

No. 09-40373

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

**DOUG MORGAN, ROBIN MORGAN, JIM SHELL, SUNNY SHELL,
SHERRIE VERSHER, and CHRISTINE WADE**
Plaintiff-Appellees,

v.

**LYNN SWANSON, in her individual capacity and as Principal of Thomas
Elementary School; and JACKIE BOMCHILL, in her individual capacity
and as Principal of Rasor Elementary School,**
Defendant-Appellants.

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS**

BRIEF *AMICUS CURIAE* OF WALLBUILDERS, INC.,
in support of *Plaintiff-Appellees*
Urging Affirmance.

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Federal Rule of Appellate Procedure 26.1 and Fifth Circuit Rule 28.2.1, the undersigned counsel of record certifies that the following listed individuals and entities have an interest in the outcome of this case. None of the following individuals and entities, including *Amicus Curiae*, WallBuilders, Inc., is a corporation that issues shares of stock to the public. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

1. Doug Morgan, Plaintiff-Appellee;
2. Robin Morgan, Plaintiff-Appellee;
3. Jonathan Morgan, Plaintiff-Appellee;
4. Jim Shell, Plaintiff-Appellee;
5. Sunny Shell, Plaintiff-Appellee;
6. Michael Shell, Plaintiff-Appellee;
7. Kevin Shell, Plaintiff-Appellee;
8. Sherrie Versher, Plaintiff-Appellee;
9. Stephanie Versher, Plaintiff-Appellee;
10. Christine Wade, Plaintiff-Appellee;
11. Michaela Wade, Plaintiff-Appellee;
12. Bailey Wade, Plaintiff-Appellee;
13. Malcolm Wade, Plaintiff-Appellee;
14. Clyde Moody Siebman, Counsel for Plaintiff-Appellee;
15. Wm. Charles Bundren, Counsel for Plaintiff-Appellee;
16. Kelly Shackelford, Counsel for Plaintiff-Appellee;
17. Plano Independent School District, Non-appealing Defendant and *Amicus Curiae*;
18. Carole Griesdorf, Non-appealing Defendant;
19. Lynn Swanson, Defendant-Appellee;

20. Doug Otto, Non-appealing Defendant;
21. Lisa Long, Non-appealing Defendant;
22. Suzie Snyder, Non-appealing Defendant;
23. Jackie Bomchill, Defendant-Appellant;
24. John Beasley, Non-appealing Defendant;
25. Charles J. Crawford, Counsel for Non-appealing Defendants and *Amicus Curiae* Plano Independent School District;
26. Richard M. Abernathy, Counsel for Non-Appealing Defendants and *Amicus Curiae* Plano Independent School District;
27. Thomas P. Brandt, Counsel for Defendant-Appellant;
28. Joshua A. Skinner, Counsel for Defendant-Appellant;
29. Steven W. Fitschen, Counsel of Record for *Amicus Curiae*, WallBuilders, Inc.;
30. WallBuilders, Inc., *Amicus Curiae*.
31. Texas Elementary Principals & Supervisors Association, *Amicus Curiae*
32. Kevin Friedrich Lungwitz, Counsel for *Amicus Curiae* Texas Elementary Principals & Supervisors Association;
33. Association of Texas Professional Educators, *Amicus Curiae*;
34. Jefferson K. Brim, Counsel for *Amicus Curiae* Association of Texas Professional Educators;
35. Garthie Barnett Edmonds, *Amicus Curiae*;
36. Marie Barnett Snodgrass, *Amicus Curiae*;
37. Kenneth W. Star, Counsel for *Amici Curiae* Garthie Barnett Edmonds & Marie Barnett Snodgrass;
38. W. Mark Lanier, Counsel for *Amici Curiae* Garthie Barnett Edmonds & Marie Barnett Snodgrass;

39. Kevin P. Parker, Counsel for *Amici Curiae* Garthie Barnett Edmonds & Marie Barnett Snodgrass;
40. Jack L. White, II, Counsel for *Amici Curiae* Garthie Barnett Edmonds & Marie Barnett Snodgrass;
41. Texas Association of School Boards Legal Assistance Fund, *Amicus Curiae*;
42. Christopher B. Gilbert, Counsel for Amicus Curiae Texas Association of School Boards Legal Assistance Fund.

/s/ Steven W. Fitschen
Steven W. Fitschen
Counsel of Record for *Amicus Curiae*

STATEMENT OF COMPLIANCE WITH RULE 29(c)(5)

This Brief is submitted pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure with the consent of all parties. No party's counsel authored this Brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting the Brief; and no person other than *Amicus Curiae*, WallBuilders, Inc., its members, or its counsel contributed money that was intended to fund preparing or submitting the Brief.

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS*1

SUMMARY OF THE ARGUMENT2

ARGUMENT.....3

I. THIS COURT SHOULD NOT BE DIVERTED FROM ITS TASK OF EVALUATING THE QUALIFIED IMMUNITY DEFENSE UNDER A *LEGAL TEST* RATHER THAN INDULGE THE MISLEADING POLICY-DRIVEN CONSIDERATIONS SUGGESTED BY THE PRINCIPALS AND *AMICI*3

A. The Principals’ Purported Fear of Personal Liability Is Illusory Because Defendants in Suits of this Nature Are Indemnified Through District Insurance Policies.....3

B. The Real Concern of *Amicus* Texas Association of School Boards Legal Assistance Fund Is That They Will Ultimately Have to Pay for Liability Because They Failed to Properly Train School District Employees as to the Constitutional Rights of Children.....7

C. The National School Boards Association’s Perception of a Burdensome Change to the Public School Climate Is Unsupported by Any Empirical Data and Is Irrelevant to This Court’s Disposition of the Qualified Immunity Issue.....9

CONCLUSION.....11

CERTIFICATE OF COMPLIANCE12

TABLE OF AUTHORITIES

Cases:	Page(s):
<i>Chiu v. Plano Independent School District</i> , 339 F.3d 273 (5th Cir. 2003)	6
 Other Sources:	
Appellants’ <i>En banc</i> Supplemental Brief	4, 5, 7
Appellants’ Petition for Rehearing <i>En Banc</i>	
<i>En banc Br. Amicus Curiae</i> Nat’l Sch. Bds. Ass’n	4, 7, 9
<i>En Banc Br. Amicus Curiae</i> Tex. Elementary Principals & Supervisors Ass’n	5
http://www.tasb.org/services/policy/services/education/policy_service.aspx (last visited Apr. 5, 2011).....	8
http://www.tasb.org/training/index.aspx	8
http://www.tasbrmf.org/#	2
http://www.tasbrmf.org/about/documents/marketing_brochure.pdf	2
Kim Breen, <i>District Halts Battle Over Handout Policy</i> , Dallas Morning News, Nov. 21, 2003	6, 8

INTEREST OF AMICUS CURIAE

WallBuilders, Inc., is a non-profit organization that is dedicated to the restoration of the moral and religious foundation on which America was built. WallBuilders' President, David Barton, is a recognized authority on American history and on the role of religion in public life. As a result of his expertise in these areas, he works as a consultant to national history textbook publishers. He has been appointed by the State Boards of Education in states such as California and Texas to help write the American history and government standards for students in those states. Mr. Barton also consults with Governors and State Boards of Education in several states, and he has testified in numerous state legislatures on American history. Much of his knowledge is gained through WallBuilders' vast collection of rare, primary documents of American history, including more than 70,000 documents predating 1812.

Furthermore, WallBuilders encourages citizens all across America to continue the tradition of bringing religious perspectives to bear in public life. WallBuilders and its constituents, especially those in Texas, desire to see religion treated as the Framers of the First Amendment intended and seeks to protect religious expression of students within the classroom setting.

WallBuilders, Inc. submits its Brief by consent of all parties, and as stated earlier, has drafted the Brief in compliance with FRAP 29(c)(5).

SUMMARY OF THE ARGUMENT

This Brief refutes several arguments put forth by the Defendant-Appellants Swanson and Bomchill (hereinafter the “Principals”) and their *Amici*. As described below, these arguments are distractions to, and irrelevant for, a proper qualified immunity analysis.

The Brief explains that the Principals’ and their *Amici*’s concern that suits like the instant one inappropriately expose public school employees to financial risk or ruin is illusory because the employees are indemnified by the school district insurance through their participation with the Texas Association of School Boards (“TASB”).¹ Further, TASB’s real concern in the matter is that it will have to pay for any judgment, a judgment perhaps arising out of its failure to properly train the employees. Third, this Brief addresses *Amicus* National School Boards Association’s unsupported characterization of the climate in which the Principals work as irrelevant to this Court’s qualified immunity analysis.

¹ The TASB administers Texas Association of School Boards Risk Management Fund, a fund that, although is not insurance, operates as a risk pool and as a legal resource for school districts in Texas. See <http://www.tasbrmf.org/#> (last visited Apr. 8, 2011); and http://www.tasbrmf.org/about/documents/marketing_brochure.pdf (last visited Apr. 8, 2011). Thus, although the Risk Management Fund is not insurance *per se*, for the sake of convenience, your *Amicus* will use terms like “insurance” and “indemnify” to describe the financial protection Texas school districts provide to district employees when they are the subject of lawsuits such as the instant one.

ARGUMENT

I. THIS COURT SHOULD NOT BE DIVERTED FROM ITS TASK OF EVALUATING THE QUALIFIED IMMUNITY DEFENSE UNDER A LEGAL TEST RATHER THAN INDULGE THE MISLEADING POLICY-DRIVEN CONSIDERATIONS SUGGESTED BY THE PRINCIPALS AND AMICI.

Unfortunately, much of the rhetoric included in the Principals' Supplemental *En Banc* Brief and in the Briefs of their supporting *Amici* seems to be more of an attempt to sway this Court's emotions than to persuade it on the merits. This Court need not indulge these misleading policy-driven suggestions, since applying the proper test for evaluating qualified immunity leads to a just result. Plaintiffs have a remedy against non-immune school employees, and employees receive protection from their employers' insurance policies when they transgress appropriate bounds into constitutionally unacceptable behavior .

A. The Principals' Purported Fear of Personal Liability Is Illusory Because Defendants in Suits of this Nature Are Indemnified Through District Insurance Policies.

The Principals and *Amici* multiple times attempt to paint a picture of public school teachers and administrators caught in the middle of a minefield of legal rules with any misstep resulting in destruction to their personal wealth and security. Although such a view may be enticing as a matter of rhetoric, it does not square with the actual situation—namely, that the Principals are not at personal financial risk for liability arising out of the case against them. *See, infra* pp. 4-5.

A few selected quotations from the Principals’ and *Amici’s* Briefs help illustrate their litigation strategy. First, the Principals express chagrin that school employees are “caught in the middle” of policy and constitutional debates with “little latitude for discretion, little margin for error.” (Appellants’ *En banc* Supplemental Br. at 21.) Thus, they reason, qualified immunity provides “room to make reasonable mistakes without incurring personal, *sometimes crushing*, liability.” *Id.* (emphasis added).

One *Amicus*, the National School Boards Association (“NSBA”), expressed concern about the impact of a “recent explosion of First Amendment litigation—including what appears to be a growing trend of seeking to hold rank and file administrators and teachers *personally liable for monetary damages* in their individual capacities—will have on the ability of school districts to attract and maintain quality administrators and teachers.” (*En banc* Br. *Amicus Curiae* Nat’l Sch. Bds. Ass’n at 2-3 (emphasis added).) The NSBA insists that “[i]t simply is unfair to require every teacher on every campus, no matter how fresh out of college they [*sic*] may be, to be constitutional scholars in an area of the law that has confounded the courts for years, or *risk the possibility of being held personally liable for monetary damages.*” *Id.* at 6 (emphasis added).

Still another *Amicus*, the Texas Elementary Principals & Supervisors Association, after a lengthy recitation of all the different duties that school

administrators undertake, complains that the defendants’ good-willed actions (albeit, as alleged, unconstitutional actions) resulted in their “inclusion as defendants in a 188-page petition in federal court, *risking their individual and official liability.*” (*En Banc Br. Amicus Curiae Tex. Elementary Principals & Supervisors Ass’n* at 7-8.)

It bears noting that a distinction needs to be made between individual liability and out-of-pocket payments. Although it is true that if in the end the Principals are found to have violated the students’ rights, and if they have no qualified immunity defense; then the Principals are *individually liable*. But at that point indemnification through the insurance process kicks in. In other words, the party actually liable (here, potentially the Principals) typically pays nothing.

The Principals’ and *Amici’s* bleak presentation simply does not comport with reality. The Principals’ own Certificate of Interested Persons, however, gives insight into the entity truly bearing the risk of liability—the Texas Association of School Boards Risk Management Fund. (Appellants’ *En banc* Supplemental Br. at iv.) The conclusion of another recent case also involving employees at Plano ISD helps shed light on what will happen in the instant case if the Principals are found individually liable. There is no reason to think that the Principals here have any direct financial out-of-pocket risk in the outcome of this case. Further, as

described below, there is every reason to think that *Amicus* Plano ISD is insured for the overwhelming majority of the Principals' costs associated with the case.

In *Chiu v. Plano Independent School District*, 339 F.3d 273, 275-76 (5th Cir. 2003), this Court affirmed the district court's denial of qualified immunity for individual plaintiffs there. Within several months of that decision, the parties settled the matter. But instead of bankrupting the defendant assistant superintendent and principal, the settlement was paid by insurance.² Kim Breen, *District Halts Battle Over Handout Policy*, Dallas Morning News, Nov. 21, 2003, at B1. As the article explains, "[t]he \$400,000 [settlement] payment will be covered by an insurance policy with the Texas Association of School Boards. Insurance has also picked up an estimated 80 percent of the \$230,000 in fees for the district's attorneys. The district has paid an estimated \$46,000 of that total [*i.e.* the remaining 20 percent of the legal fees." *Id.*

In fact, every dollar of settlement money and legal fees was accounted for either by insurance or by the school district. As employees of Plano ISD, the *Chiu* defendants benefitted from risk pool protection discussed previously that is provided by the Texas Association of School Boards ("TASB"). This fact does not suggest anything untoward about a public school protecting its employees from

² Just as your *Amicus* is using "insurance" as short-hand for Plano ISD's participation in the risk pool fund, so too the newspaper appears to have used "insurance" in a similar way.

having to pay judgments arising out of the employees' liability. Quite to the contrary, such an arrangement is a fair and decent way to protect employees from all different kinds of potential liability in their interactions with other employees, parents, and students. Rather, it is to point out the rather disingenuous nature of the Principals' appeal to a fear of "incurring personal, *sometimes crushing*, liability," (Appellants' *En banc* Supplemental Br. at 21 (emphasis added)), when the Principals know full well this will *not* be the case.

Further, the employees' protection from liability *via* insurance completely negates the National Association of School Boards' concern of a "growing trend of seeking to hold rank and file administrators and teachers personally liable for monetary damages in their individual capacities" which may hamper districts' "ability . . . to attract and maintain quality administrators and teachers." (*En banc* Br. *Amicus Curiae* Nat'l Sch. Bds. Ass'n at 2-3 (emphasis added).) This apocalyptic-like rhetoric is just that—rhetoric—and is detached from the reality faced by teachers and administrators.

B. The Real Concern of *Amicus* Texas Association of School Boards Legal Assistance Fund Is That They Will Ultimately Have to Pay for Liability Because They Failed to Properly Train School District Employees as to the Constitutional Rights of Children.

As noted above, TASB, as risk pool manager of Plano ISD and its employees through TASB's Risk Management Fund, will foot the bill for any damages arising out of § 1983 liability. Furthermore, as set forth below, this

responsibility for payment may be especially grating to TASB officials because it also helps craft school policies. See http://www.tasb.org/services/policy/services/education/policy_service.aspx (last visited Apr. 5, 2011).

In the *Chiu* case previously discussed, the “Texas Association of School Boards drafted the [unconstitutional] policy that Plano and other Texas school districts ha[d] adopted.” Kim Breen, *District Halts Battle Over Handout Policy*, Dallas Morning News, Nov. 21, 2003, at B1. According to the TASB website, in addition to helping draft school policy, TASB also offers training to schools on policy implementation, ranging from conducting seminars to publishing legal fact sheets for member use. <http://www.tasb.org/training/index.aspx> (last visited Apr. 5, 2011). Even the Principals here implicitly implicate TASB’s failures by attempting to avoid liability in a “Nuremberg-style” defense—arguing that “they were acting pursuant to Plano ISD policy and instructions from their supervisors and *that they were not properly trained.*” (Appellants’ Pet. for Reh’g *En Banc* at 3 (emphasis added).) It is little wonder TASB has more than a passing interest in the instant case.

But TASB’s woes are not a reason to grant or not grant qualified immunity—that’s why this Court has implemented a *legal* test for qualified immunity and not an emotional one. And your *Amicus* agrees with the Parents that the Principals fail under that legal test.

C. The National School Boards Association’s Perception of a Burdensome Change to the Public School Climate Is Unsupported by Any Empirical Data and Is Irrelevant to This Court’s Disposition of the Qualified Immunity Issue.

Finally, one additional aspect of an *Amicus*’s contribution merits special attention. *Amicus* National School Boards Association, *et al.* (“NSBA”) asserts, that, in essence, the 1980s and 1990s were kinder, gentler times for school district officials—“if a third party wanted to distribute something at school, they tended to approach someone at a school district’s central administration building to discuss whether they could and how to do so.” (*En banc* Br. Amicus Curiae Nat’l Sch. Bds. Ass’n at 4.) Yet NSBA makes the assertion baldly, with no citation to empirical data to support the proposition. NSBA also asserts, again without support, that “[t]oday, parents, students, and even outside third parties simply show up at the classroom and demand to pass out previously unseen material **now**. *Id.* (emphasis in original).

Furthermore, NSBA claims this changed atmosphere results from a deliberate advocacy movement to create First Amendment litigation through “gotcha” moments involving lower level school employees. *How else can one explain that this is the third appellate court case since 2003 to involve students who showed up at classroom holiday parties to pass out candy canes accompanied by a story that attributes a religious origin to the candy cane that isn’t even correct?*

Id. at 4-5 (emphasis added). Again, NSBA cites no empirical data for such a sweeping generalization.

Although one can easily think of multiple alternatives to NSBA's explanation for this perceived sea-change in parent-school district relations,³ the point here is that NSBA's assertions highlight your *Amicus's* argument made previously—namely, that this case must be resolved by way of legal tests. Anecdotes and perceptions of what used to be are no substitute for the proper application of sound legal principles. The district court and a panel of this Court saw clearly what that application was and denied qualified immunity under the facts as alleged. That decision was proper whether parents used to stop by the administration building before entering the school or not.

³ For instance, by way of illustration, NSBA could be perceiving (1) something that does not actually exist, or (2) a legal landscape developed to the point where parents are more aware of and willing to exercise their Constitutional rights, or even (3) an atmosphere where school districts now act out of fear of litigants suing the school for perceived Establishment Clause violations.

CONCLUSION

For the foregoing reasons, and for the reasons put forth in Plaintiff-Appellees' Brief, this Court should affirm the District Court's denial of qualified immunity.

Respectfully submitted,
this 14th day of April, 2011

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CERTIFICATE OF COMPLIANCE

Pursuant to F.R.A.P. 32.2.7(C), the undersigned certifies that this brief complies with the type-volume limitations of F.R.A.P. 32.2.7(B). Exclusive of the exempted portions, this Brief contains 2,338 words in 14 point Times New Roman font. This total was calculated with the Word Count function of Microsoft Office Word 2007.

Also, pursuant to Local Rules 2, 25.2.13, the undersigned certifies that this Brief complies with the privacy redaction requirements and that it has been scanned and found virus-free using the anti-virus component of AVG Internet Security 2011.

Finally, pursuant to Local Rule 25.2.1, the undersigned certifies that the attached electronic brief is an exact copy of the paper document.

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CERTIFICATE OF SERVICE

I hereby certify that I have duly served the attached Brief *Amicus Curiae* of WallBuilders, Inc. in the case of *Morgan, et al. v. Swanson, et al.*, No. 09-40373, on all required parties by the Electronic Case Filing system on April 14, 2011, and that all parties are registered users.

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