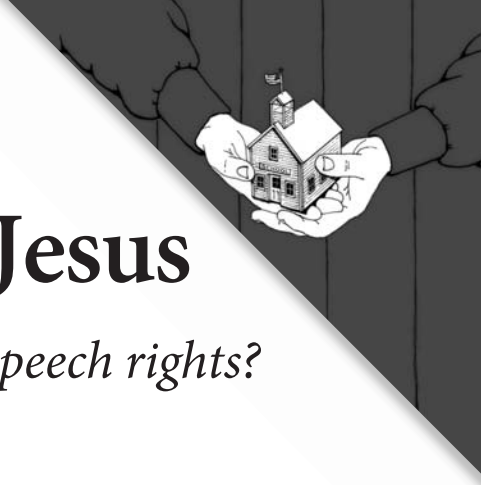

# Thou Shalt Not Say Jesus

## *Do elementary school students have free-speech rights?*

by JOSHUA DUNN and MARTHA DERTHICK

Hoping to avoid the risk of breaching an ill-defined boundary between church and state, some public school officials have prohibited elementary school pupils from distributing trinkets with religious messages, and thereby encountered a different peril. They have learned that their young pupils have constitutional rights to freedom of speech. *Morgan v. Swanson* comes from Plano, Texas. According to several parents and students, starting in 2001 school district officials began refusing to allow elementary school students to distribute material that had a religious viewpoint to their classmates. At one 2001 "winter break" party, an elementary school principal, Lynn Swanson, citing orders from district officials, confiscated a student's goody bags because they included a pencil with the legend "Jesus Is the Reason for the Season."

**Swanson also forbade students from writing "Merry Christmas" on cards sent to retirement homes.**

At a 2003 party, Swanson and other school officials took away a student's gift bags because they contained candy cane–shaped pens with an attached card explaining the religious origins of candy canes. Swanson also forbade students from writing "Merry Christmas" on cards sent to retirement homes. At another school in 2004, the principal, Jackie Bomchill, prohibited a student from giving tickets to a Christian drama to her friends. She threatened to call the police when the same student asked to distribute pencils with "Jesus Loves Me This I Know, For the Bible Tells Me So" during her class birthday party. The principal also threatened to expel the young girl if she attempted to distribute "Jesus pencils" again. The principal did allow her to give out pencils embellished with a moon design. As a result of these incidents, parents sued, claiming that their children had been subject to unconstitutional viewpoint discrimination.

The school district responded in 2005 by defining when such materials could be distributed: 30 minutes before and after school, at three annual parties, during recess, and throughout school hours, but only passively, at designated tables. This policy, except for a prohibition on distribution during lunch periods, survived in court, but the larger issue, officials' claim of qualified immunity, remained to be decided.

The Supreme Court's free-speech doctrine is relatively clear. The Court has said that government must be viewpoint neutral when regulating speech, meaning that it cannot restrict speech because of the motivating ideology of the speaker. Such restrictions are almost always found unconstitutional. But the complicating question here was, what free-speech rights do elementary school students have? The officials argued that the Supreme Court has never held that the Constitution prohibits viewpoint-based discrimination in elementary schools and they were therefore entitled to qualified immunity, which would free them from personal liability. School officials under this view could engage in all the viewpoint-based discrimination they wanted. Zoroastrian speech could be allowed, while Mormon speech could be suppressed. Pencils saying "Jesus Does Not Love Me This I Know" could be distributed, while those contending that he does could be confiscated.

Federal courts, so far, have not been sympathetic to this broad claim of arbitrary authority. Over the past two years, the Plano officials have lost their request for qualified immunity at trial and on appeal. A Fifth Circuit panel ruled that they should have known that under *Tinker v. Des Moines* (1969) and other cases like *Good News Club v. Milford* (2001), elementary school students have speech rights. Plano's counsel apparently detected more ambiguity in these precedents than did the Fifth Circuit. *Tinker*, the court explained, allows for nondisruptive student speech, while *Good News Club* applied the free-speech clause to elementary-school-age students and prohibited viewpoint discrimination in the use of school facilities. Summing up, the court said that the officials had consistently argued "that qualified immunity should be granted because elementary school students do not have any First Amendment rights. No law supports Appellants' novel proposition." The Fifth Circuit has agreed to hear an *en banc* appeal of the officials' claims, but we suspect they will not fare any better. Even if the school officials do manage to win qualified immunity and escape personal liability, courts will almost certainly never sanction the kind of discrimination alleged in Plano, leaving school districts solely liable for the conduct of their employees.

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