

No. 14-720

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**In the Supreme Court of the United States**

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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.*

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

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**REPLY BRIEF FOR PETITIONERS**

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**RULE**

Sup. Ct. R. 10(a) . . . . . 2

## INTRODUCTION

Contrary to Respondents' arguments, "[t]his case is an ideal vehicle to clarify the holding of *Tinker* [*v. Des Moines Independent Community School District*, 393 U.S. 503 (1969)], to reaffirm the vitality of the 'heckler's veto' doctrine, and to prevent students (both the potentially violent and the peaceful) from learning a message that is the very antithesis of the First Amendment: that speech can be effectively suppressed by threat of violence." Br. of Mary Beth Tinker & John Tinker ("Tinkers"), *Amici Curiae* Supp. Pet'rs at 15.

Here, school officials relied upon the perceived negative reaction of the listener (viewer) to suppress "pure speech"—the wearing of clothing by students 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 is] entitled to comprehensive protection under the First Amendment").

Without supporting authority, Respondents are reduced to dismissing the heckler's veto doctrine, "one of the oldest and most venerable in First Amendment jurisprudence," App. 12, as irrelevant—"inapt to the special characteristics of a school setting," Opp'n. Br. at 1.

Consequently, this case presents a straightforward legal question: whether it is permissible to incorporate a "heckler's veto" into the First Amendment rights of students—a result that is contrary to *Tinker*, App. 10-11 (dissent) (noting that *Tinker* "stands as a dramatic reaffirmation" of the heckler's veto doctrine), and the

decisions of the Seventh and Eleventh Circuits.<sup>1</sup> *See* Pet. at i.

Moreover, this case presents no jurisdictional or prudential barriers for this Court. *Contra* Opp'n Br. at 28-37. Certainly, no such barriers prevented the Ninth Circuit from rendering its conflicting and precedent-setting decision on the merits. Indeed, due to the circuit split created by this decision, there is a compelling reason for this Court to resolve the question presented. *See* Sup. Ct. R. 10(a).

Ultimately, this case is as much about the future of the free speech rights of students as it is about the situation at Live Oak High School on May 5, 2010. As Judge O'Scannlain warned, "interpreting *Tinker* to permit the heckler's veto . . . opens the door to the suppression of any viewpoint opposed by a vocal and violent band of students. . . . 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).

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<sup>1</sup> The Tenth Circuit can be added to the list as well. *See* Br. of Alliance Defending Freedom, *Amicus Curiae* Supp. Pet'rs at 22-24.

## REVIEW OF RELEVANT FACTS<sup>2</sup>

On May 5, 2010, Petitioners and two other students “wore American flag shirts to school.”<sup>3</sup> App. 22. On this day, some students were celebrating Cinco de Mayo. *See* App. 21. Despite the controversy surrounding this celebration in 2009, school officials permitted it to occur again on campus in 2010.<sup>4</sup> *See* App. 21-22.

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

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<sup>2</sup> Respondents attempt to manufacture a factual dispute. There is none, as the lower courts held. Further, the Ninth Circuit affirmed the district court’s grant of summary judgment in Respondents’ favor, thus “[t]he evidence of the nonmovant[s] is to be believed, and all justifiable inferences are to be drawn in [their] favor.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

<sup>3</sup> Because the Confederate flag has a long history associated with racism, cases addressing prohibitions on the wearing of this symbol in a public school do not resolve *this* case. Pet. at 15-18; *see also* App. 18-19 (dissent) (“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.”).

<sup>4</sup> This fact alone demonstrates that Respondents’ concerns about violence associated with racial tension between Mexican and Caucasian students on campus are unfounded, or worse, a pretext for suppressing Petitioners’ speech in order “to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.” *See Tinker*, 393 U.S. at 509.

The students who refused to abide by Respondents' speech restriction were directed to go home with their parents.<sup>5</sup> App. 24.

Respondents assert that Cinco de Mayo was the "background, but it was not the reason for the school's action." Opp'n Br. at 13. Respondents, however, admit that "[Petitioners] and other students were free to wear the exact same clothes *any other day*."<sup>6</sup> Opp'n Br. at 3 (emphasis added). And the record reveals:

- During a meeting held with the parents and students on the day of the incident, Respondents claimed that the students' American flag attire was objectionable because "this is their [*i.e.*, Mexicans'] day," referring to Cinco De Mayo, "an important day in [Mexican] culture."<sup>7</sup>

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<sup>5</sup> Contrary to Respondents' assertion, Opp'n Br. at 24 (arguing that the extent of the punishment should weigh in the calculus as to whether school officials violated the First Amendment), this punishment is sufficient to trigger a First Amendment violation. See generally *Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.").

<sup>6</sup> This admission is significant for an additional reason. Respondents cite to various incidents, including threats of violence, which occurred *after* the May 5, 2010, speech restriction. Opp'n Br. at 9-10, 25. While this alleged disruption commencing on May 6th was a direct result of the public being made aware of Respondents' decision to ban Petitioners' American flag clothing and was thus a crisis of Respondents making, per Respondents, if any students wanted to wear the "exact same clothes" depicting the American flag on May 6th, that would have been permitted.

<sup>7</sup> ER 400 (Boden Dep.).



- According to Respondents, during this meeting they “wanted to make sure also that there was an understanding of the importance, the cultural significance of Cinco De Mayo to our Hispanic students.”<sup>8</sup>
- Respondent Rodriguez testified as follows: “[T]he fact that it was Cinco de Mayo that day, I asked them, ‘Why today out of all days? Why today?’”<sup>9</sup>
- Respondent Rodriguez warned the students who were permitted to return to class to be “respectful” of the Cinco De Mayo activities that were to occur during lunch that day.<sup>10</sup>

The record, therefore, amply discloses that Respondents’ speech restriction was based on the very fact that “it was Cinco de Mayo,” demonstrating that the restriction was viewpoint based, the most egregious form of content discrimination.<sup>11</sup> *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995).

Regardless, the record reveals “that no classes were delayed or interrupted by [Petitioners’] attire, no

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<sup>8</sup> ER 398 (Boden Dep.).

<sup>9</sup> ER 341-42 (Rodriguez Dep.).

<sup>10</sup> ER 350-51 (Rodriguez Dep.).

<sup>11</sup> These facts are significant for an additional reason. They demonstrate a retaliatory motive that proves dispositive of any claim to qualified immunity. *Ctr. for Bio-Ethical Reform, Inc. v. City of Springboro*, 477 F.3d 807, 824-25 (6th Cir. 2007) (“Because retaliatory intent proves dispositive of Defendants’ claim to qualified immunity, summary judgment was inappropriate.”).

incidents of violence occurred on campus that day, and prior to asking [Petitioners] to change [Respondent] Rodriguez had heard no reports of actual disturbances being caused in relation to [Petitioners'] apparel." App. 53-54.

Thus, prior to restricting Petitioners' message, school officials had no information that Petitioners' speech had caused any disruption whatsoever at the school, even though the students had been on campus for over three hours and attended at least two classroom periods in addition to homeroom.<sup>12</sup>

In comparison, the record in *Tinker* reveals 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.'" *Tinker*, 393 U.S. at 517 (Black, J., dissenting).<sup>13</sup>

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<sup>12</sup> ER 391-92 (Boden Dep.) (stating that the school day "went as planned"); ER 328-29 (Rodriguez Dep.).

<sup>13</sup> As noted in the *Amici Curiae* brief filed by the Tinkers:

*Amici's* speech in *Tinker* itself involved the risk of violent reaction over political expression. . . . And the potential disturbance was not limited just to polite disagreement. One person telephoned the Tinkers' home on Christmas Eve and said "the house would be blown up by morning" . . . . A woman called for Mary Beth, and when the young teen got on the line, said, "Is this Mary Beth? . . . I'm

Accordingly, the facts are virtually indistinguishable from those in *Tinker*, except that in *this* case no class was actually disrupted by Petitioners’ “demonstration.” App. 53-54.

## ARGUMENT IN REPLY

### I. The Ninth Circuit Misapplied *Tinker* and Allowed a Heckler’s Veto to Silence Protected Student Speech.

Respondents argue that the Petition should be denied because the Ninth Circuit correctly applied *Tinker*. Opp’n Br. at 14. According to Respondents, “*Tinker* allows school officials to restrict student speech as necessary to prevent any substantial disruption in schools *regardless of its source*.” Opp’n Br. at 15. Respondents later cite to the Ninth Circuit’s opinion, which misreads *Tinker* as justifying the incorporation of a heckler’s veto.<sup>14</sup> Opp’n at 21. Thus, far from being

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going to kill you.” The Tinkers received other threatening telephone calls as well. They also received hate mail, and their house was vandalized with red paint.

Br. of Tinkers, *Amici Curiae* Supp. Pet’rs at 7-8.

<sup>14</sup> Both Respondents and the Ninth Circuit selectively quote from *Tinker*, arguing that “[w]here speech ‘for any reason . . . materially disrupts classwork or involves substantial disorder or invasion of the rights of others,’ school officials may limit the speech.” Opp’n Br. at 21 (quoting Ninth Circuit opinion); App. 29. But the missing language changes the quoted language substantively: it adds “*whether it stems from time, place, or type of behavior*.” *Tinker*, 393 U.S. at 513 (emphasis added). In other words, the “source” of the disruption must be based on the time, place, or manner of the speech in light of the special characteristics of the school environment and not on the listener’s reaction.

a reason to deny review, Respondents' arguments confirm the very basis for granting review: to resolve the question of whether listener reaction is a legitimate basis for restricting student speech under the First Amendment standard set forth in *Tinker*.

Respondents seek to bolster their view of the First Amendment's application in a public school setting by claiming that "[t]his Court's post-*Tinker* decisions have similarly held that the effect on the listeners may be a reason to restrict school speech," citing *Bethel School District v. Fraser*, 478 U.S. 675 (1986) (upholding a restriction on offensively lewd and indecent speech delivered by a student at a school assembly), and *Morse v. Frederick*, 551 U.S. 393 (2007) (holding that a public school principal may, consistent with the First Amendment, restrict student speech at a school event when that speech is reasonably viewed as promoting illegal drug use). Opp'n Br. at 22. But neither case applied the "materially and substantially disrupt" standard of *Tinker* nor remotely endorsed the incorporation of a heckler's veto to restrict student speech under *Tinker*.

Respondents next argue that the Ninth Circuit's "decision does not enshrine a 'heckler's veto,' if that notion even applies in a school setting." Opp'n Br. at 21. As an initial matter, the heckler's veto doctrine is not simply a "notion"; it is a bedrock principle of First Amendment jurisprudence. Respondents are mistaken for at least two additional reasons. First, as Judge O'Scannlain's dissent illustrates quite well, the Ninth Circuit's decision clearly endorsed the incorporation of a heckler's veto into the free speech rights of students. App. 5 (dissent) (stating that "the panel overlooks" the

heckler's veto doctrine and thus "condon[es] the suppression of free speech by some students because *other students* might have reacted violently"). And second, as *Tinker* itself makes clear, the heckler's veto doctrine does apply in a school setting. App. 10 (dissent) (noting that "*Tinker* went out of its way to reaffirm the heckler's veto doctrine"). Indeed, Respondents' claim that *Tinker* "created a test to address [the heckler's veto in schools]: the substantial disruption test," Opp'n Br. at 27, fundamentally misstates *Tinker*.

In *Tinker*, the Court concluded that school officials violated the First Amendment when they prohibited students from wearing black armbands to protest the Vietnam War. *Tinker*, 393 U.S. at 514. The Court rejected arguments that the students could be punished for wearing their armbands because school authorities had an "urgent wish to avoid the controversy which might result from the expression," *id.* at 510, because other students made hostile remarks to the children wearing armbands, *id.* at 508, because students argued in class about the armbands instead of paying attention, *id.* at 518, (Black, J., dissenting), or because responses to the armbands might lead other students to start an argument or cause a disturbance, *id.* at 508.

Thus, refusing to allow a heckler's veto to justify the suppression of the students' speech, the Court was careful to focus on whether "*engaging in the forbidden conduct* would materially and substantially interfere with the requirements of appropriate discipline," *id.* at 509 (emphasis added), and concluded that the students' speech was protected because it was "entirely divorced

from actually or potentially disruptive conduct *by those participating in it.*” *Id.* at 505-06 (emphasis added). Indeed, in reaching this conclusion, the Court expressly relied on what is arguably the leading heckler’s veto case, *Terminiello v. Chicago*, 337 U.S. 1 (1949). Thus, the Court explained:

[A]ny departure 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, [citing *Terminiello*] . . . .

*Tinker*, 393 U.S. at 509.

Respondents also mistakenly contend that the Ninth Circuit’s decision does not create a circuit split with the Seventh and Eleventh Circuits.

In *Zamecnik v. Indian Prairie School District No. 204*, 636 F.3d 874, 879 (7th Cir. 2011), the Seventh Circuit, per Judge Posner, expressly relied upon the heckler’s veto doctrine, holding that statements “met by violence or threats or other unprivileged retaliatory conduct by persons offended by them cannot lawfully be suppressed because of that conduct” and concluding that because students “harassed Zamecnik because of their disapproval of her message is not a permissible ground for banning it.” *Id.* at 879.

The same reasoning was adopted by the Eleventh Circuit. See *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1274-75 (11th Cir. 2004) (applying *Tinker* and the heckler’s veto doctrine to uphold on First Amendment grounds a student’s right to silently

hold up a fist as other students recited the Pledge of Allegiance).

Accordingly, the Ninth Circuit's decision "contravenes foundational First Amendment principles, creates a split with the Seventh and Eleventh Circuits, and imperils minority viewpoints of all kinds." App. 19 (dissent).

## **II. This Case Is the Ideal Vehicle for Deciding the Question Presented.**

Contrary to Respondents' suggestion, Opp'n Br. at 28-37, there are no jurisdictional or prudential barriers preventing this Court from resolving the important question presented.

First, the Ninth Circuit rendered its precedent-setting decision without any concern for the issues raised by Respondents. And this decision has now created a circuit split with the Seventh and Eleventh Circuits on an important federal question.

Second, there are no mootness nor qualified immunity issues that would bar review. The Ninth Circuit framed "[t]he question on appeal [as] whether Rodriguez, in his official or individual capacity, violated the students' constitutional rights." App. 25. This question is similar to the question presented to this Court in *Morse v. Frederick*, 551 U.S. 393, 400 (2007) ("We granted certiorari on two questions: whether Frederick had a First Amendment right to wield his banner, and, if so, whether that right was so clearly established that the principal may be held liable for damages. . . . We resolve the first question against Frederick, and therefore have no occasion to reach the second."). At the time of the incident at issue in *Morse*

(2002), Frederick was a high school senior. Yet, this Court did not decide the case until 2007. The fact that Frederick had long graduated was no impediment to this Court addressing the important First Amendment issue presented, nor should graduation be an impediment to resolving the important question presented here. Indeed, the legal principles established in these student speech cases (*Tinker* included) transcend the very limited time in which the student plaintiffs actually attend public school.<sup>15</sup>

Third, Petitioners' nominal damage claim makes this a live controversy. See *Bernhardt v. Cnty. of L.A.*, 279 F.3d 862, 872 (9th Cir. 2002) ("A live claim for nominal damages will prevent dismissal for mootness.").

And finally, it is incorrect to argue, as Respondents do, that a nominal damage claim is "too thin a reed to support [Petitioners'] constitutional challenge." Opp'n Br. at 36. As this Court explained in *Carey v. Piphus*, 435 U.S. 247, 266 (1978), "By making the deprivation of [constitutional] rights actionable for nominal damages without proof of actual injury, the law

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<sup>15</sup> As the Seventh Circuit stated in *Zamecnik*

The claim of mootness evaporates completely when one notes that the permanent injunction runs in favor of any student at the high school, not just Nuxoll; it is not unlikely that one or more of its 4,000-plus students may someday want to display the slogan. Injunctions often run in favor of unnamed members of a group, and this is proper as long as the group is specified.

*Zamecnik*, 636 F.3d at 879.



recognizes the importance to organized society that those rights be scrupulously observed . . . .”

**CONCLUSION**

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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