NO. 14-720

In the

# Supreme Court of the United States

JOHN DARIANO, ET UX., ON BEHALF OF THEIR MINOR CHILD, M.D., ET AL.,

*Petitioners*,

v.

MORGAN HILL UNIFIED SCHOOL DISTRICT, ET AL.,

*Respondents*.

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

**BRIEF OF *AMICUS CURIAE* ALLIANCE DEFENDING FREEDOM IN SUPPORT OF PETITIONER**


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Alliance Defending Freedom is a non-profit, public interest legal organization that provides strategic planning, training, funding, and direct litigation services to protect our first constitutional liberty—religious freedom. Since its founding in 1994, Alliance Defending Freedom has played a role, either directly or indirectly, in many cases before this Court, including: *Reed v. Town of Gilbert*, S. Ct. No. 13-502 (argued on Jan. 12, 2015); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014); *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014); *Arizona Christian School Tuition Organization v. Winn*, 131 S. Ct. 1436 (2011); *Good News Club v. Milford Central School*, 533 U.S. 98 (2001); and *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995); as well as hundreds more in lower courts.

Many of these cases involve the proper application of the Free Speech Clause in the educational context. Religious students in public schools are often censored for expressing religious beliefs that others find offensive. Recognizing that the Ninth Circuit's analysis would justify excluding

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[1] The parties' counsel of record received timely notice of the intent to file this *amicus curiae* brief pursuant to S. Ct. R. 37.2(a). Both parties granted consent to the filing of this brief. Documentation reflecting that consent is on file with the Clerk. Pursuant to S. Ct. R. 37.6, *amicus* states that no counsel for any party authored this brief in whole or in part, and no person or entity, other than *amicus* and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

religious expression wholesale simply because other students might object to it, Alliance Defending Freedom seeks to ensure that the First Amendment's guarantee of freedom of speech is safeguarded in our nation's public schools.

## SUMMARY OF ARGUMENT

The Ninth Circuit's conclusion that public schools are exempted from the heckler's veto doctrine directly conflicts with this Court's ruling in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969). That doctrine lies at the heart of the Free Speech Clause and *Tinker*, a case in which this Court reversed a district court order that expressly relied on a heckler's veto to ban protesting student's symbolic speech. Plainly, this Court's analysis focused on the protestors' decorous conduct, rather than other students' reaction to it. Because Petitioners' expressive conduct falls within *Tinker's* protective bounds, this Court should grant the petition and reverse to prevent public schools from furthering some political viewpoints and suppressing others, thus preserving the open marketplace of ideas that is necessary to teach students essential lessons of citizenship, including how to tolerate speech with which they disagree.

Moreover, the Ninth Circuit's refusal to apply the heckler's veto doctrine to public schools is unprecedented in federal appellate court precedent. Lower courts have expressed some confusion about this question for almost forty-five years. But the Seventh, Tenth, and Eleventh Circuits have long agreed that *Tinker* and heckler's vetoes do not mix.

This case represents an ideal opportunity for the Court to provide clarity to lower courts and bring the Ninth Circuit into line with its sister circuits.

## BACKGROUND

Live Oak High School in Morgan Hill, California presented a Cinco de Mayo celebration, in "the spirit of cultural appreciation," in May of 2010 to "honor[] the pride and community strength of the Mexican people who settled [that] valley and who continue to work [there]." *Dariano v. Morgan Hill Unified Sch. Dist.*, 767 F.3d 764, 774 (9th Cir. 2014) (quotations omitted). In the school's view, the Cinco de Mayo festivities were akin to celebrating "St. Patrick's Day or Oktoberfest." *Id.* But a handful of students disagreed with this standpoint and wore American flag t-shirts to school on the 5th of May as a silent, passive means of protesting what they ostensibly viewed as a celebration of Mexican nationalism.[2] *Id.*

School officials required the protesting students to "either turn their shirts inside out or take them off" because they were allegedly concerned for "their safety." *Dariano v. Morgan Hill Unified Sch. Dist.*, 822 F. Supp. 2d 1037, 1044 (N.D. Cal. 2011). Three events precipitated this decision. As Assistant Principal Miguel Rodriguez was leaving his office

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[2] Cinco de Mayo commemorates the Mexican army's 1862 victory over France at the Battle of Puebla during the Franco-Mexican War (1861-1867). The French, under Napoleon III, unsuccessfully attempted to create an empire in Mexico under a puppet ruler, the Archduke Maximilian of Austria. Mexico's victory over French forces at the Battle of Puebla inspired Mexicans to resist these imperialist efforts.

before brunch break, which occurs between 10:00 a.m. and 10:15 a.m. every day, a Caucasian student told him that he "'may want to go out to the quad area'" because "'there might be some issues.'" *Id.* Later during brunch break, another student called Rodriguez over to a group of Hispanic students and told him that "there might be problems" because the protesting students were wearing the American flag. A group of Hispanic students also asked Assistant Principal Rodriguez why the protesting students "get to wear their flag when we don't get to wear our flag," *id.*, although "students with Mexican flags displayed on their person" appeared in newspapers "in the days following Cinco de Mayo," *id.* at 1046.

Several students also approached three of the flag-wearing protestors during the morning of the 5th and asked questions about their clothing, such as: "[W]hy are you wearing that, do you not like Mexicans?" *Id.* at 1044. But the district court's factual findings do not indicate whether school administrators were cognizant of this fact. *See id.* (noting Assistant Principal Rodriguez met with the protesting students "about their attire" but failing to discuss any inquiries he made).

Indeed, most of the district court's factual findings concerned threats made against the protestors *after* school administrators banned their speech—acts of intimidation which played no role in the censorship decision—as well as verbal altercations during the school's celebration the prior year. A small group of students also opposed the school's Cinco de Mayo festivities in 2009 by displaying the American flag. *See id.* at 1043. They

erected a "makeshift American flag" on a tree on campus and chanted "USA." This led to an opposing group of students "walking around with the Mexican flag" and one student shouting "'f*ck them white boys, f*ck them white boys.'" *Id.* at 1044. Vice Principal Rodriguez "directed the minor to stop using such profanity," to which he responded, "[b]ut Rodriguez, they are racist. They are being racist. F*ck them white boys. Let's f*ck them up." *Id.* Principal Rodriguez readily dealt with this situation by removing the student from the area. *Id.*

Another situation in 2009 involved a Cinco de Mayo celebrant "shov[ing] a Mexican flag" at a protesting student and saying "something in Spanish expressing anger at [his American flag] clothing." *Id.* No fights occurred during either the 2009 or 2010 Cinco de Mayo celebrations. To the contrary, as the district court found in regards to the 2010 protest, "no classes were delayed or interrupted by [Petitioners'] attire, no incidents of violence occurred on campus that day, and prior to asking [Petitioners] to change [Vice Principal] Rodriguez had heard no report of actual disturbances being caused in relation to [Petitioners'] apparel." *Id.* at 1045. Furthermore, any unsubstantiated fear of disturbance was completely one-sided, as protestors did not target "students wearing the colors of the Mexican flag ... for violence." *Id.* at 1046.

Nonetheless, the district court ruled that school administrators "did not violate the First Amendment by asking [Petitioners] to turn their shirts inside out to avoid physical harm" based primarily on the fact that "two different students" opposed the protestors'

speech by generally stating "that they were concerned that [Petitioners'] clothing would lead to violence." *Id.* at 1045. A panel of the Ninth Circuit agreed, characterizing the censorship of Petitioners' political speech as a "minimal restriction[]," *Dariano*, 767 F.3d at 777, rejecting out of hand any "concerns about a 'heckler's veto'" in the public school context, *id.* at 778, holding that it does not matter whether a material and "'substantial disruption'" of the work of a school is "caused by the speaker" or "the reactions of onlookers," *id.*, and refusing to consider the school's "decision to have a Cinco de Mayo celebration" in the first place or the total lack of "precautions put in place" to avoid disciplinary problems, *id.* at 779.

Judge O'Scannlain dissented from the denial of rehearing en banc and filed an opinion joined by Judges Tallman and Bea, which criticized the panel for suppressing the protestors' speech rather than protecting the protesting "students who were peacefully expressing their views." *Id.* at 770. Recognizing the centrality of the heckler's veto doctrine to this Court's First Amendment jurisprudence, *id.* at 769-70, Judge O'Scannlain noted that the panel's decision misread *Tinker*, *id.* at 767-69, created a conflict with Seventh and Eleventh Circuit precedent, *id.* at 771-72, and left "any viewpoint imaginable ... vulnerable to the rule of the mob," allowing the "demands of bullies" to become "school policy," *id.* at 771.

## ARGUMENT

### I. The Ninth Circuit's Holding Conflicts With *Tinker* and Threatens to Severely Restrict the Marketplace of Ideas and Students' Free Speech Rights in Public Schools.

Petitioners' silent expression of political opinion plainly survives the *Tinker* test, which incorporates the heckler's veto doctrine as a cornerstone of free speech law. The Ninth Circuit's contrary conclusion violates the letter and spirit of *Tinker* and threatens to contract not only the marketplace of ideas, but also students' free speech rights.

#### A. The Heckler's Veto Doctrine Is an Essential Component of The Right to Free Speech.

This Court has recognized for over eighty years that the heckler's veto doctrine lies at the heart of the freedom of speech. For if government may censure expression for no other reason that certain citizens "violently disagree with it" and threaten "physical violence" to prevent its dissemination, then "there is no limit to what may be prohibited." *Near v. Minnesota*, 283 U.S. 697, 722 (1931) (quotation omitted). This Court has accordingly refused to allow "the ordinary murmurings and objections of a hostile audience ... to silence a speaker." *Feiner v. New York*, 340 U.S. 315, 320 (1951).

Instead, the Founders included protection for free speech in the First Amendment precisely because "[s]peech is often provocative and challenging" and

"may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea." *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949). Securing the open marketplace of ideas essential to any democracy requires guarding against the "standardization of ideas either by legislatures, courts, or *dominant political or community groups*" that oppose the airing of speech they find distasteful. *Id.* at 4-5 (emphasis added); *see also id.* at 4 ("[I]t is only through free debate and free exchange of ideas that government remains responsible to the will of the people and peaceful change is effected.").

One of the vital lessons of the Civil Rights Movement is that "constitutional rights may not be denied simply because of [public] hostility to their assertion or exercise." *Watson v. City of Memphis*, 373 U.S. 526, 536 (1963). "[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it." *FCC v. Pacifica Found.*, 438 U.S. 726, 745-46 (1978). If speech "gives offense," that "is a reason for according it constitutional protection. For it is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas." *Id.*

As far as the Free Speech Clause is concerned, it is irrelevant whether the Cinco de Mayo celebrants' or protestors' nationalistic views are correct. What matters is the First Amendment "principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence" because "[o]ur political system and cultural life rest upon this ideal." *Turner Broad.*

*Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994).

This unique "toleration of criticism" is the "source of our [national] strength." *Texas v. Johnson*, 491 U.S. 397, 419 (1989). It is thus incumbent on those who disagree about matters of nationalism not to rely on the potential for violence or unrest to silence their ideological opponents but to "persuade them that they are wrong." *Id.*; *see also W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 634 (1943) ("Any credo of nationalism is likely to include what some disapprove or to omit what others think essential."). Because "[if] there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.'" *Johnson*, 491 U.S. at 419 (quoting *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring)). The Ninth Circuit erred in neglecting these essential First Amendment principles here.

### B. *Tinker* Disallows the Heckler's Veto the Ninth Circuit Permitted in This Case.

The Ninth Circuit's conclusion that public schools are exempted from the heckler's veto doctrine directly conflicts with this Court's ruling in *Tinker*. Indeed, remarkable similarities exist between the Ninth Circuit's opinion in this case and the district court's decision in *Tinker*, which this Court subsequently reversed. In *Tinker*, a small group of students decided to wear black arm bands to school "to mourn those who had died in the Viet Nam war [sic] and to support Senator Robert F. Kennedy's proposal that the truce proposed for Christmas Day,

1965, be extended indefinitely." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 258 F. Supp. 971, 972 (S.D. Iowa 1966). When school officials learned of this plan, they banned all arm bands from campus. *Id.*

Noting the vehement public dispute about the Vietnam War, the district court held that "[w]hile the arm bands themselves may not be disruptive, 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" and that "[i]t was not unreasonable ... for school officials to anticipate that the wearing of arm bands would create some type of classroom disturbance." *Id.* at 973 (emphasis added). In so doing, the *Tinker* district court rejected the "material[] and substantial[] interfere[nce]" standard advanced by the Fifth Circuit and later adopted by this Court. *Id.* (declining to follow *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)); *see also Tinker*, 393 U.S. at 513 (adopting the *Burnside* standard). Like the Ninth Circuit here, the *Tinker* district court held that if any "disturbance in school discipline is reasonably to be anticipated, actions which are reasonably calculated to prevent such a disruption must be upheld by the Court." *Id.*

An erroneous rejection of the heckler's veto doctrine thus lay at the heart of the *Tinker* district court's judgment. This Court reversed that ruling after it was affirmed, without opinion, by an evenly divided Eighth Circuit sitting en banc. *See Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 383 F.2d 988, 988 (8th Cir. 1967) (en banc). Citing *Terminiello*, a

case that reaffirmed the centrality of the heckler's veto doctrine to safeguarding freedom of speech, this Court in *Tinker* directly applied the heckler's veto doctrine to public schools, stating:

> Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. 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, 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 (citation omitted); *see also Johnson*, 491 U.S. at 409 (citing *Tinker* as a classic restatement of the heckler's veto doctrine); *Zamecnik v. Indian Prairie Sch. Dist.*, 636 F.3d 874, 879 (7th Cir. 2011) (same); *Holloman v. Harland*, 370 F.3d 1252, 1272 (11th Cir. 2004) (same); *PeTA v. Rasmussen*, 298 F.3d 1198, 1206 (10th Cir. 2002) (same); *Flanagan v. Munger*, 890 F.2d 1557, 1566-67 (10th Cir. 1989) (same).

Significantly, the *Tinker* Court contrasted—with approval—the Fifth Circuit's holding in *Burnside*, which enjoined school authorities "from enforcing a regulation forbidding students to wear 'freedom buttons,'" where the protesting students' actions

were decorous, with "the opposite result" reached by "the same panel on the same day" in *Blackwell v. Issaquena County Board of Education*, 363 F.2d 749 (1966), where the protesting students "harassed [others] who did not wear [freedom buttons] and created much disturbance." 393 U.S. at 505 n.1.

This targeted focus on the protesting students' behavior—not the reaction of third parties, which is largely outside of the protestors' control—is clear throughout the *Tinker* Court's analysis. *See, e.g.*, *id.* at 505 ("[T]he wearing of armbands in the circumstances of this case was entirely divorced from actually or potentially disruptive conduct *by those participating in it*.") (emphasis added); *id.* at 508 ("The school officials banned and sought to punish petitioners for a silent, passive expression of opinion, unaccompanied by any disorder or disturbance *on the part of petitioners*.") (emphasis added); *id.* ("There is here no evidence whatever of *petitioners' interference* actual or nascent, with the schools' work or of collision with the rights of other students to be secure and to be let alone.") (emphasis added); *id.* at 514 ("[Petitioners] neither interrupted school activities *nor sought to intrude in the school affairs or the lives of others*.") (emphasis added); *see also Grayned v. City of Rockford*, 408 U.S. 104, 118 (1972) (discussing *Tinker* and confirming this point). And it serves as a clear rejection of the district court's focus on the "reactions and comments [of] other students." *Tinker*, 258 F. Supp. at 973.

The *Tinker* Court thus directly applied the

heckler's veto doctrine to our nation's public schools.[3] No other reading of the majority opinion accounts for both the facts and holding in that case. For as Justice Blackmun noted in dissent, "[w]hile the record [did] not show that any of the[] armband students shouted, used profane language, or were violent in any manner, detailed testimony by some of them shows their armbands caused comments, *warnings by other students*, the poking of fun at them, and a warning by an older football player that other, nonprotesting students had better let them alone." *Tinker*, 393 U.S. at 517 (emphasis added). This Court held regardless that the protesting students did not "'disrupt'" the work of the school because they did not employ "obscene remarks or boisterous and loud disorder." *Id.* at 518.

If offended students' warnings about potential violence controlled the free speech analysis, as the Ninth Circuit held here, the *Tinker* Court would have ruled the opposite. *See Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 215 (3d Cir. 2001) (Alito, J.) ("The Supreme Court has held time and again, both within and outside of the school context, that the mere fact that someone might take offense at the content of speech is not sufficient justification for

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[3] Notably, this Court has refused "to employ Establishment Clause jurisprudence" in public schools "using a modified hecklers' veto, in which a [private] group's religious activity can be proscribed on the basis of what the youngest members of the audience might misperceive." *Good News Club*, 533 U.S. at 119. This would be strange indeed if *Tinker* permitted a true heckler's veto, in which a student's orderly speech could be shut down based on what the most aggressive and easily-offended members of the student body are willing to hear.

prohibiting it.") (citing *Tinker*, 393 U.S. at 509).

### C. *Tinker* Safeguards Petitioners' Symbolic Speech Protesting a Controversial and Repeated School Event.

Like the armbands in *Tinker*, Petitioners' American flag t-shirts represent "a silent, passive expression of opinion." 393 U.S. at 508. The American flag is after all, "a symbol of our country" and "the one visible manifestation of two hundred years of nationhood." *Johnson*, 491 U.S. at 405 (quotation omitted). It is consequently "[p]regnant with expressive content" and undoubtedly constitutes symbolic speech. *Id.*; *see also Barnette*, 319 U.S. at 632 (describing how the "use of a[] ... flag to symbolize some system, idea, [or] institution ... is a short cut from mind to mind").

Here, there is no dispute that the protestors' well-mannered presentation of their political views was "unaccompanied by any disorder or disturbance on the part of [P]etitioners." *Tinker*, 393 U.S. at 508. The Ninth Circuit was therefore wrong to hold that their expression fell outside of *Tinker's* protective scope. This case, like *Tinker*, "does not concern speech or action that intrudes upon the work of the schools or the rights of other students." *Id.* A few students' expression of offense to a school administrator about other students wearing a flag they see at school every day cannot compare to the "hostile remarks [made] to the [*Tinker*] children wearing armbands," *id.*, to protest the Vietnam War in the wake of a former high school student being "killed in Viet Nam" [sic], *id.* at 509 n.3. Given these

facts, Respondents' ban on images of the American flag reflects nothing more than a desire to "avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Id.* at 509.

Two key factors the Ninth Circuit recognized, but refused to consider, illustrate this point. First, if school administrators were truly worried about student safety after the protests in 2009, they could have cancelled the school's Cinco de Mayo celebration the following year. But they did not, which shows that the "anticipated disruption, violence, and concerns about student safety" they cited to the Ninth Circuit could not have been great. *Dariano*, 767 F.3d at 777. No reasonable educator would allow a school's St. Patrick's Day or Oktoberfest celebration to commence if physical injury to students was likely. *But see id.* at 779 (refusing to "second-guess the decision to have a Cinco de Mayo celebration"). Administrators' rapid decision to ban Petitioners' speech was thus plainly less about student safety than about banning "expressions of feelings with which" school officials did "not wish to contend." *Tinker*, 393 U.S. at 511 (quotation omitted).

Indeed, viewpoint discrimination is even more palpable here than it was in *Tinker*. The factual equivalent in this case would be the Des Moines Independent School District sponsoring a celebration of the Vietnam War. But when the *Tinker* children silently displayed a symbol of their pacifist views, the district silenced them to avoid any possibility of a disturbance by other students. Just as this would

surely constitute an effort to confine students "to the expression of those sentiments that are officially approved," *id.*, so too is Respondents' celebration of Cinco de Mayo and ready censuring of Petitioners' nationalistic views in the face of a few general complaints of offense. School officials should have rejected such remarks out of hand following this Court's decision in *Morse v. Frederick*, 551 U.S. 393, 409 (2007), which recognized that although "much political and religious speech might be perceived as offensive to some," it remains subject to First Amendment protection under *Tinker*. *See also id.* at 423 (Alito, J., concurring) (emphasizing that school officials do not have "a license to suppress [students'] speech on political and social issues based on disagreement with the viewpoint expressed").

Second, the total lack of "precautions put in place to avoid violence" during the 2010 Cinco de Mayo celebration reveals that school administrators did not identify any palpable danger. *Dariano*, 767 F.3d at 779. School officials deal with student disciplinary issues on a regular basis. Here, all that can be said is that, the year before, Vice Principal Rodriguez readily removed one belligerent student from the area in which students were airing competing views regarding the school's Cinco de Mayo celebration.

The total lack of disciplinary measures taken in 2010 and this light response in 2009 hardly evidences significant safety concerns. As this Court recognized in a different context, "there [is] no factual evidence to support the [proposition] that

[school] authorities would be unable to cope successfully with any problems which in fact might arise or to meet the need for additional protection [for the student protestors] should the occasion demand." *Watson*, 373 U.S. at 536-37. Consequently, *Tinker* protects Petitioners' symbolic speech protesting the schools' Cinco de Mayo event. *See Tinker*, 393 U.S. at 514 (referencing the "silent, passive witness of the armbands"); *Brown v. Louisiana*, 383 U.S. 131, 142 (1966) (explaining that freedom of speech includes "appropriate types of action which certainly include the right in a peaceable and orderly manner to protest by silent and reproachful presence" a government policy with which one disagrees); *Cox v. Louisiana*, 379 U.S. 536, 550 (1965) (rejecting that speech could be censored based on "[o]thers [feeling] the atmosphere became 'tense' because of 'mutterings,' grumbling,' and 'jeering'" from a hostile group of bystanders and concluding that authorities "could have handled the crowd").

It is hard to imagine that school officials would have acted so willingly to shut down the school's Cinco de Mayo celebration if protesting students had "expressed concerns" about potential violence against those choosing to participate. Intimidation of this sort is not generally tolerated in schools. That it was here is troubling because "[f]ree public education, if faithful to the ideal of ... political neutrality, will not be partisan or enemy of any class, creed, party, or faction." *Barnette*, 319 U.S. at 637. Regrettably, the Ninth Circuit failed to enforce the school's political neutrality here. *See id.*

(expressing the concern that if public schools "impose any ideological discipline ... each party or denomination must seek to control, or failing that, to weaken the influence of the educational system").

Respondents clearly favored the views of students celebrating Cinco de Mayo over those protesting the festivities. But no one in this country has the "legal right to prevent criticism of their beliefs or even their way of life." *Zamecnik*, 636 F.3d at 876. The Ninth Circuit erred in holding the contrary here. *See, e.g.*, *Pacifica*, 438 U.S. at 745-46 ("[I]t is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas.").

Indeed, the Ninth Circuit's best justification for school administrators' actions was that "those who dislike a speaker" may create such a foreboding of "disturbance that the speaker must be silenced." *Ams. United for Separation of Church & State v. City of Grand Rapids*, 980 F.2d 1538, 1553 (6th Cir. 1992) (defining a heckler's veto). That holding conflicts with *Tinker* and, given its serious undermining of students' free speech, is worthy of consideration by this Court. *See Dariano*, 767 F.3d at 771 (O'Scannlain, J., dissenting)) (warning that "[t]he next case might be a student wearing a shirt bearing the image of Che Guevara, or Martin Luther King, Jr., or Pope Francis.... It might be a shirt proclaiming the *shahada*, or a shirt announcing 'Christ is risen!' It might be any viewpoint imaginable, but whatever it is, it will be vulnerable to the rule of the mob.").

### D. *Tinker's* Concern Was Preparing Students for Citizenship and the Ninth Circuit's Ruling Obviates That Training by Contracting the Marketplace of Ideas, Along With Student's Free Speech Rights.

*Tinker* reaffirmed public schools' unique place as "the marketplace of ideas" where our "[n]ation's future ... leaders [are] 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 authoritative selection." *Tinker*, 393 U.S. at 512 (quoting *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967)). "'[E]ducating the young for citizenship'" is the goal that justified the *Tinker* Court's extension of free speech rights to students; otherwise, the Court feared that they would "discount" the First Amendment and other "important principles of our government as mere platitudes." *Id.* at 507 (quoting *Barnette*, 318 U.S. at 637). Of course, many high school students are eligible to vote and others soon will be.

*Tinker* prepares them for citizenship by preventing "'a State [from] conduct[ing] its schools as to foster a homogeneous people,'" a trait the Court associated with "totalitarianism" rather than democracy. *Id.* at 511 (quoting *Meyer v. Nebraska*, 262 U.S. 390, 402 (1923)). Public schools are thus banned from "confin[ing] students to the expression of those sentiments that are officially approved." *Id.* (quotation omitted). Students must be free to engage in "personal intercommunication" with each other because learning to listen to and tolerate disagreeable opinions is "an important part of the

educational process." *Id.* at 512. It is that "hazardous freedom" or "openness" in a "relatively permissive, often disputatious, society," *id.* at 508, that the *Tinker* Court viewed as our unique "national strength, *id.* at 509.

Our strength in that regard is failing as "unacceptable opinions" now litter the educational landscape. *See Morse*, 551 U.S. at 423 (Alito, J., concurring) (recognizing that "some public schools have defined their educational missions as including the inculcation of whatever political and social views are held" by "school administrators and faculty"). *But see Barnette*, 319 U.S. at 642 ("[N]o official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.").

The Ninth Circuit exacerbated that trend by giving public schools *carte blanche* authority to foster certain political and moral viewpoints and silence students who disagree based on their classmates' indignation. And it allowed them to do so even though such narrow-minded offense is often something public schools themselves have taught. *Tinker* expressly rejected such "'strangl[ing] [of] the free mind at its source.'" *Tinker*, 393 U.S. at 507 (quoting *Barnette*, 319 U.S. at 637); *see also Barnette*, 319 U.S. at 641 ("We set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent. Authority here is to be controlled by public opinion, not public opinion by authority.").

This vicious circle of moral inculcation and censorship is exactly the sort of "standardization of ideas" that the heckler's veto doctrine, and *Tinker*, were designed to prevent. *Terminiello*, 337 U.S. at 4; *see also Tinker* 393 U.S. at 508 (citing *Terminiello*). *Tinker* essentially held that "the process of education in a democracy must be democratic." *Eisner v. Stamford Bd. of Educ.*, 440 F.2d 803, 807 n.2 (2d Cir. 1971) (quotation omitted). Such give and take is impossible if school officials' first—not last—response to ideological conflict is silencing speech, rather than educating students, encouraging dialogue, and neutrally disciplining students who break the rules and cause a disruption. If students cannot appreciate such a basic civics lesson, "one wonders whether [their] schools can teach anything at all." *Hedges v. Wauconda Cmty. Unit Sch. Dist. No. 118*, 9 F.3d 1295, 1300 (7th Cir. 1993).

Because the Ninth Circuit's holding narrows "the opportunity for free political discussion" in our nation's public schools and imperils government's ability to be "responsive to the will of the people ... that change may be obtained by lawful means," *Stromberg v. California*, 283 U.S. 359, 369 (1931), it conflicts with *Tinker*'s underlying rationale and deserves this Court's review. *See Terminiello*, 337 U.S. at 4 ("The right to speak freely and to promote diversity of ideas and programs is ... one of the chief distinctions that sets us apart from totalitarian regimes.").

## II. The Ninth Circuit's Conclusion That *Tinker* Permits Heckler's Vetoes Conflicts With The Precedent of Three Other Circuits.

Questions regarding the heckler's veto doctrine's application to public schools are longstanding. This case presents an ideal opportunity for this Court to resolve these quandaries, along with a pressing conflict between the Ninth and the Seventh, Tenth, and Eleventh Circuits.

### A. Lower Courts' Concern About a Heckler's Veto in the Public School Context are Longstanding.

There has long been concern among the courts of appeals about permitting a heckler's veto in the public school context. As soon as two years after *Tinker*, the Second Circuit questioned whether "school officials [would] take reasonable measures to minimize or forestall potential disorder and disruption that might otherwise be generated in reaction to the [airing] of controversial or unpopular opinions, before they resort to banishing the ideas from school grounds." *Eisner*, 440 F.2d at 809. The Second Circuit did not directly link this concern to *Tinker* but it noted "[t]he difficult constitutional problems raised by 'the heckler's veto'" in the public school context "where the threshold of disturbance which may justify official intervention is relatively low," as opposed to the higher standard applied off campus. *Id.* at 809 n.6.

Since that time, other courts of appeals, or individual judges, have noted confusion on this

issue. *See, e.g.*, *Barr v. Lafon*, 553 F.3d 463, 464 (6th Cir. 2009) (Boggs, J., dissenting from denial of rehearing en banc) (questioning whether a ban on confederate symbols "would sanction a 'heckler's veto,' in the sense that it appeared to make no distinction as to whether the forecast disruption was by supporters or opponents of the symbols," as well as whether that distinction mattered). The Third Circuit sitting en banc, for instance, recently noted a circuit conflict as to whether *Tinker's* substantial-disruption standard ... permit[s] a school to restrict speech because of the heckler's veto of other students' disruptive reactions."[4] *B.H. v. Easton Area Sch. Dist.*, 725 F.3d 293, 322 n.24 (3d Cir. 2013) (en banc) (quotation omitted). But it declined to join the fray because "no forecast of substantial disruption would be reasonable on th[e] record under any meaning of that term." *Id.*

This case presents an ideal opportunity for the Court to resolve this uncertainty regarding *Tinker's* application of the heckler's veto doctrine, which has now existed for almost 45 years.

### B. The Ninth Circuit's Conclusion that *Tinker* Allows for Heckler's Vetoes Is Unprecedented and Conflicts with Rulings from the Seventh, Tenth, and Eleventh Circuits.

To *Amicus'* knowledge, the Ninth Circuit's

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[4] As explained below in Part II.B, *Amicus* does not agree with the Third Circuit's framing of the circuit conflict on this issue but it does agree that the conflict exists.

conclusion that *Tinker* allows heckler's vetoes is unprecedented among federal appellate courts. It is abundantly clear, on the other hand, that the Seventh, Tenth, and Eleventh Circuits hold the opposite view. *See, e.g.*, *Zamecnik*, 636 F.3d at 879 ("Two of the cases that endorse the doctrine of the heckler's veto, *Tinker* and *Hedges*, are school cases."); *Holloman*, 370 F.3d at 1274-75 ("The fact that other students may have disagreed with either Holloman's act or the message it conveyed is irrelevant to our analysis," as is the fact that "students cloaked their disagreement in the guise of offense or disgust."); *PeTa*, 298 F.3d at 1206 (quoting *Tinker* in support of the proposition that "the state may not prevent speech simply because it may elicit a hostile response"); *Flanagan*, 890 F.2d at 1566-67 (citing *Tinker* as evidencing the Supreme Court's square rejection of "the 'heckler's veto' as a justification for curtailing 'offensive' speech in order to prevent public disorder"); *see also Johnson*, 491 U.S. at 409 (citing *Tinker* as a classic restatement of the heckler's veto doctrine).[5]

The Ninth Circuit's curious deviation from this long-held consensus warrants this Court's review.

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[5] *Taylor v. Roswell Independent School District*, 713 F.3d 25, 38 n.11 (10th Cir. 2013), has no bearing on this circuit conflict as the *Taylor* opinion explicitly states that the question of a heckler's veto, *i.e.*, whether "the problematic student disruptions were aimed at stopping plaintiffs' expression," was neither evidenced nor argued in that case.

## CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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