RECENT CASES

CONSTITUTIONAL LAW — FREE SPEECH CLAUSE — FIFTH CIRCUIT UPHOLDS TEXAS SCHOOL DISTRICT'S DRESS CODE UNDER INTERMEDIATE SCRUTINY. — *Palmer ex rel. Palmer v. Waxahachie Independent School District*, 579 F.3d 502 (5th Cir. 2009), *cert. denied*, 130 S. Ct. 1055 (2010).

Over forty years ago, the Supreme Court issued its landmark student speech decision, *Tinker v. Des Moines Independent Community School District*,[1] proclaiming that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[2] *Tinker* held that in order for public schools to regulate student speech, schools must demonstrate that the speech would "substantially interfere" with school discipline or with the rights of other students.[3] Since this decision, the Court has carved out three narrow exceptions to the *Tinker* rule, granting schools the authority to regulate sexually explicit or lewd speech,[4] school-sponsored speech,[5] and speech promoting illegal drug use.[6] In the past decade, without guidance from the Supreme Court, four circuit courts, including the Fifth Circuit in *Canady v. Bossier Parish School Board*,[7] have created a fourth exception to *Tinker*. These circuits have held that public schools may restrict student speech through content-neutral regulations such as mandatory uniform policies or dress codes, which need only satisfy intermediate scrutiny[8] instead of *Tinker*'s heightened scrutiny.[9]

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[1] 393 U.S. 503 (1969).

[2] *Id.* at 506.

[3] *Id.* at 509 (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)).

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

[5] Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988).

[6] Morse v. Frederick, 127 S. Ct. 2618 (2007). This comment uses "*Tinker* framework" to refer to the Court's rulings on student speech in public schools: *Tinker*, *Fraser*, *Hazelwood*, and *Morse*.

[7] 240 F.3d 437 (5th Cir. 2001).

[8] *See* Bar-Navon v. Brevard County Sch. Bd., 290 Fed. App'x 273, 276–77 (11th Cir. 2008) (upholding the school district's dress code prohibiting the wearing of non-otic pierced jewelry under intermediate scrutiny); Jacobs v. Clark County Sch. Dist., 526 F.3d 419, 428–32, 434–37 (9th Cir. 2008) (upholding the district's dress code under intermediate scrutiny); Blau v. Fort Thomas Pub. Sch. Dist., 401 F.3d 381, 390–93 (6th Cir. 2005) (same); *Canady*, 240 F.3d at 443–44 (upholding the mandatory uniform policy under intermediate scrutiny); *see also* Ronald D. Wenkart, Commentary, *School Uniform Policies, School Dress Codes and the First Amendment: A Fourth Category of Student Speech?*, 238 EDUC. L. REP. (WEST) 17, 26 (2008) (stating that *Canady*, *Blau*, and *Jacobs* "have created a fourth category of student speech").

[9] *See* Richard J. Peltz, *Censorship Tsunami Spares College Media: To Protect Free Expression on Public Campuses, Lessons from the "College* Hazelwood*" Case*, 68 TENN. L. REV. 481, 509 (2001) ("The *Tinke*r standard . . . was an adaptation of First Amendment strict scrutiny to the academic environment . . . ."); *see also Jacobs*, 526 F.3d at 429 n.24.

Recently, in *Palmer ex rel. Palmer v. Waxahachie Independent School District*,[10] the Fifth Circuit upheld the constitutionality of the dress code of the Waxahachie Independent School District (WISD) under intermediate scrutiny. The court thereby affirmed, on different grounds, the district court's denial of a preliminary injunction to enjoin enforcement of WISD's dress code as to Palmer's political speech. The panel wrongly concluded that the *Canady* standard[11] had been met. WISD's dress code was not a content-neutral regulation, so the court erred in applying intermediate scrutiny. Even if, arguendo, the dress code were content neutral and intermediate scrutiny applied, the court wrongly found this test to be satisfied. *Palmer* illustrates the danger of the *Canady* exception swallowing the *Tinker* rule by allowing government censorship of nondisruptive, political student speech in public schools.

In September 2007, Paul Palmer, a student at Waxahachie High School, wore a t-shirt to school bearing the words "San Diego."[12] The assistant principal informed Palmer that his shirt violated the dress code, which prohibited messages on t-shirts except those messages related to a university, sports team, club, or to school spirit.[13] Palmer's parents brought him a replacement shirt, a t-shirt with "John Edwards for President '08" printed on the front, and the school found this shirt unacceptable as well.[14] On April 1, 2008, Palmer, by and through his parents, brought suit in the United States District Court for the Northern District of Texas under 42 U.S.C. § 1983, alleging that WISD's dress code infringed upon his First Amendment right to free speech and seeking, inter alia, a preliminary injunction.[15]

In May 2008, after analyzing the dress codes of forty other schools,[16] WISD approved a new, more speech-restrictive dress code for the next school year.[17] The policy prohibited clothing with any messages or symbols, except that "[s]tudents [could] wear campus principal-approved WISD sponsored curricular clubs and organizations, athletic team, or school 'spirit' collared shirts or t-shirts."[18] The code

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[10] 579 F.3d 502 (5th Cir. 2009), *cert. denied*, 130 S. Ct. 1055 (2010).

[11] That is, *Canady*'s holding that public schools can restrict student speech through content-neutral regulations that satisfy intermediate scrutiny.

[12] *Palmer*, 579 F.3d at 505.

[13] *Id.* at 505 & n.1. This dress code permitted polo shirts with any messages. *Id.* at 505 n.1.

[14] *Id.* at 505.

[15] *Id.*

[16] *Id.* at 511.

[17] *Id.* at 505.

[18] Brief of Appellee Waxahachie Independent School District at 7, *Palmer*, 579 F.3d 502 (No. 08-10903), 2009 WL 3375373. For instance, WISD's dress code allowed students to wear t-shirts proclaiming "TRIBE PRIDE Waxahachie Indians" as school spirit shirts. *See* Transcript of Motion for Preliminary Injunction at 32–33, *Palmer*, 579 F.3d 502 (No. 3:08-CV-0558-m); Waxahachie Indep. Sch. Dist., Secondary (Grades 6–12) Student Dress Code: 2009–10 Clarifications Power-

also exempted shirts with manufacturers' logos smaller than two inches by two inches.[19] Palmer sent WISD three shirts for approval under the new code, including the John Edwards t-shirt and a t-shirt emblazoned with "Freedom of Speech" on the front and the text of the First Amendment on the back.[20] WISD found all three shirts to be unacceptable.[21]

On July 2, 2008, Palmer filed an amended complaint and a second motion for a preliminary injunction.[22] At the preliminary injunction hearing, WISD's deputy superintendent testified that the code did not prohibit students from wearing campaign buttons or bumper stickers with written messages affixed to their clothing or backpacks,[23] assuming that the items comport with the *Tinker* framework.[24] He interpreted WISD's policy "not to prohibit a student from wearing a pie-shaped pin, or presumably a poster of some kind" that conveys a political message.[25] The district court denied the preliminary injunction on the ground that Palmer did not prove irreparable injury, given that Palmer could convey his political messages through bumper stickers or buttons on his clothing.[26]

Palmer appealed, and the Fifth Circuit affirmed the district court's denial of the preliminary injunction, but on different grounds. Writing for the panel, Judge Smith[27] first determined that Palmer did satisfy the irreparable injury standard, as "[w]ords printed on clothing qualify as pure speech,"[28] and any loss of free speech rights for even a small amount of time is irreparable injury.[29] Then, turning to whether Palmer established "a substantial likelihood of success on the merits,"[30] Judge Smith declared that Palmer's claim would succeed if the *Tinker* framework applied due to WISD's stipulation that Palmer's speech was not disruptive, lewd, school-sponsored, or supportive of illegal

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Point at 9 (2009), http://www.wisd.org/docs/6-2009-10%20Secondary%20Student%20Dress%20Code%20PowerPoint.pdf.

19 Brief of Appellee, *supra* note 18, at 7.

20 *Palmer*, 579 F.3d at 506.

21 *Id.*

22 Brief of Appellant at 5, *Palmer*, 579 F.3d 502 (No. 08-10903), 2008 WL 6969004.

23 Transcript of Second Motion for Preliminary Injunction at 35–37, 44–47, *Palmer*, 579 F.3d 502 (No. 3:08-CV-0558-m). No references to campaign buttons or bumper stickers appeared in WISD's policy. *See id.* at 36, 53.

24 *Id.* at 46–47.

25 *Id.* at 39; *accord id.* at 37.

26 *Id.* at 73; *see also Palmer*, 579 F.3d at 506.

27 Judges Higginbotham and Southwick joined Judge Smith's opinion.

28 *Palmer*, 579 F.3d at 506 (alteration in original) (quoting Canady v. Bossier Parish Sch. Bd., 240 F.3d 437, 440 (5th Cir. 2001)) (internal quotation mark omitted).

29 *Id.* (citing Deerfield Med. Ctr. v. City of Deerfield Beach, 661 F.2d 328, 338 (5th Cir. 1981)).

30 *Id.* (quoting Byrum v. Landreth, 566 F.3d 442, 445 (5th Cir. 2009)). A substantial likelihood of success on the merits is one of the requirements for granting a preliminary injunction. *Id.*

drug use.[31] Under circuit precedent in *Canady*, however,[32] schools can restrict student speech through content-neutral regulations, which are analyzed under intermediate scrutiny.[33]

Applying the *Canady* standard, the Fifth Circuit first analyzed whether WISD's dress code was a content-neutral regulation. The court stated that content neutrality is determined by examining the government's purpose in enacting the speech regulation, which cannot entail "disagreement with the message [the speech] conveys."[34] The court held that WISD did not adopt the policy to suppress student speech and thus concluded that the code was content neutral. Although Palmer contended that the code's exemptions for logos and principal-approved school-spirit shirts rendered WISD's policy content based, the court determined that the exceptions simply "provide[d] students with more clothing options."[35]

Having held the code to be content neutral, Judge Smith then applied the *Canady* intermediate scrutiny test, assessing whether (1) the dress code furthered a substantial government interest, (2) the interest was unrelated to the suppression of student speech, and (3) the incidental restrictions on free speech were no more restrictive than necessary to further that interest.[36] Palmer contended that the dress code failed the first and third prongs of the intermediate scrutiny test. With respect to the first prong, the court determined that the code furthered WISD's substantial interests in "maintain[ing] an orderly and safe learning environment . . . and encourag[ing] professional and responsible dress," as stated in the code's preamble.[37] The panel rejected Palmer's argument that the interests were undermined by the fact that students could wear bumper stickers and buttons on their clothes, reasoning that these items were less visible and distracting than large t-shirts.[38] Even if this distinction was "odd," the court emphasized deference to the school board's determination that the code furthered important interests.[39] The court held that the third prong was satisfied, as students could wear what they wished after school and communicate their political views in other ways during the school day.[40]

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[31] *Id.* at 507.

[32] The panel stated it was bound by *Canady* under the circuit's rule of orderliness. *Id.* at 508.

[33] *Id.* at 507–09.

[34] *Id.* at 510 (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)) (internal quotation mark omitted).

[35] *Id.*

[36] *Id.* (citing Canady v. Bossier Parish Sch. Bd., 240 F.3d 437, 443 (5th Cir. 2001)).

[37] *Id.*

[38] *Id.* at 511–12.

[39] *Id.* at 512. The court also rejected as "perverse reasoning" Palmer's argument that the dress code was unconstitutional because it did not prohibit enough speech. *Id.*

[40] *Id.* at 513 (citing *Canady*, 240 F.3d at 443).

The Fifth Circuit wrongly determined that WISD's dress code met the *Canady* standard. The panel erred in its application of *Canady* on two major grounds: holding the dress code to be a content-neutral regulation such that intermediate scrutiny applied, and holding the first and third prongs of the intermediate scrutiny standard to be satisfied. In upholding WISD's dress code under *Canady*, the court effectively undermined *Tinker*'s mandate that nondisruptive, passive political speech be allowed in public schools. Thus, *Palmer* illustrates the danger of the *Canady* exception swallowing the *Tinker* rule. The Fifth Circuit is in effect "strangl[ing] the free mind at its source"[41] by restricting student expression through clothing to "those sentiments that are officially approved."[42]

Contrary to the Fifth Circuit's determination, WISD's dress policy was content based. Under *Turner Broadcasting System, Inc. v. FCC*,[43] regulations are content based if "*by their terms* [they] distinguish favored speech from disfavored speech on the basis of the ideas or views expressed."[44] If a regulation prohibits a whole subject matter from discussion, the regulation is content based;[45] WISD's dress code, on its face, distinguishes allowed from disallowed speech on the basis of subject matter. WISD's policy states that all messages are prohibited from students' clothing except those principal-approved shirts that promote WISD and its programs.[46] By its terms, then, the policy excludes all subject matter — including speech regarding universities, sports teams, or political candidates — except content relating to WISD's clubs, sports teams, and activities.[47] The content discrimination at issue here is particularly troubling, as it restricts political speech, which lies at the core of First Amendment protection.[48]

Although the Fifth Circuit acknowledged that there was "some judicial support" for determining content neutrality by the *face* of the regulation,[49] the court concluded that the government's *purpose* in adopting the regulation was the controlling factor.[50] The court stated that WISD did not adopt the code to suppress student speech, so the

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41 W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943).

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

43 512 U.S. 622 (1994).

44 *Id.* at 643 (emphasis added); *see also Palmer*, 579 F.3d at 509.

45 *See* Boos v. Barry, 485 U.S. 312, 318–19 (1988).

46 Brief of Appellee, *supra* note 18, at 7; *see also Palmer*, 579 F.3d at 505.

47 As the dress code only allows speech with a certain viewpoint — that which *endorses* the school district's activities — the regulation is arguably viewpoint discriminatory as well. *See* Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995).

48 Virginia v. Black, 538 U.S. 343, 365 (2003).

49 *Palmer*, 579 F.3d at 509–10 (citing Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 642–43 (1994); Jacobs v. Clark County Sch. Dist., 526 F.3d 419, 444 (9th Cir. 2008) (Thomas, J., dissenting)).

50 *See Palmer*, 579 F.3d at 510 (citing Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989)).

court found the regulation content neutral.[51] The Fifth Circuit's reliance on the purpose test is misplaced. In recent cases involving various speech regulations, the Supreme Court has used the purpose test, the facial discrimination test, or a combination of both tests to determine the content neutrality of the regulations.[52] In light of this unclear guidance from the Court, many commentators have noted that the purpose test is ill-suited to speech cases, especially when the regulation is facially content discriminatory.[53] As WISD's dress code makes content distinctions on its face, there is no need for the court to look to governmental purpose, which is often extremely difficult to ascertain and can be easily fabricated.[54] Additionally, *Turner* expressly stated that the "mere assertion of a content-neutral purpose [will not] be enough to save a law which, on its face, discriminates based on content."[55] WISD's single justification for the dress code's exemptions — to increase the clothing options for students[56] — convinced the court but does not pass muster under *Turner*.[57] Therefore, under the facial discrimination test, the panel should have deemed the dress code content based, applied the *Tinker* framework, and granted Palmer's preliminary injunction motion.

Assuming, arguendo, that the dress code was content neutral and intermediate scrutiny applied, the Fifth Circuit erred in analyzing prongs one and three of the test and finding them satisfied. With regard to the first prong, according to *Turner*, the government "must do more than simply 'posit the existence of the disease sought to be cured'"; it must demonstrate that "the regulation will *in fact* alleviate

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[51] *Id.*

[52] *See* Hill v. Colorado, 530 U.S. 703, 719 (2000) (applying the purpose test to a facially neutral regulation); United States v. Playboy Entm't Group, Inc., 529 U.S. 803, 811–12 (2000) (applying both the purpose and facial discrimination tests); Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105 (1991) (applying the facial discrimination test to a facially discriminatory regulation); City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 47–48 (1986) (applying the purpose test to a facially discriminatory regulation); *see also* Barry P. McDonald, *Speech and Distrust: Rethinking the Content Approach to Protecting the Freedom of Expression*, 81 NOTRE DAME L. REV. 1347, 1381 (2006) ("[T]he Court itself has been unable to articulate a clear and principled basis for distinguishing between these approaches.").

[53] *See* Erwin Chemerinsky, *Content Neutrality as a Central Problem of Freedom of Speech: Problems in the Supreme Court's Application*, 74 S. CAL. L. REV. 49, 59–61 (2000); Calvin Massey, *The Role of Governmental Purpose in Constitutional Judicial Review*, 59 S.C. L. REV. 1, 4 (2007); McDonald, *supra* note 52, at 1423–24 ("[A] regulation that draws content distinctions on its face should be considered content-based . . . because of the special risks it can pose to free expression.").

[54] Massey, *supra* note 53, at 3; McDonald, *supra* note 52, at 1406.

[55] *Turner*, 512 U.S. at 642–43; *see also* Bartnicki v. Vopper, 532 U.S. 514, 526 n.9 (2001).

[56] *Palmer*, 579 F.3d at 510.

[57] *Cf.* McDonald, *supra* note 52, at 1380 n.139 (noting that the *City of Cincinnati* Court applied mainly a facial discrimination test and also "examin[ed] and disregard[ed] the asserted government purpose"); City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410, 429 (1993) (finding the city's asserted purposes — improved safety and aesthetics — "unpersuasive").

[the purported] harms in a direct and material way."[58] Although WISD did posit substantial interests — such as fostering a safe learning environment, promoting responsible attire, and cutting down on enforcement time[59] — WISD did not offer any empirical evidence that its own policy actually *furthered* these interests. Instead of adhering to First Amendment principles, the court emphasized great deference to WISD's determination that the dress code furthered substantial interests.[60] The court stated that teachers' and administrators' affidavits, as well as WISD's analysis of forty other schools' dress codes, constituted sufficient evidence.[61] The panel's excessive deference to conclusory affidavits from school officials does not comport with traditional intermediate scrutiny, and commentators have noted this troubling trend of deference in free speech cases involving government actors.[62] This deference is deeply flawed and disturbing: the people prohibiting speech are the same people to whom the court is deferring, creating the obvious potential for abuse.

Furthermore, the dress code's allowance for message-bearing campaign buttons and bumper stickers affixed to students' clothing undermines WISD's substantial interests.[63] The Fifth Circuit determined that the dress code still advanced the above-mentioned interests because "shirts are large and quite visible";[64] prohibiting them while allowing pins would still lead to less distraction, more responsible dress, and less teacher enforcement time.[65] The court failed, however, to give weight to the testimony of WISD's deputy superintendent, who stated that under WISD's code, students may wear a pie-sized pin with a political message or multiple bumper stickers stuck to their clothing.[66] Students wearing political posters, pie-sized campaign buttons, or t-shirts plastered with bumper stickers do not further WISD's interests in less distraction, responsible dress, and less enforcement time. The panel again demonstrated unfettered deference to WISD by holding that this distinction was reasonable, revealing the court's inadequate scrutiny of WISD's determinations.[67]

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[58] *Turner*, 512 U.S. at 664 (emphasis added) (quoting Quincy Cable TV, Inc. v. FCC, 768 F.2d 1434, 1455 (D.C. Cir. 1985)).

[59] *Palmer*, 579 F.3d at 510.

[60] *Id.* at 510–12.

[61] *Id.* at 511. The court never stated the results of WISD's analysis. *Id.*

[62] *See, e.g.*, Gia B. Lee, *First Amendment Enforcement in Government Institutions and Programs*, 56 UCLA L. REV. 1691, 1693–94 (2009).

[63] *See Palmer*, 579 F.3d at 511.

[64] *Id.* at 512.

[65] *Id.*

[66] Transcript of Second Motion for Preliminary Injunction, *supra* note 23, at 35–39.

[67] The panel rejected Palmer's argument that WISD's policy was unconstitutional because it did not prohibit *enough* speech. *Palmer*, 579 F.3d at 512. However, the Supreme Court has held

With respect to the third prong, the court wrongly found that the dress code was narrowly tailored to substantial government interests. The court reasoned that this prong was met by the fact that students could wear what they wanted after school and could freely talk about their political views during the school day.[68] If the Court had applied this analysis to the facts of *Tinker*, the prohibition of black armbands would have been constitutionally permissible,[69] given that students could wear the armbands after school and voice their concerns about the Vietnam War during school hours. But the Court rejected this proposition in *Tinker* — students do retain the right to express nondisruptive political speech during the school day. Overall, the panel's analysis of the intermediate scrutiny standard is flawed, and the dress code does not pass muster even under this lower scrutiny.

The Fifth Circuit's decision in *Palmer* demonstrates the danger of the *Canady* exception swallowing the *Tinker* rule. *Tinker* stated that passive, nondisruptive political speech must be allowed in public schools during school hours.[70] In order to protect this speech, school speech regulations must be examined under the high standard of the substantial disruption test. The *Canady* exception allows schools to issue speech regulations that satisfy only intermediate scrutiny, a standard the Supreme Court has never applied to school restrictions on pure student speech. Instead of protecting student speech, the *Canady* standard authorizes schools to prohibit more speech, including passive, nondisruptive political speech protected under *Tinker*. In the instant case, for example, WISD's dress code prohibited inoffensive political speech on student clothing during school hours. In holding the dress code constitutional under *Canady*, *Palmer* effectively rejected *Tinker*'s mandate. Overall, *Palmer* illustrates that the *Canady* exception to the *Tinker* framework, employed by the Fifth Circuit and three other circuits,[71] is an exception that destroys the *Tinker* rule. Courts should not follow the Fifth Circuit's lead and should instead adhere to *Tinker*'s higher standard, lest they permit public schools to "be enclaves of totalitarianism,"[72] prohibiting student expression of nondisruptive political ideas.

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a speech regulation unconstitutional for not "banning a wider category of speech." R.A.V. v. City of St. Paul, Minn., 505 U.S. 377, 404 (1992) (White, J., concurring in the judgment).

[68] *Palmer*, 579 F.3d at 513 (citing Canady v. Bossier Parish Sch. Bd., 240 F.3d 437, 443 (5th Cir. 2001)).

[69] *See* Petition for Writ of Certiorari at 10, *Palmer*, 579 F.3d 502 (No. 09-409), 2009 WL 3199676.

[70] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 514 (1969).

[71] *Canady* is in conflict with current law in two other circuits that adhere solely to the *Tinker* framework. *See* Guiles v. Marineau, 461 F.3d 320 (2d Cir. 2006); Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200 (3d Cir. 2001).

[72] *Tinker*, 393 U.S. at 511.