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Gay-Straight Alliances and Sanctioning Pretextual Discrimination Under the Equal Access Act

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***MORSE V. FREDERICK'S* NEW PERSPECTIVE ON SCHOOLS' BASIC EDUCATIONAL MISSIONS AND THE IMPLICATIONS FOR GAY-STRAIGHT ALLIANCE FIRST AMENDMENT JURISPRUDENCE**

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Consider two eleventh grade students, Michael and Anna, who attend public high school in a suburban town. The high school has approximately 1,000 students and enforces an abstinence policy banning any discussion of sexual activity. Two years ago, Michael and Anna were the high school's first students to openly identify as gay and lesbian. Now over twenty students openly identify as gay, lesbian, bisexual, transgender, or queer (LGBTQ). Recently, Michael and Anna discussed the growing interest among LGBTQ students and allies to form a gay-straight alliance (GSA) with one of their teachers. The teacher agreed to advise the GSA and filed a petition to the Board of Education to create the student group. The GSA's mission was to provide students with a safe space at school to discuss anti-LGBTQ harassment and work together to promote tolerance and acceptance regardless of sexual orientation and gender identity. The Board of Education denied the GSA's petition, claiming that allowing a "sex-based" group to meet on school grounds would violate the school's abstinence policy and thus interfere with the school's educational mission.

This hypothetical is not uncommon. LGBTQ youth are becoming more open about their sexual orientations and gender identities, which has resulted in more efforts by students to form student groups to discuss issues surrounding sexual orientation and gender identity, and in turn greater resistance to the formation of GSAs from school districts that oppose them.¹ LGBTQ students usually contend that GSA prohibitions violate their rights

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¹ See *infra* note 21 and accompanying text.

under the Federal Equal Access Act² (EAA) and the First Amendment.³ Despite being presented with both EAA and First Amendment claims, most courts have avoided the First Amendment issue and resolved the cases solely on equal access grounds.⁴ This avoidance has created uncertainty with regard to the level of protection that the First Amendment affords students to form GSAs in public schools. As this uncertainty lingers, school districts become increasingly clever in creating their student organizations'

² Education for Economic Security (Equal Access) Act, 20 U.S.C. §§ 4071-74 (1984) (prohibiting school districts from denying religious student organizations the same access to school facilities and resources as other extracurricular student organizations). The operative rule of the EAA, however, extends to both non-religious and religious student organizations:

It shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings.

20 U.S.C. § 4071(a).

³ U.S. CONST. amend. I; *see, e.g.*, *Caudillo v. Lubbock Indep. Sch. Dist.*, 311 F. Supp. 2d 550 (N.D. Tex. 2004) (alleging that a school district violated the Equal Access Act and the First Amendment when it prohibited a GSA from meeting on school grounds); *East High Gay/Straight Alliance v. Bd. of Educ. of Salt Lake City*, 81 F. Supp. 2d 1166 (C.D. Utah 1999) (alleging that a school district violated the Equal Access Act and the First Amendment when it prohibited a GSA from meeting on school grounds); *see also* Eric W. Schulze, *Gay-Related Student Groups and the Equal Access Act*, 196 EDUC. L. REP. 369, at *7 (2005). ("If the school only allows curriculum related student groups to meet, then the EAA will not apply. Nevertheless, that does not mean that the students have no other recourse and the GSA may be denied equal treatment to other student groups with impunity. . . . [I]n addition to the EAA claim, student groups denied the right to meet at school typically plead a violation of their First Amendment rights to freedom of speech.").

⁴ *See, e.g.*, *Colin v. Orange Unified Sch. Dist.*, 83 F. Supp. 2d 1135, 1149 (C.D. Cal. 2000) ("In finding that the District has likely violated the Equal Access Act, the Court need not reach Plaintiffs' First Amendment claim."); *Boyd County High Sch. Gay Straight Alliance v. Bd. of Educ. of Boyd County*, 258 F. Supp. 2d 667, 691 (E.D. Ky. 2003) ("Since the Court has found that Defendants likely violated the Equal Access Act, the Court need not at this time address . . . Plaintiffs' First Amendment claim . . . for purposes of the pending motion."); *White County High Sch. Peers Rising in Diverse Educ. v. White County Sch. Dist.*, No. 2:06-CV-29-WCO, 2006 WL 1991990, at *12 (N.D. Ga. July 14, 2006) ("Plaintiffs have also asserted that defendants' actions violate plaintiffs' right to expressive association under the federal and state constitutions. The court has already found that defendants' denial of equal access to PRIDE based on the content of its speech violates the EAA. Having reached this determination, it is unnecessary for the court to address plaintiffs' constitutional claims for purpose of the pending motion.").

policies in ways that avoid triggering the EAA.⁵ Since the only alternative federal means of relief is under the First Amendment, the need for a clarification of the protection that the First Amendment affords students to form GSAs is particularly urgent.

To date, only the United States District Court for the Southern District of Florida has addressed how the United States Supreme Court's recent decision in *Morse v. Frederick*⁶ affects the First Amendment analysis in GSA litigation.⁷ In *Morse*, the Supreme Court adopted a new rule permitting schools to limit student expression that is "reasonably viewed as promoting illegal drug use."⁸ The district court in *Gonzalez v. School Board of Okeechobee County*, held that *Morse* did not apply to GSA First Amendment claims because a "GSA's intent to gain recognition as a noncurricular student group is entirely dissimilar from the advocacy of illegal drug use."⁹

⁵ See, e.g. *East High Gay/Straight Alliance*, 81 F. Supp. 2d at 1166. In *East High Gay/Straight Alliance*, the school district attempted to avoid the EAA by not permitting any student group or organization not directly related to the curriculum to organize or meet on school property. The school board's policy provided, "[i]t is the express decision of the Board of Education of Salt Lake City School District not to allow a 'limited open forum' as that is defined by the Federal Equal Access Act, 20 U.S.C. § 4071." *Id.* at 1168. See also Dena S. Davis, *Religious Clubs in the Public Schools: What Happened After Mergens?*, 64 ALB. L. REV. 225, 234 (2000) ("After *Mergens*, a number of school districts went to considerable trouble attempting to avoid complying with the Equal Access Act."). See generally, Carolyn Pratt, *Protecting the Marketplace of Ideas in the Classroom: Why the Equal Access Act and the First Amendment Require the Recognition of Gay/Straight Alliances in America's Public Schools*, 5 FIRST AMENDMENT L. REV. 370 (2007).

⁶ *Morse v. Frederick*, 127 S. Ct. 2618 (2007).

⁷ *Gonzalez v. Sch. Bd. Of Okeechobee County*, 571 F. Supp. 2d 1257, 1269 (S.D. Fla. 2008).

⁸ See *Morse*, 127 S. Ct. at 2629. During the *Morse* litigation, LGBTQ advocates feared that if the Court had granted schools broad discretion to limit any student speech that ran contrary to their basic educational missions, then schools would be permitted to limit GSA meetings by adopting policies that treated GSAs as contrary to their self-defined educational missions. See Brief for Lambda Legal Def. & Educ. Fund, Inc. as Amicus Curiae Supporting Respondent at *24, *Morse*, 127 S. Ct. 2618 (No. 06-278), 2007 WL 542415.

⁹ After analyzing the four prominent student free speech cases (*Tinker v. Des Moines Independent Sch. Dist.*, 393 U.S. 503 (1969); *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675 (1986); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988); and *Morse*, 127 S. Ct. 2618), the district court held that only *Tinker* applied. The court reasoned that "the desire of the GSA to meet as a group to discuss matters pertinent to the challenges presented by their non-heterosexual identity and to build understanding and trust with other heterosexual students sounds in the political speech addressed in *Tinker*." *Gonzalez*, 571 F. Supp. 2d at 1269.

At first glance, the court's conclusion in *Gonzalez* seems correct. Recognizing GSAs and limiting speech advocating illegal drug use are two completely different factual scenarios. Consequently, it is easy to overlook the analogies between the two, which may prove important for advocates. The purpose of this Article is to demonstrate that *Morse v. Frederick* could alter the First Amendment analysis in GSA litigation to make it easier for LGBTQ students to form GSAs under the First Amendment. Prior to *Morse*, the Supreme Court increasingly deferred to schools' educational missions, granting schools ever-greater authority to limit student speech.¹⁰ In *Morse*, however, the Court shifted its tone and harshly criticized the notion that schools may limit student speech merely because they view it as antithetical to their basic educational missions.¹¹

I argue that the Court's shift should be viewed as a rejection of the basic educational mission argument. If broadly applied to other student speech cases, including GSA litigation, this approach could serve as a new constraint on schools' authority to limit student speech. Recently, schools have prohibited GSAs by alleging that they violate their educational missions.¹² Therefore, interpreting *Morse* as a rejection of the basic educational mission argument strengthens claims by LGBTQ students that prohibitions of GSAs violate the First Amendment. This interpretation also prevents schools from fashioning their self-defined educational missions to exclude legitimate, LGBTQ-positive viewpoints on school grounds.

Since *Morse* is a relatively recent decision, its influence on student speech litigation is unclear. Some scholars interpret *Morse*'s holding as limited to its facts.¹³ Other scholars criticize lower courts' recent extensions

¹⁰ Part II develops this proposition in more detail. This Article contends that in *Fraser* and *Kuhlmeier*, the Supreme Court adopted two exceptions to the *Tinker* rule that granted schools more authority to limit student speech that was (1) offensively lewd and indecent or (2) school-sponsored. This Article posits that in both decisions, the Court deferred to schools' basic educational missions, or their self-defined central tenets and values, to limit these categories of student expression.

¹¹ See *Morse*, 127 S. Ct. at 2629. Part IV.C of this Article develops this point in more detail.

¹² See *infra* note 27.

¹³ See, e.g., Joseph Blocher, *School Naming Rights and the First Amendment's Perfect Storm*, 96 GEO. L.J. 1, 47 (2007) ("The actual holding of [*Morse*] was quite narrow. Invoking the importance of student safety, it upheld schools' power to limit speech that reasonably appears to encourage illegal drug use, as opposed to advocating decriminalization, or opposing the war on drugs, or any other social or political commentary. The Court's decision did not appear to rest clearly on any of its previous three school speech cases, but it did confirm that schools are a uniquely limited kind of limited public forum.").

of *Morse* to limit student speech that is unrelated to promoting illegal drug use.¹⁴ Although *Morse* was not an optimal decision for free speech advocates,¹⁵ this Article emphasizes the laudable aspects of *Morse* that are being currently ignored.

Part I presents recent trends in GSA litigation and the three policy models which have been adopted by school districts to ban GSAs. Part II illustrates that prior to *Morse* the Supreme Court was progressively granting schools more deference under the First Amendment to limit student expression that violated their educational missions.¹⁶ Originally, in *Tinker v. Des Moines Independent School District*, the Supreme Court held that in order to limit student speech schools had the high burden of showing that it “materially and substantially interfere[s] with the requirements of appropriate discipline in the operation of the school.”¹⁷ Later, in *Bethel School District No. 403 v. Fraser*, the Court carved out an exception to this rule, explicitly deferring to schools’ basic educational missions to grant schools greater authority to limit “lewd and obscene” student speech.¹⁸ Similarly, in *Hazelwood v. Kuhlmeier*, the Supreme Court deferred to schools’ basic educational missions to grant schools greater authority to limit school-sponsored speech.¹⁹

¹⁴ See Clay Calvert, *Misuse and Abuse of Morse v. Frederick by Lower Courts: Stretching the High Court's Ruling Too Far to Censor Student Expression*, 32 SEATTLE U. L. REV. 1 (2008).

¹⁵ The optimal result would have been for the Court to apply the rule adopted by the Supreme Court in *Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969) rather than to carve out a new exception specific to promoting illegal drug use. The *Tinker* rule only permits schools to limit student expression if it “materially and substantially interfere[s] with the requirements of appropriate discipline in the operation of the school.” *Id.* at 509.

¹⁶ David L. Hudson & John E. Ferguson, *The Courts' Inconsistent Treatment of Bethel v. Fraser and the Curtailment of Student Rights*, 36 J. MARSHALL L. REV. 181, 190 (2002) (“Two years after *Fraser*, the Supreme Court continued the trend of curtailing student First Amendment rights when they decided a student press case—*Hazelwood School District v. Kuhlmeier*.”); Erwin Chemerinsky, *Students Do Leave Their First Amendment Rights at the Schoolhouse Gates: What's Left of Tinker?*, 48 DRAKE L. REV. 527, 535 (2000) (“[T]he Supreme Court rulings subsequent to *Tinker* have almost all sided with school officials In other words, the judicial deference model very much has replaced the speech protective model in subsequent cases.”).

¹⁷ 393 U.S. 503, 509 (1969) (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (1966)).

¹⁸ 478 U.S. 675, 680 (1986).

¹⁹ 484 U.S. 260, 272-73 (1988).

Part III illustrates that conflicting interpretations of *Fraser* and *Kuhlmeier* have resulted in uncertainty for litigants over the level of deference that these cases afford schools to limit student expression that allegedly interferes with schools' basic educational missions. For example, the school district in *Morse* interpreted *Fraser* and *Kuhlmeier* as granting schools broad discretion in identifying their educational missions and limiting any expression that they felt disrupted those missions.²⁰ Despite the Court's previous deference to schools' basic educational missions, the *Morse* Court explicitly refused to grant schools broad discretion to limit student speech that it viewed as contradicting their basic educational missions. I posit that the Court now seems to be emphasizing objective phenomena, such as laws and social trends, to determine whether schools should be allowed to limit particular student speech. These phenomena are independent of schools' subjective assessments of student speech and biased definitions of their educational missions. This new emphasis on objective factors could operate as a new restraint on the deference that schools were previously afforded to limit student speech that violated their basic educational missions.

Part IV extends this Article's interpretation of *Morse* to GSA First Amendment jurisprudence. I contend that the Court's rejection of the basic educational mission argument strengthens claims of LGBTQ students that prohibiting GSAs violates the First Amendment. I reach this conclusion by assessing how the *Morse* Court's rejection of the basic educational mission argument affects the constitutional legitimacy of the three policy models that schools have adopted to ban GSAs.

I. GAY-STRAIGHT ALLIANCES AS AN EMERGING ISSUE: THREE POLICY BAN MODELS AND LITIGATION TRENDS

The presence of LGBTQ students in secondary schools is growing as youths recognize and accept their sexual orientations and gender identities at younger ages.²¹ The increased number of LGBTQ youth has

²⁰ Brief for Petitioner at *21-25, *Morse v. Frederick*, 127 S. Ct. 2618 (2007) (No. 06-278) 2007 WL 118979.

²¹ Camille Lee, *The Impact of Belonging to a High School Gay/Straight Alliance*, 85 HIGH SCH. J. 3, 13 (2002); see also Lambda Legal, Schools, <http://www.lamdalegal.org/our-work/issues/youth/schools> (last visited Nov. 25, 2008) ("As more and more youth at earlier ages recognize and accept their sexual orientation or gender identity, their presence in schools has grown."); Ronald G. Russo, *The Extent of Public Education Nondiscrimination Policy Protections for Lesbian, Gay, Bisexual, and Transgender Students: A National Study*, 41 URB. EDUC. 115, 119 (2006) ("Throughout our nation's public schools there is an ever-growing number of LGBT students 'coming out of

influenced students to form GSAs in order to address the special needs of LGBTQ students at school. The first public school GSA emerged in 1989.²² Now, over 4,000 GSAs exist in secondary schools throughout the United States.²³ The goals of GSAs include establishing safe spaces to talk about previous anti-LGBTQ harassment and promoting tolerance and acceptance on the basis of sexual orientation and gender identity at school.²⁴

While the number of GSAs in secondary schools has increased, school districts have adopted three types of policies to prevent LGBTQ students from forming GSAs.²⁵ First, some school districts have adopted policies that prohibit student organizations from “engaging in any activity contrary to law, School Board policy, and the adopted core values, or

the closet,’ declaring their sexual orientations.”). Researchers posit that this is attributable to the greater visibility of the LGBTQ movement and young people’s willingness to assert their sexual orientations and gender identities at younger ages. *See, e.g.*, Eric Rofes, *Opening Up the Classroom Closet: Responding to the Educational Needs of Gay and Lesbian Youth*, 59 HARV. EDUC. REV. 444 (1989).

²² Gay, Lesbian, and Straight Education Network (GLSEN), Background and Information about Gay-Straight Alliances, <http://www.glsen.org/cgi-bin/iowa/all/library/record/2336.html> (last visited Nov. 9, 2008).

²³ *Id.*

²⁴ MELINDA MICELI, *STANDING OUT, STANDING TOGETHER: THE SOCIAL AND POLITICAL IMPACT OF GAY-STRAIGHT ALLIANCES* 27 (2005) (“Gay-straight alliance clubs emerged in schools out of the desire of lesbian, gay, bisexual and straight students to create a more visible cultural and structural change that might improve the environment of fear, intolerance, and discrimination of LGBT people in which all students existed.”); *see also, e.g.*, La Jolla High School Gay-Straight Alliance, Mission Statement, http://www.angelfire.com/super2/ljhs_gsa/mission.html (last visited Dec. 29, 2008); Marell Brooks, *LHS Gay-Straight Alliance receives grant*, THE LOMPOC RECORD, Feb. 10, 2006, available at <http://www.lompocrecord.com/articles/2006/02/10/news/news08.txt> (“[The GSA’s] mission is to promote equality and foster sensitivity about sexual orientation. The club provides a safe and productive atmosphere in which members can positively contribute to the school culture.”).

²⁵ A fourth type of policy ban not discussed in this paper prohibited teachers from “encouraging, condoning or supporting illegal conduct.” These laws prohibited GSAs in schools on the grounds that homosexual sodomy was illegal by state law. *See, e.g.*, James Brooke, *To Be Young, Gay and Going to High School in Utah*, N.Y. TIMES, Feb. 28, 1996, at B8; Jason B. McCreary, *Getting Clubbed Over a Club*, 4 J. CASES IN EDUC. LEADERSHIP 37 (2001). These policy bans are no longer legitimate after the Supreme Court’s decision in *Lawrence v. Texas*, 539 U.S. 558 (2003), which held criminal sodomy statutes unconstitutional.

school rules.”²⁶ Under this policy model, schools maintain vast discretion to define which student organizations are antithetical to their educational missions, values, or policies. These school districts view GSAs as inimical to school values, or, in schools that enforce abstinence policies, as violations of school rules and policy.²⁷

Second, school districts have adopted policies that prohibit the formation of clubs that are “sex based,” “encourage or promote sexual activity,”²⁸ or are “sexually oriented, gay/straight or otherwise.”²⁹ These school districts then contend that they may prohibit GSAs because the organizations are predominantly rooted in the sexualities or sexual orientations of student members.³⁰ For instance, the Okeechobee County School Board of Okeechobee, Florida enacted a policy in October 2007 banning any club that is “sex-based or based upon any sexual grouping,

²⁶ See Chesterfield County Public School, Community Briefing from the School Board, at 3 (March 14, 2006), available at www.chesterfield.k12.va.us/CCPS/school_board/files/Board_club_policy.doc.

²⁷ See *id.* The School Board of Chesterfield County, Virginia adopted such a policy in 2006. Carrie Tyer, Letter to the Editor, *Schools Need Not Allow Gay-Straight Alliance Clubs*, FREE LANCE-STAR, May 18, 2006, available at <http://www.fredericksburg.com/News/FLS/2006/052006/05182006/190816>.

²⁸ See, e.g., Amy Biegelsen, *Bills Relating to Student Clubs, Sex Ed Fail to Pass*, VIRGINIAN-PILOT, Mar. 17, 2006, at E3.

²⁹ Rachel Simonsen, *Okeechobee District Bans ‘Sex-Based’ Clubs*, PALM BEACH POST, Oct. 11, 2007, at 2B. In August 2006, Rowan-Salisbury Board of Education in North Carolina adopted a similarly worded policy to prevent the formation of GSAs. Rowan-Salisbury Bd. of Educ. Meeting Minutes at 3-4, Apr. 10, 2006, available at <http://www.rss.k12.nc.us/BOE/0506BOEMnts/BOE4-10-06.pdf>.

³⁰ Interestingly, conservative Christians have also criticized these policies as overbroad:

While successful in shutting out GSAs from school campuses, this approach is not ideal because it prevents the formation of clubs that support and promote healthy and responsible sexual decision-making. In the last decade, abstinence clubs, which encourage students to postpone sexual relationships until marriage, have been surfacing in schools. Several Christian student clubs also have members take abstinence pledges. A ban against sexuality clubs could silence the healthy message these groups extend to teens.

Stephanie Evans, *Gay-Straight Alliance Clubs: How Homosexual Student Organizations Harm Our Schools*, FINDINGS (N.C. Fam. Pol’y Council), Sept. 2006, at 1 available at <http://www.ncfpc.org/PolicyPapers/Findings%200611-GSA.pdf>.

orientation or activity of any kind.” Officials said that the new policy was aimed to prevent student groups that challenged the district’s abstinence-only education from meeting.³¹

Finally, some school districts have gone as far as banning or attempting to ban all student organizations that do not directly relate to the school’s curriculum to prevent GSAs from forming.³² Schools have primarily resorted to adopting these policies in order to avoid triggering the obligations of the Equal Access Act.³³ For instance, after a high school principal threatened to resign over the creation of a GSA, a South Carolina school district held a vote to determine whether they should ban all nonacademic and non-athletic clubs to legally prevent the GSA from organizing.³⁴

LGBTQ students typically pursue two claims against schools that prohibit them from forming GSAs: first, LGBTQ students almost always

³¹ See Simmons, *supra* note 29.

³² See, e.g., *East High Gay/Straight Alliance v. Bd. of Educ. of Salt Lake City Sch. Dist.*, 81 F. Supp. 2d 1166 (C.D. Utah 1999). Part IV.C of this article discusses limitations on the permissibility of this type of policy ban under the First Amendment.

³³ 20 U.S.C. §§ 4071-4074 (2006). The Equal Access Act provides:

it shall be unlawful for any public secondary school which receives Federal financial assistance and which has a limited open forum to deny equal access or a fair opportunity to, or to discriminate against, any students who wish to conduct a meeting within that limited open forum on the basis of the religious, political, philosophical, or other content of the speech at such meetings.

20 U.S.C. § 4071(a) (2006). Congress did not define the term “noncurriculum.” However, in *Board of Education of the Westside Community Schools v. Mergens*, 496 U.S. 226, 237-39 (1990), the Supreme Court defined the term to include any student organization that does not directly relate to the body of courses offered at the school. The Court held that a student organization directly relates to the curriculum if: “[1] the subject matter is actually taught, or will soon be taught, in a regularly offered course; [2] if the subject matter of the group concerns the body of courses as a whole; [3] if participation in the group is required for a particular course; or [4] if participation in the group results in academic credit.” *Id.* at 239-40.

³⁴ *School May Ban All Clubs to Prevent Gay/Straight Alliance*, NBCAUGUSTA.COM, June 20, 2008, <http://www.nbcaugusta.com/news/southcarolina/20608374.html>. The district ultimately voted against the ban, choosing instead to adopt a policy allowing parents to opt out of allowing their children to join any student organization, and the principal later announced that he would not resign. *S.C. Principal Rethinks Resignation Over Gay Club*, NBCAUGUSTA.COM, Dec. 5, 2008, <http://www.nbcaugusta.com/news/southcarolina/35634859.html>.

assert that banning GSAs violates the Federal Equal Access Act,³⁵ and second, LGBTQ students also usually claim that banning GSAs violates the First Amendment.³⁶ In 1999, the first federal district court addressed the legitimacy of a GSA ban under the Equal Access Act and the First Amendment.³⁷ Since then, of the nine federal district courts to assess the legitimacy of GSA bans under the Equal Access Act or the First Amendment, only three have addressed the First Amendment claim.³⁸ Other courts have found it unnecessary to rule on the First Amendment issue because the cases were resolvable solely on statutory equal access grounds.³⁹ Judicial avoidance of this issue has led to the underdevelopment of GSA First Amendment jurisprudence. Furthermore, more schools are

³⁵ 20 U.S.C. §§ 4071-74 (2006). *See supra* note 2 and accompanying text; *see also infra* notes 40-41 and accompanying text.

³⁶ *See supra* note 3 and accompanying text; *see also infra* notes 39-40 and accompanying text.

³⁷ *See East High Gay/Straight Alliance*, 81 F. Supp. 2d 1166; Todd A. DeMitchell & Richard Fossey, *Student Speech: School Boards, Gay/Straight Alliances, and the Equal Access Act*, 2008 B.Y.U. EDUC. & L.J. 89, 98-99 (2008) (“*East High Gay/Straight Alliance v. Board of Education of Salt Lake City School District* was the first reported EAA case involving gay-related school groups.”).

³⁸ The three cases that have addressed the First Amendment claim are *East High Gay/Straight Alliance*, 81 F. Supp. 2d 1166; *Caudillo v. Lubbock Indep. Sch. Dist.*, 311 F. Supp. 2d 550 (N.D. Tex. 2004); and *Gonzalez v. Sch. Bd. Of Okeechobee County*, 571 F. Supp. 2d 1257, 1269 (S.D. Fla. 2008). Three courts were only faced with the Equal Access claim during litigation. *See Franklin Cent. Gay/Straight Alliance v. Franklin Twp. Cmty. Sch. Corp.*, No. IP01-1518 C-M/S, 2002 WL 32097530 (S.D. Ind. Aug. 30, 2002); *Straights and Gays for Equality v. Osseo Area Sch.-Dist.* No. 279, 471 F.3d 908 (8th Cir. 2006); *Gay-Straight Alliance of Okeechobee High Sch. v. Sch. Bd. of Okeechobee County*, 483 F. Supp. 2d 1224 (S.D. Fla. 2007).

³⁹ Three courts faced both equal access and First Amendment claims during litigation, but explicitly avoided addressing the First Amendment claim because the cases could be addressed solely on equal access grounds. *See Colin v. Orange Unified Sch. Dist.*, 83 F. Supp. 2d 1135 (C.D. Cal. 2000); *Boyd County High Sch. Gay Straight Alliance v. Bd. of Educ. of Boyd County*, 258 F. Supp. 2d 667 (E.D. Ky. 2003); *White County High Sch. Peers in Diverse Educ. v. White County Sch. Dist.*, No. 2:06-CV-29-WCO, 2006 WL 1991990 (N.D. Ga. July 14, 2006). The canon of constitutional avoidance is frequently invoked in cases involving both statutory and constitutional interpretation. *See, e.g.*, *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (“Another rule of statutory construction . . . is . . . where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress.”). *See generally*, Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189, 1202-17 (2006).

shrewdly avoiding triggering the Equal Access Act by only permitting curriculum-related student organizations to meet at school.⁴⁰ Therefore, it will become increasingly difficult for courts to address GSA cases solely on equal access grounds; they will be pushed to address the constitutional question.

II. FIRST AMENDMENT STUDENT SPEECH FRAMEWORK BEFORE *MORSE V. FREDERICK*: THE INCREASING JUDICIAL DEFERENCE TO SCHOOLS' BASIC EDUCATIONAL MISSIONS

Prior to *Morse v. Frederick*,⁴¹ three Supreme Court cases, collectively known as the *Tinker-Fraser-Kuhlmeier* trilogy,⁴² defined the scope of deference that schools were afforded under the First Amendment in limiting student expression. Subpart A focuses on the foundational case on First Amendment student speech jurisprudence, *Tinker v. Des Moines Independent School District*,⁴³ where the Supreme Court adopted the bright-line rule that a school may only limit student expression when it “materially and substantially interfere[s] with the requirements of appropriate discipline in the operation of the school.”⁴⁴ Later, in *Bethel School District No. 403 v. Fraser*⁴⁵ (as discussed in Subpart B *infra*) and *Hazelwood School District v. Kuhlmeier*⁴⁶ (as discussed in Subpart C *infra*) the Court adopted two exceptions to the *Tinker* rule, granting schools greater authority to limit student expression that is “offensively lewd and indecent”⁴⁷ or expression that is school-sponsored.⁴⁸ In granting this increased authority, the Court

⁴⁰ See *supra* note 5 and accompanying text.

⁴¹ 127 S. Ct. 2618 (2007).

⁴² See, e.g., *Guiles v. Marineau*, 461 F.3d 320, 324 (2d Cir. 2006) (“[W]e discuss *Tinker*, *Fraser*, and *Hazelwood*, a trilogy of cases in which the Supreme Court enunciated standards for assessing whether a school’s censorship of student speech is constitutionally permissible.”).

⁴³ 393 U.S. 503 (1969).

⁴⁴ *Id.* at 509 (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (1966)).

⁴⁵ 478 U.S. 675 (1986).

⁴⁶ 484 U.S. 260 (1988).

⁴⁷ *Fraser*, 478 U.S. at 685.

⁴⁸ *Kuhlmeier*, 484 U.S. at 273.

deferred to schools' policy decisions regarding their basic educational missions.⁴⁹ In neither case did the Court articulate the bounds of the deference that it granted schools to limit student expression that violated their educational missions, resulting in uncertainty over how to apply *Fraser* and *Kuhlmeier* during future litigation.⁵⁰

A. *Tinker v. Des Moines Independent School District*

Tinker is the foundational case in First Amendment student speech jurisprudence.⁵¹ In *Tinker*, the student petitioners were suspended after wearing black armbands to school in protest of the Vietnam War.⁵² School administrators had previously adopted a policy requiring students to remove armbands protesting the war. If the students refused, they would be suspended.⁵³ The school district argued that it ought to have ample discretion to limit student expression that could be reasonably anticipated to lead to a school disturbance.⁵⁴ According to the school, the armbands would lead to such a disturbance.⁵⁵

The Supreme Court upheld the students' right to wear the armbands and rejected the notion that schools have unfettered authority to limit

⁴⁹ See, e.g., *Governor Wentworth Reg'l Sch. Dist. v. Hendrickson*, 421 F. Supp. 2d 410, 420 (D.N.H. 2006) (“[*Fraser* and *Kuhlmeier*] each clearly recognize the fundamental importance of the educational mission entrusted to the public school system, and the critical necessity of maintaining an orderly environment in which learning can take place.”).

⁵⁰ This uncertainty is illustrated by the parties' conflicting interpretations of *Fraser* and *Kuhlmeier* in *Morse v. Frederick*, 127 S. Ct. 2618 (2007). See *infra* Part III.A.

⁵¹ Chemerinsky, *supra* note 16 at 527 (“*Tinker v. Des Moines Independent Community School District* is the most important Supreme Court case in history protecting the constitutional rights of students.”).

⁵² *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 504 (1969).

⁵³ *Id.*

⁵⁴ Brief for Respondents at *35, *Tinker*, 393 U.S. 503, 1968 WL 94384.

⁵⁵ *Tinker*, 393 U.S. at 508-09. The school district also highlighted that a student suspended from another school district wearing the armband was subjected to physical violence. Brief for Respondents, *supra* note 54, at *33. Moreover, a former student within the school district had been killed in the Vietnam War. The school district believed that a disturbance might erupt because some of the former student's friends were still in school. *Id.* at *11.

student expression.⁵⁶ The Court famously stated that “[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate. This has been the unmistakable holding of this Court for almost 50 years.”⁵⁷ The Court held that in order for schools to ban student speech they have the burden of showing that prohibiting such speech is motivated by “more than a mere desire to avoid the discomfort and unpleasantness that always accompan[ies] an unpopular viewpoint.”⁵⁸ On these grounds, the Court adopted a less deferential rule, requiring expression to “materially and substantially interfere with the requirements of appropriate discipline in the operation of the school” in order for schools to prohibit it.⁵⁹ The Court found no evidence that wearing the armbands had caused a disturbance on school grounds or resulted in threats or acts of violence within the school district.⁶⁰

⁵⁶ *Tinker*, 393 U.S. at 511 (“In our system state-operated schools may not be enclaves of totalitarianism. Schools officials do not possess absolute authority over their students. Students in school as well as out of school are ‘persons’ under our Constitution.”); cf. Edward T. Ramey, *Student Expression: The Legacy of Tinker in the Wake of Columbine*, 77 DENV. U. L. REV. 699, 699 (2000) (“Tinker represents a predictable judicial response to the inevitable excesses of public school administrators accorded too much unquestioned deference in matters touching upon individual liberties.”).

⁵⁷ *Tinker*, 393 U.S. at 506; Chemerinsky, *supra* note 16 (“This sentence powerfully conveys schools are not institutions immune from constitutional scrutiny: students retain their constitutional freedoms even when they cross the threshold into the school.”).

⁵⁸ *Tinker*, 393 U.S. at 508. The Court stated:

[I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority’s opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says that we must take this risk.

Id. (citing *Terminiello v. Chicago*, 337 US 1 (1949)).

⁵⁹ *Id.* at 509.

⁶⁰ Chemerinsky, *supra* note 16, at 533 (“The final theme expressed in *Tinker* is the need for careful judicial review to ensure the school has met this heavy burden. Repeatedly throughout the opinion, Justice Fortas emphasized the lack of evidence to support punishing the speech.”).

B. *Bethel v. Fraser School District No. 403*

The *Tinker* rule guided courts' assessments of student speech prohibitions until *Bethel v. Fraser School District No. 403*.⁶¹ In *Fraser*, the Supreme Court circumvented *Tinker* and adopted a new rule giving school officials greater authority to limit "offensively lewd and indecent" student speech.⁶²

The student respondent was suspended after delivering a speech during a school assembly nominating a fellow student for elective office.⁶³ During the speech, the candidate was referred to in terms of an "elaborate, graphic, and explicit sexual metaphor."⁶⁴ The school district maintained a policy banning use of obscene language at school.⁶⁵ Many of the students in the audience were fourteen years old and were required either to attend the assembly or report to study hall.⁶⁶

In defending its decision to suspend the student, the school district argued that *Tinker* was inapplicable because the decision involved discrimination against a particular political viewpoint, not a school's ability to regulate indecent or offensive forms of student expression.⁶⁷ The school district emphasized the special characteristics of the public school environment and claimed that it "had authority to regulate Fraser's indecent and offensive sexual talk because it has the responsibility to inculcate community standards of decency and civility in student discourse."⁶⁸ In light of this responsibility, the district argued that the "maintenance of standards of decency in student discourse is an appropriate goal of the educational process."⁶⁹ The school district posited that prohibiting the

⁶¹ 478 U.S. 675 (1986).

⁶² *Id.* at 685.

⁶³ *Id.* at 677-78.

⁶⁴ *Id.* at 678.

⁶⁵ *Id.* at 680. Interestingly, the policy followed the language in *Tinker* and provided that "[c]onduct which materially and substantially interferes with the educational process is prohibited, including the use of obscene, profane language or gestures." *Id.*

⁶⁶ *Id.*

⁶⁷ Brief of Petitioners at *13, *Fraser*, 478 U.S. 675 (No. 1034), 1985 WL 667975.

⁶⁸ *Id.* at *7.

⁶⁹ *Id.* at *17.

student's speech was necessary to dispel impressions that the school approved of speech that it considered incompatible with its basic educational mission.⁷⁰ Consequently, the school district advocated for a more deferential standard to apply to sexually indecent or offensively lewd student speech, contending that its restrictions were "reasonable in light of the surrounding circumstances."⁷¹

The Supreme Court agreed with the petitioner that *Tinker* permits students to engage in a "nondisruptive, passive expression of a political viewpoint," but does not "concern speech or action that intrudes upon the work of schools or the rights of other students."⁷² In upholding the school district's ability to prohibit the student's expression, the Court emphasized the special role that public education plays in preparing students for citizenship and in "inculcat[ing] the habits and manners of civility."⁷³ The *Fraser* Court did not articulate which modes of expression were appropriate to further "habits and manners of civility," but affirmed that prohibiting vulgar and offensive terms in public discourse was within this realm and an appropriate function of schools.⁷⁴ Moreover, the Court acknowledged the "interest in protecting minors from exposure to vulgar and offensive spoken language."⁷⁵

The Court also deferred to school districts' judgments to determine whether particular expression is vulgar, lewd, or offensive and thus

⁷⁰ The school district specifically claimed that "[a] public school has an 'important interest in avoiding the impression that it has endorsed a viewpoint at variance with its educational program.'" *Id.* at *25 (quoting *Seyfried v. Walton*, 668 F.2d 214, 216 (3d Cir. 1981)).

⁷¹ *Id.* at *17.

⁷² *Fraser*, 478 U.S. at 680 (citing *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503, 508 (1969)).

⁷³ *Id.* at 681.

⁷⁴ *Id.* at 681-82.

⁷⁵ *Id.* at 684 (referring to *FCC v. Pacifica Found.*, 438 U.S. 726 (1978)).

contradictory to their basic educational missions.⁷⁶ Although the *Fraser* Court did not explicitly reason why it granted this deference, one possible explanation is that the Court viewed school districts to have more expertise in defining their particular educational missions. Because school districts not only have the ability to construct school policies, but also have stronger connections with the local community, including parents, it follows that they would be in a better position than the courts to assess community standards.⁷⁷

The *Fraser* Court's decision to defer to schools' definitions of indecent or offensively lewd expression that contradicts their basic educational missions created uncertainties for future litigation. For instance, if the responsibility to "inculcate the habits and manners of civility"⁷⁸ was so fundamental, should it not override student speech protection in other contexts not involving lewd or indecent speech?⁷⁹ Does *Fraser* allow for a

⁷⁶ The First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech such as respondent's would undermine the school's basic educational mission. It was perfectly appropriate for the school to disassociate itself to make the point that vulgar speech and lewd conduct is wholly inconsistent with the 'fundamental values' of public school education.

Id. at 685-86. *See also* Boroff v. Van Wert City Bd. of Educ, 220 F.3d 465, 468 (6th Cir. 2000) ("The [*Fraser*] Court ultimately held that the school district had the authority to determine that the vulgar and lewd speech at issue would undermine the school's basic educational mission.").

⁷⁷ In fact, the Third Circuit has adopted this reasoning to defer to schools' basic educational missions:

[The teacher] was vested with the authority, unconstrained by school regulations, to determine the manner in which the classes should be conducted so as to best serve the educational mission of the school. This required her to exercise her discretion Her exercise of this discretion is entitled to substantial deference from this Court not only because she is a professional educator, but also because she is in a far better position than we to predict how students and their parents are likely to respond to the way she conducts her class in any given situation and what impact those responses may have on the ongoing educational process.

C.H. v. Oliva, 195 F.3d 167, 174 (3d Cir. 1999).

⁷⁸ *Fraser*, 478 U.S. at 681.

⁷⁹ For example, in *Denno v. School Board of Volusia County*, the Eleventh Circuit read the school's responsibility to inculcate values of civility, as declared in *Fraser*, to permit a school to ban displays of the Confederate flag during school hours on school

school to define its educational mission by adopting school policies and then limit any student expression that violates these policies? Can schools ban student speech that can be reasonably construed to promote illegal behavior, such as drug or alcohol use? Or, can a school limit a student's expression only if there are legitimate or compelling interests in support of prohibiting it? Conflicting interpretations of *Fraser*'s holding in the appellate briefs in *Morse v. Frederick* illustrate that these uncertainties still arise in litigation.⁸⁰

C. *Hazelwood School District v. Kuhlmeier*

In *Kuhlmeier*, the Supreme Court again circumvented *Tinker* to expand schools' authority to limit student expression that reasonably might be perceived to bear the school's imprimatur.⁸¹ The respondent students were staff writers for the school's newspaper.⁸² The principal of the school always reviewed articles prior to publication.⁸³ During prior review, the principal objected to and excised two articles from the newspaper, one dealing with students' experiences with pregnancy and the other discussing the impact of divorce on students at school.⁸⁴

Before addressing the specific legal issue at hand, the Court revisited *Fraser* and affirmed the principle that school districts have the ability to limit expression that contradicts their "basic educational mission[s]" and reaffirmed that "[t]he determination of what manner of speech in the classroom or in school assembly is inappropriate properly

premises. 218 F.3d 1267, 1274-75 (11th Cir. 2000); see also *Bowler v. Town of Hudson*, 514 F. Supp. 2d 168, 179 (D. Mass. 2007) ("Several courts have read *Fraser* to support censorship of student speech that was not 'lewd, vulgar, or obscene,' but that could reasonably be interpreted to promote illegal or 'immoral' activities, including suicide, murder, and drugs." (quoting *Fraser*, 478 U.S. at 683)).

⁸⁰ See *infra* Part III.B.

⁸¹ *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 272-73 (1988); see Bruce C. Hafen, *Hazelwood School District and the Role of First Amendment Institutions*, 1988 DUKE L.J. 685, 692-99 for a discussion on how *Kuhlmeier* affords schools more deference to limit student expression than *Tinker*; see also Chemerinsky, *supra* note 16, at 537 ("The Court went even further in its deference to school authorities in *Hazelwood School District v. Kuhlmeier*.").

⁸² *Kuhlmeier*, 484 U.S. at 262.

⁸³ *Id.* at 263.

⁸⁴ *Id.*

rests with the school board, rather than with the federal courts.”⁸⁵ The Court then rejected the application of the *Tinker* rule, noting that *Tinker* “addresses educators’ ability to silence a student’s personal expression that happens to occur on school premises . . . [not] educators’ authority over school-sponsored publications, theatrical productions, and other expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school.”⁸⁶ The Court found that the latter category of expressive activities is part of the school curriculum, not forums of public expression, and is designed to “impart particular knowledge or skills to student participants and audiences.”⁸⁷

The Court gave schools greater authority to limit expressive activities that bore the school’s imprimatur because of the connection between these expressive activities and the school’s curriculum. This greater authority served to “assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school.”⁸⁸ The *Kuhlmeier* Court also invoked the same reasoning as it did in *Fraser*, claiming that schools

⁸⁵ *Id.* at 267 (internal citations omitted). The Court also stated:

We have nonetheless recognized that the 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.” 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. Accordingly, we held in *Fraser* that a student could be disciplined for having delivered a speech that was “sexually explicit” but not legally obscene at an official school assembly, because the school was entitled to “disassociate itself” from the speech in a manner that would demonstrate to others that such vulgarity is “wholly inconsistent with the ‘fundamental values’ of public school education.” We thus recognized that “[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. It is in this context that respondents’ First Amendment claims must be considered.

Id. at 266-67 (internal citations omitted).

⁸⁶ *Id.* at 271.

⁸⁷ *Id.*

⁸⁸ *Id.*

must also retain the authority to refuse to sponsor student speech that might reasonably be perceived to advocate drug or alcohol use, irresponsible sex, or conduct otherwise inconsistent with the “shared values of a civilized social order,” or to associate the school with any position other than neutrality on matters of political controversy.⁸⁹

Unlike the *Tinker* standard, which requires a high showing of a “material and substantial interference” in order to limit student expression, the *Kuhlmeier* rule allowed schools to limit school-sponsored expression as long as the limitation was “reasonably related to pedagogical concerns.”⁹⁰

Although *Kuhlmeier* applies to a narrowly defined set of school-sponsored expressive activities, the deferential reasoning of the Court, which is similar to the Court’s reasoning in *Fraser*, raised challenges for future cases. *Kuhlmeier* undoubtedly affirmed the principle in *Fraser* that in light of schools’ special responsibility to inculcate values, they should be given greater deference to limit particular categories of expression when they contradict schools’ basic educational missions. However, the precise scope of this deference remained unclear, thereby setting the stage for *Morse v. Frederick*. The parties’ positions in *Morse* were shaped by their conflicting interpretations of the level of deference *Kuhlmeier* affords schools to limit speech violating their basic educational missions. These conflicting interpretations placed pressure on the *Morse* Court to clarify the scope of the deference given to schools under such circumstances.

III. MORSE V. FREDERICK: A NEW RESTRAINT ON THE DEFERENCE AFFORDED TO SCHOOLS TO LIMIT STUDENT EXPRESSION ANTITHETICAL TO THEIR BASIC EDUCATIONAL MISSIONS

Part II demonstrated that after *Tinker*, the Supreme Court increasingly granted schools authority to limit student expression that violated their self-defined basic educational missions. This Part focuses on the Supreme Court’s most recent student free speech decision, *Morse v. Frederick*, where the Court held that under the First Amendment, schools may limit student expression that is “reasonably viewed as promoting illegal drug use.”⁹¹ Subpart A provides a brief synopsis of the facts in

⁸⁹ *Id.* at 272 (internal citations omitted).

⁹⁰ *Id.* at 270, 273.

⁹¹ *Morse v. Frederick*, 127 S. Ct. 2618, 2629 (2007).

Morse for contextual purposes. Subpart B focuses on the school district's position in *Morse*, which advocated for schools to have broad discretion in limiting student expression that contradicted their basic educational missions. Subpart C focuses on the Court's holding in *Morse*, and more specifically, understanding the decision as a constraint on the amount of deference afforded to schools to limit student expression that contradicts their basic educational missions.

A. Relevant Facts

In *Morse*, the high school student respondent received a ten-day suspension for holding a banner in front of the school displaying the message "BONG HiTS 4 JESUS" as the Olympic Torch Relay passed the school.⁹² The principal allowed students to leave class to observe the relay as an approved social event or class trip.⁹³ The banner was easily readable by students on the other side of the street. School policy prohibited "any assembly or public expression that . . . advocates the use of substances that are illegal to minors."⁹⁴ The student filed suit, alleging that the suspension violated his First Amendment rights.⁹⁵

B. The School District's Interpretation of the Role of Schools' Basic Educational Missions in Limiting Student Expression

The uncertainty over the appropriate bounds of deference that schools should be afforded to limit student expression that contradicts their basic educational missions was a major area of disagreement for the parties to the case, as shown in their appellate briefs and oral arguments before the Supreme Court. The school district in *Morse* advocated for a broad rule that "allows the school board considerable discretion both in identifying the educational mission [of the school] and to prevent disruption of that mission."⁹⁶ The school district argued that the "special characteristics" of public school settings require deference to schools⁹⁷ and emphasized that

⁹² *Morse*, 127 S. Ct. at 2622.

⁹³ *Id.*

⁹⁴ *Id.* at 2623.

⁹⁵ *Id.*

⁹⁶ Transcript of Oral Argument at *5, *Morse*, 127 S. Ct. 2618 (No. 06-278), 2007 WL 880748.

⁹⁷ Brief for Petitioner, *supra* note 20, at *18-25.

public schools have a special responsibility to prepare students for citizenship and teach them the “boundaries of socially appropriate behavior.”⁹⁸ The school district noted that this responsibility justified the Court’s deferential approach to schools’ basic educational missions in *Fraser* and *Kuhlmeier*.⁹⁹

However, the school district argued for extending *Fraser* to new grounds by applying the decision to the content of student expression, even though the *Fraser* Court explicitly limited its holding to the form of student expression. The school district emphasized dicta in the *Fraser* dissent, which stated that “a school faculty must regulate the content as well as the style of student speech in carrying out its educational mission.”¹⁰⁰ During oral argument before the Supreme Court, Ken Starr, lead counsel for the school district, also argued that it was permissible to limit the student’s speech based on its content.¹⁰¹ The school district contended that the school’s ability to adopt policies should influence the Court to conclude that the rule it advocated by the school district did not grant schools unfettered discretion to limit school speech.¹⁰² However, as amici briefs in support of the student highlight, this rule would allow student expression to “be

⁹⁸ *Id.* at *18 (quoting *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986)).

⁹⁹ *Id.*

¹⁰⁰ *Id.* at *23-24. However, amici for the student respondent emphasized that “[i]t was the objectionable style of his speech, not its message or his viewpoint, which justified the school’s prohibition.” Brief for Lambda Legal Def. & Educ. Fund, *supra* note 8, at *14 (citing *Fraser*, 478 U.S. at 683).

¹⁰¹ The following excerpt from oral arguments illustrates this point:

Justice Stevens: Let me just clear up one thing to be 100% sure I understand your position. It does—the message is the critical part of this case. If it was a totally neutral message on a 15-foot sign, that would be okay. You’re not saying 15-foot signs are disruptive . . . And so we’re focusing on the message and that’s the whole crux of this case.

Mr. Starr: That’s why this case is here because of the message.

Transcript of Oral Argument, *supra* note 96, at *13.

¹⁰² In *Morse*, the school had a policy that specifically prohibited “any assembly or public expression that . . . advocates the use of substances that are illegal to minors.” *Morse v. Frederick*, 127 S. Ct. 2618, 2623 (2007). In oral arguments, Ken Starr stated, “here we have a written policy which does in fact respond to concerns about the exercise of standardless discretion.” Transcript of Oral Argument, *supra* note 96, at *13.

prohibited . . . simply because school officials disapproved of the speech or because the school board drafted a policy.”¹⁰³

The school district also tried to extend *Kuhlmeier* to new grounds by emphasizing dicta in *Kuhlmeier*, which it interpreted as granting authority for schools to limit student speech advocating illegal drug use.¹⁰⁴ The *Kuhlmeier* Court stated in dicta, “[a] school must also retain the authority to refuse to sponsor student speech that might reasonably be perceived to advocate drug or alcohol use, irresponsible sex, or conduct otherwise inconsistent with ‘the shared values of a civilized social order.’”¹⁰⁵ Although the school district acknowledged that *Kuhlmeier* applied to school-sponsored speech,¹⁰⁶ it highlighted that this dicta was supported by “*Fraser’s* emphasis on . . . school[] educational mission[s],”¹⁰⁷ which involved student expression that was not school-sponsored. Therefore, under the rule advocated by the school district, this dicta could be extended beyond school-sponsored speech to any expression that could “reasonably be perceived to advocate drug or alcohol use, irresponsible sex, or conduct otherwise inconsistent with ‘the shared values of a civilized social order’,”¹⁰⁸ or any school declaring that such expression contradicts their basic educational missions.¹⁰⁹

¹⁰³ Brief for Lambda Legal Def. & Educ. Fund, Inc., *supra* note 8, at *14; *see also* Brief of the Nat’l Coalition Against Censorship & the Am. Booksellers Found. for Free Expression as Amici Curiae Supporting Respondent at *22, *Morse*, 127 S. Ct. 2618 (No. 06-278), 2007 WL 550929 (“Reading *Fraser* to allow schools to prohibit any message or form of expression that the school determines to be offensive to its own principles essentially creates the same scenario the *Tinker* majority eschewed—confining student expression to those sentiments that are officially approved.”).

¹⁰⁴ Brief for Petitioner, *supra* note 20, at *25.

¹⁰⁵ *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 272 (1988).

¹⁰⁶ Brief for Petitioner, *supra* note 20, at *25.

¹⁰⁷ *Id.* (quoting *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986)).

¹⁰⁸ *Kuhlmeier*, 484 U.S. at 272.

¹⁰⁹ Transcript of Oral Argument at *5, *Morse*, 127 S. Ct. 2618 (No. 06-278), 2007 WL 880748.

C. The *Morse* Holding: A New Restraint on the Deference Afforded to Schools to Limit Student Speech Contradicting their Basic Educational Missions

Free speech advocates have criticized *Morse* because the Supreme Court once again circumvented *Tinker* to adopt a rule granting schools greater authority to limit student expression that is reasonably viewed to promote illegal drug use.¹¹⁰ *Morse* was not the optimal result for free speech advocates, who would have preferred for the Court to apply the constitutionally stringent “material or substantial” standard from *Tinker*, and to conclude that the student’s banner did not result in “material or substantial” disruption to the school setting.¹¹¹ However, there are some aspects of *Morse* that imply that the Court is shifting its perspective regarding the amount of deference that schools should be afforded to limit speech that contradicts their basic educational missions. Although the implications of this shift are not entirely clear, I predict that free speech advocates will find this shift praiseworthy.

The *Morse* Court extracted two principles from *Fraser* to guide its analysis.¹¹² First, that the constitutional rights of students in public schools were not coextensive with the rights of adults.¹¹³ Second, that “the mode of analysis set forth in *Tinker* is not absolute.”¹¹⁴ Although the Court concluded that the decision in *Kuhlmeier* was inapplicable because “no one would reasonably believe that the banner bore the school’s imprimatur,”¹¹⁵ it found *Kuhlmeier* to be instructive with regard to the two *Fraser* principles.¹¹⁶

¹¹⁰ American Civil Liberties Union, *ACLU Slams Supreme Court Decision in Student Free Speech Case*, June 25, 2007, <http://www.aclu.org/scotus/2006term/morsev.frederick/30230prs20070625.html>; see generally Hans Bader, *Bong Hits 4 Jesus: The First Amendment Takes a Hit*, 2007 CATO SUP. CT. REV. 133 (2007).

¹¹¹ Counsel for the student advocated for the *Tinker* rule to be applied. See Brief for Respondent at *10-13, *Morse v. Frederick*, 127 S. Ct. 2618 (2007) (No. 06-278), 2007 WL 579230.

¹¹² The *Morse* Court avoided clarifying the *Fraser* analysis because it was unnecessary to reach a decision on the merits of the case. *Morse*, 127 S. Ct. at 2626.

¹¹³ *Id.*

¹¹⁴ *Id.* at 2627.

¹¹⁵ *Id.*

¹¹⁶ *Id.* (“The case [*Kuhlmeier*] is nevertheless instructive because it confirms both principles cited above. *Kuhlmeier* acknowledged that schools may regulate some speech

The Court resolved some uncertainties about the level of deference that *Fraser* and *Kuhlmeier* afforded schools to limit student speech on the basis of their educational missions. In the majority opinion, Chief Justice Roberts acknowledged the breadth of the rule that the school district sought the Court to adopt and rejected it on those grounds.¹¹⁷ According to Roberts:

Petitioners urge us to adopt the broader rule that Frederick's speech is proscribable because it is plainly 'offensive' as that term is used in *Fraser*. We think this stretches *Fraser* too far; that case should not be read to encompass any speech that could fit under some definition of 'offensive.' After all, much political and religious speech might be perceived as offensive to some. The concern here is not that Frederick's speech was offensive, but that it was reasonably viewed as promoting illegal drug use.¹¹⁸

Roberts' analysis does not explicitly mention the basic educational mission argument. However, as discussed in Part III.B *supra*, the school district's proposed standard allowed school districts to define which student expression was "plainly 'offensive'" through its basic educational mission. Therefore, in essence, Roberts' analysis is a rejection of the basic educational mission argument.

In a concurring opinion joined by Justice Kennedy, Justice Alito provides a stronger and explicit rejection of the basic educational mission argument on the basis that such great deference could be easily manipulated:

[t]he "educational mission" of the public schools is defined by the elected and appointed public officials with the authority over the schools and by the school administrators and faculty. As a result, some public schools have defined their educational missions as including the inculcation of whatever political and social views are held by members of these groups. . . . The "educational mission" argument would give public school

'even though the government could not censor similar speech outside the school.' And, like *Fraser*, it confirms that the rule of *Tinker* is not the only basis for restricting student speech.") (internal citations omitted).

¹¹⁷ *Id.* at 2629. (internal citations omitted).

¹¹⁸ *Id.*

authorities a license to suppress speech on political and social issues based on disagreement with viewpoint expressed.¹¹⁹

Finally, Justice Stevens' dissenting opinion, joined by Justices Souter and Ginsburg, rejects the Court's holding as impermissible viewpoint discrimination.¹²⁰ The dissenting justices also reject the petitioner's broad rule granting deference to schools to limit student speech that contradicts their basic educational missions.¹²¹ Therefore, seven of the nine Supreme Court justices rejected the idea that *Fraser* and *Kuhlmeier* grant schools a blank slate to limit student expression simply because it contradicts their self-defined educational missions.

Despite rejecting the basic educational mission argument, the Court still afforded schools greater authority to limit student speech that is reasonably viewed as promoting illegal drug use. If the Court rejected the educational mission argument, what did it use to justify this increased discretion? The Court stated that it gave weight to "the special characteristics of the school environment, and the governmental interest in stopping student drug abuse—reflected in the policies of Congress and myriad school boards."¹²² At first glance, this analysis seems similar to the rationale employed by the Court in *Fraser* and *Kuhlmeier*. Therefore, it is plausible to read *Morse* as being similar to previous cases in which the Court circumvented *Tinker* in order to adopt more deferential rules permitting schools to limit particular categories of student speech. Given that *Morse* is a relatively recent decision, it is yet to be seen whether this will be *Morse*'s effect.

However, there is a perceptible difference between the mode of analysis employed by the Court in *Fraser* and *Kuhlmeier* and that applied in *Morse*. Even though the *Morse* Court viewed deterring student drug use as an "important—indeed, perhaps compelling interest,"¹²³ it did not merely accept the school district's position that deterring student drug use was an important educational goal. The Court acknowledged that school boards throughout the country had adopted policies prohibiting student speech that

¹¹⁹ *Id.* at 2637.

¹²⁰ *Id.* at 2644.

¹²¹ *Id.*

¹²² *Id.* at 2629.

¹²³ *Id.* at 2628.

promoted illegal drug use,¹²⁴ but the Court's primary focus was on objective findings independent of schools' subjective assessments. First, the Court emphasized the objective harms that result from drug use by young people, which the Court found to not only negatively affect student drug users, but also the student body and faculty.¹²⁵ Second, the Court highlighted that drug use among America's youth is a widespread and growing problem.¹²⁶ Third, the Court emphasized that, in response to the growing drug problem among America's youth, Congress had declared that educating students about the dangers of illegal drug use is part of a school's job.¹²⁷ This Congressional mandate applied to all public schools, not particular schools that choose to include this in the definitions of their basic educational missions.¹²⁸ Therefore, the Court seems to be shying away from deferring to schools' self-defined educational missions and focusing on objective factors independent of schools' subjective assessments or definitions.

Moreover, unlike *Fraser*, in which the Court explicitly deferred to the school district's definition of what was "offensively lewd or indecent," the majority in *Morse* extensively scrutinized the reasonableness of the principal's interpretation of the banner's message.¹²⁹ The Court offered and analyzed the merit of an array of possible interpretations that differed from the principal's interpretation. Although the Court agreed that the principal's interpretation was "a plainly reasonable one," this assessment would have been unnecessary if the Court had continued its trend of deferring to schools' subjective assessments of what contradicted their basic educational missions.

Therefore, *Morse* should be viewed as a new restraint on the deference that school districts are afforded to limit speech that contradicts their educational missions. Because *Morse* is a relatively recent decision, it

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.* ("Congress has declared that part of a school's job is educating students about the dangers of illegal drug use." *Id.* at 2621).

¹²⁸ The Court stated: "[Congress] has provided billions of dollars to support state and local drug-prevention programs, and required that schools receiving federal funds under the Safe and Drug-Free Schools and Communities Act of 1994 certify that their drug prevention programs 'convey a clear and consistent message that...the illegal use of drugs [is] wrong and harmful.' 20 U.S.C. § 7144(d)(6) (2000 ed., Supp. IV)" *Id.* at 2628.

¹²⁹ *Id.* at 2624-26.

is unclear how the Court's decision will affect the First Amendment protection of student expression.¹³⁰ As demonstrated in the next Part, despite this uncertainty, *Morse* is a potentially helpful First Amendment precedent for students attempting to form GSAs.

IV. *MORSE*'S IMPLICATIONS FOR GAY-STRAIGHT ALLIANCE FIRST AMENDMENT JURISPRUDENCE

This Part demonstrates how interpreting *Morse* as a rejection of the basic educational mission argument affects GSA First Amendment jurisprudence. After analyzing how the rejection of the basic educational mission argument affects the constitutional legitimacy of the three different types of policies that schools have adopted to prohibit GSAs, this Article concludes that *Morse* would strengthen LGBTQ students' claims that each of these policies violates the First Amendment.

A. School Policies Explicitly Prohibiting Student Speech Violating Schools' Self-Defined Rules and Values

The *Morse* Court's rejection of the basic educational mission argument supports the claim that banning GSAs by means of school district policies prohibiting students from "engaging in any activity contrary to law, School Board policy, and the adopted core values, or school rules"¹³¹ is unconstitutional. School districts have the authority under *Morse* to prohibit student speech promoting illegal drug use. They do not have the vast authority, however, to limit GSAs from forming merely because they believe that the organizations' missions offend their self-defined values or educational missions.

B. School Policies Explicitly Prohibiting "Sex-Based" Student Organizations

Morse's effect on the level of First Amendment protection afforded to students who attempt to form GSAs in schools with policies banning student groups that are "sex-based" or "based upon any sexual grouping, orientation or activity of any kind"¹³² is less clear. It is possible to interpret *Morse* as making it more difficult for LGBTQ students to challenge these

¹³⁰ See *supra* note 13 and accompanying text.

¹³¹ See *supra* notes 28 and 29 and accompanying text.

¹³² See Simmons, *supra* note 29.

policies as First Amendment violations. *Morse* could be extended as support for giving increased deference to school officials to limit speech that reasonably promotes illegal behavior. Some states, such as Texas, criminalize sexual conduct between minors if they are more than three years apart in age.¹³³ The federal district court in *Caudillo v. Lubbock Independent School District* relied upon the illegality of sexual conduct between minors to conclude that the school's prohibition of the GSA did not violate the Equal Access Act.¹³⁴ If *Morse* can be extended to grant schools increased authority to limit speech that can arguably constitutes promotion of illegal conduct, then it is possible that these statutes will lead courts to grant greater authority for schools to limit student expression in states that criminalize sexual conduct between minors.

This possibility is further supported by the fact that the *Morse* Court accepted the school district's view that *Kuhlmeier* supports the proposition that schools "must also retain the authority to refuse to sponsor student speech that might reasonably be perceived to advocate drug or alcohol use."¹³⁵ Even though the *Morse* Court rejected the argument that *Kuhlmeier* applied to the case, the Court still incorporated the "reasonable perception" language into the rule it constructed. The *Kuhlmeier* Court stated in dicta that schools must retain the authority to limit not only student speech that is reasonably viewed as promoting illegal drug use, but also speech that "might reasonably be perceived to advocate . . . irresponsible sex."¹³⁶ Therefore, if school districts view GSAs as reasonably promoting illegal same-sex sexual activity between minors, it is possible that *Morse* makes it more difficult for students to prove that prohibiting GSAs results in First Amendment violations.

However, there are aspects of *Morse* that may help LGBTQ students defeat policies banning student groups that are "sex-based" or "based upon any sexual grouping, orientation or activity of any kind."¹³⁷ Even if *Morse* can be extended to support the argument that schools have more deference to limit speech promoting illegal sexual conduct between minors, these policies are illegitimate because they also prohibit student expression advocating entirely legal activity. In fact, a GSA's mission to

¹³³ TEX. PENAL CODE ANN. § 21.11(a), (b) (Vernon 2003).

¹³⁴ 311 F. Supp. 2d 550, 565-66 (N.D. Tex. 2004).

¹³⁵ *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 272 (1988).

¹³⁶ *Id.*

¹³⁷ See Simmons, *supra* note 29.

promote tolerance and respect and to hold discussions on combating harassment and violence on the basis of sexual orientation within school advocates respect for the law. At least one lower court has already rejected the notion that a GSA violates school abstinence policies prohibiting discussions of sexual conduct on campus when the group's goal is to promote tolerance and respect.¹³⁸

Moreover, *Morse's* effect on the First Amendment legitimacy of these policies is contingent upon whether courts defer to schools' definitions of "sex-based." The *Morse* Court did not simply defer to the principal's view that the banner could be reasonably perceived as advocating illegal drug use. Rather, the Court dedicated an entire section of its opinion to exploring alternative interpretations of the banner before concluding that the principal's interpretation was reasonable.¹³⁹ In *Caudillo*, where the federal district court upheld a school district's ban of a GSA under the First Amendment, the organization had posted links to websites containing sexually explicit content.¹⁴⁰ Most GSAs primarily intend to promote tolerance and respect in schools on the basis of sexual orientation and gender identity.¹⁴¹ Therefore, to ban all GSAs under policies prohibiting "sex-based" clubs, the courts would have to defer to schools' views that by their nature GSAs will promote irresponsible sex between minors.

Existing case law suggests that it is unlikely that courts will interpret GSAs that serve to promote tolerance and respect as promoting irresponsible sex. One federal district court has held that the school's arguments "do not offer any clear reason to believe that the [GSA] would

¹³⁸ In *Gay-Straight Alliance of Okeechobee High School v. School Board of Okeechobee County*, 483 F. Supp. 2d 1224, 1228 (S.D. Fla. 2007), the school argued that it had the authority to prohibit a GSA from meeting on school grounds because the organization was a sex-based club and it had the authority to restrict sexual material from children. The district court held that the school could not rely on the name of the student organization to reach the conclusion that its discussions would contain sexually inappropriate content. *Id.* at 1229. Rather, the school had to proffer direct evidence that the organization was involved in sharing sexually explicit material or engaging in sexually explicit discussions. *Id.*

¹³⁹ *Morse v. Frederick*, 127 S. Ct. 2618, 2624-25 (2007).

¹⁴⁰ *Caudillo v. Lubbock Indep. Sch. Dist.*, 311 F. Supp. 2d 550, 556 (holding that the school had the authority to prohibit a GSA from meeting on school grounds when the organization declared "educat[ing] willing youth about safe sex, AIDS, hatred, etc." as one of its missions and posted links on its website to www.gay.com and www.youthresources.com, two sites that contained links to material with sexual content.).

¹⁴¹ See *supra* note 24 and accompanying text.

hinder the teaching of the benefits of abstinence at school. In fact, there is no apparent reason why the [GSA] might not be an advocate for abstinence in the school.”¹⁴² Rather than deferring to the school’s interpretation of “sex-based,” the court upheld that the school district had the burden of showing that the GSA would be “involved with accessing or sharing with other students obscene or explicit sexual material” and that this burden cannot be met by “an assumption or conclusion derived from the name of the club.”¹⁴³ The opinion in this prominent case suggests that some courts decline to defer to schools’ definitions of what is “sex-based.” *Morse* dealt with an individual banner; no prior case law had interpreted the expression’s meaning. However, existing case law rejecting schools’ biased definition of “sex-based,”¹⁴⁴ in addition to *Morse*’s increasing scrutiny towards school districts’ interpretations of student expression, supports the argument that *Morse* may ease the burden on LGBTQ students to prove that policies prohibiting “sex-based” clubs violate the First Amendment.

C. School Policies Prohibiting All Noncurricular Student Organizations

After *Morse*, school districts may still ban GSAs under the First Amendment if they prohibit all noncurricular student organizations from meeting on school grounds. In fact, in light of *Morse*’s effect on the other two types of policies that schools have adopted to ban GSAs, prohibiting all noncurricular student groups seems to be the most viable legal option for school districts to ban GSAs. As this Subpart demonstrates, however, this is not necessarily a negative result for LGBTQ students or free speech advocates. By interpreting *Morse* as a rejection of the basic educational mission argument, schools are now forced to take the extreme and disfavored measure of banning all noncurricular student groups in order to prohibit a GSA from forming.

School administrators who oppose GSAs have acknowledged that banning all noncurricular student clubs from meeting is “a very comprehensive . . . very serious step.”¹⁴⁵ One board of education member in a school district that was considering a ban on all student groups to prevent

¹⁴² *Gay-Straight Alliance of Okeechobee High Sch.*, 483 F. Supp. 2d at 1229.

¹⁴³ *Id.*

¹⁴⁴ *Id.* at 1228-29.

¹⁴⁵ Dyana Bagby, *Gay Student Club Under Fire in Madison County*, SOUTHERN VOICE, Sept. 23, 2005, available at http://www.sovo.com/2005/9-23/news/localnews/localnews_gaygroups.cfm.

a GSA from forming publicly stated that taking such a drastic measure would not “be fair” to the entire student body.¹⁴⁶ Some students have even held organized walkout protests after their school districts banned all noncurricular clubs to prohibit a GSA from forming at their school.¹⁴⁷ Parents have also expressed concerns that “banning all clubs would put students applying to college at a disadvantage.”¹⁴⁸

Existing case law also supports the notion that schools cannot avoid these concerns by adopting written policies prohibiting all noncurricular groups from meeting at school, banning GSAs from meeting, but then continuing to allow other noncurricular groups to meet at school. The Supreme Court and lower federal courts have affirmed that courts must look to schools’ actual practices, as opposed to stated policies, in order to determine whether they are truly banning all noncurricular clubs from meeting at school.¹⁴⁹ In *East High Gay/Straight Alliance v. Board of Education of Salt Lake City School District*, the federal district court held that the school’s practice of banning the GSA, but allowing noncurricular groups to convene on school grounds, ran “afoul of both the Equal Access Act and the First Amendment.”¹⁵⁰ Therefore, resistance from students,

¹⁴⁶ See, e.g., Lee Shearer, *Lines Drawn Over Gay Support Club at High School*, ATHENS BANNER-HERALD, Sept. 15, 2005, available at http://onlineathens.com/stories/091605/new_20050916058.shtml. (“I don’t think that it would be fair to ban all clubs.” (quoting Robert Haggard, Chairman of the Madison County School Board)).

¹⁴⁷ See, e.g., McCreary, *supra* note 25, at 8 (“On Friday, the day after passing the resolution, most students in the district held a walkout in protest of the ban on all clubs. At Pleasantville, over 700 students gathered in front of the school, blocking traffic on a busy two-lane public road.”).

¹⁴⁸ Sexuality Info. & Educ. Council of the United States (SIECUS), Georgia State Profile, Students Finally Win GSA Lawsuit in White County, <http://www.siecus.org/index.cfm> (follow “Policy & Advocacy” hyperlink; then follow “State Profiles” hyperlink; then click on Georgia on the map of the United States; then follow “Events of Note” hyperlink) (last visited Nov. 25, 2008).

¹⁴⁹ Bd. of Educ. v. Mergens, 496 U.S. 226, 246 (1990); see also *Straights & Gays for Equality v. Osseo Area Sch.-Dist.* No. 279, 471 F.3d 908, 912 (8th Cir. 2006) (concluding that the EAA was triggered because the school’s cheerleading and synchronized swimming groups were non-curricular student groups that were allowed to meet on school grounds during non-instructional time).

¹⁵⁰ 81 F. Supp. 2d 1166, 1173 (C.D. Utah 1999); see also SIECUS, *supra* note 148 (“In adherence to the new district rule, PRIDE was not allowed to meet on campus However, the school still permitted other non-academic clubs, like the Shooting Club, a prayer group, and the Dance Team to convene on school grounds . . . the court decided that PRIDE has the right to meet on campus.” (commenting on White County High Sch. Peers

parents, and school administrators to the option of banning all noncurricular student groups, together with the heightened judicial scrutiny placed upon schools to ensure that they enforce the ban on all noncurricular groups if they exercise this option, effectively deter school districts from adopting policies banning all noncurricular groups merely to prevent a GSA from forming.

CONCLUSION

Prior to *Morse v. Frederick*, the trend in Supreme Court First Amendment jurisprudence was toward granting schools increasing authority to limit student speech when it violated their self-defined basic educational missions. This Article exposed *Morse*'s harsh criticism toward the basic educational mission argument, and advocated interpreting this skepticism as a rejection of this argument. Extending this Article's interpretation of *Morse* to GSA litigation further clarifies the level of protection that the First Amendment affords students to form GSAs within public schools and strengthens claims by LGBTQ students that GSA prohibitions violate the First Amendment. Therefore, although *Morse* is not an optimal decision for free speech advocates, it may represent a step in the right direction.