No. _____

In the Supreme Court of the United States

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

Petitioners,

v.

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

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

On May 5, 2010, students at a California public high school were directed to remove their American flag shirts because school officials thought that other students who were celebrating Cinco de Mayo might react negatively to the pro-America message.

As Ninth Circuit Judge O'Scannlain observed in his dissent from the denial of rehearing en banc:

> [I]t is a foundational tenet of First Amendment law that the government cannot silence a speaker because of how an audience might react to the speech. It is this bedrock principle—known as the heckler's veto doctrine—that the panel overlooks, condoning the suppression of free speech by some students because *other students* might have reacted violently.
>
> In doing so, the panel creates a split with the Seventh and Eleventh Circuits and permits the will of the mob to rule our schools.

App. 5 (dissent).

The question presented is whether the Ninth Circuit erred by allowing school officials to prevent students from engaging in a silent, passive expression of opinion by wearing American flag shirts because other students might react negatively to the pro-America message, thereby incorporating a heckler's veto into the free speech rights of students contrary to *Tinker v. Des Moines Independent Community School District,* 393 U.S. 503 (1969), and the decisions of other United States courts of appeals.

PARTIES TO THE PROCEEDING

The Petitioners are John Dariano and Dianna Dariano, on behalf of their minor child, M.D.; Kurt Fagerstrom and Julie Ann Fagerstrom, on behalf of their minor child, D.M.; and Kendall Jones and Joy Jones, on behalf of their minor child, D.G. (the students at Live Oak High School, who were minors at the time, are collectively referred to as "Petitioners").

The Respondents are 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 (collectively referred to as "Respondents").

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JURISDICTION

The judgment of the court of appeals was entered on February 27, 2014. App. 2. A petition for rehearing was denied on September 17, 2014. App. 4. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Free Speech Clause of the First Amendment provides, in relevant part, "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I.

STATEMENT OF THE CASE

On May 5, 2010, Petitioners and two other students "wore American flag shirts to school." App. 22. On this day, some students were celebrating the holiday known as Cinco de Mayo, which, in the United States, is a celebration of Mexican culture and heritage. *See* App. 21. School officials had approved the on-campus, student-sponsored celebration of the holiday, which "was presented in the 'spirit of cultural appreciation.'" App. 21.

Because it was Cinco de Mayo, Respondents were concerned that some students on campus might react negatively toward Petitioners' American flag shirts. Consequently, "Boden directed Rodriguez to have the students either turn their shirts inside out or take them off." App. 23. Petitioners refused.

Respondents' directive was in response to a few vague comments: a "Caucasian student" told Rodriguez that "there might be some issues"; a female student told Rodriguez that "there might be problems"; and "[a] group of Mexican students" asked Rodriguez why Petitioners "get to wear their flag out when we [sic] don't get to wear our [sic] flag?"[1] App. 23.

Respondents also allegedly took into account an incident that occurred at Live Oak High School during a 2009 Cinco de Mayo Celebration involving a group of Caucasian students and a group of Mexican students. App. 21. The incident was triggered by a Mexican student parading around campus with a Mexican flag. App. 22. In response to this display of Mexican nationalism, some Caucasian students hung a makeshift American flag on a tree and began chanting "U–S–A." App. 22. "[I]n response to the white students' flag-raising, one Mexican student shouted "f*** them white boys, f*** them white boys." App. 22. Rodriguez intervened and asked the Mexican students

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[1] The record makes a distinction between "Caucasian" and "Mexican" students. The Ninth Circuit "use[d] the ethnic and racial terminology employed by the district court (Caucasian, Hispanic, Mexican). For example, the district court at times referred to students of Mexican origin born in the United States and students born in Mexico collectively as 'Mexican.'" App. 21 n.2.

to stop using profane language, to which one Mexican student responded, "But Rodriguez, they are racist. They are being racist. F*** them white boys. Let's f*** them up." App. 22.

Despite Respondents' alleged concerns, "the following facts are undisputed: '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 . . . Rodriguez had heard no reports of actual disturbances being caused in relation to [Petitioners'] apparel.'" App. 9 n.2 (dissent).[2]

Moreover, despite Respondents' concerns related to the 2009 Cinco de Mayo incident and their claims of racial tension, *see* App. 27, Boden approved the Cinco de Mayo activities for May 5, 2010, *see* App. 21.

Because Petitioners were not allowed to wear their American flag shirts to school on Cinco de Mayo, they brought a civil rights lawsuit against Respondents, alleging, *inter alia*, a violation of their First Amendment right to freedom of expression. App. 20.

The district court granted Respondents' motion for summary judgment and denied Petitioners' motion for summary judgment, concluding that "the school officials reasonably forecast that [Petitioners'] clothing could cause a substantial disruption with school activities, and therefore did not violate the standard set forth in *Tinker* by requiring that [Petitioners] change." App. 54.

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[2] Judge O'Scannlain's dissent from the denial of rehearing en banc is cited and referred to throughout this petition as the "dissent."

The Ninth Circuit affirmed the district court's decision and denied Petitioners' rehearing request over the dissent of Circuit Judge O'Scannlain, who was joined by Circuit Judges Tallman and Bea. App. 1-37.

REASONS FOR GRANTING THE PETITION

I. The Ninth Circuit's Decision Conflicts with *Tinker*, Incorporates a "Heckler's Veto" into the First Amendment, and Creates a Circuit Split.

The important constitutional question this case presents for the free speech rights of students cannot be overstated. The Ninth Circuit's "opinion contravenes foundational First Amendment principles, creates a split with the Seventh and Eleventh Circuits, and imperils minority viewpoints of all kinds."[3] App. 19 (dissent); *see* Sup. Ct. R. 10(a) & (c).

Indeed, if this decision is permitted to stand, it will have a detrimental impact on *all* student speech by rewarding violence over civil discourse and effectively invalidating *Tinker*. As Judge O'Scannlain forewarned:

> In this case, the disfavored speech was the display of an American flag. But let no one be fooled: by interpreting *Tinker* to permit the heckler's veto, the panel opens the door to the

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[3] Judge O'Scannlain summed up the question presented by this case as follows: "I would hold that the reaction of other students to the student speaker is not a legitimate basis for suppressing student speech absent a showing that the speech in question constitutes fighting words, a true threat, incitement to imminent lawless action, or other speech outside the First Amendment's protection." App. 19.

> suppression of any viewpoint opposed by a vocal and violent band of students. The 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 student wearing a President Obama "Hope" shirt, or a shirt exclaiming "Stand with Rand!" 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. The demands of bullies will become school policy.

App. 14 (dissent).

This Court's review is warranted to preserve the free speech rights of students and to prevent the dire consequences articulated by Judge O'Scannlain.

A. The Ninth Circuit's Decision Conflicts with *Tinker*.

In *Tinker v. Des Moines Independent Community School District,* 393 U.S. 503 (1969), this Court held that school officials violated the First Amendment by suspending students for wearing black armbands in protest of the Vietnam War. *Id.* at 508, 513–14. In reaching this conclusion, the Court famously stated that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Id*. at 506.

Respondents' decision banning Petitioners' American flag clothing to avoid unrealized and unarticulated student unrest ratifies a policy inconsistent with *Tinker.* Indeed, *Tinker* does not countenance Respondents' restriction on Petitioners'

silent, passive expression of opinion—rather, it forbids it. That is, *Tinker* does not authorize school officials to restrict student speech apart from its current or forecasted disruption *due to the time, place or manner* of the student's speech activity. *See id*. at 513 ("But conduct by the student, in class or out of it, which for any reason—*whether it stems from time, place, or type of behavior*—materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.") (emphasis added).

In *Tinker*, the Court described the "problem posed by the present case" as follows: "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.*" *Id*. at 508 (emphasis added). As this Court noted, the "mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint" is not an acceptable justification for censorship. Consequently, a restriction on student speech is prohibited by the First Amendment "if it could not be justified by a showing that the *students' activities* would materially and substantially disrupt the work and discipline of the school." *Id*. at 513 (emphasis added). As the Court found, 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"—despite their "urgent wish to avoid the controversy which might result from the expression, even by the silent symbol of armbands." *Id*. at 510 (emphasis added).

Like the armbands worn in *Tinker*, the Constitution does not permit public school officials to deny Petitioners' *form of expression*—the peaceful, passive, and silent expression of a pro-America message through the wearing of a shirt depicting the American flag. *Tinker*, 393 U.S. at 505-06 (holding that the wearing of armbands by students was "closely akin to 'pure speech,' which, we have repeatedly held, is entitled to comprehensive protection under the First Amendment").

There is no principled way of distinguishing Petitioners' wearing of their American flag shirts to school on Cinco de Mayo from the *Tinker* students' wearing of black armbands to protest the Vietnam War—a provocative act during a time of deep social unrest in a divided nation:

> 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 wore it to exhibit their disapproval of the Vietnam hostilities and their advocacy of a truce, to make their views known, and, by their example, to influence others to adopt them. They neither interrupted school activities nor sought to intrude in the school affairs or the lives of others. They caused discussion outside of the classrooms, but no interference with work and no disorder. In the circumstances, our Constitution does not permit officials of the State to deny their *form of expression*.

Tinker, 393 U.S. at 514 (emphasis added).

Although the majority opinion in *Tinker* did not emphasize nor rely upon any disturbances caused by students reacting to the armbands, Justice Black's dissent identified evidence in the record revealing that "the armbands caused comments, warnings by other students . . . and a warning by an older football player that other, non-protesting students had better let them alone. There [was] also evidence that a teacher of mathematics had his lesson period practically 'wrecked' chiefly by disputes with Mary Beth Tinker, who wore her armband for her 'demonstration.'" *Id*. at 517 (Black, J., dissenting). And despite this evidence of disruption caused by others, the Court protected the students' right to engage in this form of expression on a public school campus, thereby rejecting any heckler's attempt to veto the expression of Ms. Tinker's and others' unpopular opinion. *See infra* part. I.B.; App. 10 (dissent) (noting that "*Tinker* went out of its way to reaffirm the heckler's veto doctrine").

Here, there is no dispute that the *content* of Petitioners' speech and the *viewpoint* expressed by it are protected by the First Amendment. And the *manner* in which Petitioners engaged in their speech was nothing short of silent and peaceful (*i.e.*, it was not materially or substantially disruptive). As this Court noted in *Tinker*, "[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*." *Tinker*, 393 U.S. at 505 (emphasis added).

The principles outlined in *Tinker* embody the longstanding recognition that our public schools serve as a unifying social force and must, therefore, provide

the basic tools for shaping democratic values. *See*, *e.g.*, *McCollum v. Bd. of Educ.*, 333 U.S. 203, 216, 231 (1948) (Frankfurter, J.) (describing the American public school as "the most powerful agency for promoting cohesion among a heterogeneous democratic people" and "the symbol of our democracy and the most pervasive means for promoting our common destiny"). And because our schools "are educating the young for citizenship," the obligation to ensure the "scrupulous protection of constitutional freedoms of the individual" is mandatory "if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." *W.V. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943).

Indeed, it is far better in our civilized society to teach students about the First Amendment and why we tolerate divergent views than to suppress speech. Thus, the better and proper response is for school officials to educate the audience rather than silence the speaker. By restricting Petitioners' speech, Respondents failed to fulfill this fundamental obligation of our government-operated schools and violated the First Amendment in the process.

B. The Ninth Circuit's Decision Impermissibly Incorporates a Heckler's Veto into the First Amendment.

One of the "bedrock First Amendment principles" that the Ninth Circuit's decision disregards is that government officials may not "restrict speech based on listener reaction," even if the listeners are minors on a public school campus. *See Ctr. for Bio-Ethical Reform, Inc. v. L.A. Cnty. Sheriff Dep't*, 533 F.3d 780, 790 (9th Cir. 2008) ("There is . . . no precedent for a 'minors'

exception to the prohibition on banning speech because of listeners' reaction to its content."). This is known in First Amendment parlance as a "heckler's veto." *Id*. at 788 n.4; *Lewis v. Wilson,* 253 F.3d 1077, 1082 (8th Cir. 2001) ("The [F]irst [A]mendment knows no heckler's veto.").

In *Tinker*, this Court "went out of its way to reaffirm the heckler's veto doctrine; the principle that 'the government cannot silence messages simply because they cause discomfort, fear, or even anger.'" App. 10 (dissent) (quoting *Ctr. for Bio–Ethical Reform, Inc.*, 533 F.3d at 788 (citing *Tinker*, 393 U.S. at 508)). The Ninth Circuit did precisely what *Tinker* cautions against by permitting school officials to punish students engaged in a passive expression of opinion to pacify, and indeed reward, those students opposed to the message.

Petitioners did nothing more than engage in a silent, passive expression of a pro-America viewpoint on May 5, 2010, and any perceived negative response, reaction, or potential disruption was from the "hecklers" who opposed this viewpoint. *See Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 134-35 (1992) (holding that speech cannot be "punished or banned, simply because it might offend a hostile mob"); *Ctr. for Bio-Ethical Reform, Inc.*, 533 F.3d at 789 ("Whether prospectively, as in *Forsyth County*, or retrospectively, as in the case before us, the government may not give weight to the audience's negative reaction.").

As Judge O'Scannlain noted, "[t]he heckler's veto doctrine is one of the oldest and most venerable in First Amendment jurisprudence." App. 12 (dissent).

Affirming the heckler's veto doctrine in the public school context, *Tinker* explains:

> [I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. 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. . . .

Tinker, 393 U.S. at 508.

As Judge O'Scannlain emphasized, and the majority panel ignored, exceptions to the heckler's veto doctrine have only been applied to "well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem." App. 12-13 (dissent) (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72) (1942)); *see also United States v. Alvarez*, 132 S. Ct. 2537, 2543-44 (2012) (listing categories of speech in which content-based restrictions are generally permitted). These limited categories include "fighting words"—"those which by their very utterance inflict injury or tend to incite an immediate breach of the peace," *Chaplinsky*, 315 U.S. at 572; speech that is directed to inciting or producing imminent lawless action and is likely to incite or produce such action, *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969); and true threats, *Virginia v. Black*, 538 U.S. 343, 358–60 (2003).

"[G]iven the central importance of the heckler's veto doctrine to First Amendment jurisprudence," Judge O'Scannlain notes, it "should come as no surprise" that *Tinker* "stands as a dramatic reaffirmation" of it. App. 10-11 (dissent); *see also* App. 10 (dissent) ("*Tinker* went out of its way to reaffirm the heckler's veto doctrine . . . .").

In the final analysis, the Ninth Circuit's decision affirms a dangerous lesson by rewarding students who resort to disruption rather than reason as the default means of resolving disputes. *See* App. 13-14 (dissent) ("Live Oak's reaction to the possible violence against the student speakers, and the panel's blessing of that reaction, sends a clear message to public school students: by threatening violence against those with whom you disagree, you can enlist the power of the State to silence them. This perverse incentive created by the panel's opinion is precisely what the heckler's veto doctrine seeks to avoid."). Because school officials perceived that those who oppose the message conveyed by Petitioners' American flag clothing would adversely react to the message, Petitioners were not permitted to speak. This not only creates perverse incentives for student hecklers, it effectively turns the First Amendment on its head. *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118 (1991) ("[I]f it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection.") (citations omitted); *Texas v. Johnson*, 491 U.S. 397, 414 (1989) ("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.").

C. The Ninth Circuit's Decision Creates a Circuit Split.

In addition to contravening *Tinker* and impermissibly incorporating a heckler's veto into the First Amendment, the Ninth Circuit's decision creates a split with the Seventh and Eleventh Circuits, both of which have held, consistent with *Tinker*, that school officials cannot suppress student speech based on the negative reaction of its audience.

In *Zamecnik v. Indian Prairie School District No. 204*, 636 F.3d 874, 875 (7th Cir. 2011), a student wore a shirt to school on the Day of Silence bearing the slogan, "Be Happy, Not Gay." The school sought to prohibit the student from wearing the shirt based, in part, on "incidents of harassment of plaintiff Zamecnik." *Id.* at 879. The Seventh Circuit squarely rejected that rationale as "barred by the doctrine . . . of the 'heckler's veto.'" *Id.* In *Zamecnik*, the Seventh Circuit made clear that *Tinker* "endorse[s] the doctrine of the heckler's veto" and described the rationale behind that doctrine:

> Statements that while not fighting words are met by violence or threats or other unprivileged retaliatory conduct by persons offended by them cannot lawfully be suppressed because of that conduct. Otherwise free speech could be stifled by the speaker's opponents' mounting a riot, even though, because the speech had contained no fighting words, no reasonable person would have been moved to a riotous response. So the fact that homosexual students and their sympathizers harassed Zamecnik because of

> their disapproval of her message is not a permissible ground for banning it.

Id. Indeed, in the absence of evidence indicating a true threat, speculation that a message might provoke violence constitutes "too thin a reed on which to hang a prohibition of the exercise of a student's speech." *Id.* at 877. The court observed:

> As one would expect in a high school of more than 4,000 students, there had been incidents of harassment of homosexual students. But we thought it speculative that allowing the plaintiff to wear a T-shirt that said "Be Happy, Not Gay" would have even a slight tendency to provoke such incidents, or for that matter to poison the educational atmosphere.

Id. The court affirmed the grant of summary judgment to Zamecnik. *Id.* at 882.

Consistent with the Seventh Circuit, the Eleventh Circuit has held that school officials cannot suppress a student's speech based on the listener's (or viewer's) reaction. In *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1259 (11th Cir. 2004), the court affirmed the First Amendment right of a student to silently hold up a fist as other students recited the Pledge of Allegiance. School officials justified punishing the student based on a "concern that his behavior would lead to further disruptions by other students." *Id.* at 1274. Applying *Tinker*, the court rejected the school officials' asserted justification, which was based on a heckler's veto, reasoning:

> Allowing a school to curtail a student's freedom of expression based on such factors turns reason

> on its head. If certain bullies are likely to act violently when a student wears long hair, it is unquestionably easy for a principal to preclude the outburst by preventing the student from wearing long hair. To do so, however, is to sacrifice freedom upon the alter [sic] of order, and allow the scope of our liberty to be dictated by the inclinations of the unlawful mob.

Id. at 1275.

While the Ninth Circuit eschews any responsibility on the part of school officials to protect the speech rights of students, *Holloman*, in contrast, takes a different and more principled approach:

> While the same constitutional standards do not always apply in public schools as on public streets, we cannot afford students less constitutional protection simply because their peers might illegally express disagreement through violence instead of reason. If the people, acting through a legislative assembly, may not proscribe certain speech, neither may they do so acting individually as criminals. Principals have the duty to maintain order in public schools, but they may not do so while turning a blind eye to basic notions of right and wrong.

Id. at 1276.

In this case, "[t]he panel claims that the *source* of the threatened violence at Live Oak is irrelevant: apparently requiring school officials to stop the source of a threat is too burdensome when a more 'readily-available' solution is at hand, . . . namely, silencing the

target of the threat. Thus the panel finds it of no consequence that the students exercising their free speech rights did so peacefully, that their expression took the passive form of wearing shirts, or that there is no allegation that they threatened other students with violence." App. 8-9 (dissent).

By curtailing Petitioners' freedom of expression and turning a blind eye to basic notions of right and wrong, the Ninth Circuit's decision marks a dramatic departure from *Tinker* and the decisions of other United States courts of appeals, thereby creating a circuit split that should be resolved by this Court.[4]

II. The Ninth Circuit's Reliance on Confederate Flag Cases to Justify Banning the American Flag Is Wholly Misplaced.

The Ninth Circuit's approach goes so far as to derogate America's national symbol of unity by essentially analogizing the American flag to the

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[4] It should be noted that protecting the student speech and the constitutional principles at issue in this case poses no challenge to "the traditional authority of teachers to maintain order in public schools" nor requires them "to surrender control of the American public school system to public school students." *Morse v. Frederick*, 551 U.S. 393, 421 (2007) (Thomas, J., concurring) (internal quotations and citations omitted). Students at Live Oak High School were permitted to wear message-bearing shirts to school, including shirts bearing American flag images on days other than Cinco de Mayo. *See, e.g.,* App. 23, 28. Thus, a ruling in favor of protecting Petitioners' speech would not prevent a school district from adopting an appropriate policy, such as a uniform requirement, for example, that would allow school officials to avoid entangling themselves in impermissible, viewpoint-based speech restrictions such as the one at issue here.

Confederate flag and its racially divisive elements. App. 31-32; *but see* App. 17-19 (dissent) (criticizing the panel's reliance on the Confederate flag cases for upholding the restriction on the American flag).

There is no question that the American flag is fertile with meaning, not merely as the "symbol of our country" but as the "one visible manifestation of two-hundred years of nationhood." *Texas v. Johnson*, 491 U.S. 397, 405 (1989) (quoting *Smith v. Goguen*, 415 U.S. 566, 588 (1974)). Indeed, our flag is "[p]regnant with expressive content," and "readily signifies this Nation as does the combination of letters found in 'America.'" *Johnson*, 491 U.S. at 405. Because "government may not . . . proscribe particular conduct *because* it has expressive elements," flag-*burning* constitutes expressive activity protected by the First Amendment. *Id.* at 406 (emphasis added). Respondents' decision banning students from *wearing* the American flag puts before the Court *Johnson*'s contextual inverse. The discordant message it sends to students is that the American flag's *desecration* deserves the full protection of the First Amendment, but *celebrating* it does not.

The Ninth Circuit's flawed analysis succumbed to a somewhat novel pretense: because the Confederate flag cases do not, *per se*, disapprove of a heckler's veto, they stand for the broad proposition that the heckler's veto doctrine does not apply in our public schools. *See* App. 17-19 (dissent). But as Judge O'Scannlain recognized, what the "[Confederate flag] cases actually illustrate is a permissive attitude towards regulation of the Confederate flag that is based on the flag's unique and racially divisive history." App. 18 (dissent).

There is nothing in American jurisprudence that admits to an ethical or moral equivalency between the American flag (a symbol of freedom and national unity) and the Confederate flag (arguably, a symbol of slavery and racism). As Judge O'Scannlain concluded, "Whether or not this history [*i.e.*, the Confederate 'flag's unique and racially divisive history'] provides a principled basis for the regulation of Confederate icons, it certainly provides no support for banning displays of the American flag."[5] App. 18-19 (dissent); *see also* App. 18 n.8 (dissent) (citing Confederate flag cases and noting that "all emphasize that, across America, Confederate symbols carry an inherently divisive message").

In closing, there is never a legitimate basis for banning the display of an American flag on an American public school campus. And by incentivizing and rewarding violence as a legitimate response to unpopular speech, the Ninth Circuit's decision is contrary to our foundational First Amendment principles and provides a dangerous lesson in civics to our public school students. The Court should grant review and reverse.

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[5] As Judge O'Scannlain points out, the Eleventh Circuit has suggested that the display of the Confederate flag may not be deserving of the full protection of *Tinker,* but may be restricted as offensive under the standard of *Bethel School District v. Fraser,* 478 U.S. 675 (1986). *See Scott v. Sch. Bd. of Alachua Cnty.,* 324 F.3d 1246, 1248 (11th Cir. 2003) (per curiam); *Denno v. Sch. Bd. of Volusia Cnty., Fla.,* 218 F.3d 1267, 1273–74 (11th Cir. 2000). App. 17 n.7.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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