NO. 06-278

IN THE
SUPREME COURT OF THE UNITED STATES

DEBORAH MORSE, JUNEAU SCHOOL BOARD,

Petitioners,

v.

JOSEPH FREDERICK,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF *AMICUS CURIAE* ALLIANCE DEFENSE FUND SUPPORTING RESPONDENT

Benjamin W. Bull
Jordan W. Lorence
Gary S. McCaleb
ALLIANCE DEFENSE FUND
15333 N. Pima Rd., Suite 165
Scottsdale, AZ 85260
(480) 444-0020

Kevin H. Theriot
Counsel of Record
ALLIANCE DEFENSE FUND
15192 Rosewood
Leawood, KS 66224
(913) 685-8000

Timothy D. Chandler
ALLIANCE DEFENSE FUND
101 Parkshore Dr., Suite 100
Folsom, CA 95630
(916) 932-2850

Attorneys for Amicus Curiae

QUESTIONS PRESENTED

1. Whether the First Amendment allows public schools to prohibit students from displaying messages promoting the use of illegal substances at school-sponsored, faculty-supervised events.

2. Whether the Ninth Circuit departed from established principles of qualified immunity in holding that a public high school principal was liable in a damages lawsuit under 42 U.S.C. § 1983 when, pursuant to the school district's policy against displaying messages promoting illegal substances, she disciplined a student for displaying a large banner with a slang marijuana reference at a school-sponsored, faculty-supervised event.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE(S)**

OTHER AUTHORITIES

INTEREST OF *AMICUS CURIAE*[1]

The Alliance Defense Fund ("ADF") is a not-for-profit public interest legal organization providing strategic planning, training, funding, and direct litigation services to protect our first constitutional liberty—religious freedom. Since its founding in 1994, ADF has played a role, either directly or indirectly, in many cases before this Court, including *Scheidler v. National Organization for Women (NOW)*, 126 S.Ct. 1264 (2006), *Rumsfeld v. Forum for Academic and Institutional Rights*, 126 S.Ct. 1297 (2006), *Gonzales v. O Centro Beneficente Uniao Do Vegetal*, 546 U.S. 418 (2006), *Ayotte v. Planned Parenthood of Northern New England*, 546 U.S. 320 (2006), *Van Orden v. Perry*, 545 U.S. 677 (2005), *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002), *City of Los Angeles v. Alameda Books*, 536 U.S. 921 (2002), *Good News Club v. Milford Central Schools*, 533 U.S. 98 (2001), *Troxel v. Granville*, 530 U.S. 57 (2000), *Mitchell v. Helms*, 530 U.S. 793 (2000), *Dale v. Boy Scouts of America*, 530 U.S. 640 (2000), *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998), *Washington v. Glucksberg*, 521 U.S. 702 (1997), *Vacco v. Quill*, 521 U.S. 793 (1997), *Agostini v. Felton*, 521 U.S. 203 (1997), *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995), *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*, 515 U.S. 557 (1995), *American Library Association v. Reno*, 515 U.S. 557 (1995), as well as hundreds more in the lower courts.

---

[1] According to Counsel of Record for Respondent, the parties have submitted to this Court a standing agreement consenting to the filing of all *amicus curiae* briefs. In accordance with Rule 37.6, *amicus* states that no counsel for any party has authored this brief in whole or in part, and no person or entity, other than the *amicus*, has made a monetary contribution to the preparation or submission of this brief.

Included in these cases are a significant number of student speech cases around the country. For instance, ADF represents the Harpers in *Harper v. Poway Unified School District*, 445 F.3d 1166 (9th Cir. 2006), *petition for cert. filed*, No. 06-595 (filed Oct. 26, 2006). Like the speech at issue in this case, religious speech can be controversial. As such, it is often the target of censorship in our Nation's public schools. Recognizing that this case will potentially have a profound impact on the landscape of students' speech rights, ADF is seeking to ensure that the freedom of expression and the opportunity for rigorous debate of controversial ideas—which are essential to our democratic system—are jealously guarded within our schools.

SUMMARY OF ARGUMENT

This brief addresses two primary issues: first, whether this Court's decision in *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986) ("*Fraser*") allows schools to censor any student expression that it believes is inconsistent with its educational mission; and second, whether this Court's decision in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969) ("*Tinker*") allows schools to censor speech merely because it is offensive or derogatory.

Both should be answered in the negative. This Court should affirm that *Fraser* allows schools to restrict vulgar speech, profanity, and other *manners of speech* that are inappropriate for public discourse, particularly in the school environment; but it does not allow schools to censor viewpoints with which it disagrees. Petitioners' contention that schools can ban any speech that contradicts their "educational mission"—an inherently vague and infinitely malleable concept—should be flatly rejected. As seen in the

Sixth Circuit's decision in *Boroff v. Van Wert City Board of Education*, Petitioners' reading of *Fraser* would give schools unprecedented discretion in deciding what students may say on campus. The end result would be precisely what *Tinker* said the First Amendment could never allow: an "enclave of totalitarianism" where students are "confined to the expression of those sentiments that are officially approved." 393 U.S. at 511.

This Court should also reject *amici*'s argument that *Tinker*'s prohibition on student speech that invades the rights of other students allows schools to ban speech that is offensive. Although this case is not particularly well-suited for addressing this issue, the Ninth Circuit's recent decision in *Harper v. Poway Unified School District*, 445 F.3d 1166 (9th Cir. 2006) has amplified the need for clarity on this issue. If this Court decides to address this issue here, it should hold that *Tinker*'s "rights of others" prong applies only to speech that could result in tort liability.

ARGUMENT

I. THIS COURT HAS NEVER ALLOWED SCHOOLS TO CENSOR PRIVATE, NON-DISRUPTIVE STUDENT SPEECH BECAUSE OF THE VIEW IT EXPRESSES.

A. Students do not shed their constitutional rights at the schoolhouse gate.

This Court first demarcated the scope of students' free speech rights on campus in *Tinker*. Starting with the premise that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," 393 U.S. at 506, *Tinker* held that schools must tolerate

student speech, including controversial political speech, unless it would materially and substantially disrupt the operation of the school or infringe upon the rights of other students. *Id.* at 513. That is particularly true here, where the plaintiff students never even made it to the schoolhouse.[2]

Since *Tinker*, this Court has carved out two narrow categories of speech that a school may restrict, even without the threat of substantial disruption. The first is graphic sexual innuendo and other profane language. In *Fraser*, this Court emphasized that "it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse." 478 U.S. at 683. This Court said *Tinker* was distinguishable because this restriction is based on the manner of speech, not the viewpoint of the speaker. *Id.* at 685.

Second, in *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988) ("*Hazelwood*"), this Court acknowledged that schools have a special interest in regulating their own speech. *Id.* at 270-71. *Hazelwood* gives schools significant deference in regulating student speech that it sponsors—that is, speech that would reasonably be viewed as bearing the imprimatur of the school. Any such regulation, *Hazelwood* held, need only have a legitimate pedagogical concern. *Id.* at 273.

---

[2] *Amicus* submits that school officials could and should have avoided engaging in constitutionally problematic censorship by simply punishing the students for being truant that day. *See Frederick v. Morse*, 439 F.3d 1114, 1116 (9th Cir. 2006).

B. Petitioners and *amici* are asking this Court to substantially limit students' First Amendment rights.

Petitioners, and *amici* supporting them, contend that they were justified in removing Frederick's banner under all three of these cases. *See, e.g.*, Brief for Petitioner, p. 15. This brief responds to two of those contentions: (1) that the banner could be censored under *Fraser* because its message is inconsistent with the Petitioners' "educational mission;" and (2) that the banner could be censored under *Tinker* because it infringed upon the rights of other students.

As explained below, if this Court adopts either of these arguments, it would eviscerate much of the First Amendment freedoms our public school students currently enjoy—opening the door for schools to censor private, non-disruptive student speech solely because the school disagrees with its message. While the school environment admittedly raises unique concerns that justify some limits on students' freedom of expression, the First Amendment is nonetheless alive and well on our Nation's campuses. And "if there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989). This principle plays a central role in shaping our democratic society, and cannot be disregarded within our public schools.

II. *FRASER* CANNOT BE READ TO ALLOW A SCHOOL TO CENSOR STUDENT SPEECH WITH WHICH IT DISAGREES.

The central holding of *Fraser* is that 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." 478 U.S. at 685. This statement also forms the premise of Petitioners' argument. They claim that part of a school's educational mission is to "promot[e] a healthy, drug-free lifestyle." Brief for Petitioner, p. 25. And Frederick's banner, because it expressed "a positive sentiment about marijuana use," is inconsistent with this mission. *Id.* Therefore, the argument goes, the school was justified in censoring Frederick's speech under *Fraser*.

This argument ignores the critical distinction between *Fraser* and this case: the censorship in *Fraser* was based on the student's language; the censorship here is based on the student's viewpoint. This distinction is critical because viewpoint discrimination is uniquely repugnant to the First Amendment. *See Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819, 829 (1995); *R.A.V. v. St. Paul*, 505 U.S. 377, 391 (1992). As detailed below, the *Fraser* Court strongly suggested that it would not have gone so far as to allow viewpoint discrimination. This Court should also avoid taking such a perilous step.

A. *Fraser* only permits schools to prohibit plainly offensive manners of speech, not plainly offensive viewpoints.

Inculcating habits and manners of civility—by discouraging vulgar and lewd language—is unquestionably an important function of public schools. But the *Fraser* Court viewed this function as a regulation of the language that students use, not the ideas they express.

> Surely it is a highly appropriate function of public school education to prohibit the use of ***vulgar and offensive terms*** in public discourse. Indeed, the "fundamental values necessary to the maintenance

> of a democratic system" disfavor the use of terms of debate highly offensive or highly threatening to others. Nothing in the Constitution prohibits the states from insisting that certain ***modes of expression*** are inappropriate and subject to sanctions. The inculcation of these values is truly the "work of the schools."

Fraser, 478 U.S. at 683 (quoting *Tinker*, 393 U.S. at 508) (emphasis added). This Court used *Cohen v. California*, 403 U.S. 15 (1971), which upheld an adult's First Amendment right to wear a jacket bearing an obscenity in a courthouse, as an example of this distinction:

> It does not follow, however, that simply because the use of an offensive ***form of expression*** may not be prohibited to adults making what the speaker considers a political point, the same latitude must be permitted to children in public school . . . . [T]he First Amendment gives a high school student the classroom right to wear Tinker's armband, but not Cohen's jacket.

478 U.S. at 682 (quotation marks and citation omitted; emphasis added). Indeed, the cases *Fraser* relied on all concern vulgar and profane language. *See id.* at 682-85, where the Court cites *Ginsberg v. New York*, 390 U.S. 629 (1968) (upholding ban on sale of sexually-oriented materials to minors); *Board of Education v. Pico*, 457 U.S. 853 (1982) (acknowledging that school boards may remove vulgar books from school libraries); and *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978) (holding that FCC may prohibit obscene, indecent, or profane language).

Thus, schools are given significant discretion in deciding what manners of speech are appropriate within the school environment. But this Court repeatedly emphasized its

unwillingness to give the same discretion to schools if they are censoring ideas, rather than language. It stressed that students have "the undoubted freedom to advocate unpopular and controversial views in schools and classrooms," and that an indispensable objective of public education is to teach tolerance of such divergent views. *Fraser*, 478 U.S. at 681. In fact, this Court emphasized that the critical distinction between *Fraser* and *Tinker* was the regulation's viewpoint-neutrality:

> We hold that petitioner School District acted entirely within its permissible authority in imposing sanctions upon Fraser in response to his offensively lewd and indecent speech. Unlike the sanctions imposed on the students wearing armbands in *Tinker*, the penalties imposed in this case ***were unrelated to any political viewpoint***.

Id., 478 U.S. at 685 (emphasis added).

Justice Brennan's concurrence in *Fraser* further supports this view. He wrote separately to "express [his] understanding of the breadth of the Court's holding." 478 U.S. at 688. Reiterating that the holding was based on the school's interest in teaching students how to engage in appropriate public discourse, he noted that this interest is significantly limited in two ways. First, the context of the speech must be taken into account. Where the student is engaging in true public discourse—here, in a speech at a school-wide assembly—this interest is particularly weighty. *Id.* at 689. But in a different context, even at school, the speech "may well have been protected." *Id.* Second, even in the context of a school assembly, where the school's interest was strongest, it may not engage in viewpoint discrimination. Justice Brennan underscored that there was "no suggestion that school officials attempted to regulate respondent's

speech because they disagreed with the views he sought to express." *Id.*

B. The majority of circuit courts have interpreted *Fraser* narrowly, and the sole minority court reveals the danger in Petitioners' view.

Boroff v. Van Wert City Board of Education, 220 F.3d 465 (6th Cir. 2000)—the only circuit court case that supports Petitioners' view of *Fraser*—provides a perfect example of the danger in interpreting *Fraser* so broadly. *Boroff* involved a high school student who wore a t-shirt to school featuring "goth" rocker Marilyn Manson. *Id.* at 466. The front of the shirt depicted Manson and a three-faced Jesus with the words "See No Truth. Hear No Truth. Speak No Truth." *Id.* at 467. The back had the word "BELIEVE," with the letters "LIE" highlighted. *Id.* On several occasions, the school sent Boroff home from school for wearing the shirt. *Id.*

In a divided opinion, the Sixth Circuit rejected Boroff's constitutional claim, relying on *Fraser*. The court agreed with the school's principal, who thought the shirt was offensive "because the band promotes destructive conduct and demoralizing values that are contrary to the educational mission of the school." *Id.* at 469. The court went beyond the content of the shirt, and considered the views expressed by the band in deciding the shirt's message conflicted with the school's educational mission—vaguely defined by the school as establishing "a common core of values that include human dignity and worth . . . self respect, and responsibility" as well as instilling "an understanding and appreciation of the ideals of democracy and help them to be diligent and competent in the performance of their obligations as citizens." *Id.*

Not only did the Sixth Circuit fail to question this amorphous definition of an "educational mission," but it also

looked beyond the language on the shirt itself to the ideas expressed by the signer it depicted, even referencing song lyrics and media quotes from the singer. *Id.* at 469-70. As one legal commentator noted, the Sixth Circuit's "rationale would permit public school officials to restrict virtually any student speech they deem to be offensive."[3]

By contrast, along with the Ninth Circuit opinion in this case, multiple lower courts have interpreted *Fraser* to apply only to the manner of speech students employ, not their viewpoints. *See, e.g., Guiles v. Marineau*, 461 F.3d 320, 328 (2d Cir. 2006) ("*Fraser* itself . . . indicated that its rule applies to the 'manner of speech,' i.e., the offensiveness of its form, but not the speech's content"); *Saxe v. State College Area School District*, 240 F.3d 200, 213 (3d Cir. 2001) ("*Fraser* permits a school to prohibit words that offend for the same reasons that obscenity offends—a dichotomy neatly illustrated by the comparison between Cohen's jacket and

---

[3] Miller, Andrew D.M., *Balancing School Authority and Student Expression*, 54 Baylor L. Rev. 623, 649 (2002), quoting O'Shea, Kevin, *First Amendment Rights in Education*, First Amendment Rights in Education Project, at 16 (2000). Indeed, legal commentators have been both vocal and unified in their criticism of *Boroff*'s interpretation of *Fraser*. *See, e.g.*, Lavorato, Cindy and Saunders, John, *Public High School Students, T-Shirts, and Free Speech: Untangling the Knots*, 209 Ed. Law Rep. 1, 6-7 (2006) ("The Court's analysis and conclusion [in *Boroff*] raises several concerns, and arguably should not be considered persuasive precedent in any but the Sixth Circuit"); Peterson, Justin T., *School Authority v. Students' First Amendment Rights: Is Subjectivity Strangling the Free Mind at its Source?*, 3 Mich. St. L. Rev. 931, 948-50 (2005) (noting that *Boroff* illustrates "the confusion that *Fraser* has caused"); Hudson, David L. and Ferguson, John E., *The Courts' Inconsistent Treatment of Bethel v. Fraser and the Curtailment of Student Rights*, 36 J. Marshall L. Rev. 181, 203 (2002) (*Boroff* "flies in the face of Constitutional principles that are designed to protect against . . . government preference for certain ideas while punishing those with non-conforming views").

Tinker's armband") (quotation marks and citation omitted); *Newsom v. Albemarle County School Board*, 354 F.3d 249, 256 (4th Cir. 2003) ("When student speech falls within the lewd, vulgar, and plainly offensive rubric, it can be said that *Fraser* limits the form and manner of speech, but does not address the content of the message"); *Sypniewski v. Warren Hills Regional Board of Education*, 307 F.3d 243, 254 (3d Cir. 2002) (noting *Fraser* did not apply because the school "did not contend the [banned] shirt contained indecent language"); *East High Gay/Straight Alliance v. Board of Educaction of Salt Lake City School District*, 81 F.Supp.2d 1166, 1193 (D.Utah 1999) ("*Fraser* speaks to the form and manner of student speech, not its substance. It addresses the mode of expression, not its content or viewpoint").

C. Adopting the view of Petitioners and their supporting *amici* would effectively eliminate the *Tinker* standard.

Fraser cannot be read so broadly as to allow schools to censor all student expression that conflicts with their "educational mission." Otherwise, it would be triggered any time a school decides that something a student says is inconsistent with something it is trying to teach. As the Ninth Circuit noted in this case,

> There has to be some limit on the school's authority to define its mission in order to keep *Fraser* consistent with the bedrock principle of *Tinker* that students do not "shed their constitutional rights to freedom of speech at the schoolhouse gate." Had the school in that case defined its mission as instilling patriotic duty or promoting support for national objectives, it still

> could not have punished the students for wearing the black armbands.

Frederick, 439 F.3d at 1120 (footnote omitted). Countless other examples are available from cases where students' free speech rights have upheld, but no longer would be under Petitioners' interpretation of *Fraser*. In *Newsom*, for example, the Fourth Circuit preliminarily enjoined a middle school policy prohibiting all clothing depicting weapons. 354 F.3d at 261. Echoing Petitioners, the school officials could argue that it is part of a school's educational mission to discourage violence, especially gun-related violence, among students.[4] Similarly, in *Castorina v. Madison County School Board*, the Sixth Circuit held that a school could not ban t-shirt's bearing Confederate flags without any showing of disruption. 246 F.3d 536, 542 (6th Cir. 2001). Under a broad reading of *Fraser*, the court certainly could have upheld the ban, noting the important educational mission of promoting racial harmony among the student body. And in *Saxe*, the Third Court struck down a school district policy prohibiting derogatory or negative speech about issues such as racial customs, religious tradition, and sexual orientation. 240 F.3d at 217. "Such speech, when it does not pose a realistic threat of substantial disruption, is within a student's First Amendment rights." *Id.* This policy was derived in an attempt to provide students "with a safe, secure, and nurturing school environment" and with the admonition that "disrespect among members of the school community is unacceptable behavior which threatens to disrupt the . . . well being of the individual." *Id*. at 202. This could certainly be

[4] In fact, the school did make this very argument, contending that schools had an obligation "to discourage and prevent gun-related violence since the images on Newsom's t-shirt conflicted with the message that 'Guns and Schools Don't Mix.'" *Newsom.* at 252. But the court refused to apply *Fraser*, choosing to apply *Tinker* instead. *Id.* at 257.

argued to fall within a school's educational mission. Thus, these cases and countless others would be overruled if this Court adopts Petitioner's reading of *Fraser*, and students would be drastically circumscribed at will by school officials.

Ultimately, if the First Amendment means anything at schools, it is that students have the right to disagree with what they are being taught, as long as they do not materially disrupt the school's operations. Anything less, and there would be no need for the First Amendment at all. "If there is any fixed start in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion . . . ." *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943).

The Petitioners' view would swallow *Tinker* and make *Hazelwood*'s deferential standard—requiring speech restrictions to be related to a legitimate pedagogical concern—apply to *all* student speech, not just that which is school-sponsored. The end result would be precisely what *Tinker* said the First Amendment could never allow: an "enclave of totalitarianism whereby students are "confined to the expression of those sentiments that are officially approved." 393 U.S. at 511; *see also Guiles*, 461 F.3d at 330.

III. *TINKER* CANNOT BE READ TO ALLOW SCHOOLS TO CENSOR STUDENT SPEECH MERELY BECAUSE IT IS OFFENSIVE.

Tinker held that a high school student's expression of opposition to the Vietnam War could not be censored by school officials because it did not "materially disrupt[ ] classwork or involve[ ] substantial disorder or invasion of the rights of others . . . ." 393 U.S. at 513. Other *amici* in this case have invited this Court to decide this case under the

"invasion of the rights of others" prong, arguing that Frederick's banner "invok[es] the second prong of *Tinker*" because Frederick "recognized that his banner ***might be offensive*** to Christian students."[5] *Amici* base this argument on the Ninth Circuit's opinion in *Harper v. Poway Unified School District*, which held that the second prong in *Tinker* allows school officials to censor any student speech that may be perceived as demeaning or derogatory toward a student's core characteristics such as race, religion, or sexual orientation. 445 F.3d at 1178.

This interpretation cannot be squared with a fair reading of *Tinker*, and is inconsistent with this Court's line of cases holding that offensive speech is exactly what the First Amendment is designed to protect. *See, e.g., Texas v. Johnson*, 491 U.S. at 414 ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea offensive or disagreeable"); *United States v. Eichman*, 496 U.S. 310, 319 (1990) (same).

A. There is no right not to be offended.

This Court has *never* carved out from First Amendment protection speech that offends others. Such offence is not a cognizable invasion of third party rights that could justify viewpoint discrimination. In *Barnette*, this Court held that a student's right not to salute the American flag and recite the pledge of allegiance is protected by the Free Speech and Free Exercise Clause of the First Amendment:

---

[5] *See* Brief of *Amici Curiae* National School Boards Association, American Association of School Administrators, and National Association of Secondary School Principals in Support of Petitioners, p. 21 (emphasis added).

> The freedom asserted by these appellees ***does not bring them into collision with rights asserted by another individual*** . . . . [T]he refusal of these persons to participate in the ceremony ***does not*** interfere with or ***deny rights of others*** to do so.

319 U.S. at 630 (emphasis added). "Rights of others" refers to other students' First Amendment rights to salute the flag and recite the pledge. It certainly does not refer to the rights of other students not to be offended by any perceived lack of patriotism on the part of the non-participating students.

Reading *Tinker* in light of *Barnette* can only lead to the conclusion that "infringing on the rights of others" does not mean simply offending them with negative, derogatory, or demeaning speech. Otherwise, schools could censor one side of a political or religious debate merely because another student may take offense.

The Third Circuit's opinion in *Saxe* provides a good model for evaluating the scope of students' free speech rights. There, the court struck down a public school district's anti-harassment policy that banned "derogatory remarks, jokes, demeaning comments or behaviors," and "negative name calling and degrading behavior . . . ." 240 F.3d at 202-03.

> Because the Policy's "hostile environment" prong does not, on its face, require any threshold showing of severity or pervasiveness, it could conceivably be applied to cover any speech about some enumerated characteristics the content of which ***offends someone***. This could include much "core" political and religious speech: the Policy's "Definitions" section lists as examples of covered harassment ***"negative"*** or ***"derogatory" speech*** about such contentious issues as "racial customs,"

> "religious tradition," "language," "sexual orientation," and "values." Such speech, ***when it does not pose a realistic threat of substantial disruption***, is within a student's First Amendment rights.

Id. at 217 (emphasis added). Yet this is exactly what *amici* are asking for—the power to censor private speech merely because it may be offensive, even if it does not pose a realistic threat of disruption. *Saxe* flatly rejected this argument, noting that although "[t]he precise scope of *Tinker*'s 'interference with the rights of others' language is unclear . . . it is certainly not enough that the speech is merely offensive to some listener." *Id.*

B. *Tinker*'s "rights of others" language should be interpreted to apply only to speech that could result in tort liability.

Lower courts have opined that "infringing on the rights of others" means engaging in tortious conduct. *See Kuhlmeier v. Hazelwood School District*, 795 F.2d 1368, 1375 (8th Cir.), *rev'd on other grounds*, 484 U.S. 270 (1988) (schools may only censor speech that "could result in tort liability for the school"); *Slotterback v. Interboro School District*, 766 F.Supp. 280, 289 n.8 (E.D.Pa. 1991).

Tinker's citation to *Blackwell v. Issaquena County Board of Education*, 363 F.2d 749 (5th Cir. 1966), is particularly instructive on this point. In *Blackwell*, the Fifth Circuit rejected the free speech claims of students distributing buttons protesting racism at school. The students actually "accosted other students by pinning the buttons on [other students] even though they did not ask for one." *Id.* at 751. Obviously, students have a right not to be physically accosted

and forced to speak in a way that violates their beliefs. *See, e.g., Barnette*, 319 U.S. at 642.

But they do not have a "right" to be protected from speech that may offend them because it is offensive, derogatory, or demeaning:

> 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 we must take this risk, *Terminiello v. Chicago*, 337 U.S. 1 (1949); and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.

Tinker, 393 U.S. at 508-09; *accord Davis ex rel. Lashonda D. v. Monroe County Board of Education*, 526 U.S. 629, 652 (1999) (holding that "[d]amages [for harassment under Title IX] are not available for simple acts of teasing and name-calling among [elementary-aged] school children . . . even where these comments target differences in gender"). It would be disconcerting, to say the least, for this Court to hold that speech that is not actionable "harassment" on an elementary school campus may nonetheless be censored on a high school campus because it somehow "invades the rights of others."

No doubt many students who had loved ones fighting in Vietnam felt demeaned and offended by Mary Beth Tinker's speech condemning the war. But this is exactly the type of speech that needs protecting—especially in the high school context:

> The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools. The classroom is peculiarly the marketplace of ideas. The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, rather than through any kind of authoritarian selection.

Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967) (internal citations, quotations, and editing marks omitted).

Without this protection, those feeling offended or demeaned by another's speech can have it censored—the classic Heckler's Veto. This Court has routinely reject this type of censorship. "Speech cannot be . . . punished or banned, simply because it ***might offend*** a hostile mob." *Forsyth County, Ga. v. The Nationalist Movement*, 505 U.S. 123, 135-36 (1992) (addressing restriction based on adverse listener reaction to, *inter alia*, a demonstration in opposition to Martin Luther King Day) (emphasis added); *see also R.A.V.*, 505 U.S. at 389 ("a State may not prohibit only that commercial advertising that depicts men in a ***demeaning*** fashion") (emphasis added).

Therefore, should this Court choose to address this aspect of *Tinker*, it should only allow schools to censor student speech that could result in tort liability for the school.

CONCLUSION

The freedom of expression is a critical part of a democracy's foundation. And our public schools, above all else, should strive to prepare students to participate and excel in our democratic political system. This includes providing students the opportunity to both hear and articulate

controversial and potentially offensive ideas. As Justice Harlan once observed, "[it is] often true that one man's vulgarity is another's lyric." *Cohen*, 403 U.S. at 24 (Harlan, J., dissenting). Students must learn how to confront such ideas and be given the opportunity to engage in civil debate within the controlled environment of our schools. But, as one prominent constitutional school scholar has noted, "[s]chools cannot teach the importance of the First Amendment and simultaneously not follow it."[6] Thus, this Court should interpret *Fraser* and *Tinker* in a manner that encourages, rather than stifles, these realities.

Respectfully submitted.

Benjamin W. Bull
Jordan W. Lorence
Gary S. McCaleb
ALLIANCE DEFENSE FUND
15333 N. Pima Rd., Suite 165
Scottsdale, AZ 85260
(480) 444-0020

Kevin H. Theriot
Counsel of Record
ALLIANCE DEFENSE FUND
15192 Rosewood
Leawood, KS 62244
(913) 685-8000

Timothy D. Chandler
ALLIANCE DEFENSE FUND
101 Parkshore Dr. Suite 100
Folsom, CA 95630
(916) 932-2850

---

[6] Chemerinsky, Erwin, *Students Do Leave Their First Amendment Rights at the Schoolhouse Gates: What's Left of Tinker?*, 48 Drake L. Rev. 527, 545 (2000).