No. 07-1567

In The
Supreme Court of the United States

DERRICK ("RABBIT") LOWERY, a Minor, et al.,

Petitioners,

v.

MARTY EUVERARD, DALE SCHNEITMAN, AND CRAIG KISABETH,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF AMICUS CURIAE LIBERTY LEGAL INSTITUTE IN SUPPORT OF PETITIONERS

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RE-DRAFTED QUESTIONS PRESENTED

May a government school official punish a student for peacefully petitioning for administrative change when the petition does not contain words that may be prohibited under *Bethel Sch. Dist. No. 403 v. Fraser,* 478 U.S. 675 (1986), or *Morse v. Frederick,* 127 S. Ct. 2618 (2007), the petition could not be interpreted as school-sponsored under *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988), and the school did not satisfy their burden that a "material and substantial" disruption to the operation of the school would result under *Tinker v. Des Moines*, 393 U.S. 503 (1969)?

In other words, is *Tinker* the mandated standard for student speech cases when *Bethel*, *Hazelwood*, and *Morse* do not control?

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INTEREST OF AMICUS CURIAE[1]

The Liberty Legal Institute is a non-profit law firm dedicated to the preservation of religious freedom and other First Amendment rights. In its commitment to the protection of religious liberty and speech, the Institute has been involved in significant First Amendment litigation nationwide, including several student speech cases in public schools. The Institution is gravely concerned that student speech will be threatened if the Court does not affirm that *Tinker v. Des Moines Indep. Cmty. Sch. Dist.,* 393 U.S. 503 (1969), is the controlling precedent for student speech, clarify that the school bears the burden of proof on the substantial disruption affirmative defense, and remand for consideration in light of the opinion.

Amicus believes that *Tinker* provides the best framework for analyzing freedom of speech in public schools. *Tinker* affords substantial protection for student speech and expression, while still allowing schools to operate effectively. Lower courts, unfortunately, have set aside the *Tinker* framework and substituted a lower standard unfit for evaluating student speech. Given the importance of free speech

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[1] The parties of record received proper notice of and consented to the filing of this brief in support of Petitioner. Amicus states that no portion of this brief was authored by counsel for a party and that no person or entity other than amicus made a monetary contribution to the preparation or submission of this brief.

and expression, the Court should be very cautious when granting government broad powers to prohibit it, even in the context of public schools.

ARGUMENT

I. Absent guidance on the actual application of the *Tinker* "material and substantial" disruption standard, some lower courts have either refused to apply *Tinker* or mistakenly limited *Tinker* in ways contrary to the Court's precedent.

Some federal courts have tried to cabin away *Tinker* by declaring that it only applies to viewpoint discriminatory policies. This is contrary to this Court's precedent, as viewpoint discrimination jurisprudence is an independent body of law; when a policy is challenged that constitutes viewpoint discrimination, *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995), *Good News Club v. Milford Cent. Sch. Dist.*, 533 U.S. 98 (2001), and *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993) provide the appropriate standard. But even more compelling is the fact that *Tinker* itself declared that it is not limited to viewpoint-based regulations. In *Tinker,* students decided to wear black armbands to express their opposition to the Vietnam War. In response to the planned protest, school authorities prohibited the wearing of ***all*** armbands, and provided that any students wearing armbands would be suspended until they returned without them. The

Court, in striking the policy down, specifically stated that the material and substantial disruption standard "obvious[ly]" applies to *both* content-based and viewpoint-based policies.

> If a regulation were adopted by school officials forbidding discussion of the Vietnam conflict [content-based regulation], *or* the expression by any student of opposition to it [viewpoint-based regulation] anywhere on school property except as part of a prescribed classroom exercise, it would be obvious that the regulation would violate the constitutional rights of students, at least 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.

Tinker, 393 U.S. at 513 (emphasis and bracketed words added).

The Court has continually affirmed *Tinker*'s holding, but delineated three exceptions to the case's framework: (1) speech that could be "reasonably viewed as promoting illegal drugs" *Morse*, 127 S. Ct. at 2625; (2) "vulgar and lewd speech" *Bethel*, 478 U.S. at 685; and (3) "school-sponsored" speech, *Hazelwood*, 484 U.S. at 271. Although the Court's precedent mandates that *Tinker's* material and substantial disruption standard governs as long as the speech does not fall within one of the above exceptions, several federal

courts have ignored or diminished *Tinker*, threatening student speech.[2]

This is an important case because it affords the Court the opportunity to re-affirm that *Tinker* is the controlling precedent for student speech cases absent vulgar, lewd or profane language, absent any school publication scenario, and absent language that arguably promoted the use of illegal narcotics. This is an important case about the rights of students to petition the government for change in governmental administration. The application of *Connick v. Myers*, 461 U.S. 138 (1983), to student speech is but the most recent of a line of federal cases seeking to abandon *Tinker* for standards more deferential to the State. Other than *Bethel*, *Hazelwood*, and *Morse*, there is no opinion from this Court that holds "the special characteristics of the public schools necessarily justify any other speech restrictions," such as applying *Connick* or applying any other more deferential standard than *Tinker*, such as the *O'Brien* standard. *See Morse*, 127 S. Ct. at 2637 (Alito, J., concurring).

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[2] While this brief discusses the cases where federal courts either intentionally did not apply Tinker out of some philosophical disagreement or were simply confused, there are federal courts that have applied the proper analysis. *See, e.g., Guiles v. Marineau*, 461 F.3d 320, 325 (2nd Cir. 2006); *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 214 (3rd Cir. 2001) (Alito, J.); *Newsom v. Abemarle Cty. Sch. Bd.*, 354 F.3d 249, 255-57 (4th Cir. 2003); *Pinard v. Clatskanie Sch. Dist.*, 467 F.3d 755, 765 (9th Cir. 2006); *Fleming v. Jefferson Cty. Sch. Dist.*, 298 F.3d 918, 923 (10th Cir. 2002).

A. Lower federal courts have incorrectly stated that *Tinker* only applies to viewpoint-based policies and that the less-rigorous intermediate scrutiny test in *United States v. O'Brien*, 391 U.S. 367 (1968), controls when the regulation at issue is content-based, leaving student speech with substantially less protection.

Using the *O'Brien* intermediate scrutiny to evaluate student speech is completely without Supreme Court precedent. Although the Court decided *O'Brien* in 1968, prior to every student speech case at the Supreme Court, the Court has never once mentioned *O'Brien* as relevant to student speech analysis and continually affirmed *Tinker*. The *O'Brien* standard is most famous for its application to zoning regulations aimed at limiting the secondary effects of adult book stores, nude dancing establishments, and other adult entertainment venues, *see City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002); *Barnes v. Glen Theatre*, 501 U.S. 560 (1991); *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000), and is misapplied when student speech is at issue.

In 2001, the Fifth Circuit refused to apply the *Tinker* framework in two cases where a school's content-based regulation was at issue, and instead applied the less demanding time, place, and manner analysis from *O'Brien*. In *Canady v. Bossier Parish Sch. Bd.*, 240 F.3d 437 (5th Cir. 2001), parents of students unsuccessfully challenged the dress code

policy because it did not provide exceptions for religious attire. The Fifth Circuit found that the "School Board's uniform policy is unrelated to any viewpoint" and incorrectly stated that *Tinker* does not apply since it "does not account for regulations that are completely viewpoint-neutral." *Id.* at 443. The court held that "a level of scrutiny should apply . . . [that is] less stringent than the school official's burden in *Tinker*" and that "[b]oth the traditional time, place and manner analysis and the *O'Brien* test for expressive conduct satisfy this requirement." *Id.*

During the same year, the Fifth Circuit in *Littlefield v. Forney Indep. Sch. Dist.,* 268 F.3d 275 (5th Cir. 2001), upheld a dress code policy that was challenged under religious grounds, *inter alia*. The court rubberstamped the *Canady* decision and applied the *O'Brien* analysis without even a discussion of whether *Tinker* should apply.

In *Pounds v. Katy I.S.D.*, 517 F. Supp. 2d 901 (S.D. Tex. 2007), post-*Morse*, a federal district court upheld a school policy governing what type of literature students in school could distribute over a challenge that it infringed upon student religious speech. The court applied *Canady* in holding that *O'Brien*, and not *Tinker*, applied when reviewing student speech regulations that are not viewpoint-based. The court ignored the Plaintiffs' argument that Justice Alito's concurring opinion from *Morse* controlled, and instead applied the *O'Brien* standard, even though the case involved students handing religious literature to other students. The court found that distribution of

religious literature was not pure speech deserving protection under *Tinker* – and this was after *Morse*.

In addition to the Fifth Circuit, the Ninth Circuit, in another post-*Morse* decision, refused to apply *Tinker* in a school speech case. *Jacobs v. Barber*, 526 F.3d 419 (9th Cir. 2008), upheld a school dress code that allowed only plain clothes or school logos against challenges that it violated students' right to free speech, including religious speech. One student was suspended four times after wearing a T-shirt containing a message expressing the student's religious beliefs as a member of the Church of Jesus Christ of Latter-day Saints. The court applied the intermediate scrutiny standard as defined by *O'Brien* and held that *Tinker* was not applicable. The opinion incorrectly stated that *Tinker* "extends only to viewpoint-based speech restrictions, and not necessarily to viewpoint-neutral speech restrictions" and that it "applies only to restrictions on pure speech." *Id.* at 430 (internal quotation marks omitted). Judge Thomas, in dissent, correctly argued that the court's opinion "represents a substantial rewriting and undermining of the First Amendment protections afforded by *Tinker*." *Id.* at 442. Under these Fifth Circuit and Ninth Circuit cases, bans on student speech, including core political and religious speech, are not evaluated under the material and substantial disruption standard; under these cases, a school could ban an entire discussion of the Vietnam War, as long as it did not ban only one side of the discussion or the other, and survive a

constitutional challenge in direct contravention of *Tinker*. *See Tinker*, 393 U.S. at 513.

The Court should grant the petition to affirm the approach taken by the Third Circuit in *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200 (2001) (Alito, J.). The court stated: "[n]or do we believe that the restriction of expressive speech on the basis of its content may be characterized as a mere 'time, place, and manner' regulation." *Id.* at 209. It struck down the school's policy because it was not limited to merely vulgar or lewd speech or to speech that was school-sponsored, and the policy's restrictions were not necessary to prevent substantial disruption or interference with school or rights of other students. *Id.* at 215 (the case was handed down before the Court delineated the exception for promoting illegal drug use in *Morse*). This approach correctly follows the Supreme Court's precedent and allows for substantial protection of student speech.

i. Applying *O'Brien* to student speech has allowed schools to suppress constitutionally protected student speech, including core religious speech.

Knowing that broad sweeping bans on speech had a better chance of survival under the intermediate scrutiny applied in *O'Brien*, schools within the Fifth Circuit began banning all student speech on specified topics. For example, schools in Texas

adopted the Texas Association of School Board's model policy FNAA (local) (*See* App. 1) banning students from even handing a pencil to a friend that bore the message "No. 2 pencil." Additionally, a school district in Texas used that policy to prohibit a girl from handing her friend a "Jesus is the Reason for the Season" pencil and banned a boy from handing his friends bookmarks bearing the "Legend of the Candy Cane." *Morgan v. Plano Indep. Sch. Dist.*, No. 4:04cv447, slip op. at 2 (E.D. Tex. Feb. 20, 2007). If the test in *Tinker* is not applied, clearly non-disruptive speech, such as handing a pencil bearing a religious message to a friend at school between classes, can be prohibited by schools in the Fifth and Ninth Circuits.

B. Other federal courts have also refused to apply *Tinker* and incorrectly analyzed student speech under forum analysis or by evaluating if the speech would have adverse effects on other students.

The Seventh Circuit circumvented *Tinker* in *Muller v. Jefferson Lighthouse Sch.*, 98 F.3d 1530 (7th Cir. 1996), when it considered a school ban on students distributing invitations to a religious gathering. The Seventh Circuit, using forum analysis and declaring the school a non-public forum, held that *Hazelwood* applies to all student speech regulations, regardless of whether the speech was school-sponsored. This is contrary to the correct approach

taken by the Third Circuit in *Saxe*, and contrary to the Supreme Court's jurisprudence on these issues.

In *Nuxoll v. Indian Prairie Sch. Dist. #204*, 523 F.3d 668 (7th Cir. 2008), the Seventh Circuit considered a case involving a high school student who was forbidden from wearing a shirt reading, "Be Happy, Not Gay" because it would offend another group. Although it overturned the regulation in an as-applied challenge, the court declined to apply *Tinker*, holding that it applied only to viewpoint discrimination, and not content discrimination. Instead, the court inferred from *Morse* and *Bethel* that schools can forbid a type of speech if there is "reason to believe that [it] will lead to a decline in students' test scores, an upsurge in truancy, or other symptoms . . . of substantial disruption." *Id.* at 674. The court also held that Alito's concurrence in *Morse* was not controlling. *Id.* at 673. Applying its rule, the court found that because derogatory speech can cause psychological harm and lower grades, the rule was Constitutional, but that the application to Nuxoll's shirt was invalid because it was not sufficiently negative to be substantially hurtful. *Id.* at 18, 21. An eloquent partial concurrence by Judge Rovner defended *Tinker* and the importance of school speech. *Id.* at 677. The opinion correctly stated that "[c]ontrary to the majority's characterization, *Tinker* is not a case about viewpoint discrimination and is not distinguishable from the instant case." *Id.*

In *Krestan v. Deer Valley Unified Sch. Dist. No. 97*, No. CV-08-194-PHX-DGC, slip op. (D. Ariz. May 9,

2008), the court held that a Christian prayer and Bible study club could be prevented from distributing pamphlets. It rejected a *Tinker* analysis and held that the prohibition on pamphlet distribution was a viewpoint-neutral and reasonable restriction on speech in a limited public forum under *Good News Club*. *Id.* at 16.

These cases highlight the importance of this petition and the need for the Court to clarify that *Tinker* is the required test for student speech that falls outside of the categories delineated in *Fraser*, *Hazelwood* and *Morse*. Without clarification on the underlying test, federal courts are either confused or no longer believe *Tinker* is the mandated approach. But without *Tinker*, schools will simply adopt broad sweeping bans on student speech and declare themselves free of any viewpoint discrimination. If a teacher or principal were to tell a student that they are not allowed to hand another student literature about God or Jesus or Mohammad at school, the school district will not face any liability. Under *Monell v. Dept. of Soc. Serv. of New York*, 436 U.S. 658 (1978), the school district will simply argue that no viewpoint discrimination is authorized by the policy. Instead, **ALL** speech is prohibited, which invariably includes core political and religious speech. An eighteen year old may be old enough to die in Baghdad for our freedom, but without *Tinker*, she may be prohibited by the State from wearing a button advocating for her candidate of choice as Commander in Chief. The Court should grant the petition to protect the

rights of students to engage in core political and religious speech.

II. Whether *Tinker* remains good law and how to properly apply its standard are important issues the Court must resolve.

In the present case, high school students[3] were exercising their basic constitutional rights to "free speech" and to "petition the Government for a redress of grievances." *See* U.S. CONST. amend. I. The court used *Connick v. Meyers*, 461 U.S. 138 (1983) and *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968), two employment law cases, to deprive the students of their right to petition the government for a change in an appointed office. This is a massive deviation from *Tinker* and *Morse* and must be corrected. As Judge Gilman points out in his concurrence, this approach "has never before taken in student-speech cases by

[3] The Plaintiffs in this case were of substantially similar age to many of the founders when they began their public service and military careers. George Washington was seventeen when he was appointed to his first public office as the Surveyor of Culpeper County, Virginia. John Quincy Adams held his first diplomatic appointment at age fourteen when he accompanied Francis Dana as his secretary on a diplomatic mission to Russia during the Revolution. Aaron Burr became a Captain in the Continental Army at age nineteen. Jonathan Dayton, a delegate to the Constitutional Convention and Framer of the Constitution, joined the Continental Army at age sixteen and was promoted to Captain by age nineteen. James Wilkinson, a Revolutionary War hero, became a Captain in the Continental Army by age eighteen.

either the Supreme Court or any other federal court of appeals to consider the issue." *Lowery v. Euverard*, 497 F.3d 584, 601 (6th Cir. 2007). Additionally, the Sixth Circuit did not require the school to carry the burden of proof that the petition would cause a material and substantial disruption and therefore misapplied *Tinker*. As Judge Gilman again points out, the majority opinion "improperly places the burden on the students to prove that there would not have been a disruption. This is simply not the test articulated in *Tinker*." *Id.* at 603.

The Court should reaffirm that *Tinker* provides the appropriate standard for student speech, that the school bears the burden of proof on the substantial disruption affirmative defense, and remand for consideration in light of the opinion. Despite *Bethel*, *Hazelwood* and *Morse*, the Court has not revisited the underlying main test to reiterate to the unbelieving or confused lower courts that *Tinker* is alive and well, and its test means what it says. Student speech rights may not be coextensive with adults, but that only relates to permissible content-based restrictions outlined in *Bethel* and *Morse*, not the standard to be used to govern protected speech such as petitioning the government for a redress of grievances.

This new twist on student speech jurisprudence – the application of government-employee doctrine – that the Sixth Circuit implemented in the current case is yet another attempt to marginalize the protection Tinker provides to student speech. Students are not in the same position as government employees. Students are required to attend school under compulsory

attendance laws and thus parents must relinquish control of their children to the State for most of the day. This presents a significant challenge to religious families. The State daily inculcates students with mantras and messages that may, depending upon who is in power at the school and the values of the parents, undermine the teachings of the parents and the church the family attends. In addition, it is not uncommon upon a review of the evening news to see yet another teacher accused of inappropriate conduct involving students. Students should be free to dissent from the official state messages promoting cultural "norms" that run contrary to the family's or church's teachings, and students should have a voice to peacefully petition the government for change.[4]

Government schools do not have a history of welcoming the exercise of civil rights on campus, and they certainly have not been willingly accommodating religious speech. *See, e.g.*, *Board of Educ. of Westside Cmty. Sch. v. Mergens*, 496 U.S. 226 (1990); *Good News Club v. Milford Cent. Sch. Dist.*, 533 U.S. 98

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[4] The Sixth Circuit's reference to the movie *Hoosiers* is actually helpful to the students in this case. Later in the movie than the Sixth Circuit explored, there is a scene where the town establishment, including the school district, is gathered to run Coach Dale out of town. Jimmy Chitwood, a student and the star player, issues an ultimatum to the powers in the room – if Coach goes, I go. Jimmy was petitioning the government, caused quite a stir in the town, and directly contravened authority. Jimmy Chitwood's stand is a reminder to all that even the voice of a student can lead to positive change.

(2001); *Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384 (1993); *Widmar v. Vincent*, 454 U.S. 263 (1981). Of course, there is a litany of cases since these landmark decisions in every circuit in the country enforcing these decisions. *Amicus* is on demonstrably solid ground when expressing doubt as to the wisdom of granting schools any more discretion to censor speech. If this new *Connick v. Meyers* balancing approach to student speech is not stopped, there is no doubt that the first casualty will be religious speech and any other speech that runs contrary to the questionable social agenda of most of our nation's public schools. The Court should grant the Petition and bring any speculation regarding *Tinker*'s continuing vitality to an end.

CONCLUSION

The Petition should be granted and the question of whether *Tinker* is the primary test for student speech cases should be answered to bring clarity and uniformity to the federal courts.

Respectfully submitted,

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