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# The Court's Missed Opportunity in *Harper v. Poway*

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# THE COURT'S MISSED OPPORTUNITY IN *HARPER V. POWAY*

## I. INTRODUCTION

On June 25, 2007, the Supreme Court decided *Morse v. Frederick*,[1] bringing the case better known as "Bong Hits 4 Jesus" into widespread public attention. "Bong Hits" featured a familiar narrative—a rebellious student alleges persecution by his high school principal after a minor incident—which, when added to a relatively frivolous fact pattern and a headline-grabbing nickname, placed the case in the spotlight.

Beneath the public hype,[2] however, lies a jurisprudential disappointment. In accepting *Bong Hits*, and refusing to accept a case where compelling school interests were in conflict with high-value student speech, the Court missed an opportunity to clarify important, unresolved dimensions of schoolhouse speech law. Instead of granting certiorari in *Bong Hits*, the Court should have decided a more important schoolhouse speech case last term: *Harper v. Poway Unified School District*.[3]

What *Harper* lacked in a sexy nickname, it more than made up for in a compelling presentation of legal issues that school officials across the country need to have resolved. How much discretion do school officials have to restrict speech when they

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1. Morse v. Frederick, 127 S. Ct. 2618 (2007).

2. Coverage in the Washington Post called *Bong Hits* "[t]he most important student free-speech conflict to reach the Supreme Court since the height of the Vietnam War." Robert Barnes, *Justices to Hear Landmark Free-Speech Case*, WASH. POST, Mar. 13, 2007, at A3.

3. 127 S. Ct. 1484 (2007). Specifically, on March 5, 2007, the Court granted certiorari in *Harper*, vacated the Ninth Circuit's judgment, and remanded with instructions to dismiss the appeal as moot. Justice Breyer dissented without opinion. The mootness problem in *Harper* arose because Petitioner Harper had graduated from Poway High School. Suggestion of Mootness at 1, Harper v. Poway Unified Sch. Dist., 127 S. Ct. 1484 (2007) (No. 06-595). The Court could have avoided this mootness problem, however, by granting Harper's younger sister's motion to intervene, as she is currently a student at Poway High. *Harper*, 127 S. Ct at 1484 (denying motion to intervene); *see also* Harper v. Poway Unified Sch. Dist. 445 F.3d 1166, 1173 n.9 (9th Cir. 2006).

fear substantial disruption to the school environment, especially post-Columbine? Is it ever possible for a student's words and writings alone to "invade the rights of others?" What should school officials do when presented with high-value speech that conflicts with their interest in school safety?

In Part II we discuss *Bong Hits*, briefly outlining the factual background and summarizing the Supreme Court's decision. In Part III we argue that the Court's decision to accept *Bong Hits* was flawed because (1) the case presented a simplistic question pitting low-value speech against a high government interest and (2) the Court failed to provide any meaningful guidance on how to resolve closer cases. In Part IV we explain why *Harper* would have been a better case for the Court to decide, and offer a suggested resolution to a similar case if and when it comes before the Court in the future.

## II. HOW A CASE CALLED "BONG HITS" MADE IT TO THE SUPREME COURT

### *A. The Simple Facts of* Bong Hits

On January 24, 2002, en route to the winter games and followed by television crews, the Olympic Torch Relay made its way through Juneau, Alaska.[4] To Joseph Frederick, a senior attending Juneau-Douglas High School ("JDHS"), the television crews were particularly appealing.[5] JDHS released its students to witness and participate in the event, though they were supervised by JDHS officials and teachers.[6]

As the relay and camera crews passed in front of JDHS, Frederick joined[7] a crowd of both students and non-students[8] observing the event and, along with several friends, unfurled a 14-foot banner reading "BONG HITS 4 JESUS."[9] Frederick has since stated that he displayed the banner "to be meaningless and funny, in order to get on television,"[10] and that the

4. *Morse*, 127 S. Ct. at 2622.

5. Joint Appendix at 27–28, 66, *Morse*, 127 S. Ct. 2618 (No. 06-278).

6. *Id.*; Brief for the Petitioner at 3, *Morse*, 127 S. Ct. 2618 (No. 06-278).

7. Frederick arrived at the event directly from home. Brief for the Petitioner, *supra* note 6, at 5; Brief for the Respondent at 2, *Morse*, 127 S. Ct. 2618 (No. 06-278).

8. *Morse*, 127 S. Ct. at 2622; Brief for the Respondent, *supra* note 7, at 2.

9. *Morse*, 127 S. Ct. at 2622.

10. Linda Greenhouse, *Free-Speech Case Divides Bush and Religious Right*, N.Y.

message "really did not have a meaning . . . it was a parody and could be subjectively interpreted to mean whatever anyone want[ed] it to mean."[11]

Regardless of the banner's intended meaning, if any, JDHS Principal Deborah Morse did not take kindly to its display.[12] Upon seeing the banner, Morse approached Frederick and demanded that it be taken down.[13] Frederick initially resisted, asking about his First Amendment rights and questioning whether he was on school grounds.[14] Morse then took the banner down and instructed Frederick to report to her office, where she suspended him for ten days.[15] Morse justified the sanction on her belief that the banner was in violation of a Juneau School Board policy prohibiting expression that advocates the use of illegal substances.[16]

Frederick administratively appealed his suspension to the School Superintendent.[17] Though limiting the term to time served (eight days), the Superintendent upheld the suspension.[18] Frederick next appealed to the Board of Education, which also upheld the suspension.[19] Having exhausted his administrative remedies, Frederick brought suit against Morse and the Juneau School Board under 42 U.S.C. § 1983, alleging a violation of his First Amendment rights and seeking declaratory and injunctive relief, compensatory damages, punitive damages, and attorney's fees.[20]

The United States District Court for the District of Alaska granted summary judgment in favor of Morse and the Juneau School Board ("School Board"), holding that they were entitled

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TIMES, Mar. 17, 2007, at A22.

11. Joe Frederick, *Joe's Story*, STRIKE THE ROOT, Nov. 17, 2003, http://www.strike-the-root.com/3/frederick/frederick1.html.

12. *Morse*, 127 S. Ct. at 2622.

13. *Id.*

14. Joint Appendix, *supra* note 5, at 24–25; Brief for the Petitioner, *supra* note 6, at 5.

15. *Morse*, 127 S. Ct. at 2622. The suspension was subsequently reduced to eight days on administrative appeal. *Id.* at 2623.

16. *Id.* at 2623 (stating that School Board Policy No. 5520 prohibits "any assembly or public expression that . . . advocates the use of substances that are illegal to minors . . ."); Brief for the Petitioner, *supra* note 6, at 6; Brief for the Respondent, *supra* note 7, at 3–4.

17. *Morse*, 127 S. Ct. at 2623.

18. *Id.*

19. Brief for the Respondent, *supra* note 7, at 4.

20. *Morse*, 127 S. Ct. at 2623.

to qualified immunity and that they had not violated Frederick's First Amendment rights.[21] In finding no First Amendment violation, the district court relied on the Supreme Court's decision in *Bethel School District No. 403 v. Fraser*,[22] which, in the district court's view, "stated that it is the province of the [School] Board to determine what manner of speech . . . is inappropriate."[23]

The Ninth Circuit Court of Appeals reversed, holding that Frederick's speech should instead be analyzed under the Supreme Court's decision in *Tinker v. Des Moines Independent Community School District*.[24] The Ninth Circuit disagreed with the district court's application of *Fraser*, noting that "[o]ur case differs from *Fraser* in that Frederick's speech was not sexual [], and did not disrupt a school assembly."[25] Because Morse and the School Board had not shown that the banner risked substantial disruption to the educational environment, which would have justified the suspension under *Tinker*, the court held that Frederick's free speech rights had been violated.[26] The Ninth Circuit further held that Morse and the School

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21. *Id.*

22. 478 U.S. 675 (1986). In *Fraser*, a high school student delivered a speech laced with sexual innuendo to a captive audience of 600 fellow students. The speech distracted several students in the audience and resulted in some yelling and graphic gestures. The school district reacted by disciplining the student for his use of "indecent" and "obscene" language. *Id.* at 677–79. In the resulting lawsuit, the student argued successfully in the Ninth Circuit that the district's language standards were overly vague and that his speech did not create a substantial disruption to the educational environment. *Id.* at 679–80. The Supreme Court reversed, noting that "it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse." *Id.* at 683. The Court reasoned that sexual innuendo before a captive audience of adolescents was something a school reasonably could restrict. *Id.* at 685.

23. Frederick v. Morse, No. J02-008 CV(JWS), 2003 WL 25274689, at *5 (D. Alaska May 29, 2003) (internal quotation marks omitted).

24. Frederick v. Morse, 439 F.3d 1114, 1118 (9th Cir. 2006). *See generally* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S 503 (1969). In *Tinker*, a small group of high school students decided to protest the Vietnam War by wearing black armbands to school. When the school district heard of the plan, it adopted a policy prohibiting the wearing of all armbands. The students wore the armbands, were suspended from school, and filed suit claiming violation of their First Amendment free speech rights. *Id.* at 504. The Supreme Court ruled for the students. They retained their First Amendment speech rights within the schoolhouse walls, because there was "no evidence whatever of petitioners' 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.* at 508.

25. *Frederick*, 439 F.3d at 1119.

26. *Id.* at 1123.

Board were not entitled to qualified immunity.[27]

### *B. The Supreme Court's Analysis*

Reversing the Ninth Circuit, the Supreme Court held that "schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use."[28] The Court's holding did not result from an application of any of its prior school speech cases. At the outset, the Court determined that *Hazelwood School District v. Kuhlmeier*[29] was not controlling because "no one would reasonably believe that Frederick's banner bore the school's imprimatur."[30] The opinion, written by Chief Justice Roberts, next discussed *Fraser* [31] and acknowledged that "[t]he mode of analysis employed in *Fraser* is not entirely clear," leaving it open to multiple interpretations.[32] *Fraser* could be read to focus on the sexual content of the speech, or it could be read to stand for the broader principle that "school boards have the authority to determine what manner of speech in the classroom or in school assembly is inappropriate."[33] However, the Court determined that it "need not resolve this debate to decide this case."[34]

Instead of applying *Tinker*, its only remaining school speech case, the Court resolved *Bong Hits* by identifying a *new* category of speech that may be prohibited by the schools without any showing of a risk of substantial disruption: speech

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27. *Id.* at 1125.

28. Morse v. Frederick, 127 S. Ct. 2618, 2622 (2007).

29. 484 U.S. 260 (1988). In *Hazelwood*, high school students writing for the school newspaper had several prospective articles censored by the principal. The school newspaper was published and taught for credit as the "Journalism II" class. The students claimed that their First Amendment rights to free speech in school were being violated. The principal believed that the articles, which were written about family divorce and student pregnancy issues, were inappropriate because they risked identifying members of the student body and thus showed a failure to master journalism principles taught in "Journalism II." *Id.* at 262–65. The Supreme Court held that the principal could reasonably restrict the speech because it was curricular, stating that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns." *Id.* at 273.

30. *Morse*, 127 S. Ct. at 2627.

31. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986).

32. *Morse*, 127 S. Ct. at 2626.

33. *Id.* (internal quotation marks omitted).

34. *Id.*

encouraging illegal drug use.[35] In coming to this conclusion, the Court focused on the strong government interest in deterring drug use by schoolchildren.[36] This interest, considered in light of the "special characteristics of the school environment,"[37] "allow[s] schools to restrict student expression that they reasonably regard as promoting illegal drug use."[38]

In a concurring opinion, Justice Alito (joined by Justice Kennedy) effectively limited the scope of the Court's holding, making it clear that he joined the five justice majority opinion on the understanding that it would not support the restriction of speech which "[could] plausibly be interpreted as commenting on any political or social issue, including speech on issues such as the wisdom of the war on drugs or of legalizing marijuana for medicinal use."[39] Justice Alito sought to harmonize the Court's opinion with school speech precedent by explaining his view that "illegal drug use presents a grave and in many ways unique threat to the physical safety of students," thus aligning the Court's ruling with *Tinker*'s emphasis on avoiding violence and material disruption to the schools.[40] Justice Alito also made it clear that he did not endorse any reading of *Fraser* that gave school boards authority to censor student speech contrary to their self-defined educational missions.[41] In particular, he expressed concern that "the 'educational mission' argument would give public school authorities a license to suppress speech on political and social issues based on disagreement with the viewpoint expressed."[42]

Justice Thomas concurred separately, providing a detailed review of pre-*Tinker* public education cases in support of his conclusion that "the First Amendment, as originally understood, does not protect student speech in public schools."[43]

Justice Breyer concurred in the judgment and dissented in

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35. *Id.* at 2622.

36. *Id.* at 2628.

37. *Id.* at 2629 (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969)).

38. *Id.*

39. *Id.* at 2636 (Alito, J., concurring) (internal quotation marks omitted).

40. *Id.* at 2638.

41. *Id.* at 2637.

42. *Id.*

43. *Id.* at 2630 (Thomas, J., concurring).

the reasoning, expressing his view that the damage elements of the case should have been disposed of based on Morse and the School Board's qualified immunity, and that injunctive relief should have been denied because Frederick's suspension was justified for reasons other than the banner display.[44]

Justices Stevens, Souter, and Ginsburg dissented on the grounds that Frederick's banner "neither violate[d] a permissible rule nor expressly advocate[d] conduct that is illegal and harmful to students."[45]

## III. A CRITICAL READING OF *BONG HITS*

There are two major problems with the Court's decision to grant certiorari in *Bong Hits*. First, as discussed in Part III.A, the very fact that there are substantial arguments about whether this case was a schoolhouse speech case at all warrants serious doubt as to the Court's propriety in granting certiorari. Second, as discussed in Part III.B, *Bong Hits* presented an easy case in which a high government interest was weighed against low-value student speech. This dichotomy is too similar to *Fraser*, and accordingly *Bong Hits* could not be expected to help answer the more difficult question of how a case involving *both* high governmental interests and high-value speech should be resolved. Despite these concerns, the questionable wisdom of granting certiorari in *Bong Hits* might have been ameliorated had the Court provided helpful doctrinal guidance on how to resolve future, more difficult school speech cases. As discussed in Part III.C, the Court not only failed to provide meaningful guidance, it actually made this area of the law *less* clear.

### *A.* Bong Hits *Shares None of the Special Characteristics that Warrant Reduced Student Speech Rights*

The first major problem with *Bong Hits* is that it's arguably not about school speech. The Court majority asserted that the Olympic torch relay was "school-sanctioned and school-supervised,"[46] while Frederick pointed out that his banner was not within school classrooms, hallways, or even official

44. *Id.* at 2638 (Breyer, J., concurring in part, dissenting in part).

45. *Id.* at 2644 (Stevens, J., dissenting).

46. *Id.* at 2622.

grounds, but was instead on a public thoroughfare, during a public event.[47] Given the ambiguity, should the school speech precedents even apply?

Our aim is not to rehash the factual dispute, but to look at the philosophical justification for why courts distinguish schoolhouse speech cases from other realms of speech. The courts have consistently justified students' reduced speech rights by looking to three "special characteristics of the school environment."[48] Because *Bong Hits* satisfies none of these special characteristics, it is ultimately ill-suited to the line of schoolhouse speech cases it has joined.

The first of these special characteristics is that schools have a substantial interest in protecting the physical safety of their students, well above the interest of the government in protecting the general public.[49] In *Tinker*, for example, the Court held that administrators had the authority to protect the educational environment from speech leading to substantial disruption or interference with the "rights of other students to be secure and let alone."[50] Since *Tinker*, courts have uniformly held that speech threatening physical disruption can be suppressed.[51]

The second special characteristic is the immaturity of the audience: schools can protect captive adolescents from offensive speech, including sexual innuendo. This principle is exemplified in *Fraser*, where school officials sanctioned a student for a speech laced with sexual innuendo during a mandatory school assembly.[52] The Court emphasized that captive audiences of immature high school students do not have to be forced to listen to "sexually explicit, indecent, or

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47. *See* Brief for the Respondent, *supra* note 7, at 4, 8.

48. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969). These special characteristics have also warranted different Fourth Amendment rights for students in schools. *See* Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 656 (1995); New Jersey v. T.L.O., 469 U.S. 325, 336 (1985).

49. *See* Blackwell v. Issaquena County Bd. of Educ., 363 F.2d 749, 754 (5th Cir. 1966) ("The proper operation of public school systems is one of the highest and most fundamental responsibilities of the state. The School authorities in the instant case had a legitimate and substantial interest in the orderly conduct of the school and a duty to protect such substantial interests in the school's operation.").

50. *Tinker*, 393 U.S. at 508.

51. *See, e.g.*, LaVine v. Blaine Sch. Dist., 257 F.3d 981 (9th Cir. 2001); Denno v. Sch. Bd. of Volusia County, 218 F.3d 1267 (11th Cir. 2000); West v. Derby Unified Sch. Dist. No. 260, 206 F.3d 1358 (10th Cir. 2000).

52. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 678 (1986).

lewd speech" in the name of the First Amendment.[53]

The third special characteristic of schools is their need to control their curriculum. In *Hazelwood*, the Court held that schools do not have to sponsor certain student speech in the curricular setting.[54] This ensures that schools can avoid association with any potentially-controversial student position.[55]

*Bong Hits* exhibits none of these special characteristics. Morse admitted that Frederick's banner in no way threatened disruption or the rights of others to be secure in the educational environment,[56] so *Tinker* was inapplicable.[57] The Ninth Circuit held that there was no sexual or otherwise plainly offensive speech involved, so *Fraser* was inapplicable.[58] *Hazelwood* was similarly unavailable, since "Frederick's pro-drug banner was not sponsored or endorsed by the school, nor was it part of the curriculum, nor did it take place as part of an official school activity."[59]

In *Bong Hits*, the Court several times recited the law's "special characteristics" mantra,[60] yet still chose to apply—*and modify*—schoolhouse speech law around a situation that did not trigger any of the doctrine's fundamental assumptions. The Court lacked all of the philosophical justifications that have historically been used to rationalize reduced speech rights in school. Because there was no identified educational need for the suppression of a student's First Amendment rights, the Court should have used some other philosophical justification for analyzing *Bong Hits* in the *Tinker-Fraser-Hazelwood* line.

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53. *Id.* at 684; *see also* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 274–75 (1988).

54. *Hazelwood*, 484 U.S. at 272.

55. *Id.*

56. Brief of Appellant at 5, Frederick v. Morse, 439 F.3d 1114 (9th Cir. 2006) (No. 03-35701).

57. Frederick v. Morse, 439 F.3d 1114, 1123 (9th Cir. 2006). In his concurrence, Justice Alito attempted to argue that speech that promotes illegal drug use is similar enough to physical disruption that it can be regulated under *Tinker*. *See supra* Part II.B. Although Justice Alito's attempt to bring *Bong Hits* in line with precedent is welcome, his argument equating drug speech with physical disruption is a stretch.

58. *Frederick*, 439 F.3d at 1119.

59. *Id.*

60. Morse v. Frederick, 127 S. Ct. 2618, 2625, 2629 (2007).

### *B.* Bong Hits *Presented an Easy Case, Balancing Significant Government Interests Against Low-Value Student Speech*

The second major problem with the Court's decision to grant cert in *Bong Hits* is that the case, like *Fraser*, presented yet another fact pattern in which a significant government interest was weighed against low-value student speech. To put it simply, *Bong Hits* was too easy a case for the Court to decide, since the governmental interest almost always wins in this fact pattern.[61] It would be much more helpful to educators and attorneys for the Court to accept a case of high-value speech that runs in conflict with other fundamental characteristics of the school setting (e.g., high-value political speech that risks substantial disruption of the educational environment or invasion of the rights of other students).

In *Bong Hits*, all parties agreed that the speech in question was of little value. Principal Morse argued that it "advertise[d] or promote[d] use of illegal drugs."[62] Frederick responded only that it was "meaningless and funny."[63] The dissent danced around the meaning of the phrase "Bong Hits 4 Jesus" and described it as "curious," "ambiguous," "nonsense," "ridiculous," "obscure," "silly," "quixotic," and "stupid";[64] it never labeled the message important, relevant, or worth any serious consideration. There was nothing of social or political value in Frederick's message.

The respect courts assign to the speaker also bleeds into the value of the speech itself. Frederick was not exactly a model student at JDHS. Earlier that same year, he was disciplined for refusing to stand during the Pledge of Allegiance.[65] While such challenges to authority might be respected when coming from a speaker defending sincerely held beliefs, Frederick does not appear to be such a speaker.[66] The dissenting justices in *Bong Hits* could not come up with a better motive for

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61. *See supra* note 51.

62. *Morse*, 127 S. Ct. at 2625.

63. *Id.*

64. *Id.*

65. Joint Appendix, *supra* note 5, at 64.

66. In fact, Frederick has claimed that he refused to stand for the pledge in response to an unfriendly exchange with a school Vice Principal the previous day. Frederick, *supra* note 11. Frederick later described his saga as "a story of a high school senior who refused to bow down in submission before an authority." Barnes, *supra* note 2.

Frederick's actions during the torch relay than that "he just wanted to get on television."[67] Even when attempting to invoke the First Amendment in his defense, Frederick's self-avowed motive is trivial: "We thought we had a free speech right to display a humorous saying, and that's all we were doing."[68] Frederick's appearance as a student who repeatedly challenged school officials to, at best, make trivial First Amendment points he did not particularly care about could not have helped the Court's perception that his speech was of little value, and likely made it more probable that the Court would find for Morse.

The governmental interest at issue in *Bong Hits* was significant. Decisions have long recognized that there is an "important—indeed, perhaps compelling" governmental interest in deterring drug use by school children.[69] The majority cited a number of studies, all demonstrating that "the [drug] problem remains serious today."[70] Finally, the Court observed that Congress and "[t]housands of school boards across the country" have implemented policies and programs aimed at discouraging drug use by schoolchildren.[71]

*Bong Hits*' low-value speech/high government interest dichotomy is quite similar to *Fraser*, where the "recognized [] interest in protecting minors from exposure to vulgar and offensive spoken language"[72] easily outweighed Fraser's right to express an "elaborate, graphic, and explicit sexual metaphor" to a captive audience of high school students.[73] The Court repeatedly emphasized that Fraser's speech was low-value through frequent sobering comments about the schools' role in teaching "fundamental values of habits and manners of civility."[74] The Court also cast the speaker in a negative light by describing how teachers had warned him not to deliver the speech, and generally disparaged his decision to deliver a speech with sexual innuendo to adolescents.[75]

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67. *Morse*, 127 S. Ct. at 2649.

68. Joint Appendix, *supra* note 5, at 28.

69. *Morse*, 127 S. Ct. at 2628 (quoting Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 661 (1995)).

70. *Id.*

71. *Id.*

72. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 684 (1986).

73. *Id.* at 678.

74. *Id.* at 681.

75. *Id.* at 678.

*Bong Hits* and *Fraser* are essentially the opposite of *Tinker*, where protecting high-value political speech outweighed an insignificant government interest. In *Tinker*, a small group of students decided to protest the Vietnam War by wearing black armbands to school.[76] The students were very serious and chose a respectful, non-confrontational approach.[77] This political speech was balanced against the school's illegitimate interest in "avoid[ing] the discomfort and unpleasantness that always accompany an unpopular viewpoint."[78] Unsurprisingly, the Court held that school officials had violated the students' First Amendment rights, and could not suspend students for "a silent passive expression of opinion, unaccompanied by any disorder or disturbance."[79]

The Court's categorical approach impedes establishment of a functional body of schoolhouse speech law. It is just too easy to hold that significant government interests allow schools to suppress low-value speech. The lack of a serious countervailing principle means that the Court can avoid the challenging issues that educators actually face, like what to do when a serious, controversial speaker risks sparking a physical disruption. As a conservative advocacy organization said in its amicus brief, "It would be regrettable if the Court were to resolve the important questions of constitutional law at issue here in the context of a jokester's prank, rather than a student's bearing of a serious message."[80]

What educators and lawyers need is for the Court to weigh in upon the following situation: a respect*ful*, respect*ed* student attempts to speak on important, political issues, yet is silenced by administrators fearing substantial disruption or interference with the rights of other students. Even if the Court were to uphold the student's punishment, as in *Bong Hits*, the legal value to school administrators and their lawyers would be dramatically different. It strains credulity to believe that Justice Thomas would have written the same *Bong Hits* concurrence—that students lack all free speech rights in

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76. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 504 (1969).

77. *Id.* at 508.

78. Morse v. Frederick, 127 S. Ct. 2618, 2626 (2007) (quoting *Tinker*, 393 U.S. at 509).

79. *Tinker*, 393 U.S. at 508.

80. Brief for American Center for Law and Justice as Amici Curiae Supporting Respondents at 4, *Morse*, 127 S. Ct. 2618 (No. 06-278).

schools[81]—if the speech in question was religious or politically conservative (e.g., "Affirmative Action is shameful").

### *C. The Court Failed to Use* Bong Hits *as an Opportunity to Clarify Schoolhouse Speech Jurisprudence*

Like Justice Breyer, we "cannot find much guidance in [the Court's] decision."[82] Having decided to take this questionable case, the Court could have at least provided meaningful guidance as to how future, closer cases of student speech suppression in the public schools should be resolved.

To be sure, *Bong Hits* did answer some questions in what the Second Circuit recently called "the unsettled waters of free speech rights in public schools."[83] All members of the Court agreed that, even if Frederick's speech was protected, Morse would have been entitled to qualified immunity.[84] The Court also resolved at least one lingering question about *Fraser*: the decision "should not be read to encompass any speech that could fit under some definition of 'offensive.'"[85]

But this minor clarification pales in comparison to the critical question the Court decided it "need not resolve": whether *Fraser* is limited to speech that is sexual in nature, or whether it stands for the broader principle that "school boards have the authority to determine what manner of speech in the classroom or in school assembly is inappropriate."[86] Not only has this debate divided the circuits,[87] it was the very question that divided the district court and the Ninth Circuit in *Bong Hits*.[88] While Justice Alito's rejection of this broader reading of

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81. *Morse*, 127 S. Ct. at 2634 (Thomas, J., concurring) (stating that "the Constitution does not afford students a right to free speech in public schools").

82. *Id.* at 2640 (Breyer, J., concurring in the judgment in part and dissenting in part). Breyer suggested that the Court rule on qualified immunity grounds and thus avoid the underlying schoolhouse speech question. *Id.* at 2638.

83. Guiles *ex rel.* Guiles v. Marineau, 461 F.3d 320, 321 (2d Cir. 2006).

84. *Morse*, 127 S. Ct. at 2629.

85. *Id.* at 2629.

86. *Id.* at 2626 (quoting Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986)).

87. *Compare* Frederick v. Morse, 439 F.3d 1114, 1119 (9th Cir. 2006) ("*Fraser* focuses upon the sexual nature of the offensiveness in the in-school speech that can be punished . . . ."), *with* Boroff v. Van Wert City Bd. of Educ., 220 F.3d 465, 470 (6th Cir. 2000) ("The Supreme Court has held that the school board has the authority to determine 'what manner of speech in the classroom or in school is inappropriate.'" (quoting Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986))).

88. *See supra* Part II.A.

*Fraser*[89] is helpful, and may well guide its interpretation in the future, the Court's failure to produce a majority opinion on this important point is lamentable.

Compounding the problem of not resolving this key debate over *Fraser*'s proper interpretation, the Court also chose not to apply its only other potentially relevant school speech precedent, *Tinker*.[90] Instead, to quote Justice Stevens, the Court "invent[ed] out of whole cloth a special First Amendment rule permitting the censorship of any student speech that mentions drugs, at least so long as someone could perceive that speech to contain a latent pro-drug message."[91] Carving out a third exception to *Tinker* (after *Fraser* and *Hazelwood*) for illegal drug promotion provides little future guidance to school administrators and their attorneys. As Justice Thomas aptly put it, "[The Court's] jurisprudence now says that students have a right to speak in schools except when they don't."[92]

Creating this third exception also leaves important questions about how to apply *Tinker*'s test unanswered. For example, when is a forecasted disruption substantial enough to warrant suppressing student speech? What did *Tinker* mean when it said that speech that interferes with "the rights of other students to be secure and to be let alone" may be suppressed?[93] Interestingly, the *Bong Hits* opinion appears to have actually *increased* the uncertainty surrounding this "rights of others" prong. Unlike in *Fraser* and *Hazelwood*, neither the majority nor any of the concurring opinions included the rights of others language in their descriptions of *Tinker*'s holding.[94] This omission is puzzling in light of the lower courts' clear recognition of the rights of others prong as an independent element under *Tinker*,[95] and calls into question future attempts to rely on it in the *Tinker* analysis.

We have serious doubts that *Bong Hits* was worth Supreme Court review. It failed to fall under any of the traditional

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89. *Morse*, 127 S. Ct. at 2636 (Alito, J., concurring).

90. *Id.* at 2626 (majority opinion).

91. *Id.* at 2650 (Stevens, J., dissenting).

92. *Id.* at 2634 (Thomas, J., concurring).

93. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508 (1969).

94. *Morse*, 127 S. Ct. at 2622–43.

95. *See, e.g.*, Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 217 (3d Cir. 2001) (Alito, J., writing for the court) ("The precise scope of *Tinker*'s 'interference with the rights of others' language is unclear.").

special circumstances that warrant reduced speech rights in school, presented an easy case in which significant governmental interests were weighed against low-value student speech, and is of marginal utility to educators. Tyler Chase Harper, however, did not have a frivolous message and was not labeled a drug dealer by the school. His respectful yet challenging speech would have presented the Court with a more difficult and meaningful case of balancing First Amendment rights with school safety.

## IV. THE COURT SHOULD HAVE DECIDED *HARPER V. POWAY* INSTEAD OF *BONG HITS*

As we will see, *Harper* touches upon very serious public issues of gay rights, religious expression, and student speech inside school walls. In Part IV.A, we review *Harper*'s facts. In Part IV.B, we discuss why *Harper*, unlike *Bong Hits*, would have required the Court to address and resolve some of the most difficult and important issues in school speech law. In Part IV.C, we suggest a way for the Court to resolve such a difficult high government interest, high-value speech case.

### *A. The Simple Facts of* Harper v. Poway

Poway High School ("Poway") had a history of conflict and disruption surrounding sexual orientation issues.[96] During the 2003 "Day of Silence," an annual student-led event raising awareness of discrimination against homosexuals, "volatile behavior," including an altercation that required Principal Scott Fisher to physically separate students, broke out among students.[97] A week later, an unexpected "Straight Pride Day," involving "inflammatory," anti-homosexual messages on hand-printed t-shirts, resulted in an altercation, personal conflicts, and several suspensions.[98] Principal Fisher, fearing future physical conflicts, met with student leaders and attempted to

96. Harper v. Poway Unified Sch. Dist. 445 F. 3d 1166, 1171 (9th Cir. 2006).

97. Excerpts of Record at 149, 152, Harper v. Poway Unified Sch. Dist., 445 F.3d 1166 (9th Cir. 2006) (No. 04-57037).

98. *Id.* at 152, 157. These larger incidents aside, disruption around sexual orientation issues was a daily occurrence at Poway. Several homosexual students recently successfully sued Poway for failing to provide a safe environment and permitting numerous forms of anti-homosexual harassment. *Harper*, 445 F.3d at 1172, n.6.

"problem-solve" the tension.[99]

On the 2004 Day of Silence, Tyler Chase Harper, a sophomore at Poway and a devout Christian,[100] decided to express his opposition to the Day of Silence.[101] Harper believed that homosexual behavior was "destructive to humankind . . . immoral, damaging to the practitioners and to human society in general,"[102] and that the school was "advocating the homosexual lifestyle."[103] He wore a t-shirt with "I WILL NOT ACCEPT WHAT GOD HAS CONDEMNED" taped on the front, and "HOMOSEXUALITY IS SHAMEFUL" taped on the back, with a biblical citation.[104] Apparently, no one noticed.[105] The next day he changed the t-shirt message to read "BE ASHAMED OUR SCHOOL EMBRACED WHAT GOD HAS CONDEMNED" on the front, and "HOMSEXUALITY IS SHAMEFUL" on the back, again followed by a biblical citation.[106]

With this new message, Harper got a rise out of his fellow students, and was "confronted by a group of students on campus" that very morning, resulting in a "tense verbal conversation."[107] Soon afterward, his teacher noticed that Harper's t-shirt had "caused a disruption" in the classroom.[108] The teacher thought that Harper's t-shirt "created a negative and hostile working environment for others," and sent Harper to the front office.[109]

Harper may not have realized how seriously administrators would take his t-shirt. Just two hours earlier, a "very upset" man claiming to be a parent had called the school and threatened them for "condoning" the Day of Silence.[110] The caller said that he and others had "had it" and "would be doing something about it."[111] He "said he was coming to campus that

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99. Excerpts of Record, *supra* note 97, at 152.
100. *Id.* at 5.
101. *Id.* at 6.
102. *Id.* at 5.
103. *Id.* at 185.
104. Harper v. Poway Unified Sch. Dist., 445 F.3d 1166, 1171 (9th Cir. 2006).
105. *Id.*
106. *Id.*
107. *Id.* at 1171.
108. Excerpts of Record, *supra* note 97, at 156.
109. *Id.* at 157.
110. *Id.* at 159.
111. *Id.*; *Harper*, 445 F.3d at 1173, n.7.

day," causing administrators to fear for the safety of the school.[112] The administrators called to get their assigned deputy sheriff on campus as soon as possible.[113] When Harper arrived in the office they thought his situation might be related and were concerned that his t-shirt might incite violence.[114]

Several school officials spoke with Harper. The school's deputy sheriff briefly met with Harper to document the t-shirt and assess the potential for violence.[115] The deputy sheriff warned the school officials that, in his opinion, Harper's t-shirt "could lead to disruption between the students."[116] Assistant Principal Edward Giles chatted with Harper about their shared faith—they had previously attended the same church for some years—and empathized that school employees also had to be careful about expressing disruptive beliefs in a work environment.[117] He suggested that Harper make the message more "non-confrontational," and encouraged him to become an officer of the Bible Club.[118]

Principal Fisher spoke with Harper about the physical dangers that could result from Harper's t-shirt, and how inflammatory Harper's particular choice of language was to other students, but Harper would not change his t-shirt or remove the tape.[119] Principal Fisher had Harper remain in the front office, gave him credit for attendance, and did not suspend him or place anything in his disciplinary file.[120] Harper did not display the t-shirt message again, and Poway did not further discipline Harper.[121]

Soon thereafter, Harper filed a complaint alleging that Poway violated his First Amendment right to freedom of speech.[122] He requested preliminary and permanent injunctions prohibiting the school from "violating [his] constitutional rights by selectively banning religious expression

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112. Excerpts of Record, *supra* note 97, at 154.

113. *Id.* at 159.

114. *Id.* at 154.

115. *Id.* at 165.

116. *Id.* at 166.

117. *Id.* at 160, 162; *Harper*, 445 F.3d at 1173.

118. Excerpts of Record, *supra* note 97, at 162.

119. *Id.* at 149.

120. *Id.* at 150.

121. Harper v. Poway Unified Sch. Dist., 345 F. Supp. 2d 1096, 1101 (S.D. Cal. 2004).

122. *Id.*

in school," declaratory judgment against Poway's policies and actions, nominal damages, punitive damages, and civil penalties.[123]

In November 2004, the district court denied Harper's motion for preliminary injunction largely on *Tinker*'s substantial disruption grounds.[124] The court held that Harper "failed to demonstrate he [would] succeed on the merits of his claims."[125] Additionally, because Poway still needed to protect school safety and the rights of other students, the court held that "the balance of hardships [did] not tip sharply in [Harper's] favor."[126]

In 2006, the Ninth Circuit affirmed the district court's denial of the preliminary injunction.[127] The Ninth Circuit agreed that Harper did not demonstrate a likelihood of success on the merits of his free speech claim because Harper's speech intruded upon the rights of other students to be secure and let alone.[128] Harper petitioned for certiorari to the Supreme Court.[129] The Court granted certiorari, vacated the Ninth Circuit's judgment, and remanded the case with instructions to dismiss the appeal as moot because Harper had already graduated from Poway.[130]

### *B. The Supreme Court Missed an Opportunity to Resolve the Conflict Between High-Value Speech and Compelling Government Interests*

*Harper* presented a remarkable opportunity for the Court to improve and clarify existing schoolhouse speech law. There is no doubt that *Harper* belongs in the school speech line of cases. Harper's t-shirt provoked a tense confrontation in school hallways and created a disruptive working environment in the classroom.[131]

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123. Excerpts of Record, *supra* note 97, at 17.

124. *Harper*, 345 F. Supp. 2d at 1120.

125. *Id.* at 1119.

126. *Id.* at 1122.

127. *Harper*, 445 F.3d at 1171.

128. *Id.* at 1175.

129. Harper v. Poway Unified Sch. Dist., 127 S. Ct. 1484 (2007).

130. *Id.* (stating that the district court had already entered final judgment dismissing Harper's claims as moot); Suggestion of Mootness, *supra* note 3, at 1 (stating that the District Court had dismissed Harper's equitable claims as moot because Harper had graduated from high school and thus no longer had standing).

131. Harper v. Poway Unified Sch. Dist., 345 F. Supp. 2d 1096, 1120 (S.D. Cal.

*Harper* thus triggers two of the 'special circumstances' that schoolhouse speech law recognizes as justifications for reduced speech in schools. Administrators, teachers, and others believed that Harper's speech would result in substantial disruption to the educational environment, as in *Tinker*.[132] They also believed that Harper's t-shirt presented offensive speech to a captive audience (the classroom), as in *Fraser*.[133] While Justice Alito called *Bong Hits* "at the far reaches" of schoolhouse speech regulation,[134] *Harper* falls clearly under multiple prongs of traditional doctrine.

*Harper* also placed high-value speech from a respected speaker in conflict with important government interests. Administrators thought that Harper's t-shirt could provoke disruption, but they also believed that Harper was genuine in his belief and respectful of school officials.[135] This was part of Principal Fisher's motivation in declining to discipline Harper through suspension or notation in his record.[136] He did not have any other disciplinary record or questionable activities.[137] Thus, it is probable that the Court would have described him and his message with respect. The Court would have been presented with important government interests already recognized as worthy of restricting speech in schools: physical disruption, interference with the rights of others, and offensive speech in front of captive adolescents.

The combination of high-value speech and compelling governmental interests would be much more difficult to resolve and correspondingly should produce an opinion more valuable to educators. *Harper* places uniformly recognized values—free speech and children's safety—in direct conflict.[138] This situation confuses conventional political lines and would make predicting the Court's decision difficult.

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2004); Excerpts of Record, *supra* note 97, at 156.

132. *See* Excerpts of Record, *supra* note 97, at 149–50, 156–57, 162, 166.

133. *See id.* at 149; *Harper*, 445 F.3d at 1178.

134. Morse v. Frederick, 127 S. Ct. 2618, 2638 (2007).

135. *Harper*, 345 F. Supp. 2d at 1100–01.

136. Excerpts of Record, *supra* note 97, at 50. In fact, later on school administrators expressed their sympathy for Harper, who may have been pressured into his speech by conservative religious organizations looking for a test case. Statements of Poway School Officials, Speech at Stanford Law School (March 15, 2007).

137. Statements of Poway School Officials, *supra* note 136.

138. Recognized values to everyone except Justice Thomas, perhaps. *Morse*, 127 S. Ct. at 2630 (Thomas, J., concurring).

Conservatives on the Court, for example, may be more interested in promoting religious speech and politically-conservative messages that challenge perceived school endorsement of homosexuality. Yet they may also be more prone to public safety arguments and 'command and control' methods increasingly popular in schools, which would clamp down on speech like Harper's. On this side, the Court would hear data on the modern dangers facing schools, including a perception of increased school shootings and educators' new tools of violence prediction. "'Reading, writing and arithmetic' must now make room for phrases like 'threat assessment approach' and 'school-wide lock down.'"[139] The Court would also hear about how educators are placed in the unenviable position of trying to identify dangerous students and pinpoint when they must step in to prevent harm.[140] These arguments may encourage conservative Justices to find Poway officials justified in protecting the school environment.

The liberals on the Court would also face ideological conflicts. Some Justices may agree with Judge Reinhardt of the Ninth Circuit that Harper's speech was threatening and demeaning to homosexual students.[141] The Court would look to data on the challenges facing young homosexual students, including social isolation, academic underachievement, and high dropout rates.[142] On the other hand, the liberal Justices would also be more likely to welcome greater speech rights in the school environment. They may be persuaded by advocates arguing that schools have given in to post-Columbine fears of harmless speech sparking a school shooting. "[S]ince the fall of 1999, as schools reopened for the first post-Littleton school year, [the ACLU has] been seeing even more measures that are turning schools into fortresses and students into prisoners. All across the country, ACLU offices have been receiving complaints from students and parents in record-setting numbers."[143]

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139. Richard C. Demerle, Note, *The New Scylla and Charybdis: Student Speech vs. Student Safety After Columbine*, 10 B.U. PUB. INT. L.J. 428, 429 (2001).

140. *See* Mary Ellen O'Toole, *The School Shooter: A Threat Assessment Perspective*, http://www.fbi.gov/publications/school/school2.pdf.

141. Harper v. Poway Unified Sch. Dist., 445 F.3d 1166, 1178–79 (9th Cir. 2006).

142. *Id.*

143. Nadine Strossen, *Keeping the Constitution Inside the Schoolhouse Gate-Students' Rights Thirty Years After* Tinker v. Des Moines Independent Community School District, 48 DRAKE L. REV. 445, 462 (2000).

Each member of the Court would be faced with a classic dilemma: encourage the substantive speech itself at the risk of a disagreeable long-term legal rule, or set a legal rule that discourages the sympathetic speaker yet broadens the door for future advocacy? Regardless of the outcome, resolving this kind of conflict with Harper's unconventional facts would have been of higher value than *Bong Hits*' summary affirmation of school officials' authority to participate in the War on Drugs.[144] In the future, the Court should accept a more challenging case, giving educators facing difficult situations[145] guidance on how conflicting interests in the educational environment must be resolved.

### *C. A Proposal for the Resolution of the Difficult Issues* Harper *Presents in the Future*

We have argued that the Court should have decided *Harper v. Poway* on its merits and used the case to provide guidance as to how to balance strong government interests against high-value speech. We would be remiss, however, in describing the ways in which *Harper* was a better choice without providing our own form of guidance, namely, a suggestion for a way to resolve *Harper*.

A nonpolitical legal solution to the high-value speech/high government interest dilemma is suggested in Justice Breyer's *Bong Hits* partial concurrence and dissent. Breyer notes that the "surrounding context and manner" of Frederick's speech also seemed important to Morse's decision to remove the banner.[146] "To say that school officials might reasonably prohibit students during school-related events from unfurling 14-foot banners (with any kind of irrelevant or inappropriate message) designed to attract attention from television cameras seems unlikely to undermine basic First Amendment principles."[147] We propose extending this context and manner argument not just for low-value speech, but as a tiebreaker for high-value speech that also implicates an important government interest like public safety.

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144. Especially given the reduced Fourth Amendment and due process rights students are entitled to in schools. *See supra* note 49.

145. Morse v. Frederick, 127 S. Ct. 2618, 2629 ("School principals have a difficult job, and a vitally important one.").

146. *Id.* at 2638 (Breyer, J., concurring).

147. *Id.*

A manner rationale is based in the Court's *Fraser* decision, which explicitly noted that "[n]othing in the Constitution prohibits the states from insisting that certain *modes of expression* are inappropriate and subject to sanctions."[148] Lower courts have also taken note of manner-type themes: the district court in *Harper*, for example, observed, "[T]here is nothing in the record to suggest [Harper] would not be free to proselytize any religious view or any other viewpoint in a *manner* that does not violate neutral and valid school policies."[149]

Indeed, other evidence suggests that Poway's decision to suppress Harper's speech was largely influenced by Harper's manner of speaking. Administrators believed that derogatory phrases taped on his t-shirt would give classmates the short, provocative aspect of Harper's message without his underlying devout, respectful beliefs.[150] They also believed that having a message on a t-shirt was an improper manner of speaking because it forced other students to sit and view it in the classroom, distracting them from their rights to be secure and let alone, and risking disruption of the primary educational environment.[151]

In a 2007 speech, school officials described how they found a way for Harper to communicate his message in a more controlled, effective manner.[152] During the next year's Day of Silence, administrators gave Harper an opportunity to speak to interested students.[153] They set up a small platform for him in the school's usual space for students to gather during lunch.[154] The situation avoided short t-shirt messages, giving students an opportunity to hear the full extent of Harper's beliefs. The location was also important: being outside of the classroom, students could opt-in to Harper's talk during time not reserved for schoolwork.[155] Administrators were on hand to ensure that Harper did not incite his fellow students and that violence did

148. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986) (emphasis added).

149. Harper v. Poway Unified Sch. Dist., 345 F. Supp. 2d 1096, 1122 (S.D. Cal. 2004) (emphasis added).

150. Excerpts of Record, *supra* note 97, at 162 (Declaration of Edward L. Giles).

151. *Id.* at 153, 156 (Declarations of Lynell Antrim and David Lee LeMaster).

152. Statements of Poway School Officials, *supra* note 136.

153. *Id.*

154. *Id.*

155. *Id.*

not erupt.[156] Harper spoke for ten to fifteen minutes without incident.[157]

Poway's manner-based approach here benefited most, but not all parties. Several students heard Harper's perspective, teachers worked in an uninterrupted environment, and administrators avoided their nightmare of physical violence. Perhaps the only person that came out worse-off was Harper himself. When he was done, Harper looked visibly disappointed that others did not care enough to engage with his viewpoint, either in agreement or disagreement.[158]

Using manner as a tiebreaker helps avoid encouraging First Amendment martyrs. When administrators clamp down on speech, the resulting outrage and claims of suppression lead to lawsuits and a sense of martyrdom in the name of securing Constitutional rights. Thoughtful school administrators know that their actions can backfire and actually encourage *more* speech, risking further disruption. We suggest that in close calls, students should be allowed to speak in conformance to guidelines on appropriate methods of communication, allowing all sides to achieve their goals. By providing guidelines for how students may present their viewpoints, schools can encourage high-value student speech while still protecting compelling government interest in student safety.

## V. CONCLUSION

*Bong Hits* was certainly not "[t]he most important student free-speech conflict to reach the Supreme Court since the height of the Vietnam War."[159] While *Bong Hits* had an interesting set of facts and appealed to a broad audience, it did nothing to clarify or resolve important issues relating to student speech restrictions. The opinion will become an asterisk to traditional schoolhouse speech law, carving out a small exception for low-value speech promoting illegal drug use. In contrast, *Harper* presented a novel issue of student speech restriction: what happens when high-value student speech is in conflict with a compelling government interest?

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156. *Id.*
157. *Id.*
158. Statements of Poway School Officials, *supra* note 136.
159. Barnes, *supra* note 2.

In the future, we hope that the Court will accept a case similar to *Harper*. When it does, we suggest that the Court look to the practice of Poway educators and use the manner and context of the speech as a tiebreaker. The practical solution of Poway school administrators led to a careful, appropriate, and we believe Constitutional means of balancing speech and safety.

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