school but under different circumstances, where the school's legitimate interests in teaching and maintaining civil public discourse were less weighty."). Moreover, while advocating a bright line between "school-sponsored events" and other activity, the School and its amici do little to define where it is

drawn -- except to insist that the students' observation of the Olympic Torch Relay falls on their side of it. *E.g.*, Petition 1 ("at a school-sponsored and faculty-supervised event taking place on and adjacent to school grounds during school hours").[6]

Is a football game or other sporting event held after hours a "school event" for this purpose? Would it matter if the school's pep band attended as a group? Or if the event did not take place at the school's facilities, but at some third-party site? If students are told to visit a museum over the next week and report on something they see there, is each student's separate trip a "school event"? The School and its amici cannot answer these questions because they do not identify where the bright line between "school-sponsored events" and other events is drawn.

Not everything involving a student during school hours constitutes a "school-sponsored event," regardless of its attenuated connection to school authorities or its degree of school supervision. If it did, every student given permission to study in the town's public library during school hours -- as shown in Part II of this Argument, there is evidence to show less than that here -- would be participating in a "school event,"

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[6] The School and its amici also never quite settle on whether the "event" that was "school sanctioned" was the torch relay itself or the students' observation of it. *Compare* Pet. Br. 31 ("The Olympic Torch Relay was an important community event" with which Frederick's banner interfered) *with* U.S. Br. 22 ("Coca-Cola may have sponsored the relay, but the school sponsored its students' attendance at that event"). Plainly, the School did not "sanction" or "sponsor" the torch relay itself, which would have taken place with or without the consent of the School, so to the extent that Frederick purportedly interfered with the relay, he was not interfering with a "school event" at all.

and their speech subject to the full panoply of school regulation, just as if they were speaking in the middle of calculus class. The School and its amici complain about courts "overseeing a typology of school-related activities" (DARE Br. 16), but some lines *must* be drawn if students' entire lives are not to be given over to schools' speech-suppressing agenda -- and the School and its amici just refuse to do so. The Ninth Circuit's nuanced approach does not use rigid categories. It provides a case-sensitive analysis that allows courts properly to measure the school's interest in its "educational mission" in the particular context in which the speech took place.

In addition to claiming that Frederick's speech was at a school-sponsored *activity*, the School and its amici also try to characterize Frederick's speech as school-sponsored *speech*, *i.e.*, speech with the school's imprimatur as in *Hazelwood School Dist. v. Kuhlmeier*, 484 U.S. 260 (1988). Specifically, the School argues that it would have given its imprimatur (or would have been perceived to have done so) had it *not* punished Frederick. Pet. Br. 15 (banner, if not punished, conveyed message that "drug-use promotion is openly tolerated"); *id.* at 33-34; NSBA Br. 14 n.16. In short, the School argues that *all* speech at a school-sponsored activity is school-sponsored speech. *E.g.*, Pet. Br. 33. Since classes and walking in the halls between classes are "school-sponsored activities," there is little expression (including Tinker's armband) that could not be characterized as "sponsored" by the school.

While citing *Kuhlmeier* for this proposition, the School and its amici ignore the fact that this Court considered and rejected that very argument in that case. *Kuhlmeier*, 484 U.S. at 271 n.3 (fact that school permitted underground newspaper to be sold on a state university campus did not make it school-

sponsored speech). "Onlookers" would not "reasonably perceive" (NSBA Br. 14 n.16) all speech on school property or at school events as bearing the imprimatur of the school just because the school respects students' right to free speech.[7]

3. Two other arguments deserve brief mention. First, the School and its amici assert that local school board control is important and that this Court should not attempt to micromanage the thousands of local school districts in this nation. *E.g.*, Pet. Br. 18-20; NSBA Br. 17-19. The short answer -- and the one already given by this Court -- is that this Court does not "micromanage" anything except its own area of expertise: the individual rights of citizens of the United States, including high school students. *Barnette*, 319 U.S. at 637-38 (rejecting argument that decision would make the Court the school board for the country; "small and local authority may feel less sense of responsibility to the Constitution"); *id.* at 638-39 (rejecting argument that courts possess no special competence in education; "our duty to apply the Bill of Rights to assertions of official authority [does not] depend upon our possession of marked competence in the field where the invasion of rights occurs").

Second, one of the School's amici offer two alternative interpretations of Frederick's speech which, it claims, can

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[7] The School and its amici focus on this Court's statement in *Kuhlmeier* that a school "must also retain the authority to refuse to *sponsor* student speech that might reasonably be perceived to advocate drug or alcohol use," *Kuhlmeier*, 484 U.S. at 272 (emphasis added). *E.g.*, Petition 16. But if this Court meant that schools have "latitude in *regulating*" such student speech (*id.* (emphasis added)), it could have said so.

justify taking it from the First Amendment's protective carapace. One interpretation of "Bong Hits 4 Jesus" is that it "mock[s] Christianity's central religious figure and trivializ[es] faith traditions" and thus is a "hurtful" opinion that can be regulated on that ground. NSBA Br. 21. Another is that the speech was "jabberwocky" or "nonsense" entitled to no First Amendment protection at all. *Id.* at 22-23. These arguments are obviously self-contradictory and have no roots in this Court's First Amendment jurisprudence. Tinker's armband may very well have been offensive to those whose parents or friends were fighting or had been killed in Viet Nam. *Tinker*, 393 U.S. at 509 n.3 (school was concerned that friends of a former student killed in the war would take offense). That speech may offend is never a basis for punishing it. And the NSBA offers no support for its suggestion that courts should analyze the importance of what was said in determining the protection offered by the First Amendment, a prospect far more dangerous than anything suggested by the opinion below.

II. This Court May Affirm The Judgment Below On Other Grounds As Well

Frederick may raise any argument properly raised that would support the judgment of the court below. This Court may affirm on any such ground. *Northwest Airlines, Inc. v. County of Kent*, 510 U.S. 355, 364 (1994); *Thigpen v. Roberts*, 468 U.S. 27, 30 (1984) (affirming on ground not relied upon by the court below and not addressed in the petition for certiorari). As noted in the Statement of the Case, the Ninth Circuit did nothing more here than vacate the district court's granting of summary judgment to defendants. It did not grant Frederick summary judgment. *Good News Club v. Milford Central School*, 533 U.S. 98, 129 (2001) (Breyer, J., concurring) ("To deny one party's motion for summary judgment, however, is not

to grant summary judgment for the other side. There may be disputed `genuine issue[s]' of `material fact,' Fed. Rule Civ. Proc. 56(c), particularly about how a reasonable child participant would understand the school's role").

On defendants' motion for summary judgment, of course, all disputed facts, and all inferences from the undisputed facts, had to be weighed in Frederick's favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) ("The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor."). Although the School wants this Court to rely upon "the facts as determined by the two lower courts" (Pet. Br. 35), it does not explain what business those courts had *determining* facts on summary judgment motions. *E.g.*, *Eisenmann Corp. v. Sheet Metal Workers Int'l Ass'n Local No. 24*, 323 F.3d 375, 380 (6th Cir. 2003) ("By its very nature, a summary judgment does not involve the determination of disputed questions of fact, but is confined to purely legal issues.").

With that standard in mind, the judgment of the Ninth Circuit denying defendants summary judgment can be affirmed for a variety of reasons not relied upon by the Ninth Circuit.

1. As noted previously, the Ninth Circuit took a nuanced approach to the question of what speech regulation is consistent with the First Amendment at "school events," taking into account the context of the event and the school's interest at that event, while the School and its amici espouse a bright line test. But both the Ninth Circuit and the School have ignored evidence that the observation of the Olympic torch relay was not, in any reasonable sense, a "school event" at all, particularly if the School's "bright line" test must be adopted.

Micaela F. Croteau testified as follows:

> On the day on which the Olympic Torch Relay was to be run through Juneau, the school allowed students to go out to the street to watch it . . . We were not required to stay together as a class, and I think only the gym class stayed together. *We were just told to come back to our next class at a particular time.*

J.A. 36 (emphasis added). Similarly, Sara Croteau testified:

> [W]hen the torch relay was being run near our school, the teacher announced that we could go watch it. Some students did, others did not, and the teacher made no effort to keep those of us who did go out together.
>
> We stood in the snow for a long time waiting for the torch to come by. *Many* people got bored and left. The school administrators weren't stopping *any* of the people who left. . . I could have done *whatever I wanted*.

J.A. 38 (emphasis added).

This testimony must be taken as true, and reasonable inferences from it made in Frederick's favor. If the *only* thing that teachers told students at Juneau Douglas High School was that they had to be back to their next class at a particular time, and school administrators did nothing to stop even one of the

many students who chose to leave the torch relay route, then it is reasonable to infer that the students had a free period to do what they wanted. While this surely was done to accommodate those who wanted to watch the Olympic Torch Relay, students had no obligation to watch it or to stay anywhere near the high school. Under these circumstances, the School had no reasonable basis for believing that this was a "school event" at all at which it could regulate the speech of its students. Pet. App. 5a (characterizing case as a "sidewalk speech" case would make it much easier to decide).[8]

A school cannot offer its students an opportunity to go out to the public square unsupervised, and then punish them for doing what any other citizen in the public square could do. This Court may affirm the judgment of the Ninth Circuit on the ground that there was an issue of fact relating to whether this was a "school event" at all.

2. The School claims that it punished Frederick because his speech violated its policy 5520 in that it "advocate[d] the use of substances that are illegal to minors." Frederick pre-

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[8] *Compare* Pet. Br. 3 ("Once outside the classroom, the students were allowed to be in only one place -- in front of the school, either on campus or lined along either side of the street . . . the student body remained under the supervision of high school administrators, teachers, and staff"); Petition 5 n.3 ("students remained under faculty supervision and were not otherwise released from school"). The School claims that the student affidavits -- which it asserts, without support, came from "Frederick's friends" -- "did not contradict evidence presented by the school district that set forth in detail the supervisory roles of administrators and teachers." Pet. Br. 13 n.3. This is nonsense. Testimony that there was no obligation to attend and no supervision at all obviously contradicts the School's efforts to say otherwise.

sented evidence on the motions for summary judgment that this was a pretext. Specifically, Frederick testified that the school tolerates all kinds of t-shirts with messages promoting drug or alcohol use. J.A. 31. If so, a reasonable trier of fact could conclude that his speech was punished not for its content, and not because it interfered with the School's interest in deterring the use of illegal substances, but because Morse was embarrassed that the message could be seen by non-students. But the school has no legitimate interest in restricting student speech to outsiders when it permits the same speech to be made to other students. *Cf. Greater New Orleans Broadcasting Ass'n v. United States*, 527 U.S. 173, 190-91 (1999) (prohibition against advertising of privately-run gambling casinos violated First Amendment where government permitted advertising of other casinos operated by government and Indian tribes).

3. Finally, the district court erred in granting summary judgment to the Juneau School Board on grounds of qualified immunity. Pet. App. 26a-30a. Entities like the Juneau School Board do not have qualified immunity. *Owen v. City of Independence*, 445 U.S. 622 (1980). Accordingly, the Ninth Circuit's judgment vacating the award of summary judgment to the school board can be affirmed on that ground as well.

CONCLUSION

The judgment of the court below should be affirmed.

Respectfully submitted,

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