

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 DEBORAH MORSE, ET AL. :

4 Petitioners :

5 v. : No. 06-278

6 JOSEPH FREDERICK. :

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8 Washington, D.C.

9 Monday, March 19, 2007

10

11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States
13 at 10:03 a.m.

14 APPEARANCES:

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16 Petitioners.

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21 Respondent

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P R O C E E D I N G S

(10:03 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument first today in case 06-278, Morse versus Frederick.

Mr. Starr.

ORAL ARGUMENT OF KENNETH W. STARR

ON BEHALF OF THE PETITIONERS

MR. STARR: Mr. Chief Justice, and may it please the Court:

Illegal drugs and the glorification of the drug culture are profoundly serious problems for our nation. Congress has so recognized, as has this Court, time and again. The magnitude of the problem is captured in the amicus brief, the Court has a number of amicus briefs before it, but the amicus brief of General McCaffrey, of Secretary Bennett, and a number of organizations. And particularly at pages 5 to 9 of that brief, the nature and scope of the problem are well-captured.

JUSTICE KENNEDY: Well, is this case limited to signs about drugs? What is the rule that you want us to adopt for deciding this case?

MR. STARR: The rule of the Court -- that it articulated in Tinker. The rule of the Court as

1 articulated in Tinker is that there is, in fact, a right
2 to political speech subject to disruption, requirements
3 that the speech not be disruptive. That was --

4 JUSTICE KENNEDY: Disruptive of what?
5 Disruptive of the classroom order? There was no
6 classroom here.

7 MR. STARR: Including but not limited to.
8 This was a school authorized event, this was education
9 outside of the classroom. It was essentially a school
10 assembly out of doors. It was essentially --

11 JUSTICE SOUTER: Well, I can understand if
12 they unfurled the banner in a classroom that it would be
13 disruptive, but what did it disrupt on the sidewalk?

14 MR. STARR: The educational mission of the
15 school, which is --

16 JUSTICE SOUTER: No, but I mean, that's at a
17 level of generality that doesn't get us very far. I
18 mean, what specifically did it disrupt? Did it disrupt
19 the parade, did it disrupt teaching, what was it?

20 MR. STARR: 5520, a school policy of the
21 board that says emphatically that political speech is
22 protected, embracing Tinker.

23 JUSTICE SOUTER: Then if that's the rule,
24 the school can make any rule that it wants on any
25 subject restrictive of speech, and if anyone violates

1 it, the result is, on your reasoning, it's disruptive
2 under Tinker.

3 MR. STARR: Not at all. I think this Court --

4 JUSTICE SOUTER: Then I'm missing the
5 argument.

6 MR. STARR: The argument is that this Court
7 in Tinker articulated a rule that allows the school
8 boards considerable discretion both in identifying the
9 educational mission and to prevent disruption of that
10 mission, and this is disruptive of the mission --

11 JUSTICE KENNEDY: Well, suppose you have --
12 suppose you have a mission to have a global school. Can
13 they ban American flags on lapel pins?

14 MR. STARR: Absolutely not, because under
15 Tinker that is political expression. Let me be very
16 specific. This case is ultimately about drugs and other
17 illegal substances, which are --

18 JUSTICE GINSBURG: So if the sign had been
19 "Bong Stinks for Jesus," that would be -- and Morse had
20 the same reaction -- that this was demeaning to the
21 Olympics and it was unruly conduct, that there would be
22 a protected right under Tinker because the message was
23 not promoting drugs?

24 MR. STARR: She stated in her answers to
25 interrogatories that she may very well not have

1 interfered with the banner had it in fact said "Legalize
2 Marijuana." Under our theory, we think she could have
3 interfered with that because it was disruptive to the
4 event, it was disorderly to the event itself, but the --

5 JUSTICE SOUTER: What would be disorderly?
6 I don't understand this disorder. If somebody holds up
7 a sign and says change the marijuana laws, why is it
8 disruptive of anything, simply because the school quite
9 naturally has said we support the enforcement of the
10 law, and the law right now does forbid the use of
11 marijuana?

12 MR. STARR: I --

13 JUSTICE SOUTER: It's political speech, it
14 seems to me. I don't see what it disrupts, unless
15 disruption simply means any statement of disagreement
16 with a position officially adopted by the school. Is
17 that what you mean by disruption?

18 MR. STARR: No. Your Honor, first of all,
19 this is, I think, an unusual characterization, namely
20 for this to be called political speech. We would --

21 JUSTICE SOUTER: If it's calling -- I mean
22 --

23 MR. STARR: We think it's a First -- I'm
24 sorry.

25 JUSTICE SOUTER: A call for a change in the

1 law, I would have supposed, was political speech.

2 MR. STARR: That wasn't the interpretation.
3 Your Honor, let's back up, if I may. Someone has to
4 interpret the message and the front line message
5 interpreter is the school official. The school official
6 --

7 JUSTICE SOUTER: Well, that may be, but
8 that's not the hypo. The -- the hypothetical is, what
9 if there is a sign or a statement in the school calling
10 for a change in, you know, the prohibition against
11 marijuana use. As a call for change in the law, I would
12 suppose it was political speech. But as I understood
13 the argument you were making, it would still be regarded
14 as an exception, as it were, to Tinker, because it was
15 disruptive. And it was disruptive in the sense that it
16 disagreed with official school policy, which was to
17 enforce the law or support the law as it was. Is that
18 your position on what disruption means under Tinker?

19 MR. STARR: But our -- the answer is no.
20 Because what we are also urging the Court to consider is
21 its gloss on Tinker and Fraser, and also what this
22 Court said in Kuhlmeier. And in Fraser, the Court was
23 very clear, the first three paragraphs in part three of
24 the opinion, in talking about the habits and manners of
25 civility, and inculcating the values of citizenship.

1 That, in fact, is what is happening here. There is an
2 effort both to -- to prevent a message that is
3 inconsistent with a fundamental message of the schools,
4 which is the use of illegal drugs is simply verboten,
5 and we believe that is permitted under Tinker --

6 JUSTICE SCALIA: So you want to get away
7 from a hypothetical then. I don't know why you try to
8 defend a hypothetical that involves a banner that says
9 amend the marijuana laws. That's not this case as you
10 see it, is it?

11 MR. STARR: Well, it's certainly not this
12 case, but --

13 JUSTICE SCALIA: This banner was interpreted
14 as meaning smoke pot, no?

15 MR. STARR: It was interpreted -- exactly --
16 yes. It was interpreted as an encouragement of the drug
17 culture and --

18 JUSTICE ALITO: Are you arguing that there
19 should be a sui generis rule for speech that advocates
20 illegal drug use, or this broader argument that the
21 school can suppress any speech that is inconsistent with
22 its educational mission as the school --

23 MR. STARR: The Court can --

24 JUSTICE ALITO: -- defines it?

25 MR. STARR: I apologize. The Court can

1 certainly decide this on very narrow grounds, that there
2 are certain substances, illegal drugs, we would include
3 alcohol and tobacco, that's part of the school's policy,
4 because those are illegal substances which are very
5 injurious to health. And this Court has noted that in
6 Vernonia and in Earls, time and again, it has said these
7 are very dangerous substances and we have a clear policy
8 sanctioned by Congress, and also noted by courts across
9 the country, that illegal drugs are so dangerous that
10 schools are entitled to have a message going --

11 CHIEF JUSTICE ROBERTS: But the problem --
12 the problem, Mr. Starr, is that school boards these days
13 take it upon themselves to broaden their mission well
14 beyond education or protection from illegal substances,
15 and several of the briefs have pointed out school boards
16 have adopted policies taking on the whole range of
17 political issues. Now, do they get to dictate the
18 content of speech on all of those issues simply because
19 they have adopted that as the part of their educational
20 mission?

21 MR. STARR: No, because that may very well
22 be inconsistent with Tinker. Tinker articulates a
23 baseline of political speech is, in fact, protected,
24 subject to --

25 CHIEF JUSTICE ROBERTS: Well, I think that

1 -- I think you're right about that, and I guess my
2 question goes to how broadly we should read Tinker. I
3 mean, why is it that the classroom ought to be a forum
4 for political debate simply because the students want to
5 put that on their agenda? Presumably the teacher's
6 agenda is a little bit different and includes things
7 like teaching Shakespeare or the Pythagorean Theorem,
8 and just because political speech is on a student's
9 agenda, I'm not sure that it makes sense to read Tinker
10 so broadly as to include protection of those, that
11 speech.

12 MR. STARR: This Court has not read Tinker
13 quite so broadly in both Fraser and in Kuhlmeier, and
14 there are a couple of aspects of Tinker that I think are
15 worthy of note. One, that there was no written policy
16 there, so there was an issue of standardless discretion
17 being exercised. And also --

18 JUSTICE GINSBURG: But it may have made a
19 difference in Tinker. If the school had a policy,
20 defend our troops in Vietnam, would that have brought
21 this into the category that you are now carving out?
22 You said that Tinker had no policy, but suppose the
23 school did have a policy, patriotism, we support our
24 troops, no bad speech about the war in Vietnam. Should
25 Tinker have come out the other way?

1 MR. STARR: No, it should not, because there
2 I think there are concerns with respect to what this
3 Court has identified as trying to, even in the public
4 school setting, quite apart from the university setting,
5 to cast a pall of orthodoxy to prevent the discussion of
6 ideas. What is happening here of course in this case,
7 it can be decided very narrowly, that drugs, alcohol and
8 tobacco just have no place in the schools. And --

9 JUSTICE KENNEDY: Yes, but the rule you
10 proposed, I thought, in response to my question is that
11 the school has wide discretion to define its educational
12 mission and it can restrict speech that's inconsistent
13 with that mission.

14 MR. STARR: And that's what this Court in --

15 JUSTICE KENNEDY: And it seems to me that's
16 much broader than Tinker. Now you said, well, there is
17 an exception for political speech. Well, but then
18 you're right with Justice Ginsburg's hypothetical, let's
19 suppose that they have a particular view on a political
20 issue, No Child Left Behind, or foreign intervention and
21 so forth.

22 MR. STARR: Justice Kennedy, the words that
23 you articulated are essentially quotes of Fraser and
24 Kuhlmeier, so there is a broadening of the lens and a
25 restoration, frankly, of greater school discretion in

1 those two cases than one might see in Tinker. They of
2 course drew, as you well know, from Justice Black's
3 warning in dissent in Tinker that the Federal courts, the
4 Federal judiciary should not be extending itself unduly
5 into the work of the school boards' --

6 JUSTICE STEVENS: May I ask --

7 JUSTICE SCALIA: Why do we have to get into
8 the question of what the school board's policy is and
9 what things they can make its policy? Surely it can be
10 the -- it must be the policy of any school to discourage
11 breaking of the law. I mean, suppose this banner had
12 said "Kill Somebody," and there was no explicit regulation
13 of the school that said you should not, you should not
14 foster murder. Wouldn't that be suppressible?

15 MR. STARR: Of course. That is not --

16 JUSTICE SCALIA: Of course it would, so --

17 MR. STARR: The answer is yes.

18 JUSTICE SCALIA: Why can't we decide this
19 case on that narrow enough ground, that any school
20 whether it has expressed the policy or not, can suppress
21 speech that advocates violation of the law?

22 MR. STARR: I think it can, but it raises
23 some interesting potential hypothetical questions, what
24 about listening to the voice of Martin Luther King
25 Junior, conscientious objection and so forth. I don't

1 think the Court needs to stray into those areas because
2 here we have a written policy which does in fact respond
3 to concerns about the exercise of standardless
4 discretion.

5 JUSTICE SOUTER: Does -- do we have --

6 JUSTICE STEVENS: May I just clear up one
7 thing to be 100 percent sure I understand your position?
8 It does -- the message is the critical part of this
9 case. If it was a totally neutral message on a 15-foot
10 sign, that would be okay. You're not saying 15-foot
11 signs are disruptive?

12 MR. STARR: Not inherently disruptive, but
13 in fact -- the answer is yes. We're not saying that. And --

14 JUSTICE STEVENS: And so we're focusing on
15 the message and that's the whole crux of the case.

16 MR. STARR: That's why this case is here
17 because of the message.

18 JUSTICE BREYER: Well, why is that? Why?
19 Why? I mean suppose you go on a school trip, and the
20 teacher says on the school trip, I don't want people
21 unfurling 15-foot banners. I don't care what they are
22 about.

23 MR. STARR: It may very well be though --

24 JUSTICE BREYER: We are going to visit the
25 State capital and we are not marching down the street

1 with 15-foot banners. I mean, does the First Amendment
2 say the teacher can't say that?

3 MR. STARR: It does not. But the Juneau
4 School Board and 5520, Justice Breyer, allows -- in fact
5 it has a Tinker statement in the first paragraph of
6 5520, which is also, you will not be advocating drugs.
7 And so there is essentially a culture of liberty in
8 Juneau. You don't have to --

9 JUSTICE BREYER: You just said suppose --
10 why could I not say that? I mean I'm not going to do
11 it, necessarily. But why could I not say, would it be
12 wrong in an opinion to say a school board can on a
13 school trip tell the students they can't unfurl 15-foot
14 banners? Is that a correct statement of the law or not?
15 In your opinion.

16 MR. STARR: In my opinion it is a correct
17 statement of the law. But in response to Justice
18 Stevens' question, the message here is in fact critical
19 because what we know about this case is that -- and you're
20 here of course to respond to this case, which has to do
21 with a message that the message interpreter, Deborah
22 Morse, who by the way --

23 JUSTICE STEVENS: It's also critical here to
24 your case that it was a school event. If it, if this
25 had been two blocks down the street there would

1 have been no objection.

2 MR. STARR: If Mr. Frederick had seen fit to
3 go down Glacier Avenue to J and J's, a popular hangout,
4 there would have been no high school jurisdiction.
5 There may have been elementary school -- but yes. He
6 could have gone, Justice Stevens, to the State capital
7 or anywhere along the ten-mile route.

8 JUSTICE GINSBURG: Suppose it were Saturday
9 instead of a weekday.

10 MR. STARR: I beg your pardon.

11 JUSTICE GINSBURG: Suppose it were Saturday,
12 not a school day. And the school children were not
13 required to show up at the Olympic event but were
14 encouraged to and the same thing happened. Would it
15 make a difference that it wasn't in the course of a
16 regular school day?

17 MR. STARR: No. I think it still, under
18 your hypothetical would be school sponsored. But there
19 might be a more difficult showing of disruption or
20 inconsistency with the educational mission. That is
21 what this Court articulated in Fraser and again in
22 Kuhlmeier that the school is able, under our policies of
23 federalism and values of federalism and democratic theory,
24 to fashion its educational mission subject to
25 constitutional safeguards. And that mission of

1 preventing the schools from being infected with pro-drug
2 messages continues wherever there is school
3 jurisdiction, and that would include on a Saturday field
4 trip or other kind of activity and I think that --

5 JUSTICE SCALIA: Mr. Starr, you -- you
6 responded to Justice Breyer that you think the school
7 could just prohibit the unfurling of 15-foot banners on
8 a trip. Could it prohibit the wearing of black armbands
9 on a trip?

10 MR. STARR: I don't believe so.

11 JUSTICE SCALIA: And if not -- if not,
12 what's the difference?

13 MR. STARR: Because of the potential for
14 disruption, disorderliness in the event and the judgment
15 that is entrusted to --

16 JUSTICE SOUTER: But don't we have to be
17 more specific about the context in determining whether
18 there's a disruption? If there's a school trip to an art
19 museum, unfurling a 15-foot banner in front of the
20 pictures is clearly going to be disruptive of the object
21 of the trip. Unfurling the banner in a classroom is going
22 to be disruptive to the teaching of Shakespeare or
23 whatever is supposed to be going on there.

24 What we have here is the unfurling of a
25 banner on a sidewalk in a crowd with kids throwing

1 snowballs waiting for some -- somebody to run by with a
2 TV camera nearby. And there is a real question as to
3 whether, it seems to me, as to whether it is in a kind
4 of practical, real world sense, disruptive of anything.
5 And if there is such a question, shouldn't the answer
6 favor the right to, to make the speech as opposed to
7 favor the right to suppress it?

8 MR. STARR: Your Honor, the answer is no.

9 We do think that the test that this Court
10 has articulated which we embrace, looks not simply to
11 "disruption" but inconsistency with what this Court has
12 called -- this is this Court's language -- the basic
13 educational mission, then surely --

14 JUSTICE SOUTER: All right. Let me, let me
15 follow, actually ask you the same question on -- on
16 that. Because in response to Justice Scalia's question
17 you said certainly that the school has got the right to
18 have a policy that forbids violating the law and calling
19 for violations of the law.

20 Accepting that as a premise, don't we need,
21 before the school may suppress the speech, don't we need
22 at least a statement which is clearly inconsistent with
23 that policy? And if that is so, is "Bong Hits 4 Jesus"
24 inconsistent with it? It sounds like just a kid's
25 provocative statement to me.

1 MR. STARR: Your Honor, with all due
2 respect, the key is to allow the school official to
3 interpret the message as long as that interpretation is
4 reasonable. You might disagree with that just as
5 Justice Brennan disagreed with whether Matt Fraser's
6 speech was all that terrible. But he said even though
7 it wasn't all that terrible I nonetheless defer to the
8 interpretation of school officials. That's what our
9 educational system is about.

10 JUSTICE GINSBURG: But those were the words
11 and characterizing them as offensive, but here one could
12 look at these words and say it's just nonsense. Or one
13 could say it's like mares-eat-oats. It isn't clear that
14 this is "smoke pot."

15 MR. STARR: Your Honor, again, Deborah
16 Morse, a conscientious principal, interpreted the
17 message in light of the subculture of the school where
18 drug use is a serious problem. And it was on-the-spot
19 judgment. We believe that judgment was reasonable as
20 opposed to a judgment reached in judicial chambers, but
21 we know that that was also the judgment of the
22 superintendent and district judge --

23 JUSTICE STEVENS: Is that a judgment clear
24 enough as a matter of law, or is there possible debate
25 as to whether that's a reasonable interpretation of the

1 message? Let's assume it was an ambiguous message.
2 Would we have to accept her interpretation on summary
3 judgment?

4 MR. STARR: Yes, I believe you do. And --
5 well, that's of course a question for the district
6 judge. And here the judge analyzed the facts in terms
7 of what the individual was trying to say and determined
8 that that is a reasonable interpretation and that is all
9 that is required under this Court's law.

10 I'd like to reserve the remainder of my
11 time, if I may. Thank you.

12 CHIEF JUSTICE ROBERTS: Thank you, counsel.
13 Mr. Kneedler.

14 ORAL ARGUMENT OF EDWIN S. KNEEDLER,
15 ON BEHALF OF UNITED STATES AS AMICUS CURIAE,
16 SUPPORTING PETITIONERS

17 MR. KNEEDLER: Mr. Chief Justice, and may it
18 please the Court:

19 The First Amendment does not require public
20 school officials to stand aside and permit students who
21 are entrusted to their supervision and care to promote
22 or encourage the use of illegal drugs. As this Court
23 observed in *Earls*, the nationwide drug -- drug epidemic
24 makes the war against drugs a pressing concern in every
25 school.

1 JUSTICE KENNEDY: And is that the rationale
2 on which you wish us to decide this case, nothing more
3 broad?

4 MR. KNEEDLER: The Court need not decide
5 anything more broadly than that.

6 JUSTICE KENNEDY: I'm asking what your
7 recommendation is to what our rule should be in this case.

8 MR. KNEEDLER: Well, I think this is a
9 manifestation of the principle articulated in Earls and
10 repeated in Hazelwood that a school does not have to
11 tolerate a message that is inconsistent with its basic
12 educational mission.

13 JUSTICE ALITO: Well, that's a very -- I
14 find that a very, a very disturbing argument, because
15 schools can, and they have, defined their educational
16 mission so broadly that they can suppress all sorts of
17 political speech and speech expressing fundamental
18 values of the students, under the banner of, of -- of
19 getting rid of speech that's inconsistent with their
20 educational mission.

21 MR. KNEEDLER: That's why I think there
22 would, there would be, it would make a lot of sense for
23 the Court to articulate a rule that had to do with
24 encouraging illegal conduct and particularly --

25 JUSTICE BREYER: Well, why go into this? I

1 mean, that's what I actually, seriously don't
2 understand. Suppose the school has the following rule:
3 By the way, on our field trips you can carry around 15-
4 foot banners. They can say anything. Except they can't
5 talk about drugs and they can't talk about sex and they
6 can't talk about -- I don't know. Alright, so you have
7 three things. Would that be constitutional?

8 MR. KNEEDLER: Well -- I think, I think a
9 school could certainly prohibit the display of banners
10 on a school trip or in a school assembly.

11 JUSTICE BREYER: Suppose that this
12 particular person had whispered to his next door
13 neighbor, "Bong Hits 4 Jesus, heh heh heh," you know.
14 Supposed that's what had happened?

15 (Laughter.)

16 MR. KNEEDLER: And that may well -- that may
17 well be different. And that's why I --

18 JUSTICE BREYER: No. What would be
19 different -- that's what I -- what a principal who has
20 to act quickly sees across the street at a school
21 meeting, a big banner go up making a joke out of drug
22 use. So the principal acts.

23 Now, are we supposed to divide that into
24 little bitsy parts? Because as soon as we do we are
25 going to get a rather interesting, complicated and very

1 difficult set of constitutional rules. But you want us
2 to do that.

3 MR. KNEEDLER: No. I do not. I think -- I
4 think the point that you make that a principal sees the
5 banner across the street and sees the word "Bong Hits,"
6 and -- and at the very moment when the Olympic torch was
7 about to arrive, I think it was. She made a quick
8 judgment and an entirely reasonable one that the display
9 of the slang words "Bong Hits" --

10 JUSTICE KENNEDY: Well, then you're not
11 arguing for the broad educational mission, which is what
12 you said at the first.

13 MR. KNEEDLER: Well, there are several
14 gradations that the Court could take: Advocacy of
15 illegal conduct generally; more specifically advocacy of
16 illegal drugs. But I believe -- I think it's important
17 to recognize that this Court's precedents recognize --
18 recognize several different justifications for
19 restricting student speech. In Tinker itself which
20 dealt with political speech, the Court was careful to
21 point out that even then, if the speech could be shown
22 to present a threat of a material disruption to the
23 class work, and I think this would answer your question,
24 Mr. Chief Justice, if the teacher wants to teach
25 Shakespeare, the teacher doesn't have to turn over the

1 class to political speech.

2 JUSTICE ALITO: But that's a
3 viewpoint-neutral regulation. This isn't, the principal
4 didn't say this was a viewpoint-neutral regulation, did
5 she?

6 MR. KNEEDLER: No. No. And -- and, and
7 just to finish, in Tinker even with a viewpoint concern,
8 the Court said if you could show material disruption,
9 and --- and the Court made that clear in Tinker, by, by
10 its comparison to several lower court decisions where
11 wearing buttons had been prohibited because they had
12 caused disruption. And the third category in Tinker
13 itself was where there would be an intrusion upon the
14 rights of other students to be secure and be let alone.
15 That's Tinker dealing with political speech.

16 But in Fraser and Hazelwood the Court
17 identified additional categories of speech that could be
18 governed by the school, and this is in footnote 4 of
19 Hazelwood. The Court made clear that the ability to
20 regulate those categories of speech goes beyond the
21 question of whether there would be disruption or whether
22 there would be --

23 CHIEF JUSTICE ROBERTS: So -- so you think
24 that the, not a 15-foot banner but a very discrete
25 button that says "Legalize Marijuana," although it might

1 be covered as not being disruptive under Tinker, it
2 could be inconsistent with the school's mission and
3 prohibited on that basis?

4 MR. KNEEDLER: Well, I think -- I think if,
5 if the button is "Legalize Marijuana" during a referendum
6 in the State, then that, that might be the category of
7 political speech that could not be regulated.

8 JUSTICE GINSBURG: And at -- at this very
9 rally, I mean I thought your brief said that it's okay
10 to work for change in existing law which such a sign
11 would be, but it is not okay to violate the law. And no
12 one was smoking pot in that crowd.

13 MR. KNEEDLER: But -- but the, what was
14 happening was a sign that was reasonably construed to
15 encourage the use of illegal drugs.

16 JUSTICE SOUTER: All right. Given the fact
17 that this is a First Amendment case, isn't a court
18 forced into the position if it's going to be consistent
19 with what else we have said, even at the final appellate
20 level, of giving pretty careful scrutiny to the
21 statement itself in determining whether it may be
22 suppressed or punished?

23 And if we do that, is it such a reasonable
24 construction that this is an -- an incitement to illegal
25 drug use?

1 I mean it's a statement which makes, makes
2 the drug law look a little ridiculous, I think, but I'm
3 not sure that that is very distinguishable from a
4 statement saying "you ought to change the drug law."

5 MR. KNEEDLER: Well, I -- I -- I think in,
6 in this Court's decisions dealing with public schools,
7 this Court has, has a consistent theme as to give
8 deference to the judgments by the educators. Public
9 schools --

10 JUSTICE SOUTER: Do we have to give -- let
11 me ask you this. And maybe this is the, as far as we
12 can go with it here.

13 Is that the answer to the question here
14 about what the statement means?

15 MR. KNEEDLER: Yes.

16 JUSTICE SOUTER: In other words, if we give
17 deference your argument wins. But if we don't give
18 deference, then does anybody really know what the
19 statement means?

20 MR. KNEEDLER: I don't think the question is
21 what Mr. Frederick intended. The question is what a
22 reasonable observer would think. And the words "bong
23 hits" are slang that would be particularly, have a
24 particular characteristic of getting across to other
25 students, and they suggest a casual tolerance and

1 encouragement of --

2 JUSTICE STEVENS: What if the sign said
3 "bong hits should be legal"?

4 MR. KNEEDLER: I, I think that would be a
5 judgment call. I think the, I think the casual use --

6 JUSTICE STEVENS: Under your view wouldn't
7 the principal's judgment always prevail?

8 MR. KNEEDLER: Well it has to be a
9 reasonable judgment and this is, this is reflected in
10 Fraser, it's reflected in --

11 JUSTICE STEVENS: Is that a question of fact
12 or a question of law?

13 MR. KNEEDLER: Pardon me?

14 JUSTICE STEVENS: Is whether it's a
15 reasonable judgment --

16 MR. KNEEDLER: I think ultimately it's a
17 question of law, whether it's a reasonable judgment.

18 JUSTICE KENNEDY: This, this -- this parade
19 had a theme to celebrate the Olympics, the high
20 school kids are carrying the torch, the band is in it.
21 And suppose the banner said vote for -- "vote Republican,"
22 "vote Democrat." And he wants to be on the TV with that.
23 Could this -- the principal make him take that sign down
24 on the ground in that it's inconsistent with the whole
25 theme of, of, of the parade? Something like our Hurley

1 case?

2 MR. KNEEDLER: Yes. I -- I mean, I think
3 for this reason. This was essentially an outdoor
4 assembly, where the -- whether the students were
5 assembled to watch a particular event, just as in an
6 indoor assembly.

7 JUSTICE KENNEDY: Is that different from the
8 rationale you've put --

9 MR. KNEEDLER: Yes. Again, that's why I
10 don't think there's any one single rule that governs all
11 cases. This, this I think falls under the Fraser
12 standard, where the Court said that, that schools have a
13 duty to inculcate matters of civility and to prepare
14 students for citizenship, and not violating the law is
15 an important part of that and teachers act in loco
16 parentis. They act as guardians and they should be able
17 to do, as this Court says in Earls, what a reasonable
18 guardian would do. That would mean don't allow people
19 to encourage lawbreaking.

20 JUSTICE GINSBURG: But it wasn't, it wasn't
21 like an assembly, was it? As I understand it, the
22 children were released from school, but they were not
23 required to attend this event and they were not required
24 to stand in front of the school on the opposite side.
25 They weren't monitored by their teachers, so they -- and

1 there were nonstudents in the crowd. So it's not like a
2 school assembly.

3 MR. KNEEDLER: The students' present at the
4 event, presence at the event, was like an assembly.
5 Students may go into an assembly hall and not have to
6 sit with their class. They were released from class,
7 but they were not released from school or school
8 supervision. There were teachers around there and the
9 school could define what is the nature of our assembly
10 at this public event and, just as in, in the auditorium
11 a school could say there will be no political banners
12 or, frankly, no banners about anything other than what
13 the event is --

14 JUSTICE SCALIA: Were they required to go to
15 this event or could they have skipped off and gone home
16 without violating --

17 MR. KNEEDLER: They were not allowed to go
18 home. They were required, they were required --

19 JUSTICE SCALIA: They were required to
20 attend. And there were --

21 MR. KNEEDLER: They were required to be
22 there if the classroom teacher decided to let them go
23 out there, but they were under school supervision at
24 that time.

25 JUSTICE SOUTER: Were they ever told what

1 they were supposed to do in the sense did the school
2 ever say, we are letting you out on the street to
3 celebrate the Olympics and to do only that? Was, was
4 there an object to this release from the school building
5 that was ever conveyed?

6 MR. KNEEDLER: If I may, I don't think
7 there's any question that he knew in advance that this
8 was about the Olympics. That's why he made the sign.
9 And they were released to go out and watch the torch go
10 by. He hasn't raised any question of notice or due
11 process concerns.

12 CHIEF JUSTICE ROBERTS: Thank you,
13 Mr. Kneedler.

14 MR. KNEEDLER: Thank you.

15 CHIEF JUSTICE ROBERTS: Mr. Mertz.

16 ORAL ARGUMENT OF DOUGLAS K. MERTZ, ESQ.

17 ON BEHALF OF THE RESPONDENT

18 MR. MERTZ: Mr. Chief Justice, and may it
19 please the Court:

20 This is a case about free speech. It is
21 not a case about drugs.

22 CHIEF JUSTICE ROBERTS: It's a case about
23 money. Your client wants money from the principal
24 personally for her actions in this case.

25 MR. MERTZ: He does have a damages claim

1 against the school district and the principal, but
2 that is by no means his chief object here. The
3 overwhelming object is to assert his free speech --

4 JUSTICE KENNEDY: Well, would you waive
5 damages against this principal who has devoted her life
6 to the school, and you're seeking damages for her for
7 this sophomoric sign that was held up?

8 MR. MERTZ: We are certainly willing to
9 negotiate a minimal settlement on damages. That is not
10 the object here.

11 CHIEF JUSTICE ROBERTS: But there's a
12 broader issue of whether principals and teachers around
13 the country have to fear that they're going to have to
14 pay out of their personal pocket whenever they take
15 actions pursuant to established board policies that they
16 think are necessary to promote the school's educational
17 mission.

18 MR. MERTZ: That is indeed a legitimate
19 fear, Your Honor, and we believe the existing law takes
20 care of it by requiring before qualified immunity can be
21 breached that there be a demonstration that under the
22 existing law at the time available to her --

23 CHIEF JUSTICE ROBERTS: And you think it was
24 clearly established that she had to allow a student at a
25 school-supervised function to hold a 15-foot banner

1 saying "Bong Hits 4 Jesus"?

2 MR. MERTZ: I think it was clearly
3 established at the time, Your Honor, that a principal
4 could not engage in viewpoint censorship of a
5 nondisruptive expression, under both Ninth Circuit law
6 and this Court's law. The case had --

7 JUSTICE SOUTER: Does that, does that
8 general statement that you just made apply to all
9 circumstances in which a student-teacher relationship
10 might be involved? For example, in the course of
11 teaching the class in Shakespeare would your rule prevail?

12 MR. MERTZ: The rule on qualified immunity?

13 JUSTICE SOUTER: Yes, the general rule which
14 the teacher is supposed clearly to have known here. For
15 example, in the Shakespeare class, kid doesn't, doesn't
16 say anything. He doesn't yell or scream or even raise
17 his hand. He just holds a little sign in the
18 Shakespeare class that says "Bong Hits 4 Jesus." As I
19 understood the general rule that you said the teacher
20 was bound to know here, the teacher I suppose would be
21 required or the school would be required to tolerate
22 that sign in the Shakespeare class; is that correct?

23 MR. MERTZ: I believe the analysis would be
24 the Tinker analysis in terms of substantial disruption
25 of the lesson.

1 JUSTICE SOUTER: Well, would there be a
2 substantial disruption?

3 MR. MERTZ: It would all depend on the
4 circumstances. My guess is that if it were simply
5 passively holding the sign --

6 JUSTICE SOUTER: If the kids look around and
7 they say, well, so and so has got his bong sign up again --

8 (Laughter.)

9 JUSTICE SOUTER: -- you know, they then return,
10 they then return to Macbeth. Does the -- does the, does
11 the teacher have to, does the school have to tolerate that
12 sign in the Shakespeare class?

13 MR. MERTZ: I believe that in circumstances
14 where it is a substantial distraction --

15 JUSTICE GINSBURG: Can't it just say no
16 signs when you're supposed to be learning?

17 MR. MERTZ: Your Honor, I think the answer
18 is yes if they had a content-neutral rule prohibiting
19 signs in school. I believe that would be --

20 CHIEF JUSTICE ROBERTS: But can't the school
21 decide that it's part of its mission to try to prevent
22 its students from engaging in drug use and so that it's
23 going to have a viewpoint on drug use and that viewpoint
24 is going to be that it's opposed to it and so that it
25 takes a particular view with respect to signs that in

1 their view seem to encourage drug use?

2 MR. MERTZ: Certainly it is within the
3 school's mission to discourage drug use. Certainly it
4 has many tools to allow it to give its own viewpoint --
5 certainly it can -- it does not need to provide a forum
6 in the school itself for students with a contrary
7 viewpoint. But when a student is basically on his own
8 time, whether it's outside of school --

9 CHIEF JUSTICE ROBERTS: So your position
10 would be different if this were in the student gym and
11 they were having a discussion. There was a program to
12 discourage drug use and he held up his sign; you would
13 say it would be all right to take down the sign inside
14 the school gym?

15 MR. MERTZ: No, I'm not so sure.

16 CHIEF JUSTICE ROBERTS: So it doesn't matter
17 that this is outside. It matters on the content of the
18 sign, not the location?

19 MR. MERTZ: Well, what matters is whether
20 there is a substantial disruption of what the school is
21 trying to achieve legitimately, whether it's a classroom
22 lesson or a lesson on drug use.

23 JUSTICE SCALIA: Well, but the school has --
24 the school has a program, an anti-drug program that
25 shows movies, it brings in policemen and social workers

1 to preach against drug use and you're saying that --
2 never mind unfurling a banner. You're saying that it
3 has to let students contradict this message it's trying
4 to teach, to walk around, you know, with a button that
5 says "Smoke Pot, It's Fun."

6 MR. MERTZ: I believe, Your Honor --

7 JUSTICE SCALIA: Does the school have to do
8 that?

9 MR. MERTZ: I believe, Your Honor, that a
10 nondisruptive pin, badge, whatever you want to call it,
11 would have to be tolerated. However, they would not
12 have to tolerate a student who interrupts a anti-drug
13 presentation.

14 JUSTICE SCALIA: But the school, even though
15 it is trying to teach one point of view, can allow
16 students to come in and undermine that point of view,
17 assuming that it's legitimate to teach that point of
18 view? It can allow students to come in and undermine
19 what it's trying to teach?

20 MR. MERTZ: I think that --

21 JUSTICE SCALIA: And that is not disruption
22 in your view?

23 MR. MERTZ: I think they cannot prevent
24 presentation of a contrary viewpoint as long as it is
25 done in such a way that it doesn't interfere with the

1 school's own presentation of its viewpoint.

2 JUSTICE KENNEDY: Can -- a student be
3 allowed -- wear a button that says "Rape Is Fun"?

4 MR. MERTZ: No, I don't think so --

5 JUSTICE KENNEDY: Why?

6 MR. MERTZ: There is a distinction there.

7 JUSTICE KENNEDY: Why?

8 MR. MERTZ: Because when you're talking
9 about hate speech, speech that actually advocates
10 violence, then you're in another category of speech.
11 There has been general recognition --

12 JUSTICE SCALIA: Nonviolent crimes are okay,
13 it's only violent crimes that you can't, you cannot
14 promote, right? Right?

15 MR. MERTZ: I think there is a --

16 JUSTICE SCALIA: "Extortion Is Profitable,"
17 that's okay?

18 (Laughter.)

19 MR. MERTZ: Well --

20 JUSTICE SCALIA: This is a very, very, with
21 all respect, ridiculous line. I mean, I can understand
22 you're saying you cannot promote things that are
23 unlawful, but to say, oh, it's only violent, where do
24 you get that line from, only violent unlawful acts?

25 MR. MERTZ: No, I'm not saying only violent

1 unlawful acts. But this is a case where if you look at
2 it in the context of what was going on in the State at
3 the time, where there was an active public debate on
4 marijuana policy, on marijuana for medical use, on
5 marijuana for personal use, so it's --

6 CHIEF JUSTICE ROBERTS: So it's a political
7 -- even assuming it's a political issue, the question is
8 whether the school has to say our classrooms, our field
9 trips, our sponsored and supervised activities are a
10 forum for that debate?

11 MR. MERTZ: I believe it does not have to if
12 being a forum would disrupt the school's own educational
13 program and --

14 CHIEF JUSTICE ROBERTS: And disruption does
15 not include undermining the message they want to send?
16 It has to be some type of physical disruption. But
17 undermining the message they want to send, they can't
18 make the judgment that that's not allowed?

19 MR. MERTZ: Preventing a contrary viewpoint
20 from being expressed, that we --

21 JUSTICE BREYER: Yes, but you rephrased it
22 that way, but what actually happened is the principal
23 looks across the street, a 15-foot banner goes up at
24 what's supposed to be a school event with everybody right
25 together in a single place, and it says a joke, it makes

1 a joke out of drug use. The principal thinks of course
2 adolescents and post-adolescents sometimes like to test
3 limits, and if the kids go around having 15-foot banners
4 making a joke out of drug use that really does make it a
5 little tougher for me to convince the students at this
6 school not to use drugs, and particularly putting up
7 15-foot banners. I don't know why everybody wants to
8 get away from that because I think you would have had a
9 very different case if in fact it had been a whisper or
10 if it had been a serious effort to contest the drug
11 laws. It wasn't either. It was a joke. It was a
12 15-foot banner. We have the message plus the means plus
13 the school event.

14 Now, what's your response?

15 MR. MERTZ: My response, Your Honor, is
16 that, first of all, it was a 14-foot banner.

17 JUSTICE BREYER: That's an excellent
18 response, I think.

19 (Laughter.)

20 MR. MERTZ: Yes. That was just the preliminary.
21 In fact, what it was was a person displaying this banner
22 in a quiet, passive manner that didn't interfere with
23 anybody's observation.

24 JUSTICE BREYER: I concede that
25 interference consists of it's pretty hard to run a

1 school where kids go around at public events publicly
2 making a joke out of drugs. That's what his thought is.
3 Now, I don't think he has to be able to read content
4 discrimination, viewpoint discrimination, time-place.
5 He doesn't know the law, the principal. His job is to
6 run the school. And so I guess what I'm worried about
7 is a rule that would -- is on your side, a rule that
8 takes your side; we'll suddenly see people testing
9 limits all over the place in the high schools. But a
10 rule that's against your side may really limit people's
11 rights on free speech. That's what I'm struggling with.
12 Now, I want some help there and I'm worried about the
13 principal.

14 MR. MERTZ: I believe the answer is that the
15 Tinker case as we understand it struck a very wise
16 compromise between allowing school officials to have
17 complete discretion to suppress student speech in order
18 to maintain what they conceive of as their individual
19 mission and the student's right to speak in a
20 nondisruptive manner. The speaker -- the Tinker case
21 has stood the test of time for 40, almost 30 years and,
22 although --

23 JUSTICE SCALIA: Well, you can say that, but
24 the subsequent cases seem to me to try to cut back on
25 it. I mean, it stood the test of time in the sense that

1 it hasn't been overruled, but --

2 MR. MERTZ: There have been some narrow
3 exceptions to it in subsequent cases, of course, the
4 Fraser and the Kuhlmeier cases. But the basic, the
5 heart of it, the requirement that the school demonstrate
6 that substantial disruption before it can engage in
7 suppression of --

8 JUSTICE SCALIA: I think we're using
9 disruption in two different senses here and we should
10 probably separate the two. One sense is disrupting the
11 class so that whatever is being taught can't be taught.
12 But you're also using it in the sense of undermining a
13 general message that the school is trying to get across:
14 Obey the law, don't use drugs, whatever. Maybe we
15 should have a different word for -- the first is
16 disruption. Disruption is a, is a funny word for the
17 second. Let's called it undermining instead.

18 Now, you think both of them, however, are
19 bad and both of them can be a basis for suppressing the
20 speech?

21 MR. MERTZ: If I understand your question
22 correctly, the second of them might better be called
23 allowing competing viewpoints.

24 JUSTICE SCALIA: So you think undermining is
25 perfectly okay? You would never consider undermining to

1 be disruption and therefore bad?

2 MR. MERTZ: I think undermining in the sense
3 of preventing impeding the school from delivering its
4 own message --

5 JUSTICE SCALIA: Okay, but only that.

6 MR. MERTZ: -- would be substantial
7 disruption.

8 JUSTICE SCALIA: Right after a class on
9 drugs, he can be standing there in the hall and say:
10 This class was ridiculous, drugs are good for you, I use
11 them all the time, I urge all of you. That's perfectly
12 okay? That's not undermining?

13 MR. MERTZ: I believe that is the kind of
14 speech --

15 JUSTICE SCALIA: That's not disruption?

16 MR. MERTZ: -- that we must tolerate no
17 matter how unwise it is.

18 JUSTICE GINSBURG: But couldn't a school,
19 couldn't a school board have a time, place, or manner
20 regulation that says you're not going to use the halls
21 to proselytize for your cause, whatever it may be?

22 MR. MERTZ: I believe that's correct.

23 JUSTICE GINSBURG: You could have reasonable
24 rules of decorum for what goes on inside the school
25 building.

1 MR. MERTZ: Right.

2 CHIEF JUSTICE ROBERTS: Does the school have
3 to be completely neutral in that respect? Does it have
4 to punish the student who says that was a good program,
5 I'm not going to use drugs, and you shouldn't either,
6 because he's taking a position on a public issue?

7 MR. MERTZ: I think a content-neutral --
8 content neutrality is critical here, and if the school
9 wants to allow anti-drug comments, messages, then it has
10 an outside of the official forum --

11 CHIEF JUSTICE ROBERTS: Where does that
12 notion that our schools have to be content neutral -- I
13 thought we wanted our schools to teach something,
14 including something besides just basic elements,
15 including the character formation and not to use drugs.
16 They have to be neutral on whether you should use drugs
17 or not?

18 MR. MERTZ: Content neutrality goes to what
19 speech is suppressed or punished. As far as the school
20 delivering its own message, there is no requirement of
21 equal time or that it be neutral. It's got its own
22 viewpoint in the case of drugs, a viewpoint that almost
23 all of us agree with, and it should be able to espouse
24 --

25 JUSTICE SCALIA: A school isn't an open

1 forum. A school isn't there for everybody to teach the
2 students whatever he wants. It's there for the teachers
3 to instruct. And you're turning it into an open forum.
4 If the school says, addresses one issue, everybody else
5 has to be able to address that issue.

6 MR. MERTZ: I don't believe that's the case
7 at all, Your Honor.

8 JUSTICE SCALIA: That's not my vision of
9 what a school is.

10 MR. MERTZ: In the classroom delivering the
11 prescribed messages, in school assemblies, where the
12 school wishes to present a particular message, that's
13 one case. However, in the lunchroom, outside in recess,
14 across the street, that is a quintessentially open forum
15 where it would not be proper, I think, to tell students
16 you may not mention this subject, you may not take this
17 position.

18 JUSTICE KENNEDY: But do you concede that
19 there was some right of school control for what was
20 going on across the street?

21 MR. MERTZ: No. Actually our primary
22 position on that is that he was in a public place at a
23 public event among public people --

24 JUSTICE KENNEDY: If kids were throwing
25 bottles and injuring passers-by, the principal had no

1 right or duty to go over there and stop it?

2 MR. MERTZ: Oh, I think if they were
3 engaging in an act of hooliganism --

4 JUSTICE KENNEDY: Well, that's because the
5 school has a right of control.

6 MR. MERTZ: There is a distinction here.
7 This young man had not been in school today, had not
8 been on campus, was not in any class that was released
9 to attend --

10 CHIEF JUSTICE ROBERTS: Why did he go where
11 he went?

12 MR. MERTZ: Pardon?

13 CHIEF JUSTICE ROBERTS: Why did he choose
14 that location to unfurl his banner?

15 MR. MERTZ: He explained because it was the
16 only place where he actually knew the route of the
17 relay.

18 JUSTICE BREYER: But I mean, that's -- I
19 have, I guess his note -- you accept this which is what
20 the teacher said. The entire class went to view the
21 relay. Individual students -- this is at 9:30 in the
22 morning. They were not given the option of remaining in
23 class, nor were they released to do as they pleased.
24 They were to watch the relay with the rest of the student
25 body, either just in front of the school or just across

1 the street -- that's me, not them -- and then return
2 directly to their classrooms, which I guess the school
3 did. So it sounds like you're going to one place, stand
4 together, behave yourselves, watch the relay, and the
5 teachers will be there and take you back to class. Now
6 is there something else in the record that suggests
7 something different?

8 MR. MERTZ: There is a major dispute on that
9 point, Your Honor. We presented several affidavits that
10 showed individual teachers --

11 JUSTICE BREYER: Just tell me where to look.
12 Where are the conflicting affidavits? I'm just reading
13 from page 51 of the joint appendix. I didn't know there
14 was a dispute.

15 MR. MERTZ: It would be on pages 32, 34, 36.

16 JUSTICE BREYER: Okay, I'll look at those.
17 Another somewhat minor point. Can I ask you another
18 point about the record? I'll read those.

19 MR. MERTZ: Okay. Can I finish the
20 description of what actually happened? According to the
21 students, for those who were released from class, there
22 was no requirement for staying on campus, and many of
23 them did not stay on campus. No requirement for --

24 JUSTICE BREYER: No, they went across the
25 street.

1 MR. MERTZ: Some of them did. Some went
2 down to the local McDonald's.

3 JUSTICE BREYER: Was there any -- there was
4 no requirement, they didn't have to go across the street
5 or stay on campus, they could wander off distantly.

6 MR. MERTZ: They could, and many of them
7 did.

8 JUSTICE BREYER: Okay.

9 MR. MERTZ: And there was no requirement
10 that they stay together, no requirement that they do
11 anything in particular. They --

12 JUSTICE SCALIA: I had to watch -- not even
13 watch the parade, no requirement they watch the parade?
14 They were released in order to watch the parade.

15 MR. MERTZ: That was the intent, obviously,
16 for those who were released.

17 JUSTICE SCALIA: The intent, it was the
18 direction.

19 MR. MERTZ: But --

20 JUSTICE SCALIA: It was not only the intent,
21 it was the direction.

22 MR. MERTZ: Actually it was not. According
23 to these student affidavits, they were simply released
24 and said, you can go watch --

25 JUSTICE GINSBURG: Was there any

1 factfinding on that? You referred to affidavits.

2 MR. MERTZ: No. No. It was decided on cross
3 motions for summary judgment in the district court, and
4 there were no findings, actually no factual findings at
5 all, and certainly nothing on that particular point.

6 JUSTICE BREYER: Can I ask another
7 record point, just so I know where to look?

8 MR. MERTZ: Yes.

9 JUSTICE BREYER: You've also asked for an
10 injunction that would require expunging his 5-day
11 suspension from his record.

12 MR. MERTZ: Correct.

13 JUSTICE BREYER: 10 days. Well, 10 or 5,
14 unclear. I noticed the superintendent of schools on
15 page 66a when he's reviewing this, what he says is,
16 "Joseph contends that all his behavior is excusable
17 because he was exercising his free speech right.
18 Even if I were to concede his speech across from the
19 high school is protected, which I do not, the rest of
20 his behavior warranted the suspension." And then he
21 says, "And I'm cutting it from 10 days to 5." So given
22 that, if you win, suppose you were to win, and you --
23 that it is protected and so forth -- then would you
24 concede or not concede the suspension, the 5 days, it's
25 over, it still stands, I don't care about the

1 expungement or not?

2 MR. MERTZ: The -- whether it remains on the
3 record, anything that remains on his record is obviously
4 much more --

5 JUSTICE BREYER: No, but I'm asking that you
6 think about it. I'm putting you on the spot.

7 MR. MERTZ: In that case, I missed the point
8 of your --

9 JUSTICE BREYER: I want to know what the
10 superintendent said. As I read it is, he says, look, I
11 don't care if this was protected or not. I'll give you
12 that. It's protected. But the rest of his behavior,
13 the way he treated the principal, what he did, the
14 reluctance, et cetera, et cetera, that warrants a
15 suspension too, and I'm cutting it from 10 days to 5.
16 So it sounds to me as I read it that the teacher is
17 saying even if you're right, he's still suspended for 5
18 days. That's what the superintendent says.

19 Now suppose you win your point that you're
20 interested in winning, which you may not or you may.
21 Are you still then going to pursue this case on the 5
22 days, that that should be erased?

23 MR. MERTZ: If the only thing left were
24 discipline because he was tardy that day, was -- didn't
25 divulge the names of the other people holding the

1 banner, that sort of thing, we couldn't --

2 CHIEF JUSTICE ROBERTS: I think it's a
3 more --

4 JUSTICE BREYER: You couldn't what? I
5 didn't hear the last part of what you said. You just
6 got to the point of --

7 MR. MERTZ: Of answering the question.

8 JUSTICE BREYER: Yes. What's the answer?

9 MR. MERTZ: Yes. Those things wouldn't
10 manner anymore.

11 JUSTICE BREYER: So you would not pursue it?

12 MR. MERTZ: Correct.

13 CHIEF JUSTICE ROBERTS: Can we get back --
14 I'm sorry.

15 JUSTICE SCALIA: Go ahead.

16 CHIEF JUSTICE ROBERTS: Can we get back to
17 what the case is about. You think the law was so
18 clearly established when this happened that the
19 principal, that the instant that the banner was
20 unfurled, snowballs are flying around, the torch is
21 coming, should have said oh, I remember under Tinker I
22 can only take the sign down if it's disruptive. But
23 then under Fraser I can do something if it interferes
24 with the basic mission, and under Kuhlmeier I've got
25 this other thing. So she should have known at that

1 point that she could not take the banner down, and it
2 was so clear that she should have to pay out of her own
3 pocket because of it.

4 MR. MERTZ: Mr. Chief Justice, there are two
5 different time points we have to talk about. There's
6 the heat of the moment out there on the street, but then
7 later back in the office when she actually decided to
8 levy the punishment after she had talked to him, after
9 she had heard why he did it and why he didn't do it, after
10 she had had a chance to consult with the school
11 district's counsel. At that point in the calmness of
12 her office, then she should indeed have known it. And
13 she did testify that she had taken a master's degree
14 course in school law in which she studied Kuhlmeier and
15 Fraser and Tinker. So --

16 CHIEF JUSTICE ROBERTS: And so it should be
17 perfectly clear to her exactly what she could and
18 couldn't do.

19 MR. MERTZ: Yes.

20 JUSTICE SCALIA: As it is to us, right?

21 (Laughter.)

22 JUSTICE SOUTER: I mean, we have had a
23 debate here for going on 50 minutes about what Tinker
24 means, about the proper characterization of the
25 behavior, the nonspeech behavior. The school's terms in

1 dealing with the kids that morning. The meaning of the,
2 of the statement. We've been debating this in this
3 courtroom for going on an hour, and it seems to me
4 however you come out, there is reasonable debate.
5 Should the teacher have known, even in the, in the calm
6 deliberative atmosphere of the school later, what the
7 correct answer is?

8 MR. MERTZ: We believe at the very least she
9 should have known that one cannot punish a nondisruptive
10 holding of a sign because it said something you
11 disagreed with.

12 JUSTICE KENNEDY: Of course I disagree with
13 the characterization "nondisruptive." It was completely
14 disruptive of the message, of the theme that the school
15 wanted to promote. Completely disruptive of the reason
16 for letting the students out to begin with. Completely
17 disruptive of the school's image that they wanted to
18 portray in sponsoring the Olympics.

19 MR. MERTZ: Well, they weren't sponsoring
20 the Olympics, they weren't even sponsoring this event
21 actually. They simply let the students out to watch it.
22 That was --

23 JUSTICE KENNEDY: Some of the students were
24 carrying the torch and the band was playing in the
25 parade.

1 MR. MERTZ: A few of the students -- a few of
2 the relay runners were from the school and had been
3 allowed to skip school to do that, and the pep band
4 played as it went by. I do not believe that made the
5 torch relay a school event. The best that can be said
6 for them is that they let students watch it with the
7 concurrence of individual teachers, and that that
8 attendance was a school-sanctioned attendance. Now
9 whether that allows them to then engage in this kind of
10 punishment of speech by a student who was not even
11 among those released, who is standing --

12 JUSTICE GINSBURG: Now you said that in your
13 brief, and I couldn't understand that somehow you got
14 mileage out of his being truant that morning. Would the
15 case have come out differently, would you be making any
16 different argument if he got to school on time and was
17 released with the rest of them? Does the case turn on
18 the fact that he was late to school that day?

19 MR. MERTZ: We believe it would be a closer
20 question, but the fact that he was not there in school
21 today, and intentionally was not there today, turns this
22 into a pure free speech case where you have a citizen in
23 a public place at a public event who was not acting as a
24 student.

25 JUSTICE GINSBURG: So he's not a school

1 child because he's playing hooky?

2 MR. MERTZ: Because he was playing hooky
3 because he chose not to be there, because he was not
4 part of the class.

5 JUSTICE GINSBURG: Even though the law
6 required him to be there?

7 MR. MERTZ: That's right.

8 JUSTICE SCALIA: Well, he wasn't playing
9 hooky. He showed up late, that's all, right? I mean,
10 he actually came and joined his classmates at an event
11 that he knew was an event that the school told the
12 classes to go to.

13 MR. MERTZ: He joined --

14 JUSTICE SCALIA: As far as I'm concerned, he
15 just showed up late.

16 MR. MERTZ: He joined a public crowd on a
17 private side -- public sidewalk in front of private
18 homes. The crowd happened to have some other students
19 in that school there.

20 JUSTICE GINSBURG: Where did he go
21 immediately after? He went to the school building for
22 whatever it was, the third period of the day.

23 MR. MERTZ: Yes. The principal instructed
24 him to do so and he did.

25 JUSTICE KENNEDY: So under your view, if the

1 principal sees something wrong in the crowd across the
2 street, he has to come up and say now, how many here are
3 truants and how many were here and so forth, and I can't
4 discipline you because you're a truant, you can go ahead
5 and throw the bottle.

6 (Laughter.)

7 MR. MERTZ: No, I don't think she needs to
8 do that in the heat of the moment. But later on once
9 she's discovered the true facts, then at that point I
10 think she loses a basis for punishing him as a student
11 if he was not there as a student.

12 JUSTICE SCALIA: Because you're both a
13 truant and a disrupter, you get off.

14 (Laughter.)

15 JUSTICE SCALIA: Had you been just a
16 disrupter, tough luck.

17 MR. MERTZ: Well, it may well be that he
18 could have been punished for being truant, but of course
19 that's not why we're here. He was punished for
20 displaying -- for the content of the sign he was
21 displaying in a public place as a private citizen.

22 JUSTICE SCALIA: Who were the people that
23 helped him hold up his flag? Were they not classmates
24 of his?

25 MR. MERTZ: Most of them were classmates; at

1 least one was not a student.

2 JUSTICE SCALIA: Did he not know that these
3 classmates were there at a public event that was
4 sponsored, not sponsored, but to which the school had
5 directed the students to go?

6 MR. MERTZ: I'm sure he did know.

7 JUSTICE SCALIA: So it seems to me it's like
8 joining a school trip at the zoo, you know. You -- you
9 don't make it to the -- to the school, but you drive
10 there yourself and then join the class as it's going
11 through the zoo. It seems to me he's in school.

12 MR. MERTZ: A better analogy might be if he
13 had gone on his own time to the zoo and was engaging in
14 some expressive act, and there happened to be a school
15 group there at the same time, could the teacher with
16 that group then have disciplined him for what he was
17 doing?

18 CHIEF JUSTICE ROBERTS: That gets back to
19 the point I was trying to make earlier. He came here
20 because it was the school event, the school-sponsored
21 activity. He could have gone anywhere along the route.
22 He knew that it was coming by the school, he knew that
23 they were going to be, the students were going to be
24 released to see it. He went to join up with the school
25 even if he were truant that day.

1 MR. MERTZ: No, Your Honor. I believe
2 that's incorrect. There is nothing in the record that
3 even suggests that he went there in order to join up
4 with schoolmates or in order to be near the school. He
5 says, in fact, he intentionally tried to avoid the
6 school because he thought that that way he could avoid
7 the school jurisdiction for his --

8 JUSTICE SCALIA: You think he could have
9 been marked absent for the whole day because he didn't
10 intend to be part of the school group afterwards? I
11 mean, suppose there's a suspension of so much for half a
12 day truancy, and so much more for a whole day's truancy.
13 And he shows up and he says, oh, you can't -- you have
14 to hold me for a whole day's truancy because I didn't
15 intend to be in school. I was in school but I didn't
16 intend to be there.

17 MR. MERTZ: I think it would all depend on
18 whether he --

19 JUSTICE SCALIA: That doesn't make any sense
20 to me. Does it depend on his intent, whether he
21 intended not to be a truant that afternoon?

22 MR. MERTZ: I think that would depend on the
23 fact of whether he was a truant that afternoon.

24 JUSTICE SCALIA: He was either in school or
25 he wasn't in school.

1 MR. MERTZ: In the morning he wasn't in
2 school.

3 JUSTICE SCALIA: In the afternoon he either
4 was or he wasn't.

5 MR. MERTZ: In the afternoon he was.

6 JUSTICE SCALIA: And the question is whether
7 joining the school group, intentionally joining the
8 school group, going there because the school group was
9 there, whether that places him in school.

10 MR. MERTZ: Well, as a hypothetical, if he
11 were intentionally joining a school group, I would have
12 to say that puts him within whatever jurisdiction the
13 school has.

14 JUSTICE BREYER: Why does it matter? That
15 is, why doesn't the -- you're suing the teacher or the
16 principal and why wouldn't the issue be what that
17 principal really reasonably thought the situation was?
18 I mean, if the principal reasonably thought he was part
19 of the school group, if the principal reasonably
20 thought that this was a school outing, if the principal
21 reasonably thought that students are staying together,
22 why wouldn't that just be the ground on which you'd take
23 the case, we should take it that way, because the
24 principal reasonably thinks?

25 MR. MERTZ: As far as qualified immunity, I

1 think that's correct, if she had a reasonable belief.

2 JUSTICE BREYER: But even on the merits?

3 MR. MERTZ: On the merits I don't think so,
4 because if he was not in fact there as part of a school
5 group --

6 JUSTICE BREYER: Even if the principal
7 couldn't tell him to take down the banner even if she
8 thought he was part of the school group reasonably, if
9 he really wasn't?

10 MR. MERTZ: I do not believe there's
11 anything in the law that allows a principal to convert a
12 pure free speech exercise into a school exercise because
13 it's --

14 JUSTICE SCALIA: I thought you were going to
15 appeal to the calm of her office the next day.

16 Mr. MERTZ: Yes.

17 JUSTICE SCALIA: I thought that was going to
18 be your answer to my question. Whatever she thought at
19 the time, she didn't think it later.

20 JUSTICE GINSBURG: May I ask to you clarify
21 one thing. I initiated this line of questioning when I
22 said I was surprised that your brief made such a big
23 deal that he was late to school. You would still be
24 making the argument about the free speech right if he
25 had diligently showed up for his math class first period

1 in the morning, gone out with the others, and had his
2 banner to unfurl when the torch came by?

3 MR. MERTZ: That is correct. We have two
4 independent bases for defending him here. One is the
5 pure free speech in a public place argument. That's the
6 one that hinges on the fact that he was not among the
7 released students. The other argument, which we believe
8 in equally, is that even if it were a on-campus or on an
9 extension of campus like a field trip, then under Tinker
10 because it was not disruptive they cannot punish it.

11 My time is up. I thank the Court.

12 CHIEF JUSTICE ROBERTS: Thank you,
13 Mr. Mertz.

14 Mr. Starr, you have a minute remaining.

15 REBUTTAL ARGUMENT OF KENNETH W. STARR

16 ON BEHALF OF PETITIONERS

17 MR. STARR: For the reasons that have been
18 discussed, under no circumstances should Deborah Morse,
19 a conscientious principal, be subjected to the
20 possibility of punitive damages or compensatory damages.

21 A very brief factual point. In light of the
22 richness of the discussion with respect to the facts, I
23 would guide the Court to page 109 of the joint appendix.
24 This is Deborah Morse's interrogatory answer and there
25 she sets forth the facts, and that bleeds into the law.

1 To promote drugs -- and this is our
2 fundamental suggestion and submission. To promote drugs
3 is utterly inconsistent with the basic educational
4 mission of the schools, and for this Court to suggest to
5 the contrary would really be quite inconsistent with
6 much of its drug jurisprudence, *Vernonia* and *Earls*. The
7 opinion of the Court in *Earls* 2002 is especially
8 powerful with respect to the scourge of drugs and their
9 dangers.

10 More broadly, the Court does not need to go
11 more broadly, but the Court has spoken more broadly with
12 respect to the need to defer to school officials in
13 identifying the educational mission. But we know that
14 there are in fact constitutional limits. Those limits
15 are captured in *Tinker*. A passive pure political speech
16 that reflects on the part of the school board a
17 standardless discretionary effort to squelch any kind of
18 controversial discussion, that casts a pall of orthodoxy
19 over the classroom. We are light years away from that.

20 I thank the Court.

21 CHIEF JUSTICE ROBERTS: Thank you counsel,
22 the case is submitted.

23 (Whereupon, at 11:04 a.m., the case in the
24 above-entitled matter was submitted.)

25

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