No. 05-13813-C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

MICHELLE HEINKEL, by and through her parent and next friend DEBRA HEINKEL, and NATE CORDRAY,
Plaintiffs-Appellants

v.

SCHOOL BOARD OF LEE COUNTY, FLORIDA,
Defendant-Appellee

On Appeal from the United States District Court
for the Middle District of Florida
Honorable Virginia M. Hernandez Covington
United States District Judge
Case No. 2:04-cv-184-FtM-29SPC

BRIEF *AMICUS CURIAE* OF THE NATIONAL LEGAL FOUNDATION,

in support of Plaintiffs-Appellants
Supporting reversal

Steven W. Fitschen
Counsel of Record for Amicus Curiae
Colleen M. Holmes
The National Legal Foundation
2224 Virginia Beach Blvd., St. 204
Virginia Beach, VA 23454
(757) 463-6133

No. 05-13813-C

Heinkel v. School Board of Lee County, Florida

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1, the undersigned counsel of record certifies that the following listed individuals and entities have an interest in the outcome of this case. None of the following individuals and entities, including Amicus Curiae The National Legal Foundation, are a corporation that issues shares of stock to the public.

Nate Cordray, Plaintiff-Appellant

Liberty Counsel, Counsel for Plaintiffs-Appellants

Honorable Virginia M. Hernandez Covington, District Judge

Thomas M. Gonzalez, Counsel for Defendant-Appellee

Steven W. Fitschen, Counsel for Amicus Curiae

Michelle Heinkel, Plaintiff-Appellant

Debra Heinkel, Plaintiff-Appellant

Colleen M. Holmes, Counsel for Amicus Curiae

Rena M. Lindevaldsen, Counsel for Plaintiffs-Appellants

Mary M. McAlister, Counsel for Plaintiffs-Appellants

The National Legal Foundation, Amicus Curiae

No. 05-13813-C

Heinkel v. School Board of Lee County, Florida

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT--CONTINUED

Jason Odom, Counsel for Defendant-Appellee

School Board of Lee County, Florida, Defendant-Appellee

Erik W. Stanley, Counsel for Plaintiffs-Appellants

Anita L. Staver, Counsel for Plaintiffs-Appellants

Mathew D. Staver, Counsel for Plaintiffs-Appellants

Thompson, Sizemore & Gonzalez, P.A., Counsel for Defendant-Appellee

_____

Steven W. Fitschen
Counsel of Record
for Amicus Curiae

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

Cases: **Page(s)**

Miscellaneous:

INTEREST OF *AMICUS CURIAE*

Amicus Curiae The National Legal Foundation (NLF) is a 501c(3) public interest law firm dedicated to the defense of First Amendment liberties and to the restoration of the moral and religious foundation on which America was built. Since its founding in 1985, the NLF has litigated important First Amendment cases in both the federal and state courts. Most notably, the NLF litigated *Board of Education of Westside Community Schools v. Mergens*, 496 U.S. 226 (1990) at the United States Supreme Court.

The NLF has gained valuable expertise in the area of First Amendment law, which it believes will assist this Court in deciding this appeal. The NLF has an interest, on behalf of its constituents and supporters, in arguing on behalf of religious liberty.

This brief is filed pursuant to the consent of counsel of record for Plaintiffs-Appellants and a Motion for Leave to File a Brief *Amicus Curiae*.

STATEMENT OF THE ISSUES

This *Amicus Curiae* Brief will address only two issues presented by this Appeal:

I. Whether the District Court erred when it allowed the School Board to censor during non-instructional time private student expression on a currently debated social issue.

II. Whether the District Court erred when it engaged in forum analysis in a situation factually similar to a cases in which other courts have indicated that forum analysis is not required.

SUMMARY OF THE ARGUMENT

The Defendant School Board denied several of its students the right to distribute literature during non-instructional time. The court below upheld this denial because it believed that sharing literature with fellow students would cause material and substantial disruption of the school day and interference with the rights of other students and parents. In so doing, the court below ignored the legal standards governing when and how such predictions should be made. It also ignored the legal standards for determining what expression can be censored due to content. Furthermore, the court below erred when it engaged in forum analysis.

ARGUMENT

"It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.,* 393 U.S. 503, 506 (1969). This Supreme Court language plainly declares the right of students in American's public schools to express themselves under the protection of the First Amendment. However, the Appellees in the instant case have denied Michelle Heinkel

(hereinafter, "Heinkel")[1] her right to share her religious pro-life views with her classmates in her public school hallways between classes.

The court below correctly held that the School Board's policy is unconstitutional because it comprises viewpoint discrimination against literature with a religious or political purpose. *Heinkel v. Sch. Bd. Of Lee County*, No. 2:04-cv-184-FtM-33SPC, slip op. at 14 (M.D. Fla. July 1, 2005). Therefore, this brief will not address the constitutionality of the policy. Instead, it will examine the School Board's decision to bar Heinkel from distributing pro-life literature from the Freedom to Learn organization, *id*. at 19. The District Court below erred when it held that the School Board had sufficient reason to justify restricting Heinkel's right to express her views.

This brief will demonstrate that the School Board's prediction that Heinkel's sharing literature with her fellow students would cause material and substantial disruption of the school day and interference with the rights of other students and parents ignored the legal standards governing when and how such predictions should be made. Therefore, the School Board denied Heinkel the right to express her views without meeting the standard set forth in *Tinker* and its progeny. Furthermore, this Brief will demonstrate that the court below erred when it

[1] *Amicus* agrees with Plaintiff-Appellant Nate Cordray that he was improperly dismissed from this lawsuit. However, because this brief does not address that

engaged in forum analysis.

II. THE COURT BELOW SHOULD HAVE GRANTED SUMMARY JUDGMENT TO HEINKEL, NOT THE SCHOOL BOARD, BECAUSE THE UNDISPUTED MATERIAL FACTS WERE A LEGALLY INSUFFICIENT BASIS UPON WHICH TO PREDICT A SUBSTANTIAL DISRUPTION TO HEINKEL'S SCHOOL.

In *Burnside v. Byars,* 363 F.2d 744, 749 (5th Cir. 1966), the Fifth Circuit, the predecessor to this Court, declared that schools

> cannot infringe on their students' right to free and unrestricted expression as guaranteed to them under the First Amendment to the Constitution, where the exercise of such rights in the school buildings and schoolrooms do not materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.

The Supreme Court adopted the *Burnside* test and restated it, noting that students are free to express themselves at school as long as they do not cause a substantial disruption or interfere with the rights of others. *Tinker,* 393 U.S. at 511.

A. The Court Below Erred Because The Summary Judgment Materials Demonstrate, At Most, That The School Board Operated on Intuition.

The court below cited *Butts v. Dallas Independent School District,* 436 F.2d 728, 731 (5th Cir. 1971), in support of the assertion that schools need not wait for an actual disruption before taking action. *Heinkel*, No. 2:04-cv-184-FtM-33SPC, at 16. While it is true that a disruption is not a prerequisite for school action, in *Tinker* the Supreme Court also held that "undifferentiated fear or apprehension of

---

issue and for ease of reference, this Brief will refer to Plaintiffs-Appellants

disturbance is not enough to overcome the right to freedom of expression." 393 U.S. at 508.

In fact, though not noted by the court below, the Fifth Circuit went on to say in *Butts* that while a school need not wait for a disruption to happen, there at least has to be "a determination, based on fact, not intuition, that the expected disruption would probably result from the exercise of the constitutional right and that foregoing such exercise would tend to make the expected disruption substantially less probable or less severe." 436 F.2d at 731. The *Butts* court also stated that more than the "*ex cathedra*" determination of the official is required to forecast disruption. *Id.* at 732.

The School Board in the instant case denied Heinkel's request to distribute pro-life literature because it "'determined that the documents would *tend* to create a substantial disruption in the school environment.'" *Heinkel,* No. 2:04-cv-184-FtM-33SPC, at 17 (*quoting* Doc. #26, Ex. I). The Board's determination was based on—in the *Butts* court's words—intuition, not fact. The court below detailed its reasons for believing that school Superintendent Browder "reasonably concluded," *id*, that a disruption would result.

However, the court's reasons, at best, establish nothing more than intuition. At worst, the court's reasons were analytically irrelevant. The reasons cited by the

---

collectively as "Heinkel."

court below included a Florida statute allowing parents to remove their children from reproductive education, district officials' statements (in letters and depositions) that abortion was not taught in the schools, calls from three parents concerned about the possibility of their children being exposed to the pro-life literature, a comment in a Supreme Court dissent regarding the divisiveness of the abortion issue, and officials' bald assertions (noted above) that the literature would 'tend to create a substantial disruption). *Id*. at 17-18

The court in *Butts* stated that 'we believe that the Supreme Court has declared a constitutional right which school authorities must nurture and protect, not extinguish, unless they find the circumstances allow them no practical alternative." *Butts,* 436 F.2d at 732. The court went on to say that while the school officials are the judges of such circumstances, 'there must be some inquiry, and establishment of substantial fact, to buttress the determination." *Id.* The School Board's determination in the instant case has no such buttress. Similarly, in *Reineke v. Cobb County School District,* 484 F. Supp. 1252, 1259 (D. Ga. 1980) (emphasis added), the court said that 'in the absence of additional, compelling evidence, it was unreasonable to equate the *possibility* of controversy or adverse reaction with a substantial likelihood of disruption.

Cases in which restrictions on speech or expression were upheld are not to the contrary. For example, the Fifth Circuit upheld a restriction in *Blackwell v.*

Issaquena County Board of Education, 363 F.2d 749, 753 (5th Cir. 1966) where a "complete breakdown in school discipline" occurred because of certain students wearing and distributing expressive buttons. The students in that case distributed buttons supporting school integration to other students who did not want them and who through them through windows, thus disrupting classroom instruction and interfering with the rights of others. *Id.*

However, in a different Fifth Circuit case concerning the same buttons—in fact, the previously mentioned *Burnside* case (*i.e.*, the case from which the Tinker standard was adopted)—a restriction was struck down because of a lack of compelling evidence of disruptive activities. 363 F.2d at 748. The students in that case wore and distributed the buttons in a proper expressive manner and only a "mild curiosity" was shown by the other students. *Id.*

Thus, it is not the literature or other expression that controls the analysis.[2] Neither a particular button (or by analogy, a particular pamphlet) nor its topic (whether integration or abortion) controls the analysis. Rather, only disruption or the prediction thereof—again, a prediction based upon more than intuition or bald assertions—controls the analysis. Here there is *nothing* that provides a basis for a valid prediction of disruption. Most of the court below's reasons that were noted

[2] Those special sub-categories of speech and expression for which the content *can* be considered will be discussed in following sections. Here, we are dealing with the general principles, not the exceptions.

above—the Florida statute allowing parents to remove their children from reproductive education, the district officials' statements (in letters and depositions) that abortion was not taught in the schools, the calls from three parents concerned about the possibility of their children being exposed to the pro-life literature, a comment in a Supreme Court dissent regarding the divisiveness of the abortion issue—go to the *topic* of abortion. The only one of the court's reasons that goes to a *prediction of disruption* are the board's own bald assertions. (Certainly, three phone calls from parents cannot constitute substantial disruption. To state the proposition is to demonstrate its absurdity.)

Admittedly, while actual disruptions can be objectively determined, 'the 'reasonable forecast' of disruption that might result from the exercise of expression is a more difficult standard to apply." *Shanley,* 462 F.2d at 970. However, the situation must leave the school officials with no practical alternative but to restrict the expression. *Butts,* 436 F.2d at 732. The school must attempt other avenue of dealing with any potential disruption first. *Id.* Here, nothing of the kind was attempted, perhaps because, in reality there was no volatile situation to deal with.

By comparison, in *Scott v. School Board,* 324 F.3d 1246, 1249 (11th Cir. 2003), this Court upheld a restriction on students wishing to display Confederate flags because the school officials had relied on sufficient facts to forecast disruptive activities. The facts in that case showed that racial tensions had resulted

in fights in the months leading up to the restriction. *Id.* The record of racial confrontation, coupled with the atmosphere concerning the flag in the community at the time, substantiated the concerns of the school officials. *Id.*

A similar restriction concerning the Confederate flag was upheld in *West v. Derby Unified School District No. 260,* 206 F.3d 1358, 1366 (10th Cir. 2000). Again, past events in the record concerning racial tensions were deemed sufficient to support a reasonable forecast of disruption of school activities. *Id.*

Also, in *Guzick v. Drebus,* 431 F.2d 594, 598-600 (6th Cir. 1970), a suspension of a student for wearing an anti-war button was upheld because of the "incendiary" atmosphere at the school regarding the war issue. The court further noted that the policy of the school against wearing buttons had been put into place because of racial tensions at the school. *Id.*

There is no evidence of an "incendiary" atmosphere at the school in the instant case. Contrary to the situations in *Scott, West,* or *Guzick,* there were no facts before the court below in the summary judgment proceeding to suggest that Heinkel's school was experiencing fights or even tension between pro-life and pro-abortion advocates. Also, Heinkel merely seeks to exercise her right to distribute literature, not to disruptively force it on her fellow students. There simply are no grounds to justify a forecast of disruptive activity resulting from the distribution of Heinkel's literature.

E. The Court Below Erred Because Heinkel's Literature Was, At Most, Merely Controversial, And The Supreme Court Has Upheld Students' Rights To Distribute Controversial Material That Does Not Rise To The Level Of "Fighting Words."

The School Board's action against Heinkel is based on its policy that abortion would not be taught in schools because it is a controversial topic. However, in *Tinker*, the Supreme Court held that restrictions on student speech must be "caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." 393 U.S. at 509. In *Butts,* the court specifically recognized the difference between merely controversial speech and "fighting words" that are likely to cause a disruption. 436 F.2d at 731. In *Feiner v. New York,* 340 U.S. 315, 321 (1951), the Supreme Court described the threshold between the two as that point "where the speaker passes the bounds of argument or persuasion and undertakes incitement to riot."

Abortion is a highly disputed issue. But "a function of free speech under our system of government is to invite dispute." *Terminiello v. Chicago,* 337 U.S. 1, 4 (1949). In *Shanley v. Northeast Independent School District,* 462 F.2d 960, 972 (5th Cir. 1972), the court found that articles about marijuana and birth control in a student publication, while controversial, were not "fighting words" that would likely cause disruption. The court went on to say that

> it appears odd to us that an educational institution would boggle at "controversy" to such an extent that the mere representation that students should become informed of two widely-

> publicized, widely-discussed, and significant issues that face the citizenry should prompt the board to stifle the content of a student publication.

Id.

In the instant case, Heinkel merely desired to share her views on abortion, a controversial social issue similar to marijuana laws and birth control. The pro-life literature would likely create discussion, but not disruption. Like the publication in *Shanley,* Heinkel's literature would spur useful discussion of an important social issue. While the views in Heinkel's literature may be controversial, "it should be axiomatic at this point in our nation's history that in a democracy 'controversy' is, as a matter of constitutional law, never sufficient in and of itself to stifle the views of any citizen . . . ." *Shanley,* 462 F.2d at 971.

F. <u>The Court Below Erred Because Heinkel's Literature Is Not Obscene, Libelous or Inflammatory And, Thus, Does Not Justify a Restriction.</u>

Only rarely will the content of the literature itself justify a restriction. The court in *Shanley* suggested that only those remarks that are obscene, libelous, inflammatory, or the like justify restrictions on speech. *Shanley,* 462 F.2d at 964 (noting specifically the absence of these three categories of speech). The following is an example of inflammatory speech (the only category that the court below could conceivably have been concerned about in the instant case) from a student publication that was the subject of *Quarterman v. Byrd,* 453 F.2d 54, 55-56 (4th Cir. 1971):

> We have to be prepared to fight in the halls and in the classrooms, out in the streets because the schools belong to the people. If we have to – we'll burn the buildings of our schools down to show these pigs that we want an education that won't brainwash us into being racist. And that we want an education that will teach us to know the real truth about things we need to know, so we can better serve the people!

This excerpt is obviously inflammatory. There is nothing about Heinkel's literature that is inflammatory, (or obscene, libelous, or inappropriate in any way). It was, as explained in section I. B., merely controversial. Because there is nothing in the summary judgment materials to support a reasonable forecast of disruption, and nothing in the literature that is inflammatory, obscene, or libelous; Heinkel should have been allowed to distribute her literature unless it was found that doing so would have collided with the rights of other students or parents. As we will demonstrate next, distribution of the literature would not have interfered with the rights of others in any way.

D. The Court Below Erred Because Heinkel's Distribution Would Not Have Interfered With the Rights of Other Students or of Parents.

The court below held that distribution of the literature would collide with the rights of those parents who did not want their children exposed to literature concerning abortion. This fear was based on complaints received from three parents. *Heinkel*, No. 2:04-cv-184-FtM-33SPC, at 18. Few subjects would be approved by all parents. These concerns amount to little more than a heckler's veto, which is insufficient to suppress the rights of students to express their ideas.

The Supreme Court recently expressed skepticism of the heckler's veto in the Establishment Clause context. In *Good News Club v. Milford Central School,* 533 U.S. 98, 119 (2001), the Court stated, "we decline to employ Establishment Clause jurisprudence using a modified heckler's veto, in which a group's religious activity can be proscribed on the basis of what the youngest members of the audience might misperceive." *Good News Club,* 533 U.S. at 119.

While the case at bar does not concern the Establishment Clause, the principle is the same. In fact, the heckler's veto doctrine originated in the Free Speech context where the discomfort of certain individuals cannot justify infringement on the rights of others. In a literature distribution case similar to the instant case, the Seventh Circuit used the following analogy: "Consider a parallel: the police are supposed to preserve order, which unpopular speech may endanger. Does it follow that the police may silence the rabble-rousing speaker? Not at all. The police must permit the speech and control the crowd; there is no heckler's veto." *Hedges v. Wauconda Community Unit Sch. Dist. No. 118,* 9 F.3d 1295, 1299 (7th Cir. 1993). In another similar case, a principal's fear that parents would object to their children being exposed to religious literature at school were held to be insufficient to prevent the distribution of the literature. *Thompson v. Waynesboro Area School Dist.,* 673 F. Supp. 1379, 1388 (D. Pa., 1987).

In fact, the court below erred when it ignored binding precedent on this very

point. In *Shanley* (a pre-Fifth Circuit split case), the Fifth Circuit emphatically stated "[u]nder the First Amendment and its decisional explication, we conclude that . . . expression by high school students cannot be prohibited solely because other students, teachers, administrators, or parents may disagree with its content . . . ." 462 F.2d at 970.

Nor does the word "solely" in the last quotation legitimize the decision below. The Supreme Court has recognized that schools in certain contexts act *in loco parentis* and have a duty to protect students "from exposure to sexually explicit, indecent, or lewd speech" during school sponsored events in which the students are a "captive audience." *Bethel Sch. Dist. No. 403 v. Fraser,* 478 U.S. 675, 684 (1986). In the instant case, however, nothing in the literature has been alleged to be sexually explicit, indecent, or lewd. Furthermore, the pro-life literature was not sponsored by the school or the district and would be distributed during free time to students in the hallways, not to a captive audience during a school assembly. Thus, neither aspect of the *in loco parentis* theory applies.

As noted above for other purposes, the court below highlighted the fact that abortion is not part of the curriculum of the district and that § 1002.20 (3) (d) of the Florida Statutes allows parents to exempt their children from the teaching of reproductive health and sexually transmitted diseases. *Heinkel*, No. 2:04-cv-184-FtM-33SPC, at 17-18. These circumstances do not interfere with the rights of

other students and parents because the pro-life literature is not school-sponsored. At most, the statute and district curriculum might be relevant had Heinkel sought to have her literature endorsed by the school. Otherwise every school could do an end run around *Shanley's* admonition that "expression by high school students cannot be prohibited solely because other students, teachers, administrators, or parents may disagree with its content . . . ." 462 F.2d at 970.

E. The Court Below Erred Because The Florida Statute and District Curriculum Were Irrelevant To Heinkel's Private Expression.

Courts have consistently distinguished school-sponsored speech from private student speech. This point was implicated at least tangentially by the prior section of this Brief, but merits a few additional comments here. The Supreme Court, in an often-quoted passage, explained

> there is a crucial difference between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect. 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 (U.S. 1990) (plurality). This certainly applies to Heinkel's religious pro-life literature. The literature was clearly not the school district's speech. It was Heinkel's speech.

Despite *Mergens'* clear teaching, the court below cited *Hazelwood School District v. Kuhlmeier,* 484 U.S. 260, 270-71 (1988), and *Bethel School District No.*

403 v. Fraser, 478 U.S. 675, 684 (1986), to support the notion that schools have the power control their environment and that that power justified the School Board's censorship. *Heinkel,* No. 2:04-cv-184-FtM-33SPC, at 10.

However, *Kuhlmeier* and *Fraser* do not support this proposition. In *Kuhlmeier,* the Court stated that "the question whether the First Amendment requires a school to tolerate particular student speech—the question that we addressed in *Tinker*—is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech." 484 U.S. at 270-71. The Court held that the standard from *Tinker* that applies to private student speech does not necessarily apply to school sponsored speech. *Id.* The Court found that schools could exercise editorial control over school sponsored publications without the constraints of *Tinker* when "legitimate pedagogical concerns" were involved. *Id.* at 272-73. Similarly, in *Fraser,* the Supreme Court found that schools have some control over the content of speeches at school-wide assemblies. 478 U.S. at 684.

Both *Kuhlmeier* and *Fraser* distinguished the student speech in *Tinker* from speech in school-sponsored activities. *Kuhlmeier,* 484 U.S. at 270-71, *Fraser,* 478 U.S. at 684. This distinction was recognized in *Rivera v. East Otero School Dist.,* 721 F. Supp. 1189 (D. Colo. 1989). "In [*Fraser*] and [*Kuhlmeier*], the Supreme Court recognized a distinction between school-affiliated speech and the private

speech of students." *Id.* at 1195. In *Rivera,* the court, in striking the offending portions of the school's literature distribution policy, relied upon that very distinction in reaching its decision. *Id.* at 1193.

The court in *Burch v. Barker,* 861 F.2d 1149, 1157 (9th Cir. 1988), made the same point even more explicitly:

> Control over the educational curriculum requires control by administrators over the content of what is taught; this is a premise made more explicit in *Kuhlmeier.* The corollary of this premise is that no similar content control is justified for communication among students which is not part of the educational program.

The pro-life literature that Heinkel wishes to distribute is clearly private student expression protected by the First Amendment. Heinkel is not asking the school or school district to sponsor the literature, only to be allowed to share her views with classmates during free time in the hallways. For this reason, too, the court below erred.

II. THE COURT BELOW ERRED WHEN IT INAPPROPRIATELY ENGAGED IN FORUM ANALYSIS.

The court below employed a forum analysis. *Heinkel*, No. 2:04-cv-184-FtM-33SPC, at 10-12. The following section will demonstrate that a forum analysis is inappropriate for the present case and that the court erred when it engaged in such an analysis.

The court below relied on *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37 (1983), in determining that the school in the

case at bar was a nonpublic forum. *Heinkel,* No. 2:04-cv-184-FtM-33SPC, at 12. However, *Perry* is not an appropriate vehicle with which to import forum analysis into case because *Perry* involved completely different circumstances. *Perry* involved outside teacher unions that were seeking access to the interschool mail system. It did not protected private expression by students. As set forth above, the standard for evaluating schools' ability to control private student expression is found in *Tinker,* and the court in *Rivera v. East Otero School Dist.,* 721 F. Supp. 1189 (D. Colo. 1989), stated, "the holding in *Tinker* did not depend upon a finding that the school was a public forum." 721 F. Supp. 1189 at 1193. The Supreme Court actually commented on this very distinction in *Perry* itself, noting that *Tinker* "did not involve the validity of an unequal access policy but instead involved an unequivocal attempt to prevent students from expressing their viewpoint on a political issue." *Perry,* 460 U.S. at 49. Therefore, the court below erred by engaging in forum analysis at all.

Although, the court below did find certain portions of the School Board's policy unconstitutional under its forum analysis, this Court should clarify that forum analysis has no place in this case and should instead grant Heinkel's Motion for Summary Judgment on the grounds discussed in Section I. of this Brief.

CONCLUSION

For the foregoing reasons, this Court should reverse the decisions of the

District Court granting the School Board's motion for Summary Judgment and denying Heinkel's motion for Summary Judgment.

Respectfully submitted
this first day of September, 2005

_____
Steven W. Fitschen
Counsel of Record for *Amicus Curiae*
The National Legal Foundation
2224 Virginia Beach Blvd., Ste. 204
Virginia Beach, VA 23454
(757) 463-6133

CERTIFICATE OF COMPLIANCE

Pursuant to F.R.A.P. 32(a)(7)(C)(i), the undersigned certifies that this brief complies with the type-volume limitations of F.R.A.P. 32(a)(7)(B). Exclusive of the exempted portions, this Brief contains 4,358 words. This total was calculated with the Word Count function of Microsoft Word 2000.

_____

Steven W. Fitschen

Counsel of Record for Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that I have duly served the attached Brief *Amicus Curiae* of the National Legal Foundation in the case of *Heinkel v. School Board of Lee County*, 05-13813-C on all required parties by depositing the required number of paper copies in the United States mail, first class postage, prepaid on September 1, 2005, addressed as listed below. The required number of paper copies were filed in the same manner on the same date.

Matthew D. Staver (Lead Counsel)
Liberty Counsel
210 East Palmetto Avenue
Longwood, Florida 32750
Telephone: (407) 875-2100
Attorney for Plaintiffs-Appellants

Mr. Thomas Gonzalez, Esq.
Thompson Sizemore & Gonzalez
P.O. Box 639
Tampa, Florida 33601
Telephone: (813) 273-0050
Attorney for Defendant

_____

Steven W. Fitschen
Counsel of Record
The National Legal Foundation
2224 Virginia Beach Boulevard, Ste. 204
Virginia Beach, Virginia 23454
(757) 463-6133