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

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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 acti

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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 ch

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 t`s y pa

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 Borchill's decisions.

Both the decision of the Magistrate below and the Panel Decision in this Court take an unnecessarily narrow view of qualified immunity

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).

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 whenden

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

[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 &*

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.

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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.

Hazelwood School District v. @

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 wi he stablishment

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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

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 ÁÀ· r

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

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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 Ar[illegible]

(*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,

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Bethel School District No. 403 v. Fraser, 475 U.S. 675 ([illegible]

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 Si ga a 4 gi ;

that the advocation of drugs is *per se* "materially and substantivally 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

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(s) /s/ Christopher B. Gilbert

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

Dated: March 16, 2011