APPEAL NO. 11-17858

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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, and JOY JONES, on behalf of their minor child, D.G.,

Plaintiffs-Appellants,

v.

MORGAN HILL UNIFIED SCHOOL DISTRICT; NICK BODEN, in his official capacity as Principal, LIVE OAK HIGH SCHOOL; and MIGUEL RODRIGUEZ, in his individual and official capacity as assistant principal, LIVE OAK HIGH SCHOOL,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of California
Civil Case No. 5:10-cv-02745 (Honorable James Ware)

BRIEF OF*AMICUS CURIAE* ALLIANCE DEFENSE FUND IN SUPPORT OF APPELLANTS AND REVERSAL

Jeffrey A. Shafer
ALLIANCE DEFENSE FUND
801 G Street NW, Suite 509
Washington, D.C. 20001
Telephone: (202) 393-8690

Kevin H. Theriot
ALLIANCE DEFENSE FUND
15192 Rosewood
Leawood, Kansas 66224
Telephone: (913) 685-8000

David A. Cortman
ALLIANCE DEFENSE FUND
1000 Hurricane Shoals Rd., NE
Suite D1100
Lawrenceville, GA 30043
Telephone: (770) 339-0774

Attorneys for Amicus Curiae

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 *amicus curiae* Alliance Defense Fund states that it has no parent corporation and issues no stock.

Dated March 7, 2012

/s/Jeffrey A. Shafer
Jeffrey A. Shafer

Counsel for Amicus Curiae

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INTEREST OF *AMICI CURIAE*

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 First Amendment liberties to speech and religious freedom. Since its founding in 1994, ADF has played a role, either directly or indirectly, in dozens of cases before the Supreme Court, this Court, and in hundreds of cases before the federal and state courts across the country, as well as in tribunals around the world.

Included in these cases are a significant number of student speech cases. Like plaintiffs' speech at issue in this case, students' speech on matters of religious and cultural significance is often characterized by school officials as controversial. As such, it is regularly the target of censorship in our Nation's public schools. Recognizing that the interpretation of *Tinker* employed in this case will potentially have a significant impact on the landscape of students' speech rights in the Ninth Circuit and elsewhere, 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.

Pursuant to FED. R. APP. P. 29(a), this Brief is being filed contemporaneously with a motion seeking leave of the Court to appear as Amicus.

FED. R. APP. P. 29(C)(5) CERTIFICATION

No party or party's counsel participated in, or provided financial support for, the preparation and filing of this brief, nor has any entity other than Amicus and its counsel participated in or provided financial support for the brief.

INTRODUCTION

The court below anomalously construed the Supreme Court's *Tinker* decision to authorize school officials to effectuate a "heckler's veto," thereby selectively muzzling the speakers on one side of an important exchange of viewpoints. The district court's mistaken read of *Tinker* authorizes school officials to serve as (hapless or complicit) viewpoint-suppressing agents effectuating the wishes of disorderly students over their peaceful counterparts—thereby ensuring officially sanctioned asymmetry in student discourse. The views disfavored by an (allegedly) hostile mob may be suppressed; the competing views disfavored by peaceful students are given free reign. The district court approved of this arrangement, rationalizing that "all students whose safety was in jeopardy were treated equally." (R-67; ER-10; Vol. I [Order at 13].) "Treated equally"—in that they all had their passive and decorous speech censored. Those communicating

other views, who were not in jeopardy because of the aggression of viewpoint opponents, were permitted to speak freely on the issue in contest.

ADF offers that the district court's unlikely ruling—which reads into Speech Clause standards perverse incentives for student hecklers and administrators alike, and ratifies viewpoint-discriminatory regulation and outcomes—is both bad policy and incompatible with governing case law. The Supreme Court's discussion in *Tinker v. Des Moines Ind. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969), uniformly demonstrates that school officials may not regulate student speech due to its content and viewpoint, but may only restrict that speech when the time, place, or manner of its presentation does or may reasonably be forecast to "materially disrupt[] classwork or involve[] substantial disorder or invasion of the rights of others."

Accordingly, the Supreme Court's instruction in *Tinker* reproves the district court's use of listeners' hostile response to Plaintiff's peaceful speech as a basis for censoring their patriotic message. "Listener's reaction to speech is not a content-neutral basis for regulation," *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 134 (1992). *Tinker* both requires content neutrality, and omits listeners' reaction from those considerations countenanced for regulation of student speech.

Tinker's substance reveals the following pertinent points: (1) The Supreme Court's description and use of its "substantial disruption" test is exclusively

connected to an evaluation of the *speech act itself*. (2) Conversely, the Court in *Tinker* never entertains that a *listener's response* to the speaker's message is a factor in the "substantial disruption" evaluation or in authorizing regulation of student speech. (3) Indeed, the Court instead affirms that controversy from discussion is inevitable, and disclaims it as a ground for censoring speech. (4) The standards the Supreme Court announced and applied for assessing the "substantial disruption" of speech are directed to its time, place, and manner—not its message content or its level of popularity. Logically attending, then, are the Court's prohibitions on regulation of speech due to its message.

FACTUAL SUMMARY

ADF relies on the factual recitation presented in Appellants' brief. We would only highlight that while Defendants forbade display of images of the American flag, they sanctioned and enabled the celebration of Cinco de Mayo by students, allowing opportunity for participating students to communicate political themes, including Mexican patriotism and views on Chicano assimilation, through expressive folk dancing, color displays, and other speech-related activities. App.Br. at 8-9 & n.4, 27, 38-39.

ARGUMENT

I. The First Amendment prohibits a "heckler's veto."

This Court's review in *Ctr. for Bio-Ethical Reform, Inc. v. L.A. Cnty. Sheriff Dep't*, 533 F.3d 780, 787-89 (9th Cir. 2008), of the background on the First Amendment's prohibition of a heckler's veto[1] yielded the following:

> It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers, or simply because bystanders object to peaceful and orderly demonstrations.

Id. at 787-88 (quotation marks and citations omitted).

"Listeners' reaction to speech is not a content-neutral basis for regulation." *Forsyth County*, 505 U.S. at 134. When school officials forbade Plaintiffs to wear clothing containing an image of the American flag because a purportedly hostile audience was opposed to the message that image communicates, those officials plainly regulated speech because of its message. "If *listeners* react to speech on its content and the government then ratifies that reaction by restricting the speech *in response to listeners' objections*, then the restriction is content-based." *Ctr. for Bio-Ethical Reform*, 533 F.3d at 789 (emphasis in original). (And often, more specifically, viewpoint-based, as here.) Because Defendants' prohibition on students' passive display of the image of the American flag purported to depend on

[1] "We use this term [hecklers veto] to describe restrictions on speech that stem from listeners' negative reactions to a particular message." 533 F.3d at 788 n.4.

a "measure of the amount of hostility likely to be created by the speech based on its content," the result was that "[t]hose wishing to express views unpopular with bottle throwers" were forbidden to speak. *Forsyth County*, 505 U.S. at 134.

Yet student patriotic speech should not be "punished or banned, simply because it might offend a hostile mob." *Id.* at 135. The default First Amendment principle is that "the government may not regulate speech based on its substantive content or the message it conveys." *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995). This Court has acknowledged the general premise set forth by the Supreme Court in *Cox v. Louisiana*, 379 U.S. 536 (1965), that "'constitutional rights may not be denied simply because of hostility to their assertion or exercise.'" *Ctr. for Bio-Ethical Reform*, 533 F.3d at 788, quoting *Cox*, 379 U.S. at 551. And "[t]here is . . . no precedent for a 'minors' exception to the prohibition on banning speech because of listeners' reaction to its content." 533 F.3d at 790.

School officials' censorship of Plaintiffs' passive t-shirt displays was an imposition triggered by the message Plaintiffs sought to communicate, and in service of those "hearers" who opposed Plaintiffs' message and wanted it suppressed. As a general matter, the First Amendment forbids this form of intrusion that skews public discourse by privileging hostile partisans. And this principle holds true in the specific context of student speech in State schools.

II. *Tinker* forbids the form of censorship ratified by the District Court.

Tinker does not authorize school officials to regulate student speech apart from its current or forecasted disruption due to the time, place, or manner of the speakers' presentation. Administrators' regulation of student speech in order to mollify opponents of its messages is an errant practice finding no support in *Tinker*.

Those forms of student speech that present certain problematic *content*—be it fighting words,[2] speech that is obscene or lewd,[3] that advocates drug use,[4] or is troubling for its apparent association with the school itself[5]—may all be regulated because of its content, and are outside the reach of *Tinker*. Student speech that is not encompassed by these unique categories, however, are under *Tinker*'s purview and are subject only to content-neutral regulation of their manner of presentation.

1. The focus of *Tinker*'s "disruption" evaluation is on the speaker's form of presentation. Exampling this prescribed form of evaluation, the Court in *Tinker* concluded that "the wearing of armbands in the circumstances of this case was entirely divorced from actually or potentially disruptive conduct *by those participating in it*." 393 U.S. at 505 (emphasis added). The Court later observed that the "*silent, passive* expression of opinion" of the armbands was

[2] *See Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).
[3] *See Bethel Sch. Dist. v. Fraser*, 478 U.S. 675 (1986).
[4] *See Morse v. Frederick*, 551 U.S. 393 (2007).
[5] *See Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988).

"unaccompanied by any disorder or disturbance *on the part of petitioners*." *Id.* at 508 (emphasis added). And there was no evidence of "*petitioners*' interference" with school operation or the rights of others. *Id*. (emphasis added). "Accordingly," their speech could not be forbidden. *Id.*

In expounding its rule governing school officials, the Court emphasized that "to justify prohibition of a particular expression of opinion," it had to be the case that "*engaging in the forbidden conduct* would materially and substantially interfere" with school discipline. *Id.* at 509 (emphasis added). The Court in *Tinker* stated that after its "independent examination of the record," it resolved the case in favor of the petitioners for it found no evidence that "*the wearing of the armbands* would substantially interfere with" the school's legitimate interests. *Id*. (emphasis added). The Court later explained that a regulation forbidding students to discuss or express opposition to the Vietnam War would be unconstitutional, unless "*the students' activities*" would disrupt school function. *Id*. at 513 (emphasis added). Thus did the Court when denouncing the school officials' prohibition resort to a description of the manner of petitioners' speech: "the *silent, passive* 'witness of the armbands.'" *Id*. at 514 (emphasis added). The requisite analytical focus is on the *expression itself.*

2. The converse should also be observed: the Court in *Tinker* does not in its description of the rule or in its application of that rule assign significance to the

reactions of the speaker's audience. This is a conspicuous absence, and instructive to the question under consideration.

3. In fact, when the Court does address the responses of the speaker's audience, it is in order to dispense with its relevance as a factor justifying regulation. "Any word spoken . . . 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." *Id*. at 508. The open and often disputatious nature of our society is indicative of our strength, *not* a cause for alarm or regulation. *Id.* Thus, "mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint" is not an acceptable justification for censorship. *Id*. at 509.

Indeed, emphasizing the categorically separate nature of listeners' responses from the evaluation that the *Tinker* rule calls for, the Court juxtaposed its evidentiary finding that school officials had no reason "to anticipate that the *wearing of the armbands* would substantially interfere with the work of the school or impinge upon the rights of other students," *id.* at 509 (emphasis added), with the school officials' "urgent wish to avoid the *controversy which might result from* the . . . the silent symbol of armbands," *id.* at 510 (emphasis added).

Again separating the permitted basis for regulation from the controversy of the message, the Court stated that a student "may express his opinions, even on controversial subjects" so long as he does so in a way conforming to appropriate

discipline not intruding on others' rights. *Id*. at 513. The controversy of a message and the form of its presentation are categorically distinct considerations. Only the latter is considered under *Tinker*'s "disruption" appraisal. The aggression of hecklers is not a factor countenanced.

4. Instead, *Tinker* requires an evaluation directed not only to the speech act itself (as explained in (1), above), but specifically involves a content-neutral view of the time, place, and manner of that speech. The Supreme Court's repeated identification of the "silent, passive," and thus nondisruptive, nature of the armband speech in *Tinker* demonstrates this requisite focus. After noting the "inevitable" and "important" intercommunication among students, *id.* at 512, and affirming the propriety of student expression of opinions on controversial subjects, *id.* at 513, the Court then elaborates the content-neutral nature of its "disruption rule": conduct by the student which—"whether it stems from *time, place, or type of behavior*—materially disrupts classwork or involves substantial disorder or invasion of the rights of others" may be regulated. *Id.* (emphasis added). Again: time, place, or type of behavior; *not* message, viewpoint, or audience response.

Accordingly, when the Court asserted that the evidence revealed no basis for administrators to reasonably forecast "substantial disruption or material interference with school activities" from the armband speech, it explained that

conclusion by applying its content-neutral assessment standard to petitioner's *conduct*:

> These petitioners merely went about their ordained rounds in school. Their deviation consisted only in wearing on their sleeve a band of black cloth, not more than two inches wide. . . . They neither interrupted school activities nor sought to intrude in the school affairs or the lives of others.

Id. at 514. The time, place, and type of behavior at issue did not interfere with the school's legitimate interests, and thus could not be forbidden.

This Court's observation in *Ctr. for Bio-Ethics Reform* thus faithfully conforms to the course established in *Tinker*:

> Here if [the speech regulation] applies only to disruptions caused by the *manner* and not the *content* of speech, our First Amendment concerns are resolved. A statute that restricts speech only when it is disruptive because of its manner, not its content, is an example of content-neutral regulation that has been affirmed time and again.

533 F.3d at 790 (emphasis in original).

In *Tinker*, the Supreme Court stated that "prohibition of expression of one particular opinion" may not be accomplished—unless that speech otherwise may be regulated under the "disruption" standard elaborated in that case decision. 393 U.S. at 510-11. Which is to say, the speech may not be prohibited because of its particular *message*, only for the disruption potential deriving from its time, place, or manner of presentation. "[S]chool officials cannot suppress expressions of feelings with which they do not wish to contend." *Id.* at 511 (quotation marks omitted.)

The Supreme Court reiterated the content-neutral character of *Tinker*'s authorized regulation of speech in its subsequent decision in *Grayned v. City of Rockford*, 408 U.S. 104 (1972). The Court there emphasized that *Tinker* allowed restrictions on student speech "only if the forbidden conduct" works a material disruption or invasion of rights of others. *Id*. at 118. In *Grayned*, when deciding whether a city's noise ordinance regulating speech near a school was constitutional, the Court announced: "[o]ur touchstone is *Tinker*." *Id*. at 117. The Court noted that "Rockford's antinoise ordinance goes no further than *Tinker* says a municipality may go to prevent interference with its schools," *id*. at 119, and that the ordinance's prohibition on a disruptive *manner* of picketing near a school conforms to *Tinker*'s terms, observing that "the ordinance gives no license to punish anyone because of *what he is saying*," *id*. at 120 (emphasis added).[6]

> The nature of a place, the pattern of its normal activities, dictate the kinds of regulations of time, place, and manner that are reasonable. Although a silent vigil may not unduly interfere with a public library, *Brown v. Louisiana*, 383 U.S. 131 (1966), making a speech in the reading room almost certainly would. That same speech should be perfectly appropriate in a park. The crucial question is whether the *manner* of expression is basically incompatible with the normal activity of a particular place at a particular time.

Id. at 116 (emphasis added).

[6] Instead the Court evaluated—as it did in *Tinker*—the manner of speech, observing that "quiet and peaceful" picketing near a school is consistent with the normal functioning of the school; and that "boisterous" demonstrations do interfere with school functions. 408 U.S. at 119.

Plaintiffs' "silent, passive" display of an American flag image on their clothing was appropriate for and compatible with the school context. Defendants' censorship of that speech was predicated on opposition to Plaintiffs' *message*, not to any disruption attending to the place or manner of that communication. *Tinker* does not authorize that form of speech regulation.

CONCLUSION

The court below, like many others, failed to give careful attention to either the nuanced formulation of *Tinker*'s rule, or the Supreme Court's instructive method of applying that rule. The defendant school officials' effectuation of a heckler's veto censoring Plaintiffs' peaceful and unobtrusive display of an image of the United States flag on their clothing finds no refuge under *Tinker*. The district court's judgment should be reversed.

Respectfully submitted this the 7th day of March, 2012.

By: s/ Jeffrey A. Shafer
Jeffrey A. Shafer

Attorney for Amicus Curiae

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because this brief contains 2,895 words, excluding parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Word 2007 in 14-point Times New Roman.

Dated: March 7, 2012

s/Jeffrey A. Shafer
Jeffrey A. Shafer

Attorney for Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that on March 7, 2012, I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system upon the following:

William J. Becker, Jr., Esq.
THE BECKER LAW FIRM
11500 Olympic Blvd., Ste. 400
Los Angeles, CA 90064

Robert J. Muise, Esq.
AMERICAN FREEDOM LAW CENTER
P.O. Box 131098
Ann Arbor, MI 48113

Erin Mersino, Esq.
THOMAS MORE LAW CENTER
24 Frank Lloyd Wright Drive
P.O. Box 393
Ann Arbor, MI 48106

Don Willenburg, Esq.
Mark S. Posard, Esq.
Alyson S. Cabrera, Esq.
GORDON & REES LLP
275 Battery Street, Suite 2000
San Francisco, CA 94111

s/Jeffrey A. Shafer
Jeffrey A. Shafer

Attorney for Amicus Curiae