No. 06-595

IN THE
SUPREME COURT OF THE UNITED STATES

TYLER CHASE HARPER, et al.,
Petitioners,

KELSIE J. HARPER,
Proposed Intervenor,

v.

POWAY UNIFIED SCHOOL DISTRICT, et al.,
Respondents.

ON PETITION FOR CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MOTION TO EXPEDITE CONSIDERATION OF
PETITION FOR WRIT OF CERTIORARI

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Petitioner Tyler Chase Harper and Proposed Intervenor Kelsie Harper ("Petitioners") respectfully request the Court to expedite its consideration of their petition for a writ of certiorari in this case. Expediting consideration of this case is needed for two independent reasons. First, the primary relief sought in this case is an injunction allowing high school students to express their sincerely held religious beliefs while on campus. One of the students, Mr. Harper, has already graduated, and therefore will never enjoy that opportunity. Ms. Harper, now a junior, is nearing graduation, and expediting review of the case will help ensure that she does not suffer the same fate as her brother. Second, expediting review will allow the Court to consider this case at the same time as *Morse v. Frederick*, No. 06-278, another student speech case currently before the Court.

The issue in this case is whether, absent any showing of disruption, a public high school may engage in viewpoint-based censorship of student speech about homosexual conduct because the speech allegedly "interferes with the rights of other students" who perceive the speech as "derogatory" or "demeaning." Petitioners brought this action to challenge a Poway Unified School District policy banning all student speech deemed "negative" or "offensive" in regard to, among other topics, sexual orientation. Mr. Harper was forced to remove a t-shirt bearing the statements "Homosexuality is Shameful" and "Romans 1:27" as a result of this policy, even though there was no evidence that his speech had been disruptive. The district court denied Mr. Harper's motion for preliminary injunction, and, in a split decision, the Ninth Circuit affirmed. Judge Reinhardt, writing for the majority, concluded that under *Tinker*, schools may prohibit speech that is deemed "derogatory" and that is "directed at students' minority status such as race, religion, and sexual orientation." *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1183 (9th Cir. 2006), *petition for cert. filed*, 2006 WL 3064699 (U.S. Oct. 26, 2006) (No. 06-595).

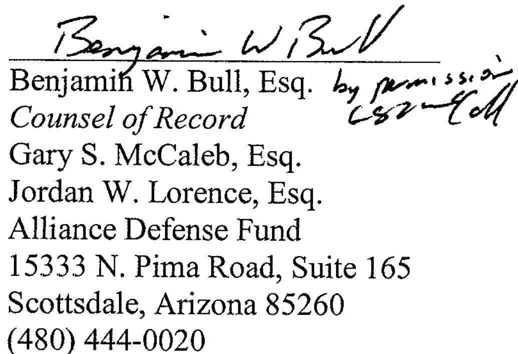
Mr. Harper has already foregone his opportunity to exercise his constitutional freedoms and communicate his religious viewpoint to his high school peers. After waiting four months for the district court to rule on his motion for preliminary injunction, and 17 months for the Ninth Circuit to rule on his appeal, he graduated while his petition for rehearing en banc was pending. While his underlying case is still viable because he is seeking damages, he no longer has standing to pursue injunctive relief. His sister, Ms. Harper, still does. But time is short. She is currently a junior at Poway High School and is scheduled to graduate in a little over a year. If a favorable decision is delayed longer than that, its impact for Ms. Harper will be diminished – she will never fully enjoy her First Amendment liberties while on campus. Protecting such fundamental rights while they are still available to the Petitioner, warrant expedited review.

Importantly, expediting review of this case would allow the Court to consider this case concurrently with the petition for writ of certiorari filed in *Morse v. Frederick* (No. 06-278, filed Aug. 28, 2006), which raises issues closely related to our case. *Frederick* involves a student who was suspended for displaying a banner with the slogan "Bong Hits 4 Jesus" at a school-sponsored event. The Ninth Circuit concluded that, because there was no evidence of disruption, the school was not justified in censoring the student – despite the fact that the message was offensive to Christians and promoted drug use. Viewed together, these cases send conflicting messages: speech that may be offensive or derogatory toward Christians is permissible under *Frederick*, but speech that may be offensive or derogatory toward homosexual conduct is not permissible under *Harper*. Similarly, speech that conflicts with a school policy against pro-drug messages is permissible under *Frederick*, but speech that conflicts with a school policy against "harassment" on the basis of sexual orientation (i.e. any negative or offensive speech) is not permissible under *Harper*. These cases provide the Court an ideal opportunity to clarify an

increasingly muddled area of constitutional law.

For the foregoing reasons, Petitioners request that the Court grant expedited consideration of the petition for writ of certiorari in this case.

Respectfully submitted this 1st day of November, 2006,



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