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 FOR *AMICUS CURIAE* LAMBDA LEGAL DEFENSE AND EDUCATION FUND, INC. IN SUPPORT OF RESPONDENT

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INTEREST OF THE AMICUS CURIAE

Lambda Legal Defense and Education Fund, Inc. ("Lambda Legal") is a national organization committed to achieving full recognition of the civil rights of lesbians, gay men, bisexuals, transgender people and those with HIV through impact litigation, education and public policy work.[1] Lambda Legal has brought numerous cases to vindicate the free expression rights of lesbian, gay, bisexual and transgender ("LGBT") students, teachers and administrators, as well as their allies, under the First Amendment and the Equal Access Act, 20 U.S.C. § 4071 *et seq*. As part of this work, Lambda Legal has been at the forefront of advocating for the rights of students to form gay-straight alliances and to express LGBT perspectives on curricular subjects in the public schools. *See*, *e.g.*, *Colin v. Orange Unified Sch. Dist.*, 83 F. Supp. 2d 1135 (C.D. Cal. 2000); *East High Sch. PRISM Club v. Seidel*, 95 F. Supp. 2d 1239 (D. Utah 2000); *East High Gay/Straight Alliance v. Bd. of Educ. of Salt Lake City Sch. Dist.*, 81 F. Supp. 2d 1166, 1184 (D. Utah 1999). Lambda Legal is concerned that school officials may be given unfettered authority to silence student views that the school does not favor, when the expression of those views does not materially and substantially interfere with the requirements of appropriate discipline in the operation of the school or with the rights of other students.

At the same time, Lambda Legal also has represented numerous high school students who have

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court. This brief has not been authored in whole or in part by counsel for any party, and no one other than Lambda Legal has made any monetary contribution to its preparation.

been subjected to severe abuse and harassment at school based on their sexual orientation or sex. *See*, *e.g.*, *Nabozny v. Podlesny*, 92 F.3d 446 (7th Cir. 1996); *Henkle v. Gregory*, 150 F. Supp. 2d 1067 (D. Nev. 2001). Based on that work, Lambda Legal echoes the concern of the *amici* school administrators that school officials must be allowed to regulate student behavior that interferes with another student's right to receive an education or that seriously harms classmates in other ways. However, because neither this case, nor the questions on which *certiorari* were granted, involve such interference or harms, Lambda Legal submits this *amicus curiae* brief to assist the Court in properly applying the First Amendment to the speech involved in this case without unnecessarily reaching the issue, not presented here, of how school officials may regulate student conduct that adversely affects those students' peers.

SUMMARY OF ARGUMENT

This case concerns a school principal's suspension of a student, as well as the principal's seizure and destruction of a banner with the vague message, "Bong Hits 4 Jesus," held by the student along the route of a parade the student and his classmates had been permitted by the school to attend. The principal's sole justification for her action was that the message on the banner was inconsistent with the school's anti-drug advocacy.

Nearly forty years ago, this Court recognized that students have the right to engage in the expression of dissent in educational settings, as long as their speech does not disrupt the school's operation substantially or interfere with the rights of others. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969). Whether a

school seeks to instill in youth a particular view regarding American foreign policy, illegal drug use or some other topic, the government's role as educator, *Tinker* explained, cannot transform students into "closed-circuit recipients of only that which the State chooses to communicate" nor justify confining student expression "to those sentiments that are officially approved." *Id*. at 511.

Tinker's teachings remain sound today, and the only two exceptions to *Tinker*'s general test – involving speech that is lewd or curriculum-based – are not presented by this case. As a result, this Court should reaffirm the rule that has governed schools for decades: a student's dissent in non-curriculum settings from a school's orthodoxy is constitutionally protected, so long as it is not lewd, likely to disrupt school operations substantially or likely to interfere with the rights of others.

Petitioners advance the dangerous argument that the viewpoints expressed by students during noncurricular activities are a form of school speech that school administrators should be able to control. This Court and others have recognized the difference between a school's own speech and speech it simply tolerates. Moreover, this and lower courts have rejected the argument that a school may censor student speech out of a fear that onlookers will misunderstand the source of the viewpoint.

Petitioners also vastly would extend a school's control over speech that offends because of the vulgar manner in which it is expressed to any speech that is "offensive" in the sense that it can be argued to depart from majoritarian sentiment. Petitioners candidly admit the fact that suppression of the banner in question was based solely upon the viewpoint of its message. Their approach would untether secondary schools from the First Amendment's anchor that government may not squelch a

message merely because it is at odds with government's preferred views. By exempting secondary schools from the established doctrine applicable to viewpoint-based restrictions, the Court would license schools to prohibit student expression of innumerable particular views – even in the extracurricular context – whenever those views are at odds with school policy. The wide range of social, political, religious, and personal matters on which local school boards often see fit to pronounce policy – a sample of which are discussed in Section I(C)(3) of this brief – demonstrates the danger of Petitioners' argument to the cherished principles of free speech and robust debate on which both American liberty and real education depend.

While school administrators do *not* have justification to censor speech that advances a viewpoint different from the school district, they do have a compelling interest in preventing interference with the rights of students to an education and to personal safety. However, the speech in this case does not present those concerns. Thus, this Court should reject the argument that a school's need to control such truly disruptive conduct justifies the censorship here. At the same time, the Court should not rule so broadly – and unnecessarily – regarding students' speech rights as to tie a school's hands to address conduct that causes other students serious harms.

ARGUMENT

I. *TINKER* PROTECTS THE SPEECH AT ISSUE.

This Court's landmark ruling in *Tinker* categorically rejected the notion that school officials are entitled to suppress "'expressions of feeling with which they do not wish to contend.'" 393 U.S. at 511 (quoting with approval *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)). To

the contrary, "[i]n the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views." *Tinker*, 393 U.S. at 511.[2]

Petitioners seem to read *Tinker* as providing students with First Amendment rights only when they are engaged in "silent, passive political protest." (Brief of Petitioner [hereinafter "Pet. Br."] at 20, 25.) Relying on a distorted interpretation of *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988),[3] Petitioners essentially argue that any student expression in a school-related context is subject to the same level of control that schools have over their own speech and curriculum. (Pet. Br. at 24-25, 32-34.) And citing *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986), Petitioners propose a doctrinal approach that would allow schools to censor any student whose viewpoint differs from messages administrators assert it is part of the school's mission to impart. (Pet. Br. at 21-24, 27-32.) Respectfully, Petitioners' interpretation of these decisions is

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[2] It does not matter that the message on the banner at issue in this case may have been vague or jocular. "[A] narrow, succinctly articulable message is not a condition of constitutional protection." *Hurley v. Irish-American Gay, Lesbian, & Bisexual Group of Boston*, 515 U.S. 557, 569 (1995). Moreover, the prospect that a student could be disciplined for expressing a message as nebulous and farcical as "Bong Hits 4 Jesus" undoubtedly would lead to student self-censorship of far more serious and pointed expression, well beyond anything schools officials legitimately could interdict.

[3] Although Petitioners and the Ninth Circuit have referred to this case as *Kuhlmeier*, this brief will refer to it by the case's more commonly used short form name, *Hazelwood*.

inconsistent with the plain language of this Court's opinions and should be rejected.

A. The Court Should Reaffirm *Tinker*'s Application to Speech That Is Not Lewd Or Part Of A School's Curriculum.

In this Court's landmark ruling in *Tinker*, the Court began with what it called the "unmistakable holding" of numerous cases dating back to the 1920's that students do not "shed their constitutional rights to freedom of speech or expression" simply because they are attending school. 393 U.S. at 506. While Petitioners seek to distinguish the constitutionally protected wearing of wordless black armbands that was at issue in *Tinker* as involving silent, "passive" conduct that conveyed a political message (see Pet. Br. at 15, 20, 21, 25), this Court never suggested those attributes were necessary criteria for First Amendment protection to inhere.[4] Instead, quoting from *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967), the Court in *Tinker* sweepingly reiterated that the "Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'" *Tinker*, 393 U.S. at 512. And, while the

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[4] Indeed, given the tenor of Petitioners' other arguments, it is unlikely that they truly accept this distinction. If Joseph Frederick had worn a green armband that was understood to extol political support for smoking of marijuana as an act of civil disobedience, the Juneau School Board's policy prohibiting "any public expression that ... advocates the use of substances that are illegal to minors" (see Juneau School Board Policy 5520, reprinted at Petition for Writ of Certiorari App. 53a-54a) would be equally violated.

special circumstances of the school environment at times require that students' expressive rights be constrained for the sake of maintaining order or protecting others' rights, this means only that schools may create rules of proper student *conduct*, *id*. at 507, not that they may impose hegemony over the ideas a student might express.

This Court said that a school's power has limits *within* the classroom, to say nothing of regulating student attendance at a parade on a public street, as here.[5] *See id.* at 508-09 ("Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk…."); at 512 ("A student's rights, therefore, do not embrace merely the classroom hours.").

The Court in *Tinker* poignantly defended the right of students to express views contrary to those of government and school officials, so long as the students do not disrupt the educational opportunities of others or otherwise violate their rights:

> *When he is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinions, even on controversial subjects* ..., if he does so without 'materially and substantially interfer(ing) with the requirements of appropriate discipline in the operation of the school' and without colliding with the rights of others. But *conduct* by the

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[5] This Court has acknowledged that spectators play a role in shaping the "public drama" that inheres in a parade, and that parades often attract banners with all sorts of messages, including those not part of the parade's theme. *See Hurley*, 515 U.S. at 568-70 (referring to "Say No to Drugs" banner at South Boston St. Patrick's Day Parade).

> student, in class or out of it, which for any reason – whether it stems from time, place, or type of behavior – materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.

Id. at 512-13 (emphasis added).

Three important lessons can be distilled from this portion of the Court's opinion. First, the mere fact that a student's speech occurs during a school-related activity is not reason to exempt it from First Amendment protection; the Court reached the very opposite conclusion. *Id.* at 512 ("The classroom is peculiarly the 'marketplace of ideas.'") (quoting *Keyishian,* 385 U.S. at 603). Second, certain restrictions on student speech may be justified as a means of regulating *conduct* that materially is disruptive of classwork, appropriate discipline, or other students' rights. Finally, the category of speech that may be curtailed is expressive conduct that collides with the rights of other students, not student expression that conflicts with school officials' preferred views.

Since *Tinker*, this Court has carved out two exceptions in which administrators may have the power to regulate student speech: (1) when such speech is vulgar, lewd, or indecent, *Fraser*, 478 U.S. at 683; or (2) when such speech (as opposed to simply the context in which it occurs) "may fairly be characterized as part of

the school curriculum," *Hazelwood*, 484 U.S. at 271.[6] As lower courts widely have recognized, *Tinker* states the general rule for student speech, while *Fraser* and *Hazelwood* are specific exceptions to *Tinker*'s application:

> To summarize: Under *Fraser*, a school may categorically prohibit lewd, vulgar or profane language. Under *Hazelwood*, a school may regulate school-sponsored speech (that is, speech that a reasonable observer would view as the school's own speech) on the basis of any legitimate pedagogical concern. Speech falling outside of these categories is subject to *Tinker*'s general rule: it may be regulated only if it would substantially disrupt school operations or interfere with the right of others.

Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 214 (3d Cir. 2001); *accord Guiles v. Marineau*, 461 F.3d 320, 325-26 (2d Cir. 2006); *Newsom v. Albemarle County Sch. Bd.*, 354 F.3d 249, 255-57 (4th Cir. 2003); *Chandler v. McMinnville Sch. Dist.*, 978 F.2d 524, 529 (9th Cir. 1992); *Griggs v. Fort Wayne Sch. Bd.*, 359 F. Supp. 2d 731, 739-40 (N.D. Ind. 2005) (noting that eight of the circuits agree that "*Tinker* provides the default rule for suppression of student speech, and *Fraser* and *Hazelwood* create narrow exceptions to the rule"); *East High Gay/Straight Alliance,* 81 F. Supp. 2d at 1193-94 (rejecting the argument that

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[6] In both *Fraser* and *Hazelwood*, this Court was careful to reaffirm *Tinker*. *Fraser*, 478 U.S. at 681 (reaffirming "[t]he undoubted freedom to advocate unpopular and controversial views in schools and classrooms" so long as it is not done in a socially inappropriate manner); *Hazelwood*, 484 U.S. at 266 (students "cannot be punished merely for expressing their personal views on the school premises" outside the school's curriculum).

Fraser and *Hazelwood* "signal a retreat from *Tinker*'s powerful affirmation of students' rights to free expression of their views").

Yet the arguments of Petitioners and some of their supporting *amici* risk swallowing the *Tinker* rule by substantially expanding the narrow *Hazelwood* and *Fraser* exceptions. Under the doctrine they propose, a school could control not only the content of truly school-sponsored speech such as a newspaper for class credit, but also speech at any event open to the public that the school allowed students to attend. Additionally, administrators could censor not only lewd and vulgar speech but also any speech that contravened what the school termed its "basic mission." These arguments misread the Court's bedrock First Amendment cases and violate the principle of *Tinker* that students "may not be confined to the expression of those sentiments that are officially approved." *Tinker*, 393 U.S. at 511; *see also Colin*, 83 F. Supp. 2d at 1141 (schools' responsibility of inculcating values "does not permit educators to act as 'thought police' inhibiting all discussion that is not approved by, and in accord with the official position of, the state.").

B. *Hazelwood* Does Not Apply And Should Not Be Expanded To Cover All Student Speech Occurring In Any School-Related Context.

Petitioners advance the troubling argument that *Hazelwood* applies to this case merely because the school permitted students to attend the *corporate-sponsored* Olympic Torch rally. As the appellate court below explained, the student banner seized and destroyed in this case "was not sponsored or endorsed by the school, nor was it part of the curriculum, nor did it take place as

part of an official school activity." *Frederick v. Morse*, 439 F.3d 1114, 1119 (9th Cir. 2006). In *Hazelwood*, by contrast, the school sponsored a student newspaper, and participating students received academic credit in "Journalism II." 484 U.S. at 268. While a school has the authority to control speech that "may fairly be characterized as part of the school curriculum," the strict *Tinker* holding still governs "educators' ability to silence a student's personal expression" in other circumstances. *Id*. at 271. Thus, it has been widely and correctly recognized that *Hazelwood* "governs only when a student's school-sponsored speech could reasonably be viewed as speech of the school itself." *Saxe*, 240 F.3d at 213-14; *Guiles*, 461 F.3d at 327; *see also Hazelwood*, 484 U.S. at 270-71 (setting forth the difference between a school's general duty "to tolerate particular student speech – the question that we addressed in *Tinker*" and "whether the First Amendment requires a school affirmatively to promote particular student speech.").

Petitioners resurrect the argument, rejected by this Court, that a school can censor speech out of fear that onlookers incorrectly might associate the school with that speech. (*See* Pet. Br. at 33-34.) In upholding the rights of noncurricular religious clubs to meet on school property, this Court remarked: "We think that secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis." *Bd. of Educ. of Westside Cmty. Sch. v. Mergens*, 496 U.S. 226, 250 (1990); *see also id*. at 260 (Kennedy, J., concurring). *Mergens* distinguished the newspaper in *Hazelwood* because the "high school newspaper produced as part of the school's journalism class was part of the curriculum." *Id*. at 237 (*citing Hazelwood,* 484 U.S. at 271). Courts have echoed Justice O'Connor's common-sense realization

that "The proposition that schools do not endorse everything they fail to censor is not complicated." *Mergens*, 496 U.S. at 250 (plurality opinion); *accord Saxe*, 240 F.3d at 214 (rejecting the notion that censorship is "justified under *Hazelwood* because observers might 'infer that the school endorses whatever it permits.'") (quoting *Hedges v. Wauconda Cmty. Unit Sch. Dist. No. 118*, 9 F.3d 1295, 1299 (7th Cir. 1993)). These courts recognize that students benefit both when a wide range of discussion is permitted and when the First Amendment's mandates are explained to them. *Id*. ("[The School District] proposes to throw up its hands, declaring that because misconceptions are possible it may silence its pupils, that the best defense against misunderstanding is censorship.... The school's proper response is to educate the audience rather than squelch the speaker.").

Mergens reveals the danger of trying to expand *Hazelwood* to such an extent: if a school has the power to control noncurricular speech, then its failure to do so could be deemed an endorsement of such speech.[7]

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[7] Lower courts have had little trouble rejecting arguments to expand *Hazelwood*. "Any student group meeting on school premises may arguably be characterized as school-sponsored, but the Court must look beyond carelessly strewn labels and examine the substance of the relationship" between the school and the activity in question. *Westfield High Sch. L.I.F.E. Club v. City of Westfield*, 249 F. Supp. 2d 98, 115 (D. Mass. 2003). The Third Circuit rejected as "very far from the mark" an argument that the *Hazelwood* standard applied to a school's distribution of literature from a variety of organizations. *Child Evangelism Fellowship of N.J., Inc. v. Stafford Twp. Sch. Dist.*, 386 F.3d 514, 524 (3d Cir. 2004). "School- or government-sponsored speech occurs when a public school or other government entity aims 'to convey its own message'" and not when a school merely "facilitates the expression of 'a diversity

Expansion of the right to censor controversial ideas inevitably will lead to added community pressure for the school to do so. *See, e.g., Boyd County High Sch. Gay Straight Alliance v. Bd. of Educ.*, 258 F. Supp. 2d 667, 674-75 (E.D. Ky. 2003); *East High Gay/Straight Alliance*, 81 F. Supp. 2d at 1191 n.39. The expansion of *Hazelwood* to cover speech in any activity that a school allows is an unwise affront to *Tinker*. As the Court recognized in *Mergens*, the fact that a school allows its students to express themselves in extracurricular activities and elsewhere does not transform the students' speech into the school's own. The Court should reaffirm the rule that student speech that is not a part of the school's own curriculum is governed by *Tinker*, not *Hazelwood*.

C. *Fraser* Also Does Not Apply And Should Not Be Extended To Cover The Expression Of An Unpopular Idea.

Petitioners additionally seek a dangerous expansion of the *Fraser* exception, which allows schools to censor

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of views from private speakers.'" *Id.* (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833, 834 (1995)). Similarly, it generally has been recognized that "[a]llowing a student group to meet on school premises during non-instructional time ... does not affirmatively promote particular student speech" and is not likely to be seen as "'bearing the imprimatur of the school.'" *East High Gay/Straight Alliance*, 81 F. Supp. 2d at 1194-95; *see also L.W. v. Knox County Bd. of Educ.*, ___ F. Supp. 2d ___, 2006 WL 2583151 (E.D. Tenn. Sept. 6, 2006) (students reading Bible to other students at recess not covered by *Hazelwood*); *O.T. ex rel. Turton v. Frenchtown Elem. Sch. Dist. Bd. of Educ.*, __ F. Supp. 2d __, 2006 WL 3579215, *5 (D.N.J. Dec. 11, 2006) (*Hazelwood* did not apply to school talent show because school "did not aim to convey its own message through the medium of the school talent show.").

speech that is lewd or vulgar.[8] Petitioners instead ask this Court to allow schools to define what constitutes their "basic educational mission" and censor any speech advancing a contrary position. (See Pet. Br. at 21-24.) Such a rule improperly would eviscerate *Tinker*.

1. *Fraser* Applies Only To The Manner, Not The Content Of Speech.

In *Fraser*, this Court held that a school may prohibit "lewd, indecent, or offensive speech and conduct." 478 U.S. at 683. The reason such speech could be prohibited was not simply because school officials disapproved of the speech or because the school board drafted a policy, as Petitioners suggest. Matthew Fraser was giving a nominating speech, and there was no suggestion that he was disciplined because the school preferred a particular outcome in the student election. It was the objectionable style of his speech, not its message or his viewpoint, which justified the school's prohibition. *Fraser*, 478 U.S. at 683. *Fraser* made clear that this Court was concerned with "certain modes of expression" that a student might use improperly and that what a school board had the power to regulate was the "manner of speech," not the views expressed. *Id*. Lower courts widely have understood *Fraser* to permit regulation of "the appropriateness of the manner in which the message is

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[8] *Fraser* also uses the term "offensive," which the Court limited to meaning insulting or sexual in content. *See* 478 U.S. at 683 ("The pervasive sexual innuendo in Fraser's speech was plainly offensive to both teachers and students – indeed to any mature person. By glorifying male sexuality, and in its verbal content, the speech was acutely insulting to teenage girl students.").

conveyed, not of the message's content." *Saxe*, 240 F.3d at 213; *Guiles*, 461 F.3d at 328; *Newsom*, 354 F.3d at 256; *Castorina ex rel. Rewt v. Madison County Sch. Bd.*, 246 F.3d 536, 542 (6th Cir. 2001); *Nixon v. Northern Local Sch. Dist. Bd. of Educ.*, 383 F. Supp. 2d 965, 971 (S.D. Ohio 2005); *East High Gay/Straight Alliance*, 81 F. Supp. 2d at 1193; *Griggs*, 359 F. Supp. 2d at 739.

The sexualized way in which the speech in *Fraser* was delivered was understood to be acutely insulting to female students and potentially damaging to young people. This Court has since recognized that lewd, sexual speech by a student may interfere with the rights of other students or contribute to a hostile learning environment. *See Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 646 (1999). Indeed, the Court viewed the lewd student expression at issue in *Davis* as a form of (mis)conduct that schools are expected to proscribe. *Id.*

By contrast, this case does not implicate *Fraser*'s concern that students express themselves in a manner that is not lewd.[9] Joseph Frederick might be able to be prohibited from wearing the infamous jacket of *Cohen v. California,* 403 U.S. 15 (1971), to school with "drug laws"

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[9] Courts generally have understood the limited nature of *Fraser*'s holding and applied it narrowly only to student speech fairly characterized as lewd. *Compare Posthumus v. Bd. of Educ. of Mona Shores Public Sch.*, 380 F. Supp. 2d 891, 901 (W.D. Mich. 2005) (student could be disciplined for the "lewd and vulgar" reference to an assistant principal as a "dick"); *with Behymer-Smith v. Coral Acad. of Sci.*, 427 F. Supp. 2d 969, 972-73 (D. Nev. 2006) ("Plaintiff's recitation of Auden's poem, which includes the words 'damn' and 'hell,' does not constitute speech that can be considered vulgar, lewd, obscene, or offensive.").

substituted for "the draft." *See Fraser*, 468 U.S. at 682; *see also Broussard ex rel. Lord v. Sch. Bd. of City of Norfolk*, 801 F. Supp. 1526 (E.D. Va. 1992) (concluding that a school could prohibit a student from wearing a T-shirt that says "Drugs Suck!" because of the lewd and sexual nature of the reference). That question, however, is not posed by the present case.

Finally, Petitioners wrongly characterize Frederick's speech as "plainly offensive" under *Fraser*. (Pet. Br. at 28.) This Court should reject a definition of "plainly offensive" that would encompass speech that contravenes a school's policies. "[T]he phrase 'plainly offensive' as used in *Fraser* cannot be so broad as to be triggered whenever a school decides a student's expression conflicts with its 'educational mission' or claims a legitimate pedagogical concern." *Guiles*, 461 F.3d at 330. "Nor was *Fraser* an invitation to censor and punish any speech that offends school authorities." *Frederick*, 439 F.3d at 1122 n.44. "Indeed, if schools were allowed to censor on such a wide-ranging basis, then *Tinker* would no longer have any effect." *Guiles*, 461 F.3d at 330; *see also Boroff v. Van Wert City Bd. of Educ.*, 220 F.3d 465, 474 (6th Cir. 2000) (Gilman, J., dissenting) (it would be "essentially overruling *Tinker* [to] conclude[e] that after *Fraser* and *Kuhlmeier*, school officials can forbid whatever student speech they consider 'offensive' (in the sense of promoting 'disruptive and demoralizing values'), as long as their decision does not appear 'manifestly unreasonable.'").

Fraser gave administrators the authority to censor the "manner" of student speech where it is lewd or vulgar. But provocative speech that does not fall into that category is still protected under *Tinker*, and this Court should reaffirm that important principle.

2. Petitioners' View of *Fraser* Would Allow A School To Engage In Viewpoint Discrimination Simply By Labeling Its Public Policy Preferences As Part Of Its "Educational Mission."

Petitioners' reading of *Fraser* runs afoul of this Court's established suspicion of viewpoint-discriminatory government regulation. "When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant.... The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Rosenberger*, 515 U.S. at 828-29 (citations omitted). The vice of such restrictions is that they are aimed at "suppressing particular ideas" and lend themselves to "invidious, thought-control purposes." *See Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 794 (1994) (Scalia, J., concurring and dissenting in part). The risk of indoctrination is no less serious in schools than other places; rather, in the compulsory educational context where inquiry and critical thinking should be encouraged, that risk is at its zenith.

When a speaker's viewpoint runs counter to the public policies established by government, that certainly is not a reason to afford the speaker *less* First Amendment protection. The First Amendment ordinarily denies a State the power to prohibit speech that "a vast majority of its citizens believes to be false and fraught with evil consequence." *Whitney v. California*, 274 U.S. 357, 374 (1927) (Brandeis, J., concurring). Indeed, the "enduring lesson" of this Court's First Amendment

jurisprudence is "that the government may not prohibit expression simply because it disagrees with its message." *Texas v. Johnson*, 491 U.S. 397, 416 (1989); *see also R.A.V. v. City of St. Paul*, 505 U.S. 377, 382-86 (1992) (holding that government speech prohibition may not be based solely on state hostility towards a speaker's underlying message).

Despite Petitioners' complete avoidance of the doctrine, viewpoint neutrality certainly is not an alien concept for public schools. This Court repeatedly has struck down attempts by public schools to discriminate on the basis of a speaker's viewpoint. *See Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 107 (2001) ("Because the restriction is viewpoint discriminatory, we need not decide whether it is reasonable in light of the purposes served by the forum."); *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *see also Erznoznik v. City of Jacksonville*, 422 U.S. 205, 214 (1975) ("In most circumstances, the values protected by the First Amendment are no less applicable when government seeks to control the flow of information to minors."). The Nation's commitment to viewpoint neutrality for student speech likewise is embodied in the Equal Access Act, 20 U.S.C. § 4071 et seq., through which Congress extended the prohibition on viewpoint discrimination applicable to state universities, *see Widmar v. Vincent*, 454 U.S. 263 (1981), to all American secondary schools that receive federal funds.

Indeed, one of this Court's most poignant First Amendment decisions arose when students refused to conform their expression to the established policy preferences of school administrators. In *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), in upholding the First Amendment right of students to

decline to salute the American flag during the midst of World War II, this Court rejected the notion that the difficulty of educating good citizens justified enforced expression favored by local government officials who ran public schools: "That they 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 637.

While Petitioners focus their argument on illegal drug use, (Pet. Br. at 26-30), their actions remain viewpoint discriminatory. The record strongly suggests that a banner with an anti-drug message would *not* have been censored. (See Joint Appendix at 25.) The Eleventh Circuit faced a similar argument a decade ago when the University of South Alabama denied funding to a gay student group on the ground that the group advocated violation of Alabama's sodomy and sexual misconduct laws. *Gay Lesbian Bisexual Alliance v. Pryor*, 110 F.3d 1543, 1546 (11th Cir. 1997). The court easily concluded that the school had engaged in viewpoint discrimination:

> [The University] prohibited funding to GLBA based on the Attorney General's unsupported assumption that GLBA fosters or promotes a *violation* of the sodomy or sexual misconduct laws. The statute discriminates against one particular viewpoint because state funding of groups which foster or promote *compliance* with the sodomy or sexual misconduct laws remains permissible. This is blatant viewpoint discrimination.

Id. at 1549.

Ironically, Petitioners justify their prohibition on the perceived message of Frederick's banner by reference to the very feature that most strongly cries out for First Amendment protection – that is, its perceived challenge to the orthodox viewpoint that drug use is an evil at all times to be curtailed. Even accepting that discouraging drug use by minors is a legitimate educational aim, and that educators have a sincere and empirical basis to oppose teenage drug use, the problem is that laudable ends do not justify unconstitutional means. *Johnson*, 491 U.S. at 418 ("It is not the State's ends, but its means, to which we object."). Surely the "war against drugs" (Pet. Br. at 26) is no greater justification for infringement of First Amendment liberties than World War II or the Vietnam War, waged when *Barnette* and *Tinker* were decided.[10]

As explained below, the breadth of topics included in state and local school board policies makes Petitioners' approach to the First Amendment all the more alarming.

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[10] There is a huge difference between preventing students from *using* drugs and preventing them from *talking* about them. Indeed, particularly because schools have been held in certain circumstances to have the power to conduct suspicionless drug testing of students, *see Bd. of Educ. v. Earls*, 536 U.S. 822 (2002); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646 (1995), students' expression of views on the subject of drug use may be one of the few ways they have of objecting to such measures.

3. Petitioners' Reading of *Fraser* Is Troubling Because School Policies Today Address A Broad Range of Civic, Political, Social, And Cultural Issues.

Petitioners' reading of *Fraser* to permit censorship of any speech that is contrary to the school's "mission" is a rigged game, because school authorities are the ones who typically define the "mission" of the educational system, which can touch on a wide range of politically charged topics. Allowing a school to censor any speech that contradicts even just the written statements of a school system's educational "mission" would eviscerate the First Amendment rights of students. A survey of school policies from around the country suffices to demonstrate the implications of Petitioners' argument.

The curricular guidelines for the State of Alaska expressly state that students must be taught to "develop an understanding of how science explains changes in life forms over time, including genetics, heredity, the process of natural selection, and biological evolution." Alaska Dept. of Educ., "Content and Performance Standards for Alaska Students" (4th ed. June 2005) at 15, *available at* http://www.eed.state.ak.us/standards/pdf/standards.pdf. The clearly stated educational "mission" of the Alaska schools is to teach the scientific theory of evolution and natural selection. Petitioners' argument thus logically could be applied to ban student speech questioning the theories of Charles Darwin.

California has enacted a comprehensive educational framework that is rife with instruction on issues that cause considerable controversy. California offers its own definition of "patriotism," stating that students should "[r]ealize that true patriotism celebrates the moral force

of the American idea as a nation that unites as one people the descendents of many cultures, races, religions or ethnic groups." California Dept. of Educ., "History-Social Science Framework for California Public Schools" (2005) at 21, *available at* http://www.cde.ca.gov/re/pn/fd/documents/hist-social-sci-frame.pdf. Whether one agrees or not with California's definition of "true patriotism," students should be free to offer up competing views of what patriotism means without fear that their speech could be censored for contradicting a scholastic "mission." California schools also are required to ensure that students "understand why a democracy needs citizens who value give-and-take on issues, who do not feel it necessary to go to war over every idea, and who seek middle ground on which consensus and cooperation can flourish." *Id.* at 23. Given this mission, would it be permissible to silence students who refuse to seek "middle ground" and hold their beliefs strongly and proudly? Can a school ban student speech simply because it suggests a degree of zeal that is out of step with the California Department of Education's mandate that schools teach students not to "go to war" over ideas? Additionally, could a California school discipline a student who spoke against the principle of showing "kindness toward domestic pets and the humane treatment of living creatures" that every teacher in the State is required to "endeavor to impress upon the minds" of pupils? *See* Cal. Educ. Code § 233.5(a).

A student praising the luncheon counter sit-ins of the Civil Rights movement, or advocating any civil disobedience, may run afoul of Florida's required instruction stressing "respect for authority." *See* Fla. Stat. §1003.42(s). While "respect for the environment" may be a fine ideal for Georgia to instill in its student body, *see* Ga. Code § 20-2-145, it ought not empower a

school to punish a student with a "Pave the Rainforest" bumper sticker on his backpack. *Id*. Were Petitioners' arguments to prevail, students rooting for the opposing team during Homecoming might be seen as violating the Georgia and Alabama school systems' missions of instilling "school pride." *See id*.; Ala. Code § 16-6B-2.

Virginia requires instruction in "economic self-reliance" and "the Golden Rule." Va. Code § 22.1-208.01. South Carolina requires students to be taught the importance of "sportsmanship." S.C. Stat. § 59-17-135. South Dakota mandates instruction to promote "regard for the elderly." S.D.C.L. § 13-33-6.1. Again, these goals of character education may be laudable, but students must be allowed to express opinions that run contrary to the stated curricular mission of their schools. The First Amendment tolerates no less. While it may be within the power of the Nebraska Legislature to require that students learn "the dangers and fallacies of ... Communism," Neb. Rev. Stat. § 79-724, it is not permissible for a school to censor students who see merit in the works of Karl Marx.

The San Francisco Board of Education has been extremely outspoken on matters of both national and international concern, even adopting a written policy opposing the war in Iraq. San Francisco Bd. of Educ., Res. No. 212-10A16A (January 14, 2003), *available at* http://portal.sfusd.edu/data/board/prf/memberreso/ACF50.pdf. The Board also has publicly opposed efforts to end affirmative action by state actors. San Francisco School Bd. of Educ., Res. No. 35-13A2 (March 2, 2004), *available at* http://portal.sfusd.edu/data/board/pdf/memberreso/oppose%20ward%20connerly%20final.pdf. Students in Juneau should no more be forbidden from dissenting publicly against their schools' view of drug use than

students in San Francisco's schools who disagree with their school systems' views about the Iraq war or affirmative action.

Amicus is particularly concerned about the impact Petitioners' desired rule might have on gay, lesbian, bisexual and transgender students and their allies. High school students have an established constitutional right to speak about their sexual orientation in school settings. *See Henkle*, 150 F. Supp. 2d at 1076; *Fricke v. Lynch*, 491 F. Supp. 381, 385, 387 (D.R.I. 1980). Where a school has created a public forum, students interested in exploring lesbian and gay perspectives on curricular subjects likewise have a First Amendment right to have the same access to the forum afforded other student groups. *See East High Sch. PRISM Club*, 95 F. Supp. 2d at 1251. But what if a school had a policy like that enacted (although later repealed) by the Merrimack, New Hampshire School Board, which stated: "The Merrimack School District shall neither implement nor carry out any program or activity that has either the purpose or effect of encouraging or supporting homosexuality as a positive lifestyle alternative"? Jill Smolowe, "The Unmarrying Kind," TIME, Apr. 29, 1996, *available at* http://www.time.com/time/magazine/article/0,9171,98446 9-1,00.html. Free speech rights should not depend on conformity with what school authorities consider orthodox, particularly in matters of students' sexual orientation.

While schools may have wide latitude to teach what they wish, they are not free to stamp out competing ideas. *Fraser* sought to ensure that students expressed their opinions in a manner that was not lewd or vulgar. It was not a license to censor viewpoints contrary to those held by the school administration. Given the vast array of

social and political issues on which school authorities opine, students cannot rightly be disciplined simply for voicing opinions at odds with school policies.

D. Frederick's Expression Is Protected Under *Tinker* Because It Neither Disrupted School Nor Interfered With The Rights Of Others.

Because *Tinker* governs this case, Frederick's expression is protected, as there was no demonstrated risk of material and substantial disruption of the school's operation and his speech did not interfere with the rights of other students. *See Tinker*, 393 U.S. at 513. Petitioners complain that Frederick's banner "interfered with decorum by radically changing the focus of a school activity." (Pet. Br. at 30.) Yet the black armbands involved in *Tinker* equally could have caused "discomfort and unpleasantness that always accompany an unpopular viewpoint," and obviously changed the focus of the school's teaching. *See Tinker*, 393 U.S. at 509. School officials are prohibited from censoring speech on the ground that it was "'meant to compete for students' attention.' The same can be said of any of the forms of student expression that have been found to be protected, including the wearing of armbands or buttons in class." *Holloman v. Harland*, 370 F.3d 1252, 1272 (11th Cir. 2004). If a school were allowed to censor any speech that might "distract" another student "from the planned curriculum, constitutional protection for student expression by definition would be eliminated." *Id*.

Even the "argument" or "disturbance" that *Tinker* says a school must tolerate did not occur here. *See Tinker*, 393 U.S. at 508. Courts have respected the *Tinker* command that an "undifferentiated fear or apprehension of disturbance" does not suffice. *Id.*

Instead, in order to justify limiting student's speech, a school must *demonstrate* a risk of substantial disruption. *Pinard v. Clatskanie Sch. Dist. 6J*, 467 F.3d 755, 767 n.16 (9th Cir. 2006); *Guiles* 461 F.3d at 326; *Holloman*, 370 F.3d at 1276 (principal could not justify discipline out of a belief that "other students may react inappropriately or illegally[;] such reactions do not justify suppression of Holloman's expression."). Petitioners made no such showing. Frederick's expression aroused Principal Morse's ire, and apparently no one else's.

Unable to demonstrate a risk of substantial disruption, Petitioners resort to the claim here that Frederick's banner "was the wrong message, at the wrong time, and in the wrong place." (Pet. Br. at 32.) This argument is eerily similar to the claim rejected in *Tinker* "that 'the schools are no place for demonstrations.'" 393 U.S. at 509 n.3. Courts recognize that schoolyards and assemblies are legitimate venues for even unpopular student speech, so long as its expression does not interfere with the rights of other students. The courts have been vigilant in protecting such speech, particularly for those in the minority. *See, e.g., McLaughlin v. Bd. of Educ. of Pulaski County Special Sch. Dist.*, 296 F. Supp. 2d 960 (E.D. Ark. 2003) (school would have to justify under *Tinker* any limitation on a student's right to be openly gay); *Boyd County High Sch. Gay Straight Alliance*, 258 F. Supp. 2d. at 689 (under *Tinker*, the right of a gay-straight alliance to form could not be subject to a "heckler's veto" of other students); *East High Gay/Straight Alliance*, 81 F. Supp. 2d at 1193 (gay-straight alliance could form in light of *Tinker*'s "protection of a student's right to express an unpopular view"); *Colin*, 83 F. Supp. 2d at 1141 ("The only way to maintain the 'independence and vigor of Americans' ... is through tolerating speech that school authorities may

vehemently disagree with.") (quoting *Tinker*, 393 U.S. at 509).

What made Frederick's expression wrong, in Petitioners' view, was not a resulting disruption but instead an opinion contrary to their own. That is not a reason that can pass muster under *Tinker* or any other of this Court's First Amendment decisions.

II. THIS CASE DOES NOT IMPLICATE A SCHOOL'S COMPELLING INTERESTS IN PROTECTING STUDENTS' RIGHTS TO AN EDUCATION AND TO PERSONAL SAFETY.

The brief of *amici* school administrators forcefully makes the point, not relevant to the questions presented by this appeal, that schools must be able to regulate student conduct that "interferes with maintaining a safe and effective learning environment." (Brief of *Amici Curiae* National School Boards Association *et al.* at 7, 15.) This echoes the proviso in *Tinker* that student speech may be limited when it produces a "collision with the rights of other students to be secure and to be let alone." *Tinker*, 393 U.S. at 508. While Petitioners argue vaguely that Frederick's banner interfered with "decorum," (Pet. Br. at 16, 30), there is no contention that Frederick interfered with the rights of others to receive an education.

This case does not present the problem of harassment of, epithets directed at, or violence against other students. Many courts have recognized that student speech that torments other students based on their personal characteristics implicates *Tinker*'s concern that student expression might in some circumstances collide with other students' rights. *See*, *e.g.*, *Sypniewski v. Warren Hills Reg'l Bd. of Educ.*, 307 F.3d 243, 271 (3d

Cir. 2002) (considering code of conduct issued in the wake of "widespread racial harassment of students, disruption of school teaching, violence, interference with the rights of other students, and the subjection of male and female students to sexual and racial obscenities"); *Phillips v. Anderson County Sch. Dist. Five*, 987 F. Supp. 488 (D.S.C. 1997) (granting summary judgment against student who sought to wear jacket that looked like Confederate flag, when similar symbols in the past had sparked racial tension at the school). This case, however, in no way involves expressive attacks among students or other interference through student expression with other students' rights.

Thus, the serious concerns advanced by *amici* school administrators cannot justify the censorship under review. Because those concerns are important, however, this Court, in protecting the speech that is at issue in the instant appeal, should exercise care to distinguish explicitly the rule applied in this case from the rules governing conduct or expression that seriously interferes with the rights of others to an education and to personal safety.

CONCLUSION

For these reasons, *amicus* Lambda Legal Defense and Education Fund, Inc. respectfully requests that this Court affirm the judgment of the Ninth Circuit that the expression of Joseph Frederick was constitutionally protected and could not lawfully be censored nor punished by Petitioners.

Respectfully Submitted,

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