No. 08-10903

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PAUL T. PALMER, by and through his parents and legal guardians, Paul D. Palmer and Dr. Susan Gonzalez Baker,
Plaintiff-Appellant,

v.

WAXAHACHIE INDEPENDENT SCHOOL DISTRICT,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF TEXAS, DALLAS DIVISION

BRIEF *AMICUS CURIAE* OF THE NATIONAL LEGAL FOUNDATION,

in support of *Plaintiff-Appellant*
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* The National Legal Foundation, 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. Paul T. Palmer, by and through his parents and legal guardians, Paul D. Palmer and Susan Gonzalez Baker, Plaintiff-Appellant;
2. Kelly Shackelford, Counsel for Plaintiff-Appellant;
3. Hiram Stanley Sasser, III, Counsel for Plaintiff-Appellant;
4. Roger L. Byron, Counsel for Plaintiff-Appellant;
5. Allyson N. Ho, Counsel for Plaintiff-Appellant;
6. Craig A. Stanfield, Counsel for Plaintiff-Appellant;
7. Lauren F. Barker, Counsel for Plaintiff-Appellant;
8. Ryan L. Bangert, Counsel for Plaintiff-Appellant;
9. Waxahachie Independent School District, Defendant-Appellee;
10. Sara Louise Hardner Leon, Counsel for Defendant-Appellee;
11. William C. Bednar, Jr., Counsel for Defendant-Appellee;
12. The National Legal Foundation, *Amicus Curiae* on behalf of Plaintiff-Appellant;
13. Steven W. Fitschen, Counsel of Record for *Amicus Curiae*, The National Legal Foundation;
14. Douglas E. Myers, Counsel for *Amicus Curiae*, The National Legal Foundation.

/s/ Steven W. Fitschen
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INTEREST OF *AMICUS CURIAE*

The National Legal Foundation (NLF) is a public interest law firm dedicated to the defense of First Amendment liberties and the restoration of the moral and religious foundation on which America was built. The NLF and its donors and supporters, in particular those in Texas, are vitally concerned with the outcome of this case because of the effect the loss of political liberty could have on religious liberty and expression of students within public schools.

This brief is filed pursuant to consent from Counsel of Record for the Appellant and pursuant to a Motion for Leave to File a Brief *Amicus Curiae*.

SUMMARY OF THE ARGUMENT

This Brief makes one argument not made by the Plaintiff-Appellant Paul Palmer (hereinafter "Mr. Palmer"). *Amicus* argues that the holding in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), in addition to being constitutionally correct, has been necessitated by compulsory attendance laws in force in all fifty states of the Union.

ARGUMENT

I. PROTECTION OF STUDENT SPEECH RIGHTS UNDER THE *TINKER* STANDARD IS APPROPRIATE, IN PART, BECAUSE OF THE NATURE OF COMPULSORY SCHOOL ATTENDANCE.

Mr. Palmer has capably argued that *Tinker* governs the instant dispute and that, whether the facts are evaluated under *Tinker* or *United States v. O'Brien*, 391

U.S. 367 (1968), Waxahachie Independent School District's (the "School District") clothing policy unconstitutionally restricts pure speech in violation of the First Amendment. (*See generally* Appellant's Br.) Your *Amicus* will not reiterate those arguments here. Rather, *Amicus* will argue that the standard set forth in *Tinker* has been necessitated by the advent and reach of compulsory school attendance, a phenomenon non-existent at the nation's founding.

"There is no doubt as to the power of a State, having a high responsibility for education of its citizens, to impose reasonable regulations for the control and duration of basic education." *Wisconsin v. Yoder*, 406 U.S. 205, 213-14 (1972). The "reasonable regulations" states impose, however, have not always included compulsory attendance for all school-aged children. In Texas, for example, although public education was *provided* from its earliest days, it was not until the fall of 1916 that it was *required*. *See, e.g.,* 1879 Tex. Rev. Civ. Stat. tit. LXXVIII; 1895 Tex. Rev. Civ. Stat. tit. LXXXVI; 1911 Tex. Rev. Civ. Stat. tit. 48; 1925 Tex. Rev. Civ. Stat. tit. 49; *Texas Educ. Agency v. Leeper*, 893 S.W.2d 432, 433-34 (Tex. 1994). Prior to the 1915 compulsory attendance law, educating the state's young people, although encouraged and financed by the legislature and the public fisc, was ultimately left to the discretion of parents. *See, e.g.,* 1879 Tex. Rev. Civ. Stat. tit. LXXVIII; 1895 Tex. Rev. Civ. Stat. tit. LXXXVI; 1911 Tex. Rev. Civ. Stat. tit. 48.

It is in this change from the promoted to the prescribed that a holding like *Tinker* becomes constitutionally necessary. If a student can come and go from school as he pleases, restraints imposed by a particular school of a particular message are somewhat muted. It becomes a different matter, however, when a politically-minded (or religiously-minded, for that matter) young man, such as Mr. Palmer, is required to spend significant portions of each day under the supervision and control of a state organ. He may not simply seek an apprenticeship with a local newspaper or sign on with a political organization to give vent to his political passions. He must go to school. And unless he comes from a family of some means or his parents wish to home-educate, he must attend the state-run public school.

None of this is to argue that Mr. Palmer *should not* be in school or that a state's interest in educating children and youths is inappropriate. "Providing public schools ranks at the very apex of the function of a State." *Yoder*, 406 U.S. at 214. But the *Yoder* Court also noted something every bit as important as—in fact, more important than—compulsory school attendance. The Court remembered the First Amendment and the unequivocal protection of the free exercise of religion.

> Thus, a State's interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on *fundamental rights and interests*, such as those specifically protected by the Free Exercise Clause of the First Amendment, and

> the traditional interest of parents with respect to the religious upbringing of their children so long as they, in the words of *Pierce* [v. Soc'y of Sisters], "prepare [them] for additional obligations."

Id. at 214 (citation omitted) (emphasis added).

What the *Yoder* Court noted explicitly in protecting the free exercise rights of parents, the *Tinker* Court noted implicitly for student speech. *Tinker*, 393 U.S. at 507. Congruent with the facts of the instant case, *Tinker* involved "school officials bann[ing] and [seeking] to punish [students] for a silent, passive expression of opinion, unaccompanied by any disorder or disturbance on the part of petitioners." *Id.* at 508. Importantly, "[t]here [was] . . . no evidence whatever of [students'] interference, actual or nascent, with the schools' work or of collision with the rights of other students to be secure and to be let alone." *Id.* The Court then concluded that "[a]ccordingly, [this case did] not concern speech or action that intrudes upon the work of the schools or the rights of other students." *Id.*

In other words, the Court held that when a state-run school imposes restrictions that impact the "core of what the First Amendment is designed to protect," *Morse v. Frederick*, 127 S. Ct. 2618, 2626 (2007), only a material or substantial disruption to the operation of the school warrants the restriction. *Tinker*, 393 U.S. at 509. Simply put, the government cannot have its cake and eat it too by requiring student attendance *and* by demanding students shed their First Amendment rights at the schoolhouse gate. *See id.* at 506. Although school

districts perform "important, delicate, and highly discretionary functions," all of these functions can be performed "within the limits of the Bill of Rights." *West Virginia v. Barnette*, 319 U.S. 624, 637 (1943). The Court went on to emphasize the point:

> That they [public schools] are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes."

Id.

Although one may suggest that *Tinker* was an extra-constitutional innovation,[1] a holding unheard of in the days of "Readin' and 'ritin' and 'rithmetic,/ Taught to the tune of the hick'ry stick,"[2] such a person would be missing that vital difference between voluntary and compulsory school attendance discussed above. Furthermore, because compulsory attendance laws have only been in existence in the United States for approximately 100 years (some states a bit more, some a bit less), *see* http://www.infoplease.com/ipa/A0112617.html (last visited Dec. 19, 2008), any case regarding students' rights which predate those laws are unhelpful for the present constitutional inquiry. When *parents* had full discretion whether to place a child under the supervision of the state-run school,

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[1] *See, e.g., Morse*, 127 S. Ct. at 2630-31 (Thomas, J., concurring).

[2] The phrase appears to have its origin in an old grammar school song entitled, "School Days," composed by Cobb & Edwards in 1907. *See* http://levysheetmusic.mse.jhu.edu/otcgi/llscgi60.

the school's authority was nearly co-extensive with the parents'. *Morse*, 127 S. Ct. at 2630-31 (Thomas, J., concurring). If parents disagreed with school rules or the application of certain forms of discipline, however, they could simply remove the child, without any fear of repercussions from the state. Compulsory attendance laws have changed that critical dynamic.[3]

Once again, *Yoder* is instructive for how this Court should view the *Tinker* holding and its application to the instant case.

> Long before there was general acknowledgment of the need for universal formal education, the Religion Clauses had specifically and firmly fixed the right to free exercise of religious beliefs, and buttressing this fundamental right was an equally firm, even if less explicit, prohibition against the establishment of any religion by government. The values underlying these two provisions relating to religion have been zealously protected, sometimes even at the expense of other interests of admittedly high social importance.

Yoder, 406 U.S. at 214. Should Mr. Palmer's speech rights be any less guarded by this same First Amendment?

Perhaps, in one sense, the instant case has become difficult because we have forgotten from whence we have come. In an age filled with accounts of teen sex and violence (some of them exaggerated, but most of them not), schools face

[3] Also affecting student portability is the significant cost of education. Adjusted for inflation, per pupil spending on education increased by more than a factor of ten from 1919 to 1990 ($66 to $853 per pupil). National Center for Education Statistics, U.S. Dep't of Educ., *120 Years of American Education: A Statistical Portrait* 35 (1993). The cost of education, especially in light of the taxing structure in most districts, makes it cost prohibitive to both pay school taxes and tuition for large numbers of people.

challenges not evident in the not-so-distant past. But the prevailing winds of an era must not dictate the principle. It may be tempting for some to say that Mr. Palmer's harm is slight because he has other options for conveying his political speech. But the test is not whether he *could* speak in a different manner; rather the test is whether the manner he has chosen has created a substantial and material disruption to the educational process. *Tinker* does not ignore the need for order and discipline. It simply places the burden on the School District to show that its restriction on a First Amendment right arose in light of a material and substantial disruption to the educational process and *not* because it simply thought it preferential to do so. This the School District has not proven, nor can it.

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 Plaintiff-Appellant's Brief, this Court should reverse the District Court's denial of

injunctive relief in favor of the School District.

Respectfully submitted,
this 23rd day of December, 2008

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CERTIFICATE OF SERVICE

I hereby certify that I have duly served the attached Brief *Amicus Curiae* of The National Legal Foundation in the case of *Palmer v. Waxahachie Independent School District*, No. 08-10903, on all required parties by depositing two paper copies and one electronic copy in the United States mail, first class postage, prepaid on December 23rd, 2008 addressed as follows:

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