NO. 08-40707

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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 Rasor Elementary School,

Defendants/Appellants

On Appeal from the United States District Court
for the Eastern District of Texas, Sherman Division

BRIEF OF *AMICUS CURIAE* CHRISTIAN LEGAL SOCIETY SUPPORTING REVERSAL OF DISTRICT COURT'S DECISION

Darren L. McCarty
State Bar No. 24007631
ALSTON & BIRD LLP
2200 Ross Avenue, Suite 3601
Dallas, Texas 75201
Telephone: 214.922.3400
Telecopy: 214.922.3899

Gregory S. Baylor
State Bar No. 01941500
CHRISTIAN LEGAL SOCIETY
8001 Braddock Road, Suite 300
Springfield, Virginia 22151
Telephone: 703.642.1070
Telecopy: 703.642.1075

COUNSEL FOR AMICUS CURIAE
CHRISTIAN LEGAL SOCIETY

NO. 08-40707

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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 Rasor Elementary School,

Defendants/Appellants

On Appeal from the United States District Court
for the Eastern District of Texas, Sherman Division

CERTIFICATE OF INTERESTED PARTIES

Pursuant to Federal Rule of Appellate Procedure 28(a)(1) and Local Rule 28.2.1, the undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Plaintiffs-Appellants

- Jonathan Morgan
- Doug Morgan
- Robin Morgan
- Michael Shell
- Kevin Shell
- Jim Shell
- Sunny Shell
- Stephanie Versher
- Sherrie Versher
- Michaela Wade
- Bailey Wade
- Malcolm Wade
- Christine Wade

Attorneys for Plaintiffs-Appellants-Cross-Appellees

- Clyde Moody Siebman
  Siebman Reynolds Burg & Phillips LLP
  300 N. Travis Street
  Sherman, Texas 75090-0070

- Kelly Shackelford
  Hiram Stanley Sasser, III
  Liberty Legal Institute
  903 E. 18th Street, Suite 230
  Plano, Texas 75074

- Wm. Charles Bundren
  Wm. Charles Bundren & Associates
  2591 Dallas Parkway, Suite 300
  Frisco, Texas 75034

- Allyson N. Ho
  Craig A. Stanfield
  Morgan, Lewis & Bockius LLP
  1000 Louisiana Street, Suite 4200
  Houston, Texas 77002

Defendants-Appellees-Cross-Appellants	*Attorneys for Defendants-Appellees-Cross-Appellants*
• Plano Independent School District	• Charles Joseph Crawford Richard Mercer Abernathy Abernathy Roeder Boyd & Joplin 1700 Redbud, Suite 300 McKinney, Texas 75069 • Thomas Phillip Brandt Fanning Harper & Martinson 4849 Greenville Ave., Suite 1300 Dallas, Texas 75206
• Carole Griesdorf, in her individual capacity and as the Special Assistant to the Plano ISD Superintendent	• Charles Joseph Crawford Richard Mercer Abernathy Abernathy Roeder Boyd & Joplin 1700 Redbud, Suite 300 McKinney, Texas 75069
• Lynn Swanson, in her individual capacity and as Principal of Thomas Elementary School	• Charles Joseph Crawford Richard Mercer Abernathy Abernathy Roeder Boyd & Joplin 1700 Redbud, Suite 300 McKinney, Texas 75069 • Thomas Phillip Brandt Fanning Harper & Martinson 4849 Greenville Ave., Suite 1300 Dallas, Texas 75206
• Doug Otto, in his individual capacity and as the Superintendent of Plano ISD	• Charles Joseph Crawford Richard Mercer Abernathy Abernathy Roeder Boyd & Joplin 1700 Redbud, Suite 300 McKinney, Texas 75069

Defendants-Appellees-Cross-Appellants	*Attorneys for Defendants-Appellees-Cross-Appellants*
• Lisa Long, in her individual capacity and as Principal of Wells Elementary School	• Charles Joseph Crawford Richard Mercer Abernathy Abernathy Roeder Boyd & Joplin 1700 Redbud, Suite 300 McKinney, Texas 75069
• Suzie Snyder, individually	• Charles Joseph Crawford Richard Mercer Abernathy Abernathy Roeder Boyd & Joplin 1700 Redbud, Suite 300 McKinney, Texas 75069
• Jackie Bomchill	• Joshua Alan Skinner Thomas Phillip Brandt Fanning Harper & Martinson 4849 Greenville Avenue 1300 Two Energy Square Dallas, Texas 75206
• John Beasley	• Charles Joseph Crawford Richard Mercer Abernathy Abernathy Roeder Boyd & Joplin 1700 Redbud, Suite 300 McKinney, Texas 75069

Amicus Curiae

- Christian Legal Society

Attorneys for Amicus Curiae

- Darren L. McCarty
  Alston & Bird LLP
  2200 Ross Avenue, Suite 3601
  Dallas, Texas 75201

- Gregory S. Baylor
  Christian Legal Society
  8001 Braddock Road, Suite 300
  Springfield, Virginia 22151

TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

FEDERAL RULES

INTEREST OF *AMICUS CURIAE*

The Christian Legal Society (the Society) is a nonprofit interdenominational association of Christian attorneys, law students, judges, and law professors with chapters in nearly every state and members at over 140 accredited law schools. The Society's legal advocacy division, the Center for Law & Religious Freedom (the Center), works for the protection of religious belief and practice, as well as for the right to publicly advocate those beliefs. The Center strives to preserve religious freedom in order that men and women might be free to do God's will, and because the founding instrument of this Nation acknowledges as a "self-evident truth" that all persons are divinely endowed with rights that no government may abridge nor any citizen waive.

The Center has been instrumental in securing protections for student religious (and other) speech, including the federal Equal Access Act and continues to advocate in state and federal courts for the First Amendment rights of students on public school and university campuses. Because this case presents an exceptionally important question of First Amendment interpretation, the Christian Legal Society files this *Amicus Curiae* brief.

AUTHORITY TO FILE

Amicus states that all counsel of record have received notice of its intent to file this brief, and all parties to this appeal have consented to the filing of this brief. Therefore, *Amicus* is not required to obtain leave of Court under Federal Rule of Appellate Procedure 29(a). Furthermore, *Amicus* certifies that no portion of this brief was authored by counsel for a party and no person or entity other than *Amicus* or their counsel made a monetary contribution to the preparation or submission of this brief.

INTRODUCTION

Public school students occupy a unique place among those whom the First Amendment protects. Because education is one of the few mandates in our society, countless children spend their formative years under the supervision of public school administrators—their first substantial interaction with a government institution. Public schools are also social environments where students learn to interact with peers. In all, students learn life-long lessons about how to participate within our larger society. Public school students of faith – like those who hold other sincere beliefs – learn to balance their right to express those beliefs with rules and social norms. That public schools broadly accommodate free speech, in plain accord with the First Amendment, is critical to the formation of children's beliefs and their understanding of how the communication of their beliefs is protected by our Constitution.

If students' First Amendment rights are violated, absent *pro bono* legal assistance, many, if not most, will not have the means to mount a legal challenge. If they are fortunate enough to request court intervention, those same young students must return to the care of the very individuals whom they have served with a summons and complaint. Without broad First Amendment protections, clearly outlined by the courts, public school students may well find themselves in

local outposts subjected to far different and improper restrictions on their right to speak.

The matter before this Court is a stark demonstration of overly aggressive local government restrictions on the core free speech of our youngest and most impressionable. Passing out pencils with a religious message on a playground after school resulted in a principal's forceful taking of the pencils from an elementary school girl's hand. 4.R.1620. More troubling, the school called for police intervention against the young girl and her mother. 4.R.1617-18. The message was clear: speaking ever so mildly about your beliefs was not acceptable. Rather than learning that America is a society free and open to speech, it was the opposite. The school's requirement that written materials be "pre-cleared" by the administration, 3.R.1053-54, beyond providing ample room for subtle viewpoint and other arbitrary discrimination, inculcates a belief that government is the arbiter of ideas and speech. Unfortunately, the facts here demonstrate the danger of leaving local administrations with too-broad discretion in formulating speech restrictions.

This appeal presents quite different views of the First Amendment. The first view confirms broad First Amendment protections against government interference with student speech unless it materially and substantially interferes with discipline or the rights of others within the school setting. *Tinker v. Des Moines Independent*

Community School District, 393 U.S. 503, 508 (1969). The second view would give license to countless teachers and school officials to regulate core speech via broad and discretionary time, place, and manner restrictions. *O'Brien v. United States*, 391 U.S. 367 (1968). This open door for unchecked abuses of the First Amendment pragmatically suggests that this second view, articulated in *O'Brien*, is inappropriate. More importantly, *O'Brien*'s regime for analyzing laws governing *expressive conduct* simply does not comport with First Amendment protections of *pure speech*. Rather, the *Tinker* standard, which has governed student speech for nearly four decades, provides appropriate protection for student speech rights within the framework of an educational setting.

ARGUMENT

For the reasons stated below, the Court should vacate the judgment of the district court and remand for reconsideration of the 2004 and 2005 policies at issue under the standards and protections set forth in *Tinker*.

I. The *O'Brien* Test Is The Incorrect Standard To Apply To The Plano Independent School District Policies.

A. The *O'Brien* test applies to expressive conduct.

The *O'Brien* test applies to restrictions that incidentally interfere with expressive conduct. The speech at issue in this case is pure, written communication, not symbolism or conduct with some expressive element. While *O'Brien* analyzed regulations prohibiting the burning of a draft card, and the

impact such a prohibition had on the individual's expressive purpose for doing so, its outcome depended upon the intersection of free-speech principles and governmental restrictions that were not targeted at regulating speech. *O'Brien*, 391 U.S. at 376.

O'Brien itself makes that distinction clear: the law at issue prohibiting the destruction of a selective service certificate, on its face, did not abridge free speech but rather dealt with conduct having no connection to speech—the destruction of a card. *Id.* at 372-374. As the Supreme Court noted, there is "nothing necessarily expressive about such conduct." *Id.* at 374. Only the expressive aspect of publicly burning a draft card gave rise to First Amendment concerns. *Id.* at 376-377. Nevertheless, the Supreme Court upheld the regulation against destroying draft cards under a relaxed standard because it "condemn[ed] only the noncommunicative impact of conduct within its reach." *Id.* at 382.

This case presents a markedly distinct circumstance: regulation of pure, written communication — not symbolic or expressive conduct appropriately analyzed under *O'Brien*. The Plano Independent School District ("PISD") prohibited students from engaging in written *speech*. 3.R.1053-54; 3.R.1183-86. Communicating with friends about religious beliefs, inviting classmates to a free concert or to church, or telling them Jesus is the "reason for the season" directly

conveyed the students' beliefs. It was pure speech restricted by a rule directed at speech, not at conduct.

The district court chose to apply *O'Brien* at the PISD's urging. The district court surmised that in *Canady v. Bossier Parish School Board*, 540 F.3d 437 (2001), the Fifth Circuit found *Tinker* was applicable to school regulations directed at student viewpoints, but that *Tinker* does not account for regulations that are completely viewpoint neutral. The district court then reasoned that because the PISD regulations are "viewpoint neutral," *O'Brien*, not *Tinker,* was the correct standard.

That reasoning, however, does not comport with established precedent. The words "viewpoint" and "neutral" are not even found in the *O'Brien* opinion. 391 U.S. 367. In fact, *O'Brien* plainly differentiates between symbolic speech and pure speech, a point that is highlighted when compared with *Tinker*. *Compare O'Brien*, 391 U.S. at 376 ("when 'speech' and 'nonspeech' elements are combined in the same course of conduct . . ."), *with Tinker,* 393 U.S. at 508 ("Our problem involves direct, primary First Amendment rights akin to 'pure speech.'"). *O'Brien* has no place in evaluating restrictions expressly aimed at pure speech.

B. *Canady* is readily distinguishable from the situation at the Plano schools.

The school uniform cases, particularly *Canady*, are expressive conduct cases and readily distinguishable. In *Canady*, the issue was whether *wearing* a school

uniform interfered with a student's right to *expression*. 140 F.3d at 439-440. As an expressive conduct case, *Canady*'s facts decidedly contrast with those here.

As the *Canady* opinion noted, speech only tangentially attaches to clothing. *Canady*, 240 F.3d at 441 (stating that clothing is a symbol of an opinion or cause only "if the message is likely to be understood by those intended to view it."). The PISD rules, by contrast, are directed towards speech itself. Thus the distinction between *O'Brien* and *Tinker*: Government is granted broader discretion to regulate conduct, but restrictions aimed directly at speech are rightly to be regarded with greater suspicion and subjected to increased scrutiny. In regulating pure speech, the government is to be afforded less latitude.

Importantly, *Canady* itself noted the strong conviction regarding students' rights to speech and correctly distinguished speech from conduct. The School Board's purpose for enacting the uniform policy was "in no way related to the suppression of student speech . . . Students may still express their views through other mediums during the school day. The uniform requirement does not bar the *important* 'personal intercommunication among students' *necessary* to an *effective* educational process." 240 F.3d at 443. (emphasis supplied). The Court's application of *O'Brien* relied specifically upon regulation of conduct — not whether the uniform rules were viewpoint neutral.

The *Canady* opinion stressed that speech itself is *necessary* for an effective education process, suggesting interpersonal communication should not be further hindered by schools, but rather fostered. 240 F.3d at 443. PISD's arguments turn *Canady* on its head by suggesting that its opinion embraces the very restrictions on core speech that *Canady* instead warns against. *Canady*, deriving from *O'Brien*'s analysis of expressive conduct, likewise has no place in the evaluation of pure speech.

C. The *O'Brien* test should not apply because it invites suppression of core First Amendment rights.

O'Brien's less protective analysis, which would allow for significantly more leeway in developing restrictions on student speech, simply provides cover for inappropriate restrictions. This case is a perfect example of facially viewpoint-neutral policies enforced to create an oppressive regime chilling student speech that the school would prefer not to deal with, directly contrary to the aims of the First Amendment. As this Court said over 35 years ago, "'[S]chool officials cannot ignore expressions of feelings with which they do not wish to contend. They cannot infringe on their students right to free and unrestricted expression as is guaranteed to them under the First Amendment to the Constitution.'" *Shanley v. Northeast I.S.D.*, 462 F.2d 960, 969 (5th Cir. 1972) (*quoting Burnside v. Byars*, 363 F.2d 744 (5th Cir. 1966)).

II. THE *TINKER* TEST IS THE CORRECT STANDARD TO APPLY.

A. *Tinker* and its progeny.

For nearly forty years, *Tinker* has protected the First Amendment rights of school children. Beginning with the proposition that children do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," the Supreme Court in *Tinker* cited this Court's precedent to fashion a system of protection that comported with the practicalities of the school environment. *Tinker*, 393 U.S. at 505 (citing *Burnside v. Byars*, 363 F.2d 744 (5th Cir. 1966). Though this oft-quoted passage enjoys a venerated status in American jurisprudence, it was not so clear at the time. Indeed, the federal circuits were split. In fact, the lower court in *Tinker* referred to, but declined to follow, this Circuit's lead in *Burnside v. Byars*, 363 F.2d 744 (5th Cir. 1966). In *Burnside*, this Circuit ordered that high school authorities be enjoined from enforcing a regulation forbidding students to wear "freedom buttons." 363 F.2d at 749. The *Tinker* opinion confirmed the soundness of *Burnside*, and indeed adopted its very standard of "material and substantial interference." 393 U.S. 504. The Supreme Court determined that the problem at issue in *Tinker*, like the issue here, was a "primary First Amendment right[] akin to 'pure speech.'" *Tinker*, 393 U.S. at 508.

Pure speech is entitled to "comprehensive protection under the First Amendment." *Tinker*, 393 U.S. at 505-506. A student may express his opinions if

he does so without "materially and substantially interfer[ing] with the requirements of appropriate discipline in the operation of the school and without colliding with the rights of others." *Tinker*, 393 U.S. at 512. (internal quotes omitted). In nearly forty years of jurisprudence, only three adjustments to the general framework of *Tinker* have emerged, and in each instance the Supreme Court has affirmed the soundness of *Tinker*.

In *Bethel School District No. 403 v. Fraser*, 478 U.S. 675, 685 (1986),[1] the Supreme Court held that school policies may constitutionally prohibit speech if it is "vulgar," "lewd," "indecent," or "plainly offensive." Recognizing that in other arenas outside of schools, First Amendment jurisprudence recognizes "an interest in protecting minors from exposure to vulgar and offensive spoken language," the Court held that it is a "highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse." *Fraser*, 478 U.S. at 684-685.

In *Hazelwood School District v. Kuhlmeier*,[2] the Supreme Court upheld a school's right to control the content of the official school newspaper. 484 U.S. 260, 276 (1988). The Court affirmed *Tinker's* holding, but distinguished the

---

1 The speech at issue in *Fraser* was a nominating speech by a high school student. 478 U.S. at 677. During the speech, the student referred to his candidate "in terms of an elaborate, graphic, and explicit sexual metaphor." *Id.* at 677-678.

2 The speech at issue in *Kuhlmeier* consisted of two school newspaper articles, dealing with pregnancy and divorce. 484 U.S. at 565-566. The school principal withheld publication of the articles, citing privacy concerns for the students featured in the articles. *Id.*

immediate situation by stating that "the standard articulated in *Tinker* for determining when a school may punish student expression need not also be the standard for determining when a school may refuse to lend its name and resources to the dissemination of student expression." *Kuhlmeier*, 484 U.S. 260 at 571.

Finally, in *Morse v. Frederick*,[3] the Supreme Court again reaffirmed its holding in *Tinker*. 127 S. Ct. 2618. The Court pointed out that "*Tinker* warned that schools may not prohibit student speech because of undifferentiated fear or apprehension of disturbance or a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Id.* at 2629 (internal citations omitted). The Court held that the danger associated with the speech in question—which advocated illegal drug use—was "much more serious and palpable." *Id.* Importantly, the Court declined to adopt the "broader rule" that the speech at issue was proscribable because it is "plainly offensive" under *Fraser*. *Id.* The Court limited its holding in *Fraser*, stating that it should not be read to encompass any speech that could fit under some definition of "offensive" since "much political and religious speech might be perceived as offensive to some." *Id.* The Court held narrowly that the speech at issue did not warrant First Amendment

---

[3] The speech at issue in *Morse* was a 14-foot banner unfurled at a school event which bore the phrase "BONG HiTS 4 JESUS." 127 S. Ct. at 2622.

protection in school because it was reasonably viewed as promoting illegal drug use.[4] *Id.*

The broad prohibition on written student speech here does not fall within one of these narrow exceptions to the *Tinker* standard.

B. Religious speech is among the core speech that the First Amendment protects.

Religious speech is among the "core" speech that the First Amendment protects. The Supreme Court articulated religious speech's place within First Amendment jurisprudence:

> Our precedent establishes that private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression. Indeed, in Anglo-American history, at least, government suppression of speech has so commonly been directed *precisely* at religious speech that a free-speech clause without religion would be Hamlet without the prince. Accordingly, we have not excluded from free-speech protections religious proselytizing, or even acts of worship.

Capitol Square Review and Advisory Board v. Pinette, 515 U.S. 753 (1995). Accordingly, the Supreme Court has vigorously protected the rights of private actors to engage in religious discourse. In *Pinette*, the Court affirmed a district

---

[4] Importantly, Justice Alito's concurring opinion in Morse, which this Court has recognized as controlling, *Ponce v. Socorro Independent School District*, 508 F.3d 765, 768 (5th Cir. 2007), clarified that he and Justice Kennedy joined the opinion of the Court "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." 127 S. Ct. 2636.

court's issuance of an injunction requiring the Capitol Square Review and Advisory Board to approve an application to place an unattended cross on the statehouse plaza in Columbus, Ohio. *Pinette*, 515 U.S. at 769. In doing so, the Court held that the display was private religious speech that is as fully protected under the Free Speech Clause as secular private expression. *Pinette*, 515 U.S. at 760.

Likewise, in *Watchtower Bible and Tract Society of New York v. Village of Stratton*, 536 U.S. 150 (2002), the Supreme Court invalidated an ordinance which required individuals to obtain a permit prior to engaging in door-to-door advocacy and to display the permit upon demand.[5] The district court held that, because the regulation was content-neutral and of general applicability, it did not violate the First Amendment. *Id.* at 159. The Supreme Court disagreed, stating:

> The mere fact that the ordinance covers so much speech raises constitutional concerns. It is offensive not only to the values protected by the First Amendment, but to the very notion of a free society—that in the context of everyday public discourse a citizen must first inform the government of her desire to speak to her neighbors and then obtain a permit to do so.

Id. at 165. Furthermore, the Court pointed out that a significant amount of "spontaneous speech" was effectively banned by the ordinance, giving the example of a person who made a spontaneous decision to go across the street and urge a

---

[5] Watchtower is the group which coordinates the preaching activities of Jehovah's Witnesses throughout the United States. *Watchtower*, 536 U.S. at 153.

neighbor to vote against the mayor, but could not do so until he obtained the mayor's permission. *Watchtower*, 536 U.S. at 167. The dangers to speech noted in *Watchtower* are the precise concerns before this Court.

The Supreme Court's precedent demonstrates the highly protected status of core speech, which is inadequately safeguarded under the looser expressive conduct standards.

C. *Tinker* is vital to protect students' free speech rights.

The abandonment of the *Tinker* standard in favor of the much less-protective *O'Brien* test would signal a drastic change in First Amendment jurisprudence and would undoubtedly result in chilling the exchange of ideas that enriches the educational environment. While it is well-established that the First Amendment rights of school children are not coextensive with those of adults,[6] the erosion of the First Amendment protections now offered by *Tinker* would deprive school children of an invaluable facet of their educational experience by, among other things, removing spontaneous dialogue from public schools in favor of school-sanctioned exchanges of ideas. *Cf. Watchtower*, 536 U.S. 150, 167 (2002).

Requiring that students have their messages filtered through local regulatory schemes, undoubtedly colored by the innate biases of individual officials, grants all too much discretion in the schoolhouse gatekeepers—local school officials—and

---

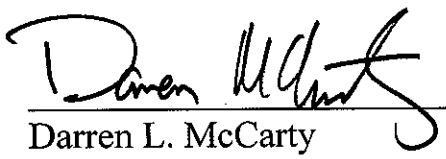
[6] *See, e.g., Fraser*, 478 U.S. at 682 (holding that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings.").

leaves students without sufficient protections. Repeatedly suffering and witnessing rebuffs of local schools would inculcate students with the notion that "free" discourse occurs at the time and place of the government's choosing—directly counter to First Amendment ideals.

CONCLUSION

Amicus urges this Court to vacate the judgment below and remand for consideration of the 2004 and 2005 Policies under the *Tinker* standard.

Respectfully submitted,



Darren L. McCarty
State Bar No. 24007631
ALSTON & BIRD LLP
2200 Ross Avenue, Suite 3601
Dallas, Texas 75201
Telephone: 214.922.3400
Telecopy: 214.922.3899

Gregory S. Baylor
State Bar No. 01941500
CHRISTIAN LEGAL SOCIETY
8001 Braddock Road, Suite 300
Springfield, Virginia 22151
Telephone: 703.642.1070
Telecopy: 703.642.1075

COUNSEL FOR *AMICUS CURIAE*
CHRISTIAN LEGAL SOCIETY

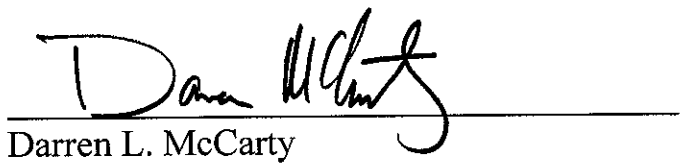
CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing document has been served on all counsel of record via e-mail and First Class Mail on November 3, 2008.

Darren L. McCarty

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 32(a)(7) and 29(d) and Fifth Circuit Rule 32.3, I hereby certify that this brief complies with the applicable type-volume word count option limitations, and that the word count verified by Microsoft Word is 3,377, excluding parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).



Darren L. McCarty

LEGAL02/31016703v1