NO. 09-40373

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

DOUG MORGAN; ROBIN MORGAN; JIM SHELL; SUNNY SHELL;
SHERRIE VERSHER; CHRISTINE WADE

Plaintiffs-Appellees,

v.

LYNN SWANSON, IN HER INDIVIDUAL CAPACITY AND AS PRINCIPAL OF THOMAS ELEMENTARY SCHOOL; JACKIE BOMCHILL, IN HER INDIVIDUAL CAPACITY AND AS PRINCIPAL OF RASOR ELEMENTARY SCHOOL

Defendants-Appellants

On Appeal From The United States District Court for
the Eastern District Of Texas – Sherman Division

**EN BANC BRIEF OF AMICI CURIAE
NATIONAL SCHOOL BOARDS ASSOCIATION AND
TEXAS ASSOCIATION OF SCHOOL BOARDS LEGAL ASSISTANCE FUND IN SUPPORT OF DEFENDANTS-APPELLANTS LYNN SWANSON AND JACKIE BOMCHILL**

Christopher B. Gilbert
State Bar No. 00787535
THOMPSON & HORTON LLP
Phoenix Tower, Suite 2000
3200 Southwest Freeway
Houston, Texas 77027
(713) 554-6744 - telephone
(713) 583-7698 - fax
cgilbert@thompsonhorton.com
Attorneys for Amici Curiae

This case again requires analysis of the delicate balance that public school administrators must strike between protecting the First Amendment right to free speech and avoiding endorsing religion in violation of the Establishment Clause. The many cases and the large body of literature on this set of issues demonstrate the lack of adequate guidance to enable teachers and principals to determine whether the decisions they make comply with constitutional standards. As this case demonstrates, decisions in such seemingly innocuous and benign activities as elementary school parties and fundraisers for elementary school art classes too often lead to protracted litigation.

Pounds v. Katy Indep. Sch. Dist., 730 F.Supp.2d 636, 638 (S.D. Tex. 2010)

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I.
SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that in addition to those persons listed in the briefs already filed in this matter, the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. National School Boards Association – Amicus Curiae

2. Texas Association of School Boards Legal Assistance Fund (including the Texas Association of School Boards, Texas Association of School Administrators, and the Texas Council of School Attorneys) -- Amicus Curiae

3. Christopher B. Gilbert, Thompson & Horton LLP, Phoenix Tower, Suite 2000, 3200 Southwest Freeway, Houston, Texas 77027 – Attorney for Amici Curiae National School Boards Association and Texas Association of School Boards Legal Assistance Fund

/s/ Christopher B. Gilbert
Christopher B. Gilbert

Attorney for the Amici Curiae National School Boards Association and Texas Association of School Boards Legal Assistance Fund

II.
INTEREST OF AMICI CURIAE

The National School Boards Association ("NSBA") is a federation of state associations of school boards from throughout the United States, the Hawai'i State Board of Education, and the board of education of the U.S. Virgin Islands. Through its state associations NSBA represents over 95,000 of the Nation's school board members who, in turn, govern the nearly 15,000 local school districts that serve more than 46.5 million public school students—which is approximately 90 percent of the elementary and secondary students in the nation.

Nearly 800 public school districts in Texas are members of the Texas Association of School Boards Legal Assistance Fund ("LAF"), which advocates the positions of local school districts in litigation with potential state-wide impact. The Legal Assistance Fund is governed by three organizations: the Texas Association of School Boards ("TASB"), the Texas Association of School Administrators ("TASA"), and the Texas Council of School Attorneys ("CSA"). The National School Boards Association and the Texas Association of School Boards Legal Assistance Fund (hereinafter jointly referred to as "NSBA/TASB-LAF") are filing and have paid all costs associated with the preparation of this brief, because they are concerned about the impact that the recent explosion of First Amendment litigation – including what appears to be a growing trend of seeking to hold rank and file administrators and

teachers personally liable for monetary damages in their individual capacities – will have on the ability of school districts to attract and maintain quality administrators and teachers. The overly strict reading of the qualified immunity test by the court below and the Panel seeks to hold two elementary school principals responsible for attempting to interpret and apply the oftentimes bewildering array of First Amendment free speech and Establishment Clause cases, in an area of the law in which even judges of the very highest level cannot agree. For these reasons, NSBA/TASB-LAF submit this brief.

III.
STATEMENT OF MATERIAL FACTS AND PURPOSE OF BRIEF

Amici Curiae NSBA/TASB-LAF file this Brief in Support of Defendants-Appellants Lynn Swanson and Jackie Bomchill, for the limited purpose of addressing the second prong of the *Saucier* qualified immunity test, *i.e.* whether the First Amendment rights at issue were clearly established. NSBA/TASB-LAF do not intend to express an opinion on whether elementary school students are entitled to full *Tinker* rights, except as necessary to address the "clearly established" element. To the extent necessary, NSBA/TASB-LAF adopt the Statement of the Facts as set forth in the Supplemental En Banc Brief of Appellants Swanson and Bomchill.

IV.
ARGUMENT AND AUTHORITIES

Over the last fifteen years, the locus of decision-making on many First Amendment issues in the Texas public school system and school districts nationwide appears to have shifted from the central administration building, to the schools, to the individual classrooms themselves. In the 1980's and early 1990's, if a third party wanted to distribute something at school, they tended to approach someone at a school district's central administration building to discuss whether they could and how to do so. Generally, this allowed a school district to focus their most experienced and trained administrators on the issue, who had some period of time (even if just a matter of days) to consider the request and, if necessary, seek outside counsel. Today, parents, students, and even outside third parties simply show up at the classroom and demand to pass out previously unseen material **now**. While many of these requests are simply the product of our twenty-first century Internet-driven on-demand culture (and, TASB-LAF must concede, also the result of the decentralization created by the Texas site-based decision making movement[1]), the Amici believe, based on the experience of its members in Texas and nationwide, that a growing number of these requests are part of a deliberate advocacy movement to create First Amendment litigation through "gotcha" moments involving lower level

[1] *See* TEX. EDUC. CODE § 11.251 to §11.253.

school employees. How else can one explain that this is the third appellate court case since 2003 to involve students who showed up at classroom holiday parties to pass out candy canes accompanied by a story that attributes a religious origin to the candy cane that isn't even correct?[2]

This case typifies the litigation that has sprung up as a result of the "Candy Cane Crusade." It is the understanding of counsel for the Amici from reviewing the record below that the students and parents who sought to pass out the candy canes and pencils at the classroom parties did not seek advance approval or even let the teachers know what they were bringing; instead, they simply showed up at the parties – one parent with the candy canes already arranged on a tray – and insisted that they be allowed to pass out their items right then and there – thus putting extra pressure on the harried teacher to say "yes" to avoid disappointing the student in front of his or her parents and class. One parent's reaction, when told "no," was to immediately call the media; another parent already had her cellphone ready to call her lawyer. It is in this kind of intense, litigation-ready atmosphere that we now expect educators to be able to instantaneously analyze and apply First Amendment jurisprudence that

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[2]*See Curry v. School District of the City of Saginaw*, 452 F.Supp.2d 723, 736 (E.D. Mich. 2006) ("[i]t appears that he learned that lesson well by ascribing a religious – albeit unoriginal and inaccurate – aura to a historically secular object [the candy cane] to enhance its marketability."); *see also* http://www.snopes.com/holidays/christmas/candycane.asp. (visited March 14, 2011).

takes lawyers and courts years to analyze and argue during subsequent litigation – which in this case has already dragged on for six years without resolution.

Common sense dictates that teachers and principals need some leeway in making decisions as to whether a specific student's request to pass out an item in class would or would not violate the First Amendment – and that leeway can be provided by the qualified immunity defense. It simply is unfair to require every teacher on every campus, no matter how fresh out of college they may be, to be constitutional scholars in an area of the law that has confounded the courts for years, or risk the possibility of being held personally liable for monetary damages.

A. The Magistrate's Decision below and the Panel Decision made numerous errors in applying the qualified immunity test to Defendants Swanson's and Bomchill's decisions.

Both the decision of the Magistrate below and the Panel Decision in this Court take an unnecessarily narrow view of qualified immunity. First, even though *Pearson v. Callahan*, 129 S. Ct. 808 (2009) had just been decided by the Supreme Court, the Amici believe the Magistrate erred by focusing too much on the first prong of the qualified immunity test – *i.e.* whether the facts alleged by the Plaintiffs made out a violation of the First Amendment – instead of following the "older, wiser judicial counsel not to pass on questions of constitutionality ... unless such adjudication is unavoidable." *Pearson*, 129 S. Ct. at 821 (Breyer, J., concurring)). *Pearson* significantly altered the test for qualified immunity as set forth by the Supreme Court

in *Saucier v. Katz*, 533 U.S. 194 (2001), which required courts to first determine whether a violation of a constitutional right had been established by the plaintiffs before turning to the question of whether that right was clearly established. *See Saucier*, 533 U.S. at 201. The *Pearson* Court concluded that the *Saucier* test was too rigid, and therefore ruled that the *Saucier* sequence, while often appropriate, should not be considered mandatory, and left it to the sound discretion of the lower courts to determine "which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand." *Pearson*, 129 S. Ct. at 818.

Because *Saucier* forced the Defendants to take a strong stance on whether and to what extent elementary school students have First Amendment rights (a decidedly nuanced and unresolved issue) in their Motion to Dismiss Based on Qualified Immunity – which was filed in April of 2008, well before *Pearson* was decided – the Magistrate took a strong stance on that substantive issue as well, and the Amici believe that this overly colored any analysis of whether elementary school student First Amendment rights, whatever they might be, are clearly established. With respect to the Panel Decision, the Panel acknowledged the changes made to the qualified immunity analysis by *Pearson* in a footnote, but concluded that because *Pearson* did not abolish the first prong of the qualified immunity test, "we will analyze both prongs in turn." *Morgan v. Swanson*, 627 F.3d 170, 176 n. 8 (5th Cir.

2010). Like the Magistrate's opinion, the Panel Decision then spends most of its time focusing on the primary substantive question of whether elementary students have First Amendment rights. Given the very broad level at which this analysis is conducted, as discussed below, and the "lack of adequate guidance to enable teachers and principals to determine whether the decisions they make comply with constitutional standards," *Pounds*, 730 F.Supp.2d at 638, the Amici believe that this issue is precisely what the Supreme Court meant when it invoked the "older, wiser judicial counsel not to pass on questions of constitutionality ... unless such adjudication is unavoidable." *Pearson*, 129 S. Ct. at 821.

Second, the Amici believe that in performing the qualified immunity analysis, the Magistrate fundamentally erred below by determining that "the Court is guided ***solely*** by precedent from this Circuit as well as the Supreme Court." (Recommendation of the Magistrate Judge, p. 8 (emphasis added).) This statement is incorrect even under pre-*Pearson* Fifth Circuit caselaw; this Court, sitting *en banc* in *McClendon v. City of Columbia*, 305 F.3d 314 (5th Cir. 2002), noted that as far back as 1989, it had approved using other circuit's caselaw in determining whether or not a right was clearly established for purposes of qualified immunity. *See McClendon*, 305 F.3d at 327-28). In *Pearson*, the Supreme Court made it clear that government officials may rely on court decisions from other circuits to justify their actions, and that courts should take those decisions into account in determining

whether a point of law was clearly established for purposes of qualified immunity. *See Pearson*, 129 S. Ct. at 823 ("The officers here were entitled to rely on these cases, even though their own Federal Circuit had not yet ruled on 'consent-once-removed' entries."). *Pearson* went so far as to hold that a court could find that a right was not "clearly established" based on a split among the circuit courts that only developed ***after*** the events that had given rise to the lawsuit. *Id.*[3] The Magistrate should therefore have given greater consideration – and weight – to the *Curry* and *Walz* decisions (which are discussed below).[4]

Third, the Magistrate also erred when he declared that "the matter before the Court does not involve the Establishment Clause but rather a student's right to free speech." (Recommendation, p. 9.) Although the student Plaintiffs asserted violations of their free speech rights, the Defendant principals took the action they did because of concerns about possible violations of the Establishment Clause. This case, therefore, involves the intersection of ***both*** sets of rights, and the proper qualified immunity question is not whether the students' rights to free speech were clearly

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[3] The Panel's assertion that the Defendants should not have cited *Morse* for qualified immunity purposes because it had not been decided when they made their decisions, *see Morgan*, 627 F.2d at 180 n.13, is therefore incorrect.

[4] Although the Panel at least acknowledged that under *Pearson* and *McClendon*, it could look at caselaw from other circuits in determining whether a right is clearly established, it then declared that doing so would be "misplaced and unhelpful." *Morgan*, 627 F.3d at 181. As discussed below, this statement is puzzling, given the virtually analogous similarities of cases such as *Curry* and *Walz* to this case.

established, but whether those rights, as balanced against the District's obligations under the Establishment Clause, were clearly established.

The Panel decision also focuses overly much on the free speech aspect of this case, and does so at such a generalized level of analysis that no reasonably informed principal, reading the cases cited by the Panel, would understand what he or she was supposed to do under the facts presented in this case. To support the broad proposition that even elementary students have First Amendment rights in the public schools, the Panel cites to *Tinker v. Des Moines Indep. Comm. Dist.*, 393 U.S. 503 (1969) and *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), *see Morgan*, 627 F.3d at 177, and later to cases such as *Good News Club v. Milford Central School*, 533 U.S. 98 (2001), *Lamb's Chapel v. Center Moriches Union Free School District*, 508 U.S. 384 (1993), and *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995). *See Morgan*, 627 F.3d at 180. None of these cases provide much guidance to a school principal as to whether the Establishment Clause would require the principal to prevent elementary school students from passing out religious messages during school parties. *Rosenberger* is a university case. *Milford Central* and *Lamb's Chapel* both involved students and community members who voluntarily chose to attend events run by third parties on school property after school hours, which would both lessen any potential for disruption of school services and reduce the chance, even to an elementary school observer, that the events would be

perceived as school-sponsored. The fact that a school cannot compel an elementary school student to say the Pledge of Allegiance (*Barnette*) does little to tell a principal whether and to what extent a principal must allow elementary students to pass out things during the school day, at school events, or during dismissal. *Tinker*, which dealt with the passive wearing of armbands by older students, has been restricted and distinguished so many times by subsequent courts that it is difficult to derive direction from it for specific situations:

> Today, the Court creates another exception. In doing so, we continue to distance ourselves from *Tinker*, but we neither overrule it nor offer an explanation of when it operates and when it does not. I am afraid that our jurisprudence now says that students have a right to speak in schools except when they don't – a standard continuously developed through litigation against local schools and their administrators.

Morse v. Frederick, 127 S. Ct. 2618, 2634 (2007) (Thomas, J., concurring). *Tinker* also did not involve a clash between the students' free speech rights, and the school's obligations under the Establishment Clause, which is central to this case.

The Panel's overly-generalized approach to the question of whether and to what extent elementary school students have free speech rights has already been rejected by the Supreme Court for qualified immunity purposes. In *Anderson v. Creighton*, 483 U.S. 635 (1987), the United States Supreme Court ruled that it was not enough that a public official know of a generalized right, such as the right to free speech or the right to due process. *Anderson*, 483 U.S. at 639. If it were, there would

never be a situation where qualified immunity would arise, and the doctrine of qualified immunity would become a mere rule of pleading. *Id.* Instead, the right must be "clearly established" under the specific factual circumstances confronting the public official. This Court ruled 23 years ago that in the analogous area of employment retaliation under the First Amendment, where courts must balance each free speech claim on a case-by-case basis, "[t]here will rarely be a basis for *a priori* judgment that the termination or discipline of a public employee violated 'clearly established' constitutional rights." *Noyola v. Texas Dept. of Human Resources*, 846 F.2d 1021, 1025 (5th Cir. 1988). As the Fourth Circuit noted in *Maciarello v. Sumner*, 973 F.2d 295 (4th Cir. 1992), "[o]fficials are not liable for bad guesses in gray areas; they are liable for transgressing bright lines." *Id.* at 298.

In this case, by denying principals Swanson and Bomchill qualified immunity for their decisions, both the Magistrate and the Panel decisions largely ignored highly relevant case law from other circuits and focused overly much on the student's free speech claims, while ignoring the impact that the Establishment Clause would have on those rights. This provides insufficient protection to rank and file school administrators and teachers who are increasingly being asked to make on-the-spot decisions regarding a volatile and difficult area of the law. If society as a whole is serious about emphasizing education, then educators need a greater level of

protection from monetary damages when making hard decisions in areas of uncertain law.

B. The Student Plaintiffs' First Amendment speech rights, as balanced against the obligations of the school district under the Establishment Clause, were not "clearly established."

This case graphically highlights the difficulties that a school principal would have knowing how to balance a student's right to free speech with the school's obligation to follow the Establishment Clause. Suppose that a principal receives a request from a student to pass out pencils with religious sayings and candy canes with a religious story attached to them at a class party. If the principal were to then research the issue, he or she would find two Courts of Appeals decisions that appear to be exactly on point – and both of which upheld the decision of the school to prohibit the distributions. In *Walz v. Egg Harbor Township Board of Educ.*, 342 F.3d 271 (3rd Cir. 2003), the Third Circuit upheld a principal's decision to prohibit students from passing out pencils that read "Jesus ♡ The Little Children" at a class party held right before Easter, and candy canes accompanied by a religious story at the December holiday party. The Third Circuit conducted an exhaustive analysis, both of student free speech jurisprudence in general and how it applied in the elementary school context, and concluded that schools could exercise greater control over elementary-aged students than older students:

> In conventional elementary school activities, the age of the students bears an important inverse relationship to the degree and kind of control a school may exercise: as a general matter, the younger the students, the more control a school may exercise.

Id. at 276. The Court upheld the ban on distributing candy canes and pencils during the parties:

> In the context of its classroom holiday parties, the school's restrictions on this expression were designed to prevent proselytizing speech that, if permitted, would be at cross-purposes with its educational goal and could appear to bear the school's seal of approval. Given its valid educational purpose, the school's action here was appropriate.

Id. at 280-81 (internal citations omitted).

So if Ms. Swanson and Ms. Bomchill had researched the issue of whether a school could prohibit students from passing out pencils and candy canes with religious messages at the time some of the underlying incidents were occurring between 2001 and 2003, they would have found one case directly on point – the underlying 2002 district court decision in *Walz*[5] and then the 2003 Court of Appeals decision – both of which said a principal could limit such distributions without violating a student's First Amendment rights.

Had Ms. Swanson and Ms. Bomchill continued their research after this case was filed in December 2004 – which the Supreme Court held in *Pearson* was permissible for qualified immunity purposes, *see Pearson*, 129 S. Ct. at 823 – they

[5] *Walz v. Egg Harbor Township Board of Educ.*, 187 F.Supp.2d 232 (D. N.J. 2002).

would have discovered the two decisions in *Curry v. School District of the City of Saginaw*, 452 F.Supp.2d 723 (E.D. Mich. 2006), *aff'd on other grounds*, *Curry v. Hensiner*, 513 F.3d 570 (6th Cir. 2008). As part of an elementary school "Classroom City" exercise, where each student was required to create and market a product to the other students, the plaintiff student decided to sell Candy Cane ornaments made out of pipe cleaners and beads, with a card attached to the ornament that purported to describe the religious symbolism of the candy cane, similar to the card at issue in *Walz*. A teacher noticed the card and brought it to the attention of the principal, who told the student he could not sell the ornaments with the card. The student removed the card and was not otherwise punished for the incident.

In evaluating whether the principal was entitled to qualified immunity, the district court followed the now slightly-discredited mandatory two-step procedure from *Saucier v. Katz*, 533 U.S. 194 (2001), and first considered whether the student had shown a violation of his free speech rights under the First Amendment. The district court found that the restriction on the student's speech was not justified under even the more generous *Hazelwood*[6] standard. *Curry*, 452 F.Supp.2d at 735. The court found that the ornament with the card met the requirements of the exercise, and also noted that there was no evidence of disruption caused by the sale of the ornaments. *Id.* at 736-37.

[6] *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988).

The court then turned to the question of whether the Establishment Clause required the school to prohibit distribution of the religiously-themed ornaments, which it called "a closer question." *Id.* at 737. The court felt that the question came down to whether the speech at issue – selling the ornaments – was government or private speech. However, the court noted that even private speech endorsing religion, while protected by the First Amendment, is not guaranteed a forum on all property owned by the State, especially where the State provides the vehicle for the expression and the forum is one that is traditionally closed. *Id.* at 737-38. The court felt that this case provided a particularly difficult question:

> The reason the question is close in this case is that reasonable people could view the nature of the forum-the Classroom City environment-in different ways. To the extent that forum is open, the danger of attributing private religious views to the State is minimal. The danger, however, increases where the forum is closed. And all of this must be considered in light "of the fact that [the Supreme Court] ha[s] been particularly vigilant in monitoring compliance with the Establishment Clause in elementary and secondary schools."

Id. at 738 (quoting *Van Orden v. Perry,* 125 S.Ct. 2854, 2863-64 (2005)). The court noted that "[t]he Supreme Court has not offered a single, consistently-applied test that lower courts might apply to assist in making [Establishment Clause] determination," *id.* at 738, but settled on using the *Lemon* test. The court then concluded that the prohibition on selling the ornaments with the card failed the effect prong of the *Lemon* test, because no reasonable observer would attribute the religious message to

the school, considering that it was one product out of fifty-six being sold by students in the mock marketplace. *Id.* at 740.

The court then turned to the question of whether the student's right that it had found to be violated was clearly established at the time. The court agreed with the Plaintiff that "the right to be free to speak on ideas and beliefs in a school setting is clearly established," but noted that "the qualified immunity defense requires the Court to look beyond the right in the abstract." *Id.* at 742. The court concluded that in this case, the First Amendment speech rights of a student to make religious statements in a quasi-classroom setting were not clearly established at the time of the incident: "the school administrator reasonably could not be expected to identify the subtle distinctions that differentiate one type of forum that resulted or the appropriate test that should be applied." *Id.* at 742. The court therefore held that the principal was entitled to qualified immunity:

> Ms. Hensinger had to make a difficult choice in a complicated situation. That she was expected to apply several constitutional tests to determine the correct legal answer would be daunting even in an ideal situation. Her knowledge of the law no doubt sensitized her to her obligations under the Establishment Clause, which under some circumstances may serve as a compelling government interest and therefore constitutionally justify a free speech violation....Balancing obligations under the Establishment Clause and the free speech provisions of the First Amendment in this case placed the defendant squarely upon the "hazy border" that divides acceptable from unreasonable conduct. This appears to the Court to be precisely the type of case for which the qualified immunity defense was intended.

Id. at 742-43 (internal citations omitted).

What makes the *Curry* litigation so instructive to the qualified immunity issues in this case is what happened when the student plaintiff appealed the issue of qualified immunity. In *Curry v. Hensiner*, 513 F.3d 570 (6th Cir. 2008), the Sixth Circuit upheld the lower court's grant of qualified immunity, but did so under the first *Saucier* prong: the Court found that the student had not shown that the principal's actions violated his constitutional rights at all. On appeal, the parties disputed which of the Supreme Court's student speech cases should apply. The Court disagreed with the plaintiff that *Tinker*, and not *Hazelwood*, should apply:

> For speech to be perceived as bearing the imprimatur of the school does not require that the audience believe the speech originated from the school, only that an observer would reasonably perceive that the school approved the speech....Even though Joel and his parents circumvented the product approval process, students and parents were unaware of this, and reasonably would have perceived the product as school-approved if it had been sold.

Id. at 577 n.1. The Court then held that prohibiting the distribution of the ornaments with the religious message was constitutional under *Hazelwood*:

> The school's desire to avoid having its curricular event offend other children or their parents, and to avoid subjecting young children to an unsolicited religious promotional message that might conflict with what they are taught at home qualifies as a valid educational purpose.

Id. at 579. Because the Court found that no constitutional violations existed, there was no need to address the "clearly established" prong of the *Saucier* qualified immunity test on which the lower court had relied.

So in the end, the Sixth Circuit and its lower court could not agree whether the student's First Amendment rights had been violated or not - but they agreed that those rights were not clearly established. What is puzzling about this case is how the Magistrate and the Panel could determine that Swanson and Bomchill violated the clearly established First Amendment rights of the Plaintiffs, when the two most analogous circuit court decisions have held that principals did not violate a student's First Amendment rights at all when they prohibited similar distributions. After concluding that it would be "misplaced and unhelpful" to look at cases from other circuits, the Panel Decision stated that even if the Court did, "Appellants would still not be entitled to qualified immunity," *Morgan*, 627 F.3d at 181 – but then cites to a list of cases including both *Walz* and *Curry*, where the courts held that school officials were entitled to prohibit students from passing out religious items virtually identical to those at issue here. The Panel calls it a "novel proposition" that "school officials may discriminate against religious viewpoints because of the age of the speaker," *id.* at 182 n.14, but then cites to cases such as *Walz*, where the Third Circuit noted: "[i]n the elementary school setting, age and context are key," *Walz*, 342 F.3d at 275; *Muller v. Jefferson Lighthouse Sch.*, 98 F.3d 1530 (7th Cir. 1996), where the

court noted that "[a]ge is a critical factor in student speech cases," *id.* at 1538, and upheld restrictions on passing out religious literature at an elementary school; and *Walker-Serrano ex rel. Walker v. Leonard*, 325 F.3d 412 (3rd Cir. 2003), where the Court upheld a prohibition on the distribution of literature by an elementary school student, noting that "[t]he significance of age in this inquiry has called into question the appropriateness of employing the *Tinker* framework to assess the constitutionality of restrictions on the expression of elementary school students." *Id.* at 416.

While NSBA/TASB-LAF is not taking the position that elementary students have no free speech rights, the Amici believe that age is a very relevant factor in determining what rights they might have. If we take seriously the numerous cases that hold that "age *is* a relevant factor in assessing *the extent* of a student's free speech rights in school," *Baxter v. Vigo County Sch. Corp.,* 26 F.3d 728, 738 (7th Cir. 1994), then it may be that *Tinker* and like cases do apply to elementary school students, but in some modified and limited manner, as suggested by the *Walker-Serrano* Court. *See Walker-Serrano*, 325 F.3d at 417. Whatever those rights might be for elementary students, they are all not clearly established today – and the sheer number of judicial opinions on the issue actually makes the rights less clearly established for a lay person, not more.

It is the belief of the Amici that there are very few areas of First Amendment jurisprudence where the law is truly "clearly established," sufficient to provide

adequate notice to school principals and teachers as to how they should proceed. The principals here had to consider not only the students' free speech rights, but their own obligations under the Establishment Clause. As this Court noted only thirteen years ago:

> When we view the deceptively simple words of the Establishment Clause through the prism of the Supreme Court cases interpreting them, the view is not crystal clear. Indeed, when the Supreme Court itself admits that it "can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law," as a Circuit Court bound by the High Court's commandments we must proceed in fear and trembling.

Helms v. Picard, 151 F.3d 347, 355-56 (5th Cir. 1998). This begs the question: if this Court approaches an analysis of the Establishment Clause with "fear and trembling," how are public school administrators and teachers supposed to feel when confronted with the need to make an immediate decision about whether a student's free speech rights (assuming they even apply) or the school's Establishment Clause responsibilities win out – especially knowing that their decision might subject not only them, but their employer, to monetary damages if they are wrong?

Even today, the Supreme Court still can't decide what the appropriate test is for Establishment Clause cases. Although it is "generally accepted" that the *Lemon* test is still the most viable test, in his dissenting opinion in *McCreary County v. American Civil Liberties Union*, 545 U.S. 844 (2005), Justice Scalia cataloged how a majority of the then-sitting Justices had repudiated the *Lemon* test at one time or

another. *McCreary County*, 545 U.S. at 890 (Scalia, J., dissenting). Although we now have four relatively new Justices, noted constitutional law professor Erwin Chemerinsky opined in a 2006 law review article that Chief Justice Roberts and Justice Alito would in all likelihood join Justices Scalia, Kennedy and Thomas in voting to overrule *Lemon* in an appropriate case. *See* Erwin Chemerinsky, *Why Separate Church and State?*, 85 OR. L. REV. 351 (2006).

Justices Sotomayor and Kagan are a little harder to predict with regards to how they would vote in a referendum on *Lemon*. Despite a fairly lengthy tenure as both a district court judge and judge on the Second Circuit Court of Appeals, Justice Sotomayor has authored relatively few Establishment Clause decisions. In a thoughtful article entitled "Justice Sotomayor and Establishment Clause Jurisprudence: Which Antiestablishment Standard will Justice Sotomayor Endorse?", David Estes suggested that while Justice Sotomayor's Establishment Clause cases have been fairly straightforward in following established precedent, she has seemed "frustrated with the uncertainty of Establishment Clause jurisprudence," calling the cases "a morass of competing and conflicting rationales." *See* 11 Rutgers Journal of Law & Religion 525, 539 (2010) (quoting *Flamer v. City of White Plains*, 841 F.Supp. 1365, 1378 (S.D. N.Y. 1993)). Estes predicts that Justice Sotomayor will follow the lead of former Justice Byron White in preferring"fact-intensive analysis

and narrow rulings," which could make her position on Establishment Clause cases "unpredictable." *Id.*

Justice Kagan, although lacking the lengthy judicial history of Justice Sotomayor, was asked about her views on *Lemon* and the Establishment Clause by Senator Dianne Feinstein during her confirmation, and while she did not repudiate *Lemon*, her response was not exactly a ringing endorsement, either:

> As to what Establishment Clause test I would use, that is a hard, hard question. Right now there are a multitude of such tests. The most established one, the oldest one, is the Lemon v Kurtzmann test ... Many, many justices have tried to kill this test. I think that there have been six individual justices who at least have expressed some skepticism about it. But it continues on; it has not been reversed, and it's usually the test that the lower courts apply. Its sometimes applied and sometimes not applied by the Supreme Court very much depending on the circumstances, but it continues to be the primary test of the court.
>
> Now, other justices have had different ways of approaching this issue. Justice O'Connor famously asked about whether particular actions would be seen by reasonable observers as endorsements of religion. Some of the justices have used a kind of coercion test: asking whether a governmental action coerces a person in the exercise of religion. Justice Breyer has recently talked about religious divisiveness as a way to approach Establishment Clause inquiries. And I think that the reason why there are so many tests - and I don't think that I've mentioned all of them, even - I think that the reason is that the Establishment Clause can arise in a very wide variety of contexts, with a very wide variety of factual situations and circumstances, and sometimes one test might be the appropriate way to analyze the problem, and sometimes another. And it's very hard to say kind of in the abstract which is appropriate. It's a matter of sort of situation sense, if you will. It's a more contextual inquiry as to what's the approach to use that would make sense.

(*See* http://www.bjconline.org/index.php?option=com_content&task=view&id=3660&Itemid=134 (visited on March 12, 2011)). So this begs the question: if a majority of sitting Justices would be willing to overrule *Lemon* in an appropriate case, Justice Sotomayor is likely to be "unpredictable" in her approach to Establishment Clause cases, and Justice Kagan believes it is "a matter of sort of situation sense," how can a principal know whether and how to properly apply the *Lemon* test in very fact-specific situations like those present in this case?

McCreary County and its companion case, *Van Orden v. Perry*, 545 U.S. 677 (2005), would themselves baffle any school teacher or principal trying to make sense of the Supreme Court's Establishment Clause jurisprudence. Both cases involved whether governmental entities could display the Ten Commandments in public displays on public property. *Van Orden* said that you could; *McCreary County* said that you could not. Although gallons of ink have been spilled trying to explain how these two cases can be reconciled, the truth is that they cannot – at least not in a manner easily understood by non-lawyers. In both cases, the same four Justices said that the displays were constitutional, and the same four Justices said that they were unconstitutional - and all for the same reasons. In *McCreary County*, the prevailing plurality reaffirmed the *Lemon* test and applied it to the facts of the case, while in *Van Orden*, the prevailing plurality called the *Lemon* test "not useful" and then disregarded it, instead using what amounted to a historical analysis. *Van Orden*, 125

S.Ct. at 2861. The swing vote in both cases was Justice Breyer, and he explained his seemingly-contradictory votes by noting that "no single mechanical formula [ ] can accurately draw the constitutional line in every case." *Van Orden*, 125 S.Ct. at 2868-69 (Breyer, J., concurring). He then held that in difficult cases, there is "no test-related substitute for the exercise of legal judgment." *Id.* at 2869 (Breyer, J., concurring).

Justice Breyer's position sounds suspiciously like those of Justices Sotomayor and Kagan, discussed above. The Amici respectfully suggest that if the new Establishment Clause test in difficult cases is "the exercise of legal judgment," there will never be a situation where such rights can be said to be clearly established. As one appellate court has already noted, after trying to make sense of *McCreary County* and *Van Orden*, "we remain in Establishment Clause purgatory." *American Civil Liberties Union of Kentucky v. Mercer County, Ky.*, 432 F.3d 624, 636 (6th Cir. 2005).

The same can equally be said of free speech jurisprudence under the First Amendment. For years, parties have argued about whether to apply *Tinker*, *Fraser*[7] or *Hazelwood* to various student speech situations. One of the major underlying issues in this very case – and a central issue in the appeal to this Court involving Plano ISD, *see Morgan v. Plano Indep. Sch. Dist.*, 589 F.3d 740 (5th Cir. 2009) -- is whether *Tinker* or the *O'Brien* test should apply to facially-neutral school policies (or,

[7] *Bethel School District No. 403 v. Fraser*, 475 U.S. 675 (1986).

put more broadly, whether *Tinker* is the fallback test for all student speech situations that do not narrowly fall under *Hazelwood* or *Fraser*). Unlike in the Establishment Clause arena, the Roberts Court has had a chance to consider a student free speech case – and in *Morse v. Frederick*, 127 S. Ct. 2618 (2007), the Court did not do anything but muddy the constitutional waters.

Morse was the case where a student was disciplined for displaying a banner that read "Bong Hits 4 Jesus" when the Olympic torch relay ran past his school. A panel of the Ninth Circuit had unanimously found that the student's rights had been violated, and that those rights were so clearly established that the principal was not entitled to qualified immunity, in part because the principal admitted that "in her 'advanced school law' course she studied '*Tinker,* [*Kuhlmeier*], *Bethel, Fraser*, all of the pertinent case law related to student rights or ... related to schools.'" *Frederick v. Morse*, 439 F.3d 1114, 1124 (9th Cir. 2006) (paraphrasing in original). However, in a very split decision that produced five different opinions, the Supreme Court reversed the Ninth Circuit and ruled that not only were the student's rights not clearly established, his rights were not violated at all. *Morse v. Frederick*, 127 S. Ct. 2618 (2007).

Morse does very little to clarify the field of student speech law, because it is very difficult to tell whether the majority was applying *Tinker* to Frederick's specific speech and making an implicit finding (since it is never explicitly said in the opinion)

that the advocation of drugs is *per se* "materially and substantively disruptive," or whether the Court was simply carving out a new subcategory of unprotected student speech for speech advocating the use of illegal drugs. Obviously one member of the majority opinion did not believe the Court was using *Tinker* to rule in favor of the school district: "I write separately to state my view that the standard set forth in *Tinker* [citation omitted] is without basis in the Constitution." *Id.* at 2630 (Thomas, J. concurring).

A subsequent opinion from the Sixth Circuit highlights this confusion. *Defoe v. Spiva*, 625 F.3d 324 (6th Cir. 2010) involved a student's First Amendment challenge to a ban on displays of the Confederate flag. The "lead opinion" applied *Tinker* in a very straightforward manner to uphold the ban because of disruption caused by the Confederate flag. *Id.* at 326-338. The "concurring opinion" found that *Morse* had rejected *Tinker*, and that like the drug speech in *Morse*, the school could prohibit "racially hostile or contemptuous speech in school, regardless of any showing of disruption under *Tinker*. *Id.* at 338-342. To make matters even more confusing, for attorneys and lay administrators alike, the lead opinion, despite going first and being three times as long as the concurrence, begins with the statement "the concurring opinion shall govern as stating the panel's majority opinion." *Id.* at 326.

So when a disagreement about the application of *Tinker* and *Morse* is so significant that it somehow turns a concurring opinion into a "majority opinion," how

is a school principal supposed to understand what lesson to take from the case about when to apply *Tinker* and when to apply *Morse*? If four years after *Morse* was issued three circuit court judges cannot even agree on whether it or *Tinker* applies to a dispute as common as a Confederate flag ban, how is a school principal supposed to understand how to apply those cases to other situations – especially when you add the "vast, perplexing desert of Establishment Clause jurisprudence"[8] into the mix? It seems clear that whatever the free speech rights might be for elementary students, they were not clearly established in the early 2000's, and they are still not clearly established today.

Respectfully submitted,

THOMPSON & HORTON LLP

By: /s/ Christopher B. Gilbert
Christopher B. Gilbert
State Bar No. 00787535

Phoenix Tower, Suite 2000
3200 Southwest Freeway
Houston, Texas 77027
Telephone: (713) 554-6744
Telecopy: (713) 583-7698
Email: cgilbert@thompsonhorton.com

Attorneys for Amici Curiae

[8] *Helms*, 151 F.3d at 350 .

CERTIFICATE OF SERVICE

I certify that on March 16, 2011, a true and correct copy of the foregoing document was served electronically in compliance with Rule 25(b) and (c) of the Federal Rules of Appellate Procedure and sent by certified mail, return receipt requested, to:

Paul D. Clement
Ashley C. Parrish
King & Spalding LLP
1700 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
Attorneys for the Plaintiffs – Appellees

Mr. Thomas P. Brandt
Fanning, Harper, Martinson, Brandt & Kutchin, P.C.
Two Energy Square
4849 Greenville Ave., Suite 1300
Dallas, Texas 75206
Attorneys for the Defendants- Appellants Lynn Swanson and Jackie Bomchill

/s/ Christopher B. Gilbert
Christopher B. Gilbert

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