No. 04-0001

IN THE SUPREME COURT
OF THE UNITED STATES

_____

COREY EDWARDS,

Petitioner and Cross-Respondent,

v.

WATAUGA HIGH SCHOOL BOARD OF EDUCATION,

Respondent and Cross-Petitioner.

_____

On Writ of Certiorari to the
United States Court of Appeals for the Fourteenth Circuit

_____

BRIEF OF PETITIONER AND CROSS-RESPONDENT

_____

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QUESTION PRESENTED

I. Whether Section 3.18 of the Watauga Code of Conduct is void and the students who participated in the affirmative action bake sale were inappropriately suspended because the Code is unconstitutionally overbroad and void for vagueness?

II. Whether, even if Section 3.18 of the Watauga Code of Conduct is valid, the students' suspensions were inappropriate because the conduct of the students did not violate the Code because there was no substantial disruption?

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STATEMENT OF JURISDICTION

The judgment of the Fourteenth Circuit Court of Appeals in this case was entered on August 23, 2004. The petition for Writ of Certiorari was granted by this Court on September 1, 2004. The jurisdiction of this Court is found in 28 U.S.C. § 1254(1) (2004).

CONSTITUTIONAL PROVISIONS

The following United States Constitutional Provisions are relevant and set forth in the Appendix: U.S. CONST. amend. I.

STATEMENT OF THE CASE

Statement of Facts

Petitioner, Corey Edwards, is the parent and natural guardian of Maggie Edwards, a minor and president of Staying Informed About the Issues Group ("Staying Informed"). (R. at 4.) Maggie Edwards was placed on a 10 day suspension for participating in an affirmative action bake sale sponsored by Staying Informed in violation of Section 3.18 of the Watauga Code of Conduct ("Code"). Id. The Code was enacted prior to the beginning of the 2003-2004 academic year, in response to two prior incidents in which violence resulted from racially divisive comments. Id. at 2.

Section 3.18 of the Code provides:

(a) Prohibited conduct includes symbols, language, or comments constituting abuse or harassment based on race.
(b) Symbols, language, or comments causing, or likely to cause, anger or resentment between students based on race are prohibited.
(c) A non-exhaustive list of prohibited conduct includes reference to Black Power, White Supremacy, the Black Panthers, or the Ku Klux Klan.

Id. at 3. After the code was enacted, the Dean of Students wrote a memo in response to several questions regarding Section 3.18. Id. The memo, simply restated the terms of the Code without defining or clarifying what was actually prohibited. Id.

On October 2, 2003, Staying Informed held the first annual affirmative action bake sale outside, in the morning, for 30 minutes before the first class of the day and caused no interference with access to the building. Id. at 3. The purpose of the bake sale was to engage the student body in a discussion about affirmative action policies at local colleges. Id. The bake sale was conducted in a peaceful and respectful manner with members of Staying Informed simply wearing t-shirts to explain their activity. Id. The front of the shirt had the words: "Triple A; Affirmative; Action; Analogy" printed on them. Id. The back read "Muffins? Blacks $ .25; Hispanics $ .50; Whites $ 1.00." Id. The students wore the t-shirts to explain that the bake sale was an analogy the group was using to generate thought and discussion on affirmative action. Id.

After the bake sale was over several teachers engaged the students in conversations about the advantages and disadvantages of affirmative action. Id. at 3-4. During the last class period of the day, school administrators held an assembly for all students to voice their thoughts and opinions on the issue. Id. at 4.

On October 7, 2003, a student approached school officials and stated that the Staying Informed bake sale violated Section 3.18. Id. at 2. School administrators then imposed 10 day suspensions on all members of Staying Informed who participated in the bake sale. Id. at 4.

Procedural Background

The Petitioner appears before this Court in Case No. 04-0001 on appeal of the decision rendered by the Fourteenth Circuit Court of Appeals on August 23, 2004, which held that Section 3.18 of the Code was correctly determined to be valid by the District Court for the Eastern District of Elizabethton at Bergen. *Id.* at 4. The Fourteenth Circuit Court of Appeals also held that the District Court correctly determined that Watauga High School inappropriately suspended the students because their conduct did not cause a substantial disruption. *Id.*

SUMMARY OF THE ARGUMENT

This court should reverse the Fourteenth Circuit Court of Appeals' decision that Section 3.18 of the Code of Conduct was valid, and affirm the Fourteenth Circuit Court of Appeals' decision that Watauga High School inappropriately suspended the members of Staying Informed because their conduct did not cause a substantial disruption. Section 3.18 of the Watauga Code of Conduct is void because it is unconstitutionally overbroad and void for vagueness. However, even if the Court finds Section 3.18 valid, the students should not have been suspended because their conduct did not cause a substantial disruption.

Section 3.18 of the Watauga Code of Conduct is void because it is unconstitutionally overbroad. Section 3.18 is overbroad because it makes no exception for use of symbols, language, comments, or references to certain political organizations for legitimate educational purposes. Section 3.18 is also overbroad because it has no geographical or contextual limitations and purports to cover all "abuse or harassment." In addition, the policy is overbroad because it is not limited to speech that causes substantial disruption or interference with the work of the school. Therefore, Section 3.18 is unconstitutionally overbroad.

Section 3.18 of the Watauga Code of Conduct is void for vagueness for two reasons. First, students could not reasonably interpret what was prohibited. After the code was enacted, the Dean of Students in response to requests for clarity wrote a memo which simply restated the language of the regulation. These multiple requests for clarity demonstrate that the words were not easily defined and further that not only one person but many people of ordinary intelligence could not reasonably interpret what activity was prohibited. Section 3.18 is also void for vagueness because the policy gave unrestricted power to school officials and failed to set out adequate standards to prevent arbitrary and discriminatory enforcement. To determine what

constitutes "abuse" or "harassment," punishable under the policy, students are required to make a subjective reference because different people find different things abusive. Therefore, Section 3.18 is void for vagueness because students could not reasonably determine what was prohibited and the policy failed to set out adequate standards to prevent arbitrary and discriminatory enforcement.

Even if this Court finds that Section 3.18 is valid, the suspensions resulting from the affirmative action bake sale are inappropriate because the conduct of the students did not cause a substantial disruption. The bake sale was held outside, in the morning, for 30 minutes before the first class of the day and caused no interference with access to the building. The students conducted themselves in a peaceful and respectful manner and there was no disturbance during the bake sale.

After the bake sale was over several teachers engaged the students in conversations about the advantages and disadvantages of affirmative action. During the last class period of the day, school administrators held an assembly for all students to voice their thoughts and opinions on the issue. Allowing students to openly discuss both sides of important social issues in a peaceful and respectful manner is not a substantial disruption but is clearly within the process of educating our youth for citizenship in a democratic society. Therefore, the students were inappropriately suspended because the bake sale did not cause a substantial disruption.

For these reasons, the Petitioner respectfully requests that this Court reverse the Fourteenth Circuit Court of Appeals' decision that the Code was not overbroad or void for vagueness and therefore valid, and affirm the Fourteenth Circuit Court of Appeals' decision that Watauga High School inappropriately suspended the members of Staying Informed because their conduct did not cause a substantial disruption.

ARGUMENT

I. SECTION 3.18 OF THE WATAUGA CODE OF CODUCT IS VOID AND THE STUDENTS WHO PARTICIPATED IN THE AFFIRMATIVE ACTION BAKE SALE WERE INAPPROPRIATELY SUSPENDED BECAUSE THE CODE IS UNCONSTITUTIONALLY OVERBROAD AND VOID FOR VAGUENESS.

The First Amendment to the United States Constitution prohibits the government from making any law "abridging the freedom of speech." U.S. Const. amend I. First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students. Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 506 (1969). It has been the unmistakable holding of this Court that students and teachers do not "shed their constitutional rights to freedom of speech at the schoolhouse gate." Id.

A. SECTION 3.18 OF THE WATAUGA CODE OF CONDUCT IS UNCONSTITUTIONALLY OVERBROAD BECAUSE IT CAN BE INTERPRETED TO PROHIBIT PROTECTED SPEECH, IT DOES NOT CONTAIN ANY GEOGRAPHICAL OR CONTEXTUAL LIMITATIONS, AND IT IS NOT LIMITED TO SPEECH THAT CAUSES A SUBSTANTIAL DISRUPTION.

A statute may be declared unconstitutional when it is sufficiently overbroad. City of Houston v. Hill, 482 U.S. 451, 458 (1987). An overbroad statute is one that is designed to punish activities that are not constitutionally protected, but which prohibits protected activities as well. Id. In determining if an enactment is overbroad, a court must determine whether the enactment reaches a substantial amount of constitutionally protected conduct. Hoffman Estates v. The Flipside, Hoffman Estates, Inc., 455 U.S. 489, 494 (1982).

a. Section 3.18 is overbroad because it can be interpreted to prohibit protected speech and it makes no exception for use of symbols, language, comments, or references to certain political organizations for legitimate educational purposes.

In discerning the reach of the policy, the court must consider any limiting constructions placed on the policy by the school district. Killion v. Franklin Regional School District, 136

F.Supp.2d 446, 458 (2001)(citing Ward v. Rock Against Racism, 491 U.S. 781, 795-96 (1989)). The court found a school policy overbroad because it could be interpreted, and was in fact interpreted, to prohibit protected speech. Id. at 459. The school failed to offer any limiting constructions on the policy, such as factors not included in the policy that are routinely considered in determining whether a student had violated the policy. Id. Therefore, the school policy was overbroad because it could be interpreted to prohibit protected speech.

A school district's policy prohibiting the drawing of a Confederate flag was not overbroad because the school district gave the policy a limiting construction. West v. Derby Unified School District No. 260, 206 F.3d 1358, 1367 (2000). This limiting construction prevented it from being interpreted to prohibit the use or possession of such symbols for legitimate educational purposes. Id. Therefore, the policy was valid because the school district gave the policy a limiting construction which prevented it from being interpreted to prohibit the use or possession of such symbols for legitimate educational purposes.

Therefore, a school policy is overbroad if it fails to have a limiting construction, such as factors not included in the policy that are routinely considered in determining whether a student had violated the policy, which prevent the policy from being interpreted to prohibit speech and conduct for legitimate educational purposes.

Similar to the overbroad school policy which was interpreted to prohibit protected speech in Killion, Section 3.18 was also interpreted to prohibit the protected speech of the students' at the bake sale. Unlike the limiting construction in West, which prevented the school policy from being interpreted to prohibit the use or possession of the Confederate flag for legitimate education purposes, Section 3.18 contains no such limiting construction and can be interpreted to prohibit all use of symbols, language, comments, or references to certain political organizations

for legitimate educational purposes. Under Section 3.18 the school could potentially discipline a student for possessing in textbooks and other school materials references to such political organizations as the Ku Klux Klan or the Black Panthers. Students could also be punished for discussions conducted in the classroom relating to American history if a reference is made to these political and historic organizations. Without an exception to the application of Section 3.18 prohibiting the use of symbols, language, comments, or references to certain political organizations for legitimate educational purposes the school can punish students for participating in classroom exercises and discussions. Therefore, Section 3.18 is overbroad because it can be interpreted to prohibit protected activities since it does not contain any exceptions for legitimate education purposes.

b. Section 3.18 is overbroad because it has no geographical or contextual limitations and purports to cover all "abuse or harassment" which could occur anywhere, even in the student's own home.

A school policy, that does not contain any geographical limitations and thus can be read to cover speech that occurs off the school's campus and is not school related, is overbroad. Flaherty v. Keystone Oaks School District, 247 F.Supp.2d 698, 706 (2003). A Student Handbook policy was overbroad because it was not linked within the text to any geographical limitations. Id. at 705. Further, the policy was unconstitutionally overbroad because it failed to limit a school official's authority to discipline expressions that occur on school premises or at school related activities, thus providing unrestricted power to school officials. Id. Therefore, the school policy was unconstitutionally overbroad because it permitted a school official to discipline a student for an abusive, offensive, harassing or inappropriate expression that occurred outside of school premises and was not tied to a school related activity. Id. at 706.

A school anti-harassment policy was overbroad because it did not contain any

geographical or contextual limitations but, rather, purported to cover "any harassment of a student by a member of the school community." Saxe v. State College Area School District, 240 F.3d 200, 216 (3rd Cir. 2001). The school policy did not contain any geographical or contextual limitations and purported to cover all "abuse" whether the "abuse" occurred in a school sponsored assembly, in the classroom, in the hall between classes, or in a playground or athletic facility. Id. The policy swept "protected activity wholly outside of the school context along with proscribed activity." Id. Therefore, the Policy was overbroad because it covered private student speech that merely "happens to occur on the school premises." Id.

Therefore, a school policy is over reaching if it is not linked within the text to any geographical or contextual limitations because failing to limit a school official's authority to discipline expressions that occur on school premises or at school related activities unconstitutionally provides unrestricted power to school officials.

Similar to the overbroad policy in Flaherty which failed to limit a school official's authority to discipline expressions that occur on school premises or at school related activities, thus providing unrestricted power to school officials, the breadth of Section 3.18 was over reaching because it was not linked within the text to any geographical limitations. Under Section 3.18 school officials' authority to discipline student expression was in no way limited to school activities or to school grounds thus providing unrestricted power to school officials. Under Section 3.18 a student could be punished for any "abuse or harassment" which could occur anywhere, even in the student's own home.

Similar to the anti-harassment policy in Saxe, Section 3.18 swept protected activity wholly outside of the school context along with proscribed activity. Therefore, Section 3.18 of the Watauga Code of Conduct is unconstitutionally overbroad because it contains no

geographical or contextual limitations thus giving school officials' unrestricted authority to prohibit any student speech.

c. The policy is overbroad because it is not limited to speech that causes substantial disruption or interference with the work of the school.

School policies are overbroad if they are not limited to speech that causes, or is likely to cause, a substantial disruption with school operations, as set forth in Tinker. Flaherty, 247 F.Supp.2d at 706. In Flaherty, a Board Policy which authorized discipline of "abusive, offending, harassing, or inappropriate" speech or conduct that interferes with the educational program of the school was overbroad. Id. at 704. The policy was overboard because its application was not limited to those circumstances that cause a substantial disruption to school operations, as required by Tinker. Id.

A school's anti-harassment policy which, covers speech that has the "purpose or effect of" interfering with educational performance or creating a hostile environment, was substantially overbroad because the policy ignored Tinker's requirement that a school must reasonably believe that speech will cause actual, material disruption before prohibiting it. Saxe, 240 F.3d at 217. The court further stated that prohibited "harassment," as defined by the policy, does not necessarily rise to the level of a substantial disruption under Tinker. Id. Because the policy which prohibits speech that "creates an intimidating, hostile or offensive environment," does not, on its face, require any threshold showing severity or pervasiveness, it could conceivably be applied to cover any speech which might offend someone. Id. Therefore, the policy is unconstitutionally overbroad because it appears to cover substantially more speech than could be prohibited under Tinker's substantial disruption test.

Therefore, school policies are overbroad if they are not limited in their application to speech that causes, or is likely to cause, an actual material disruption with school operation.

Similar to the policy in Flaherty which was not limited to speech that causes, or is likely to cause, a substantial disruption, Section 3.18 was in no way limited to circumstances that cause a substantial disruption to school operation. Section 3.18 could, and in fact did, punish speech that did not rise to the substantial disruption test but merely caused a student to be angered. Similar to the anti-harassment policy in Saxe, which ignored the substantial disruption requirement that schools must reasonably believe that speech will cause actual, material disruption before prohibiting it, Section 3.18 prohibits conduct which causes or is likely to cause a student anger or resentment regardless of whether the material disruption test is met. The affirmative action bake sale caused no material disruption to the operation of the school on the day of the bake sale and therefore school officials had no reason to believe that the speech would create a material disruption days after the bake sale. Therefore, the policy is overbroad because it is not linked within the text to speech that substantially disrupts school operations.

B. SECTION 3.18 OF THE WATAUGA CODE OF CONDUCT IS UNCONSTITUTIONALLY VOID FOR VAGUENESS BECAUSE STUDENTS COULD NOT REASONABLY INTERPRET WHAT WAS PROHIBITED AND THE POLICY FAILED TO SET OUT ADEQUATE STANDARDS TO PREVENT ARBITRARY AND DISCRIMINATORY ENFORCEMENT.

The First Amendment requires that speech restrictions be "narrowly drawn." In re Primus, 436 U.S. 412, 438 (1965). The constitutional guarantees of freedom of speech forbid the States to punish the use of words or language not within "narrowly limited classes of speech." Chaplinsky v. New Hampshire, 315 U.S. 568, 571 (1942). Because First Amendment freedoms need breathing space to survive, the government may regulate it only with narrow specificity. NAACP v. Button, 371 U.S. 415, 433 (1963). To escape a void for vagueness determination, the rules in question must be enumerated with "sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and

discriminatory enforcement." Kolender v. Lawson, 461 U.S. 352, 357 (1983).

a. Section 3.18 of the Watauga Code of Conduct is void for vagueness because students could not reasonably interpret what was prohibited.

A regulation is void for vagueness "if a person of ordinary intelligence cannot reasonably interpret what is prohibited." Grayned v. City of Rockford, 408 U.S. 104, 108 (1972). Under the void for vagueness doctrine, a governmental regulation may be declared void if it fails to give a person adequate warning that his conduct is prohibited. Chicago v. Morales, 527 U.S. 41, 56 (1999). A vague statute does not provide a person with sufficient warning of the conduct proscribed by the law and may thus lay a trap for the innocent. Grayned, 408 U.S. at 108.

This Court invalidated an ordinance that made it a criminal offense for "three or more persons to assemble…on any of the sidewalks…and there conduct themselves in a manner annoying to persons passing by…." Coates v. City of Cincinnati, 402 U.S. 611, 611 (1971). This Court held that the ordinance was unconstitutionally vague because "conduct that annoys some people does not annoy others." Id. at 614. Thus, the ordinance was vague, not in the sense that it required a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct was specified at all. Id. Therefore, since the statute did not define terms such as "annoying" the statute was vague because "men of common intelligence must necessarily guess at its meaning." Id.

This court held that a city's vagrancy ordinance was unconstitutionally vague because it did not give fair notice of what conduct was forbidden. Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972). Eight defendants were convicted of violating a Florida vagrancy ordinance, although none of them were engaged in any known criminal activity at the time they were detained. Id. 158-60. The ordinance was void for vagueness because it failed to give a "person of ordinary intelligence fair notice that this contemplated conduct" was forbidden by the

statute. Id. at 162 (citing United States v. Harriss, 347 U.S. 612, 617 (1954)). The Jacksonville ordinance makes criminal, activities, which by modern standards are normally innocent acts. Id. at 163. Therefore, since the statute failed to give a person adequate warning of what conduct was forbidden the statute was unconstitutionally void for vagueness.

In Turner v. South-Western City School District, 82 F.Supp.2d 757 (S.D. Oh. 2001), the court held that a student handbook policy that prohibited weapons, including "look-alike guns" was not void for vagueness because an individual of common intelligence could determine the type of conduct that would violate the rule. Turner, 82 F.Supp.2d at 766. The handbook, in unambiguous terms, prohibits the possession, transmission, or handling of any object that looks like a gun, or could, "reasonably be considered to be a weapon." Id. The court found that an individual of common intelligence can glean from reading the handbook what conduct is prohibited. Id. Therefore, because the policy was written in unambiguous terms and only that which the policy specifically prohibits can be punished, the policy was not void for vagueness.

In Flaherty, the court held that the Student Handbook policies were void for vagueness because they failed to define in any significant manner the terms "abuse, offend, harassment, and inappropriate." Flaherty, 247 F.Supp.2d at 704. The court expressly rejected the idea that students could look to the Board Policies for more specific definitions because there was no reference in the Student Handbook to put the students on notice to look there. Id. Therefore, the court held that the Student Handbook policies did not provide the students with adequate warnings of the conduct that was prohibited. Id.

Therefore, a policy is void for vagueness if it fails, within the policy, to specify a standard of conduct for students to judge their conduct and fails to give students of ordinary intelligence fair notice of what is forbidden.

Similar to the ordinance in Coates which, by not defining any terms, failed to specify any standard of conduct, Section 3.18 also did not define any terms and therefore failed to specify a standard of conduct by which students could judge their behavior. While one student might be angered by the students' conduct at the bake sale, the same conduct will not anger other students. One student being angry is not enough to satisfy the substantial disruption test.

Similar to the ordinance in Papachristou which failed to give fair notice of what conduct was forbidden, Section 3.18 does not give students adequate notice of what speech is prohibited. Unlike the policy in Turner which was written in unambiguous and definite terms, Section 3.18 included no definitions and students of ordinary intelligence could not determine what is prohibited. After the code was enacted, the Dean of Students was asked numerous questions regarding what was actually prohibited by Section 3.18. The Dean, in response to these requests for clarity, wrote a memo which simply restated the language of the regulation without defining any terms or providing any clarity. These multiple requests for clarity demonstrate that the words were not easily defined and further that not only one person but many people of ordinary intelligence could not reasonably interpret what activity was prohibited.

Similar to the holding in Flaherty, where the court expressly rejected the idea that students could look to another document for more specific definitions, Section 3.18 also did not put students on notice to look for more specific definitions in a subsequent document. While the memo written by the Dean did not clarify or define any terms in the Code, even if this Court finds that the memo did clarify the Code, students were not put on notice to look there and the school cannot rely on the memo as clarification. Therefore, Section 3.18 is void for vagueness because people of ordinary intelligence could not reasonably interpret what was prohibited.

b. Section 3.18 of the Watauga Code of Conduct is void for vagueness because the regulation gave unrestricted power to school officials and failed to set out

adequate standards to prevent arbitrary and discriminatory enforcement.

Under the void for vagueness doctrine, a regulation may be declared void if it fails to set out adequate standards to prevent arbitrary and discriminatory enforcement by school officials. Morales, 527 U.S. at 56. If various school administrators would interpret a school policy differently it may also be declared void for vagueness. Delegating basic policy matters to school officials for resolution on an ad hoc basis, invites arbitrary and discriminatory enforcement. Grayned, 408 U.S. at 108-109.

A school regulation prohibiting "verbal/written abuse of a staff member" was found void for vagueness because "abuse" was not clearly defined by the handbook. Killion, 136 F.Supp.2d. at 449. A student was suspended for creating an insulting Top 10 List about a faculty member in violation of the school's "abuse policy." Id. at 448-49. The court held that because "abuse" was not clearly defined by the handbook, school officials must make a subjective reference to determine what constitutes "abuse," punishable under the policy. Id. at 459. While some statements might be seen as universally abusive, different people find different things abusive. Id. This unrestricted delegation of power leads to the danger that school officials will interpret the policy arbitrarily. Id. (citing Morales, 527 U.S. at 60). Therefore, the policy was void for vagueness because it was subject to arbitrary and subjective interpretation. Id. at 449.

In addition to invalidating a city's vagrancy ordinance because it failed to give notice to a potential offender, this Court also invalidated the ordinance because the ordinance encouraged arbitrary and erratic arrests by the police. Papachristou, 405 U.S. at 162. Those generally implicated by the imprecise terms of the ordinance, poor people, nonconformists, dissenters, and idlers, may be required to comport themselves according to the lifestyle deemed appropriate by the Jacksonville police and the courts. Id. at 170. This Court stated that where there are no

standards governing the exercise of the discretion granted by the ordinance, the scheme permits and encourages an arbitrary and discriminatory enforcement of the law. Id. Further, it furnishes a convenient tool for "harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure." Id. (citing Thornhill v. Alabama, 310 U.S. 88, 97-98 (1940)).

In Turner, the court held that the handbook prohibiting look-alike guns was not void for vagueness because it did not provide for an unrestricted delegation of power to school officials. Turner, 82 F.Supp.2d at 767. Under the look-alike provision of the handbook, school officials can only discipline students for doing precisely what the handbook prohibits. Id. There was no danger that school officials would interpret the provision arbitrarily because of the specificity of the language as to what is prohibited. Id. Students will only be punished for possessing objects which look like guns and since guns are clearly definable, objects which look like guns are as easily definable. Id. Therefore, the policy was upheld because the terms were easily definable which meant there was no danger that the policy would be arbitrarily interpreted.

Since no terms were defined by the Code and no clarification was provided upon request, the regulation was subject to arbitrary interpretation and subjective evaluation. To determine what constitutes "abuse" or "harassment," punishable under the policy, one must make a subjective reference because different people find different things abusive. Even school officials were not aware that the students were in possible violation of Section 3.18 until 5 days after the activity occurred and another student informed them that in her view the students had violated the code. The school officials' not initially interpreting the code to prohibit the activity of Staying Informed during their bake sale demonstrates the arbitrary interpretation, subjective evaluation, and discriminatory application of the regulation by school officials. Therefore,

Section 3.18 is void for vagueness because the regulation failed to give the students adequate warning that their conduct was prohibited and failed to set out adequate standards to prevent arbitrary and discriminatory enforcement.

II. EVEN IF SECTION 3.18 OF THE WATAUGA CODE OF CONDUCT IS VALID, THE STUDENTS' SUSPENSIONS WERE INAPPROPRIATE BECAUSE THE CONDUCT OF THE STUDENTS DID NOT VIOLATE THE CODE BECAUSE THERE WAS NO SUBSTANTIAL DISRUPTION.

The vigilant protection of constitutional freedoms is "nowhere more vital than in the community of American schools." Shelton v. Tucker, 364 U.S. 479, 487 (1960). First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students and it has been the unmistakable holding of this Court that students and teachers do not "shed their constitutional rights to freedom of speech at the schoolhouse gate." Tinker, 393 U.S. at 506. In recognizing student expressive rights, this Court has imposed a significant burden on the school to justify punishment of speech by demonstrating that engaging in the forbidden conduct would materially and substantially interfere with the requirements of appropriate discipline in the operation of the school. Id. at 509.

A. SINCE THE SPEECH OF THE STUDENTS PARTICIPATING IN THE AFFIRMATIVE ACTION BAKE SALE WAS NOT SCHOOL SPONSORED SPEECH OR LEWD AND OFFENSIVE SPEECH, THE SUBSTANTIAL DISRUPTION TEST APPLIES.

For expressive conduct which is "akin to pure speech" to be prohibited, the school must show that speech caused a disruption or substantially interfered with discipline or the operation of the school. Tinker, 393 U.S. at 509. Upon learning that students planned to wear black armbands to school to express their disapproval of Vietnam, school officials adopted a policy that students wearing armbands to school would be punished. Tinker, 393 U.S. at 504. This Court struck down the ban, finding no evidence that the armbands "materially and substantially

interfered with the requirements of appropriate discipline in the operation of the school" as there was "no indication that the work of the school or any class was disrupted" and "outside the classrooms, a few students made hostile remarks to the children wearing armbands, but there were no threats or acts of violence on school premises." Id. at 508-09. This Court further stated that "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." Id.

Since Tinker, the Supreme Court has carved out a number of narrow categories of speech that a school may restrict even without the threat of substantial disruption. Saxe, 240 F.3d at 212. This Court concluded that the standard articulated in Tinker for determining when a school may punish student expression that happens to occur on school premises 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. Hazelwood School District v. Kuhlmeier, 484 U.S. 260, 272-73 (1988). This Court also distinguished the students' expressive speech which was "akin to pure speech" in Tinker, from the obscene and lewd speech in Bethel School District No. 403 v. Fraser, 478 U.S. 675, 685 (1986), which was unrelated to any political viewpoint.

Hazelwood is inapplicable because no reasonable person would believe that the bake sale was speech supported by the school because it had no connection with any school-sponsored activity, other than using the property outside the school to conduct the sale and there was no teacher supervision. Bethel is also inapplicable because the speech at the affirmative action bake sale was in no way obscene or lewd. Speech falling outside of these categories is subject to Tinker's general rule that the speech may be regulated only if it would substantially disrupt school operations or interfere with the rights of others. Saxe, 240 F.3d at 214.

B. THE SUBSTANTIAL DISRUPTION TEST REQUIRES THAT A HISTORY OF PAST SUBSTANTIAL DISRUPTIONS MUST BE

RELATED TO THE POLICY, THE CONDUCT OF STUDENTS MUST CREATE A MATERIAL SUBSTANTIAL DISRUPTION TO THE OPERATION OF THE SCHOOL, AND MORE THAN A FEW STUDENTS MUST BE UPSET.

For expressive conduct which is "akin to pure speech" to be prohibited, the school must show that speech caused a disruption or substantially interfered with discipline or the operation of the school. Tinker, 393 U.S. at 509. In order for the state, in the form of school officials, to justify prohibition of a particular expression of opinion, the school officials must be able to show that their action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompanies an unpopular viewpoint. Id.

a. The prior racial tension at Watauga High School was not at all connected or similar to the conduct of the students participating in the affirmative action bake sale.

A school district can justify a policy where it can demonstrate a concrete threat of substantial disruption that is linked to a history of past events. Sypneiwski v. Warren Hills Regional Board of Education, 307 F.3d 243, 262 (3rd Cir. 2002). To do so, however, the policy must have been created as a result of the past history of events. Flaherty, 247 F.Supp.2d at 705.

In response to a series of confrontations between black and white students at Derby High School, some of which were directly related to the Confederate flag, the school district had reason to believe that a future display of the Confederate flag by a student might cause a substantial disruption. West, 206 F.3d at 1367. Therefore, the school district adopted a "Racial Harassment and Intimidation" policy that expressly prohibited drawing the Confederate flag. Id. A student was then suspended from school for knowingly and intentionally violating the policy by drawing a Confederate flag on a piece of paper during class. Id.

Unlike the connection between the prior racial confrontations related to the Confederate flag and the drawing of the Confederate flag in West, the prior racial tension at Watauga High

School was not at all connected or similar to the conduct of the students participating in the affirmative action bake sale. There is no evidence that any of the prior incidents were at all related to affirmative action or other student speech by members of Staying Informed.

b. The conduct of the students did not create a substantial disruption in the operation of the school.

The court held that a school regulation forbidding the wearing and distributing of "freedom buttons" was arbitrary and unreasonable, and an unnecessary infringement on the students' protected right of free expression because it did not cause a substantial disruption to the operation of the school. Burnside v. Byars, 363 F.2d 744, 748-49 (5th Cir. 1966). The students were expelled not for causing a commotion or disrupting classes, as required by the substantial disruption test, but for violating the school regulation. Id. There was no interference with educational activity and there was no evidence that there was a commotion or that the buttons tended to distract the minds of the students away from their teachers. Id. Therefore, the regulation unnecessarily infringed on the students' protected right of free expression because the students' conduct did not create a substantial disruption.

In a case heard simultaneously with Burnside, the court found that a similar school regulation prohibiting wearing "freedom buttons" was reasonable because the participating students created a substantial disruption to the operation of the school. Blackwell v. Issaquena County Board of Education, 363 F.2d 749, 754 (5th Cir. 1966). The court found that students conducted themselves in a disorderly manner, disrupted classroom procedure, interfered with the proper decorum and discipline of the school, disturbed other students who did not wish to participate in wearing the buttons, accosted students by pinning buttons on them even though the students did not ask for one, entered classrooms in session without permission, threw buttons into school windows, and conducted themselves discourteously, and displayed an attitude of

hostility. Id. at 751-53. The students' conduct created a state of confusion, disrupted class instruction, and lead to a breakdown of orderly discipline. Id. at 753. Therefore, the court held that the school authorities had a legitimate and substantial interest in the orderly conduct of the school and a duty to protect substantial interests in the school's operation. Id.

Similar to the student activity in Burnside, the Staying Informed bake sale did not cause a disruption or substantially interfere with discipline or operation of the school. The bake sale was held outside, in the morning, for 30 minutes before the first class of the day and caused no interference with access to the building. The purpose of the bake sale was to engage the student body in a discussion about affirmative action policies at local colleges. The students conducted themselves in a peaceful and respectful manner and there was no disturbance during the sale.

After the bake sale was over several teachers engaged the students in conversations about the advantages and disadvantages of affirmative action. During the last class period of the day, school administrators held an assembly for all students to voice their thoughts and opinions on the issue. Allowing students to openly discuss both sides of important social issues in a peaceful and respectful manner is not sufficient to satisfy the substantial disruption test. The process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; schools must teach by example the shared values of a civilized social order. Bethel, 478 U.S. at 681. An important part of the educational process is teaching students personal intercommunication and how to express with words their thoughts, opinions, and concerns which was the purpose of the bake sale. Therefore, the student speech at the affirmative action bake sale did not create a substantial disruption.

c. One student being upset by the students' speech at the affirmative action bake sale is not enough to be considered a substantial disruption.

A student was suspended for wearing a t-shirt to school, the front of which displayed a

photograph of President George W. Bush with the caption "International Terrorist," to express his feelings about the President's foreign policies and the imminent war in Iraq. Barber v. Dearborn Public Schools, 286 F. Supp. 2d 847, 849 (E.D. Mich. 2003). The student was suspended for creating a substantial disruption or the possibility of a substantial disruption because one student commented that he was angered by the shirt and one teacher commented that he felt the shirt was inappropriate. Id. at 856. Even when considered together, these comments do not constitute a material and substantial disruption of the school's activities. Id. The school cannot show that a disruption already had occurred or was likely to occur. Id.

A high school could not prohibit its students from distributing religious tracts on school grounds because the school failed to establish that students' distribution of the religious tracts gave rise to a material or substantial disruption of the operation of the school. Clark v. Dallas Independent School District, 806 F. Supp. 116, 120 (N.D. Tex. 1992). Noting that the only evidence of disruption was the objection of several other students, the court observed that "if school officials were permitted to prohibit expression to which other students objected, absent any further justification, the officials would have a license to prohibit virtually every type of expression." Id.

Therefore, to satisfy the substantial disruption test, more is required than several students objecting or being upset by the speech.

Similar to Barber and Clark where only one or a group of students were upset by the speech of other students, only one student was upset by the student speech at the affirmative action bake sale. Therefore, since only one student was upset by the speech the substantial disruption test is not met.

CONCLUSION

Section 3.18 of the Watauga Code of Conduct is void and the students who participated in the affirmative action bake sale were inappropriately suspended because the Code is unconstitutionally overbroad and void for vagueness. The Code is overbroad because it can be interpreted to prohibit protected speech, it does not contain any geographical or contextual limitations, and it is not limited to speech that causes a substantial disruption. The Code is void for vagueness because students could not reasonably interpret what was prohibited and the policy failed to set out adequate standards to prevent arbitrary and discriminatory enforcement.

Even if Section 3.18 of the Code is valid, the students' suspensions were inappropriate because the conduct of the students did not violate the Code because there was no substantial disruption. Since the speech of the students participating in the affirmative action bake sale was not school sponsored speech or lewd, offensive speech, the substantial disruption test applies. The substantial disruption test requires that a history of past substantial disruptions must be related to the regulation, the conduct of students must create a substantial disruption, and more than a small number of students being upset is required to satisfy the substantial disruption test.

For the reasons stated above, the Petitioner, Corey Edwards, respectfully requests that this Court reverse the Fourteenth Circuit Court of Appeals' decision that the Code was valid because it was overbroad and void for vagueness, and affirm the Fourteenth Circuit Court of Appeals' decision that Watauga High School inappropriately suspended the members of Staying Informed because their conduct did not cause a substantial disruption.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The foregoing Brief was served upon attorney for the Respondent and Cross-Petitioner, at the following address, on this 11th day of October, 2003:

Respondent's Attorney, Esq.
5000 Main Street, Suite 1200
Cincinnati, Ohio 45220

DATED: _____

_____
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APPENDIX

CONSTITUTIONAL PROVISION:

U.S. CONST. amend I

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peaceably to assemble and to petition the Government for a redress of grievances."