

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
No. 04-2849

C.N., INDIVIDUALLY AND AS GUARDIAN
AD LITEM OF J.N., A MINOR; L.M.,
INDIVIDUALLY AND AS GUARDIAN AD
LITEM OF V.M., A MINOR; AND M.E.,
INDIVIDUALLY AND AS GUARDIAN AD
LITEM OF J.E., A MINOR;

Plaintiffs-Appellants,

vs.

RIDGEWOOD BOARD OF EDUCATION,
FREDERICK J. STOKLEY, JOYCE SNIDER,
RONALD VERDICCHIO, ROBERT
WEAKLEY, JOHN MUCCILO, ANTHONY
BENCIVENGA, AND SHEILA BROGAN,

Defendants-Appellees.

ON APPEAL FROM JUDGMENT
ENTERED ON JUNE 3, 2004, BY THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY,
GRANTING SUMMARY JUDGMENT
TO DEFENDANTS

Hon. Jose L. Linares, U.S.D.J

Civil Action No. 2:00-1072

BRIEF OF AMICUS CURIAE
NATIONAL SCHOOL BOARDS ASSOCIATION
SUPPORTING DEFENDANTS-APPELLEES

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TABLE OF CONTENTS

TABLE OF CONTENTS.....	i
TABLE OF AUTHORITIES	ii
STATEMENT OF THE IDENTITY OF THE <i>AMICUS CURIAE</i> , INTEREST IN THE CASE, AND THE SOURCE OF ITS AUTHORITY TO FILE	1
ARGUMENT	1
I. Asking students to answer questions on controversial and sensitive issues does not compel speech in violation of the First Amendment	2
II. The public policy interest in conducting surveys to gather information to help students outweighs any privacy right to not disclose personal matters.....	8
III. Surveying students does not violate parents’ right to make important decisions with respect to the care and custody of their children	13
CONCLUSION.....	18
CERTIFICATE OF BAR MEMBERSHIP	19
CERTIFICATE OF COMPLIANCE.....	20
CERTIFICATE OF SERVICE.....	21

TABLE OF AUTHORITIES

CASES

<u>Abington Township v. Schempp</u> , 374 U.S. 203 (1963).....	16
<u>Altman v. Bedford Cent. Sch. Dist.</u> , 45 F. Supp. 2d 368 (S.D.N.Y. 1999)	16
<u>Aubrey v. Sch. Dist. of Philadelphia</u> , 437 A.2d 1306 (Pa. Commw. 1981).....	15
<u>Axson-Flynn v. Johnson</u> , 356 F.3d 1277, 1291-92 (10th Cir. 2004).....	6
<u>Bd. of Regents v. Southworth</u> , 529 U.S. 217, 242-43 (2000)	5
<u>Brown v. Hot, Sexy and Safer Productions, Inc.</u> , 68 F.3d 525, 534 (1st Cir. 1995).....	15, 16
<u>Brown v. Li</u> , 308 F.3d 939, 953 (9th Cir. 2002)	5
<u>Cornwell v. State Bd. of Educ.</u> , 314 F. Supp. 340 (D. Md. 1969).....	15
<u>Daughtery v. Vanguard Charter Sch. Academy</u> , 116 F. Supp. 2d 897 (W.D. Mich. 2000).....	16
<u>Davis v. Page</u> , 385 F. Supp. 395 (D.N.H. 1974).....	15
<u>Hazelwood School Dist. v. Kuhlmeier</u> , 484 U.S. 260, 268-69 (1988)	15
<u>Hopkins v. Hamden Bd. of Educ.</u> , 289 A.2d 914 (Conn. C.P. 1971)	15

<u>Keyishan v. Bd. of Regents,</u> 385 U.S. 589, 603 (1967).....	4
<u>Leebaert ex rel. Leebaert v. Harrington,</u> 193 F. Supp. 2d 491, 502 (D. Conn. 2002).....	14, 15
<u>Monteiro v. Tempe Union Sch. Dist.,</u> 158 F.3d 1022 (9th Cir. 1998)	16
<u>Steirer v. Bethlehem Area Sch. Dist.,</u> 987 F.2d 989, 996 (3d Cir. 1993)	6, 7, 10
<u>United States v. Westinghouse Electric Corp.,</u> 638 F.2d 570 (3d Cir. 1980)	8-9
<u>West Virginia State Bd. of Educ. v. Barnette,</u> 319 U.S. 624, 642 (1943).....	3
<u>Wisconsin v. Yoder,</u> 406 U.S. 205 1972	14

STATUTES AND REGULATIONS

20 U.S.C. §1232h(a)	14
ALA. CODE § 16-36-62 <i>et seq.</i>	14
N.J. ADMIN. CODE § 6A: 8-3.1(d) (2002).....	14
OKLA. STAT. ANN. tit. 70 § 16-101 <i>et seq.</i>	14

OTHER AUTHORITIES

CENTERS FOR DISEASE CONTROL AND PREVENTION, YOUTH RISK BEHAVIOR SURVEILLANCE, UNITED STATES (2004) 4-6, 8, 12, 13, 17, 18, 20, <i>available at</i> http://www.cdc.gov/mmwr/PDF/SS/SS5302.pdf	11, 12
NEW JERSEY DEP’T OF EDUC., NEW JERSEY CORE CURRICULUM CONTENT STANDARDS FOR COMPREHENSIVE HEALTH & PHYSICAL EDUCATION, <i>available at</i> http://www.state.nj.us.njded/cccs/s2_chpe.htm	9, 17

**STATEMENT OF IDENTITY, INTEREST OF *AMICUS CURIAE*,
AND SOURCE OF AUTHORITY TO FILE**

The National School Boards Association (NSBA) is a federation of 49 state school boards associations, the Hawai‘i State Board of Education, and the school boards of the District of Columbia and the U.S. Virgin Islands. NSBA represents the 95,000 school board members who govern America’s 15,000 public school districts. NSBA believes that local school boards have a legitimate need to survey students regarding their behavior and attitudes and are able to do so under certain circumstances within constitutional limitations. All parties have consented to the filing of this brief.

ARGUMENT

Public school boards are entrusted with the responsibility of educating the Nation’s schoolchildren. As part of that responsibility school boards have the authority to teach children about a wide range of topics, using a variety of teaching techniques. Local school boards also have a public policy interest in helping to assure the health and safety of students. A finding that the school district in this case could not, consistent with the Constitution, administer a voluntary, anonymous survey would undermine school boards’ ability to teach students a complete, well balanced curriculum and to assist struggling students with issues that may affect their ability to learn. Such a ruling is not supported by the law’s current definition of

compelled speech, and this court should avoid expanding that definition in a manner that would unnecessarily limit a school's ability to instruct students. Likewise schools have a strong public policy interest in conducting surveys to gather information to assist students, an interest that outweighs any minimal infringement of students' privacy rights that may occur when schools administer voluntary, anonymous surveys and disclose results only in the aggregate. Finally, surveying students about controversial and sensitive matters does not violate parents' rights to rear their children as they see fit. Parents may have certain statutory rights to notice and the option to remove their children from exposure to certain curricular materials, but their objections alone are not legally sufficient to override state and local decisions about mandatory curriculum content that includes some controversial topics.

I. Asking students to answer questions on controversial and sensitive issues does not compel speech in violation of the First Amendment.

A ruling by this court that asking students to complete a voluntary survey about controversial and sensitive topics is impermissible compelled speech would severely limit the ability of public schools to teach about controversial and sensitive subject matter. As an initial matter, school districts cannot be deemed to compel students to speak where, as in this

case, students are asked to complete a survey on a *voluntary* basis. Speech cannot be compelled if the “speaker” is not required to speak. Likewise, where the government does not coerce the speaker to adopt a particular viewpoint, the elicited speech does not fit within the definition of compelled speech. *West Virginia State Board of Education v. Barnette*¹ and its progeny hold that speech is compelled when the speaker is required to express a viewpoint with which he or she does not agree. Nothing in the record indicates that this occurred here; survey takers were not required to give particular answers to questions. They could freely choose their responses and could opt to give no response to any or all of the questions.

If the court were to find compelled speech in this case, practically speaking, such a ruling would have a chilling effect on speech in the public school classroom. Certain topics and teaching techniques might be limited in a way that undermines student learning and is not supported by the precedent of this or other courts. Under Plaintiffs’ view, merely asking students about “core political concepts”—rather than requiring them to espouse particular views on such topics—is “compelled speech” that violates the First Amendment. If the court agreed with this view of the law, arguably schools would be prevented from requiring students to discuss or write about

¹ 319 U.S. 624, 642 (1943).

their ideas concerning “core political concepts” (racial equality, hunger, poverty, religion, equality, charity, etc.). The mere act of eliciting these ideas would be forbidden by the First Amendment even though students might experience no pressure to adopt a particular viewpoint or suffer no adverse consequences based on their expression. In other words, if the First Amendment bars schools from administering voluntary, anonymous surveys because they draw out students’ views or experiences with respect to sensitive and controversial issues, it would call into question any classroom discussion in which students are asked or required to express their views about such topics. Students’ active participation in their own education as to these matters could no longer be required or even encouraged.

Students’ active participation is necessary to teaching them how to think critically, a skill essential to being a productive and informed citizen in a complex society. Part of this process involves exposing students to a wide variety of ideas and experiences, some of which may be controversial and sensitive and with which students may not agree or feel comfortable.² Not

² See *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) (“The classroom is peculiarly the ‘marketplace of ideas.’ The Nation’s future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth ‘out of a multitude of tongues, [rather] than through any kind of authoritative selection.’”) (alterations in original) (citations omitted).

surprisingly, in this process teachers may, as an academic exercise, ask students to express their views on such topics or defend the views of others.³ As the cases below illustrate, courts support school boards' decisions to include controversial and sensitive topics in a school curriculum, recognizing that school boards have a pedagogical interest in teaching a variety of skills and knowledge, and are in a better position than courts, or students, to decide curriculum content and the manner in which to teach these core skills and knowledge.

For example, the Tenth Circuit recently held that a university student in an actor training program could be compelled to recite a script containing

³ In two cases in which universities were defendants, the Supreme Court and the Ninth Circuit Court of Appeals discussed a university's ability to require students to express a viewpoint with which they disagree for the purposes of developing critical thinking skills. In *Bd. of Regents v. Southworth*, 529 U.S. 217, 242-43 (2000), Justice Souter wrote in a concurring opinion that university "students are inevitably required to support the expression of personally offensive viewpoints in ways that cannot be thought constitutionally objectionable unless one is prepared to deny the University its choice over what to teach." Similarly, in *Brown v. Li*, 308 F.3d 939, 953 (9th Cir. 2002), the court stated, "For example, a college history teacher may demand a paper defending Prohibition, and a law-school professor may assign students to write 'opinions' showing how Justices Ginsburg and Scalia would analyze a particular Fourth Amendment question.... Such requirements are part of the teachers' curricular mission to encourage critical thinking [in the hypothetical examples] and to conform to professional norms [in this case]."

language she found offensive as long as the speech was reasonably related to pedagogical concerns.⁴ The court explained its reasoning as follows:

Requiring an acting student, in the context of a classroom exercise, to speak the words of a script as written is no different than requiring that a law or history student argue a position with which he disagrees. Both types of restriction on student speech, if not pretextual, can meet the *Hazelwood* standard, which "does not require that the [restrictions] be the most reasonable or the only reasonable limitations, only that they be reasonable." The school's methodology may not be *necessary* to the achievement of its goals and it may not even be the most effective means of teaching, but it can still be "reasonably related" to pedagogical concerns. A more stringent standard would effectively give each student veto power over curricular requirements, subjecting the curricular decisions of teachers to the whims of what a particular student does or does not feel like learning on a given day. This we decline to do.⁵

This court has likewise recognized that students may have to participate in parts of the school curriculum that they may find offensive, distasteful, or contrary to their personal beliefs as long as they are not required to "express their belief, either orally or in writing" of support for the "value" underlying the curriculum.⁶ In *Steirer v. Bethlehem Area School*

⁴ *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1291-92 (10th Cir. 2004). The pedagogical reasons asserted by the university in this case included: (1) teaching students how to step outside their own values and character by forcing them to assume a very foreign character and to recite offensive dialogue; (2) teaching students to preserve the integrity of the author's work; and (3) measuring true acting skills to be able convincingly to portray an offensive part.

⁵ *Id.*

⁶ *Steirer v. Bethlehem Area Sch. Dist.*, 987 F.2d 989, 996 (3d Cir. 1993).

District,⁷ students claimed their First Amendment right not to be compelled to speak was violated because a mandatory community service program forced them to “affirm the philosophy that serving others and helping the community are what life is all about.” This court disagreed because students were not required to express their belief in the value of community service.⁸ Also, students were not required to provide community service to an organization with whose message they disagreed; and students were free to criticize the program; with no adverse effect on their grade. Community members were just as likely to perceive that students were performing community service to meet a graduation requirement as they were to perceive that students were performing community service to express a “particularized message of their belief in the value of community service and altruism.”⁹

Clearly, “core political concepts” (including charity) may be raised, explored, and taught in public schools, and students may be required to participate in curricular activities that touch on these issues, as long as students are not required to voice agreement (or disagreement) with particular values.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* at 996-97.

In summary, taking a survey on a voluntary basis does not compel any particular viewpoint and raises no First Amendment concerns. If merely asking students about controversial topics in a voluntary survey is deemed compelled speech, schools will be severely limited not only as to surveys, but also as to the subject matter and the teaching techniques that are constitutionally permissible in the classroom.

II. The public policy interest in conducting surveys to gather information to help students outweighs the privacy right to not disclose personal matters.

Schools have a public policy interest in conducting surveys that may ask sensitive or personal questions to determine the issues that students face and to provide relevant assistance based on the needs revealed by survey results. Even absent this public policy interest, students' right to privacy is not implicated when schools administer student surveys in a manner that respects individual privacy and choices. First, no *disclosure* of personal matters occurs when survey results are revealed only in the aggregate. Second, when students respond to the survey on a *voluntary and anonymous* basis, they are not forced to discuss personal matters in an individually identifiable manner.

Where no disclosure of personal information takes place, this court need not consider the balancing test discussed in *United States v.*

Westinghouse Electric Corp.,¹⁰ to determine whether the “disclosure” in fact violates personal privacy. Even if the court were to apply this balancing test to voluntary and anonymous surveys administered to students, the *Westinghouse* factors would weigh heavily against finding an impermissible violation of privacy. In the school context, the seventh factor, “whether there is an express statutory mandate, articulated public policy, or other recognizable public interest favoring access,” is particularly important.¹¹ Many states, like New Jersey, require public schools to educate students about controversial and sensitive topics such as the “effects of the use and abuse of alcohol, tobacco, and other drugs”; “biological, social, cultural, and psychological aspects of human sexuality and family life”; “the causes of stress and...ways to deal with stressful situations... and ways to cope with rejection, loss, and separation.”¹² Surveys that provide community specific information on such topics may play a critical role in helping school boards to design curricula that meet the state mandates in a manner that addresses the specific needs of students in their own communities.

¹⁰ 638 F.2d 570 (3d Cir. 1980).

¹¹ *Id.* at 578.

¹² NEW JERSEY DEP’T OF EDUC., NEW JERSEY CORE CURRICULUM CONTENT STANDARDS FOR COMPREHENSIVE HEALTH & PHYSICAL EDUCATION, available at http://www.state.nj.us/njded/cccs/s2_chpe.htm.

This court in *Steirer* recognized that school boards have the necessary expertise to determine the educational content and methodology appropriate to teaching children about sensitive and controversial topics.¹³ The *Steirer* court declined to question the school board’s decision on educational policy matters, such as requiring students to participate in community service projects, because public school officials have a “long history and tradition of teaching values to their students.”¹⁴ This court stated:

To the extent there is an implicit value judgment underlying the [community service] program it is not materially different from the underlying programs that seek to discourage drug use and premature sexual activity, encourage knowledge of civics and abiding rule of law, and even encourage exercise and good eating habits.”¹⁵

While the classroom is one of the primary places where children learn such values, the public policy interest in *teaching* young people about controversial and sensitive topics cannot be implemented effectively without the cooperation of many individuals, government agencies, and community organizations. Thus, school districts and community social service agencies across the Nation have a strong interest in determining the issues with which children are struggling in order to offer them helpful, relevant assistance. It

¹³ 987 F.2d at 997.

¹⁴ *Id.*

¹⁵ *Id.*

is important that this occur on not only on an individual basis, but also at the school, community, and national level.

Studies indicate that America's youth face serious issues that can affect their health, safety, and ability to learn, including depression, suicide, drug and alcohol use, violence, and premarital sex.¹⁶ Communities have an interest in assisting and educating their young people regarding these issues. A logical first step in offering meaningful assistance to children is to determine what issues are prevalent in a particular community. Surveying students in a particular community at school is an efficient and effective way to accomplish this goal.

¹⁶ A recent national survey compiled by the Centers for Disease Control and Prevention of students in grades 9-12 revealed the following statistics: During the 30 days preceding the survey: 30.2% of students had ridden with a driver who had been drinking alcohol; 17.1% of students carried a weapon; 21.9% of students smoked cigarettes; 44.9% had consumed at least one drink of alcohol; and 22.4% smoked marijuana. During the 12 months preceding the survey: 33.0% of students had been in a physical fight; 8.9% had been hit, slapped, or physically hurt on purpose by a boyfriend or a girlfriend; 28.6% had felt so sad or hopeless almost every day for 2 weeks or more in a row that they stopped doing usual activities; 16.9% of students had seriously considered attempting suicide. In their lifetimes, 9.0% of students had been forced to have sexual intercourse when they did not want to; 46.7% of students had had sexual intercourse; 14.4% had had sexual intercourse with 4 or more partners; and 4.2% of students had been pregnant or gotten someone else pregnant. *See* CENTERS FOR DISEASE CONTROL AND PREVENTION, YOUTH RISK BEHAVIOR SURVEILLANCE, UNITED STATES (2004) 4-6, 8, 12, 13, 17, 18, 20, *available at* <http://www.cdc.gov/mmwr/PDF/SS/SS5302.pdf>.

While national statistics provide *general* information regarding the issues young people face and how pervasive those issues are, local statistics are more useful in assessing the severity and pervasiveness of the problems that youth in a *particular community* face. A careful look at the Center for Disease Control's data by geographic location, sex, and race/ethnicity reveals that the severity of common problems among teenagers varies from community to community.¹⁷ By gathering and analyzing data about their own students, local school boards are better able to focus curricula and resources on the particular needs of local youth and to seek the assistance of parents and other community organizations to develop holistic, integrated strategies and programs to provide educational and preventive assistance.

¹⁷ For example, the CDC survey indicated that within the 30 days preceding the survey 21.1% of students in New York State had ridden with a driver who had been drinking alcohol, as opposed to 42.8% of students in North Dakota. Of females surveyed in Dallas, Texas, 39.2% had done the same, as opposed to only 17.0% of females in New York City. Within 30 days preceding the survey 5.2% of male students in Ohio had carried a weapon to school, as opposed to 16% of male students in Wyoming. Within the preceding year of the survey, 23.4% of Hispanic females had seriously considered attempting suicide, compared to only 12.9% of Hispanic males. Of females surveyed in Kentucky, 33.4% had used cigarettes within the 30 days preceding the survey, whereas only 13.6% of females in Idaho had done so. Finally, 29.8% of high school students in New York City had tried marijuana in their lifetime, but 52.2% had done so in Milwaukee, Wisconsin. *See id.* at 42, 45, 50, 58.

In summary, where the state has a public policy of educating students about sensitive and controversial topics, student data collected from surveys can assist in the development of an effective curriculum and ensuring that students are ready and able to learn. This court has acknowledged this public policy. Moreover, the pervasiveness of problems facing our youth related to drugs, alcohol, sex, violence, and depression, illustrates that school districts across the Nation must have the ability to survey local students to determine their needs so that appropriate assistance may be provided.

III. Surveying students does not violate parents' right to make important decisions with respect to the care and custody of their children.

The parental right to make important decisions regarding the care and custody of children does not prohibit schools from administering student surveys, especially where parents receive advance notice of the surveys and may opt their children out of participation. While this right is important, it is not absolute. Courts have recognized that in the school context, the countervailing interests in ensuring adequate education of children may overcome parental objections to curriculum content and other educational activities. Similar legal principles apply to the administration of surveys for legitimate educational reasons.

The Supreme Court has recognized that the Constitution protects parental rights with respect to the care and custody of children, including some control over what children learn in school.¹⁸ Some state statutes allow parents and community members to contribute to choosing the school curriculum by participating in the selection of textbooks.¹⁹ In addition, some federal laws, such as the Protection of Pupil Rights Act (PPRA), recognize parental interests in children’s education and provide specific rights, including the right to inspect curricular materials.²⁰

While parents may participate to some extent in selecting and reviewing curricular materials, parents generally do not have the right to opt their children out of required school curriculum regardless of the subject matter being taught.²¹ Some states, like New Jersey, allow parents to seek exemptions from parts of the curriculum for specific, limited reasons such as “sincerely held moral or religious beliefs.”²² However, in the absence of such an exemption, courts have generally been unresponsive to parents’

¹⁸ See *Wisconsin v. Yoder*, 406 U.S. 205 (1972).

¹⁹ See, e.g., ALA. CODE § 16-36-62 *et seq.*; OKLA. STAT. ANN. tit. 70 § 16-101 *et seq.*

²⁰ 20 U.S.C. § 1232h(a).

²¹ *Leebaert ex rel. Leebaert v. Harrington*, 193 F. Supp. 2d 491, 502 (D. Conn. 2002) (“[U]nder the law as it exists today, parents of public school students do not have a constitutional veto over decisions of school officials concerning the contents of required courses” or whether students have to participate in them.).

²² N.J. ADMIN. CODE § 6A: 8-3.1(d) (2002).

attempts to opt their children out of mandatory classes, such as sex education.²³ These cases support a school district's authority to require students to attend classes presenting sensitive and controversial material despite parents' objections.

The authority of school boards to define and prescribe the school curriculum, including controversial, sensitive topics, has been repeatedly reaffirmed by the courts.²⁴ The Supreme Court in *Hazelwood School District v. Kuhlmeier*²⁵ recognized that school boards may, consistent with the Constitution, regulate the content of all school-sponsored speech as long as the regulation is "reasonably related to legitimate pedagogical concerns." Lower courts have affirmed school boards' decisions to include numerous

²³ See, .e.g., *Leebaert ex rel. Leebaert v. Harrington*, 193 F. Supp. 2d 491, 502 (D. Conn. 2002); *Davis v. Page*, 385 F. Supp. 395 (D.N.H 1974); *Hopkins v. Hamden Bd. of Educ.*, 289 A.2d 914 (Conn. C.P. 1971) *Cornwell v. State Bd. of Educ.*, 314 F. Supp. 340 (D. Md. 1969); *Davis v. Page*, 385 F. Supp. 395 (D.N.H 1974); *Aubrey v. Sch. Dist. of Philadelphia*, 437 A.2d 1306 (Pa. Commw. 1981).

²⁴ This point is well-articulated by the First Circuit: "If all parents had a fundamental constitutional right to dictate individually what the schools teach their children, the schools would be forced to cater a curriculum for each student whose parents had genuine moral disagreements with the school's choice of subject matter. We cannot see that the Constitution imposes such a burden on state education systems...." *Brown v. Hot, Sexy and Safer Productions, Inc.*, 68 F.3d 525, 534 (1st Cir. 1995).

²⁵ 484 U.S. 260, 268-69 (1988).

controversial topics in the school curriculum, including HIV/AIDS,²⁶ drugs,²⁷ racial issues,²⁸ and morals.²⁹ Schools may also teach about religion or use religious materials in the classroom.³⁰

These cases demonstrate that parental objections alone are an insufficient basis to invalidate state and local school board decisions about the importance of exposing students to sensitive, controversial subject matter in school. This principle applies equally to questions in student surveys that seek to gather student information for legitimate educational reasons. For example, parental objections to survey questions about stress, depression,

²⁶ See, e.g., *Brown*, 68 F.3d 525 (parents' rights to rear children were not violated when the school district required students to attend a sexually explicit AIDS awareness assembly).

²⁷ See, e.g., *Altman v. Bedford Cent. Sch. Dist.*, 45 F. Supp. 2d 368 (S.D.N.Y. 1999) (holding that Drug Abuse Resistance Program (DARE) did not violate student's First Amendment rights where program is "relatively free of moral overtones, contains no religious emphasis whatsoever, and leaves the 'decision' whether or not to use tobacco, alcohol or drugs to the students after evaluating both positive and negative effects").

²⁸ See, e.g., *Monteiro v. Tempe Union Sch. Dist.*, 158 F.3d 1022 (9th Cir. 1998) (upholding school's refusal to remove THE ADVENTURES OF HUCKLEBERRY FINN and A ROE FOR EMILY from school curriculum despite accusations that works were racist in whole or in part).

²⁹ See, e.g., *Daugherty v. Vanguard Charter Sch. Academy*, 116 F. Supp. 2d 897 (W.D. Mich. 2000) (rejecting argument that school district could not employ "Moral Focus Curriculum" based on four Greek cardinal virtues of prudence, temperance, fortitude, and justice because curriculum endorsed a religious viewpoint).

³⁰ See *Abington Township v. Schempp*, 374 U.S. 203 (1963) ("Nothing we have said indicates that such a study of the Bible or of religion, when presented objectively as part of a secular program of education may not be effected consistently with the First Amendment.").

and death implicate no constitutional concerns where legally valid state curriculum content standards on social and emotional health include: “discuss[ion of] the causes of stress and demonstrate ways to deal with stressful situations...explain and demonstrate ways to cope with rejection, loss, and separation.”³¹ If a district can teach about such subject matter without violating parents’ rights regarding custody and control of their children, certainly a district can survey about the same subject matter.

In summary, the argument that school districts may not administer a *voluntary survey* to students on controversial, sensitive topics because it infringes on parental rights must fail given the large body of case law allowing school districts to *teach* about those same controversial, sensitive subjects in *required* classes. Certainly, if the parental right to rear their children as they see fit is not infringed when schools *teach* about controversial subjects, there is little, if any, impingement on that right when students merely are *surveyed*—even on a mandatory basis—about their feelings about controversial subjects. For this reason, parents’ rights regarding the custody and control of their children do not prevent school boards from administering surveys about controversial and sensitive topics.

³¹ *Supra* note 12.

CONCLUSION

The district court reached the correct conclusion when it held that the school district did not violate students' First Amendment speech and privacy rights by administering a voluntary, anonymous survey and disclosing results only in the aggregate. Affirming the district court's decision will preserve a school district's ability to be flexible when educating students about a variety of topics and prepared to meet the diverse and changing needs of students.

Respectfully submitted,

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CERTIFICATE OF BAR MEMBERSHIP

Pursuant to Local Appellate Rule 28.3, the undersigned certifies that she is one of the attorneys whose names appear on this brief and that she is a member of the bar of this Court.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), the undersigned certifies as follows:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 3,213 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in proportionally spaced typeface, 14-point Times New Roman, using Word 97.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that two copies per counsel of this Brief Amicus Curiae have been served by first-class U.S. mail on counsel (listed below) for each party, and that ten copies of this Brief have been dispatched by first-class U.S. mail to the Clerk of the United States Court of Appeals for the Third Circuit, 601 Market Street, Philadelphia, PA 19106, on this 28th day of October, 2004.

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