No. 09-50850

In the United States CourtoOm-54pg.0006slsEMC

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SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

1. National School Boards Association, 1680 Duke Street, Alexandria, VA 22314—Amicus Curiae

2. Texas Association of School Boards Legal Assistance Fund (including Texas Association of School Boards, Texas Association of School Administrators and Texas Council of School Attorneys), P.O. Box 400, Austin, TX 78767-0400--Amicus Curiae

3. Francisco M. Negrón, Jr., General Counsel, National School Boards Association, 1680 Duke St., Alexandria, VA 22314 – Attorney for Amici Curiae

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Attorney for the Amici Curiae National School Boards Association and Texas Association of School Boards Legal Assistance Fund

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INTERESTS OF THE *AMICI*

The National School Boards Association ("NSBA") is a nonprofit organization representing state associations of school boards, as well as the Hawaii State Board of Education and the Board of Education of the U.S. Virgin Islands. Through its members, NSBA represents over 95,000 school board members who govern more than 14,000 local school districts serving about 49.8 million students. NSBA regularly represents its members' interests before Congress and federal and state courts and has participated as *amicus curiae* in many cases involving the authority of school boards to adopt and implement policies designed to protect student safety

Nearly 800 public school districts in Texas are members of the Texas Association of School Boards Legal Assistance Fund ("TASB Legal Assistance Fund"), which advocates the interest of school districts in litigation with potential statewide impact. The TASB Legal Assistance Fund is governed by three organizations: the Texas Association of School Boards, Inc. ("TASB"), the Texas Association of School Administrators ("TASA"), and the Texas Council of School Attorneys ("CSA").

TASB is a non-profit corporation whose members are the approximately 1,036 public school boards in Texas. As locally elected boards of trustees, TASB's members are responsible for the governance of Texas public schools.

TASA represents the state's school superintendents and other administrators responsible for carrying out the education policies adopted by their local boards of trustees.

CSA is comprised of attorneys who represent more than ninety percent of the public school districts in Texas.

Amici support the authority of school leaders to adopt and implement policies designed to regulate access to school facilities and events and to protect student safety. *Amici* recognize the importance of parental involvement in their children’s education, but believe that school officials are in the best position to determine the proper balance between encouraging and accommodating parental participation in public schools and maintaining a safe and distraction-free learning environment.

Appellants oppose the filing of this brie

school facilities. Ultimately, control must remain with the school board so it can ensure that students are able to learn in a safe, distraction-free environment.

If this court concludes that parents do have a constitutional right to access school premises, a district's use of the Raptor system to identify registered sex offenders (RSOs) passes strict scrutiny. School districts have a compelling interest in knowing whether a potential visitor is an RSO to keep students safe from such individuals. Likewise, using the Raptor system is narrowly tailored because Raptor only identifies RSOs and uses minimal information to do so. Granting individual accommodations to the visitor access policy would be overly burdensome and would render the visitor access policy ineffective. Finally, school districts should not have to offer individual accommodations to visitor access policies when the desired modification fails to accomplish the purposes of the policy, and no constitutional right is implicated.

ARGUMENT

I. THE CONSTITUTION PROVIDES PARENTS NO RIGHT OF PHYSICAL ACCESS TO A SCHOOL DISTRICT.

A. The cases plaintiffs cite do not grant parents a constitutional right of physical access to school premises.

The plaintiffs point to a number of U.S. Supreme Court cases to support their claim that they have a constitutional right to be on school grounds. Plaintiffs are correct that the Supreme Court has used "broad sweeping language" to describe parental rights. However, the only relevant[1] Supreme Court cases involving parental rights claims *against a school district* are *Pierce v. Society of Sisters*[2] and *Meyer v. Nebraska*.[3]

In *Pierce* the Court struck down a state statute requiring students to attend public school. In *Meyer* the Court struck down a state statute prohibiting the teaching of foreign language. Neither case held or in any way implied that parents have a constitutional right to be physically present on campus for any reason—including monitoring their children's education.

The federal courts have interpreted *Meyer* and *Pierce* narrowly. Most courts have agreed that they guarantee parents the right to choose between private and

[1] *Wisconsin v. Yoder*, 406 U.S. 205 (1972), invalidated a state statute requiring children to attend high school. *Yoder* is not relevant here because it involved a First Amendment free exercise of religion claim.

[2] 268 U.S. 510 (1925).

[3] 262 U.S. 390 (1923).

Edwards.[6]

opportunity for the Fifth Circuit to join the Fourth Circuit in decisively concluding that parents have no such rights.

B. Granting parents a constitutional right of access to school facilities would undermine school boards' authority to achieve their mission of educating students.

1. Nothing in school districts' operational structure indicates parents have a constitutional right to access school facilities.

The combined forces of school boards, school administrators, and teachers and other employees operate America's public schools. State law divides the responsibilities for public e

professional educators trained in school administration and educational leadership. Teachers are educated in the subject matter they teach and teaching methodology.

Parents' rights regarding the operations of public school districts are contained in state law. State laws could allow parents to set policy for the district, run the schools, and teach classes. In general, state laws do not afford parents such direct control of public education due to the numerous practical problems that would arise under that scenario. Parents might be inclined to set policy favorable to their children, would lack administrative knowledge and experience to run the district, and would have inadequate knowledge of subject matter and teaching methodology to successfully instruct students. Moreover, individual parents might have very different ideas about what policy, administration, and teaching should entail and would lack the education, experience, and accountability to the electorate to reach consensus. Nevertheless, state law does not leave parents without remedy regarding school district governance. Parents may vote in school board elections, may provide input regarding school policy at school board meetings, and may express their views regarding the district's day-to-day operations to administrators and teachers.

Under the above-described operational structure, the combined forces of the school board, school administrators, and other school employees share control of and responsibility for school facilities—including visitor entrance. School boards

typically adopt a visitor entrance policy.[11] This policy—like all other policies—is adopted in an open meeting with an opportunity for public input to ensure it addresses the community's circumstances, expectations, and needs. While the details of visitor access policies vary, Tucson Unified School District's policy, which "encourage[s] parents and other interested citizens to visit schools and classrooms as long as such visits do not disrupt school operations or interfere with the educational process," is typical.[12] School administrators and other school employees implement the visitor entrance policy. If the board has not adopted a visitor access policy, state law may empower school administrators to use their discretion regarding visitor access. In any case, districts do not place unreasonable restrictions on visitor access but instead attempt to balance their operational and student welfare needs against the needs of outsiders with legitimate reasons for coming on to school grounds.

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2. Schools boards and administrators should be able to control access to their facilities to ensure student safety and to minimize harassment and distraction.

Government entities other than schools are able to limit public access to their facilities.[13] The Center for Disease Control and Prevention's (CDC) visitor policy explains why CDC limits public access including: protecting government property; protecting work from unintentional contamination; restricting access to certain areas and materials; protecting sensitive information; and ensuring the health, safety, and security of employees, contractors, and visitors.[14] These reasons, and others, are equally applicable to school districts. The facts of many of the cases in which parents have claimed

District Board of Education, where a parent was banned after "continued verbal and written attacks" on staff, a New Jersey district court stated:

> However, the reality of our times, and indeed common sense, suggests that the public—parents included—cannot have unfettered access to the halls of learning. We are not too far removed from the tragedies of Columbine or the Amish school shooting to forget that the safety of our children and school officials is paramount.[15]

In two cases parents with weapons on their person have argued that they should not have been banned from campus.[16]

Another reason school districts need to control visitor access is to keep harassers off school premises. The vast majority of parents who have sued districts after being banned have harassed staff or students.[17] In one case, the father yelled at his son's teacher, followed her into the parking lot, swatted his son and another student for misbehaving at school, and used profanity with administrators.[18] After being banned from campus, the parent returned, verbally taunted teachers, and had

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[15] 492 F. Supp. 3d 439 (D.N.J. 2007).

[16] *Cina v. Waters*, 779 N.Y.S.2d 289 (N.Y. App. Div. 2004) (probation officer parent refused to remove her gun when attending parent-teacher conferences); *Nuding v. Bd. of Educ. of Cerro Gordon Cmty. Unit Sch. Dist. No. 110*, 730 N.E.2d 96 (Ill. App. Ct. 2000) (parent brought pocketknife and toy gun that looked real to school board meeting).

[17] *Gaines-Hanna v. Farmington Public Sch. Dist.*, rD(tow)9(el prem)6 havenel te4Tj/TT0 1 Tf0 Tc 0 Tw311.865

to be removed by the police.[19] He even confronted his son's teacher on a class field trip, shouting "No Justice, No Peace."[20]

Finally, school districts need to control who enters the school campus simply to make ensure the education environment is distraction-free. In *Mayberry v. Independent School District No. 1*, a parent volunteer was banned from a school campus after she visited the classroom of another parent's child, per that parent's request, for two minutes and later that day looked in the child's classroom.[21] The plaintiff argued that parents have been successfully banned from campus only after a pattern of "threatening and abusive behavior."[22] The court concluded "this distinction is not relevant," citing a number of cases for the proposition that school districts can establish and enforce standards for a tranquil learning environment.[23]

Amici are not suggesting that most parents who visit schools are dangerous, intend to harass anyone, or will be disruptive to the learning environment. Instead, *amici* are simply pointing out the realities that demonstrate the necessity for school boards and administrators to control access to school premises. Just one parent with unlimited access to school premises for only one day could choose to interrupt

[19] *Id*.

[20] *Id*.

[21] No. 08-CV-416-GKF-PJC, 2008 WL 5070703, at *1-2 (N.D. Okla. Nov. 21, 2008).

[22] *Id*. at *5.

[23] *Id*.

classroom instruction, monopolize the superintendent's time, stop school construction, destroy school property, or harm students.

3. A constitutional right of physical access to monitor the district makes little sense where parents lack a right to control what they want to monitor.

The plaintiffs have tried to differentiate themselves from other parents who claim to have a constitutional right of physical access but have not expressed any sincere interest in their children's education. The plaintiffs argue their alleged constitutional right to control and direct the upbringing of their children includes the right to monitor the district through physical access in order to meet teachers and inspect instructional materials, classrooms, and workstations. However, it makes little sense for parents to have a constitutional right to monitor their children's education through physical access when parents have no constitutional right to make decisions to change the things they seek to monitor.

As mentioned in Section I.A., courts have consistently held that parents have no right to determine how public schools educate students, because it would be impossible for districts to function if they had to accommodate every parent's input regarding every educational decision that affected his or her child. As the Seventh Circuit noted: "Imagine if a parent insisted on sitting in on each of her child's

classes in order to monitor the teacher's performance or on vetoing curricular choices, texts, and assignments."[24]

No parents have successfully argued that they have a constitutional right to access school premises no matter how sincere their desire to participate in their children's education.[25] In fact, the court in *Mejia v. Holt Public Schools* directly rejected a parent's argument that he had a constitutional right of physical access to attend parent-teacher conferences, stating: "[*Meyer* and *Pierce*] . . . do not extend or create a right of parents to go onto school property for purposes of participating in the child's education. The right of a parent to direct his child's education is 'limited in scope.'"[26]

4. Parents do not need a constitutional right of physical access to be involved in their children's education.

School districts welcome parental involvement. School districts receiving Title I funding—and most do—are required to have parental involvement policies under the No Child Left Behind Act.[27] Schools recognize that research has shown that parental involvement supports a student's academic success and positive

[24] *Crowley*, 400 F.3d at 969.

[25] *Id*. at 960 (parent claimed constitutional right to be playground monitor); *Harper v. Madison Metropolitan Sch. Dist*., No. 03-2311, 2004 WL 1873225 (7th Cir. Aug. 20, 2004) (parent claimed equal protection right to visit daughter's classroom).

[26] No. 5:01-CV-116, 2002 WL 1492205, * 5 (W.D. Mich. Mar. 12, 2002) (citation omitted).

[27] U.S. DEP'T OF EDUC., NO CHILD LEFT BEHIND: A PARENT'S GUIDE, at 10-11 (2003), *available at* http://www.ed.gov/parents/academic/involve/nclbguide/parentsguide.pdf

attitude toward education. Given the importance of parental involvement, public schools encourage and accommodate parental involvement and support of their child's education.[28] Parents at a typical public school may volunteer in the

there are alternative channels of communication available such as . . . telephone, e-mail, or notes to the teacher or administrators."[29]

C. Whether parents have a constitutional right to access school facilities should not be conditioned on the reason the district has denied parents access.

School boards do not routinely deny parents access to school facilities because, as discussed in Section I.B.4, districts want pare

reasonable. However, whether parents have a constitutional right of access does not depend on the reason the district banned access. The parents must justify each

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their educational mission unless their policies are consistently followed by all members of the school community.

II. DISTRICTS HAVE A COMPELLING INTERST IN KNOWING WHETHER A VISITOR IS A REGISTERED SEX OFFENDER AND USE OF RAPTOR IS NARROWLY TAILORED.

A. Knowing whether a campus visitor is a registered sex offender is a compelling government interest because students need to be protected from sex offenders while in school.

Assuming arguendo that parents have a fundamental constitutional right to access school facilities, a school policy that infringes on that right is nevertheless constitutional if it is narrowly tailored to meet a compelling state interest.[32] Given the significant number of registered sex offenders (RSOs), that some target children, that RSOs are easily identifiable, and that some districts want to allow them some limited access to campuses while keeping students safe, schools officials have a compelling interest in knowing whether a campus visitor is an RSO. It is only by so knowing that school officials can take the most effective measures to protect students from known sex offenders.

Given the sizable number of RSOs in every state, schools officials have a compelling interest in knowing whether a campus visitor is a RSO. As required by federal law, each state maintains both a sex offender and crimes against children

[32] *See Washington v. Glucksberg*, 521 U.S. 702, 721 (1997). The Court in *Meyer*, 262 U.S. at 399-400, and *Pierce*, 268 U.S. at 535, applied the rational basis test to parental rights claims. *Amici* asserts the rational basis test should be applied if the court concludes parents have a constitutional right of physical access. Regardless, this policy withstands strict scrutiny.

jobs in other districts or states without disclosing the allegations.[40] Given the number of potential unidentifiable risks present in the school environment, it is imperative for administrators to be able to identify individuals who have committed a prior sex offense so at the very least children are protected from them.

The plaintiffs in this case argue that Lake Travis ISD has no compelling interest in knowing who is anURSO because the district does not prevent RSOs from being on campus in all locations and at all times. No visitor access policy can keep students safe at all times, in all locations, from all people. However, the perceived shortcomings of this policy do nothing to undermine the fact that by screening visitors for RSOs school officials can protect students against known sex offenders and potentially reduce the percentage of children victimized by them even further.

Particularly for school districts that want to allow RSOs to access campus in some instances, districts have a compelling interest in knowing who RSOs are so that district officials can keep students safe while RSOs are on campus. Lake Travis ISD recognizes that some RSOs—particularly sex offender parents— have legitimate business on school grounds. The district has devised a system of

[40] *See, e.g.*, Caroline Hendrie, *'Passing the Trash' by School Districts Frees Sexual Predators to Hunt Again*, EDUC. WEEK, Dec. 9, 1998, at 16; Diana Jean Schemo, *Silently Shifting Teachers in Sex Abuse Cases*, N.Y. TIMES, June 18, 2002, at A19; *Doe-2 v. McLean County Unit Dist. No. 5 Bd. of Directors*, 2010 WL 199625 (7th Cir. Jan. 22, 2010) (finding no Title IX liability for school district that entered into severance agreement with teacher after receiving complaints of

identifying and escorting RSOs that will keep students safe. Obviously Lake Travis ISD's system will not work if it cannot identify RSOs.

A ruling that Lake Travis ISD has no compelling interest in knowing whether a campus visitor is an RSO will cast doubt on school policies adopted across the country to protect school children from sex offenders. Although many states have laws restricting where sex offenders may live, most[41] do not address whether and when sex offenders may actually enter school facilities.[42] In these states local school boards may formulate sex offender policies.[43] Many districts have adopted policies much more restrictive than the policy challenged in this case. Some require RSOs to seek written permission from the superintendent to be on school property or to give advance notice before attending an event, even when the offender is a parent.[44] At least one school district bans RSOs from entering school

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[41] *But see Commonwealth v. Doe*, 682 S.E.2d 906 (Va. 2009) (holding court order lifting statutory ban prohibiting sex offender from entering school violated district's constitutional authority to supervise students).

[42] *See* Karen A. Salvemini, Comment, *Sex-Offender Parents: Megan's Law and Schools' Legal Options in Protecting Students Within their Walls*, 17 WIDENER L.J. 1031, 1055-56 (2008); D. Scott Bennett, *Sex Offender Registry Laws and School Boards*, INQUIRY & ANALYSIS, Feb. 2008, at 4-6.

[43]

property at all.[45] It would be ironic if this court concluded there was no compelling interest in knowing whether a campus visitor is a RSO in this case where RSOs are not banned from campus. Such a ruling would make it more difficult for districts across the country to maintain current sex offender policies or to update these policies in response to changing community circumstances.

B. The Raptor system is narrowly tailored because it relies on minimal

few weeks.[49] Other systems may be updated less frequently or may only check against state and local sex offender databases.[50] Finally, computerized visitor management systems are becoming increasingly common in schools due to DOJ's support. DOJ has provided funding to school districts to cover the cost of acquiring these systems through programs such as the COPS Secure Our Schools grants that are designed to increase school safety and security.[51]

C. No individual remedy should be available to plaintiffs.

1. Making exceptions to the visitor policy for every individual who objects is overly burdensome and would render the policy ineffective.

School districts need to have a standard visitor entry policy because so many visitors arrive on campus every day, from delivery persons to parents who are picking up children. While plaintiffs object to their driver's license information being sent over the Internet, other visitors might raise different objections or propose alternative remedies. Particularly for smaller districts that do not employ a staff member dedicated solely to screening visitors, making individual accommodations would be time-consuming and impractical, and could cause the exceptions to swallow the rule. An RSO, who knows the school district routinely

[49] Laurel L. Scott, *San Angelo Schools Install Visitor Security System*, SAN ANGELO STANDARD TIMES, Dec. 21, 2009.

[50] *See id.*

[51] Press Release, Marietta City Schools, District Safe Schools Partnership with Marietta Police Yields Grant Valued at $499K (Oct. 12, 2009), *available at* http://www.marietta-city.org/newsroom/pressrelease/0910/20091012.php (last viewed Jan. 11, 2009).

accommodates individual objections to the screening, could avoid detection simply by raising an objection. The point of the screening system is thereby lost. Given the limited budgets facing school districts, staff should not have to spend time determining if a visitor's objections warrant an exception to the policy and then modifying the policy to meet each visitor's preference.

In addition, the numerous occasions where many visitors are invited on campus at one time justify having a consistent visitor policy to ensure these events run smoothly and efficiently. In a typical school year most schools host numerous events during the school day that many visitors attend. On these occasions an Internet-based system allows school officials quickly and accurately to screen for RSOs.[52] It also allows the school to maintain a complete, centralized record of visitors in case of an emergency.

2. Plaintiffs' desired alternative would not result in an accurate search for registered sex offenders and is based on plaintiffs' unsubstantiated fears of the Internet.

Lake Travis should not be required to adopt plaintiffs' proposed individually tailored remedy of manually screening visitors against a state database because such a screening process would not accomplish the district's objectives. Despite registration requirements, local authorities have had difficulty keeping track of

[52] Such systems allow a school district to standardize visitor procedures across the district. *See* Laurel L. Scott, *San Angelo Schools Install Visitor Security System*, SAN ANGELO STANDARD TIMES, Dec. 21, 2009.

RSOs. In 2007 a group of U.S. Marshals be

in violation of residency restrictions, give fake addresses, or simply register under a "transient" or "homeless" designation because they cannot find housing.[56] Given that an RSO may not be registered in the state or at the address where he or she is actually living, checking national registries allows districts to identify such RSOs regardless. Manually checking a state database would not accomplish this same result.

Finally, districts should not be required to exempt individuals from school policies and practices that rely on the use of electronic communication or data systems based on unfounded fears about potential security breaches. Plaintiffs' assertion that, "no data system is completely secure from attack or compromise" is correct. However, schools or other governmental entities are not legally required to use only those systems that are completely fail safe, since no such systems exist. In today's world, more transactions, many of them essential to governmental functions, are moving on to the Internet. The policies implemented in school districts reflect this reality. Data security and protecting student privacy are issues that schools must[57] and do[58] address. Companies that design the visitor

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[56] *See* Jenny Michael, *Sex Offenders Struggle to Find Housing*, BISMARCK TRIBUNE, Sept. 27, 2009, at 1A.

[57] Family Educational Rights and Privacy Act, 73 Fed. Reg. 74,806, 74,843-44, (Dec. 9, 2009) (to be codified at 34 C.F. R. pt 99) (discussing U.S. Department of Education's recommendations for safeguarding student data).

[58] Mark C. Blom, *How Safe Is A District's Information Highway*?, INQUIRY & ANALYSIS, Oct. 2009, at 6-7.

management systems and other electroni

CERTIFICATE OF COMPLIANCE

Pursuant to 5th Cir. R. 32.2 and .3, the undersigned certifies this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7).

1. EXCLUSIVE OF THE EXEMPTED PORTIONS IN 5TH CIR. R. 32.2, THE BRIEF CONTAINS 7000 WORDS.

2. THE BRIEF HAS BEEN PREPARED IN PROPORTIONALLY SPACED TYPEFACE USING MICROSOFT WORD 2007 IN 14-POINT TIMES NEW ROMAN FONT.

3. THE UNDERSIGNED UNDERSTANDS A MATERIAL MISREPRESENTATION IN COMPLETING THIS CERTIFICATE, OR CIRCUMVENTION OF THE TYPE-VOLUME LIMITS IN Fed. R. App. P. 32(a)(7), MAY RESULT IN THE COURTS STRIKING THE BRIEF AND IMPOSING SANCTIONS AGAINST THE PERSON SIGNING THE BRIEF.

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National School Boards Assoc., et al.

Dated: February 25, 2010