No. 09-409

In the

Supreme Court of the United States

PAUL T. PALMER, by and through his parents and legal guardians, PAUL D. PALMER and DR. SUSAN GONZALEZ BAKER,
Petitioners,

v.

WAXAHACHIE INDEPENDENT SCHOOL DISTRICT,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF *AMICI CURIAE* OF CHARLES BARUCH AND WALKER BATEMAN IV,

in support of the *Petitioners.*

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INTEREST OF *AMICI CURIAE*[1]

Walker Bateman IV is a former public school board member in the Highland Park Independent School District in Highland Park, Texas. Located in north Dallas, HPISD includes four elementary schools, one middle school, and one high school with a student population of approximately 1,900 students. HPISD's total student enrollment for the 2009-2010 school year is approximately 6,432.

Charles "Chad" Baruch is a high school administrator at Yavneh Academy of Dallas, a private school in Dallas, Texas. He previously served as a teacher or coach in large public high schools in South Dakota, Minnesota, and Wisconsin.

Mr. Bateman and Mr. Baruch are deeply concerned about the constitutional and educational implications of the Fifth Circuit's decision. They are particularly worried that the public education community, hesitant to oppose one of its own members and adopting a "circle the wagons" mentality, may not completely or accurately explain those implications to this Court. Mr. Bateman and

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[1] The parties have consented to the filing of this Brief. Copies of the letters of consent have been filed with the Clerk. No counsel for any party has authored this Brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this Brief. No person or entity has made any monetary contribution to the preparation or submission of this Brief, other than the *Amicus Curiae*, its members, and its counsel.

Mr. Baruch tender this Brief solely to help this Court understand the issues presented in this case, attempting to offer the perspective of high school administrators working "in the trenches" of American public education.[2]

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Forty years ago, this Court struck exactly the right balance between the need for administrators to maintain order in America's public schools and the need for young Americans to learn to function as citizens in a vibrant democracy by exercising their First Amendment liberties. In *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), this Court made clear to administrators and students alike that:

- political speech does not lose its constitutional protection simply because it is exercised by a student attending—often under threat of criminal sanction for non-attendance—one of America's public schools, but that
- students may not rely on the First Amendment to disrupt the educational process or infringe on the rights of their classmates.

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[2] Although Mr. Bateman and Mr. Baruch are not themselves administrators in the public schools, their combined experiences within the public and private school systems have afforded them insight into the unique problems associated with handling matters of student speech and dress.

Tinker was to student expression and political participation what *Brown v. Board of Education*, 347 U.S. 483 (1954), was to student equal-opportunity. It reaffirmed that a core value of the Constitution does not cease to exist in America's public schools.

By this Brief, Mr. Bateman and Mr. Baruch make three arguments in support of Paul "Pete" Palmer's Petition for Writ of *Certiorari*. First, the federal case law governing student expression—especially student dress—is hopelessly confused and varies among circuits. If this Court does not address this circuit split, high school principals and students will continue to suffer from a lack of clear guidance and needless litigation will result. Second, *Tinker* provides a straightforward standard easily understood by high school principals (who deal every day with preventing school disruption, but likely lack experience with content-neutrality) and permits principals all the leeway necessary to maintain school order. *Tinker* is the only possible standard that grants principals that leeway while still respecting the constitutional rights afforded to students—and respecting the important role that America's public schools play in preparing students to function as informed citizens in our democratic system. Third and finally, the Waxahachie School District's (the "School District") policy is not content-neutral because it permits government-sanctioned messages while barring all non-sanctioned messages.

ARGUMENT

I. THIS COURT SHOULD GRANT THE WRIT TO CLARIFY AND UNIFY THE FEDERAL CASE LAW CONCERNING STUDENT SPEECH RIGHTS, ESPECIALLY WITH REGARD TO STUDENT DRESS.

For many years, high school administrators and students assumed that the *Tinker* standard governed all student speech (other than speech covered by the narrow exceptions carved out in *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986), *Hazelwood v. Kuhlmeier*, 484 U.S. 260 (1988), or more recently *Morse v. Frederick*, 127 S. Ct. 2618 (2007)). Over the past decade, that certainty has given way to growing confusion. The recent circuit split deepened that confusion and left students in different parts of the country subject to different court-created standards. (*See* Pet. for Writ of Cert. at 19-22.) The time has come for this Court to consider this issue and make uniform the principles governing it.

The confusion for many principals is aggravated because they lack significant legal training. Illustrating this fact, one popular legal guidebook for principals contains a question-and-answer format, providing direct answers to most legal questions a principal might confront. It does not, however, directly answer the question of "How does a court determine if a student's choice of dress is constitutionally protected?" Charles C. Haynes, *et*

al., *The First Amendment in Schools* 77-78 (2003). Instead, the book's answer would confuse most experienced lawyers, much less high school principals. The book notes that different courts apply different standards, including both those from *Tinker* and *United States v. O'Brien*, 391 U.S. 367 (1968), and leaves the reader (legally-trained or otherwise) without much guidance on which standard any particular court might apply. *Id.* Another guidebook is more blunt, stating that "intermediate appellate courts differ over First Amendment protection for t-shirts, and this area of the law remains unsettled." *The Constitution at School: A Guide for Public High School Principals on the Constitutional Rights of Students on Campus* 9 (Texas Young Lawyers Ass'n ed., 2009).

If this Court does not resolve the circuit split and make the standard governing this issue clear and uniform, principals and students will continue to differ over the permissibility of limitations on student expression, and school districts will continue to face needless lawsuits.

II. THIS COURT SHOULD GRANT THE WRIT TO CLARIFY THAT *TINKER* CONTROLS STUDENT SPEECH CASES BECAUSE IT PROVIDES A STRAIGHTFORWARD STANDARD FOR SCHOOL PRINCIPALS TO USE.

A. The *Tinker* standard is easily understood and applied by school principals.

Tinker provides a standard uniquely well-suited for principals to properly administer matters of student speech and dress. Most American public school principals lack understanding of or experience with the intricacies of *content-neutrality* or *least-restrictive means*. But they understand disruption. They *live* disruption. The average American principal can easily forecast the likelihood of a particular act or event causing substantial and material disruption. That is a call principals are asked to make time and again in the exercise of their duties. *Tinker's* simplicity and applicability can be simply illustrated. Following the Fifth Circuit's decision in this case, a Texas newspaper interviewed a suburban Dallas principal for comment. The principal responded that his school would only "forbid a campaign t-shirt if it would cause a disruption in the class." Amanda Casanova, *Student Takes Dress Code to Court*, Abilene Reporter News, July 8, 2009.[3] In other words, without identifying it,

[3]Available at: http://www.reporternews.com/news/2009/jul/08/dress-code-hedline-in-here/ (last viewed on November 2, 2009).

the principal instinctively articulated the *Tinker* standard.

Tinker also affords principals ample leeway to maintain school order. *Tinker* permits school administrators to control student speech only when the speech "materially and substantially disrupt[s] the work and discipline of the school," meaning it will "materially disrupt classwork" or cause "substantial disorder or invasion of the rights of others." *Tinker*, 393 U.S. at 513.[4]

With the exception of lewd, obscene, or school-sponsored speech, or speech that advocates illegal drug use, a school has no legitimate reason for censoring student speech. *Tinker* permits principals to address these situations, vesting them with unfettered power to stifle *all* student expression—from sexually-provocative clothing to gang-related apparel—likely to interfere materially with the educational process. Any greater power fails to serve a legitimate educational purpose.

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[4] Although the phrase "invasion of the rights of others" has been used differently at times by various Courts of Appeals, *see e.g. Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166 (9th Cir. 2006), and *Hedges v. Wauconda Cmty. Unit Sch. Dist. No. 118*, 9 F.3d 1295 (7th Cir. 1993), its application here is unnecessary—the political speech at issue here can easily be evaluated in terms of material and substantial disruption, with no separate implication of the rights of others.

B. *Tinker* Allows for Proper Maintenance of Order within the School While Still Respecting the Constitutional Rights of the Students.

America's public schools are charged with preparing young Americans to live and participate in a liberal democracy. Indeed, this Court "has long recognized what none of us can doubt: education is vital to citizenship in a democratic republic." Suzanna Sherry, *Responsible Republicanism: Educating for Citizenship*, 62 U. Chi. L. Rev. 131, 131 (1995). One important aspect of this mission is inculcating in students an understanding of and appreciation for the principles of the Constitution.

When a school stifles speech—especially speech that does not even arguably impede the school's educational mission—it is antithetical to teaching the value of free expression. This constitutional socialization requires scrupulous protection of student free expression "if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943).

The School District should be one of the most outspoken advocates of preparing students to participate in the civic arena. Many in school administrative roles understand and appreciate that preparation. In September 2004, the National Association of Secondary School Principals, a professional organization comprised of more than

30,000 middle and high school administrators, devoted an entire issue of its national magazine, *Principal Leadership*, to the topic of "Making Civics Real." According to one article in that issue:

> Creating informed, engaged citizens who are knowledgeable voters and active participants in both the democratic process and their communities may be *our single-most important mission as educators.*

Kathryn A. Agard, *Learning to Give*, Principal Leadership, Sept. 2004, at 43, 46 (emphasis added).

Education—or at least effective education—is not something that the school does *to* the student. Rather, education involves an interactive process revolving around a free exchange of ideas. The communication and probing of dissenting opinions is a critical part of the educational process in this country. And this free exchange of ideas should not be limited to the classroom—it should take place in the cafeteria, the commons, the library, and the locker room.

Pete Palmer's t-shirt did not hinder the educational process. Under better tutelage, it would have aided that process. It presented a unique opportunity for a social studies discussion about anything from the presidential election, to the importance of voting and participation in the political processes, to the history of political dissent, to this Court's decision in *Tinker*. Rather than embrace this opportunity to engage its students, the

School District chose instead to stifle the speech. Lock-step adherence to a restrictive policy of censorship trumped education. As this Court has cautioned, "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools. The classroom is peculiarly the 'marketplace of ideas.'" *Tinker*, 393 U.S. at 512 (quoting *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967)).

Disagreement is a fundamental part of the democratic process at every level. It is an essential part of the public school's mission to prepare students to participate in the political process, including to listen to and evaluate other ideas and respond to them forcefully but civilly. Stifling student speech without cause undercuts this goal and leaves students unprepared to participate in our nation's political system.

III. THIS COURT SHOULD GRANT THE WRIT BECAUSE THE SCHOOL DISTRICT'S DRESS CODE IS NOT CONTENT-NEUTRAL.

The School District's dress code policy (the "Policy") is particularly troubling given its differentiation between speech sanctioned by the government and all other speech. Almost from its beginning, the Policy makes clear its foundation in permitting speech selectively based on content. The Policy forbids any words or symbols on student clothing "except those that promote the school district and its educational programs" (Pet. for Writ of Cert. at App. 30-31.) Thus, students are free, for

example, to wear lettering promoting elected school board officials—but not criticizing them. They may wear clothing supporting the football team—but not criticizing it (or criticizing the district for spending more money on football than debate).

Even more troubling in the Policy is the practice of permitting only "principal-approved" t-shirts from district-sponsored activities. (Pet. for Writ of Cert. at App. 30-31.) Again, for example, if the student council (a school-sponsored organization) wished to print t-shirts supporting an increase in the budget for English textbooks at the expense of athletics, its members could not wear those t-shirts to school without the approval of the principal. In this context, the phrase *principal-approved* is an artful way of saying *government-sanctioned*.

The notion of protecting speech based on sanction by the government should send chills up the spine of anyone concerned about the specter of governmental intrusion into matters of conscience. *Tinker* expressly and appropriately rejected this type of message-control by stating that "students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved." *Tinker*, 393 U.S. at 511. As Justice Jackson so famously put it: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in . . . matters of opinion . . . ." *Barnette*, 319 U.S. at 642.

CONCLUSION

The Fifth Circuit's decision grants authority to principals far exceeding the power necessary to maintain school order. Instead, the Fifth Circuit has provided principals with infinitely-elastic power to stifle student expression in violation of the First Amendment. Judicial deference to educators is important, but not at the expense of the Constitution. School administrators are asked to perform a daunting arrays of tasks, but "none that they may not perform within the Bill of Rights." *Barnette*, 319 U.S. at 637.

Mary Beth Tinker had her armband; Pete Palmer has his t-shirt. Neither of them disrupted or interfered with the educational process, and both of them evinced *precisely* the type of political awareness and involvement we profess to seek from our young people.

This Court should grant the Writ of *Certiorari* to reaffirm the balance between maintaining school order and protecting the student constitutional rights necessary to ensure a generation prepared to lead this nation into the middle of the twenty-first century.

Respectfully submitted,
this 5th day of November 2009,

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