

## **INTERESTS OF *AMICUS CURIAE***

*Amicus Curiae* The Drug Policy Alliance (“The Alliance”) brings to this appeal a keen commitment to reducing adolescent drug use and drug-related harms, a distinctive and studied interest in affirming the constitutional safeguards afforded drug-related speech, and an in-depth understanding of the prolonged and heated public debate about the legal status of marijuana in Alaska which shaped Mr. Frederick’s expressive choices at issue here. Established in 1994, The Alliance, formerly The Lindesmith Center, is a non-profit, non-partisan organization with more than 20,000 members nationwide dedicated to broadening public discussion about the nation’s drug laws and promoting drug policies grounded in science, compassion, public health, and respect for human rights.

To these ends, The Alliance has devoted substantial resources to address the issue of adolescent alcohol and drug use. The Alliance has helped assess the efficacy of current school-based drug programs, improve drug use prevention messages, and advocate for proven interventions to stem substance misuse.

Through its Office of Legal Affairs, The Alliance has vigorously challenged governmental attempts to censor and suppress drug-related speech and religious freedoms, successfully litigating two such First Amendment cases in this Court. *See Conant v. Walters*, 309 F.3d 629 (2002), *cert. denied* 2003 U.S. LEXIS

7446 (Oct 14, 2003) (affirming physicians’ First Amendment right to recommend medical marijuana to patients); *Guam v. Guerrero*, 290 F.3d 1210 (2002) (declaring the Religious Freedom Restoration Act protects the sacramental use of cannabis by Rastafarians in the federal territory of Guam).

In light of its institutional mission and legal experience, The Alliance is able to provide critical perspective and material information beyond that offered by the parties to assist this Court in its First Amendment analysis.

### **INTRODUCTION AND SUMMARY OF ARGUMENT**

Joseph Frederick, eighteen and idealistic, was engaging in an age-old form of expression – political satire – when, on a January morning in 2002, he and his friends stood on a public sidewalk holding a banner that read “Bong Hits 4 Jesus” as the Olympic Torch Relay traveled through the streets of Juneau, Alaska. His stated reason for this display was to protest what he perceived to be an erosion of civil liberties: “I just wanted to show that – to reassure myself that this is America. I have a Bill of Rights. . . . [T]he Constitution doesn’t just protect [] deep speech . . . .” ER 16, p. 60.

The free speech message that Mr. Frederick sought to convey referenced a robust and highly public debate concerning the legal status of marijuana – a debate that has gripped Alaskans for more than a quarter century, has led to the (repeated) intercession of all three branches of state government, and has

reverberated on the national political scene loud enough to prompt White House intervention. This brief begins by providing this Court with a fuller understanding of the historical, political and cultural contexts in which Mr. Frederick's speech took place and from which it cannot be divorced when assessing its First Amendment implications.

To be sure, Mr. Frederick's use of pop-culture slang juxtaposed with a jarring religious reference was disturbing to some, humorous to others, and nonsensical to most. Indeed, it is difficult, if not impossible to divine from his banner a single, discernible meaning. But the fundamental flaw of Appellees' position is not that they believed that the banner conveyed a message that it did not, though their argument errs in this respect. Rather the flaw is in the sweeping rationale that they proffer for censoring and punishing Mr. Frederick's speech: that Mr. Frederick's reference to marijuana was likely to provoke or exacerbate student drug use, endanger student safety, or imperil school order. Appellees' actions and argument boil down to the dubious claim that speech that references drug is synonymous with drug use. This Court should reject this premise as unfounded.

First, the facts of this case require that Appellees' actions be judged under the strict scrutiny standard. When Mr. Frederick held up his banner he was eighteen years of age, permissibly absent from school, standing on a public

thoroughfare, observing a city-wide event of national and international significance. Moreover, although some students at the high school chose to view the event as it passed in front of their school, the Olympic Torch Relay was not properly considered a school-sponsored event: attendance was not mandated, nor did school officials undertake special measures to organize the student body. For these reasons, the “student speech” doctrine, with its lesser First Amendment protections, does not apply here.

Second, if the Court disagrees with the application of strict scrutiny, then this case should be analyzed under the standard set forth in *Tinker v. Des Moines School District*, 393 U.S. 503 (1969). Although Mr. Frederick’s speech can perhaps be characterized as opaque and ill-conceived, it could not be “reasonably forecasted ... [to] substantially disrupt, or materially interfere with, school activities.” *Chandler v. McMinnville Sch. Dist.*, 978 F.2d 524, 530 (9<sup>th</sup> Cir. 1992) (*paraphrasing Tinker*, 393 U.S. at 514). Accordingly, it should not have been suppressed.

Third, in declaring unconstitutional Appellees’ suppression of Mr. Frederick’s speech, the Court will neither render school anti-drug policies unworkable nor give a green light to adolescent drug use. A substantial and increasing body of research shows that punitive, “zero-tolerance” school drug policies like that enforced by Appellees against Mr. Frederick are ineffective – and

may even be counterproductive – in preventing or reducing student substance abuse. There are better methods that schools can employ to reduce adolescent drug use than swift, mandatory and harsh punishments for purported transgressions, particularly where they involve drug-related speech, not drug use. In the end, the suppression of such speech could well lead to the inhibition of free communication between students and school personnel, a result antithetical to the worthy goal of preventing problematic drug use .

For these reasons, *amicus curiae* ask the Court to reverse the District Court’s order and direct entry of judgment in favor of the appellant, Joseph Frederick.

## **ARGUMENT**

### **I. The Lower Court’s Decision Should Be Reversed Because It Improperly Restricts and Punishes Political Speech That is Part of a Vigorous and Ongoing Public Debate.**

Mr. Fredrick’s reasons for engaging in his public demonstration in January of 2002 were clear:

I just wanted to show that – to reassure myself that this is America. I have a Bill of Rights. I have the right to do something, whether [] somebody finds it offensive or somebody doesn’t agree with it [] I could have used another phrase and still been going for the same message. [] I mean, the Constitution doesn’t just protect [] deep speech or legal speech.

ER 16, p. 60. The banner angered the principal of his high school, Deborah Morse, who considered the sign an affront to the school’s anti-drug policies. Principal

Morse confiscated the banner and ordered Mr. Fredrick, who had not been to school that day, to her office, and suspended him from school for ten days.<sup>1</sup>

Contrary to the District Court's characterization of the case as being limited to whether the school correctly found that "Frederick's statements directly contravened the Board's policies relating to drug abuse prevention," *Frederick v. Morse et. al.*, No. J02-0008 CV (JWS), slip.op. at 10 (D. Alaska May 29, 2003), this case concerns core issues of freedom of expression.

To properly understand the speech at issue, it must be viewed in the political and cultural context in which it occurred. Specifically, Mr. Fredrick's sign must be situated in Alaska's ardent public debate concerning marijuana policy, a debate that was set off in the mid 1970's by an Alaska State Supreme Court ruling, and has subsequently grown in intensity and expanded in scope over the ensuing decades. This debate has repeatedly bubbled over into the legislature, onto the ballot box, and back into the courts, reaching an apparent zenith by January 2002 when Mr. Frederick unfurled his banner.

**A. Alaska Has Experienced a Lengthy and Vibrant Debate – at the Ballot Box, in the Legislature, and Before the Courts – Regarding the Legal Status of Marijuana.**

At the heart of Alaska's debate over the legal status of marijuana is a 1975 decision by that state's Supreme Court, *Ravin v. State*, 537 P.2d 494 (Alaska

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<sup>1</sup> When called into the principal's office, Mr. Frederick made clear his motivation

1975) in which the court invalidated the portion of Alaska’s drug law criminalizing the possession of small amounts of marijuana in one’s home. The Court in *Ravin* held that the “citizens of the State of Alaska have a basic right to privacy in their homes under Alaska’s Constitution . . . [which] encompass[es] the possession and ingestion of substances such as marijuana in a purely personal, non-commercial context.” *Ravin*, 537 P.2d at 504. As the court made clear, the *Ravin* decision flowed from the unique and powerful provision of the Alaska Constitution establishing that “[t]he right of the people to privacy is recognized and shall not be infringed,” Alaska Const. art. I, § 22, a provision which, unlike the federal constitution, recognizes the independent “right to be left alone.” *Ravin*, 538 P.2d at 515. Alaska’s strong constitutional guarantee of privacy rights no doubt flows from its distinct history of strong individualism tied to its being America’s “last frontier,” a refuge for people fleeing the “lower 48.” As a result of these cultural and historical factors, Alaska became the first, and is to date, the only state in the Union that constitutionally prevents the state government from prohibiting private consumption of small amounts of marijuana in one’s home. Andrew S. Winters, Note, *Ravin Revisited: Do Alaskans Still Have a Constitutional Right to Possess Marijuana in the Privacy of Their Homes?*, 15 Alaska L. Rev. 315, 319 (1998).

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for displaying the banner by quoting Thomas Jefferson on free speech.

The *Ravin* decision prompted a strong outpouring of public opinion, provoking cheers of support, protestations of anger, and calls for reform. See *The Private Use of “Pot” – A Growing Public Issue*, U.S. News & World Report, April 28, 1975, at 37. The ruling received extensive coverage not just statewide but nationally and internationally. See e.g., *Alaska Marijuana Law Overturned*, Facts on File World News Digest, June 7, 1975 at 399 C3; *Court Dilutes Pot Law: Ruling Says Constitution Protects Home Use*, Anchorage Daily Times, May 27 1975, at 1; *Pot and Privacy*, Newsweek, June 9, 1975, at 66. The *Ravin* decision initiated public debate that has continued to this day, climaxing around the time the Olympic torch passed through Juneau in 2002.

In the wake of *Ravin*, the Alaska legislature amended the then-existing marijuana laws, exempting marijuana from the criminal penalties for possessing controlled substances. Alaska Stat. § 17.12.110(a) (repealed 1982). At the same time, the legislature prohibited the public use of marijuana in a fashion that mirrored the law prior to *Ravin*, Alaska Stat. § 17.12.110(d) (repealed 1982), while also making possession by an adult of any amount of marijuana for personal use – conduct that the supreme court had protected in *Ravin* – punishable by a civil fine rather than a criminal penalty, Alaska Stat. § 17.12.110(e) (repealed 1982).

Debate ensued regarding whether or not the new legislation complied with *Ravin*. In 1982, the legislature again revamped Alaska’s drug laws, this time

excising the civil fines while permitting the possession of up to four ounces of marijuana in a private place, thereby eliminating any potential inconsistencies between the penal code and the *Ravin* decision. *See Noy v. State*, 2003 Alas. App. LEXIS 167 at \*8-9 (Aug. 29, 2003) (outlining statutory reforms to Alaska's marijuana laws).

Whether deserved or not, Alaska gained an international reputation for having “legalized” marijuana. This reputation did not sit well with many Alaskans, who undertook repeated efforts to re-criminalize marijuana. *See generally* Albert DeChiara & John F. Galliher, *Dissonance and Contradictions in the Origins of Marijuana Decriminalization*, 28 *Law & Soc’y Rev.* 41, 55 (1994). In 1985 and again in 1987, bills to amend the Alaska Constitution to expressly exclude marijuana use and possession from the right to privacy were introduced in the legislature but did not pass.<sup>2</sup>

In 1990, these legislative failures fed increasing public discontent culminating in Ballot Measure 2, which sought to invalidate the *Ravin* decision by re-criminalizing marijuana possession in private places. The initiative received the strong backing of the first Bush Administration and then-Director of the White

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<sup>2</sup> *See* S.J.R. 16, 14<sup>th</sup> Leg., 1<sup>st</sup> Sess. (Alaska 1985); S.J.R. 4, 15<sup>th</sup> Leg., 1<sup>st</sup> Sess. (Alaska 1987). In 1989, the legislature again attempted unsuccessfully to criminalize possession of small amounts of marijuana. *See generally* S.B. 18, 16<sup>th</sup> Leg., 1<sup>st</sup> Sess. (Alaska 1989); H.B. 88, 16<sup>th</sup> Leg., 1<sup>st</sup> Sess. (Alaska 1989).

House Office of National Drug Policy – the so-called “Drug Czar” – William Bennett, who traveled to Alaska and campaigned aggressively for its passage. *See* Jeff Berliner, *Bennett Stumps Alaska to Outlaw Legal Marijuana*, UPI, Oct. 26, 1990. For the White House, Alaska represented a battleground for the hearts and minds of America concerning drug policy generally, and marijuana policy specifically. In stumping for this ballot measure, Mr. Bennett squarely placed Alaska in the national spotlight. *See* Jeff Berliner, *Alaska Protest Draws Pro-Marijuana Forces*, UPI, Nov. 5, 1990; Charles P. Wohlforth, *Off the Pot*, New Republic, Dec. 3, 1990, at 9; *Donahue Show: Showdown Over Pot Smoking in Anchorage, Alaska* (NBC television broadcast, Nov. 16, 1990).

The initiative passed with 55 percent of the vote. The debate, however, did not abate. Instead, questions arose whether its passage could legally overrule the constitutionally-grounded *Ravin* decision. *See generally* Andrew S. Winters, Note, *Ravin Revisited*, 15 Alaska L. Rev. 315 (1998). Alaskans for Privacy, a civil libertarian organization, filed suit challenging the legal legitimacy of the initiative and overcame the State’s motion to dismiss. *Alaskans for Privacy v. State*, No. 3AN-91-1746, slip. op. (D. Alaska Jan. 21, 1992). The suit, however, was dropped when litigation funds ran out. *See* Andrew S. Winters, Note, *Ravin Revisited*, 15 Alaska L. Rev. 315, 328 (1998). The underlying issue, though, resurfaced in 1993 when a lower state court, applying *Ravin*, expressly

discounted the language of the 1990 initiative and dismissed the case of a defendant charged with simple marijuana possession for personal use. *State v. McNeil*, No. 1KE-93-947 CR, slip op. at 5 (D. Alaska Oct. 29, 1993).

By 1998, the year that Joseph Fredrick entered high school, the debate turned to the legalization of marijuana for medicinal purposes. Ballot Measure 8, which passed with 58 percent of the vote, removed state-level criminal penalties for the use, possession and cultivation of marijuana for medical purposes with the recommendation of a physician. *See* Alaska Stat. § 11.71.090 (Michie 2003). Like previous marijuana legislation, Measure 8 provoked heated discourse throughout Alaska, even inspiring a group of Juneau-Douglas High School students to form “Juneau’s Teens Against Ballot Measure 8.” Paysha Stockton, *Marijuana Vote Sparks Passion on Both Sides*, Juneau Empire, Oct. 29, 1998, available at <http://www.juneauempire.com/stories/102998/pot.html>. The following year, the legislature courted more controversy when it mandated patients using medical marijuana pursuant to Measure 8 to enroll in a state-run registry. *See* Alaska Stat. §17.37.010 (Michie 2003).<sup>3</sup>

In 2000, the organization Free Hemp in Alaska undertook the passage of Ballot Measure 5, which sought to decriminalize the possession and use of

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<sup>3</sup> *See* Cathy Brown, *Stricter Medical Pot Law Clears Major Hurdles*, Juneau Empire, May 18, 1999, available at [http://www.juneauempire.com/stories/051899/Loc\\_marijuana.html](http://www.juneauempire.com/stories/051899/Loc_marijuana.html).

marijuana in Alaska. The measure also contained sweeping provisions conferring amnesty for and monetary restitution to previously convicted marijuana law offenders. Alaska Division of Elections, *2000 General Election Ballot Measures*, available at <http://www.gov.state.ak.us/litgov/elections/oep2000/bm00.htm>.

Measure 5 spawned vigorous campaigns by both sides.<sup>4</sup> The initiative failed to pass, but garnered the unexpectedly strong support of 40 percent of the electorate. Buoyed by this showing, Free Hemp in Alaska drafted a less ambitious marijuana reform initiative and began actively gathering signatures to have it placed on the ballot.<sup>5</sup> See Timothy Inklebarger, *Marijuana Legalization Group Brings Effort to Juneau*, *Juneau Empire*, Sept. 19, 2002, available at <http://www.juneauempire.com/stories/index.html>.

This was the legal, political, and cultural context that was bubbling to a boil when the Olympic torch passed through Juneau and Mr. Frederick raised his

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<sup>4</sup> See Sam Howe Verhovek, *Alaska's Voters to Decide On Legalizing Marijuana*, *N.Y. Times*, Oct. 10, 2000 at A18 (reporting that initiative supporters were “visible all over Anchorage” and gathered more than twice the needed number of signatures to qualify for the ballot); Alaska Public Offices Commission, *Campaign summary: 2000 State General Year-End Report Filed March 28, 2001 By Free Hemp in Alaska*, available at <https://webapp.state.ak.us/apoc/index.jsp> (reporting campaign expenditures).

<sup>5</sup> Indeed, the debate continues. In 2002, Alaska’s Lieutenant Governor disqualified nearly half of the signatures supporting the new Free Hemp in Alaska initiative, and a state court recently ordered him to reconsider. See *Hinterberger v. State*, No. 3AN-03-0492 Civil, slip. op. (Alaska Superior Ct. Sept. 23, 2003). In August 2003, an Alaskan Court of Appeals reaffirmed *Ravin*’s central holding. *Noy v. State*, *Alas. App.* LEXIS 167 at \* 10 (August 23, 2003).

banner. Few other issues have held the attention of Alaskans for so long and with such intensity.<sup>6</sup> Against this backdrop, it is not surprising that Mr. Frederick chose marijuana as the subject on which to exercise his free speech rights.

**B. Alaska’s Marijuana Deliberations Are Part of a Larger National Discussion Concerning Drug Policy Reform.**

Mr. Frederick’s indirect yet public invocation of marijuana also must be viewed in the context of the vibrant drug policy debates that were reaching a peak elsewhere in the country by early 2002. Between 1996 and 2002, voters and legislatures in 46 states enacted over 150 notable drug policy reforms. Bill Piper et al., Drug Policy Alliance, *State of the States, Drug Policy Reforms: 1996-2002* 1 (2003), available at <http://www.drugpolicy.org/statebystate/sosreport/index.cfm>. From 1996 to 2000, 19 drug policy initiatives qualified for statewide ballots, 17 of which were enacted by voters. *Id.* at 2. Marijuana law reform comprised over one-half of the successful initiatives.<sup>7</sup>

In response to these initiatives, the federal government launched a media-based counter-offensive aimed at youth. In 1998, the year Joseph Frederick

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<sup>6</sup> Between 1997 and 2002, the Juneau Empire alone published 120 articles about drug policy. (Year by year search of *Juneau Empire* online archives, available at <http://www.juneauempire.com/stories/index.html>.)

<sup>7</sup> Ariz. Rev. Stat. § 13-3412.01 (Supp. 2002); Cal. H & S § 11362.5 ; Colo. Const. Art. XVIII, § 14; Haw. Rev. Stat. § 329-122 (Supp. 2002); Me. Rev. Stat. Ann. tit. 22, § 2383-B.5 (West Supp. 2001); Nev. Rev. Stat. § 453A.210 (Supp. 2001); Or. Rev. Stat. §§ 475.309, 475.306 (2001); Wash. Rev. Code §§ 69.51A.040, 69.51A.010 (Supp. 2003).

entered high school, the Clinton administration unveiled a five-year, 2 billion dollar anti-drug media campaign, *Clinton to Launch Nationwide Anti-Drug Media Campaign*, U.S. Newswire, July 9, with a primary goal of “prevent[ing] youth from initiating use of drugs, especially marijuana.” Robert Hornik et al., National Institute on Drug Abuse, *Evaluation of the National Youth Anti-Drug Media Campaign: Fourth Semi-Annual Report of Findings*, 2-1 (May 2002). The White House campaign broadcast anti-drug messages nationwide through television, radio, in-school television, magazines, the internet, and other venues targeted at youth. *Id.* at 1-1. Between August 1999 and June of 2001, “76 percent of all youth recalled weekly exposure to anti-drug ads.” *Id.* at xx. By 2002, the federal government had spent just shy of one billion dollars on this campaign. Vanessa O’Connell, *Drug Czar Says Ad Campaign Has Flopped*, Wall St. J., May 14, 2002, at B1.

As a result, by 2002, a typical Alaskan high school student would have been inundated with messages about marijuana from all sides. Accordingly, it is understandable, if not downright foreseeable, that a politically engaged high school student like Mr. Frederick would gravitate towards drug policy as a topic to provoke debate about free speech.

## **II. Mr. Frederick’s Speech Was Unlawfully Suppressed and Punished.**

*Amicus curiae* join with the Juneau School Board in its recognition of the risks posed by adolescent alcohol and drug use and applaud its commitment to the prevention and reduction of drug-related harms. The Board’s laudable goals, however, do not confer upon the District or its employees unbounded discretion to suppress and/or punish speech simply because it makes reference to drugs. To be sure, Principal Morse appears to have acted out of a sincere, if misplaced, belief that Mr. Frederick’s banner was so potent in form and compelling in content that it promoted, or was likely to provoke, student drug use in a manner “inconsistent with their avowed mission to promote a healthy, drug free learning environment.” Defendant’s Cross Motion for Summary Judgment, p. 18. But for the reasons stated below, legal precedent makes clear that disapproval and even fear of the perceived message(s) conveyed by Mr. Frederick are not adequate grounds for suppressing his expressive conduct and punishing him for his speech.

### **A. A Strict Scrutiny Test Applies to the District’s Actions Because Mr. Frederick’s Speech Took Place Outside of School and Beyond The Jurisdiction of School Administrators.**

The District Court erred by failing to credit a threshold fact that is determinative of which legal precedent controls this case: Mr. Frederick was not within the school’s purview when he publicly displayed his banner. Accordingly, the case law governing student speech in the confines of public schools is

inapplicable under a fair reading of the facts presented here. Instead, the application of the school's anti-drug policies against Mr. Frederick amounted to a content-based restriction of speech in a public forum, and case law governing the repression of such speech by state actors applies. In order to pass muster, the suppression of such speech in a public forum must survive the strictest of constitutional scrutiny: it must serve a compelling government interest and be narrowly tailored to pursue these ends. *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37, 45 (1983); *ACLU v. City of Las Vegas*, 333 F.3d 1092, 1099 (2003)

On the day in question, Mr. Frederick, who was eighteen years of age, had not stepped foot inside the school or even crossed onto school grounds prior to attending the Olympic Torch Relay. Appellant's Opening Brief, p. 3.<sup>8</sup> He drove to the event and parked his car several blocks from the school. At the Torch Relay, he did not congregate in front of the school with the majority of students who had chosen to attend the event, but rather stood among members of the general public, on the other side of the thoroughfare from the school, well apart from school premises and without the school as a backdrop. *Id.* at 2. It was from this vantage point that Mr. Frederick unfurled his banner at the very moment in the proceedings that he felt maximized his ability to communicate his message to the greatest

audience: when the Torch Relay (and the accompanying television cameras) passed him by. *Id.* at 4. In fact, Mr. Frederick crossed onto school property that day only after Principal Morse, who left the school campus and crossed the street to confront Mr. Frederick and confiscate his banner, ordered Mr. Frederick to report to her office.

Moreover, viewing the Olympic Torch Relay was not a school-sponsored event. Students were allowed to go the event, but their attendance was not mandated. The school did not organize students to view the event as a student body, did not require students to stay with their classmates, and did not prevent or even warn against students from leaving the area altogether. Appellant's Opening Brief, p. 3. And of those students who did leave school to watch the event, most stood on school property or on the street directly in front of the school, and not across the street with Mr. Frederick. *Id.*<sup>9</sup>

These facts refute Appellees' claim that the school had the jurisdictional authority to sanction Mr. Frederick for purportedly violating the school's anti-drug policies. Absent this jurisdiction, this case does not involve school speech. Instead, this case should be analyzed under the strict scrutiny test

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<sup>8</sup> Mr. Frederick had absented himself from classes that morning – a prerogative he could exercise as an adult. *See* Alaska Stat. § 25.20.010 (Michie 2003).

<sup>9</sup> If the record is unclear as to whether the event was school-sponsored, then the Summary Judgment Order should be reversed and the case remanded to the trier of fact for a determination on this point.

applicable to government attempts to place content-based restrictions on speech by members of the general public undertaken in a public forum. The authority to restrict expression in public fora is “very limited,” *Boos v. Barry*, 485 U.S. 312, 318 (1988), authority that Principal Morse clearly lacked.

Protecting free discourse in the marketplace of ideas is a core principle of our democracy. Courts have consistently “recognized that the First Amendment reflects a ‘profound national commitment’ to the principle that ‘debate on public issues should be uninhibited, robust, wide-open’ . . . and have consistently commented on the central importance of protecting speech on public issues.” *Boos*, 485 U.S. at 318, quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). This principle has been extended even to discourse that is unpopular, opaque, nonsensical, ill-conceived, or immature. Any one (or several) of these adjectives might describe the message “Bong Hits 4 Jesus.” But from this fact it does not follow that Mr. Frederick’s speech was subject to censorship.

Sidewalks are the quintessential public fora. They “have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.” *Hague v. CIO*, 307 U.S. 496, 515 (1939); *see also ACLU*, 333 F.3d at 1099 (finding an outdoor mall to be a public forum for first amendment analysis); *Carey v. Brown*, 447 U.S. 455 (1983)

("[A]ccess to [sidewalks] for the purpose of exercising such rights cannot constitutionally be denied broadly and absolutely.") (*quoting Hudgens v. NLRB*, 424 U.S. 507, 515 (1976)).

Here, Appellees' actions must be assessed under the strictest standard of scrutiny. "[F]or a State to enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling interest and that it is narrowly drawn to achieve that end." *Perry Education Association*, 460 U.S. at 45; *see also Boos*, 485 U.S. at 321-22; *ACLU*, 333 F.3d at 1098.

The rationale advanced by Principal Morse for suppressing and punishing Mr. Frederick's speech was that his reference to "Bong Hits" could cause students to disregard the school's anti-drug policies and engage in illicit drug use to the detriment of their health and everyone's safety. Assuming for the sake of argument that the school's desire to create a drug-free environment presents a compelling interest on behalf of the school, it is open to serious question that the school's jurisdiction (and hence its anti-drug policies) applies to adult students who publicly express themselves outside of class and off of school property. In other words, it is doubtful the school could claim *any* legal interest in suppressing Mr. Frederick's speech, and certainly not a compelling one.

Even if the school's anti-drug policies somehow did apply to Mr. Frederick, and that creating a drug-free school is a compelling state interest,

the manner in which the District targeted and suppressed Mr. Frederick's speech was not narrowly tailored to achieve this interest. At best, the justification proffered by Principal Morse for her actions reflects "an undifferentiated fear or apprehension of disturbance" which is not enough to overcome the right to freedom of expression. *Tinker*, 393 U.S. at 508.

What Appellees cannot satisfactorily explain is how, exactly, the opaque, even nonsensical message "Bong Hits 4 Jesus" is in fact a clarion call to the community's youth to commit illegal acts of drug taking. Or how, more generally, drug speech – as opposed to actual drug use – jeopardizes the District's goal of achieving a drug-free student body. To be sure, research has shown that this form of punishment may exacerbate rather than curb drug use and experimentation among adolescents (*See* Section III below). Yet the District has "seize[d] upon the censorship of particular words" – here, 'bong' and 'hit' – "as a convenient guise for banning the expression of unpopular views." *Cohen v. California*, 403 U.S. 15, 26 (1971). The First Amendment forbids this. To hold otherwise would enable school officials to suppress, censor or punish all expressive references by students to alcohol and drugs anywhere near a school, impermissibly chilling freedom of expression.

**B. If The School Had Jurisdiction Over Mr. Frederick’s Speech, (Which Amicus Contend It Did Not) Then the *Tinker* Analysis Applies.**

The parties argue at length about which of the three legal standards regulating student speech should apply: *Tinker*, 393 U.S. 503; *Hazelwood v. Kuhlmeier*, 484 U.S. 260 (1988); or *Bethel School District v. Fraser*, 478 U.S. 675 (1986). If this Court refuses to apply the more stringent constitutional protections required by the public forum analysis as urged above, then the Court should apply *Tinker* to the facts of this case. Mr. Frederick’s banner was not “vulgar, lewd, obscene [or] plainly offensive,” and therefore *Fraser* does not control. Nor does *Hazelwood* govern since under no rational interpretation would “students, parents, and members of the public might reasonably perceive [the sign] to bear the imprimatur of the school.” *Chandler v. McMinnville Sch. Dist.*, 978 F.2d 524, 529 (quoting *Hazelwood*, 484 U.S. at 271.)

The record does not support the contention that the message on Mr. Frederick’s banner was likely to “substantially disrupt or materially interfere with school activities,” *Chandler*, 978 F. 2d at 530 (paraphrasing *Tinker*, 393 U.S. at 514), a showing necessary to suppress his speech under *Tinker*. In fact, the District acknowledges that Mr. Frederick’s expressive conduct did not disrupt or

materially interfere with any subsequent classes.<sup>10</sup> And, as noted earlier, it begs reason to claim that satirical, somewhat opaque drug-related speech would realistically provoke student drug use.

### **III. Punishing Appellant for his Speech Fails to Advance and May Thwart the Goal of Achieving “Drug Free” Schools.**

#### **A. “Zero-Tolerance” School Drug Policies Like Those of The Juneau School District Fail To Prevent Experimentation and Use by Students.**

Appellees steadfastly claim that punishing Joseph Frederick for his banner display was consistent with, even essential to enforcing the school’s anti-drug policies and achieving a drug-free student body. Defendant’s Cross Motion for Summary Judgment, p. 20. As discussed above (and by Appellant and *Amicus Curiae* Student Press Law Center et. al.), the school’s punitive actions run afoul of the Constitution. But it is also important to point out that from a purely pragmatic perspective, the school’s punitive response to Mr. Frederick’s speech was *unlikely* to advance the school’s goal of preventing student alcohol and drug use, and may even seriously undermine the school’s efforts in this regard. This section discusses the growing body of research indicating that the District’s purported justification for punishing Mr. Frederick does not withstand scientific scrutiny. For the reasons discussed below, reversing the District Court’s decision and affirming

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<sup>10</sup> The record clearly states that “[d]efendants do not contend that display of the banner disrupted classroom work.” ER 31.

Mr. Frederick's First Amendment rights will not hamper – and may well promote – the school's laudable goal of combating drug use.

Juneau School District considers “alcohol and other drug use and dependency [to be] diseases,” and seeks to “encourage abstinence . . . for all students.” Juneau School Board Policy No. 5530R-1, p. 1, *available at* <http://www.jsd.k12.ak.us/district/policies/5000/5530.html>. To this end, the District adopted a “Chemical Use Discipline” policy, the hallmark of which is a “zero-tolerance” approach to drugs, characterized by swift, harsh, uniform and mandatory punishment of perceived infractions. Juneau School Board Policy No. 5530R-2 *available at* <http://www.jsd.k12.ak.us/district/policies/5000/5530.html>. Zero-tolerance policies “mandate predetermined consequences or punishments – ranging from suspensions to expulsion and transfer to alternative schools – for specific substance-related offenses, regardless of the circumstances or disciplinary history of the student involved.” National Center on Addiction and Substance Abuse at Columbia University, *Malignant Neglect: Substance Abuse and America's Schools* 38 (2001), *available at* [www.casacolumbia.org/usr\\_doc/malignant.pdf](http://www.casacolumbia.org/usr_doc/malignant.pdf).

It was pursuant to precisely this type of policy that Mr. Frederick was disciplined *not* for obtaining drugs, possessing drugs, using drugs, or distributing drugs, but for displaying a banner making apparent (nonsensical) reference to drugs. And the punishment meted out – suspension from school – was not the

sanctions levied for speaking out of turn, which results in school detention, but rather was pegged to the use or possession of controlled substances.<sup>11</sup> A substantial and growing body of research on schools' "zero tolerance" drug policies, like those enforced against Mr. Frederick, finds that they are ineffectual at combating school drug problems.

A meta-review of the research regarding zero tolerance drug policies was conducted by The Harvard Civil Rights Project ("the Project"). Advancement Project & Harvard Civil Rights Project, *Opportunities Suspended: The Devastating Consequences of Zero Tolerance and School Discipline Policies* 17 (2000) available at [http://www.civilrightsproject.harvard.edu/research/discipline/call\\_opport.php?Page=3](http://www.civilrightsproject.harvard.edu/research/discipline/call_opport.php?Page=3). The Project first noted that the scientific literature had tracked the ballooning of "zero tolerance" policies from their original purpose of harshly disciplining only the most serious offenses into a pervasive, across-the-board approach for handling all alleged drug infractions, from the most minor to

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<sup>11</sup> The Juneau School Board punishment for a first time drug use or possession is a suspension of up to ten days, Juneau School Board Policy No. 5530R-2 available at <http://www.jsd.k12.ak.us/district/policies/5000/5530.html>, the length of Joseph Frederick's suspension. The punishment for profanity or offensive speech by a high school student is detention for one to eight hours, or at most an in-school suspension of one to three days. JDHS Discipline Grid, Attachment Nine, Defendants Cross Motion for Summary Judgment available at <http://www.jsd.k12.ak.us/jdhs/>.

the severe.<sup>12</sup> Zero-tolerance policies, it was noted, have “become a philosophy of how to deal with children – extending to conduct typical of adolescents.”

Advancement Project & Harvard Civil Rights Project, *Opportunities Suspended* 17 (2000). The Project noted that there is little evidence that these punitive policies reduce drug use or improve school safety. *Id.* An analysis of National Center for Education Statistics data of school violence similarly found that after four years of implementation, schools with zero-tolerance policies are still less safe than school’s without zero-tolerance policies. Russell Skiba & Reece Peterson, *The Dark Side of Zero Tolerance Can Punishment Lead to Safe Schools*, 80 Phi Delta Kappan 372 (1999).

The abject failure of the ubiquitous Drug Abuse Resistance Education (D.A.R.E.) program, based on the same fundamental philosophy as zero tolerance programs, is also instructive. The D.A.R.E. program is a law enforcement-led series of classroom lessons that stresses the criminal sanctions associated with illicit drug use. Numerous evaluators and federal agencies and officials have

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<sup>12</sup> See e.g. Jessica Portner, *Suspensions Spur Debate Over Discipline Codes*, Educ. Wk., Oct. 23, 1996, at 10 (13-year-old suspended for possession of Midol tablets and 7<sup>th</sup> grader for having a bottle of Advil in her backpack); *6-Year-Old Suspended Over Lemon Drops*, Washington Post, Nov. 20, 1997, at A18.

concluded that D.A.R.E., premised on punitive messaging to children, simply does not work.<sup>13</sup>

Against this research backdrop, it would be inappropriate to simply credit the School District's commitment to combating drug use as sufficient grounds for suspending Mr. Frederick from school. The meritorious nature of the District's goal should not blind one to the fact that the District likely pursued that goal in unproven, ineffectual ways when it punished Mr. Frederick. There is a dearth of evidence that such a response advances the District's efforts to prevent student drug use. And, as the next section observes, there is mounting evidence that the District's punitive response in this case may well even thwart drug use prevention efforts.

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<sup>13</sup> See e.g. General Accounting Office, *Rep. No. GAO-03-172R, Youth Illicit Drug Use Prevention: DARE Long-Term Evaluations and Federal Efforts to Identify Effective Programs* 2 (Jan 16, 2003) (finding "no significant differences in illicit drug use between students who received D.A.R.E. [] and students who did not"); National Academy of the Sciences *Juvenile Crime, Juvenile Justice* 8 (Joan McCord et al. eds., National Academy Press 2001) (finding D.A.R.E "[had] counterproductive impacts among some populations"); Richard R. Clayton et al., *The Effectiveness of Drug Abuse Resistance Education (Project DARE): 5-Year Follow-Up Results*, 25 *Preventative Med.* 307, 317 (1996) (finding "[n]o statistically significant impact[] of the intervention [] with respect to [] marijuana use."); Susan T. Ennett et al., *How Effective Is Drug Abuse Resistance Education: A Meta-Analysis of Project DARE Outcome Evaluations*, 84 *Am. J. Pub. Health* 1394 (1994).

**B. Open Dialogue, and Mutual Trust Are The Most Effective Strategies in Preventing Adolescent Drug Use and Are Fully Consistent With Juneau School Board Policies.**

Zero-Tolerance policies are in part based on the idea that fear of punishment will deter students from trying alcohol and drugs, or from graduating from experimentation into regular use.

It is increasingly clear, however, that the implementation of zero tolerance drug policies do have a deterrent effect, but not of the sort envisioned by the policies' proponents. Rather than deterring drug experimentation and use, these policies appear to deter high school students and faculty from engaging in candid and open dialogue about the known risks and dangers of different types of drug use. Moreover, they frustrate the critically important efforts of educators and other school officials to foster trusting relationships with students so that they feel comfortable and safe in discussing problems with or concerns about drugs without fear of punishment.

As one nationally renowned drug researcher and drug education expert explains, punitive zero tolerance policies:

send mixed messages; blur the lines between use and abuse; use scare tactics . . . undermine the credibility of parents and teachers . . . [and] [t]oo often . . . ignore young people's exposure to drug use and fail to engage them in a meaningful way.

Marsha Rosenbaum, Ph.D., Drug Policy Alliance, *Safety First: A Reality Based Approach to Teens, Drugs, and Drug Education* 8, 12 (2002), available at <http://www.safety1st.org/pdf/safetyfirst.pdf>.

Trust and respect among and between students and educators is a key component of successful drug prevention strategies. Research shows that “[s]tudents who feel attached or connected to school – their teachers and classmates – use cigarettes, alcohol, and marijuana less frequently than students who do not feel connected to their school.” National Center on Addiction and Substance Abuse at Columbia University, *Malignant Neglect: Substance Abuse and America’s Schools* 54 (Sept. 2001). Students’ attachments to school are best cultivated by fostering “positive student-staff interactions, positive inter-student relationships, and a sense of student empowerment.” *Id.* In the context of public secondary education, where adolescents are maturing into young adults, and after which it is expected that many students will separate from their parents, enter the workforce or pursue further education, the most effective way to foster productive relationships and self-confidence is to establish a school environment where trust and open communication are valued, where the discussion of controversial issues is embraced, and where assertions can be questioned and assumptions explored.

Punitive zero-tolerance drug policies are often antithetical to this ethos. As an article published by *The American School Board Journal* observes,

In 39 of 40 focus groups, students described their school's primary drug policy as a matter of detention, suspension, and/or expulsion. Many described dismay at seeing classmates with substance-abuse problems removed from school, rather than being given help by trusted adults in the school setting. And they expressed interest in participating in drug education in a more supportive environment.

Joel H. Brown, *Listen to the Kids: When It Comes to Drug Education, Students Confirm What Research Says*, Am. School Board J., Dec. 1997, at 40. Fear of punishment – a *sine qua non* of zero tolerance drug policies – can have harmful consequences for students who seek reliable information about drugs and the risks of drug use, as well as for students in desperate need of assistance for a substance abuse problem. As the National Center on Addiction and Substance Abuse at Columbia University found, because “the consequences are often severe, zero-tolerance policies may discourage teachers, parents and other students from reporting instances of student substance use.” National Center on Addiction and Substance Abuse at Columbia University, *Malignant Neglect: Substance Abuse and America's Schools* 38 (Sept. 2001).

In recognition of this fact, the California State Parent Teachers Association adopted a resolution entitled “Student Substance Abuse: Alternatives to Zero Tolerance,” declaring that “[s]chool connectedness (the perceived caring from teachers and high expectations for student performance) was found to make a critical difference in whether or not students turned to alcohol and drugs” and urging schools to replace punitive zero tolerance policies with more nuanced

policies that engaged students in candid conversations about drugs, offered honest drug information, encouraged students to share their drug-related concerns with faculty, and provided confidential support services, counseling, and treatment for at-risk students. Cal. Parent Teachers Ass'n, *Student Substance Abuse: Alternatives to Zero Tolerance Resolution* (2003), available at <http://www.capta.org/sections/convention-2004/downloads/resolution-2003-StudentSubstAbuse-C.pdf>.

Punishing Mr. Frederick for his drug-related speech not only infringed upon his First Amendment freedoms, but also squandered an opportunity for educators and administrators to cultivate mutual trust and respect with students and to foster rational discussion to address what Appellees term the “disease” of drug abuse.

## CONCLUSION

For these reasons, *amicus curiae* respectfully request that this Court reverse the District Court's order and direct entry of judgment in favor of the Appellant, Joseph Frederick.

Respectfully submitted,

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