

No. 08-40707

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

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**DOUG MORGAN, ROBIN MORGAN, JIM SHELL, SUNNY SHELL,  
SHERRIE VERSHER, and CHRISTINE WADE**

*Plaintiffs-Appellants-Cross-Appellees,*

v.

**PLANO INDEPENDENT SCHOOL DISTRICT,**

*Defendant-Appellee-Cross-Appellant,*

and

**LYNN SWANSON, in her individual capacity and as Principal of Thomas  
Elementary School, and JACKIE BOMCHILL, in her individual capacity  
and as Principal of Razor Elementary School,**

*Defendants-Appellants.*

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**ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF TEXAS**

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**BRIEF *AMICUS CURIAE* OF WALLBUILDERS, INC.,**

in support of *Plaintiffs-Appellants-Cross-Appellees*

Supporting reversal.

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## CERTIFICATE OF INTERESTED PERSONS

Pursuant to Federal Rule of Appellate Procedure 26.1 and Fifth Circuit Rule 28.2.1, the undersigned counsel of record certifies that the following listed individuals and entities have an interest in the outcome of this case. None of the following individuals and entities, including *Amicus Curiae* WallBuilders, Inc., is a corporation that issues shares of stock to the public. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

1. Doug Morgan, Plaintiff-Appellant-Cross-Appellee;
2. Robin Morgan, Plaintiff-Appellant-Cross-Appellee;
3. Jonathan Morgan, Plaintiff-Appellant-Cross-Appellee;
4. Jim Shell, Plaintiff-Appellant-Cross-Appellee;
5. Sunny Shell, Plaintiff-Appellant-Cross-Appellee;
6. Michael Shell, Plaintiff-Appellant-Cross-Appellee;
7. Kevin Shell, Plaintiff-Appellant-Cross-Appellee;
8. Sherrie Versher, Plaintiff-Appellant-Cross-Appellee;
9. Stephanie Versher, Plaintiff-Appellant-Cross-Appellee;
10. Christine Wade, Plaintiff-Appellant-Cross-Appellee;
11. Michaela Wade, Plaintiff-Appellant-Cross-Appellee;
12. Bailey Wade, Plaintiff-Appellant-Cross-Appellee;
13. Malcolm Wade, Plaintiff-Appellant-Cross-Appellee;
14. Clyde Moody Siebman, Counsel for Plaintiffs-Appellants-Cross-Appellees;
15. Wm. Charles Bundren, Counsel for Plaintiffs-Appellants-Cross-Appellees;
16. Kelly Shackelford, Counsel for Plaintiffs-Appellants-Cross-Appellees;
17. Allyson N. Ho, Counsel for Plaintiffs-Appellants-Cross-Appellees;
18. Plano Independent School District, Defendant-Appellee-Cross-Appellant;
19. Carole Griesdorf, Defendant-Appellee-Cross-Appellant;
20. Lynn Swanson, Defendant-Appellee-Cross-Appellant;

21. Doug Otto, Defendant-Appellee-Cross-Appellant;
22. Lisa Long, Defendant-Appellee-Cross-Appellant;
23. Suzie Snyder, Defendant-Appellee-Cross-Appellant;
24. Jackie Bomchill, Defendant-Appellee-Cross-Appellant;
25. John Beasley, Defendant-Appellee-Cross-Appellant;
26. Charles J. Crawford, Counsel for various Defendants-Appellees-Cross-Appellants;
27. Richard M. Abernathy, Counsel for various Defendants-Appellees-Cross-Appellants;
28. Thomas P. Brandt, Counsel for various Defendants-Appellees-Cross-Appellants;
29. Joshua A. Skinner, Counsel for various Defendants-Appellees-Cross-Appellants;
30. The National Legal Foundation, *Amicus Curiae* on behalf of Plaintiffs-Appellants-Cross-Appellees;
31. Steven W. Fitschen, Counsel of Record for *Amicus Curiae*, The National Legal Foundation;
32. Douglas E. Myers, Counsel for *Amicus Curiae*, The National Legal Foundation;
33. WallBuilders, Inc., *Amicus Curiae*.

s/s Steven W. Fitschen

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**TABLE OF CONTENTS**

**TABLE OF AUTHORITIES ..... ii**

**INTEREST OF *AMICUS* .....1**

**SUMMARY OF THE ARGUMENT .....1**

**ARGUMENT.....2**

**I. THE SCHOOL DISTRICT’S POLICIES WRONGFULLY  
EXCLUDE SPEECH FROM THE NATION’S YOUNGEST  
VOICES DESPITE OUR NATION’S HISTORY OF YOUTHS  
ENGAGING IN PUBLIC DEBATE, ACADEMIC PURSUITS  
AND FREE ENTERPRISE. ....2**

**CONCLUSION.....8**

## TABLE OF AUTHORITIES

<b>Cases:</b>	<b>Page(s):</b>
<i>Morgan v. Plano Indep. Sch. Dist.</i> , No. 04-cv-447, 2007 U.S. Dist. LEXIS 7375, at *32, 37 (E.D. Tex. Feb. 1, 2007).....	2, 3
<i>Morgan v. Plano Indep. Sch. Dist.</i> , No. 04-cv-447 (E.D. Tex. filed Feb. 26, 2007).....	2
<i>School Dist. of Abington Township v. Schempp</i> , 374 U.S. 203 (1963) .....	7
<i>Tinker v. Des Moines Indep. Cmty. Sch. Dist.</i> , 393 U.S. 503 (1969) .....	1, 3
<b>Other Sources:</b>	
3 John Adams, <i>The Works of John Adams</i> (Charles Francis Adams ed., Little & Brown 1851) (1765).....	3
1 Fisher Ames, <i>Works of Fisher Ames</i> (W.B. Allen ed.) (1829) .....	4
Edwin S. Gaustad, <i>Benjamin Franklin</i> (2006).....	4
1 John C. Hamilton, <i>Life of Alexander Hamilton</i> (1878) .....	5
Henry Mayer, <i>A Son of Thunder</i> (1986) .....	6
Max M. Mintz, <i>Gouverneur Morris and the American Revolution</i> (1970).....	6
Michael Novak & Jana Novak, <i>Washington’s God</i> (2006) .....	6
Robert V. Remini, <i>John Quincy Adams</i> (2002) .....	5
Benjamin Rush, <i>The Autobiography of Benjamin Rush</i> (George W. Corner ed., Greenwood Press 1970) (1948) .....	6
1 Carl Sandburg, <i>Abraham Lincoln: the Prairie Years</i> (1926) .....	7

## **INTEREST OF *AMICUS CURIAE***

*Amicus Curiae*, WallBuilders, Inc., is a non-profit corporation dedicated to the restoration of America's moral and religious heritage. Based in Texas and possessing one of the largest privately held libraries in the nation with more than 70,000 documents predating 1812, it specializes in conducting research using primary source documents. This expertise in America's history and religious heritage causes this organization to take significant interest in the present case.

WallBuilders, Inc. submits its brief by consent of all parties.

## **SUMMARY OF THE ARGUMENT**

This Brief makes one argument not made by the Plaintiffs-Appellants-Cross-Appellees (hereinafter the "Parents"). *Amicus* argues that the court below erred in granting Plano Independent School's (hereinafter the "School District") summary judgment motion by taking an unnecessarily narrow view of the free speech rights of young children.

The Brief explains that throughout this nation's history, many of the greatest and most influential men and women had begun plying their trades at very young ages. Such evidence, although in itself not dispositive of the legal standard, points to the propriety of the standard for speech restrictions in public schools as set out in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969).

## ARGUMENT

### I. THE SCHOOL DISTRICT'S POLICIES WRONGFULLY EXCLUDE SPEECH FROM THE NATION'S YOUNGEST VOICES DESPITE OUR NATION'S HISTORY OF YOUTHS ENGAGING IN PUBLIC DEBATE, ACADEMIC PURSUITS AND FREE ENTERPRISE.

The court below, in adopting nearly all the recommendations of the Magistrate Judge,<sup>1</sup> also appeared to accept the premises upon which that reasoning was based. In particular, the court noted that “in an elementary setting, more structure is required to ensure that the limited time allotted for instruction is maximized,” citing the affidavit of Deputy Superintendent Modisette regarding “material disruptions” potentially created by the “distribution of non-school materials, such as birthday cards, concert tickets and inanimate objects.” *Morgan v. Plano Indep. Sch. Dist.*, No. 04-cv-447, 2007 U.S. Dist. LEXIS 7375, at \*32, 37 (E.D. Tex. Feb. 1, 2007). The court seemed to hold that because some students may have emotional reactions to certain types of distributions that restrictions from the School District get a free pass. *Id.* at 38.

The Parents have thoroughly set out the legal arguments why the court below erred in granting partial summary judgment in favor of the School District

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<sup>1</sup> The court below did reject the Magistrate’s recommendation to grant summary judgment for the School District concerning the lunchtime restrictions for elementary school students. *Morgan v. Plano Indep. Sch. Dist.*, No. 04-cv-447 (E.D. Tex. filed Feb. 26, 2007). In particular, the court found that the policy forbidding the “distribut[ion of] materials in elementary cafeterias during designated meal periods” to “reach[] more broadly than what is reasonably necessary to protect [the School District’s] legitimate interests.” *Id.*

which will not to be reiterated here. Rather, what is presented addresses more the *ethos* of the court's narrow approach to how it views children, their capabilities and their apprehension of their First Amendment rights. As history illustrates, children and adolescent youths are capable of some remarkable achievements, including difficult apprenticeships, academic studies, and writing. Protection of their free speech rights within the public school setting is just as compelling as it would be for an adult in an analogous setting. Thus, application of the "material and substantial interference" standard from *Tinker*, 393 U.S. at 506, affords these children the protection the Constitution grants.

The court, however, seemed to misplace the origin of these constitutional rights when it noted that the School District's "2005 Policies greatly expand the First Amendment rights of students [as compared to the 2004 version]." *Morgan*, 2007 U.S. Dist. LEXIS 7375, at \*28. The statements of the court below notwithstanding, the School District has no authority to "expand," or contract for that matter, the "rights of students." The rights exist apart from the School District, deriving from the Constitution, and the School District merely accommodates these pre-existing rights in its policies. *See e.g.*, 3 John Adams, *The Works of John Adams* 449 (Charles Francis Adams ed., Little & Brown 1851) (1765) ("Rights [are] antecedent to all earthly government; Rights, that cannot be repealed or restrained by human laws; Rights, derived from the great Legislator of

the universe.”); 1 Fisher Ames, *Works of Fisher Ames* 68 (W.B. Allen ed.) (1829) (“If the Bill of Rights is violated, there every injured *citizen* may expect, and will have more complete redress, than an army of insurgents could give him. No act can have the force of law against the Bill of Rights.” (emphasis added)).

By way of illustration, history teaches that strength of character and ingenuity are not the province of adults alone. For instance, upon learning he could ill-afford to pay for his tenth son to receive a formal education, Josiah Franklin brought his ten-year-old son Benjamin home to work as a candle and soap maker. Edwin S. Gaustad, *Benjamin Franklin* 5-6 (2006). The ever-industrious Ben worked for his father until he was twelve, at which time he entered into service at an older brother’s print shop. *Id.* at 6. As a sixteen-year-old, Ben Franklin began to compose serious (and not so serious) pieces ranging from the propriety of female education to a satire on Harvard College. *Id.* at 8-9. He began to write poetry, published criticisms of local clergy and the church, and argued for “freedom of thought and freedom of speech.” *Id.* at 9, 11. It seems almost quaint to imagine that the young Franklin’s pieces may have brought him approbation of school authorities for an ill-timed conveyance of an essay to a classmate when he was facing real approbation from the community for the contents of his writings about the need for free and open debate.

Perhaps one of the most notable youths in the nation's history was John Quincy Adams. Not yet eleven years old when he accompanied his father across the Atlantic Ocean on a diplomatic mission, by age thirteen he was enrolled as a scholar at the University of Leyden in the Netherlands. Robert V. Remini, *John Quincy Adams* 6, 10 (2002). Within seven months of his arrival at Leyden, his studies were postponed to take on the task of interpreter for an American diplomatic team in St. Petersburg, Russia. *Id.* 11. For the next few years, John Quincy Adams would attend to himself in Europe, spending time in Sweden, Denmark, Germany and France, and, before returning to the United States, he assisted his father to draft the treaty ending the American Revolution. *Id.* 12-16.

Another youth from posterity worth noting is Alexander Hamilton, the West Indian-born stalwart of the founding era of the United States. Hamilton demonstrated early a "strong propensity to literature," and under the tutelage of a Doctor Knox, Hamilton developed a "strong religious bias to his feelings." Dr. Knox frequently conversed with the boy Hamilton on "polemical controversies which . . . called for the highest efforts of intellect." 1 John C. Hamilton, *Life of Alexander Hamilton* 42 (1878). By age twelve, Hamilton had demonstrated sufficient dependability to be employed in a counting-house. *Id.* at 43. Having thereafter demonstrated an aptitude for business and further affirming his

reliability to his employer, Hamilton was given charge of the business, which included oversight of international business dealings—at age thirteen. *Id.* at 44.

Other well-known figures such as George Washington, Patrick Henry, Benjamin Rush and Gouverneur Morris undertook significant responsibilities at very young ages. Washington was working on a surveying crew on the frontier at age sixteen and had become a professional surveyor by the next year. Michael Novak & Jana Novak, *Washington's God* 24 (2006). At age fifteen, Patrick Henry ran a store with his brother. Henry Mayer, *A Son of Thunder* 42-44 (1986). While still thirteen, Benjamin Rush matriculated at what the College of New Jersey (what would later become Princeton University), and graduated with a Bachelor of Arts within a year and a half and several months short of his fifteenth birthday. Benjamin Rush, *The Autobiography of Benjamin Rush* 35-36 (George W. Corner ed., Greenwood Press 1970) (1948). Similarly, Gouverneur Morris entered King's College in New York three years prior to what was normal for the time, at age twelve. Max M. Mintz, *Gouverneur Morris and the American Revolution* 16 (1970).

Many more familiar names could be added to this list—names such as Fisher Ames, Nathaniel Bowditch, Robert Fulton, Louisa May Alcott, and Harriet Beecher Stowe—but the point has been made. To view the speech rights of young students to somehow be dependent on their age and to permit the curtailment

simply because of it is to impermissibly exclude from the public square their voices. The instant case is not about a teacher forbidding note-passing during class. Rather, it is about the propriety and necessity of a school implementing prior restraints on a student’s speech in a government school, a restraint only appropriately limited by the test set forth in *Tinker*. Such prior restraints are further aggravated when they implicate religious exercise at any stage of schooling, the spirit of which Justice Potter Stewart once noted in dissent. “[A] compulsory state educational system so structures a child’s life that if religious exercises are held to be an impermissible activity in schools, religion is placed at an artificial and state-created disadvantage. Viewed in this light, permission of such exercises for those who want them is necessary if the schools are truly to be neutral in the matter of religion.” *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 313 (1963) (Stewart, J., dissenting). It bears noting that Justice Stewart did not qualify his analysis to account for age; rather he was writing in response to a challenge to a law affecting all public school students in the entire Commonwealth of Pennsylvania—from the youngest to the oldest.<sup>2</sup> *Id.* at 203.

Although seven-year-old students no longer walk four miles to school as Abraham Lincoln once did, 1 Carl Sandburg, *Abraham Lincoln: the Prairie Years*

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<sup>2</sup> *Schempp* also addressed a challenge to a policy of the Baltimore City School District, which policy affected all students enrolled in that system as well. *Schempp*, 374 U.S. at 211.

19 (1926), they do maintain a similar spirit of inquiry and a desire to speak. Regulations by schools that do more than limit the speech beyond what is necessary to prevent “material and substantial interference” to the school day wrongfully exclude speech from the youngest voices of the nation and send a message that perhaps an ability to speak freely is not so important after all. This should not be so.

### CONCLUSION

For the foregoing reasons, and for the reasons put forth in Plaintiffs’-Appellants’-Cross Appellees’ Brief, this Court should reverse the District Court’s grant of summary judgment in favor of the School District.

Respectfully submitted,  
this 4th day of November, 2008

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## CERTIFICATE OF SERVICE

I hereby certify that I have duly served the attached Brief *Amicus Curiae* of WallBuilders, Inc. in the case of *Morgan, et al. v. Plano Independent School District, et al.*, No. 08-40707, on all required parties by depositing two paper copies and one electronic copy in the United States mail, first class postage, prepaid on November 4, 2008 addressed as follows:

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