No. 09-1131

IN THE
Supreme Court of the United States

DOUG MORGAN; ROBIN MORGAN;
JIM SHELL; SUNNY SHELL; SHERRIE VERSHER; AND
CHRISTINA WADE,
Petitioners,

v.

PLANO INDEPENDENT SCHOOL DISTRICT, ET AL.,
Respondents.

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

BRIEF OF AMICUS CURIAE CLAREMONT INSTITUTE FOR THE STUDY OF STATESMANSHIP AND POLITICAL PHILOSOPHY SUPPORTING PETITIONERS

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INTRODUCTION

This case arises from Respondents' efforts to prohibit the peaceable distribution by elementary school students of written materials, including pencils and cards attached to candy canes, containing "religious" words such as "Christmas" and "Jesus." Respondents contend that the prohibition of such materials meets constitutional muster so long as it is accomplished pursuant to a far-reaching and putatively viewpoint-neutral policy that touches nearly every form of written communication. Respondents have a demonstrated history, however, of employing catch-all policies to prohibit disfavored "religious" messages while allowing non-religious messages to advance unabated. Petitioners now ask the Court to consider whether the Respondents' latest iteration of a far-reaching policy governing the "distribution of nonschool literature" is constitutionally sound.

INTEREST OF *AMICUS CURIAE*

The Claremont Institute for the Study of Statesmanship and Political Philosophy is a nonprofit organization dedicated to the task of restoring the principles of the American Founding to their rightful, preeminent authority in our national life. The Claremont Institute publishes the *Claremont Review of Books*, sponsors the Publius and Lincoln Fellowships for rising young leaders, and administers a variety of public policy programs, including Americans for Victory Over Terrorism, the Ballistic Missile Defense Project, the Center for Constitutional Jurisprudence, the Center for Local Government, and the Salvatori Center for the American Constitution.

The Claremont Institute is strongly dedicated to the task of training and equipping students with the habits, virtues, and mores necessary for active and engaged

citizenship. The Claremont Institute accordingly has a substantial interest in safeguarding the role of our public schools as training grounds for future citizens by, *inter alia*, advocating for application of the proper legal standard to restrictions on student speech such as the literature distribution policy at issue here.[1]

SUMMARY OF ARGUMENT

This case concerns the proper legal standard for judging the constitutionality of a policy that severely limits the ability of public school students to peacefully distribute written materials that reflect their religious and political beliefs. But this case's implications are far broader. The Court's decision will profoundly affect the ability of public schools to fulfill one of their most vital missions—the education of our young for citizenship—which cannot be achieved without "scrupulous protection of Constitutional freedoms of the individual." *West Virginia State. Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 637 (1943).

The petitioners, a group of students and their parents, argue that the constitutionality of Plano Independent School District's ("PISD") literature-distribution policy must be measured against the standard for student speech articulated in *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503 (1969). The courts below rejected this approach, finding instead that

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[1] Pursuant to this Court's Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part, that no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other than *amicus* and its counsel made such a monetary contribution. Counsel of record for both petitioners and respondents were notified of *amicus*'s intent to file this brief 6 days before the brief's due date. The parties have consented to the filing of this brief, and their letters granting such consent have been filed with the Clerk's office.

PISD's policy should be evaluated using the more lenient *O'Brien* standard, which this Court has applied to "incidental limitation[s]" on "expressive conduct," such as nude dancing and draft-card burning. *See United States* v. *O'Brien*, 391 U.S. 367, 376 (1968).

The *Tinker* standard—which allows student speech so long as it does not "materially and substantially disrupt the work and discipline of the school"—best accommodates the need to maintain both order and responsible freedom of speech in public schools, thus facilitating the inculcation of good citizenship. *See Tinker*, 393 U.S. at 513. The *O'Brien* standard, by contrast, emphasizes order at the expense of freedom. It is a standard better suited for so-called expressive conduct—not speech at the core of the First Amendment.

As this case demonstrates, the *O'Brien* test allows schools to effectively silence students who seek, in a respectful and appropriate manner, to profess religious or political ideals different from those advocated by the school itself. This ability to peaceably debate differences and challenge prevailing orthodoxy is the DNA of republican citizenship. Indeed, this Court has recently declared that "[t]he right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it." *Citizens United* v. *Fed. Election Comm'n*, 130 S.Ct. 876, 898 (2010). Instead of nurturing these habits of citizenship, the *O'Brien* standard adopted by the courts below threatens to turn public schools into "enclaves of totalitarianism"—precisely what this Court has said they must not become. *Tinker*, 393 U.S. at 511.

ARGUMENT

I. Public Schools Are Charged With The Vital Task Of Training Students To Become Citizens.

Public education is about much more than book learning or preparing students to be productive workers. It is "the very foundation of good citizenship." *Brown* v. *Bd. of Educ.*, 347 U.S. 483, 493 (1954). Accordingly, public schools must "awak[en] the child" to the values that sustain our constitutional republic. *Id.* Classroom teachers "influence the attitudes of students toward government, the political process, and a citizen's social responsibilities," *Ambach* v. *Norwick*, 441 U.S. 68, 79 (1979), and "inculcate the habits and manners of civility." *Bethel Sch. Dist. No. 403* v. *Fraser*, 478 U.S. 675, 681 (1986). The habits and manners of a free people include tolerance and consideration of a range of divergent political and religious views. *Id.*

The "process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the . . . class." *Id.* at 683. Public schools must do more than teach abstract principles of good citizenship; they must also serve as controlled laboratories for students to responsibly practice their constitutional freedoms. Only then can "schools . . . teach *by example* the shared values of a civilized social order." *Id.* (emphasis added). Because students learn by doing, they do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker*, 393 U.S. at 506.

When schools teach constitutional freedoms in theory but do not honor them in practice, they "strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." *Barnette*, 319 U.S. at 637. It is access to ideas and freedom "to inquire, to study and to evaluate, to gain new

maturity and understanding," *Sweezy* v. *New Hampshire*, 354 U.S. 234, 250 (1957), that prepare students for "active and effective participation in [a] pluralistic, often contentious society." *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26* v. *Pico*, 457 U.S. 853, 868 (1982). Indeed, the "Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, [rather] than through any kind of authoritative selection." *Keyishian* v. *Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 603 (1967) (citation and internal quotation marks omitted). For this reason, "[t]he vigilant protection of constitutional freedom is nowhere more vital than in the community of American schools." *Keyishian*, 385 U.S. at 603 (citing *Shelton* v. *Tucker*, 364 U.S. 479, 487 (1960)); *see also Barnette*, 319 U.S. at 637 (that schools "are educating the young for citizenship is reason for scrupulous protection of" students' liberties). Policies that unduly restrict the core constitutional freedoms essential to the development of active citizenship defeat the this critical purpose of public education.

This case pointedly raises the question, with respect to student speech, of what legal test will best ensure orderly learning within public schools while at the same time protecting the historical role of public schools as laboratories of responsible citizenship. The Court has addressed, and answered, this question in *Tinker*.

II. *Tinker* Provides A Workable Standard That Accommodates The First Amendment Rights Of Students While Allowing School Authorities To Maintain Order By Prohibiting Disruptive Speech.

For forty years, courts have applied *Tinker* and its progeny to strike a finely-tuned balance between

maintaining order in public schools and allowing students to responsibly exercise their core First Amendment freedoms. The *Tinker* standard provides space for students to respectfully discuss political, social, and religious issues without surrendering public schools to chaos, offensive behavior, or violence. *Tinker* thus preserves the public school's role as a laboratory of citizenship and provides an important check on overzealous school administrators who would inadvertently squelch the inculcation of the habits of civilized discourse on which a free republic depends.

The essential elements of the *Tinker* standard are clear and well established. Students possess First Amendment rights that they do not surrender when they pass through the "schoolhouse gate." *Tinker*, 393 U.S. at 506. However, the First Amendment rights of students in public schools are not "automatically coextensive with the rights of adults in other settings." *Fraser*, 478 U.S. at 682. Rather, they may be circumscribed "'in light of the special characteristics of the school environment.'" *Morse* v. *Frederick*, 551 U.S. 393, 405 (2007) (quoting *Tinker*, 393 U.S. at 506). Accordingly, public school officials may regulate student speech occurring at school when (i) officials have reason to believe that the speech will substantially disrupt the work of the school or infringe the rights of other students, *Tinker*, 393 U.S. at 513; (ii) the speech is lewd or vulgar, *Fraser*, 478 U.S. at 685; (iii) the speech bears the imprimatur of the school, *Hazelwood School District* v. *Kuhlmeier*, 484 U.S. 260, 273 (1988); or (iv) the speech advocates the use of illegal narcotics. *Morse*, 551 U.S. at 409-410. Speech outside of these categories, however—such as the students' respectful political and religious speech in this case—is presumptively protected.

Taken together, this body of principles affords students the ability to practice their First Amendment rights while respecting public school officials' need to restrict speech that is disruptive either because of its content or the context in which it occurs. This body of principles has likewise provided courts with workable yet flexible guideposts when grappling with difficult issues relating to school speech. Applying *Tinker* and its progeny, courts have:

- Upheld disqualification of a class-president candidate who distributed condoms attached to his campaign fliers. *Henerey* v. *City of St. Charles, Sch. Dist.*, 200 F.3d 1128, 1132-1136 (8th Cir. 1999).
- Granted a preliminary injunction permitting a student to distribute anti-abortion literature during non-instructional times. *Raker* v. *Fredrick County Pub. Schs.*, 470 F. Supp. 2d 634, 640 (W.D. Va. 2007).
- Upheld bans on student speech that threatened a Columbine-style attack on the school, a teacher, or both. *Ponce* v. *Socorro Indep. Sch. Dist.*, 508 F.3d 765, 768-772 (5th Cir. 2007).
- Recognized a student's First Amendment right to wear a t-shirt depicting President George W. Bush in a highly unflattering light. *Guiles* v. *Marineau*, 461 F.3d 320, 324-331 (2d Cir. 2006).
- Upheld prohibition of a student's petition, which stated that "[w]e 3rd grade kids don't want to go to the circus because they hurt animals" because the student sought to circulate the petition during a quiet reading period, on an icy playground, and without prior approval as required by the school's literature distribution policy. *Walker-Serrano* v. *Leonard*, 325 F.3d 412 (3rd Cir. 2003).
- Recognized a student's right to display pro-homosexual symbols, including rainbows and pink

triangles. *Gillman* v. *Sch. Bd. For Holmes County, Fla*, 567 F. Supp. 2d 1359 (N.D. Fla. 2008).

- Upheld a high school policy prohibiting the visible display of the Confederate battle flag on the school campus. *A.M.* v. *Cash*, 585 F.3d 214 (5th Cir. 2009); *B.W.A.* v. *Farmington R-7 Sch. Dist.*, 554 F.3d 734 (8th Cir. 2009); *Barr* v. *Lafon*, 538 F.3d 554 (6th Cir. 2008).

- Upheld the suspension of a high school sophomore for sending an instant message via his home computer to a classmate threatening to kill other classmates. *Mardis* v. *Hannibal Pub. Sch. Dist., #60*, No. 08-63, 2010 WL 387423 (E.D. Mo. Jan. 25, 2010).

As these cases demonstrate, *Tinker* and its progeny allow targeted speech restrictions to preserve the educational environment. But *Tinker* does not countenance unnecessarily broad bans on religious and political speech that would needlessly interfere with students' preparation for "active and effective participation in [a] pluralistic, often contentious society." *Pico*, 457 U.S. at 868.

III. Application Of The *O'Brien* Standard To Restrictions On Pure Speech Will Undermine The Ability Of Public Schools To Prepare Students For Citizenship.

The courts below discarded *Tinker* and employed the intermediate-scrutiny standard applicable to expressive conduct like nude dancing and draft-card burning to judge the constitutionality of PISD's literature distribution policy. They did so based on the fallacy that *Tinker* does not apply to viewpoint-neutral suppression of religious speech. This Court's recent decision in *Morse* v. *Frederick*, however, reaffirms that *Tinker* is the proper standard to assess *all* restrictions of core political and religious speech. If permitted to stand, the approach followed by the courts below would permit public schools

to transform themselves into totalitarian enclaves in which core political and religious speech could be stifled by facially viewpoint-neutral regulations. Such a result is both inconsistent with this Court's precedents and inimical to the school's task of preparing students for lives of engaged citizenship.

In the context of pure student speech, *Tinker* and its progeny provide the appropriate standards for judging time, place, and manner restrictions on literature distribution. *Tinker* itself expressly sets forth the standard for judging regulation of the time, place, and manner of student speech:

> [C]onduct 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.

Tinker, 393 U.S. at 513 (emphasis added). *Tinker* thus creates its own time, place, and manner standard that permits speech restrictions that are reasonably necessary to avoid disruption. In many cases, *Tinker* and its progeny afford public school officials *greater* leeway to regulate the time, place, and manner of student speech than does traditional time, place, and manner analysis by allowing schools to *completely ban* disruptive, lewd, or drug-related speech. *See, e.g.*, *Morse*, 551 U.S. at 405 ("Had Fraser delivered the same speech in a public forum outside the school context, it would have been protected. In school, however, Fraser's First Amendment rights were circumscribed in light of the special characteristics of the school environment." (citations and internal quotation marks omitted)). But *Tinker* also ensures that school officials cannot willy-nilly

suppress core religious and political speech without a reasonable forecast of disruption.

This Court in *Morse* reaffirmed that political and religious speech lies "'at the core of what the First Amendment is designed to protect.'" *Morse*, 551 U.S. at 403 (quoting *Virginia* v. *Black*, 538 U.S. 343, 365 (2003)). *Morse* emphasized that *Tinker* continues to apply to restrictions on political and religious speech, *id.* at 403-404, and repeatedly distinguished the speech in *Morse* as having no political or religious content. *Id.* at 403 ("not even Frederick argues that the banner conveys any sort of political or religious message"); *id.* at 406 n.2 ("there is no serious argument that Frederick's banner is political speech"). Likewise, in his concurrence, Justice Alito strongly reaffirmed *Tinker* and joined the majority opinion "on the understanding that . . . it provides no support for *any restriction* of speech that can plausibly be interpreted as commenting on any political or social issue[.]" *Id.* at 422 (emphasis added). Thus, this Court has plainly signaled its intent to judge all restrictions on political and religious speech—even facially viewpoint-neutral ones—under the *Tinker* standard.

The *O'Brien* test is not the appropriate standard with which to evaluate even facially viewpoint-neutral suppression of pure political or religious speech in the public school context. *O'Brien* involved a First Amendment challenge to a federal statute prohibiting the knowing destruction or mutilation of draft cards. *O'Brien*, 391 U.S. at 369-370. Applying a form of intermediate scrutiny, the Court held that "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." *Id.* at 376. Accordingly, *O'Brien* applies solely to

regulations of "noncommunicative conduct" that generate incidental limitations on speech. *Texas* v. *Johnson*, 491 U.S. 397, 403 (1989); *id.* at 410 (refusing to apply *O'Brien* to ban on flag burning); *Barnes* v. *Glen Theater, Inc.*, 501 U.S. 560, 567 (1991) (holding that a statute barring nude dancing was "justified despite its incidental limitations on some expressive activity"). *O'Brien* is not suitable for judging a policy expressly restricting the distribution of *written political or religious literature* by public school students.

Use of *O'Brien* in this case is improper because it uses the standard for judging regulations of *expressive conduct* to evaluate a school policy regulating *pure speech*. The courts below relied upon *Canady* v. *Bossier Parish School Board*, 240 F.3d 437 (5th Cir. 2001) to support their application of *O'Brien* to PISD's literature-distribution policy. *Canady*, however, addressed the constitutionality of a content-neutral uniform policy governing the type of clothing that students could wear to school. The *Canady* Court believed that *Tinker* applies only to "school regulations directed at specific student viewpoints," and therefore was inapplicable to a school uniform policy that was "completely viewpoint-neutral." *Id.* at 442-43. The Court opted instead to assess the uniform policy using the "time, place and manner analysis and the *O'Brien* test for expressive conduct," which the Court found were "virtually the same standards." *Id.* at 443.

While the *O'Brien* standard applied in *Canady* might make sense when applied to school uniform regulations that incidentally limit expressive conduct, it should not be extended to cover school policies that directly restrict pure speech. Doing so would afford inadequate protection to non-disruptive student speech regarding political and religious issues—speech that lies at the core

of the First Amendment and is essential to learning the habits of citizenship. The necessity of protecting this type of high-value speech is central to the *Tinker* line of cases, including the Court's most recent pronouncement in *Morse*. Viewed against this backdrop, the court of appeals' decision to afford student religious speech no more protection than nude dancing—and less protection than flag burning—simply cannot stand.

The facts of this case illustrate the harsh results that occur when *O'Brien*-style analysis, and not *Tinker*, is used to evaluate school policies restricting pure political and religious speech. Applying *O'Brien*, the courts below upheld a policy that permitted PISD to, *inter alia*, confiscate pencils bearing positive religious messages from elementary school students; prohibit a third-grade student from distributing candy canes to his classmates at a school Christmas party because the candy canes were affixed to cards bearing a religious poem; and prohibit a second-grade student and a fifth-grade student from distributing free tickets to events at their respective churches on the ground that religious announcements were prohibited. *See also Pounds* v. *Katy Indep. Sch. Dist.*, 517 F. Supp. 2d 901 (S.D. Tex. 2007) (employing *O'Brien* to uphold similar overreaching limitations on such student speech as the use of the words "Merry Christmas" at school Christmas parties and talking about Jesus "rather than eggs and jellybeans" at Easter).

PISD made no effort to justify these actions under *Tinker*, *Fraser*, *Kuhlmeier*, or *Morse*. Rather, PISD argued—and the district court and court of appeals agreed—that these actions were proper because they were based upon a facially viewpoint-neutral policy governing the distribution of written literature on campus. This approach sanctions the transformation of PISD into the type of speech-free zone that this Court

deplored in *Tinker*. The virtues and habits of citizenship can be neither taught nor learned in such an environment. Rather than being taught to value speech—including core political and religious speech—students are taught that non-disruptive student speech, which is neither lewd nor supportive of illegal drug use, may nonetheless be stifled by the state on the flimsiest of grounds.

Perhaps more importantly, application of *O'Brien*-style intermediate scrutiny to policies such as PISD's literature distribution policy allows school officials to indoctrinate students in state-approved views without affording students an opportunity to raise dissenting views. Students are required by law to spend a substantial portion of their lives at school. While at school, the right of students to speak is necessarily limited. The state, on the other hand, may speak freely to these students through its officials. Justice Alito, in his concurring opinion in *Morse*, recognized the dangers inherent in this imbalance of power. Rejecting the argument that school officials should be permitted to censor student speech that interferes with the school's "educational mission," Justice Alito wrote:

> This argument can easily be manipulated in dangerous ways, and I would reject it before such abuse occurs. The "educational mission" of the public schools is defined by the elected and appointed public officials with authority over the schools and by the school administrators and faculty. As a result, some public schools have defined their educational missions as including the inculcation of whatever political and social views are held by the members of these groups.

Morse, 551 U.S. at 423 (Alito, J., concurring).

This case demonstrates that the rejection of *Tinker*—and the adoption of intermediate scrutiny—could facilitate the same type of subtle brainwashing against which Justice Alito cautioned. School administrators who set the agenda for their schools must not be allowed to use facially viewpoint-neutral restrictions to marginalize student speech that would be acceptable under *Tinker* and *Morse*. This Court should apply the teachings of those cases and reinforce the long-recognized role of public schools as laboratories of citizenship.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted.

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