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,**

*Petitioner,*

*v.*

**WAXAHACHIE INDEPENDENT SCHOOL DISTRICT,**

*Respondent.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

## AMICUS CURIAE BRIEF OF THE AMERICAN CENTER FOR LAW AND JUSTICE IN SUPPORT OF PETITIONER

**JAY ALAN SEKULOW**
*Counsel of Record*
**WALTER M. WEBER**
**CARLY F. GAMMILL**
**AMERICAN CENTER FOR LAW & JUSTICE**
201 Maryland Avenue, N.E.
Washington, DC 20002
(202) 546-8890

***Counsel for Amicus Curiae***

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## INTEREST OF AMICUS[1]

Amicus, the American Center for Law and Justice (ACLJ), is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys have appeared frequently before the Court as counsel for parties or for amici in cases involving constitutional issues, with a particular emphasis on the First Amendment. In particular, Counsel of Record for amicus has argued twelve times before this Court, most recently in *Pleasant Grove City v. Summum*, 129 S. Ct. 1125 (2009).[2] Proper resolution of this case is of significant interest to the ACLJ as it will determine the degree of protection afforded to a vast number of public school students in the exercise of their First Amendment right to freedom of speech.

The ACLJ is committed to protect the free speech rights of individuals, including public school students. While public school officials undoubtedly maintain the authority to act in furtherance of the discipline and protection of students during the

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[1] Counsel of record for the parties received timely notice of the intent to file this brief pursuant to S. Ct. R. 37.2(a). The parties have consented to the filing of this brief. Copies of the parties' written consent are being filed herewith. No counsel for any party authored this brief in whole or in part. No person or entity aside from the ACLJ, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. The ACLJ has no parent corporation, and no publicly held company owns 10% or more of its stock.

[2] *See also McConnell v. FEC*, 540 U.S. 93 (2003); *Lamb's Chapel v. Center Moriches Sch. Dist.*, 508 U.S. 384 (1993); *Bd. of Educ. v. Mergens*, 496 U.S. 226 (1990); *Bd. of Airport Comm'rs v. Jews for Jesus*, 482 U.S. 569 (1987).

school day, it is vitally important that school boards, as arms of the government, not be allowed selectively to silence our nation's youth by enacting policies that discriminatorily restrict student speech on school campuses. Policies that suppress private student messages merely because they have not received approval from school officials strike at the core of the First Amendment. It is essential that lower courts understand and apply the proper constitutional standard when assessing the government's attempts to limit the free speech rights of public school students. Because the decision below sharply departs from the settled precedent of this Court, and thus seriously unsettles the clarity of the law, this Court should grant review.

## SUMMARY OF ARGUMENT

This Court enunciated the rule for analyzing the constitutionality of restrictions on the free speech rights of public school students in *Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969). In the forty years since this decision, this Court has continued to recognize *Tinker* as the governing standard in student speech cases. In particular, not once during that time has the Court applied the different—and lower—standard for restrictions on expressive *conduct* announced in *United States v. O'Brien*, 391 U.S. 367 (1968), to government regulations of pure speech in the public school setting. The application of the *O'Brien* test by the Fifth Circuit here is therefore a clear departure from, and in direct conflict with, this Court's decisions. This Court should grant the petition for

certiorari to correct the Fifth Circuit's erroneous invocation of the *O'Brien* test to analyze a restriction on pure student speech that is properly governed by the standard enunciated in *Tinker*.

## ARGUMENT

### THIS COURT SHOULD GRANT THE PETITION BECAUSE THE DECISION OF THE FIFTH CIRCUIT CONFLICTS WITH DECISIONS OF THIS COURT.

Petitioner has focused this Court on a split among the circuits as the basis for a grant of certiorari. Amicus wishes to highlight the Fifth Circuit's blatant departure from this Court's relevant decisions as an additional reason the Court should grant the petition.

This Court has held that restrictions on student speech are governed by the *Tinker* standard—which provides that a public school may not silence pure student speech that does not materially and substantially disrupt the proper discipline and functioning of the school—not the *O'Brien* test. Thus, *Tinker*, not *O'Brien*, sets the constitutional standard for the Waxahachie Independent School District's policy prohibiting students from expressing written political, religious, and other personal messages on their clothing. Both the terms of the *O'Brien* test and this Court's precedents make clear that application of *O'Brien* is inappropriate in the context of regulations of pure speech of public school students.

## A. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT THAT CONSISTENTLY HAVE RECOGNIZED THE *TINKER* STANDARD AS THE GENERAL RULE APPLICABLE TO RESTRICTIONS OF PURE SPEECH IN THE PUBLIC SCHOOL SETTING.

This Court has applied the *O'Brien* test to expressive *conduct* since its inception in 1968. When faced with government regulations of *pure speech by public school students*, however, the Court has never utilized the *O'Brien* test. Rather, this Court has consistently employed the *Tinker* standard.

Just two terms after issuing the decision in *O'Brien*, this Court decided a case involving a restriction on student expression in a public school. In *Tinker v. Des Moines Independent School District*, the Court addressed the constitutionality of a school regulation prohibiting students from expressing their political views through their clothing. The students penalized under the policy had worn armbands for the express purpose of protesting hostilities in Vietnam. *Id.* at 504. Importantly, the Court did *not* apply the test it had recently established in *O'Brien*. Instead, the Court described the students' expressive activity as "closely akin to 'pure speech,'" *id.* at 505 (and thus, as explained *infra*, beyond the purview of *O'Brien*). Citing "the special characteristics of the school environment," 393 U.S. at 506, the Court held that "in the area where students in the exercise of their First Amendment rights collide with the rules of the

school authorities," *id.* at 507, a student "may express his opinions, even on controversial subjects . . ., if he does so without 'materially and substantially interfer[ing] with the requirements of appropriate discipline in the operation of the school' and without colliding with the rights of others." *Id.* at 513.

The *Tinker* Court thus made clear that the starting point for analysis of student speech regulations is exactly the opposite of the starting point under *O'Brien*. Instead of asking whether conduct not otherwise within the parameters of free speech is nonetheless deserving of constitutional protection by virtue of its expressive nature (as *O'Brien* inquires), the question under *Tinker* is whether private student speech, which is presumptively safeguarded against government infringement by the Free Speech Clause of the First Amendment, is sufficiently disruptive of the proper functioning of the government (school) to fall outside that protection.

The Court's position was clear: the "special characteristics" of the public school setting give rise not only to unique and important governmental interests but also to the need for "vigilant protection of constitutional freedoms," *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967), such that regulation of the free speech rights of students is to be scrutinized under a more demanding rule—the *Tinker* standard—rather than "*O'Brien*'s relatively lenient standard." *Texas v. Johnson*, 491 U.S. at 407.

The Court next addressed a restriction of student speech in *Bethel School District v. Fraser*, 478 U.S. 675 (1986), involving a school's discipline of a

student based on a speech he delivered to a school-wide audience. While the *Fraser* Court rejected the student's First Amendment challenge, it expressly reaffirmed *Tinker*'s holding that public school students retain their free speech rights even while on campus. *Id.* at 680. According to the Court, the result in favor of the school was warranted by the "marked distinction between the political 'message' of the armbands in *Tinker* and the sexual content of [the student's] speech in this case . . . ." *Id.* Again, as in *Tinker*, the Court did *not* apply *O'Brien*.

Two years after the *Fraser* decision, the Court again faced a First Amendment challenge to a school's regulation of student speech. In *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), the school principal directed a faculty adviser to withhold two student-written articles from publication in the school newspaper. The students filed suit alleging violation of their free speech rights. While the Court ruled that *Kuhlmeier* involved student speech occurring entirely within the confines of a school-sponsored, curricular setting, and thus turned on a question entirely distinguishable from that in *Tinker*, the *Kuhlmeier* Court, like the *Fraser* Court before it, reaffirmed the applicability of the *Tinker* standard to pure speech by public school students.

The *Kuhlmeier* Court characterized the issue in *Tinker*—pure student speech resulting solely from the student's decision to communicate his own message—as involving "[t]he question whether the First Amendment requires a school to *tolerate* particular student speech," *Id.* at 270 (emphasis added). Put another way, this "question addresses

educators' ability to *silence* a student's personal expression that happens to occur on the school premises." *Id.* at 271 (emphasis added). Thus, the Court continued to recognize "the standard articulated in *Tinker*"—not the *O'Brien* test—as the general rule "for determining when a school may punish student expression," *id.* at 272, initiated not for curricular or other official school purposes but solely for purposes of interpersonal communication.

Most recently, this Court addressed the validity, under the First Amendment, of a school's decision to punish or restrict student speech in *Morse v. Frederick*, 127 S. Ct. 2618 (2007). In *Morse*, the Court confronted a First Amendment challenge to a principal's decision to suspend a student for displaying, at a school-supervised event, a banner appearing to advocate illegal drug use. Just like the *Fraser* and *Kuhlmeier* Courts, the *Morse* Court began by reaffirming *Tinker*'s holding that "students do not 'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.'" *Id.* at 2622 (quoting *Tinker*, 393 U.S. at 506). The Court simply explained that the *Tinker* rule is not "absolute," *id.* at 2627, when, "in light of the special characteristics of the school environment," *Tinker*, 393 U.S. at 506, student speech implicates "serious and palpable" dangers. *Morse*, 127 S. Ct. at 2629. As in *Fraser*, the *Morse* Court concluded that the proper functioning of the school (there, protecting students through its policy prohibiting advocacy of illegal drug use) outweighed the student's right to engage in his choice of personal expression on the school campus (there, speech appearing to advocate illegal

drug use). Notably, as in *Tinker*, *Fraser*, and *Kuhlmeier*, the Court did *not* apply the *O'Brien* test.

Taken together, this Court's student speech cases consistently have recognized that the general rule applicable to a restriction of student speech on the public school campus is *Tinker*'s "material and substantial interference" test, which requires a school, when attempting to "alter[] the usual free speech rights" of public school students, *Morse*, 127 S. Ct. at 2638 (Alito, J., concurring), to identify a concrete danger to "some special characteristic of the school setting," *id.*, that would justify the restriction. In other words, when a school's challenged policy "does not relate to regulation of the length of skirts or the type of clothing, to hair style, or deportment," *Tinker*, 393 U.S. at 507-08, but instead "involves direct, primary First Amendment rights akin to 'pure speech[,]'" *id.*, such as the wearing of armbands or a choice among messages incorporated into clothing, a heightened standard of scrutiny is required to afford adequate protection to students' speech rights.

The application of *O'Brien* by the Fifth Circuit here thus sharply departs from this Court's instructions in *Tinker* and fails to strike the appropriate balance between the school's legitimate interests in order and discipline and the constitutional freedoms to which public school students are entitled. Because the decision below departs from this Court's precedents on the governing constitutional standard, this decision exerts a profoundly unsettling effect upon the law. This Court should therefore grant review.

## B. THE DECISION BELOW MARKS A DEPARTURE FROM THIS COURT'S DECISIONS WHICH CLARIFY THAT THE PURPOSE OF THE *O'BRIEN* TEST IS TO ANALYZE RESTRICTIONS IMPOSED ON EXPRESSIVE CONDUCT, NOT PURE SPEECH.

As the Court enunciated the standard in *O'Brien*, "when 'speech' and 'nonspeech' elements are combined in the same course of *conduct*, a sufficiently important governmental interest in regulating the *nonspeech* element can justify *incidental* limitations on First Amendment freedoms." 391 U.S. at 376 (emphasis added). By its own terms, the *O'Brien* test is intended only for application to physical *conduct*—like burning a flag or draft card—that is intended to express an idea. Further, *O'Brien* applies only when any restrictions on First Amendment freedoms—such as the exercise of "pure speech"—are *incidental*. Thus, the *O'Brien* test is relevant for determining whether activity not otherwise constitutionally protected should nevertheless be afforded protection under the First Amendment because of its expressive nature. It is entirely inapposite where, as here, pure speech—the written or spoken word—is the intended target of the regulation.

This Court first announced the *O'Brien* test in 1968 in the context of the destruction of a selective service registration certificate. *O'Brien*, 391 U.S. 367. The Court distinguished between "speech," on the one hand, which enjoys full protection under the First Amendment, and "conduct intend[ed] . . . to

express an idea," *id.*, which enjoys such protection only when it is restricted *because of* its expressive nature, and the government fails to demonstrate that the restriction serves a sufficiently important interest. Applying this standard to O'Brien's conduct, the Court held that the government's interests in prohibiting the "independent noncommunicative" element—destruction of the draft card—was sufficient to outweigh any *incidental* restriction on the exercise of O'Brien's First Amendment rights—the communication of his anti-war message. *Id.* at 382. Subsequent decisions of this Court have likewise recognized that *O'Brien* applies to *conduct*, as distinguished from pure speech. *See, e.g., Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 65-66 (2006); *McConnell v. FEC*, 540 U.S. 93, 250 (2003); *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 567 (2001).

By contrast, the instant case centers on a school district's *direct* regulation of the written word, a means of communication this Court has labeled "pure speech," which falls squarely within the protections of the First Amendment. *See, e.g., Texas v. Johnson*, 491 U.S. 397, 404 (1989) (recognizing distinction between "speech," which clearly encompasses dissemination of the "written word," and "conduct," which is "intend[ed] . . . to express an idea"); *Tinker,* 393 U.S. at 505-06 ("'pure speech' . . ., we have repeatedly held, is entitled to comprehensive protection under the First Amendment") (citing *Cox v. Louisiana*, 379 U.S. 536, 555 (1965); *Adderley v. Florida*, 385 U.S. 39 (1966)).

This Court has expressly acknowledged that "[t]he government generally has a freer hand in restricting

expressive conduct than it has in restricting *the written* or spoken *word*." *Johnson*, 491 U.S. at 406 (emphasis added). Because this Court has "limited *O'Brien*'s relatively lenient standard" to "regulations of noncommunicative *conduct*," that are "unrelated to the suppression of free expression," *id.* at 403, 407 (emphasis added) (quoting *O'Brien*, 391 U.S. at 377), its application by the Fifth Circuit to a school policy restricting pure student speech marks a sharp departure from this Court's relevant decisions.

## CONCLUSION

Because the decision below departs from and conflicts with controlling precedent from this Court, the Court should grant the petition for certiorari.

Respectfully submitted,

Jay Alan Sekulow
*Counsel of Record*
Walter M. Weber
Carly F. Gammill
American Center for Law & Justice
201 Maryland Avenue, N.E.
Washington, DC 20002
(202) 546-8890

*Counsel for Amicus Curiae*

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