

No. 14-720

IN THE
Supreme Court of the United States

JOHN DARIANO; DIANNA DARIANO, on behalf of
their minor child, M.D.; KURT FAGERSTROM;
JULIE ANN FAGERSTROM, on behalf of their minor
child, D.M.; KENDALL JONES; JOY JONES,
on behalf of their minor child, D.G.,
Petitioners,

v.

MORGAN HILL UNIFIED SCHOOL DISTRICT;
NICK BODEN, in his official capacity as Principal,
Live Oak High School; MIGUEL RODRIGUEZ,
in his individual and official capacity as
Assistant Principal, Live Oak High School,
Respondents.

**On Petition for Writ of Certiorari to the
United States Court of Appeals for the
Ninth Circuit**

**BRIEF OF *AMICI CURIAE*
MARY BETH TINKER AND JOHN TINKER
IN SUPPORT OF PETITIONERS**

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QUESTION PRESENTED

Whether the Ninth Circuit erred by allowing school officials to prevent students from engaging in silent, passive expression of opinion because other students might react negatively to the message, thereby incorporating a heckler's veto into the free speech rights of students, contrary to *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969).

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INTERESTS OF *AMICI CURIAE*¹

Forty-five years ago, John and Mary Beth Tinker were two of the petitioners in the landmark case that established “[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.” *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

The *Tinker* case arose at the end of 1965 as the Vietnam War was becoming increasingly controversial. Although American involvement was still in its early stages, almost 2,000 U.S. soldiers had already died in the conflict, and another 6,000 would perish in the coming year. See Ronald K.L. Collins & Sam Chaltain, *We Must Not Be Afraid To Be Free* 270 (2011). John Tinker, then fifteen years old, and his thirteen-year-old sister Mary Beth, an eighth-grader, decided to express their grief over the loss of life and to show support for a proposed Christmas truce by wearing black armbands to school.

Seven students in Des Moines participated in the silent protest despite the fact that the School Board in an emergency meeting had adopted a policy prohibiting the armbands. Five students who violated the policy were suspended from school, including John and Mary Beth Tinker, who, along with

¹ All parties have consented to this *amici curiae* brief and letters of consent have been filed with the Clerk. No counsel for a party authored this brief in whole or in part, and no person or entity other than *amici* and its counsel made a monetary contribution to the preparation or submission of this brief.

another student named Christopher Eckhardt, challenged the ruling in court.

As a result, this Court was asked to decide how to apply First Amendment principles “in light of the special characteristics of the school environment” and it concluded that “[i]n our system, state-operated schools may not be enclaves of totalitarianism.” *Tinker*, 393 U.S. at 506, 511. In striking a balance between fundamental constitutional safeguards and the authority of school officials to “prescribe and control conduct in the schools,” this Court held that “undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression.” *Id.* at 507-08.

That decision, and the personal experiences that led to it, forged *amici*'s lifelong commitment to promoting First Amendment values. John Tinker is the general manager of KPIP, a low-power community FM radio station in Fayette, Missouri. He is also the editor of Schema-Root.org, a web-based encyclopedia of current events. Each year, he corresponds with dozens of students who are working on school projects related to *Tinker v. Des Moines*, and several times each year, he speaks publicly in academic settings about the case. Mary Beth Tinker has also been active, and in 2013-14 participated in a nationwide campaign to promote student rights known as the “Tinker Tour.” She traveled more than 25,000 miles by bus and spoke to more than 20,000 students and teachers at over 100 stops that included schools, colleges, churches, youth detention facilities, courts, and several national conventions. See <http://tinkertourusa.org/about/tinkertour/>. The

armband she wore in 1965 is on permanent display at the Newseum in Washington, D.C. See <http://www1.newseum.org/news/2013/04/mary-beth-tinker.html>.

BACKGROUND

This case arose when Petitioners wore American flag-themed shirts to school on May 5, 2010, while some students at Live Oak High School observed “Cinco de Mayo” celebrating Mexican culture and heritage. See App. 21-22. School officials directed the Petitioners to take off their shirts, turn them inside out, or go home, in response to comments by some students that there might be “issues” or “problems” because of the shirts. *Id.* 23. Although some students had exchanged profanities during a similar incident the previous year, *id.* 22, in 2010, no classes were delayed or interrupted by Petitioners’ wearing the American flag shirts, no violence occurred at the school, and there were no reports of actual disturbance caused by Petitioners’ attire. *Id.* 9 n.2. The Petitioners made no threats, and were not disruptive. This civil rights action followed, and the Ninth Circuit upheld the school’s decision based on *Tinker*.

SUMMARY OF ARGUMENT

The split, outlined in the Petition for Certiorari, between this Ninth Circuit decision and the Seventh and Eleventh Circuits is reason enough to grant certiorari. *Zamecnik v. Indian Prairie Sch. Dist. No. 204*, 636 F.3d 874 (7th Cir. 2011); *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252 (11th Cir. 2004). But there are other compelling reasons as well.

1. Since *Tinker*, this Court has never squarely returned to the question of student political speech at school. The lack of guidance has left lower courts in the dark about how *Tinker* should apply in elementary and secondary schools today. This case is an excellent vehicle to offer such further guidance that will provide much-needed clarity for judges, administrators, and students.

2. Many school speech cases involve speech that might potentially lead to a hostile, even violent, reaction. *Tinker* itself involved such speech. This case is thus within the core of the *Tinker* doctrine, and provides an opportunity to address how the First Amendment applies to such potentially provocative speech. Indeed the Ninth Circuit's approval of a heckler's veto in this case shows how far some courts have traveled from *Tinker*.

3. Finally, this case is about the future of free speech as much as about the present and the past. If students learn that threatening speakers is an effective way to suppress speech, this will produce more threats, and more suppression of a wide range of other speech. And beyond this, even peaceful students will learn that free speech must yield whenever its opponents are willing to threaten violence – a message antithetical to all that this Court has tried to convey about the First Amendment.

ARGUMENT

A. Lower Courts Have Struggled with How to Apply *Tinker*

The principles that *Tinker* announced have not always been easy to put into practice. Part of the reason is that this Court has never elaborated on the protection that *Tinker* offers to student political speech. In *Bethel School District No. 403 v. Fraser*, 478 U.S. 675, 680, 685 (1986), and *Morse v. Frederick*, 551 U.S. 393, 402-03 (2007), the Court stressed that the speech at issue was not political. And *Board of Education, Island Trees Union Free School District v. Pico*, 457 U.S. 853 (1982), and *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), did not involve speech by individual students but instead dealt with governmental book removal choices and school newspaper editorial decisions tied to the curriculum.

Given this limited guidance, lower courts have found it difficult to apply the principles of *Tinker* consistently. “*Tinker* continues to plague and confuse the public schools over forty years later.” Charles R. Waggoner, *The Impact of Symbolic Speech in Public Schools: A Selective Case Analysis From Tinker to Zamecnik*, 3 Admin. Issues J. 64, 65 (2013). Some lower court holdings follow *Tinker*’s principle that students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.” 393 U.S. at 506. But others give school administrators broad discretion to restrict student speech they think is offensive. And while the particular facts of each case can rightly affect the

outcome, it is often hard to see a consistent principle that can explain the decisions.

For example, in *Zamecnik*, 636 F.3d at 879-80, the Seventh Circuit held that the school could not forbid a student from wearing a T-shirt with the slogan “Be Happy, Not Gay.” Likewise, in *Chambers v. Babbitt*, 145 F. Supp. 2d 1068, 1069 (D. Minn. 2001), the district court held that a student had the right to wear a T-shirt with the words “straight pride.” Both courts expressly rejected a heckler’s veto rationale.

Similarly, in *Nixon v. Northern Local School District Board of Education*, 383 F. Supp. 2d 965, 974 (S.D. Ohio 2005), the court held that the First Amendment protected a student’s right to wear a shirt with the word “INTOLERANT” on the front and biblical injunctions condemning homosexuality, Islam, and abortion on the back. And the Third Circuit, applying *Tinker*, has held that speech of this sort in the school setting generally is protected by the First Amendment. *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 211-14 (3d Cir. 2001) (Alito, J.); *id.* at 204 (“There is no categorical ‘harassment exception’ to the First Amendment’s free speech clause.”).

But applying the same body of Supreme Court precedent, a Ninth Circuit panel held that a school may suspend a student for wearing a shirt bearing Bible verses calling homosexuality a sin. *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1185 (9th Cir. 2006), *vacated as moot*, 549 U.S. 1262 (2007). Similarly, a district court in Florida ruled that a school could prohibit T-shirts with the slogan “Islam

is of the Devil.” *Sapp v. Sch. Bd. of Alachua Cnty.*, No. 09-cv-242, 2011 WL 5084647, at *5-6 (N.D. Fla. Sept. 30, 2011). Indeed, in *Boroff v. Van Wert City Board of Education*, 220 F.3d 465, 469 (6th Cir. 2000), for example, the Sixth Circuit went so far as to uphold a ban on sacrilegious Marilyn Manson T-shirts simply because the band “promote[d] destructive conduct and demoralizing values.”

This is just a small sampling of the many cases diverging on how to apply *Tinker* – and it stands to reason that the courts’ confusion yields even more confusion among administrators, teachers, and students. Only by revisiting this area can the Court help clarify matters, whether this return visit articulates a bright-line rule or provides a benchmark on how courts should apply a less precise standard.

B. “Heckler’s Veto” Cases Are at the Heart of First Amendment Protection

This case is a perfect vehicle to reaffirm and clarify the principles of *Tinker*, because there is nothing unusual about speech leading to a risk of hostility or even violence. Speech on the most important matters facing America routinely involves some risk of such a reaction. “[F]reedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom.” *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

Amici’s speech in *Tinker* itself involved the risk of violent reaction over political expression. The District Court refused to protect wearing armbands in school as a form of protest because “debate over

the Viet Nam war had become vehement in many localities” and “individuals supporting the war and those opposing it were quite vocal in expressing their views.” *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 258 F. Supp. 971, 972-73 (S.D. Iowa 1966), *aff’d*, 383 F.2d 988 (8th Cir. 1967) (*en banc*), *rev’d*, 393 U.S. 503, 506 (1969). The court added that, “the reactions and comments from other students as a result of the arm bands would be likely to disturb the disciplined atmosphere required for any classroom.” *Id.* at 973.

And the potential disturbance was not limited just to polite disagreement. One person telephoned the Tinkers’ home on Christmas Eve and said “the house would be blown up by morning.” Collins & Chaltain, *supra*, at 277. A woman called for Mary Beth, and when the young teen got on the line, said, “Is this Mary Beth? ... I’m going to kill you.” Kelly Shackelford, *Mary Beth and John Tinker and Tinker v. Des Moines: Opening the Schoolhouse Gates to First Amendment Freedom*, 39 J. Sup. Ct. History 372, 378 (2014). The Tinkers received other threatening telephone calls as well. They also received hate mail, and their house was vandalized with red paint.

A local radio talk show host told his audience he would defend anyone who physically attacked Leonard Tinker, John and Mary Beth’s father, who was a devoted pacifist. *Id.* As Justice Black noted, in school the Tinkers faced “warnings by other students” to the point that “an older football player” felt the need to “warn[]” “that other, non-protesting students had better let them alone.” *Tinker*, 393 U.S. at 517 (Black, J., dissenting).

Yet this Court held the Tinker children’s speech to be protected despite such threats. This makes perfect sense, given that the heckler’s veto doctrine is one of the oldest and most venerable in First Amendment jurisprudence. *Terminiello v. City of Chicago*, 337 U.S. 1, 3-5 (1949), which articulated the principle that danger from “angry and turbulent” hostile audiences cannot justify censorship, came a mere 13 years after this Court first began to regularly invalidate unconstitutional speech restrictions.²

And this Court has repeated this principle on many occasions since then, reaffirming that First Amendment rights cannot be curtailed “simply because of hostility to their assertion or exercise.” *Cox v. Louisiana*, 379 U.S. 536, 551 (1965). “[T]he possible tendency of ... words to provoke violent retaliation” (setting aside the narrow zone of “fighting words”) cannot justify restricting such speech. *Street v. New York*, 394 U.S. 576, 592 (1969). Indeed, “[t]hose wishing to express views unpopular with bottle throwers” cannot even be forced to pay more for their parade permits. *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 134 (1992). They certainly cannot be ordered to stop speaking.

² The first Court decisions striking down government action on free speech, press, or assembly grounds were *Stromberg v. California*, 283 U.S. 359 (1931), and *Near v. Minnesota*, 283 U.S. 697 (1931). The first serious surge of First Amendment cases came with *Grosjean v. American Press Co.*, 297 U.S. 233 (1936), *De Jonge v. Oregon*, 299 U.S. 355 (1937), *Herndon v. Lowry*, 301 U.S. 242 (1937), and *Lovell v. City of Griffin*, 303 U.S. 444 (1938).

Likewise, the danger of violent reaction to speech was commonplace in the civil rights movement. Limiting peaceful civil rights expression because of the fear of violent crowd reactions would have severely undermined both the First Amendment and the cause of equality. *See generally* Harry Kalven, Jr., *The Negro and the First Amendment* 140-46 (1965) (discussing the heckler’s veto as a barrier to civil rights). Fortunately, this Court repeatedly responded by holding that “[p]articipants in an orderly demonstration in a public place” cannot be punished or silenced simply because “their critics might react with disorder or violence.” *Brown v. Louisiana*, 383 U.S. 131, 133 n.1 (1966); *see also Cox*, 379 U.S. at 550-51; *Edwards v. South Carolina*, 372 U.S. 229 (1963).

Even the expression in *Barnette* – a silent refusal to salute the flag – risked violent reaction. When that case reached the Court at the height of World War II, more than 2,000 Jehovah’s Witness children had been expelled from schools because of their religious convictions about the flag. Michael Welch, *Flag Burning* 6 (2000). In 1940, an estimated 1,500 Jehovah’s Witnesses were victims of mob violence in 355 communities in 44 states in just a six-month period. *See* Constitutional Amendment to Prohibit Physical Desecration of U.S. Flag, S. Rep. No. 108-33, at 57 n.17 (July 22, 2004) (minority views).

In such an atmosphere, a school principal confronted with a wave of patriotic fervor might conclude that preventing potential disruption justifies forcing a few dissenters to profess love for flag and country. After all, if the Ninth Circuit is correct in

holding that the need for order in the public schools trumps the heckler's veto doctrine, why not dispense with the prohibition against compelled speech as well? Yet this Court made clear – even (perhaps especially) against the backdrop of the violent hostility to those who refused to salute the flag – that such a refusal is protected by the First Amendment.

To be sure, school administrators may and should try to prevent physical confrontations at school. But though the “special characteristics of the school environment” give officials some latitude in maintaining order, *Tinker*, 393 U.S. at 506, these characteristics do not give officials absolute discretion in achieving that objective.

The question is not *whether* order is to be maintained in the schools, but *how* it is to be maintained. It must be done in a way that is consistent with constitutional values. As Justice Robert Jackson wrote for the Court in *Barnette*, 319 U.S. at 637, the Bill of Rights “protects the citizen against the State itself and all of its creatures – Boards of Education not excepted.” This means that schools should not be permitted to meet their responsibilities simply because silencing speech may be “the path of least resistance.” *McCullen v. Coakley*, 134 S. Ct. 2518, 2534 (2014). The government may not “sacrifice speech for efficiency.” *Riley v. National Fed. of Blind of N.C., Inc.*, 487 U.S. 781, 795 (1988).

This is nothing more than recognition of the broader First Amendment concept that a speaker cannot be muzzled simply because the speech may prompt misconduct (or misunderstanding) by a third party. The government, for instance, may not

restrict student religious speech, even in public schools, because of a fear that some in the audience will wrongly perceive that the speech is endorsed by the school. *Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 119 (2001) (“We decline to employ Establishment Clause jurisprudence using a modified heckler’s veto, in which a group’s religious activity can be proscribed on the basis of what the youngest members of the audience might misperceive.”).

Likewise, the government may not prohibit leafleting on the grounds that some recipients of the missives are litterbugs. *E.g.*, *Schneider v. New Jersey*, 308 U.S. 147, 162 (1939) (“There are obvious methods of preventing littering. Amongst these is the punishment of those who actually throw papers on the streets.”). And this is true even though restricting the leafleters may be easier, and more effective, than restricting the litterers.

The same is so with regard to hostile hecklers. The need to prevent disruption of the school environment cannot justify restricting students who engage in peaceful symbolic speech simply because others may take boisterous exception. Otherwise, as Judge O’Scannlain explained in his dissent from denial of rehearing *en banc* in this case, “[t]he demands of bullies will become school policy.” App. 14. Leaving the Ninth Circuit’s reasoning undisturbed would thus undermine both the “heckler’s veto” doctrine and this Court’s holding in *Tinker* itself.

Yet despite the Ninth Circuit’s analysis below, the rumblings of those who disliked what they (wrongly) saw as the Tinkers’ anti-American or anti-

military message could not justify censoring students who peacefully express themselves. Likewise, the rumblings of those who dislike what they (wrongly) see as an anti-Mexican message cannot justify censoring the peaceful students in this case.

C. Teach Our Children Well

The Ninth Circuit's holding is thus inconsistent with this Court's past cases, and yields an unsound result. But it also risks suppressing future speech more broadly in two ways because it sends the wrong message:

1. The decision below undermines constitutional values by teaching law-abiding students that the peaceful must surrender their rights in the face of hostility from the violent. Nothing could be more antithetical to First Amendment principles, especially in view of recent events.

“Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example.” *Olmstead v. United States*, 277 U.S. 438, 485 (1928). This is a particularly important concept in our educational institutions. Public schools are vital institutions in preparing individuals for participation as United States citizens and in preserving the values of our democratic system. *Ambach v. Norwick*, 441 U.S. 68, 76 (1979). “That schools are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.” *Barnette*, 319 U.S. at 637.

In this case, both the school system and the Ninth Circuit have set the wrong example and taught the wrong understanding of the First Amendment.

2. The opinion below also teaches another dangerous lesson – it instructs would-be censors that violence works. “[T]he heckler’s veto rewards the enemies of freedom for their misbehavior.” David P. Currie, *The Constitution in the Supreme Court: 1946–1953*, 37 *Emory L.J.* 249, 265 (Spring 1988).

Bad incentives have bad consequences. Behavior that gets rewarded gets repeated. As students learn the lesson of the Respondents’ actions, and of the Ninth Circuit’s validation of those actions, many more of them will start to make threats (even empty threats) against speakers they dislike.

Indeed, they might be able to convey their threats indirectly or anonymously, thus facing little risk of punishment. And for this little risk, they would get a substantial reward, in the form of successfully shutting up the speech they dislike – a cheap exercise of power over others that is especially likely to appeal to some teenagers who are still developing their sense of right and wrong.

Instead of preventing disruption, Respondents’ policy will thus encourage threats, or perhaps even violence that helps make the threats more credible. And it will expose an ever-widening range of speech to suppression – an indirect but important speech-restrictive effect of the ruling below. Sixth Circuit Judge Clay put this well in a recent “heckler’s veto” case: “It does not take much to see why law enforcement is principally required to protect lawful

speakers over and above law-breakers. If a different rule prevailed, ... hecklers would be incentivized to get *really* rowdy, because at that point the target of their ire could be silenced.” *Bible Believers v. Wayne Cnty.*, 765 F.3d 578, 595 (6th Cir. 2014) (Clay, J., dissenting), *en banc review granted & opinion vacated* (6th Cir. Oct. 23, 2014) (No. 13-1635). Likewise, as Judge O’Scannlain explained in his dissent below, the Ninth Circuit holding sends the message that “by threatening violence against those with whom you disagree, you can enlist the power of the State to silence them. This perverse incentive created by the panel’s opinion is precisely what the heckler’s veto doctrine seeks to avoid.” App. 13-14.

The Ninth Circuit’s holding thus provides a blueprint for anyone who wants to censor speech in the future. All they need do is threaten the speaker. Only this Court can correct that unsound lesson.

CONCLUSION

It is ironic that the student expression censured in this case involved a showing of respect for the American flag. A lifetime ago, this Court held that the government could not compel schoolchildren to salute the flag precisely because the First Amendment “includes both the right to speak freely and the right to refrain from speaking at all.” *Barnette*, 319 U.S. at 645 (Murphy, J., concurring). Likewise, the government cannot prohibit schoolchildren from displaying the flag, either.

This case is an ideal vehicle to clarify the holding of *Tinker*, to reaffirm the vitality of the “heckler’s veto” doctrine, and to prevent students (both the

potentially violent and the peaceful) from learning a message that is the very antithesis of the First Amendment: that speech can be effectively suppressed by threat of violence.

Respectfully submitted,

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