

Case No. 07-1409

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IN THE UNITED STATES  
COURT OF APPEALS FOR THE  
SIXTH CIRCUIT

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M.A.L., a minor child, by and through his parents  
and next friends, M.L. and S.A.,

*Plaintiffs-Appellee*

v.

STEPHEN KINSLAND, *et. al*

*Defendant-Appellants*

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF MICHIGAN

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AMICUS CURIAE BRIEF OF  
NATIONAL SCHOOL BOARDS ASSOCIATION, AMERICAN  
ASSOCIATION OF SCHOOL ADMINISTRATORS, NATIONAL  
ASSOCIATION OF SECONDARY SCHOOL PRINCIPALS, MICHIGAN  
SCHOOL BOARDS ASSOCIATION, OHIO SCHOOL BOARDS  
ASSOCIATION, AND THE TENNESSEE SCHOOL BOARDS  
ASSOCIATION  
IN SUPPORT OF APPELLANTS

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**UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT**

M.A.L.

v.

KINSLAND, *et. al*

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**DISCLOSURE OF CORPORATE AFFILIATIONS  
AND FINANCIAL INTEREST**

Pursuant to 6th Cir. R. 26.1, National School Boards Association, American Association of School Administrators, National Association of Secondary School Principals, Michigan Association of School Boards, Ohio School Boards Association and Tennessee School Boards Association make the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

**No.**

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

**No.**

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*Signature of Counsel*

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*Date*



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## STATEMENT OF INTEREST

The National School Boards Association represents the 95,000 school board members who govern our nation's local school districts. The American Association of School Administrators is composed of 14,000 local school system leaders dedicated to high quality education for all children. The National Association of Secondary School Principals serves 34,000 middle and high school education officials interested in the education and welfare of today's youth. The Michigan School Boards Association represents the state's 600 public school boards committed to advancing the quality of public education. The Ohio School Boards Association represents 99.9% of Ohio public schools boards seeking to advance public education through local citizen responsibility. The Tennessee School Boards Association serves the state's public school board members as a collective voice for public education and through specialized assistance and information. As organizations representing school boards and school administrators in this Circuit and throughout the nation, *Amici* have an interest in ensuring that the law governing the First Amendment rights of students is clear so that school officials are able to adopt and implement policies that respect students' constitutional rights while recognizing the need for schools to maintain safe and orderly environments that promote student learning. When court decisions, like the lower court ruling in

this case, result in more confusion for those responsible for educating our nation's children, there is a high cost to all involved.

This brief is filed with the consent of both parties pursuant to Federal Rule of Appellate Procedure 29(a).

## **ARGUMENT**

### **I. This Court Should Provide Public Schools With Clear Guidance As To The Legal Standard Governing Content-Neutral Time, Place, and Manner Restrictions On Student Speech**

Few areas of law confront school officials with more legal and political minefields than disputes over student speech. The courts themselves have acknowledged the confusion their rulings have created and “have described the tests these cases suggest as complex and often difficult to apply,”<sup>1</sup> with one federal appeals court lamenting the “unsettled waters of free speech rights in public schools, waters rife with rocky shoals and uncertain currents.”<sup>2</sup> If these questions present such difficulty for courts, they are more perplexing to those whose business is educating children. School personnel must not only develop policies consistent with these chaotic principles but also must implement these policies on a daily

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<sup>1</sup> *Morse v. Frederick*, No. 06-278, 2007 WL 1804317, at \*22 (U.S. June 25, 2007), (Breyer, J., concurring in part and dissenting in part) (citations omitted).

<sup>2</sup> *Guiles v. Marineau*, 461 F.3d 320, 321 (2d Cir. 2006), *cert. denied*, No. 06-757, 2007 WL 185179 (U.S. June 29, 2007).

basis, at a moment's notice, and usually without the luxury of extended legal consultation.<sup>3</sup>

Adding to the legal confusion and complexity as to the requirements of the U.S. Constitution as construed by federal courts is the need for school officials to navigate the results of increasing forays into this area by other levels and branches of government. These include federal statutes<sup>4</sup>; state constitutions; state statutes<sup>5</sup>; administrative and regulatory guidelines<sup>6</sup>; and even nonregulatory guidance.<sup>7</sup>

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<sup>3</sup> *Morse*, at \*21 (Breyer, J., concurring in part and dissenting in part) (“Teachers are neither lawyers nor police officers; and the law should not demand that they fully understand the intricacies of our First Amendment jurisprudence.”).

<sup>4</sup> *E.g.*, Equal Access Act, 20 U.S.C.A. §§ 4071-4074 (2007) (establishing statutory framework governing access to school fora by school-recognized, noncurriculum related student organizations); No Child Left Behind Act, 20 U.S.C.A. § 7904 (2007) (directing Secretary of Education to issue guidance on prayer in public schools and conditioning federal aid to schools on compliance with guidance).

<sup>5</sup> *E.g.*, KY. REV. STAT. ANN. § 158.183 (establishing statutory rights to student religious expression in schools); TENN. REV. STAT. ANN. § 49-6-2904 (same); CAL. EDUC. CODE § 48907 (setting forth student expression rights); CAL. EDUC. CODE § 48950 (establishing statutory rights to free speech of high school students on and off campus).

<sup>6</sup> *E.g.*, WASH. ADMIN. CODE 392-400-245 (2007) (granting students right to freedom of speech “subject to reasonable limitations upon the time, manner, and place of exercising such right”); Pledge of Allegiance in Public Schools: Constitutionality of Tenn. Code Ann. § 49-6-1001, Tenn. Op. Att’y Gen. No. 03-129 (2003) (confirming constitutionality of state statute requiring students and teachers to recite Pledge); 2001 Nev. Op. Att’y Gen. No. 27 (2001) (discussing legality of school district regulation authorizing student-initiated school prayer at commencement); Ark. Op. Att’y Gen. No. 2000-256 (2000) (discussing legality of prayer at high school football game).

<sup>7</sup> *E.g.*, Assistant Sec’y, Office for Civil Rights, Dept. of Educ., First Amendment: Dear Colleague Letter, *available at* <http://www.ed.gov/about/offices/list/ocr/firstamend.html>; Guidance on

From this complex landscape, the range of legal questions that arise in schools— particularly as disputes and successive impact litigation strategies originating in the nation’s culture wars visit themselves on educators—is formidable.<sup>8</sup> The “astounding numbers”<sup>9</sup> of resulting free speech lawsuits in the nation’s schools are a costly distraction from their educational mission.

This case and the decision by the District Court below exemplify these problems. The lawsuit and at least three others like it in other states<sup>10</sup> arose from

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Constitutionally Protected Prayer in Public Elementary and Secondary Schools, 68 Fed. Reg. 9645 (Feb. 28, 2003), *available at* <http://www.ed.gov/legislation/FedRegister/other/2003-1/022803b.pdf>.

<sup>8</sup> *E.g.*, *Guiles*, 461 F.3d 320 (T-shirt with message criticizing President Bush and featuring drug- and alcohol-related images); *Harper v. Poway Unified Sch. Dist.*, 485 F.3d 1051 (9th Cir. 2006), *vacated as moot*, 127 S.Ct. 1484 (2007) (T-shirt expressing religious condemnation of homosexuality); *Governor Wentworth Regional Sch. Dist. v. Hendrickson*, 421 F.Supp.2d 410 (D.N.H. 2006), *rev’d*, 201 Fed.Appx. 7 (1st Cir. 2006) (“tolerance” arm band); *Child Evangelism Fellowship of Md. v. Montgomery County Pub. Sch.*, 457 F.3d 376 (4th Cir. 2006) (school policy limiting teacher distribution of materials from outside groups); *Walz v. Egg Harbor Twp. Bd. of Educ.*, 342 F.3d 271 (3d Cir. 2003) (school policy prohibiting gifts with religious messages at classroom party).

<sup>9</sup> Reynolds Holding, *Fighting for Free Speech in Schools*, TIME, May 10, 2007, *available at* <http://www.time.com/time/magazine/article/0,9171,1619549,00.html> (noting 94 cases reached appellate courts in one year). A recent Westlaw search by *Amici* yielded approximately 800 federal and state cases involving student free speech claims since the U.S. Supreme Court’s decision in *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969), a figure that excludes disputes resolved prior to a decision.

<sup>10</sup> Press Release, Alliance Defense Fund, In One Week Four ADF Lawsuits Compel Four Schools to Allow Pro-Life Student Speech on *Roe v. Wade* (Jan. 22, 2007), *available at* <http://www.alliancedefensefund.org/news/pressrelease.aspx?cid=3988>; *Raker v. Frederick County Pub. Sch.*, 470 F.Supp.2d 634 (W.D. Va. 2007).

the same advocacy tactic, testing the legal bounds of content-neutral time, place, and manner rules governing student speech that is not school-sponsored and does not occur in a curricular context. Although this question is distinct from those considered in *Tinker v. Des Moines Independent Community School District*,<sup>11</sup> *Bethel School District No. 403 v. Fraser*,<sup>12</sup> and *Hazelwood v. Kuhlmeier*,<sup>13</sup> all of which concerned restrictions based on content or viewpoint, the District Court nevertheless joined a few other courts that have determined that the answer is to be found in *Tinker*, rather than in the public forum analysis that generally applies to such rules.

Certain aspects of forum analysis itself have been the source of significant judicial inconsistency. This Court has noted the uncertainty among the courts over whether a “designated public forum” differs from a “limited public forum” and, if so, what legal standard governs each.<sup>14</sup> Courts have varied in their determinations as to what kind of forum is in question when evaluating school speech cases.<sup>15</sup>

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<sup>11</sup> 393 U.S. 503 (1969).

<sup>12</sup> 478 U.S. 675 (1986).

<sup>13</sup> 484 U.S. 260 (1988).

<sup>14</sup> *United Food & Commercial Workers Local 1099 v. City of Sydney*, 364 F.3d 738, 750 (6th Cir. 2004) (noting judicial confusion surrounding use of terms); *Putnam Pit v. City of Cookeville*, 221 F.3d 834, 842 n.5 (6th Cir. 2000) (same).

<sup>15</sup> Compare *Peck v. Upshur County Bd. of Educ.*, 155 F.3d 274 (4th Cir. 1998) (finding school hallways and libraries were nonpublic forum) and *Harless v. Darr*, 973 F.Supp. 1351 (S.D. Ind. 1996) (finding classroom was nonpublic forum) with *Sherman v. Cmty. Consol. Sch. Dist. 21 of Wheeling Twp.*, 8 F.3d 1160 (7th Cir. 1993) (finding classroom was limited open forum) and *Slotterback v. Interboro*

Courts also have struggled at times with characterizing speech regulations as “content-based” or “viewpoint-based.”<sup>16</sup>

Regrettably, the District Court’s ruling in this case has added to the confusion for schools. As discussed below (*infra* at II), the District Court’s misapplication of *Tinker*’s “material and substantial” prong to a mere time, place, and manner restriction ignored the U.S. Supreme Court’s use of forum analysis in evaluating content-neutral restrictions on student speech<sup>17</sup> and departed from the widespread understanding among school officials, school attorneys, and others that forum analysis governs this kind of decision. Forum analysis makes some intuitive sense for school officials in that it is premised on recognition of the government’s need to manage public facilities.

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*Sch. Dist.*, 766 F.Supp. 280 (E.D. Pa. 1991) (finding school hallway and cafeteria were limited public forum).

<sup>16</sup> *E.g.*, *Peck v. Baldwinville Cent. Sch. Dist.*, 426 F.3d 617, 630-31 (2d Cir. 2005) (“drawing a precise line of demarcation between content discrimination, which is permissible in a non-public forum, and viewpoint discrimination, which traditionally has been prohibited *even* in non-public fora, is, to say the least, a problematic endeavor.”). For purposes of this case, *Amici* propose the distinctions are usefully encapsulated as follows: viewpoint-based regulation = no pro-life literature; content-based regulation = no literature related to abortion; time, place, manner regulation = no handbills in school hallways. *See Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 830-32 (1995) (explaining distinction between viewpoint and content discrimination).

<sup>17</sup> *Kincaid v. Gibson*, 236 F.3d 342, 347-48 (6th Cir. 2001) (noting Supreme Court’s frequent application of forum analysis to expressive activity within educational settings).

The model school board policies provided to member school districts by the state school boards associations in the states comprising this Circuit uniformly contemplate that school officials have the discretion to set reasonable, content-neutral time, place, and manner rules for student expression without needing to demonstrate that these rules are necessary to prevent “material and substantial disruption” to school activities.<sup>18</sup> This understanding is reflected even in particularly protective state statutory provisions concerning student expression<sup>19</sup> and is conceded even by plaintiffs in some student speech cases.<sup>20</sup>

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<sup>18</sup> See *Advertising in the Schools*, Kentucky Model Policy & Procedure (Kentucky School Boards Association 2007) (on file with *amicus* NSBA) (prohibiting “distribution of materials of a commercial or non-school related nature” on school property “during regular school hours or [at] school-sponsored activities”); *Nonschool-Sponsored Publications*, Ohio Policy Reference Manual (Ohio School Boards Association 2007) (on file with *amicus* NSBA) (stating students who wish to distribute nonschool-sponsored materials to other students “may be restricted as to the time and place of distribution”); *Distribution*, Tennessee Student Publications Model Policy (Tennessee School Boards Association 2007) (on file with *amicus* NSBA) (“School authorities shall regulate the time, manner, place and duration for the distribution of publications on school grounds”); *Non-School-Sponsored Student Publications*, Michigan Sample Policy (Michigan Association of School Boards 2007) (on file with *amicus* NSBA) (stating non-school sponsored student publications “may be distributed on school property during school hours in areas designated by the building Principal. Distribution that substantially interferes with the normal flow of traffic within the school corridors and entranceways ... shall not be permitted.”).

<sup>19</sup> *E.g.*, KY. REV. STAT. ANN. § 158.183 (establishing statutory right of student to distribute religious literature in a public school “subject to reasonable time, place, and manner restrictions to the same extent and under the same circumstances as a student is permitted to distribute literature on nonreligious topics or subjects in the school”); TENN. REV. STAT. ANN. § 49-6-2904 (same); CAL. EDUC. CODE § 48907 (setting forth strong statutory protections for both school-sponsored and non-

To the extent the District Court addressed forum analysis in the alternative, its discussion further confused matters, as detailed below (*infra* at III.A). The District Court’s Opinion and Order also acknowledged but failed adequately to address some of the school district’s arguments.

This case presents this Court with an opportunity not only to resolve the problems posed by the District Court’s Opinion and Order but also to clear up at least some of the legal confusion attending these questions in public schools generally. *Amici* recognize that courts decide constitutional questions narrowly, if at all,<sup>21</sup> and that the law relating to freedom of expression inherently is governed by fact-specific inquiries.<sup>22</sup> *Amici* nonetheless urge this Court, however it decides

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school-sponsored student publications but providing school board shall adopt “reasonable provisions for the time, place, and manner of conducting such activities within its respective jurisdiction”); CAL. EDUC. CODE § 48950 (establishing statutory rights to free speech of high school students “subject to reasonable time, place, and manner regulations”); COLO. REV. STAT. ANN. § 22-1-120 (setting forth strong statutory protections for both school-sponsored and non-school-sponsored student expression but providing school board shall adopt “reasonable provisions for the time, place, and manner of conducting free expression within the school district’s jurisdiction”).

<sup>20</sup> *E.g.*, *Kincaid*, 236 F.3d 342 (noting plaintiff’s assertion that yearbook was limited public forum, subject only to reasonable time, place, and manner regulations and narrowly tailored content-based regulations).

<sup>21</sup> *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11 (2004) (“Always we must balance ‘the heavy obligation to exercise jurisdiction,’ against the ‘deeply rooted’ commitment ‘not to pass on questions of constitutionality’” unless adjudication of the constitutional issue is necessary.”) (citations omitted).

<sup>22</sup> *Van Orden v. Perry*, 545 U.S. 677, 700 (2005) (Breyer, J., concurring in judgment) (observing in Establishment Clause cases, “the Court has found no

the questions discussed below, to render a decision that reflects an awareness of the costs that the lack of clear judicial guidance for schools imposes on children and of the potential benefits of clearer guidance.

## **II. Subjecting Mere Time, Place, And Manner Restrictions On Student Speech To *Tinker*'s "Material And Substantial Disruption" Standard Would Have Illogical Results, Ignore Practical Realities In Schools, And Invite More Wasteful Litigation**

As the U.S. Supreme Court pointedly observed in its most recent ruling on the First Amendment in schools, "the rule of *Tinker* is not the only basis for restricting student speech."<sup>23</sup> In *Morse v. Frederick*, the Supreme Court distilled "two basic principles" from *Fraser* that bear on the present case: (1) that the constitutional rights of students are construed "in light of the special characteristics of the school environment"; and (2) that "the mode of analysis set forth in *Tinker* is not absolute."<sup>24</sup>

The District Court's application of the *Tinker* standard in this case not only contradicts this most recent overarching explication by the Supreme Court of how *Tinker* and its progeny are to be understood, but it also ignores the Supreme Court's earlier forum analysis rulings. If, in fact, *Tinker* supersedes forum analysis, school attorneys as well as school boards and administrators are left to wonder why

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single mechanical formula that can accurately draw the constitutional line in every case.").

<sup>23</sup> *Morse* at \*8.

<sup>24</sup> *Id.*

so many courts ever would have engaged in forum analysis in school cases in the first place and which standard governs their decisions.

*Tinker's* “material and substantial disruption” standard would place an evidentiary burden on schools greater than the relatively more deferential standards that govern rules for expression in public fora. As applied by some courts, this standard exceeds not only the requirements applied to regulations in a nonpublic forum<sup>25</sup> or in a limited public forum<sup>26</sup> but even the particularly high bar set for government restrictions of speech in a traditional and designated public forum.<sup>27</sup> Whether courts set a high bar for what they deem “material and substantial,”<sup>28</sup> whether they deem professional educators’ forecast of disruption unreasonable in

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<sup>25</sup> *Putnam Pit*, 221 F.3d at 845 (noting regulation of nonpublic forum must be viewpoint neutral and reasonable in light of government’s interest in effectiveness of forum’s intended purpose).

<sup>26</sup> Some courts distinguish between designated and limited public fora and apply different tests to restrictions therein. *E.g.*, *Child Evangelism Fellowship*, 457 F.3d 382. This Court has not made this distinction. *Kincaid*, 236 F.3d at 348-49 (finding U.S. Supreme Court has recognized three types of fora, the second of which is alternatively described as limited or designated and is governed by same standards as apply in traditional public forum).

<sup>27</sup> *Putnam Pit*, 221 F.3d at 842-43 (“Content-neutral time, place, and manner restrictions [in traditional public forum] must be narrowly tailored, serve a significant public interest, and allow ample alternative avenues of communication,” and same standards apply to those to whom designated public forum is opened).

<sup>28</sup> *E.g.*, *Chandler v. McMinnville Sch. Dist.*, 978 F.2d 524 (9th Cir. 1992) (holding school officials acted unconstitutionally by asking students to remove buttons calling teachers “scabs” during strike).

the absence of past incidences,<sup>29</sup> or whether they attribute the disruption not to a precipitating incident but to the school's actions in response,<sup>30</sup> accepting the invitation to shift from forum analysis to *Tinker* for time, place, and manner rules would change not only the mode of inquiry but many outcomes.

The end result of relying on *Tinker* to evaluate all public school decisions concerning private expression by students in non-classroom school fora would be a legal and policy paradox. School officials would have less professional discretion over the use of school facilities than is exercised by any other public entity over any other forum on public property—despite the fact that the speakers and hearers in question are children.<sup>31</sup>

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<sup>29</sup> *E.g.*, *Saxe v. State College Area Sch. Dist.*, 240 F.3d 200 (3d Cir. 2001) (invalidating school district's anti-harassment policy in absence of prior disruption caused by prohibited speech); *Castorina v. Madison County Sch. Bd.*, 246 F.3d 536, 544 (6th Cir. 2001) (stating school district's policy against Confederate flags would be unconstitutional absent evidence of prior disruption); *Barber v. Dearborn Pub. Schs.*, 286 F. Supp. 2d 847 (E. D. Mich. 2003) (holding assistant principal's forecast of disruption unreasonable absent evidence of prior disruption).

<sup>30</sup> *E.g.*, *Layshock v. Hermitage Sch. Dist.*, No. 06-CV-116 (W.D. Pa. July 10, 2007) available at <http://www.aclupa.org/downloads/LayshockOrder.pdf>; *Wilson v. Hinsdale Elementary Sch. Dist.* 181, 810 N.E.2d 637 (Ill. App. Ct. 2004) (overruling trial court finding that school district's investigation, not student's speech, caused material disruption).

<sup>31</sup> *Cf. Jobe v. City of Catlettsburg*, 409 F.3d 261 (6th Cir. 2005) (holding ordinance against placing leaflets on vehicles parked on public streets did not regulate a public forum and was reasonable time, place, and manner regulation); *United Food & Commercial Workers Local 1099*, 364 F.3d 738 (upholding statutory ban on petition circulators within 100 feet of polling place); *Ater v. Armstrong*, 961 F.2d 1224 (6th Cir. 1992) (upholding statute prohibiting distribution of literature in

This cannot be what the U.S. Supreme Court intended. As the Seventh Circuit has observed, “Prohibiting handbilling in the hallway between classes is also reasonable to avoid congestion, confusion, and tardiness, to say nothing of the inevitable clutter when the recipient indiscriminately discards the handout.”<sup>32</sup> These kinds of practical considerations, as pedestrian as they may seem to those engaged in weighty deliberations over constitutional rights, are no small matter in the day-to-day lives of those responsible for educating, to say nothing of safeguarding, our children, or of the children themselves. They exemplify the Supreme Court’s repeated admonitions that “student first amendment rights are ‘applied in light of the special characteristics of the school environment’”<sup>33</sup> and that the nature of these student constitutional rights “is what is appropriate for children in school.”<sup>34</sup>

To go down the *Tinker* path in this case is also to encourage additional *Tinker*-inspired legal challenges to an array of long-accepted school policies and practices. *Tinker* already has been invoked successfully in one instance to challenge a school district’s discretion even to regulate the use of its own computer

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traditional public forum of public roadways while permitting solicitation of contributions). The District Court acknowledged but did not address this point.

<sup>32</sup> *Muller v. Jefferson Lighthouse Sch.*, 98 F.3d 1530, 1543 (7th Cir. 1996).

<sup>33</sup> *Morse*, 551 U.S. at \*3 n.5 (2007) (quoting *Tinker*, 393 U.S. at 506 and citing *Fraser*, 478 U.S., at 682; *Kuhlmeier*, 484 U.S., at 266).

<sup>34</sup> *Id.* at \*9 (citing *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 655-56 (1995) and quoting *Tinker*, 393 at 506).

equipment on campus.<sup>35</sup> Student perpetrators of online denigration or cyberbullying of classmates and teachers and false online profiles frequently have sought refuge in *Tinker*, sometimes with success.<sup>36</sup> Teachers have discovered that even the classroom itself is not always a sanctuary against the threat of lawsuits challenging the ground rules they set for their students.<sup>37</sup>

Given these examples of *Tinker*'s expansion, it is not difficult to imagine other contexts in which litigants might seek to impose *Tinker*'s more rigid standard on educator decisions. While content-neutral student dress codes and school uniform policies have been upheld using the forum analysis approach to time, manner, and place regulations or a close variation thereof,<sup>38</sup> the prospect of having

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<sup>35</sup> *Coy v. North Canton City Schs.*, 205 F.Supp.2d 791, 799-800 (N.D. Ohio 2002).

<sup>36</sup> *E.g.*, *Wisniewski v. Bd. of Educ. of the Weedsport Cent. Sch. Dist.*, No. 06-3395-cv (2d Cir. July 5, 2007) (finding reasonable forecast of disruption under *Tinker* arising from student's instant message depicting teacher being shot in head); *Mahaffey v. Waterford Sch. Dist.*, 236 F. Supp. 2d 779 (E.D. Mich. 2002) (invalidating under *Tinker* student's suspension for web page called "People I wish Would Die" because no evidence of disruption).

<sup>37</sup> *E.g.*, *Peck*, 426 F.3d 617 (rejecting application of *Tinker* to challenge of teacher's decision not to display student's class project depicting Jesus, applying forum analysis instead); *Walz*, 342 F.3d 271 (rejecting challenge to constitutionality of school's restrictions on elementary student's classroom distribution of gifts with religious messages); *Settle v. Dickson County Sch. Bd.*, 53 F.3d 152 (6th Cir. 1995) (rejecting *Tinker* challenge to grade on a proposed paper on the life of Jesus).

<sup>38</sup> *E.g.*, *Blau v. Ft. Thomas Public Sch. Dist.*, 401 F.3d 381 391-93 (6th Cir. 2005) (upholding dress code under *U.S. v. O'Brien*, 391 U.S. 367 (1968), as unrelated to suppressing expression, furthering important government interests, and not suppressing more expression than necessary); *Canady v. Bossier Parish Sch. Bd.*, 240 F.3d 437 (5th Cir. 2001) (upholding school uniform policy and finding

to justify them on the basis of a demonstrated need to alleviate or avert serious disorder could be enough to chill school districts from trying policies that may prove beneficial to students and desirable to parents.<sup>39</sup> Similarly, efforts to strike a balance between the popularity of increasingly versatile portable electronic devices such as cell phones and the real issues they pose in the school environment could be complicated by fear that, given that such devices can serve expressive purposes, these efforts must withstand judicial scrutiny on the basis not of mere rationality but of substantial disruption.<sup>40</sup> For that matter, the leap is not so great between

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*O'Brien* test is “virtually the same” as time, place, and manner analysis); *Jacobs v. Clark County Sch. Dist.*, 373 F.Supp.2d 1162 (D. Nev. 2005) (rejecting application of *Tinker* to school uniform policy); *Phoenix Elementary Sch. Dist. No. 1 v. Green*, 943 P.2d 836 (Ariz. App. Div. 2 1997) (rejecting *Tinker* challenge and upholding school uniform policy using forum analysis).

<sup>39</sup> Although the U.S. Supreme Court in *Tinker* expressly disavowed any intent to address “regulation of the length of skirts or the type of clothing, to hair style, or deportment,” 393 U.S. at 506-07, plaintiffs still invoke the ruling when challenging dress codes. *E.g.*, *Scott v. Napa Valley Unified Sch. Dist.*, No. 26-37082 (Cal. Super. Ct. July 2, 2007) *available at* [http://www.aclu.org/pdfs/freespeech/scott\\_v\\_napaschooldistrict\\_rulingonmotionfor\\_pi.pdf](http://www.aclu.org/pdfs/freespeech/scott_v_napaschooldistrict_rulingonmotionfor_pi.pdf) (enjoining school district from enforcing dress code as unnecessary to prevent material and substantial disruption under *Tinker*). *See also* Wendall Anderson, *School Dress Codes and Uniform Policies*, POL’Y REP.: REPORTING ON POL’Y ISSUES IN K-12 EDUC. MGMT. (ERIC Clearinghouse on Educ. Mgmt.), No. 2, Fall 2002 (discussing evidence documenting and questioning effectiveness of popular policies to achieve academic and school climate goals).

<sup>40</sup> *See Price v. New York City Bd. of Educ.*, 2007 WL 1518302 (N.Y. Sup. May 7, 2007) (upholding as rational school district policy forbidding student possession of cell phones on campus). *See also, e.g.*, MICH. COMP. LAWS ANN. § 380.1303 (West 2007) (authorizing boards of education to adopt regulations of student possession of electronic communications devices); OHIO REV. CODE ANN. § 3313.753 (West 2007) (same); TENN. CODE ANN. § 49-6-4214 (West 2007)

subjecting mere time, place, and manner regulations to this standard and placing the legal onus on educators to justify in federal court their decisions on such mundane matters as seating arrangements.<sup>41</sup>

The forum-oriented framework that the federal Equal Access Act sets forth governing access to various school fora for student expression originating in school-sponsored noncurricular clubs also is in tension with a *Tinker* approach.<sup>42</sup> While this kind of expression inhabits a realm somewhere between the student speech at issue in this case and school-sponsored speech at issue in cases like *Hazelwood*, the District Court's approach to content neutral rules would suggest that school officials may not set neutral criteria for access by all noncurricular clubs to various school fora where such criteria are more restrictive than necessary to avoid material and substantial disruption.<sup>43</sup>

Carried to its logical conclusion, applying *Tinker* to situations previously evaluated using forum analysis also is inconsistent with court holdings that school

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(forbidding possession without school permission of electronic pager by student on school property).

<sup>41</sup> *E.g., LoPresti v. Galloway Twp. Middle Sch.*, 885 A.2d 962 (N.J. Super. 2004) (rejecting *Tinker* challenge to middle school cafeteria policy assigning students to designated tables since policy restricted no content of expression and school was nonpublic forum, allowing school officials to impose reasonable restrictions on speech).

<sup>42</sup> 20 U.S.C.A. §§ 4071-4074 (2007).

<sup>43</sup> *Prince v. Jacoby*, 303 F.3d 1074 (9th Cir. 2002) (holding Equal Access Act requires school to provide covered clubs with same access to all school fora).

officials enjoy the discretion to narrow a forum.<sup>44</sup> Until now these decisions never have suggested that such a decision is foreclosed unless necessitated by the need to avoid a material and substantial disruption. Under this higher standard, for example, a school could be precluded from deciding to narrow access to a school forum for all parties in a viewpoint and content neutral manner out of a simple preference that whatever effort school personnel must put into supervising that forum be devoted to other educational priorities.

In some of the foregoing situations, schools conceivably might be able to demonstrate material and substantial disruption. This is of scant consolation to school boards, however, if the more restrictive standard will bring about more frequent legal challenges to what are now routine school decisions and if the evidentiary onus on school officials to justify these decisions is increased.<sup>45</sup>

Indeed, this case highlights the danger that “the more detailed the Court’s supervision becomes, the more likely its law will engender further disputes among teachers and students” so that “larger numbers of those disputes will likely make

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<sup>44</sup> *DiLoreto v. Downey Unified Sch. Dist. Bd. of Educ.*, 196 F.3d 958, 969 (9th Cir. 1999) (holding school board had inherent right to control its property and close previously open forum).

<sup>45</sup> *See Garcetti v. Ceballos*, 126 S.Ct. 1951, 1976 (2006) (Breyer, J., dissenting) (“The underlying problem with this breadth of coverage is that the standard ... despite predictions that the government is likely to *prevail* in the balance ... does not avoid the judicial need to *undertake the balance* in the first place.”) (emphasis in original).

their way from the schoolhouse to the courthouse.”<sup>46</sup> Given the variety of student speech lawsuits and the particularly intense and strategic efforts “by the friends of religion or by its enemies,”<sup>47</sup> this fear is well-placed. The costs of this dynamic to the nation’s schools, measured in legal costs, defensive behavior by school officials fearful of litigation, distraction from the academic mission, and community divisiveness, ultimately are borne by children.

### **III. Properly Evaluating Time, Place, And Manner Restrictions On Student Speech Using Forum Analysis Would Avoid The Negative Consequences Of Misapplying The *Tinker* Standard, While Still Protecting Student Speech**

#### **A. The District Court’s Approach To Forum Analysis Suffers From Numerous Flaws**

The forum analysis the District Court offered in the alternative to its reliance on *Tinker* was riddled with confusing points for school policy-makers. The uncertainty this will engender among school officials will make it more difficult for them to adopt and implement sound policies regarding expression in school facilities.

To the extent the District Court decision could be interpreted as holding that the school created a designated or limited public forum in its hallways, this is

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<sup>46</sup> *Morse*, at \*21 (Breyer, J., concurring in part and dissenting in part).

<sup>47</sup> *Gernetzke v. Kenosha Unified Sch. Dist. No. 1*, 274 F.3d 464, 467-68 (7th Cir. 2001) (questioning appropriateness of culture war litigation in public schools, and student plaintiff’s gleeful diary entry about her lawsuit by asking, “Do we really need this?”).

consistent neither with this Court’s recognition that a public forum is not created inadvertently but only with intent,<sup>48</sup> nor with the strong implications in this Court’s earlier holdings that school hallways constitute a nonpublic forum.<sup>49</sup>

To the extent the District Court suggested that the school district’s arguments were undermined by its concession that the student would be able to

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<sup>48</sup> *United Food & Commercial Workers Local 1099*, 364 F.3d at 749 (noting “government does not create a public forum by inaction or by permitting limited discourse but only intentionally opening up a nontraditional forum for public discourse” and finding no evidence state intended to open up “nontraditional forums such as schools ... for public discourse merely by utilizing portions of them as polling places”).

<sup>49</sup> *See id.* (holding parking lots and sidewalks leading to schools and other polling places were nonpublic fora absent evidence of government intent to open these fora for public discourse); *Kincaid*, 236 F.3d at 349 (noting that “[t]o determine whether the government intended to create a limited public forum, we look to the government’s policy and practice with respect to the forum, as well as to the nature of the property at issue and its ‘compatibility with expressive activity’” and that “context within which the forum is found is relevant” to determination). *Cf. Washegesic v. Bloomingdale Pub. Sch.*, 813 F.Supp. 559, 565 n.16 (rejecting school district’s argument, for purposes of Establishment Clause challenge to school’s portrait of Jesus, that hallway was limited public forum, noting that school controlled content of what was posted) *aff’d*, 33 F.3d 679 (6th Cir. 1994) (noting school maintained right to control what was posted in hallways and did not offer space to other religions). *See also Peck*, 426 F.3d at 626-27 (concluding elementary school was nonpublic forum); *Hedges v. Wauconda Cmty. Unit Sch. Dist. No. 118*, 9 F.3d 1295, 1302 (7th Cir. 1993) (holding junior high school had not “opened its doors wide enough to make the school a ‘limited public forum’” in case challenging restriction of student distribution of materials); *Phillips v. Oxford Separate Mun. Sch. Dist.*, 314 F.Supp.2d 643, 648 (N.D. Miss. 2003) (finding hallways were not public forum); *Hemry v. School Bd. of Colorado Springs Sch. Dist. No. 11*, 760 F.Supp. 856, 862 (D. Colo. 1991) (finding purpose of school hallways is to facilitate movement of students between classrooms, not to provide place for speaker to set up a soap box); *Nelson v. Moline Sch. Dist.*, 725 F.Supp. 965, 974 (C.D. Ill. 1989) (holding public school hallways are nonpublic forum during school hours).

express verbally the views articulated in his printed materials, this would effectively render all regulation of non-verbal expression invalid and all forum analysis moot where the government does not impose some kind of gag rule. This is incompatible with this Court's and other courts' previous rulings upholding public restrictions on non-verbal communications, let alone those upholding restrictions that applied to some but not all similar modes of communication.<sup>50</sup> As this Court has observed, the U.S. Supreme Court instructs that “problems of underinclusiveness are rarely problems of constitutional magnitude, unless they signify an impermissible discriminatory motive.”<sup>51</sup>

To the extent the District Court's standard of review under its forum analysis essentially weighed “reasonableness” with reference back to the *Tinker* “material and substantial disruption” standard, it is difficult to discern the point of the courts having engaged in forum analysis in the first place. In the end, the results of this approach to forum analysis are the same implausible ones as outlined above (*supra* II).

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<sup>50</sup> *E.g., Ater v. Armstrong*, 961 F.2d 1224 (6th Cir. 1992) (upholding statute prohibiting distribution of literature, but permitting solicitation of contributions, in public roadways).

<sup>51</sup> *Ater*, 961 F.2d at 1229 (citing *Ward v. Rock Against Racism*, 491 U.S. 791, 800 (1989); *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 215 (1975)). *Ater* poses a problem for the District Court's reasoning that handing out flyers in hallways would be less disruptive than verbal expression given this Court's rejection of the argument that the statute in question was invalid because permitted solicitations presented a greater safety hazard than forbidden distributions. *Id.* at n.4.

As this Court has noted, even in a traditional or designated public forum, the government may impose reasonable time, place, and manner restrictions.<sup>52</sup> Even here, “the regulation will not be invalid simply because a court concludes that the government’s interest could be adequately served by some less-speech-restrictive alternative. ‘The validity of [time, place, or manner] regulations does not turn on a judge’s agreement with the responsible decisionmaker concerning the most appropriate method for promoting significant government interests.’”<sup>53</sup> This being so, *Tinker* cannot be the touchstone of reasonableness even in a traditional public forum, let alone in a nonpublic forum.

**B. Relying On Forum Analysis Appropriately Deferential To The Professional Judgment Of Educators Does Not Deprive Student Speech Of Protection Against Arbitrary Or Capricious Restrictions**

Reliance on forum analysis, even where appropriately deferential to the judgment of school officials, by no means gives schools a free hand to restrict any expression they find disagreeable. This is true regardless of the type of forum at issue.

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<sup>52</sup> *Id.* at 1227.

<sup>53</sup> *Id.* at 1229 (citing *Rock Against Racism*, 491 U.S. at 800) (quoting *U.S. v. Albertini*, 472 U.S. 675, 689 (1985)). Cf. *Muller*, 98 F.3d at 1544-45 (noting “school administrators are not confined to those means least restrictive of student speech when they pursue legitimate educational interests”).

In a designated or limited public forum, a content-based restriction on speech must be narrowly tailored to serve a compelling government interest.<sup>54</sup> However, even a content-neutral regulation on the time, place, and manner of speech may be found unreasonable.<sup>55</sup>

In a nonpublic forum, if the intent of the restriction is solely to suppress a point of view or is not reasonable in light of the forum's purpose, it will be invalidated.<sup>56</sup> Even under the deferential standard applicable to nonpublic fora, a court evaluating the reasonableness of a restriction considers the availability or absence of alternate channels of communications.<sup>57</sup> In addition, a regulation may

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<sup>54</sup> *Kincaid*, 236 F.3d at 348, 354.

<sup>55</sup> *Id.* at 354-55 (holding university's confiscation of yearbooks unreasonable where done without notice, with no eventual distribution of books, and without alternative grounds for similar expressive activity); *Morgan v. Plano Indep. Sch. Dist.*, slip op., 2007 WL 654308 (E.D. Tex. Feb. 26, 2007) (finding, without explanation, that school district policy against distributing materials in elementary school cafeterias reached "more broadly than is reasonably necessary").

<sup>56</sup> *Kincaid*, 236 F.3d at 355-56 (holding university's confiscation of yearbooks would have been unreasonable even if evaluated under "relaxed standard" applicable to nonpublic forum, where yearbook fulfilled forum's purpose, university's actions were arbitrary and conflicted with own policy, and "smack[ed] of viewpoint discrimination"); *Ater*, 961 F.3d at 1228 (finding prohibition on distribution of literature on public roadways motivated by intent to suppress information not by safety considerations).

<sup>57</sup> *Ater*, 961 F.2d at 1227. However, to apply to this inquiry the stringent approach the District Court utilized in its overbreadth analysis—*i.e.*, whether the alternate avenues have any disadvantages relative to the access demanded—effectively would render this a circular exercise, since the very fact of the legal challenge reflects the plaintiff's dissatisfaction with the accommodation offered.

be deemed unreasonable if it vests officials with wholly arbitrary decision-making authority as to key aspects of its implementation.<sup>58</sup>

A restriction on speech also may be subject to an as-applied<sup>59</sup> or facial challenge on the basis of vagueness or overbreadth. Although a student handbook “need not be as detailed as a criminal code,”<sup>60</sup> a school policy must be clear enough

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<sup>58</sup> *Putnam Pit*, 221 F.3d at 845-46; *Ater*, 961 F.2d at 1227 (rejecting argument that statute forbidding literature on public roadways vested officials with arbitrary discretion); *Child Evangelism Fellowship*, 457 F.3d at 386-89 (holding policy on elementary school teacher distribution of materials to children unreasonably gave school officials unbridled discretion to approve or deny materials). *Amici* caution, however, that in the special context of schools, it cannot be the case that merely requiring outside materials to be pre-approved by an adult school official is constitutionally impermissible. *Shanley v. Northeast Indep. Sch. Dist.*, 462 F.2d 960, 969 (5th Cir. 1972).

<sup>59</sup> The school’s application of its policy to a particular speaker may invalidate the school’s actions more narrowly without calling into question the validity of the policy as applied to all other potential speakers. *Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass’n*, 262 F.3d 543, 556-57 (6th Cir. 2001). *E.g.*, *Heinkel v. Sch. Bd. of Lee County*, 194 Fed. Appx. 604 (11th Cir. 2006) (finding school board policy preventing middle school student from distributing anti-abortion literature constitutional under *Tinker* where classmates were aged 11-14, birth control and abortion were not part of curriculum, and controversy would disrupt educational setting).

<sup>60</sup> *Fraser*, 478 U.S. at 686; *Brandt v. Bd. of Educ. of City of Chicago*, 480 F.3d 460, 467 (7th Cir. 2007) (warning that insisting on tight limits, “expressed in precise rules, would prevent [school authorities] from responding to novel challenges”); *Muller*, 98 F.3d at 1542-43 (rejecting plaintiff’s argument that school “must spell out in intricate detail” terms of policy as inconsistent with school’s duties that are “primarily custodial and tutelary and thus discretionary in nature, not legalistic” and thus subject to reasonableness test); *Sypniewski v. Warren Hills Reg’l Bd. of Educ.*, 307 F.3d 243, 266 (3d Cir. 2002) (stating there is less need for specificity when determining vagueness of school district’s policy because of need to control wide range of disruptive behavior).

as to put a reasonable student on notice as to what is required<sup>61</sup> and must not be arbitrarily enforced.<sup>62</sup> While the District Court’s Order and Opinion referred only in passing to overbreadth in connection with its *Tinker* discussion,<sup>63</sup> a school policy must not burden substantially more speech than is necessary to further the government’s interest.<sup>64</sup>

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<sup>61</sup> *Brentwood Acad.*, 262 F.3d at 557 (even though recruiting rule by itself was subject to vagueness and overbreadth challenge, the accompanying question and answer section and interpretive guidelines satisfied reasonable notice requirement); *West v. Derby Unified Sch. Dist. No. 260*, 206 F.3d 1358, 1368 (10th Cir. 2000) (stating policy “might be void for vagueness if a reasonable student of ordinary intelligence who read the policy could not understand what conduct it prohibited”); *Stephenson v. Davenport Cmty. Sch. Dist.*, 110 F.3d 1303, 1308 (8th Cir. 1998) (invalidating school regulation against “gang” colors, symbols and other expression as void for vagueness).

<sup>62</sup> *Stephenson*, 110 F.3d at 1310 (finding ban on “gang” symbols defective for allowing school administrators and police unfettered discretion to decide what constitutes such symbol).

<sup>63</sup> Even if it is true that *Tinker* provides the proper frame of reference for evaluating an overbreadth claim in a student speech case, the claim nonetheless must be evaluated in light of the special considerations of the school environment. *Newsom v. Albemarle County Sch. Bd.*, 354 F.3d 249 (4th Cir. 2003) (finding strong probability dress code would be found overbroad despite special considerations in school context); *Sypniewski*, 307 F.3d at 260 (noting overbreadth doctrine should be used more hesitantly in school context given school district responsibilities and limited free speech rights of students). Otherwise, reducing the overbreadth inquiry to a strict *Tinker* “material and substantial disruption” test would effectively render every such overbreadth claim superfluous. Moreover, in finding the school’s alternative accommodations of the student’s desired expression unreasonable, the District Court did not adequately explain why the test should be whether a school’s time, place, and manner rules accommodate the speaker’s preferred means of dissemination.

<sup>64</sup> *Blau*, 401 F.3d at 391-93 (holding dress code did not suppress more speech than necessary and allowed students to dress as they liked outside school and to express themselves in other ways during school).

In sum, a school is not free to flout the First Amendment under forum analysis, and a court can correct the occasional school misstep without risking broad, unintended consequences.

## CONCLUSION

For all of the above reasons, *Amici* urge this Court to view skeptically the suggestion that it must take another step to complicate rather than clarify school obligations and “to wrest the day-to-day control ... from school administrators and hand it over to judges and jurors who lack both knowledge of and responsibility for the operation of the public schools.”<sup>65</sup>

This Court should decline the invitation to exacerbate the problem. An appropriate degree of deference to school officials on matters such as mere time, place, and manner regulations is not judicial abdication. Rather it promotes the ability of school officials to carry out their educational mission while preserving student free speech rights. *Amici* fully recognize that inculcating students with an appreciation for constitutional principles is a fundamental mission of public schools. Protecting those values in this case does not require this Court to set precedent that would subject education decisions to an even greater and needless degree of judicial scrutiny.

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<sup>65</sup> *Gernetzke*, 274 F.3d at 467.

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## CERTIFICATE OF COMPLIANCE

*M.A.L. v. Kinsland, et. al.*

This Brief of *Amici Curiae* has been prepared using Microsoft Word 2003, Times New Roman, 14 point.

Exclusive of the Corporate Disclosure Statement, Table of Contents, Table of Authorities, Certificate of Compliance, and Certificate of Service, this Brief contains 6,960 words.

I understand that a material misrepresentation can result in the Court's striking the Brief and imposing sanctions. If the Court so directs, I will provide an electronic version of the Brief and/or a copy of the word or line printout.

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Francisco M. Negrón, Jr.

## CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 23rd day of July 2007, I filed with the Clerk's Office of the United States Court of Appeals for the Sixth Circuit, 540 Potter Stewart U.S. Courthouse, 100 E. Fifth Street, Cincinnati, OH 45202-3988, by first class mail, the required number of this Brief of *Amici Curiae* in support of Appellants. I further certify that the required number of copies were deposited in the United States mail, first class postage pre-paid, addressed to the following:

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