

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION

PAUL T. PALMER, by and through his  
parents and legal guardians, PAUL D.  
PALMER and DR. SUSAN GONZALEZ  
BAKER,

Plaintiff,

vs.

WAXAHACHIE  
INDEPENDENT SCHOOL  
DISTRICT,

Defendant.

§ CIVIL ACTION NO. 3:08-CV-0558-M  
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§ DECLARATORY AND INJUNCTIVE  
§ RELIEF REQUESTED  
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**PLAINTIFF’S MEMORANDUM IN SUPPORT  
OF SECOND MOTION FOR PRELIMINARY INJUNCTION**

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## INTRODUCTION

The “vigilant protection of constitutional freedoms is nowhere more vital than in the community of [our] schools.” *Healy v. James*, 408 U.S. 169, 180 (1972). Among those constitutional freedoms is the right to engage in political speech, which lies “at the core of what the First Amendment is designed to protect.” *Morse v. Frederick*, 127 S. Ct. 2618, 2626 (2007) (quoting *Virginia v. Black*, 538 U.S. 343, 365 (2003)). Because students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,” *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969), the Supreme Court has made clear that absent evidence of school disruption, the First Amendment requires that students be permitted to express their political views. *Morse*, 127 S. Ct. at 1236 (Alito, J., concurring). The Fifth Circuit has confirmed that such constitutionally protected expression includes “shirts or jackets with written messages supporting political candidates,” as these messages are “pure speech” protected from censorship by the First Amendment. *Canady v. Bossier Parish Sch. Dist.*, 240 F.3d 437, 440 (5th Cir. 2001).

In violation of these fundamental constitutional principles, the Waxahachie Independent School District (“WISD”) has, yet again, adopted a policy prohibiting the very speech that the “First Amendment was designed to protect.” *See Morse*, 127 S. Ct. at 2626. Indeed, WISD has admitted that its policy for the upcoming school year would prohibit Paul “Pete” Palmer, a rising junior at Waxahachie High School (“WHS”), from wearing a shirt emblazoned with the words “John Edwards ‘08” or any other message expressing “his personal political preferences.” APPX 8-10. WISD has admitted that the message on Pete’s “John Edwards” shirt is “indisputably political in nature.” Dkt. #12 (Resp. at 9). And WISD has admitted that the “political message on Pete’s shirt expressing support for John Edwards” poses “no concrete threat” of “substantial

disruption” or “material disturbances” to school activities (Dkt #11 (Answer ¶ 32)); is not “sexually explicit, indecent, or lewd” (*id.* at ¶ 34); “was not communicated as part of a school-sponsored activity” (*id.*); and “does not promote the use of illegal drugs” (*id.* at ¶ 35). Nonetheless, WISD insists that it may continue to prohibit Pete from wearing his “John Edwards” shirt and exercising his First Amendment rights to engage in “political speech regarding a public election.” *Wiggins v. Lowndes County*, 363 F.3d 387, 390 (5th Cir. 2004) (citing *Elrod v. Burns*, 427 U.S. 347, 356 (1976)).

The First Amendment forbids such blatant censorship of core political speech. Pete thus seeks to preliminarily enjoin WISD from further prohibiting the exercise of his First Amendment rights. Pete is entitled to such relief because he satisfies all four of the requisite elements. Not only is Pete substantially likely to prevail on the merits of his First Amendment claim, but there is also a substantial threat that he will suffer irreparable injury if the injunction is not granted. As both the Supreme Court and the Fifth Circuit have held, the loss of First Amendment freedoms even for a short time constitutes irreparable injury.

Moreover, WISD school officials have not only punished Pete for engaging in constitutionally protected speech, but they have also made clear they will apply their policy to prohibit him from doing so again in the future. This threatened injury to Pete’s constitutional rights far outweighs any harm to WISD. Granting the preliminary injunction will serve the public interest by vindicating constitutional freedoms without depriving educators of any legitimate tool for maintaining order and discipline in our schools.

## **FACTUAL BACKGROUND**

### **I. WISD Officials Punish Pete And Prohibit Him From Engaging In Political Speech**

Pete Palmer is a rising junior at Waxahachie High School (“WHS”). This summer, Pete was awarded an internship by the Student Conservation Association to work with the National

Parks Services in Rocky Mountain National Park, Colorado. APPX 1-2 at ¶ 3. Pete is a good student who—until he brought this lawsuit against WISD—had never been subject to discipline by school authorities. APPX 2 at ¶ 3.

**A. Pete Is Suspended From Class For The Political Message On His T-Shirt**

On Friday, September 21, 2007, Pete went to school wearing black jeans, a black jacket, and a black t-shirt displaying the words “San Diego.” Pete was confronted by WHS Assistant Principal Brenda Johnson, who told him that his attire violated WISD’s Dress Code and that he would not be permitted to return to class until he changed into acceptable clothing. APPX 2 at ¶¶ 4-5.

Pete went to the WHS administrative office and called his parents. Pete’s father volunteered to bring Pete’s t-shirt that displays the words “John Edwards ‘08” and “www.johndwards.com” as follows:



APPX 2 at ¶ 5; *see also* APPX 11-12. Pete actively supported the former Senator’s presidential candidacy, and enjoyed wearing his t-shirt to express that support. APPX 2 at ¶ 5.

Pete was aware, however, that the WISD School Board had recently adopted a rule that prohibits students from expressing any message that does not concern “WISD clubs,

organizations, sports, or spirit . . . [or] college[s] or universit[ies]” on their t-shirts. APPX 53. Shortly after WISD enacted its policy, Pete and his father—who is an attorney with Legal Aid of NorthWest Texas—had discussed it and agreed it was unconstitutional. Thinking back to that conversation, Pete told his father to bring the Edwards t-shirt. APPX 1-2 at ¶¶ 2, 6.

Pete’s parents arrived at the WHS administrative office with the t-shirt. After Pete changed into it, Ms. Johnson informed him that he would not be permitted to return to class because the words on the t-shirt “promoted a political candidate” and thus were “unacceptable.” Pete and his parents immediately objected and informed Ms. Johnson that the words on Pete’s t-shirt were constitutionally protected political speech. Unmoved, Ms. Johnson reaffirmed her position: Pete would remain suspended from class until he changed into “acceptable” clothing. APPX 2-3 at ¶ 7.

**B. WISD Officials Ignore That The Political Message On Pete’s T-Shirt Is Protected By The First Amendment And Insist On Censoring That Message**

Minutes later, Mr. Rick Rodriguez, Executive Director for Human Resources for WISD, arrived at WHS to speak with Pete and his parents. Mr. Rodriguez informed them that the message on Pete’s t-shirt, while clearly political speech, was not permissible under the WISD policy because it did not promote a WISD club, organization, or sport team, or a college or university. Mr. Rodriguez gave Pete three options: (1) remain in in-school suspension for the remainder of the day; (2) leave school for the remainder of the day; or (3) take off the Edwards t-shirt and change into clothing that would comply with the WISD policy. When Mr. Rodriguez asked whether Pete was sure he wanted to pursue a course of action that might put his position on the football team at risk, Pete responded that if it came to a choice between his principles and athletics, he would choose his principles. APPX 3 at ¶ 8.

Upon realizing that Mr. Rodriguez and Ms. Johnson were not going to permit Pete to

return to class wearing the Edwards t-shirt, Pete's parents requested that Ms. Johnson write up a citation memorializing that Pete had been punished for expressing his political views through the message on his t-shirt. Ms. Johnson refused, noting that she had never "written up" any student for a "dress code violation" and was unsure how to proceed. She stated that her customary practice was to hold the offending student out of class until the end of the school day, or until acceptable clothing could be obtained. When Pete's parents asked what would happen if he were to return to school on Monday wearing the Edwards t-shirt, Ms. Johnson stated that Pete would be held out of class and placed in in-school suspension. APPX 3 at ¶ 9.

Pete's parents urged Ms. Johnson to reconsider her decision, insisting that the message on the t-shirt was core political speech protected by the Constitution. They informed Ms. Johnson that courts had found that even seemingly obnoxious and offensive political messages printed on student attire had been afforded protection by the courts. Ms. Johnson admitted that the message on the t-shirt was not prohibited because it was offensive, but because it contained "unapproved words" under the WISD policy. Mr. Rodriguez, in turn, requested that he and members of the WISD administration—as well as WISD attorneys—be given time to review the situation before deciding whether to issue a written citation. Pete and his parents agreed to follow that course. After Pete's parents provided him with another t-shirt that was "acceptable" to the school officials, Pete returned to class for the remainder of the day. APPX 3-4 at ¶ 10.

## **II. Pete's Parents Unsuccessfully Seek Redress Through The WISD Grievance Process**

The following Monday, September 24, 2007, Pete's father spoke with David Truitt, the assistant superintendent of WISD, in an attempt to resolve the matter. At Mr. Truitt's suggestion, Pete's parents then submitted a written complaint to David Nix, the WHS principal, challenging the disciplinary action taken by Ms. Johnson and Mr. Rodriguez against Pete. APPX 4 at ¶ 11.

**A. The WHS Principal Denies Pete's Appeal**

On Wednesday, October 3, 2007, Pete and his parents met with Mr. Nix. They explained their position that WISD's policy unconstitutionally prohibits Pete from exercising his First Amendment right to engage in core political speech. Like Ms. Johnson, Mr. Nix did not object to the message on Pete's t-shirt on grounds that it was sexually explicit, vulgar, disruptive, or plainly offensive; nor did Mr. Nix object that the message advocated illegal or harmful activities. Indeed, Mr. Nix proposed that Pete recruit a WHS teacher to sponsor a new student organization for politically active students, so that the proposed student organization could then pay to print "club t-shirts" with pro-Edwards messages just like the one on Pete's own t-shirt. APPX 4 at ¶ 12.

On October 8, 2007, Mr. Nix issued a ruling denying Pete's appeal. APPX 4 at ¶ 13. Mr. Nix admitted that the prohibited speech on Pete's t-shirt was "political." APPX 64. Mr. Nix also offered to assist Pete in forming a "Waxahachie High School Students for Edwards" club, which would "allow [Pete] the opportunity to express support for the political candidate of his choice through a school-sponsored organization." *Id.*

**B. Pete's Father Urges The WISD School Board To Remove The Prohibition Against Constitutionally Protected Messages On T-Shirts**

Mr. Palmer had read a newspaper article mentioning that the WISD Board of Trustees was going to take up an agenda item at its regularly scheduled meeting on October 8, 2007, concerning changes to WISD's policy of prohibiting students from expressing political and religious messages on their t-shirts. Pete and his parents assumed that the agenda item was unrelated to Pete's case because neither Pete nor his parents had requested that the item be added to the agenda, and no one from the WISD administration had informed them of it. APPX 5 at ¶ 14.

Nonetheless, Mr. Palmer went to the board meeting and signed up to speak during the open forum section of the meeting. Pete was still at football practice and unable to attend. In the five minutes that Mr. Palmer was allotted to speak, he requested that the board remove the prohibition against students expressing political and religious messages on their t-shirts. When the agenda item came up for discussion among the board, the president suggested that a vote be postponed. The board agreed and passed over the item without taking action. *Id.*

**C. The WISD Superintendent Rubberstamps The Principal's Ruling In A One-Page Letter To Pete's Parents**

Pete's parents filed an appeal of Mr. Nix's ruling with the WISD Superintendent, Dr. Thomas Collins. Dr. Collins scheduled a hearing for October 19, 2007. At the hearing, Pete's father provided Dr. Collins with a chart discussing cases that address the constitutionality of public-school regulation of student speech. Pete's father also asked to speak with WISD's legal counsel in order to help resolve the dispute. Without acknowledging Mr. Palmer's request, Dr. Collins declined to engage in any further discussion of WISD's policy. APPX 5 at ¶ 15.

Ten days after the hearing, Dr. Collins sent Pete and his parents a terse letter denying their appeal. APPX 5 at ¶ 16. Dr. Collins admitted that "Pete was disciplined for wearing a t-shirt with the logo 'John Edwards 08' emblazoned on the front." APPX 65. He also reiterated that WISD policy prohibits students from expressing any messages on their t-shirts except those concerning "WISD clubs, organizations, sports, or spirit . . . or college[s] or universit[ies]." *Id.*

Without any reasoning or explanation, Dr. Collins stated only that he had "decided to affirm the decision made by Mr. Nix." *Id.* Dr. Collins concluded by inviting Pete's parents to request a conference with the full WISD Board of Trustees if they were unsatisfied. *Id.* Given the lack of responsiveness by Mr. Nix and Dr. Collins to their arguments, Pete and his parents decided that pursuing further appeals within WISD would be futile. APPX 5-6 at ¶ 17.

### III. After Pete Files This Suit, WISD Adopts A New But Still Unconstitutional Policy

Pete, through his parents, filed this lawsuit against WISD seeking redress for the violation of his First Amendment rights. WISD admitted in its answer that the “political message on Pete’s t-shirt expressing support for John Edwards” poses “no concrete threat” of “substantial disruption” or “material disturbances” to school activities. Dkt #11 (Answer ¶ 32). WISD also admitted that Pete’s political message is not “sexually explicit, indecent, or lewd” (*id.* at ¶ 34); “was not communicated as part of a school-sponsored activity” (*id.*); and “does not promote the use of illegal drugs” (*id.* at ¶ 35).

On May 8, 2008, the Court held a hearing on Pete’s motion for a preliminary injunction. Upon prompting by the Court, WISD admitted that, as written, its policy of prohibiting students from expressing political messages on t-shirts did not apply to polo shirts. APPX 68 at 83:1-7. WISD further informed the Court that four days before the hearing, the school board had adopted a new dress code for the upcoming school year. APPX 68-69 at 83:25-84:3.

After WISD confirmed that it would not enforce the existing policy to prohibit Pete from wearing a polo shirt emblazoned with a “John Edwards” or other political message for the remainder of the school year, APPX 68 at 83:1-7, the Court dismissed Pete’s preliminary injunction motion without prejudice; ordered WISD to finalize and submit a new dress code for the 2008-2009 school year by June 1, 2008; instructed Pete “to make a request to wear specific attire” under the new dress code within seven days after that; and ordered WISD to “respond to that request.” Dkt. #19 (Minute Entry).

Beginning on or around May 14, 2008, Pete wore a “John Edwards ‘08” polo shirt to class at WHS at least twice during the last two weeks of school. APPX 6 at ¶18. On one occasion, a teacher sent Pete to the principal’s office for wearing the shirt. *Id.* Mr. Neel Brown,

an assistant principal, saw Pete in the office, said that WISD had to allow Pete to wear the shirt, and sent Pete back to class. *Id.*

On Friday, May 23, 2008, counsel for WISD notified Pete that the school board had finalized its 2008-2009 dress code. APPX 71. WISD's policy no longer allows students to wear shirts concerning colleges and universities, but does permit "campus principal-approved WISD sponsored curricular clubs and organizations, athletic team, or school 'spirit' collared shirts or t-shirts" and shirts with a "manufacturer's logo . . . 2" x 2" or smaller." APPX 72. The policy otherwise requires that "student clothing should be free of any slogans, words or symbols except those that promote the school district and its instruction programs." *Id.* The dress code has eliminated any distinction between polo shirts and t-shirts for purposes of this requirement.

One week later, Pete's counsel requested in writing that WISD allow him to wear three different shirts during normal school hours at WHS. APPX 76. Pete enclosed three shirts with his request: (1) a polo shirt displaying the words "Freedom of Speech" on the front and the text of the First Amendment—"Congress shall make No Law . . . abridging Freedom of Speech"—and "First Amendment" on the back; (2) another polo shirt displaying the words "John Edwards '08" on the back; and (3) the "John Edwards '08" t-shirt he had originally worn to school in September 2007. APPX 77-79, 11-12.

In its written response to Pete's request, WISD made clear that the shirts "do not conform to the secondary dress code" because they "are not free of slogans, words or symbols, and the words, slogans and symbols on the shirts has [sic] not been approved by the school district in connection with its instructional programs." APPX 80. WISD subsequently clarified that if Pete were to seek an exemption from the dress code "based upon Pete's desire to express his personal political preferences, such a request would be denied." APPX 8.

Pete desires to wear his “John Edwards ‘08” and other campaign shirts to WHS during the upcoming school year to express his political beliefs, starting on the first day of classes (August 25, 2008). WISD’s new dress code continues to prohibit Pete from expressing his “John Edwards ‘08” or other political message on his shirt. Pete remains on notice that expressing that or any other political message on his shirt at school will result in further punishment.

### **ARGUMENT**

Cases involving the constitutional free-speech rights of students often present difficult and thorny issues. This case, however, is relatively simple and straightforward: The First Amendment applies to the purely political speech on Pete’s shirt and protects its undisruptive message from censorship by WISD officials. Under the standard articulated by the Supreme Court in *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969), Pete must prevail on his First Amendment claim.

In prohibiting Pete from expressing his political message of support for John Edwards, WISD officials not only violated the First Amendment, but also struck at the very heart of what the First Amendment was designed to protect—core political speech. Pete is entitled to a preliminary injunction that will protect his First Amendment right to engage in constitutionally protected, core political speech.

#### **I. Preliminary Injunction Standard**

Pete is not required to prove his case in full to merit preliminary injunctive relief. *See Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981). He need only show:

1. A substantial likelihood that he will prevail on the merits,
2. A substantial threat that he will suffer irreparable injury if the injunction is not granted,
3. His threatened injury outweighs the threatened harm to the party whom he seeks to enjoin, and

4. Granting the preliminary injunction will not disserve the public interest.

*Ponce v. Socorro Indep. Sch. Dist.*, 508 F.3d 765, 768 (5th Cir. 2007). All four requirements are satisfied here.

## **II. Substantial Likelihood of Success on the Merits**

Pete is substantially likely to succeed on his First Amendment challenge because, under any meaningful standard, WISD has impermissibly prohibited Pete's pure political speech.

### **A. The Legal Framework For Analyzing Student Speech Under The First Amendment**

The Supreme Court has recently re-affirmed the fundamental principle that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Morse*, 127 S. Ct. at 2622 (quoting *Tinker*, 393 U.S. at 506). Because of the unique demands of the school environment, however, the Supreme Court has recognized that the constitutional rights of students "are not automatically coextensive with the rights of adults in other settings." *Morse*, 127 S. Ct. at 2622 (quoting *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986)). Over time, the Supreme Court has distilled this principle into four recognized bases upon which a school may permissibly regulate student speech. First, a school may prohibit student expression if "necessary to avoid *material and substantial* interference with schoolwork or discipline." *Tinker*, 393 U.S. at 511 (emphasis added). Second, a school may prohibit student speech that is sexually explicit, vulgar, or plainly offensive. *Fraser*, 478 U.S. at 684. Third, a school may prohibit student speech in connection with "school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school." *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988). And finally, a school may prohibit speech that could be "reasonably viewed as promoting illegal drug use." *Morse*, 127 S. Ct. at 2625. None of these

standards permit WISD to censor the message of support for a presidential candidate on Pete's shirt.

1. The leading case dealing with the right of students to express their political views is *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969). There, students decided to wear black armbands to school to express their opposition to the Vietnam War. In response to the planned protest, school authorities prohibited the wearing of all armbands, and provided that any students wearing armbands would be suspended from school until they returned without armbands. The Supreme Court held that the students could not be disciplined under the school policy, explaining that the wearing of armbands was "closely akin to 'pure speech' which, we have repeatedly held, is entitled to comprehensive protection under the First Amendment." *Id.* at 506.

The *Tinker* court took care to acknowledge "the special characteristics of the school environment" by making clear that school officials could prohibit student speech if that speech "would materially and substantially interfere with the requirement of appropriate discipline in the operation of the school." *Id.* at 509. While recognizing that school officials have comprehensive authority, consistent with constitutional safeguards, to prescribe and control conduct in the schools, the *Tinker* court cautioned that "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." *Id.* at 508.

The *Tinker* court thus held that absent a showing and finding "that engaging in the forbidden conduct would materially and substantially interfere" with school discipline, restrictions on a student's freedom of speech cannot be sustained. *Id.* at 509 (internal quotations and citations omitted). The Court explained that "in our system," students "may not be confined to the expression of those sentiments that are officially approved." *Id.* Thus, "[i]n the absence of

constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views.” *Id.*

2. The Supreme Court further delineated the scope of *Tinker*’s general rule in *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986). In *Fraser*, the Court upheld disciplinary action against a student who gave a speech at a high school assembly that was laced with “pervasive sexual innuendo.” *Id.* at 677-79. The Court held the school’s actions permissible because “it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse” among students. *Id.* at 683. School authorities thus can prohibit student speech only insofar as it is “vulgar,” “lewd,” “indecent,” or “plainly offensive.” *Id.* at 683-85. The Court declined to apply *Tinker*’s more exacting “material and substantial disruption” test because the student speech in *Fraser* was “unrelated to any political viewpoint.” *Id.* at 685.

3. The Supreme Court next addressed student-speech rights in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), permitting a high school principal to censor articles in a school-sponsored newspaper. While the Court upheld the principal’s deletion of the articles from the student newspaper, it limited the reach of its holding to school-sponsored speech. As the Court put it, “whether the First Amendment requires a school to tolerate particular student speech—the question we addressed in *Tinker*—is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech.” *Id.* at 270. Educators may exercise “editorial control of student speech in *school-sponsored* expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.” *Id.* at 273 (emphasis added). *Hazelwood* thus permits censorship of student expression only when such expression is “school-sponsored.” *Id.* at 273.

4. In its most recent student-speech case, the Supreme Court held that school officials may permissibly restrict student speech that could be “reasonably viewed as promoting illegal drug use.” *Morse v. Frederick*, 127 S. Ct. 2618, 2625 (2007). The speech at issue in *Morse* was a large banner reading “Bong Hits 4 Jesus” that was unfurled by students at a televised event. *Id.* at 2622. Noting that “detering drug use by schoolchildren is an ‘important—indeed, perhaps compelling’ interest,” the majority concluded that the “First Amendment does not require schools to tolerate at school events student expression that contributes to” the dangers posed by illegal drugs. *Id.* at 2628-29.

In reaching its holding, the Court expressly declined to prohibit student speech promoting drug use on grounds that such speech was “offensive,” noting that “much political and religious speech might be perceived as offensive to some.” *Id.* at 2629. In a narrowly drawn concurring opinion that the Fifth Circuit has recognized as controlling, *see Ponce*, 508 F.3d at 768, Justice Alito, joined by Justice Kennedy, wrote separately to “ensur[e] that political speech will remain protected within the school setting.” *Morse*, 127 S. Ct. at 2636 (Alito, J., concurring).

As Justice Alito summarized the state of the Court’s student-speech jurisprudence after *Morse*, *Tinker* “permits the regulation of student speech that threatens a concrete and ‘substantial disruption,’” while *Fraser* “permits the regulation of speech that is delivered in a lewd or vulgar manner;” *Hazelwood* “allows a school to regulate what is in essence the school’s own speech,” while *Morse* permits restriction of “speech advocating illegal drug use.” *Id.* at 2637 (Alito, J., concurring). Thus in *Morse*, the Supreme Court held that schools may restrict student speech only if that speech promotes the use of illegal drugs, or could otherwise be restricted under the tests set forth in *Tinker*, *Hazelwood*, or *Fraser*. Because Pete’s message has nothing to do with illegal drugs, *Morse* provides no basis for WISD’s prohibition of that purely political message.

Nor, as discussed below, can Pete's speech be restricted under *Tinker*, *Hazelwood*, or *Fraser*. Indeed, the school district itself has admitted as much. Dkt. #11 (Answer ¶¶ 32-35); Dkt. #12 (Resp. at 9).

**B. The General Rule of *Tinker* Applies To Prohibit WISD From Censoring Pete's Admittedly Undisruptive, Political Speech**

Under the *Morse* analysis, it is clear that WISD's censorship of Pete's speech cannot be justified under any recognized standard. WISD has admitted that the political message on Pete's shirt is not school sponsored, and thus not governed by *Hazelwood's* rational basis test; does not involve lewd, vulgar, indecent, or plainly offensive language, and thus cannot be prohibited under *Fraser*; does not promote the use of illegal drugs, and thus cannot be censored under *Morse*. Dkt. #11 (Answer ¶¶ 32-35). Accordingly, WISD's prohibition of Pete's political speech must be analyzed under *Tinker*. See, e.g., *Chiu v. Plano Ind. Sch. Dist.*, 339 F.3d 273, 281-82 (5th Cir. 2003) (applying *Tinker* to deny qualified immunity to school officials who prohibited distribution of literature); *Shanley v. N.E. Ind. Sch. Dist.*, 462 F.2d 960, 969 (5th Cir. 1972) (applying *Tinker* to hold that school officials violated the First Amendment by prohibiting speech that did not "materially and substantially interfere [ ] with the activities or discipline of the school"); *Chalifoux v. New Caney Ind. Sch. Dist.*, 976 F. Supp. 659 (S.D. Tex. 1997) (applying *Tinker* to hold that school dress code prohibiting students from wearing rosary beads on the ground that they were often used as gang symbols violated the First Amendment).

WISD has all but conceded that its prohibition of Pete's pure political speech cannot survive scrutiny under *Tinker*. First, WISD has conceded that "the printing on Pete's 'Edwards '08' T-shirt is indisputably political in nature." Dkt. #12 (Resp. at 9). And of course, it is. In *Canady v. Bossier Parish School District*, the Fifth Circuit stated that "written messages supporting political candidates," when "printed on clothing," are "pure speech . . . protected

under the First Amendment.” 240 F.3d 437, 440 (5th Cir. 2001). Second, WISD admits that the “indisputably political” message on Pete’s shirt poses no threat of “substantial disruption” or “material disturbance” to school activities. Dkt. #11 (Answer ¶ 32). WISD has effectively conceded that if *Tinker* applies, Pete will prevail on his First Amendment claim. For that reason alone, Pete’s First Amendment claim is substantially likely to succeed.

The recent case of *Guiles v. Marineau*, 461 F.3d 320 (2d Cir. 2006), *cert. denied sub nom. Marineau v. Guiles*, 75 USLW 3313 (U.S. June 29, 2007),<sup>1</sup> is instructive. There, the Second Circuit held that a shirt which featured a picture of President George W. Bush and the words “Chicken Hawk-In-Chief”—along with pictures and explanations of cocaine, drug paraphernalia and another picture of the President holding a martini glass—should not have been censored by school officials. *Id.* at 331. The 13-year-old plaintiff, Zachary Guiles, had been suspended for wearing the shirt after another student complained about it. *Id.* at 322. School officials allowed Zachary to return to school wearing the shirt, but insisted that he tape over the images of the martini glass and drugs. *Id.* at 323. Zachary sought a preliminary injunction against the school officials, claiming that their censorship violated his First Amendment rights. *Id.* The district court declined to enter an injunction, finding that the First Amendment applied to the words on the shirt but not to the images. *Id.* The Second Circuit reversed after determining that the school’s censorship violated the First Amendment under *Tinker*, because the message on the shirt “did not cause any disruption” and the school’s “censorship” was therefore “unwarranted.” *Id.* at 331.

The Seventh Circuit recently reached a similar conclusion in *Nuxoll v. Indian Prairie School District*, 523 F.3d 668 (7th Cir. 2008). There, the school had a policy banning

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<sup>1</sup> The Supreme Court denied review of *Guiles* on June 29, 2007— four days after the Court handed down its decision in *Morse*.

“derogatory comments,” oral or written, “that refer to race, ethnicity, religion, gender, sexual orientation, or disability.” *Id.* at 670. Applying *Tinker*, the Seventh Circuit concluded that the ban could not be applied to prohibit a shirt emblazoned with the words “Be Happy, Not Gay.” *Id.* at 676. The Seventh Circuit therefore reversed the district court’s denial of a preliminary injunction. *Id.* Concurring in the judgment, Judge Rovner explained that “this is a simple case” because “[w]e are bound by the rule of *Tinker*.” *Id.* Because WISD has all but admitted it cannot survive *Tinker* scrutiny, this is an even simpler case of a First Amendment violation.

The conclusion that Pete is substantially likely to prevail on his claims against WISD is reinforced by the fact that Pete’s speech is purely political. The Supreme Court has consistently pointed to the presence or absence of political content as the touchstone in determining the appropriate level of protection to be afforded student speech. In *Fraser*, the Court pointed to the “marked distinction between the political ‘message’ of the armbands in *Tinker*” that was protected by the First Amendment and “the sexual content of [Fraser’s] speech,” which was not. 478 U.S. at 680. In *Morse*, the majority noted that the speech in *Tinker* was “political speech,” and “implicated concerns at the heart of the First Amendment.” 126 S. Ct. at 2626. In contrast, the Court observed that there was “no serious argument” that a poster reading “Bong Hits 4 Jesus” constituted political speech. *Id.* at 2627 n.2.

The message expressed by Pete on his shirt supporting John Edwards is core political speech. No permissible basis exists for WISD to prohibit that speech. Pete is thus substantially likely to prevail on his First Amendment claim.

**C. WISD Cannot Rely On The Fifth Circuit’s Decisions In *Canady* And *Littlefield* To Justify Censoring Pete’s Pure Political Speech**

WISD cannot avoid the conclusion that its censorship violated Pete’s free-speech rights by invoking *Canady v. Bossier Parish School District*, 240 F.3d 437 (5th Cir. 2001) and

*Littlefield v. Forney Independent School District*, 268 F.3d 275, 286 (5th Cir. 2001), which adopted the standard set forth in *United States v. O'Brien*, 391 U.S. 367 (1968), for evaluating restrictions on expressive conduct. First, the Supreme Court's recent decision in *Morse* has made clear that the *O'Brien* standard has no place in student speech cases. Second, even if the *O'Brien* standard applied as a general rule in such cases, it would not apply here because WISD's policy prohibits pure political speech, not expressive conduct, and discriminates on the basis of the speech's content. Third, even if the *O'Brien* standard did apply here, Pete is substantially likely to prevail on his First Amendment claims because WISD's policy cannot satisfy that standard either.

**1. *Morse* Removes Any Doubt That *Tinker*, Not *O'Brien*, Applies In Student Speech Cases**

Were there any doubt that *O'Brien* should not apply in student speech cases, the Supreme Court removed it in *Morse*. In *O'Brien*, the Supreme Court held that a law prohibiting the burning of draft cards passed constitutional muster, noting that “when ‘speech’ and ‘nonspeech’ elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.” *O'Brien*, 391 U.S. at 376. In *Canady*, when the Fifth Circuit was faced with a First Amendment challenge to a school uniform policy, the court came to the conclusion that the *O'Brien* test for expressive conduct—and not *Tinker*, *Fraser* or *Hazelwood*—should be used. *Canady*, 240 F.3d at 442.

In deciding *Canady*, however, the Fifth Circuit did not have the benefit of the Supreme Court's more recent analysis in *Morse*. Justice Alito's concurring opinion, which the Fifth Circuit has recognized as controlling, see *Ponce*, 508 F.3d at 768, makes clear that the *O'Brien* test has no place in student speech jurisprudence. Justice Alito joined the Court's opinion “on

the understanding that (a) it goes no further than to hold that a public school may restrict speech that a reasonable observer would interpret as advocating illegal drug use and (b) it provides no support for any restriction of speech that can plausibly be interpreted as commenting on any political or social issue[.]” *Morse*, 127 S. Ct. at 2636 (Alito, J., concurring). Justice Alito made clear that he did not understand the majority opinion “to mean that there are necessarily any grounds for such regulation that are not already recognized in the holdings of this Court.” *Id.* And Justice Alito “join[ed] the opinion of the Court with the understanding that the opinion does not endorse any further extension” of “what the First Amendment permits.” *Id.*

By thus limiting the permissible set of restrictions on student speech to those announced in *Tinker*, *Fraser*, *Hazelwood*, and *Morse*, Justice Alito’s controlling opinion effectively overrules *Canady* to the extent it holds that a standard other than *Tinker* should apply where *Fraser*, *Hazelwood*, and *Morse* do not. *Tinker* and not *O’Brien* thus supplies the governing standard for evaluating Pete’s First Amendment claim—and under *Tinker*, as explained above, WISD’s censorship of Pete’s undisruptive, political speech cannot be sustained.

## **2. Even Under *Canady* and *Littlefield*, The *O’Brien* Standard Would Not Apply To WISD’s Content-Based Restriction On Pete’s Pure Political Speech**

Even if *Canady* and *Littlefield* remain intact, the *O’Brien* test still would not apply here because WISD’s policy prohibits pure political speech—not expressive conduct, as in *O’Brien*, *Canady*, and *Littlefield*. The Fifth Circuit has made clear that the *O’Brien* standard endorsed in *Canady* applies only to restrictions on expressive conduct. *See Littlefield*, 268 F.3d at 286 (“In *O’Brien*, the Supreme Court created an analytical framework to evaluate content-neutral restrictions on *expressive activities*.”) (emphasis added).<sup>2</sup> Unlike the burning of draft cards in

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<sup>2</sup> In addition, the *O’Brien* test applies only to content-neutral restrictions, such as the school uniform code at issue in *Canady*. *Littlefield*, 268 F.3d at 286 (*O’Brien* “created an analytical framework to evaluate content-neutral

*O'Brien*, the political message on Pete's shirt constitutes "pure speech." See *Canady*, 240 F.3d at 440 ("clothing functions as pure speech" when a "student . . . choose[s] to wear shirts or jackets with written messages supporting political candidates or important social issues"). Because WISD's policy is directed at pure political speech, not expressive conduct, it must be analyzed under *Tinker*, not *O'Brien*.

Both the Supreme Court and the Fifth Circuit reaffirmed that principle just last year. See *Morse*, 127 S. Ct. at 2626 (*Tinker*, which involved "political speech" implicating "concerns at the heart of the First Amendment," holds that "student expression may not be suppressed unless school officials reasonably conclude that it will 'materially and substantially disrupt the work and discipline of the school.'"); *Ponce*, 508 F.3d at 767 (explaining that *Tinker* "protect[s]" the "important constitutional value" of "[p]olitical speech in the school setting"). In *Ponce*, the Fifth Circuit's most recent student-speech case, the school district had disciplined a student based on the content of his journal, which threatened a Columbine-style attack on the school. *Ponce*, 508 F.3d at 767. The Fifth Circuit held that under Justice Alito's "controlling" opinion in *Morse*, *id.* at 768, student speech "advocating a harm that is demonstrably grave and that derives that gravity from the 'special danger' to the physical safety of students" is not protected by the First Amendment. *Id.* at 770. In reaching that conclusion, the Fifth Circuit emphasized that "*Tinker*'s focus on the result of speech rather than its content remains the prevailing norm," so that the "protection of the First Amendment in public schools is . . . preserved." *Id.* at 770. The Fifth Circuit specifically highlighted Justice Alito's understanding that *Morse*, which permits schools

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restrictions"). WISD's prohibition of Pete's political speech, however, is the very model of a content-based restriction. WISD's policy permits messages on shirts about WISD programs and school "spirit," but flatly prohibits messages about all other subjects, including politics. It is of no moment that WISD's policy differentiates messages on the basis of subject matter, rather than "viewpoint" or ideology: A viewpoint-neutral restriction of speech is still content based if, like WISD's, it prohibits "public discussion of an entire topic." *Boos v. Barry*, 485 U.S. 312, 319 (1988) (quoting *Consol. Edison Co. v. Pub. Serv. Comm'n*, 447 U.S. 530, 537 (1980)) (internal quotation marks omitted).

to regulate speech advocating drug use, “provides no support for any restriction of speech that can plausibly be interpreted as commenting on any *political* or social issue.” *Morse*, 127 S. Ct. at 2636 (emphasis added) (Alito, J., concurring). That proposition is dispositive here.

Unlike *Canady* and *Littlefield*, which involved generic school uniform policies, this case concerns regulations aimed squarely at pure speech. There is a big difference between aesthetics, such as school uniforms, and pure speech, such as the written or spoken word. As the Fifth Circuit itself explained in *Canady*, “written messages supporting political candidates,” when “printed on clothing” such as “shirts or jackets,” are “pure speech . . . protected under the First Amendment.” 240 F.3d at 440. In *Canady* and *Littlefield*, the Fifth Circuit was not applying the *O’Brien* standard to a restriction directed at “pure speech,” such as the “Edwards ‘08” shirt at issue here. In the Fifth Circuit, *Tinker* provides the appropriate standard for evaluating whether regulation of pure speech can survive constitutional scrutiny. Given that WISD has effectively admitted that its prohibition of Pete’s speech cannot pass the *Tinker* test, this case presents a textbook example of a First Amendment violation.

### **3. WISD’s Censorship Of Pete’s Pure Political Speech Does Not Pass Constitutional Muster Under The *O’Brien* Test**

In the unlikely event that the *O’Brien* standard applies here, WISD’s censorship of Pete’s speech still would not withstand scrutiny. Under the four-prong test outlined in *O’Brien*, a rule or policy (1) must be “within the constitutional power of the Government;” (2) it must “further[ ] an important or substantial governmental interest;” (3) “the governmental interest” must be “unrelated to the suppression of free expression;” and (4) “the incidental restriction on alleged First Amendment freedoms” must be “no greater than is essential to the furtherance of that interest.” *O’Brien*, 391 U.S. at 377. WISD’s prohibition of Pete’s pure political speech fails at

least two prongs of the *O'Brien* test. For that reason, too, Pete is substantially likely to prevail on his First Amendment claim.

First, WISD's prohibition of political speech fails the *O'Brien* test because it cannot be said that the restriction is "unrelated to the suppression of free expression." To the contrary, "suppression of free expression" is the whole point of WISD's policy. As discussed above, the prohibition is a content-based restriction on pure speech. It does not prohibit conduct in any way. Rather, the sole purpose of the policy is to prohibit students from communicating messages on their shirts that have not received the prior approval of WISD. These unapproved messages include political, religious, and issue-oriented speech—speech at the very heart of First Amendment protections.

Second, the policy fails the *O'Brien* test because the restrictions placed by WISD's policy on First Amendment freedoms are greater than necessary to further any plausible government interest, such as promoting a more orderly and disciplined learning environment. *Cf. Pyle v. S. Hadley Sch. Comm.*, 861 F. Supp. 157, 163-64 (D. Mass. 1994) (analyzing school dress code that, *inter alia*, prohibited clothing with "obscene, profane, lewd or vulgar" messages or that "[a]dvertises alcoholic beverages, tobacco products, or illegal drugs" but *expressly permitted* "[c]lothing expressing political views clearly . . . as long as the views are not expressed in a lewd, obscene or vulgar manner"). For these reasons, then, WISD's censorship of Pete's speech cannot pass muster even under the relatively lax *O'Brien* standard. *See, e.g., Griggs v. Fort Wayne Sch. Bd.*, 359 F. Supp. 2d 731, 745 (N.D. Ind. 2005) (holding that school officials' censorship of message expressing support for the military on student's shirt could not be sustained because it was not "reasonably related to any legitimate pedagogical interest," such as

preventing violence in schools). Pete is therefore substantially likely to prevail on the merits of his First Amendment claim and thus entitled to a preliminary injunction.

## **II. Threat of Irreparable Harm**

Pete's claim of constitutional injury presents "a substantial threat that irreparable injury would result if the preliminary injunction [does] not issue." *Miss. Power & Light Co. v. United Gas Pipe Line Co.*, 760 F.2d 618, 623 (5th Cir. 1985). As both the Supreme Court and the Fifth Circuit have held, the "[l]oss of First Amendment freedoms, even for minimal periods of time, constitute[s] irreparable injury." *Ingebretson v. Jackson Pub. Sch. Dist.*, 88 F.3d 274, 280 (5th Cir. 1996). By punishing Pete for expressing his support for a presidential candidate—and prohibiting him from doing so again in the future—WISD has inflicted an irreparable injury to Pete's free speech rights under the First Amendment. Further, for purposes of the irreparable harm analysis, it is of no moment that Mr. Edwards has since dropped out of the presidential race. Pete's desire to express his political message—*i.e.*, his own political preference for John Edwards to serve as President of the United States—remains the same. Given the school officials' representations that they will enforce the policy against Pete and punish him if he were again to express that political message by wearing his shirt, there is a certainty, not merely a substantial threat, that Pete will suffer irreparable injury.

## **III. Balancing of Harms**

Pete is also entitled to a preliminary injunction because the "threatened injury to [him] . . . outweighs the potential harm the injunction causes [WISD]." *Deerfield Med. Ctr. v. City of Deerfield Beach*, 661 F.2d 328, 332 (5th Cir. 1981). Absent a preliminary injunction, Pete's constitutionally protected speech will continue to be censored—with no legitimate, much less compelling, state interest that can outweigh those harms. WISD can claim no legitimate

“interest in enforcing a law that ‘curtails debate and discussion’ regarding issues of political import.” *Suster v. Marshall*, 149 F.3d 523, 533 (6th Cir. 1998) (quoting *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 299 (1981)).

Complying with a preliminary injunction will impose negligible costs on WISD. WISD must simply allow Pete to express his political message by wearing his Edwards shirt. *See, e.g., Nixon v. N. Local School Dist. Bd. of Educ.*, 383 F. Supp. 2d 965, 975 (S.D. Ohio 2005) (defendant school officials “will not suffer any harm if they are enjoined from enforcing an unconstitutional policy”). Pete’s message of support for the former presidential candidate has not caused any “material and substantial disruption” to this point; it is not likely to cause disruptions in the future. Accordingly, “other students will not be harmed since defendants have failed to show any reasonable likelihood of material disruptions.” *See id.* at 965. Because the balance of harms strongly weighs in favor of Pete, his motion for a preliminary injunction should be granted.

#### **IV. Effect on the Public Interest**

The public interest is well served by a preliminary injunction ordering WISD to desist in violating Pete’s First Amendment rights. Indeed, the protection of constitutional rights, and particularly First Amendment rights, is always in the public interest. *See Gannett Co., Inc. v. DePasquale*, 443 U.S. 368, 383 (1979); *see also United States v. Wood*, 295 F.2d 772, 782 (5th Cir. 1961) (“[T]his suit is brought by the United States under an obligation charged to it by the Civil Rights Act for the protection of constitutional rights in which, according to the Supreme Court . . . there is the ‘highest public interest.’” (internal citation omitted)); *Sund v. City of Wichita Falls*, 121 F. Supp. 2d 530, 554 (N.D. Tex. 2000) (holding that entry of preliminary

injunctive relief would serve the public interest by protecting the constitutional rights of plaintiffs).

If anything, the public interest in enforcing First Amendment guarantees is heightened in the school environment. Our schools have a responsibility to teach students about constitutional principles not only as part of the curriculum, but also by faithfully applying them. And in the context of a presidential election year, that responsibility would seem, if anything, to lead our schools to *encourage* undisruptive means of expressing political views—not to stifle them. To be sure, school officials have a responsibility to maintain order and discipline so that students can learn. Accordingly, the Supreme Court has struck a sensible balance by permitting school officials to curtail the exercise of purely political or religious speech, but *only* when they can prove that such exercise poses a substantial, concrete threat to school discipline. Any other rule would foster cynicism and disrespect in our youth, who would perceive on the part of those in authority a hypocritical failure to respect and defend the values upon which our Nation was founded.

### **RELIEF REQUESTED**

Based upon the foregoing, Pete seeks a preliminary injunction restraining WISD, its agents, employees, and all other persons acting in active concert with it, from censoring the political message on Pete's shirt by prohibiting Pete from wearing it at any facility, event, or function operated or maintained by WISD, and from punishing Pete for said conduct.

Dated: July 2, 2008

Respectfully submitted,

/s/ Allyson N. Ho

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**CERTIFICATE OF CONFERENCE**

Pursuant to Local Rule 7.1(b), I certify that I have conferred with opposing counsel in a good faith attempt to resolve this issue without Court intervention. Specifically, I conferred with Ms. Sara Leon on June 12, 2008, via telephone. Defendant opposes the relief requested in this motion.

/s/ Allyson N. Ho

Allyson N. Ho

**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing Memorandum was filed electronically in compliance with Local Rule 5.1(e) on July 2, 2008. As such, this document was served on all counsel of record who are deemed to have consented to electronic service pursuant to Local Rule 5.1(d). All other counsel of record not deemed to have consented to electronic service will be served by facsimile transmission and/or U.S. First Class mail.

/s/ Allyson N. Ho

Allyson N. Ho