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 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

BRIEF FOR THE RESPONDENT IN OPPOSITION

DANIEL R. ORTIZ JAMES E. RYAN *University of Virginia School of Law* *Supreme Court Litigation Clinic* *580 Massie Road* *Charlottesville, VA 22903* *(434) 924-3127*	SARA HARDNER LEON *Counsel of Record* WILLIAM CARR BEDNAR, JR. *Powell & Leon, LLP* *1706 W. 6th Street* *Austin, TX 78703* *(512) 494-1177* DAVID T. GOLDBERG *Donahue & Goldberg, LLP* *99 Hudson Street, 8th Fl.* *New York, NY 10013* *(212) 334-8813*

Blank Page

QUESTIONS PRESENTED

1. Whether intermediate scrutiny, the standard this Court traditionally uses to assess content-neutral regulations of speech, is the proper standard to assess the constitutionality of a content-neutral school dress code?

2. Whether the court of appeals correctly applied that standard to the facts of this case?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Constitutional Provisions

Blank Page

BRIEF FOR THE RESPONDENT IN OPPOSITION

STATEMENT

A. Factual Background

This case challenges the constitutionality of a comprehensive, school-wide dress code adopted to "maintain an orderly and safe learning environment, increase the focus on instruction, promote safety and life-long learning, and encourage professional and responsible dress for all students." Pet. App. 30. Respondent Waxahachie Independent School District (Waxahachie) adopted the dress code after finding that student dress issues consumed too much administrative time and attention, Tr. 20:1-21:3, and that limiting printed messages on clothing would reduce distractions in the classroom, allowing students to better focus their attention on schoolwork. Tr. 22:4-11. In developing the dress code, no school official ever expressed an intent or desire to regulate or suppress student political speech or any particular message. Tr. 22:4-11; Tr. 28:6-12; Tr. 34:18-23.

Before implementing the dress code, school officials engaged in an extensive policy development and review process. Tr. 18:5-22:3; Tr. 24:21-26:14. School officials reviewed over forty other school dress codes, took trips to see dress code enforcement in action, and reviewed data regarding the impact of such codes on other schools. Pet. App. 17.

Waxahachie learned that discipline had improved in those schools and that stricter dress standards had furthered the schools' educational missions and improved safety and security. Tr. 25:11-26:12; Tr. 18:6-23. Though it considered requiring school uniforms, Waxahachie ultimately adopted a dress code, believing that educational objectives could still be served while allowing students some choice in the style of their clothing. Tr. 26:15-27:12; Pet. App. 3 n.2.

Waxahachie adopted its dress code on May 21, 2007. Pet. App. 41. The initial version prohibited students from wearing printed messages on t-shirts unless the messages related to school clubs, school spirit, school sports teams, or a university. Pet. App. 37. Other portions of the dress code prohibited low-cut necklines, spiked jewelry, torn clothing, and too-short shorts, skirts or dresses. Pet. App. 38-41.

On September 21, 2007, petitioner, Paul ("Pete") Palmer, went to school wearing a t-shirt with "San Diego" written on it. Pet. App. 2. An assistant principal told him that his shirt violated the dress code, *id.*, and that he would not be permitted to return to class until he changed into acceptable clothing. 3 R. 431. Petitioner then called his parents and asked his father to bring his "John Edwards for President '08" t-shirt for him to wear instead. *Id.* at 430-431. The assistant principal told him that he would not be allowed to wear the Edwards t-shirt because it also contained a printed message. Pet. App. 2. Petitioner put on a plain t-shirt and returned to class. His parents later filed an appeal using the

school grievance process. The principal denied petitioner's appeal, and the district superintendent agreed. *Id.*

B. Proceedings in the District Court

In the spring of 2008, the District began an internal review of the dress code, and began considering changes. On April 1, 2008, petitioner sued Waxahachie under 42 U.S.C. § 1983, claiming that the dress code violated his freedom of speech under the First Amendment. Pet. App. 2. He requested, among other things, a preliminary injunction. *Id.* Four days prior to the district court hearing, Waxahachie amended the dress code after reviewing the recommendations of the administrative committee tasked with revising the policy. *Id.* at 3. The district court dismissed petitioner's motion for a preliminary injunction without prejudice. *Id.*

Waxahachie had tightened its policy to prohibit all but school-related messages on student clothing after finding that students had taken advantage of the prior exceptions to promote gang affiliation. Pet. App. 3. The new dress code continued to permit shirts printed with school-related messages. *Id.* at 3. It also permitted manufacturer's logos no larger than two inches by two inches. *Id.* at 31. While the dress code did not explicitly address accessories like political pins, buttons, or wrist bands, such items were covered, if at all, by Waxahachie's general policy that permits such items unless they are distracting, sexually explicit, or promote the violation of school rules. Pet. App. 4.

After receiving a copy of the revised dress code, petitioner submitted three shirts to Waxahachie for its reaction. Pet. App. 4. One was the original "John Edwards for President '08" t-shirt, one was a "John Edwards for President" polo shirt, and one was a t-shirt with "Freedom of Speech" printed on the front and the text of the First Amendment printed on the back. Waxahachie advised him that all three shirts would violate the dress code. *Id.*

Petitioner amended his Complaint in district court to challenge the new dress code. Pet. App. 4. The district court denied his request for a preliminary injunction, finding that he would not suffer irreparable harm because the dress code did not prevent him from conveying political messages through alternative means, like campaign buttons. *Id.* The district court never examined the remaining three requirements for a preliminary injunction: whether there was a substantial likelihood of success on the merits; whether the threatened injury if the injunction were denied would outweigh any possible harm resulting from the injunction being granted; and whether granting the injunction would not disserve the public interest. See Pet. App. 4-5.

C. Proceedings in the Court of Appeals

Petitioner appealed, challenging the district court's holding that denying a preliminary injunction would not cause him irreparable injury. Pet. C.A. Br. 20. The Fifth Circuit held that denying the preliminary injunction would indeed cause such

injury, assuming that petitioner's First Amendment rights were in fact being violated. Pet. App. 5. The court then examined whether petitioner could establish a substantial likelihood of success on the First Amendment point.

The Fifth Circuit began with this Court's admonition in *Tinker* v. *Des Moines Indep. Comty. Sch. Dist.*, 393 U.S. 503 (1969), that "students [do not] shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," Pet. App. 6 (quoting *Tinker*, 393 U.S. at 506), and summarized *Tinker*'s holding as "[s]chools can restrict student speech only if it materially interferes with or disrupts the schools' operation and cannot suppress expressions of feelings with which they do not wish to contend." *Id.* at 7 (internal quotation marks and citations omitted). It then noted that "since *Tinker,* every Supreme Court decision looking at student speech has expanded the kinds of speech schools can regulate," and described these subsequent holdings as allowing schools to prohibit sexually explicit, indecent, or lewd speech, *Bethel Sch. Dist. No. 403* v. *Fraser*, 478 U.S. 675, 685 (1986), to regulate school-sponsored speech, *Hazelwood Sch. Dist.* v. *Kuhlmeier*, 484 U.S. 260, 273 (1988), and to prohibit speech "advocating illegal drug use," *Morse* v. *Frederick*, 551 U.S. 393, 403 (2007). *Id.*

The Fifth Circuit rejected petitioner's argument that these decisions established a "bright-line rule that schools cannot restrict speech that is not disruptive, lewd, school-sponsored, or drug-related." Pet. App. 7. Such a "categorical rule," it held, was

"flawed, because it fails to include another type of student speech restriction that schools can institute: content-neutral regulations." *Id.* at 7-8. The Fifth Circuit explained that the *Tinker* line of cases "all addressed disciplinary action by school officials directed at the political content of student expression, not content-neutral regulations such as school uniforms." *Id.* at 8 (internal quotation marks omitted). Viewpoint- and content-neutral regulations of school speech, the court therefore held, are not governed by the *Tinker* line of cases but by the traditional standard used to assess such regulations outside of school: intermediate scrutiny, as first articulated by this Court in *United States* v. *O'Brien*, 391 U.S. 367 (1968); Pet. App. 8–9.

In so holding the Fifth Circuit followed its earlier decision in *Canady* v. *Bossier Parish Sch. Bd.*, 240 F.3d 437 (5th Cir. 2001). *Canady*, as the Fifth Circuit noted, has itself been followed by three other circuits, see Pet. App. 9 & n.6 (citing *Bar-Navon* v. *Brevard County Sch. Bd.*, 290 F.App'x 273, 276–277 (11th Cir. 2008); *Jacobs* v. *Clark County Sch. Dist.*, 526 F.3d 419, 428–434 (9th Cir. 2008); *Blau* v. *Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 392–393 (6th Cir. 2005). No court of appeals, by contrast, has expressed disagreement with *Canady*.

The Fifth Circuit rejected all three of petitioner's arguments that *Canady* should not control. First, it held that "[n]othing in Justice Alito's concurrence or the majority opinion in *Morse* overruled *Canady*." Pet. App. 10. That case, it found, "involved a school's targeting specific speech and did not concern content-

neutral regulation," a distinction it found "critical and controlling." *Id.* Second, it rejected petitioner's attempt to distinguish *Canady* as involving "a uniform rather than a dress code" as making "a distinction without a difference." *Id.* at 11. "A uniform code," it noted, "is merely a strict version of a dress code" and petitioner's distinction, if accepted, "would spawn endless line-drawing litigation" because courts would have to "decide when a dress code is strict enough to be considered a uniform." *Id.* The court further noted that to treat dress codes differently from uniforms "would punish those school districts that adopt dress codes rather than uniforms because their students cannot afford uniforms" and would "perverse[ly] push[ ] schools to adopt uniforms rather than dress codes that give students some clothing choice." *Id.* Third, it rejected petitioner's argument that *Canady* applied only to facial, not to as-applied, challenges to dress codes. That position, it found, "make[s] no sense." *Id.* Intermediate scrutiny should apply in both contexts. *Id.* at 11–12.

The Fifth Circuit then considered whether Waxahachie's dress code was content-neutral. Pet. App. 12. Petitioner argued that the dress code was in fact a content-*based* restriction since it allowed students to wear brand name clothing with modestly-sized logos or shirts bearing school-related messages, but not those with messages non-germane to the school environment. *Id.*; Pet. C.A. Br. 19 n.6; see also Pet. C.A. Reply Br. 11. The Fifth Circuit noted, however, that this Court had held that "[t]he principal inquiry in determining content-neutrality * * * is whether the government has adopted a

regulation of speech because of disagreement with the message it conveys." *Id.* at 13 (citing *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989), *reaff'd in Hill* v. *Colorado*, 530 U.S. 703, 719 (2000)). Under that test, it held, "the dress code is content-neutral." *Id.* at 14. The court held that Waxahachie is in no way attempting to suppress any student's expression, and its allowance for school logos and school-sponsored shirts "does not suppress unpopular viewpoints but provides students with more clothing options than they would have had under a complete ban on messages." *Id.*

The court of appeals then applied the intermediate scrutiny test from *O'Brien*. Under that test, a content-neutral regulation passes constitutional muster: (1) "if it furthers an important or substantial government interest;" (2) "if the interest is unrelated to the suppression of student expression;" and (3) "if the incidental restrictions on First Amendment activities are no more than is necessary to facilitate that interest." Pet. App. 8 (citing *Canady*, 240 F.3d at 443).

Petitioner challenged the dress code only under the first and third prongs of the test, arguing that the dress code did not further "an important or substantial governmental interest." Pet. App. 15.

Waxahachie asserted that the dress code furthered several important interests, including "maintain[ing] an orderly and safe learning environment, increas[ing] the focus on instruction, promot[ing] safety and life-long learning, * * *

encourag[ing] professional and responsible dress for all students[,] reduc[ing] administrative time spent enforcing the code, and promot[ing] the school and its activities." Pet. App. 15. The court of appeals held that "[Waxahachie's] stated interests *all* qualify under the first prong [of intermediate scrutiny.]" *Id.* at 16 (emphasis added).

It noted, moreover, that petitioner was actually making a different argument. He did "not take issue with the school board's claimed interests" but instead argued that permitting political statements on pins, wrist-bands, and other accessories nullified these proffered benefits. Pet. App. at 17. The court of appeals found, however, that the distinction between messages on shirts and on accessories made sense:

> Because shirts are large and quite visible, banning them while allowing buttons would still cause less distraction and promote an orderly learning environment. Buttons and pins are also less prominent than are shirts and therefore require less attention from and regulation by teachers. Another District goal—promoting professional and responsible dress—still functions as well, because students are prepared for a working world in which pins and buttons may be appropriate at work but large, stark political message t-shirts usually are not.

Id. at 18. And "even if, *arguendo,* [it] were to find the distinction between messages on shirts and messages on buttons odd, [the court of appeals] recognize[d] that the teachers and administrators who establish these rules know better than [the courts] how the distinction will function in schools." *Id.* "The determination of where to draw lines on dress code decisions 'properly rests with the school board, rather than with the federal courts.'" *Id.* at 19 (quoting *Hazelwood*, 484 U.S. at 267).

Petitioner's argument, the court also noted, was "somewhat ironic." Pet. App. 19. He "requests that [the court] strike down the dress code *because* the District gave him [other avenues] to express himself. He argues that, to survive intermediate scrutiny, the code must allow him no options at all." *Id.* It rejected this "perverse reasoning" because it would cause "school districts [to] rush to impose the strictest dress code possible or * * * require school uniforms." *Id.*

Finally, the Fifth Circuit held that "[the dress code] passes [intermediate scrutiny's] third prong." Pet. App. 21. Since "[it did] not restrict student dress outside of school and provide[d] students with some means to communicate their speech during school," the court of appeals found, the policy restricted no more speech than was "necessary to achieve [Waxahachie's] goals." *Id.* at 20–21. It thus affirmed the district court's denial of a preliminary injunction.

REASONS FOR DENYING THE PETITION

I. THE FIFTH CIRCUIT CORRECTLY DETERMINED THAT INTERMEDIATE SCRUTINY APPLIES TO CONTENT-NEUTRAL REGULATIONS OF STUDENT SPEECH, AS HAVE ALL OTHER CIRCUIT COURTS FACED WITH THE QUESTION

A. There Is No Circuit Split Regarding the Constitutional Status of Content-Neutral Regulations Of Student Speech

Contrary to petitioner's contention, Pet. 19–23, there is no conflict among the courts of appeals over the constitutional standard governing First Amendment challenges to content-neutral regulations of student speech in public schools. Petitioner claims that a split exists between the Fifth, Ninth, and Sixth Circuits, all of which decline to apply the *Tinker* disruption standard to content-neutral regulations of student speech, and the Second and Third Circuits, which petitioner claims apply the *Tinker* standard to such regulations. Pet. 14–25.[1] This claim blurs the

---

[1] Petitioner also cites to a non-precedential decision from a Florida district court for the proposition that the courts disagree as to the scope of *Tinker*'s holding. Pet. 19 (quoting *Bar-Navon* v. *Sch. Bd. of Brevard County, Fla.*, No. 6:06-cv-1434-Orl-19KRS, 2007 WL 3284322, at *5 (M.D. Fla. Nov. 5, 2007)). In fact, the Eleventh Circuit, in an unpublished decision in the same case, upheld the application of intermediate scrutiny to a content-neutral school dress code. *Bar-Navon* v. *Brevard Cty. Sch. Bd.*, 290 Fed. App'x at 277.

clear distinction between viewpoint-neutral regulations that incidentally impact student expression and school regulations that censor a particular viewpoint.

Neither this Court nor any court of appeals has ever applied the *Tinker* disruption test to content-neutral regulations of student speech. The Fifth Circuit joins the Sixth and Ninth Circuits in holding that intermediate scrutiny applies to content-neutral regulations, such as student dress and grooming policies. The Second and Third Circuit decisions relied on by petitioner, by contrast, involve content- or viewpoint-based restrictions, and therefore do not pose any conflict over the proper standard to apply to content-neutral regulations.

In a strikingly similar dress code case, the Ninth Circuit in *Jacobs* explained that "the *Tinker* test has only been employed when a school's restrictions have been based, at least in part, on the particular messages students were attempting to communicate." 526 F.3d at 431. In a carefully reasoned and thorough decision, the court concluded that intermediate scrutiny, which is the standard applied to content-neutral regulations of speech outside of schools, should apply within schools as well.[2] *Id.* at 434.

---

[2] The *Jacobs* court noted that "[i]f anything, the scrutiny should be even less demanding," as "'the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings, and * * * the rights of students must be applied in light of the special characteristics of the school environment.'" 526 F.3d at 434 n.34 (quoting *Morse* v. *Frederick*, 551 U.S. 393, 396–397 (2007)).

The Sixth Circuit has also declined to apply the *Tinker* disruption test to content-neutral regulations of student speech. In *M.A.L.* v. *Kinsland*, 543 F.3d 841 (6th Cir. 2008), the court analyzed restrictions on student distribution of leaflets in the hallways during school hours. The *Kinsland* plaintiffs argued that content- and viewpoint-neutral regulations on literature distribution should be subject to the *Tinker* test and therefore held invalid unless the distribution was likely to cause substantial disruption. *Id.* at 845–846.

The court emphatically rejected the argument that *Tinker* should apply to content-neutral regulations of student speech, emphasizing that "the school officials in *Tinker* sought to silence the student because of the particular viewpoint he expressed, while the Jefferson school authorities have merely sought to regulate the time, place, and manner of [plaintiff's] speech irrespective of its content or his viewpoint." *Id.* at 849. Thus the school district "need not satisfy [*Tinker*'s] demanding standard merely to impose a viewpoint-neutral regulation of the manner of [plaintiff's] speech to prevent hallway clutter and congestion." *Id.* at 850. To hold otherwise, the court observed, "would produce numerous legal anomalies, the most obvious of which is that schools would have less discretion over the use of school facilities than is exercised by any other public entity over any other forum on public property. This is not the law." *Id.* See also *Blau*, 401 F.3d at 391–393 (applying intermediate scrutiny to uphold a content- and viewpoint-neutral dress code).

The Fifth Circuit recently reaffirmed the application of intermediate scrutiny to content-neutral school regulations that impact student speech in *Morgan* v. *Plano Indep. Sch. Dist.*, --F.3d.--, 2009 WL 4265219. "We have made plain that time, place, and manner is the proper standard for evaluating content and viewpoint neutral regulations of student speech and [only] when a school imposes content or viewpoint based restrictions the court will apply *Tinker*." *Id.* (internal quotations and citations omitted.)

The Sixth Circuit, together with the Fifth and Ninth Circuits, are the only courts to address the constitutional status of content-neutral dress code regulations in schools. For dress regulations, like other content-neutral regulations impacting student speech, these courts of appeals have consistently and correctly decided that intermediate scrutiny is the proper standard and that *Tinker* does not apply.

The decisions of the Second and Third Circuits cited by petitioner are not to the contrary because those cases directly involved content- or viewpoint-*based* speech restrictions. In *Guiles* v. *Marineau*, 461 F.3d 320 (2d Cir. 2006), a student was disciplined for wearing a t-shirt critical of President George W. Bush as the "Chicken-Hawk-In-Chief" and an abuser of alcohol and drugs. *Id.* at 326. The court applied *Tinker* because both *Tinker* and the case at hand presented "political viewpoint-based discrimination." *Id.* Similarly, *Saxe* v. *State College Area Sch. Dist.*, 240 F.3d 200 (3d Cir. 2001), involved a challenge to

an anti-harassment policy, which the court explicitly determined involved content-or viewpoint-based restrictions on student speech. The court cited and applied *Tinker* because "school[s] may not prohibit speech based on the mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular *viewpoint*." *Id.* at 215. (internal quotation marks and citation omitted, emphasis added). Neither court addressed what standard might govern content- and viewpoint-*neutral* regulation of student speech. Consequently those decisions are not in conflict with the decision in this case.

Petitioner attempts to concoct a conflict from dicta. Petitioner quotes language from the Second and Third Circuit opinions, divorced from the factual contexts of those cases, which he contends establishes that those courts would apply the *Tinker* standard to content-neutral regulations of student speech. Pet. 20. That amounts to speculation, given that the cases did not involve content-neutral regulations. A speculative conflict is no substitute for a real one, as the Ninth Circuit's experience illustrates. In 1992, in a viewpoint discrimination case, the Ninth Circuit broadly declared "that the standard for reviewing the suppression of vulgar, lewd, obscene, and plainly offensive speech is governed by *Fraser,* school-sponsored speech by *Hazelwood,* and all other speech by *Tinker*." *Chandler* v. *McMinnville Sch. Dist.*, 978 F.2d 524, 529 (9th Cir. 1992) (citations omitted and emphasis added). Then 16 years later, the court encountered for the first time a content-neutral student dress code. In *Jacobs*, the court eschewed

Tinker and instead found itself obliged to apply intermediate scrutiny, clarifying its broad declaration in *Chandler* and distinguishing that decision – as well as *Tinker* – on the ground that it involved a viewpoint-based restriction on speech and thus did not control. 526 F.3d at 428–432.

Petitioner cites to cases from the Fourth and Seventh Circuit, but significantly, he does not claim they are in conflict with the Fifth Circuit. Those decisions, just as in the Second and Third Circuits, involved content-based speech restrictions. As with *Saxe*, the Seventh Circuit, in *Nuxoll* v. *Indian Prairie Sch. Dist.*, 523 F.3d 668 (7th Cir. 2008), applied *Tinker* to a policy prohibiting written or oral "derogatory comments" referring to "to race, ethnicity, religion, gender, sexual orientation, or disability." *Id.* at 670. Judge Posner described the issue in *Tinker* as "discriminat[ion] against a particular point of view, namely opposition to the Vietnam war expressed by the wearing of black armbands." *Id.* at 674. Nor was the Fourth Circuit faced with a content-neutral restriction in *Newsom* v. *Albemarle County Sch. Bd.*, 354 F.3d 249 (4th Cir. 2003). The dress code in *Newsom* prohibited "messages on clothing * * * that relate to drugs, alcohol, tobacco, weapons, violence, sex, vulgarity, or that reflect adversely upon persons because of their race or ethnic group," and the student in that case was prohibited from wearing a t-shirt depicting weapons because of the assistant principal's disagreement with the message it conveyed. *Id.* at 252–253.

There is no disagreement, much less a deep division, among the courts of appeals. All circuits that have addressed viewpoint-neutral regulation of student speech have come to the same conclusion as the Fifth Circuit, and with all relevant courts in agreement, review by this Court is unwarranted.

B. Intermediate Scrutiny Is The Proper Standard For Content-Neutral Regulation of Student Speech

The Fifth Circuit correctly decided to apply intermediate scrutiny to content-neutral school dress codes.[3] As this Court famously declared in *Tinker*, "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." 393 U.S. at 506. But neither do students and teachers *acquire* additional rights at the schoolhouse gate. Extending *Tinker* as urged by petitioner would, anomalously, grant students in public schools greater

---

[3] The Fifth Circuit was correct to apply intermediate scrutiny to the school's dress code under both the test for restrictions on expressive conduct, articulated in *O'Brien*, as well as the so-called "time, place, and manner" test for viewpoint- and content-neutral restrictions on "pure speech." This Court's application of those tests confirms that there is "little, if any, differen[ce]" between the two tests. *Clark* v. *Comty. for Creative Non-Violence*, 468 U.S. 288, 299 (1984); see also *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 661–662 (1994). Petitioner's suggestion, made in the questions presented, see Pet. i, that it is incorrect to apply intermediate scrutiny to content-neutral regulations of "pure speech" is thus without merit.

free speech protections than adults have outside of school.

While this Court has addressed the extent to which schools may engage in content- or viewpoint-*based* regulation of speech, the Court has never indicated that content-neutral regulations, such as uniform and dress codes, are impermissible in schools if they also restrict some non-disruptive speech. It is clear from *Tinker* and its progeny that students in public schools have speech rights, but because of the need "to prescribe and control conduct in the schools," *Tinker*, 393 U.S. at 507, the scope of speech protections is specially-tailored to the school setting. *Tinker* and the school speech cases that followed arose in the context of regulations discriminating based on content or viewpoint Petitioner nonetheless argues that *Tinker* and its progeny preclude the application of intermediate scrutiny to a content-neutral dress code. This view turns the *Tinker* line of cases on its head.

Justice Alito's concurrence in *Morse* v. *Frederick*, 551 U.S. 393 (2007) does not further petitioner's argument. In *Morse*, the student was disciplined for displaying a banner expressing a pro-drug use viewpoint. Justice Alito's concern was with the dangerous breadth of the "educational mission" argument advanced by the petitioners and the United States, which he saw as potential license for viewpoint discrimination: "The 'educational mission' argument would give public school authorities a license to suppress speech on political and social issues based on disagreement with the viewpoint

expressed. The argument, therefore, strikes at the very heart of the First Amendment." *Morse*, 551 U.S. at 423 (Alito, J., concurring)

Justice Alito wished to foreclose any interpretation of the majority opinion that would authorize school boards to engage in viewpoint discrimination by the simple expedient of adopting a converse point of view as their "educational mission." But Justice Alito was dealing with the viewpoint discrimination case before him, not a dress code. Accordingly, Justice Alito "join[ed] the opinion of the Court on the understanding that the opinion does not hold that the special characteristics of the public schools necessarily justify any other speech restrictions." *Morse*, 551 U.S. at 422 (Alito, J., concurring).

But the application of intermediate scrutiny to content-neutral regulations is not based on "the special characteristics" of the school setting. It is a generally applicable speech rule. This Court has never suggested that students have *more* free speech protections in school than outside of them.

Even adults in public settings may have reasonable restrictions placed on the exercise of their speech rights: "the First Amendment does not guarantee the right to communicate one's view at all times and places or in any manner that may be desired." *Heffron* v. *Int'l Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 647 (1981). Even in traditional public forums, such as a park or a public street, the government may impose reasonable

restrictions on the time, place or manner of protected speech. See, *e.g., Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989); *Perry Educ. Ass'n* v. *Perry Local Educators' Ass'n,* 460 U.S. 37, 45 (1983); *Hill* v. *Colorado*, 530 U.S. 703, 720 (2000) (upholding limits on approaching another for the purpose of "engaging in 'oral protest, education, or counseling'"); *United States* v. *Kokinda*, 497 U.S. 720 (1990) (upholding prohibition against soliciting on a sidewalk adjacent to a post office); *Int'l Soc'y for Krishna Consciousness, Inc.* v. *Lee*, 505 U.S. 672, 684 (1992) (upholding restrictions on speech rights in airport terminals); *City Council of City of Los Angeles* v. *Taxpayers for Vincent,* 466 U.S. 789 (1984) (applying intermediate scrutiny to prohibition against posting of signs on sidewalks, utility poles, and similar public structures).

Tinker does not change those fundamental principles of First Amendment law in their application to a school context. Expression by students in school may be limited by reasonable and equally applied time, place, and manner restrictions. *Shanley* v. *N.E. Indep. Sch. Dist.,* 462 F.2d 960, 970 (5th Cir. 1972). Under petitioner's reading of *Tinker,* schools would transform not merely into a public forum, but a super-public forum, in which time, place, and manner limitations are invalid.

Petitioner seeks to create a false dichotomy between the rule articulated in *Tinker* and the standard laid down in *O'Brien.* But *Tinker* is not, as petitioner asserts, distinguishable from cases like *O'Brien* and *Canady* because *Tinker* deals with "pure

speech" while the other cases deal with expressive conduct. *Tinker* itself involved expressive conduct–the silent wearing of plain black armbands. 393 U.S. at 504. As with burning a draft card, sleeping in a public park, or wearing non-uniform school clothes, it was the expressive content of the wordless conduct that brought First Amendment considerations into play. See *id.* at 505; cf. *Clark,* 468 U.S. at 298–299. The relevant distinction is not in the form of the expression but in the form and scope of the regulation.

Tinker involved a ban against black armbands because the wearers intended to express a particular viewpoint. The school district permitted the wearing of political buttons and other politically-charged symbols like the Iron Cross but singled out black armbands for prohibition because they were being worn to oppose the war in Vietnam. 393 U.S. at 510–11. It was not the prohibition of armbands or other apparel items in general, but the suppression of one particular opinion without evidence of material and substantial interference with schoolwork or discipline that was not constitutionally permissible. *Id.* at 511.

Tinker remains the rule for testing the validity of a viewpoint–based regulation of student speech in public schools. But it says nothing about the validity of a content- and viewpoint–neutral policy that restricts students' clothing only during school hours reserved for the schools' core mission of education. See *Jacobs,* 526 F.3d at 432. Like the statute upheld in *Hill* v. *Colorado,* Waxahachie's dress code is not a

regulation of speech so much as a regulation of the places where and times when some speech may occur. 530 U.S. at 719. *Tinker* is not a stand-alone doctrine that transforms schools into super–public forums in which students enjoy rights greater than adults in traditional forums. Reasonable time, place, and manner restrictions on permitted expression–like those in Waxahachie's dress code–are governed by First Amendment jurisprudence other than *Tinker*. See, *e.g.*, *Linmark Assocs., Inc.* v. *Willingboro Twp.*, 431 U.S. 85, 93 (1977) ("[L]aws regulating the time, place, or manner of speech stand on a different footing from laws prohibiting speech altogether.").

The Ninth Circuit clearly articulated the rationale of this approach in *Jacobs*. The court began by noting that *Tinker* did not fully resolve "the question of how restrictions upon expressive conduct in schools should be evaluated" and that "the holding itself extends only to viewpoint-*based* speech restrictions, and not necessarily to viewpoint-*neutral* speech restrictions." *Jacobs*, 526 F.3d at 430. The court then explained why intermediate scrutiny should apply to content-neutral regulations, such as uniform and dress codes:

> Applying intermediate scrutiny to school policies that effect content-neutral restrictions upon pure speech or place limitations upon expressive conduct (or, as is the case here, do both) not only strikes the correct balance between students' expressive rights and schools' interests in furthering their educational

> missions, but, as the Fifth Circuit explained, is entirely consistent with the Supreme Court's other school speech precedents, not to mention the remainder of the Court's First Amendment jurisprudence.

Id. at 434. Like all the other courts of appeals that have addressed this issue, the Ninth Circuit held that a content-neutral dress code passed constitutional muster. *Id.* at 428–437.

The approach taken by the Fifth Circuit in this case is necessary to the proper functioning of public schools in the United States. Petitioner's proposed rule would effectively invalidate not only dress codes like the one here, but uniform codes as well. A uniform code would certainly qualify as a content-neutral regulation incidentally burdening speech. Yet under petitioner's broad rule, not even important government interests and narrow tailoring could justify a uniform code if, in its application, it prohibited a single student from wearing a "John Edwards" or "San Diego" t-shirt—as it necessarily would. School districts around the country are looking closely at what dress and uniform code options they have to ensure that our public schools are safe and effective educational environments. Petitioner would take many of these options off the table, effectively handcuffing school boards in this pursuit.

II. PETITIONER'S SECOND QUESTION DOES NOT MERIT THIS COURT'S REVIEW

A. The Second Question Concerns The Application of Well-Established Precedent To The Facts Of This Case

Petitioner also asks this Court to review whether the Fifth Circuit correctly applied intermediate scrutiny to the facts of this case. This question does not warrant review. There is no conflict among the circuits on this point. Petitioner is thus left to argue that the Fifth Circuit erred in its application of well-established precedent to the specific facts of this case. Correcting the fact-bound application of settled law does not, ordinarily, supply a basis for granting certiorari. Even if it did, there is no error to correct in this case.

B. The Court Of Appeals Properly Applied Intermediate Scrutiny To The Facts Of This Case

The Fifth Circuit applied the well-known intermediate scrutiny test first set forth in *O'Brien*, 391 U.S. at 377. As the court explained, to pass this test, the dress code: (1) must "further[ ] an important or substantial government[al] interest;" (2) the interest must be "unrelated to the suppression of student expression;" and (3) "the incidental restrictions on First Amendment activities [must be] no more than is necessary to facilitate that interest." Pet. App. 14–15 (internal quotation marks omitted). Petitioner challenged only the first and third prongs

of the test, and the court of appeals correctly held that he did not show a likelihood of success on the merits.

The court first held that *all* of the school's stated interests were undoubtedly of sufficient importance to survive intermediate scrutiny. Pet. App. 16. The court stated that it is difficult to conceive "of a governmental interest more important than the interest in fostering conducive learning environments for our nation's children." *Id.* (internal quotation marks omitted) (quoting *Jacobs*, 526 F.3d at 435–436). The court found that the dress code furthered these interests by reducing the distractions created by large logos and messages, and by preparing students for a "working world in which pins and buttons may be appropriate at work but large, stark political message t-shirts usually are not." Pet. App. 18.

The court also found that reducing time spent administering the code was important to furthering the school's educational mission, as was promoting school spirit. *Id.* at 16. And properly so–after all, time teachers expend determining compliance with the code is time not spent teaching. Under the third prong of the analysis, the court then found that the restriction was not broader than necessary because the dress code affected students only during the school day and did not affect other means of communication. *Id.* at 20–21.

Petitioner does not question the importance of the school's interests, but instead argues that "these

interests do not apply, because the board's ban on shirts is undermined by allowing students to wear pins, buttons, wrist-bands, and bumper stickers containing messages." Pet. App. 17. His problem with the dress code, presumably, is that it does not restrict *enough* speech.

As the court of appeals observed, that is an argument that is both ironic and perverse. Pet. App. 19–20 (quoting *Metromedia, Inc.* v. *City of San Diego*, 453 U.S. 490, 540 (1981) (Stevens, J., dissenting in part)). It is ironic because it would require "that, to survive intermediate scrutiny, the code must allow him no options at all." Pet. App. 19. It is perverse because it would put Waxahachie to a Hobson's choice. If alternative forms of expression are not permitted, Waxahachie cannot show that its code is no stricter than necessary under the third prong of intermediate scrutiny. If they are permitted, according to petitioner, the entire code fails for failing to advance the school's interests. The court of appeals properly declined to subject schools to this dilemma. *Id.* at 19–20.

In assessing the school's dress code—and doing so in the context of a preliminary injunction—the Fifth Circuit was appropriately sensitive to the school environment. School administrators and teachers need sufficient flexibility to advance the goals of educating the nation's youth. See, *e.g.*, *Hazelwood*, 484 U.S. at 267. In this case, the school undertook a careful process to formulate a dress code that was easily administered yet permitted alternative avenues of expression. After some experience with

that code and further study, the school amended it to reduce the opportunities for gangs to signal membership through their choice of clothing. See Pet. App. 3 n.2. School officials should be encouraged to find ways of balancing the rights of students with the need for an orderly learning environment, while maintaining their ability to adapt to new and unforeseen circumstances.

The court of appeals displayed proper sensitivity to the school's need for discretion and its comparative advantage in knowing how to design a workable dress code while respecting the speech rights of students. Petitioner's argument that the Fifth Circuit erred in its application of intermediate scrutiny to the facts of this case is without basis, as is his fleeting attempt to bolster the significance of the decision by suggesting without explanation that it has broad implications beyond the school context. See Pet. 30.

III. THE INTERLOCUTORY POSTURE OF THIS CASE MAKES REVIEW UNNECESSARY AND UNWISE

This Court's practice establishes that review of interlocutory decisions, such as the denial of a preliminary injunction, should only be undertaken in extraordinary circumstances. See, *e.g.*, *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916) ("[E]xcept in extraordinary cases, the writ is not issued until final decree."); see also *American Constr. Co.* v. *Jacksonville, T. & K.W. R.R. Co.*, 148 U.S. 372, 384 (1893); *Va. Military Inst.* v. *United*

States, 508 U.S. 946 (1993) (Opinion of Scalia, J., respecting denial of the petition for writ of certiorari).

There is nothing extraordinary about this case. It involves a First Amendment challenge to the dress code of a single school, which hardly makes it unique. It also involves a well-reasoned decision that is consistent with the views of all other circuits to have considered the same question.

Adhering to the policy against interlocutory review is especially sensible in this case, as a decision by this Court would not even decide the preliminary injunction issues, much less the merits. There are four distinct criteria which must be met for a court to grant a preliminary injunction. The courts below only considered two–irreparable harm and likelihood of success on the merits. Thus, even if Petitioner were to succeed before this Court, the courts below would still have to consider the balance of harm and the public interest before deciding whether to grant a preliminary injunction. The case is hardly ready for review here.

This is not a case, moreover, where partially resolving the preliminary injunction would in effect decide the merits of the case. If the Court affirmed the application of intermediate scrutiny, both Petitioner and respondent would be entitled to introduce more evidence to bolster their contentions. The district court never resolved, for example, whether all school-related t-shirts have to be individually approved by the principal or whether the t-shirts simply have to relate to extracurricular clubs

and organizations that have themselves been approved by the principal. See Pet. App. 25 ("I don't think it's all that clear whether the school approval has to be of the club, or the school approval has to be of the shirt.").

Even if this Court were to apply *Tinker,* the question of whether petitioner's conduct posed a threat of substantial disruption would have to await later resolution on the merits. Waxahachie stipulated only that the original "John Edwards" t-shirt sought to be worn on September 21, 2007 was not disruptive under the circumstances of that single day. Waxahachie has never conceded that allowing repeated exceptions to its dress code would not cause disruption. See Pet. C.A. Br. 13–14; Answer to Plaintiff's Amended Verified Complaint 6, 8; Agreed Stipulation of Facts ¶ 11. The larger questions of disruption and threat of disruption remain unanswered and cannot be decided on this limited factual record. At best, this Court could only partially resolve the preliminary injunction and the merits. That consideration alone should foreclose review.

IV. PETITIONER'S ATTEMPT TO RAISE THE QUESTION OF WHETHER THE DRESS CODE IS CONTENT-BASED OFFERS ANOTHER REASON TO DENY THE PETITION

In framing the issues, petitioner concedes the content–neutrality of the dress code as indeed he must to assert that the circuits are split over

content-*neutral* regulations of student speech. Pet iii. He argues in particular that this case presents an "optimal" or "ideal" vehicle for resolving the supposed conflict. Pet. 2, 14-25.

In the courts below, petitioner argued just the opposite–that the dress code was the very model of a content-based restriction, and for that reason the *O'Brien* test should not apply.[4] Pet. C.A. Br. 41 n.6. Petitioner repeats that argument here, albeit rather softly. Down in a footnote, for example, petitioner murmurs that the Fifth Circuit erred in "deem[ing] the restriction on Pete's political speech content neutral." Pet. 9 n.1. Later, petitioner frets over the Fifth Circuit's failure to grasp that "the speech restriction actually challenged by Pete" was "why a policy banning some words and allowing others approved by the government is content neutral." Pet. 28. Yet the only questions petitioner presents for this Court's review clearly assume that Waxahachie's dress code *is* content neutral. Pet. i.

So which is it to be? In continuing to argue that the dress code was actually content-*based*, petitioner defeats his own assertion that this case presents an "optimal vehicle" for reviewing a content-*neutral* dress code. Pet. 2. Petitioner cannot frame one set of

---

[4] *Amici* in support of the petition also argue that the Fifth Circuit erred in concluding that respondent's dress code is content-neutral. See, *e.g.*, Br. for Cato Institute, et al., as *Amici Curiae* at 13–18. Indeed, some *amici* explicitly argue that "[t]his Court should grant the writ because the school district's dress code is not content-neutral." Br. for Baruch & Walker as *Amici Curiae* at 10–11.

questions in seeking this Court's review, but then turn around and slip a quite different question under the door in the body of his petition. Whether the dress code was content-based could not be reached by this Court if review were granted, as that issue is not "fairly included" in the questions presented. See Sup. Ct. R. 14.1(a); see also, *e.g.*, *Caspari* v. *Bohlen*, 510 U.S. 383, 388 (1994). Nonetheless, petitioner's persistence in advancing this argument ensures that it will remain a point of contention at the merits stage, rendering this case far from an "optimal vehicle" for addressing the questions actually presented by petitioner.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DANIEL R. ORTIZ JAMES E. RYAN *University of Virginia School of Law* *Supreme Court Litigation Clinic* *580 Massie Road* *Charlottesville, VA 22903* *(434) 924-3127*	SARA HARDNER LEON *Counsel of Record* WILLIAM CARR BEDNAR, JR. *Powell & Leon, LLP* *1706 W. 6th Street* *Austin, TX 78703* *(512) 494-1177* DAVID T. GOLDBERG *Donahue & Goldberg, LLP* *99 Hudson Street, 8th Fl.* *New York, NY 10013* *(212) 334-8813*

December 4, 2009.

Blank Page