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I. INTRODUCTION

OVER decades, the Supreme Court has recognized that certain spheres "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions."[1] Public streets and parks are the archetypal traditional public forums, and in such places, the First Amendment guarantee of the freedom of speech is at its zenith.[2] In those traditional public forums, citizens have broadly protected rights to express themselves—whether by spoken word, expressive conduct, the display of signs, or the distribution of written materials—but even in such forums, the right to express oneself "is not absolute, but relative."[3] In other more specialized settings, such as public schoolhouses, the First Amendment permits more restrictions on expression than might be allowed in traditional public forums. It is well established that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[4] However,

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1. Hague v. Comm. for Indus. Org., 307 U.S. 496, 515 (1939).
2. *See id.* at 515-16.
3. *Id.* at 516.
4. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).

those rights are not without limits. Students' First Amendment rights are not absolute when at school or school events and must be "applied in light of the special characteristics of the school environment."[5] In three recent cases, *Palmer v. Waxahachie Independent School District*,[6] *Morgan v. Plano Independent School District*,[7] and *McAllum v. Cash*,[8] the United States Court of Appeals for the Fifth Circuit directly addressed students' First Amendment rights. In applying traditional First Amendment jurisprudence, the Fifth Circuit has reaffirmed and perhaps expanded the ability of Texas public schools to regulate student expression in student dress codes, distribution policies, and student display policies. The Fifth Circuit's application of, and distinction between, regulation of content-neutral speech[9] and regulation of speech which may lead to material or substantial disruption[10] provides clear, instructive guidance for the creation of school district policies. This Article focuses on these three court decisions, their relationship to one another, and the facts and circumstances which led to the administrative policies upheld in each case, as well as the impact of the decisions on the public schools of Texas.

II. *PALMER V. WAXAHACHIE SCHOOL DISTRICT*

A specialized First Amendment jurisprudence has developed around secondary and elementary schools, reflecting the unique institutional function of school facilities in the community and in our society. Although students certainly do not shed their First Amendment rights when they enter the school building, those rights are not absolute.[11] Judge Sifton of the Second Circuit framed the issue well when he stated, "We start with an awareness that the application of the prohibitions of the *first amendment* to secondary school education presents complexities not encountered in other areas of government activity. We are dealing with the care of children by a government concerned with the 'well-being of its youth.'"[12]

In upholding school drug-testing policies (which concern conduct that, in part, occurs "outside school hours" and off school grounds), the Supreme Court has recently re-acknowledged that "for many purposes

5. *Id.*
6. 579 F.3d 502 (5th Cir. 2009).
7. 589 F.3d 740 (5th Cir. 2009).
8. 585 F.3d 214 (5th Cir. 2009).
9. *See* United States v. O'Brien, 391 U.S. 367, 376 (1968).
10. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 514 (1969).
11. *See* Perry Educ. Ass'n v. Perry Local Educators Ass'n, 460 U.S. 37, 44 (1983) ("Nowhere [have we] suggested that students, teachers, or anyone else has an absolute constitutional right to use all parts of a school building . . . for . . . unlimited expressive purposes." (quoting Grayned v. City of Rockford, 408 U.S. 104, 117-18 (1972))); Greer v. Spock, 424 U.S. 828, 836 (1976) ("The guarantees of the *First Amendment* have never meant 'that people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please.'" (quoting Adderley v. Florida, 385 U.S. 39, 48 (1966))).
12. Pico v. Bd. of Educ., 638 F.2d 404, 412 (2d Cir. 1980) (quoting F.C.C. v. Pacifica Found., 438 U.S. 726, 749 (1978)).

'school authorities act *in loco parentis*.'"[13] Importantly, a school district's *in loco parentis* concern is not limited to "normal" classroom hours, since "[t]oday's public expects its schools not simply to teach the fundamentals, but 'to shoulder the burden of feeding students breakfast and lunch, offering before and after school child care services, and providing medical and psychological services,' all in a school environment that is safe and encourages learning."[14] As such, educators are responsible for establishing local policy and controlling student affairs.[15] "A school need not tolerate student speech that is inconsistent with its 'basic educational mission,' . . . even though the government could not censor similar speech outside the school."[16]

Prior to the Fifth Circuit's decision in *Canady v. Bossier Parish School Board*,[17] the Supreme Court recognized three constitutional analyses for determining the constitutionality of student expression regulations: (1) regulations directed at specific student viewpoints,[18] (2) regulations directed at lewd, vulgar, obscene, or plainly offensive speech,[19] and (3) regulations of speech that is related to school sponsored activities.[20] The *Canady* court considered the constitutionality of a school district's mandatory, yet viewpoint-neutral, uniform policy.[21] By distinguishing *Tinker v. Des Moines Independent Community School District*, holding it should not apply to viewpoint-neutral regulations, the Fifth Circuit held the uniform policy was subject to the time, place, and manner analysis and the *O'Brien* test for expressive conduct.[22] Against this backdrop, the *McAllum* decision, discussed later in this Article, expanded the regula-

13. Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 655-56 (1995) (quoting Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 684 (1986)) (also acknowledging that "*Fourth Amendment* rights, no less than *First* and *Fourteenth Amendment* rights, are different in public schools than elsewhere; the 'reasonableness' inquiry cannot disregard the schools' custodial and tutelary responsibility for children"); *see* Bd. of Educ. v. Earls, 536 U.S. 822, 830 (2002) (quoting *Acton*, 515 U.S. at 656); *see also Bethel*, 478 U.S. at 684 ("These cases recognize the obvious concern on the part of parents, and school authorities acting *in loco parentis*, to protect children—especially in a captive audience—from exposure to sexually explicit, indecent, or lewd speech."); Anne Proffitt Dupre, *Should Students Have Constitutional Rights? Keeping Order in the Public Schools*, 65 GEO. WASH. L. REV. 49, 87, 92 (1996) ("In [*Acton*], the Court breathed new life into what many viewed as the all-but-dead doctrine of in loco parentis. . . . The contours of school power—as defined by the Acton Court—are thus broad and deep.").

14. *Earls*, 536 U.S. at 840 (Breyer, J., concurring) (quoting Brief for Nat'l Sch. Bds. Ass'n et al. as amici curiae at 3-4).

15. *See Fraser*, 478 U.S. at 681.

16. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266 (1988) (quoting *Fraser*, 478 U.S. at 685).

17. 240 F.3d 437 (5th Cir. 2001).

18. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 511-13 (1969).

19. *Fraser*, 478 U.S. at 684-86.

20. *Hazelwood*, 484 U.S. at 271-73. Since *Canady*, the Supreme Court issued its fourth major opinion on public school regulation of student speech. *See* Morse v. Frederick, 551 U.S. 393 (2007) (holding that a public school may prohibit speech advocating the illegal use of drugs).

21. *Canady*, 240 F.3d at 442.

22. *Id.* at 443; *see* United States v. O'Brien, 391 U.S. 367, 377 (1968).

tions to which the time, place, and manner analysis should apply.[23]

In *Palmer*, a student at Waxahachie High School submitted three shirts for approval under the dress code of the Waxahachie Independent School District (Waxahachie ISD), which provided in relevant part:

> Students may wear polo-style (knit) shirts, collared shirts, or blouses. Any manufacturer's logo must be 2" x 2" or smaller . . .
>
> Students may wear campus principal-approved WISD sponsored [curricular] clubs and organizations, athletic team, or school "spirit" collared shirts or t-shirts. Approved t-shirts must have rounded necklines. Throughout the school year, special dress days may be scheduled by the campus principal.[24]

The three shirts submitted for approval included a t-shirt with the printed message "John Edwards for President '08," a "John Edwards for President" polo shirt, and a t-shirt with the printed message, "Freedom of Speech," on the front and the First Amendment written out on the back.[25] Ultimately, Waxahachie ISD rejected all three submissions.[26] The petitioners then sought a preliminary injunction against Waxahachie ISD, but it was denied by the federal district court for the Northern District of Texas upon its determination that the petitioners had not shown the dress code would cause him to suffer irreparable harm.[27] On appeal in *Palmer*, the Fifth Circuit recognized that "[w]ords printed on clothing qualify as pure speech and are protected under the First Amendment,"[28] and as such, Waxahachie ISD's "ban on his shirts would cause Palmer irreparable injury."[29] However, the Fifth Circuit ultimately determined that Palmer had not shown a likelihood of success on the merits of his preliminary injunction, and it upheld the district court's order denying the injunction.[30] In reaching its conclusion that the petitioners' challenge to the dress code was without merit, the Fifth Circuit determined that the dress code was content-neutral, and it applied "intermediate scrutiny," the term meant to refer "to the time, place, manner, or *O'Brien*, tests referred to in *Canady*."[31]

The Supreme Court, in *Ward v. Rock Against Racism*, held, "The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys."[32] This principle has been adopted by the Fifth

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23. *See generally* McAllum v. Cash, 585 F.3d 214 (5th Cir. 2009).
24. *Brief of Appellee* at 7, Palmer v. Waxahachie Indep. Sch. Dist., 579 F.3d 502 (5th Cir. 2009) (No. 08-10903).
25. *Palmer*, 579 F.3d at 505-506.
26. *Id.* at 506.
27. *Id.*
28. *Id.* at 506 (emphasis omitted) (quoting Canady v. Bossier Parish Sch. Bd., 240 F.3d 437, 440 (5th 2001) (citations omitted)).
29. *Id.*
30. *Id.* at 513.
31. *Id.* at 508 n.3, 510.
32. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).

Circuit, which had recognized that restrictions on speech are "content neutral" if they are not intended to suppress a particular message.[33] Thus, in *Palmer*, the Fifth Circuit concluded:

> The District was in no way attempting to suppress any student's expression through its dress code—a critical fact based on earlier student speech cases—so the dress code is content-neutral. Its allowance for school logos and school-sponsored shirts does not suppress unpopular viewpoints but provides students with more clothing options than they would have had under a complete ban on messages. We therefore employ intermediate scrutiny.[34]

The petitioners in *Palmer* contended that intermediate scrutiny should not apply to the dress code for two reasons. First, they argued that the Supreme Court developed "a bright-line rule that schools cannot restrict speech that is not disruptive, lewd, school-sponsored, or drug-related."[35] The Fifth Circuit recognized that this bright-line rule, if it existed, would disallow the dress code, as not all dress prohibited by Waxahachie ISD, such as the shirts at issue in *Palmer*, fell within those specific categories.[36] Nevertheless, this proposed bright-line rule had already been considered and explicitly rejected by *Canady*, as it did not account for restrictions of student speech which are content neutral.[37] Second, petitioners argued that Justice Alito's concurrence in *Morse v. Frederick* overruled *Canady* insofar as the concurrence expressed "the understanding that the [majority] opinion does not endorse any further extension" of the tests set forth in *Tinker*, *Hazelwood*, or *Fraser*.[38] However, the Fifth Circuit summarily dismissed this argument, stating that nothing in *Morse* rejected *Canady*.[39]

Additionally, the petitioners maintained that even if *Canady* is the controlling precedent for school uniforms, the Fifth Circuit should apply *Tinker* to the restrictions of student speech complained against in the preliminary injunction.[40] In support of that argument, the petitioners claimed that *Canady* is distinguished from the facts of *Palmer*, as *Canady* concerned a student uniform code, not a student dress code.[41] The Fifth Circuit expressly held this to be "a distinction without a difference," concluding that such a reading of *Canady* would require school districts and judges to consider at what point a dress code becomes a uniform code

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33. Brazos Valley Coal. for Life Inc. v. City of Bryan, Tex., 421 F.3d 314, 326-27 (5th Cir. 2005).

34. *Palmer*, 579 F.3d at 510.

35. *Id.* at 507.

36. *Id.*

37. *Id.* at 507-08; *see* Canady v. Bossier Parish Sch. Bd., 240 F.3d 437, 442-43 (5th Cir. 2001).

38. *Palmer*, 579 F.3d at 508; *see* Morse v. Frederick, 551 U.S. 393, 425 (2007) (Alito, J., concurring).

39. *Palmer*, 579 F.3d at 508.

40. Brief of Appellant at 31, *Palmer*, 579 F.3d 502 (No. 08-10903, 2008 WL 6969004) ("[I]n this Circuit, *Tinker* provides the appropriate standard for evaluating whether regulation of pure speech can survive constitutional scrutiny. Indeed, this Court has never applied the *O'Brien* standard to anything other than a school uniform policy.").

41. *Palmer*, 579 F.3d at 509.

and vice versa.[42] *Palmer* expanded *Canady* as the controlling precedent for all content-neutral dress codes and reaffirmed the constitutionality of dress codes which further a substantial governmental interest.[43] Practitioners should note that the Fifth Circuit necessarily provided Texas public school districts with greater latitude to draft content- and viewpoint-neutral dress codes.[44]

Under intermediate scrutiny, a dress code will pass constitutional muster if it first "furthers an important or substantial government interest."[45] *Palmer* provides a non-exclusive list of important governmental interests, including "[i]mproving student performance, instilling self-confidence, increasing attendance, decreasing disciplinary referrals, . . . lowering the drop-out rate, . . . providing a safer and orderly learning environment and encouraging professional dress," which it recognizes are "*all* sufficient interests."[46] Federal courts should give "*substantial deference*" to those governmental interests articulated by school officials, who are in a "*better position* to formulate a dress code."[47] The emphasized language used by the Fifth Circuit highlights a public school district's ability to determine what governmental interest it wishes to target. The language of *Palmer* seems to indicate that any interest contained in its non-exhaustive list above, supported by satisfactory evidence, is alone sufficient to justify viewpoint-neutral dress code regulations.[48]

III. *MORGAN V. PLANO INDEPENDENT SCHOOL DISTRICT*

"[T]he First Amendment does not guarantee the right to communicate one's views at all times and places or in any manner that may be desired."[49] Rather, activities "protected by the First Amendment . . . are subject to reasonable time, place, and manner restrictions."[50] "Public schools, . . . while responsible for inculcating the values of the First Amendment necessary for citizenship, are not themselves unbounded forums for practicing those freedoms."[51]

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42. *Id.*

43. *Id.* at 509-10.

44. *See id.*

45. *Id.* at 510.

46. *Id.* at 510-11 (emphasis added); *see also* Jacobs v. Clark County Sch. Dist., 526 F.3d 419, 432 (9th Cir. 2008); Littlefield v. Forney Indep. Sch. Dist., 268 F.3d 275, 286 (5th Cir. 2001).

47. *Palmer*, 579 F.3d at 510-11 (emphasis added).

48. *See id.* The Fifth Circuit recognized that in previous dress code regulation cases, it "properly set a low bar for the evidence a district must submit to show its dress code meets its stated goals." *Id.* at 511 (citing *Littlefield*, 268 F.3d at 286 n.16; Canady v. Bossier Parish Sch. Bd., 240 F.3d 437, 443-44 (5th Cir. 2001)). Public school districts may indicate this progress with scientific or statistical data, sworn testimony of educators, or evidence of improvement in other school districts. *See id.*

49. Heffron v. Int'l Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 647 (1981) (emphasis omitted).

50. *Id.* (emphasis omitted).

51. *Littlefield*, 268 F.3d at 283 (emphasis omitted).

The respondents in *Morgan* asked the United States Court of Appeals for the Fifth Circuit to apply the time, place, and manner, as it did in *Palmer*, test to a challenged district policy alleged to be content- and viewpoint-neutral.[52] *Morgan* differs from *Palmer* in that the Fifth Circuit had before it an elementary school non-curricular literature distribution policy, not a student dress code.[53] The Fifth Circuit's decision in *Morgan* to apply the *O'Brien* standard indicates its intention to extend the application of the time, place, and manner test to content-neutral regulations of pure speech in public school distribution policies.[54]

Petitioners first argued that the facts in *Morgan* should be distinguished from previous First Amendment jurisprudence because the regulation in *Morgan* related to "pure speech" under a distribution policy, not dress code regulations of expressive conduct.[55] However, *Tinker*, an important "pure speech" case, is not distinguished from cases like *O'Brien*, and *Canady*, and *Clark v. Community for Creative Non-Violence*,[56] which upheld reasonable restrictions on expressive conduct.[57] *Tinker* itself involved expressive conduct—the silent wearing of plain black armbands.[58] As with burning a draft card, sleeping in a public park, or wearing non-uniform school clothes, it was only the expressive content of the wordless conduct that brought the First Amendment into play.[59] The relevant distinction is not in the form of the expression but in the form and scope of the regulations at issue. *Tinker* involved an absolute ban on wearing armbands because the wearers intended to express a particular viewpoint.[60] The school district permitted the wearing of political buttons and other politically-charged symbols like the Iron Cross, but singled out "black armbands worn to exhibit opposition to this Nation's involvement in Vietnam" for prohibition.[61] It was not the prohibiting of armbands or other apparel items in general, but "the prohibition of expression of one particular opinion . . . without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline" that was "not constitutionally permissible."[62] The *Palmer* decision is not distinguishable on these grounds, as *Palmer* recognized that it was examining the constitutionality of a policy which regulated "[w]ords printed on clothing

52. Morgan v. Plano Indep. Sch. Dist., 589 F.3d 740, 743-44 (5th Cir. 2009); *see Palmer*, 579 F.3d at 508 n.3, 510.

53. *See Morgan*, 589 F.3d at 743; *Palmer*, 579 F.3d at 505.

54. *Id.* at 746-47.

55. *Id.* at 746.

56. 468 U.S. 288, 298 (1984).

57. *Morgan*, 589 F.3d at 745-46.

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

59. *See id.* at 505-06; *cf. Clark*, 468 U.S. at 298-99 ("No one contends that aside from its impact on speech a rule against camping or overnight sleeping in public parks is beyond the constitutional power of the Government to enforce.").

60. *Tinker*, 468 U.S. at 504.

61. *Id.* at 510-11.

62. *Id.* at 511.

[which] qualify as pure speech."[63]

According to the Fifth Circuit in *Morgan*, the distribution policy of the Plano Independent School District (Plano ISD) "permits distribution of materials during: (1) 30 minutes before and after school; (2) three annual parties; (3) recess; and (4) school hours, but only passively at designated tables" and generally prohibits "distributing material at all other times and places."[64] The Fifth Circuit held Plano ISD's distribution policy constitutional, recognizing that, on its face, the policy makes no distinctions based on viewpoint—religious, secular, political, or otherwise—and prohibits no speech that the Supreme Court has recognized as constitutionally protected in a grade school setting.[65]

Morgan is significant in that it clarifies and reasserts the Fifth Circuit's stance that the proper standard for evaluating content- and viewpoint-neutral regulations of student speech, even pure speech, as opposed to regulation of expressive conduct, is "time, place, and manner," thereby enlarging a Texas public school district's ability to keep order and fulfill its purpose of imparting knowledge and thinking skills with restrictions on the time, place, and manner of pupils' non-curricular speech.[66] In reaching that significance, practitioners should consider, in detail, the text of the upheld policy, the expressive conduct regulated, and the legitimacy of the significant interest articulated in the decision.

The petitioners in *Morgan* were a group of four families whose children attended public schools in the Plano ISD.[67] The petitioners filed this lawsuit against Plano ISD on December 15, 2004, challenging the school district's student distribution policies, both facially and as applied. Petitioners sought injunctive relief, declaratory relief, and money damages under a variety of theories. The current version of the Plano ISD policy (the 2005 Policy) concerning student expression and distribution of non-school literature was adopted and enacted by the Plano ISD Board of Trustees on April 4, 2005 and again on November 1, 2005.

The 2004 Policy required students who wished to distribute non-curricular materials on campus during the school day to submit the proposed materials to the school principal (or designee), including the name of the student or organization sponsoring the distribution.[68] In April 2005, while this suit was pending, the Plano ISD Board of Trustees decided to adopt and enact the 2005 Policy, which replaced the 2004 Policy.[69] The goal of the revised policy, as evidenced in the preamble, was to allow

63. Palmer v. Waxahachie Indep. Sch. Dist., 579 F.3d 502, 506 (5th Cir. 2009) (quoting Canady v. Bossier Parish Sch. Bd., 240 F.3d 437, 440 (5th Cir. 2001)).

64. Morgan v. Plano Indep. Sch. Dist., 589 F.3d 740, 743 (5th Cir. 2009).

65. *Id.* at 747-48.

66. *See id.*; *Palmer*, 579 F.3d at 507-09; *Canady*, 240 F.3d at 443 (noting that the *O'Brien* standard is "virtually the same standard[ ]" as the traditional time, place, and manner analysis).

67. *Morgan*, 589 F.3d at 743.

68. *Id.* at 743 n.1.

69. *Id.* at 743, 748 (noting the school district was "unlikely to return to the 2004 policy").

greater distribution by students and others of all materials, including religious materials of all faiths, and to create more opportunities for students to exchange materials while remaining non-disruptive to the educational process.[70] As stated in the Preamble and recognized by the court of appeals,

> the Policy is "intended to decrease distractions, to decrease disruption, to increase the time available and dedicated to learning, and to improve the educational process, environment, safety and order at District schools and not invade or collide with the rights of others" and that the additional restrictions on elementary students are "intended to facilitate the safe, organized and structured movements of students between classes and at lunch, as well as to reduce littering."[71]

Relevant to this appeal, there are three important aspects of the 2005 Policy: (1) the policy did not ban, prohibit or censor any speech (other than non-protected speech such as obscene materials)—instead the policy simply provided time, place, and manner restrictions on distribution of non-school materials; (2) the policy was not directed at the content or viewpoint of the materials subject to its regulations—rather, the policy applies to *all* non-school materials; and (3) the policy contained no prior-review requirement.[72] Further, the purpose behind Plano ISD's regulations relating to student distribution of non-school materials was set forth plainly in the 2005 Policy: "to meet the District's legitimate concerns regarding providing instruction, providing education, maintaining discipline, and/or achieving the curricular objectives and/or state-mandated learning requirements."[73]

Unlike the prior policy, the 2005 Policy distinguished between elementary and secondary schools.[74] The 2005 Policy treated distribution in elementary schools differently from distribution in middle and high schools.[75] As the policy stated, this is "due to the age/maturity of [elementary] students and the highly structured learning environment of elementary campuses"—a distinction that is fully supported by the testimonials of Plano ISD's elementary school educators.[76] The material difference between the policy's distribution regulations in elementary schools and secondary-schools is that distribution is not restricted in secondary school hallways and cafeterias during non-instructional times, such as between classes and during designated meal periods.

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70. *See id.* at 744.

71. *Id.*

72. *See id.* at 743-44, 747-48.

73. Report & Recommendation of U.S. Magistrate Judge Denying Pls.' Mot. For Partial sum. J. (Facial Challenge to PISD Policies) & Granting Def. Plano ISD's Cross Mot. For Summ. J. at 8 n.3, Morgan v. Plano Indep. Sch. Dist., 589 F.3d 740 (5th Cir. 2009) (no. 4:04-cv-0447) (reproducing portions of the 2005 Policy) [hereinafter *Plano ISD Policy*].

74. *See id.* (2005 Policy); *cf. id.* at 8 n.2 (2004 Policy).

75. *See id.* at 8 n.3.

76. *Plano ISD Policy*, *supra* note 73, at 8 n.3

In elementary schools, students are able to distribute non-school materials—without content or viewpoint restrictions—before and after school, during designated recess periods, at "distribution tables" and other designated areas, and at the three annual elementary school parties. On the other hand, elementary students may not distribute non-school materials "in the classroom during school hours,"[77] in elementary school cafeterias during designated meal periods,[78] or in elementary school hallways during school hours. Importantly, the 2005 Policy provided, "Students may distribute materials in areas not addressed by this policy subject to the reasonable time, place, and manner restrictions developed by the campus principal and the guidelines outlined herein . . . ."[79]

On February 1, 2007, the magistrate judge issued his report and recommendation, which applied the *O'Brien* test as articulated in *Canady* and recommended that the 2005 Policy was a reasonable time, place, and manner regulation and facially constitutional in all respects.[80] The district court agreed with all of the magistrate's recommendations but one, determining that the 2005 Policy, as it related to elementary school designated lunch periods, was overbroad.[81] The Fifth Circuit concluded that the 2005 Policy was facially constitutional under *O'Brien*,[82] ultimately rejecting the petitioner's contention that the *Tinker* "substantial disruption"[83] standard must apply.[84]

The Fifth Circuit ultimately held the student distribution policy at issue to be content- and viewpoint-neutral on its face.[85] It expressly applies to all non-curricular materials, religious or secular, and prohibits no such materials that fall outside the categories of unprotected speech.[86] The policy's facial neutrality is bolstered by its preamble, which states the Plano ISD Board of Trustees' content- and viewpoint-neutral reasons for regulating student distribution of non-curricular materials with the potential to distract from the schools' core mission of education, without regard to agreement or disagreement with the messages conveyed by any of those materials.[87]

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77. *Id.*; Defs.' Supp'l Summ. J. Evid. & Argument Relating to the Facial Challenge to Plano ISD's Distribution Policies at 3-5, Morgan v. Plano Indep. Sch. Dist., 589 F.3d 740 (5th Cir. 2009) (No.4:04-c-00447) (quoting educators' statements) [hereinafter *Educator Statements*].

78. As stated in the 2005 Policy, "District elementary school cafeterias, *during designated meal periods*, are provided for the limited purpose of providing students meals and/or other nutrition and for delivering instruction to students with regard to nutrition, time management, manners, responsibility, and group discipline." *Id.* (emphasis added).

79. *Id.*

80. Morgan v. Plano Indep. Sch. Dist., 589 F.3d 740, 744 (5th Cir. 2009) (citing Canady v. Bossier Parish Sch. Bd., 240 F.3d 437 (5th Cir. 2001)).

81. *Id.*

82. *See* United States v. O'Brien, 391 U.S. 367, 372 (1968).

83. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist, 393 U.S. 503, 514 (1969).

84. *Morgan*, 589 F.3d 746-47.

85. *Id.* at 747-48.

86. *Id.* at 743 n.2, 747.

87. *See id.* at 744; *see* Turner Broad. Sys., Inc. v. Fed. Commc'ns Comm'n, 512 U.S. 622, 642 (1994) ("[T]he 'principal inquiry in determining content neutrality . . . is whether

> In addition to time, place, and manner regulations, [a school district] may reserve the forum [i.e., its schools during the school day] for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view.[88]

For Plano ISD, the primary purpose of the elementary school cafeterias during designated mealtimes is to provide students meals and deliver instruction to elementary-age students with regard to nutrition, time management, manners, responsibility, and group discipline.[89] Unlike in secondary schools, the elementary school forum of lunchtime is not intended to be "free time."[90]

Furthermore, because of the age and maturity of the students as well as the "structured environment" of elementary schools, a district's ability and authority to regulate speech is justifiably much greater for elementary schools than for high schools.[91] As aptly stated by the Seventh Circuit, "When, where, and how children can distribute literature in a school is for educators, not judges, to decide 'provided [such choices] are not arbitrary or whimsical.'"[92]

The only materials that are prohibited by Plano ISD's distribution policy are those falling into categories that the Supreme Court has expressly recognized are not protected in a grade school setting. Those categories include speech that is obscene, speech promoting illegal drug use, and—invoking the very *Tinker* standard that the petitioners urge as the only First Amendment standard applicable in schools—speech that could re-

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the government has adopted a regulation of speech because of [agreement or] disagreement with the message it conveys.'" (alteration in original) (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989))).

88. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983); *see* Justice for All v. Faulkner, 410 F.3d 760, 765 (5th Cir. 2005) ("The standards by which regulations of speech on government property must be evaluated 'differ depending on the character of the property at issue.'" (quoting *Perry Educ. Assn.*, 460 U.S. at 44)); *see also* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 266 (1988) ("[T]he First Amendment rights of students in the public schools 'are not automatically coextensive with the rights of adults in other settings' and must be 'applied in light of the special characteristics of the school environment.'" (quoting Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1976), and *Tinker*, 393 U.S. at 506)).

89. *Morgan*, 589 F.3d 747-48.

90. *Id.*

91. *See* S.G. v. Sayreville Bd. of Educ., 333 F.3d 417, 423 (3d Cir. 2003); Walker-Serrano v. Leonard, 325 F.3d 412, 416-18 (3d Cir. 2003); Peck v. Upshur County Bd. of Educ., 155 F.3d 274, 288 (4th Cir. 1998); Bell v. Little Axe Indep. Sch. Dist. No. 70, 766 F.2d 1391, 1401 (10th Cir. 1985).

92. Muller v. Jefferson Lighthouse Sch., 98 F.3d 1530, 1543 (7th Cir. 1996 (quoting Wauconda Cmty. Unit Sch. Dist. No. 118, 9 F.3d 1295, 1302 (7th Cir. 1993) (alterations in original)); *see also* Goss v. Lopez, 419 U.S. 565, 578 (1975) ("Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint . . . . By and large, public education in our Nation is committed to the control of state and local authorities." (quoting Epperson v. Arkansas, 393 U.S. 97, 104 (1968))); *Kuhlmeier*, 484 U.S. at 267 ("'[T]he determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board,' rather than with the federal courts." (quoting *Fraser*, 478 U.S. at 683)); Canady v. Bossier Parish Sch. Bd., 240 F.3d 437, 444 (5th Cir. 2001) ("[I]t is not the job of federal courts to determine the most effective way to educate our nation's youth.").

sult in material and substantial disruption.[93] Unquestionably, schools can prohibit speech falling into such categories.[94] "A school need not tolerate student speech that is inconsistent with its 'basic educational mission,' even though the government could not censor similar speech outside the school."[95]

The Supreme Court has distinguished between the standard for what speech can be *prohibited* and the standard for how speech may be *regulated*.[96] In upholding the 2005 Policy, the Fifth Circuit necessarily held that outside the narrow categories of non-protected speech, the 2005 Policy explicitly permits student distribution of any expressive materials without regard to their content or viewpoint; rather than prohibit any protected speech, Plano ISD's distribution policy merely regulates when and where students may distribute their non-school materials.[97] In short, a policy like Plano ISD's "is 'content neutral' in the constitutional sense."[98]

Plano ISD's distribution policy is constitutional as a regulation tailored to serve the unquestionably legitimate governmental interest in public education.[99] Under any First Amendment standard, improving the educational process in public schools is a significant governmental interest.[100] In its holding, the Fifth Circuit focused upon the preamble, in which Plano ISD specifically detailed its justifications for enacting the policy.[101] The Fifth Circuit concluded that Plano ISD's "2005 Policy is reasonable and facially constitutional: the regulations at issue are content neutral and the District has a significant legitimate interest that is furthered by the regulations. The regulations are aimed at providing a focused learning environment for its students."[102] The court determined it had "more than invocations of an abstract educational mission," as the regulation is intended to facilitate the beginning of class without a wait for the distribution of materials and "to facilitate the movements of students between classes and at lunch and to reduce littering."[103] Practitioners should be aware that, by specifying this educational interest, which is essentially

93. *See* Morse v. Frederick, 551 U.S. 393, 401-04 (2007).

94. *Id.* at 402-09; Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682-683 (1986); *Canady*, 240 F.3d at 441.

95. *Kuhlmeier*, 484 U.S. at 266; *see* Thomas v. Bd. of Educ., 607 F.2d 1043, 1057 (2d Cir. 1979) (Newman, J., concurring) ("[T]he First Amendment gives a high school student the classroom right to wear Tinker's armband, but not Cohen's jacket.").

96. *See* Linmark Assocs., Inc. v. Twp. of Willinboro., 431 U.S. 85, 93 (1977) ("[L]aws regulating the time, place, or manner of speech stand on a different footing from laws prohibiting speech altogether.").

97. Morgan v. Plano Indep. Sch. Dist., 589 F.3d 740, 747-748 (5th Cir. 2009).

98. M.A.L. v. Kinsland, 543 F.3d 841, 848 n.3 (6th Cir. 2008).

99. *See Fraser*, 478 U.S. at 681; Littlefield v. Forney Indep. Sch. Dist., 268 F.3d 275, 286 (5th Cir. 2001); *Canady*, 240 F.3d at 441.

100. *See, e.g., Fraser*, 478 U.S. at 681; *Littlefield*, 268 F.3d at 286; *Canady*, 240 F.3d at 441.

101. *Morgan*, 589 F.3d at 744; *see supra* text accompanying note 71 (quoting from the preamble).

102. *Id.* at 747 (footnote omitted).

103. *Id.* at 747-48.

identical to the language of the preamble, the Fifth Circuit has effectively recognized a school district's ability to advocate the legitimate governmental interest intended to be protected by a policy like that of Plano ISD.[104]

In upholding the 2005 Policy, the Fifth Circuit necessarily found that Plano ISD's policy was narrowly tailored to meet the legitimate governmental end of maximizing instructional time and effectiveness.[105] A "regulation of the time, place, or manner of protected speech must be narrowly tailored to serve the government's legitimate, content-neutral interests but . . . it need not be the least restrictive or least intrusive means of doing so."[106] Accordingly, a policy can qualify as narrowly tailored and yet still have room for some refinement.[107]

As noted, improving the educational process (as well as feeding its students) is an important and substantial interest of a public school system.[108] Here, Plano ISD has narrowly tailored its time and place regulation to further its interest of providing nutrition and instruction to elementary students during designated periods.[109] Although the Constitution may require schools to allow free expression in reasonable times, places, and manners, it does not require such expression to be permitted at every possible opportunity.

As gleaned from its holding, the Fifth Circuit held Plano ISD's policy to be consistent with *Perry Education Association* in that it "leave[s] open ample alternative channels for communication."[110] For all practical purposes, Plano ISD students are generally permitted to distribute whatever non-school materials they desire anywhere on campus except in classrooms during instructional time, that is, except in the places where and at the times when the schools are most directly engaged in their core mission of education.[111] In addition, students at all grade levels may place materials on one or more designated distribution tables at each school, where the materials are available to interested individuals at all times.[112] The Fifth Circuit expressly recognized that Plano ISD provides student "several opportunities to distribute materials throughout the day," and

104. The Fifth Circuit has previously discussed the relevance of preambulatory language to determining a regulation's purpose. *See* Baby Dolls Topless Saloons, Inc. v. City of Dallas, 295 F.3d 471, 480 (5th Cir. 2002) ("The City's concerns [in regulating the unwanted effects of sexually oriented businesses] are adequately expressed in the Ordinance's preambulatory language").

105. *Morgan*, 589 F.3d at 744-45.

106. Ward v. Rock Against Racism, 491 U.S. 781, 798 (1989).

107. *See id.*

108. *Morgan*, 589 F.3d at 747; *see* Littlefield v. Forney Indep. Sch. Dist., 268 F.3d 275, 286 (5th Cir. 2001). In *Morgan*, the regulation restricts only the time and place for distribution of non-school materials to the extent necessary to further the school district's interests: to make sure elementary school students receive a nutritious meal during designated meal times—no more, no less. *Morgan*, 589 F.3d at 747.

109. *Id.* at 743, 745-46.

110. *See Morgan*, 589 F.3d at 748; Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

111. *Morgan*, 589 F.3d at 748.

112. *Id.* at 748.

that the "alternatives for communication are fulsome."[113]

Middle and high school students face virtually no restrictions outside the classrooms during instructional time, being free to distribute materials at will in hallways while changing classes and in cafeterias during lunch.[114] The only additional restrictions placed on elementary students are those necessitated by the special context of the elementary school setting.[115] Distribution is not permitted in elementary-school hallways because, as one principal testified, "As children move from area to area through our halls, they're being taught respect for others around them, following the directions of the teacher, consideration for children who are in classrooms adjacent to the hallways and efficient use of time."[116] Similarly, elementary school lunch periods are designated for certain instructional objectives appropriate to very young children.[117] Those limits are offset in elementary schools by students' ability to distribute materials freely during recess and three annual elementary school parties.[118] Students at all grade levels can leave materials on distribution tables.[119] And, of course, Plano ISD's policy has no effect on students' opportunities to communicate their views outside of school.[120]

In finding the 2005 Policy facially valid, the Fifth Circuit held that the "time, place, and manner regulation serves the powerful interests of the school in maintaining order and discipline" and "simultaneously teaches and protects the student."[121] When identifying a public school's legitimate interest, practitioners should be aware of the differences between elementary-age children. In accordance with the holding of the Fifth Circuit, middle and high school students are free to distribute any (protected) materials they desire, almost anywhere and almost anytime before, during, and after school, except in classrooms during the school day.[122] Elementary students in such district have almost the same level of freedom, with only two additional restrictions.[123] The Fifth Circuit recognized the special considerations in the elementary school context, and it declined to speak on the constitutionality of the same policy applied to secondary school students.[124]

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113. *Id.*
114. *Id.*
115. *See id.*
116. *Educator Statements*, *supra* note 77, at 3.
117. *Morgan*, 589 F.3d at 748.
118. *Id.*
119. *Id.* at 748-49.
120. *Id.* at 747-48.
121. Morgan v. Plano Indep. Sch. Dist., 589 F.3d 740, 748 (5th Cir. 2009).
122. *See id.* at 743.
123. *See id.*
124. *Id.* at 748 n.31 ("We do not reach the question whether similar restrictions would be acceptable if imposed on middle or secondary school students. As a matter of common sense, as students become older and more self-sufficient the need for restrictions lessens.").

IV. *MCALLUM V. CASH*

Unlike the decisions in *Palmer* and *Morgan*, the United States Court of Appeals for the Fifth Circuit applied the *Tinker* standard in *McAllum v. Cash*, which involved a school district's ban of prominent displays of the Confederate battle flag in the face of racial tension and intimidation.[125] Through the Fifth Circuit's plain application of the *Tinker* standard, it is apparent that the regulation of expressive conduct in *McAllum* was absolutely aimed at the viewpoint of the prohibited message.[126] The above recited standards all have relevance to the core issue in the case—in light of the school district's history of racial tension and intimidation, whether Burleson Independent School District (Burleson ISD) can regulate the petitioners' prominent display of the Confederate battle flag as a First Amendment expression.[127] Under these facts, the Fifth Circuit resolved this issue in Burleson ISD's favor.[128] As noted by the Fifth Circuit, a survey of case law involving the Confederate flag fully supports this conclusion.[129]

Historical context is vitally important to understanding Burleson ISD's actions in this case. The Fifth Circuit spent the better part of three pages detailing the significance of the historical events of this case.[130] To start, prominent displays of the Confederate battle flag have not always been prohibited at Burleson ISD; rather, Burleson had long been a predominantly white community. In fact, it has not been until recently that even a small population of African-American students began attending Burleson High School (BHS). Relevant to this case, Burleson ISD first began experiencing noticeable racial tensions during the 2002-2003 school year, when a BHS student-athlete shoved a Confederate flag in the face of several members of the Cedar Hill volleyball team as they walked the halls of BHS on their way to their team's dressing room.[131] All of the Cedar Hill athletes were African-American.[132] Because of the hostility created and exhibited by this intimidation, the BHS principal and a BHS athletic official met with the parents of one of the Cedar Hill athletes and the Cedar Hill team as a whole to apologize for the behavior of the BHS student.[133] After this incident, a number of BHS students attempted to display the Confederate battle flag at various athletic events, sometimes by individual students, sometimes by groups of students.[134] Initially, the displays were overt, but over time they became covert. The students would then wear Confederate battle flag bandanas under baseball caps,

125. McAllum v. Cash, 585 F.3d 214, 217 (5th Cir. 2009).
126. *Id.*
127. *See id.* at 217.
128. *Id.* at 222.
129. *Id.* at 222 n.5.
130. *McAllum*, 585 F.3d at 217-220.
131. *Id.* at 222.
132. *Id.* at 218.
133. *See id.*
134. *Id.*

and remove the caps and would have T-shirts under other garments and then reveal them to the intended targets.

Throughout the 2002-2003 school year, BHS had other incidents involving the Confederate battle flag and hostile race relations that involved individuals the BHS staff was not able to identify. Based on these events, BHS increased the police presence at athletic events. Multiple occurrences at athletic events led to an increasing variety of displays of the Confederate battle flag at BHS, particularly following an event where unruly and offensive racist behavior had been displayed. The racial animosity between BHS and other schools that were predominantly African-American was so severe that the racial issue and the use of the Confederate battle flag at sporting events was raised at a district University Interscholastic League (UIL) meeting.[135] BHS was identified has having a reputation in its UIL district as being openly hostile to African-Americans. Display of the Confederate battle flag and racial insults and intimidation were identified at the UIL district meeting as problems opposing schools encountered when competing against BHS.[136]

During the 2002-2004 school years, the increasing racial hostility, coupled with the overt use of the Confederate battle flag as a symbol of hostility, fostered a racially hostile environment which led to the prohibition of prominent displays of the Confederate battle flag. Since 2002, despite having less than sixty African-American students, BHS has had thirty-five separate issues related to race problems that have been referred to campus administration for discipline.[137] From the beginning of the 2004-2005 school year, racial tensions among students increased. There were numerous instances of racially intimidating and hostile conduct, including repeated instances of students calling other students racial slurs. For example, the BHS campus suffered vandalism on the Martin Luther King Day school holiday when a Confederate battle flag was raised on the BHS flag pole and an area near the flag pole was spray-painted into a symbol resembling the Confederate battle flag.[138]

On the first day of school in January 2006, A.M. and A.T. brought their oversized Confederate battle flag purses to school.[139] The girls were referred to the campus administration for appropriate action under the prohibition of the prominent display of the Confederate battle flag. The school offered the girls the opportunity to call home and have the purses retrieved or to leave the purses in the office and retrieve them at the end of the school day.[140] They chose to go home for the day, but they were

135. *See id.* at 218-19. The UIL is the governing body for extra-curricular competitive activities. UIL: About the UIL, http://www.uil.utexas.edu/about.html (last visited June 28, 2010).

136. *McAllum*, 585 F.3d at 218, 222, 227.

137. *Id.* at 218.

138. *Id.* at 219.

139. *Id.* at 217.

140. *McAllum*, 585 F.3d at 217-18.

never suspended.[141] The petitioners appealed the purse prohibition to the principal and the superintendent and then appealed to the Burleson ISD Board of Trustees, which denied the appeal in July 2006.[142] This lawsuit followed seven months later.

The petitioners filed this lawsuit against Burleson ISD in February 2007 seeking injunctive relief, declaratory relief, and money damages under the First, Ninth, and Fourteenth Amendments of the U.S. Constitution as well as under the Texas constitution.[143] Five months later, the district court entered its order denying the petitioners' request for a preliminary injunction, holding under the facts presented that the petitioners did not have a likelihood of success on the merits of their First and Fourteenth Amendment claims. Later, the district court granted BHS's motion for summary judgment and entered a final judgment in Burleson ISD's favor based primarily on its conclusion that the regulation of speech was permissible under *Tinker*.[144] The district court took notice that the school district could reach this conclusion based upon the past racial hostility and use of the Confederate flag.[145] Petitioners then appealed to the Fifth Circuit.

The Fifth Circuit recognized that a number of other federal courts have had an opportunity to opine on the Confederate flag issue using the *Tinker* standard: Conduct by a student, which for any reason, regardless of whether it stems from time, place, or type of behavior, materially disrupts the work of the school or involves substantial disorder or invasion of the rights of others, is not authorized by the First Amendment.[146]

The petitioners argued that because there was no evidence presented that displays of the Confederate battle flag itself caused disruption, the standard articulated in *Tinker* could not be met.[147] Other circuit courts have applied *Tinker* and held that school districts may prohibit the display of the Confederate battle flag when racial hostility and tension exists within the school.[148] In *Melton v. Young*,[149] the school suspended a high school student for his unwillingness to stop wearing a Confederate battle flag patch. The student claimed First Amendment protection, much like the petitioners in *McAllum*, stating that "he was merely demonstrating pride in his Confederate heritage by the wearing of the flag and that he

141. *Id.* at 218.

142. (C.R. 3:40 - ¶ 6 and 555-556).

143. *McAllum*, 585 F.3d at 220. The plaintiffs named "Paul Elliott Cash, in his official capacity as Principal of Burleson High School," and the "Board of Trustees of Burleson Independent School District" as defendants. *Id.* at 214. Because the plaintiffs sued these defendants in their "official capacities," the real party in interest is the school district itself. *See* Kentucky v. Graham, 473 U.S. 159, 166 (1985).

144. *McAllum*, 585 F.3d at 217.

145. *Id.* at 220.

146. *Id.* at 221-23; *see* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969).

147. *McAllum*, 585 F.3d at 221.

148. *Id.*

149. 465 F.2d 1332 (6th Cir. 1972).

had no other motive."[150] The Sixth Circuit determined that the student's motive was irrelevant, holding that in light of the school district's recent history of racial tensions, the district could ban the Confederate flag, because it had more than a "undifferentiated fear or apprehension of disturbance" that the Confederate flag would "materially disrupt[ ] class work or involve[ ] substantial disorder or invasion of the rights of others."[151]

In *Phillips v. Anderson County School District Five*[152] a student brought a First Amendment claim because he was prohibited from wearing a jacket made to look like a Confederate battle flag in 1996. The court upheld the school's ban of the Confederate flag in light of community-wide racial disturbances surrounding the Confederate flag, stating, "School authorities, however, are not required to wait until disorder or invasion occurs. . . . Indeed, it has been held that the school authorities 'have a duty to *prevent* the occurrence of disturbances.'"[153]

Finally, *Castorina v. Madison County School Board*[154] involved two students who were suspended for wearing t-shirts that displayed the Confederate flag. In that case, the district court granted summary judgment in favor of the school board.[155] On appeal, the Sixth Circuit reversed and sent the case back to the district court but for a relatively simple reason: Distinguishing both *Melton*, and *West v. Derby Unified School District Number 260*,[156] the circuit court stated that it was unable to determine from the record whether the *Tinker* standard had been satisfied.[157] The petitioners in *McAllum* previously asserted that their case involved a line of reasoning similar to that in *Castorina*.[158] To the contrary, however, evidence presented before the Fifth Circuit, clearly showed a history of racial tension and intimidation in Burleson ISD that was absent in *Castorina*.[159] Thus, in rendering its conclusion, the Fifth Circuit necessarily found that even under *Castorina*, Burleson ISD has established the necessary justification for its policy on prominent Confederate flag displays.[160]

Additionally, Burleson ISD's dress code policy was held not to be unconstitutionally vague as argued by the petitioners, and as such, their Fourteenth Amendment due process rights have not been violated.[161] Laws that are unconstitutionally vague fail because persons who must conform their conduct to the law are entitled to fair notice of what is

150. *Id.* at 1334.
151. *Id.* at 1335-37 (quoting *Tinker*, 393 U.S. at 513).
152. 987 F. Supp. 488 (D.S.C. 1997).
153. *Id.* at 492-93 (internal quotations omitted) (quoting Chandler v. McMinnville Sch. Dist., 978 F.2d 524, 529 (9th Cir. 1992)).
154. 246 F.3d 536 (6th Cir. 2001).
155. *Id.* at 539.
156. 206 F.3d 1358 (10th Cir. 2000).
157. *Id.* at 541, 544. *Castorina* settled shortly after the remand.
158. McAllum v. Cash, 585 F.3d 214, 224 n.7 (5th Cir. 2009).
159. *Id.* at 218.
160. *Id* at 223-24.
161. *Id.* at 224.

permitted and proscribed.[162] Fair notice protects those who might otherwise stray into the regulated area, prescribes standards for law enforcers, and preserves legitimate activity against the chill that flows from a law of uncertain scope.[163]

According to the court in *McAllum*,[164] a policy is unconstitutionally vague if:

> "it (1) fails to provide those targeted by the statute a reasonable opportunity to know what conduct is prohibited, or (2) is so indefinite that it allows arbitrary and discriminatory enforcement."[165] Students may challenge school policies based on their alleged vagueness, but the Supreme Court has held that the standards for determining vagueness apply differently in the school context: "We have recognized that 'maintaining security and order in the schools requires a certain degree of flexibility in school disciplinary procedures, and we have respected the value of preserving the informality of the student-teacher relationship.' Given the school's need to be able to impose disciplinary sanctions for a wide range of unanticipated conduct disruptive of the educational process, the school disciplinary rules need not be as detailed as a criminal code which imposes criminal sanctions."[166]

The Fifth Circuit disagreed with the petitioners in the present situation, determining that Burleson ISD's dress code policy features specific guidelines, prohibitions, and procedures.[167] The policy gives students fair notice of what is prohibited, and there is an administrative process if the policy's meaning somehow needs to be clarified.[168] As such, the policy is not unconstitutionally vague.[169]

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162. As stated by the Fifth Circuit, "We do not apply the vagueness standard mechanically. . . ." United States v. Clinical Leasing Serv., Inc., 925 F.2d 120, 122 (5th Cir. 1991). It is noteworthy that in *Clinical Leasing*, the Fifth Circuit upheld a law challenged on vagueness, because, in part, "the regulated party may 'have the ability to clarify the meaning of the regulation[s] by its own inquiry, or by resort to an administrative process.'" *Id.* (alterations in original) (quoting Vill. of Hoffman Estates v. Lipside, Hoffmann Estates, Inc. 455 U.S. 489, 498 (1982)). In the present case, the petitioners also had these abilities.

163. Basiardanes v. City of Galveston, 682 F.2d 1203, 1209-10 (5th Cir. 1982) ("A law is facially vague if its terms are so loose and obscure that they cannot be clearly applied in any context."); *see also* Sign Supplies of Texas, Inc. v. McConn, 517 F. Supp. 778, 783 (S.D. Tex. 1980) ("A statute need not be cast in 'mathematically precise' terms. It must, however, give fair warning of the forbidden conduct, in light of common understanding and practices.") (internal citation omitted) (quoting Grayned v. City of Rockford, 408 U.S. 104, 110 (1972)).

164. *McAllum*, 585 F.3d at 224-25.

165. Women's Med. Ctr. of N.W. Houston v. Bell, 248 F.3d 411, 421 (2001) (citing *Grayned*, 408 U.S. at 108-09).

166. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 686 (1986) (quoting New Jersey v. T.L.O., 469 U.S. 325, 340 (1985)).

167. *McAllum*, 585 F.3d at 225.

168. *Id.*

169. *Id.*; *see* B.W.A. v. Farmington R-7 Sch. Dist., 508 F. Supp. 2d 740, 751 (E.D. Mo. 2007) (dismissing the plaintiff's facial challenge to the school district's dress code, in part, because "the dress code's language tracks Tinker, meaning there is no real danger that it compromises the First Amendment rights of other Farmington High students.").

V. CONCLUSION

The foregoing cases demonstrate that the United States Court of Appeals for the Fifth Circuit remains active in the process of interpreting, clarifying, and even expanding First Amendment jurisprudence, as it applies to Texas public schools. The cases surveyed in this article suggest that since the Supreme Court in *Tinker* held that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,"[170] the pendulum continues to swing in favor of increased school district regulation of student expression. The information herein should provide practitioners with instructive guidance in the future creation of public school policies which regulate or prohibit speech and expressive conduct.

170. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).