No. 09-409

In The Supreme Court of the United States

PAUL T. PALMER, by and through his parents and legal guardians, PAUL D. PALMER and DR. SUSAN GONZALEZ BAKER,

Petitioner,

v.

WAXAHACHIE INDEPENDENT SCHOOL DISTRICT,

Respondent.

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

REPLY BRIEF FOR PETITIONER

KELLY SHACKELFORD
HIRAM STANLEY SASSER, III
ROGER L. BYRON
LIBERTY LEGAL INSTITUTE
903 East 18th Street, Suite 230
Plano, Texas 75074
972.423.3131

RYAN L. BANGERT
BAKER BOTTS LLP
2001 Ross Avenue, Suite 600
Dallas, Texas 75201
214.953.6915

R. TED CRUZ
ALLYSON N. HO
Counsel of Record
CRAIG A. STANFIELD
MORGAN, LEWIS & BOCKIUS LLP
1000 Louisiana, Suite 4000
Houston, Texas 77002
713.890.5000

ALBERT C. LAMBERT
MORGAN, LEWIS & BOCKIUS LLP
1111 Pennsylvania Avenue, N.W.
Washington, DC 20004
202.739.3000

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

Blank Page

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

Blank Page

REPLY BRIEF FOR PETITIONER

In *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503 (1969), the Court held that the First Amendment prohibits the censorship of non-disruptive, political student speech in public schools. The Fifth Circuit—along with the Sixth and Ninth Circuits, but in conflict with the Second, Third, and Fourth Circuits—has held that the First Amendment does *not* prohibit the censorship of non-disruptive, political student speech in public schools as long as the speech restrictions are viewpoint or content-neutral. That holding is unprecedented in this Court's student speech jurisprudence; it effectively overrules a landmark decision of the Court; and it needlessly interferes with the exercise of core First Amendment freedoms in our Nation's public schools. The decision thus warrants this Court's review.

In opposing certiorari, respondents primarily urge that a different standard—traditionally used by the Court in analyzing First Amendment challenges to restrictions on conduct, such as nude dancing and draft-card burning—should apply in evaluating the constitutionality of content- or viewpoint-neutral restrictions on student speech. Opp. 11-12. That view, however, merely confirms the importance of the issue and the need for review by this Court. The scope of *Tinker*'s application to restrictions on student speech is a matter for this Court alone. See, e.g., *Agostini* v. *Felton*, 521 U.S. 203, 237 (1997).

A. This Court's Review Is Warranted To Resolve The Entrenched Circuit Split Concerning The Scope of *Tinker*

The Fifth Circuit, like the Sixth and Ninth Circuits, held that *Tinker* does not apply to viewpoint- or content-neutral restrictions on student speech. Pet. App. 12; *Jacobs* v. *Clark County Sch. Dist.*, 526 F.3d 419, 431-32 (9th Cir. 2008) ("*Tinker* says nothing about how viewpoint- and content-neutral restrictions on student speech should be analyzed, thereby leaving room for a different level of scrutiny."); *M.A.L.* v. *Kinsland*, 543 F.3d 841, 850 (6th Cir. 2008) (schools "need not satisfy" the *Tinker* standard of scrutiny "to impose a viewpoint-neutral regulation" of student speech.). Those decisions directly conflict with the Second, Third, and Fourth Circuits' application of *Tinker* as a general rule to all speech restrictions. See *Guiles* v. *Marineau*, 461 F.3d 320, 321 (2d Cir. 2006) ("*Tinker* applies to all non-school-sponsored student speech that is not lewd or otherwise vulgar"); *Saxe* v. *State College Area Sch. Dist.*, 240 F.3d 200, 214 (3d Cir. 2001) (student speech "falling outside" of the narrow categories of speech recognized by this Court "is subject to *Tinker*'s general rule"); *Newsom* v. *Albermarle County Sch. Bd.*, 354 F.3d 249, 252 (4th Cir. 2003) (applying *Tinker* to a viewpoint-neutral regulation prohibiting all "messages on clothing" relating to weapons).

Respondent does not dispute that in the Second, Third, and Fourth Circuits, schools cannot constitutionally prohibit public-school students from

expressing non-disruptive, political messages on shirts. Nor does respondent dispute that, in the Fifth, Sixth, and Ninth Circuits, schools can do precisely that. There is a clear, longstanding 3-3 circuit split on the question of what standard applies to restrictions on student speech. See Frank D. LoMonte, *Shrinking* Tinker*: Students are "Persons" Under our Constitution—Except When They Aren't*, 58 AM. U. L. REV. 1323, 1328 (2009) ("Most courts continue to recognize *Tinker* as supplying the default standard under which regulation of student expression is to be judged unless the facts fit one of the relatively narrow exceptions carved out by the Supreme Court. At least three U.S. circuit courts of appeal, however, have indicated that they will require the government to satisfy the *Tinker* standard only in the relatively rare instance when a regulation discriminates based on the speaker's viewpoint."). Respondent does not seriously dispute the merits of that split.

Instead, respondent attempts to avoid it by arguing that the Second and Third Circuits' decisions in *Guiles* and *Saxe* were really just about viewpoint discrimination (and thus indisputably governed by *Tinker*). But that argument does not withstand scrutiny. In *Guiles*, the Second Circuit carefully analyzed whether *Tinker* is limited to viewpoint-based discrimination, but ultimately concluded that *Tinker* supplies the "general rule" for student-speech cases. 461 F.3d at 326 (explaining that this Court "considers the rule of *Tinker* to be *generally applicable to student-speech cases*" and announcing that it would "[p]roceed

according to the understanding that *Tinker* applies to *all* non-school-sponsored student speech that is not lewd or otherwise vulgar") (emphasis added); *id.* at 327. There would have been no need for that analysis under respondent's narrow view.

Indeed, the *Guiles* court "pause[d] to acknowledge some lack of clarity in the Supreme Court's student-speech cases" and noted "[i]t is not entirely clear whether *Tinker*'s rule applies to all student speech that is not sponsored by schools, subject to the rule of *Fraser*, or whether it applies only to political speech or to political viewpoint-based discrimination." *Id.* at 326. That is precisely the conflict that merits this Court's review. And the Second Circuit's explicit acknowledgement of the confusion and uncertainty underscores the need for this Court's intervention.[1]

In *Saxe*, the Third Circuit made clear, after surveying this Court's student-speech cases, that student speech "falling outside" the recognized exceptions to *Tinker* "is subject to *Tinker*'s general rule: it may be

---

[1] Respondent's contention that Justice Alito's concurrence in *Morse* v. *Frederick* "does not further petitioner's argument" (Opp. 18) misses the point. Justice Alito, joined by Justice Kennedy, stated he did "not read the [majority] opinion to mean that there are necessarily *any* grounds for such regulation that are not already recognized in the holdings *of this Court*." *Morse*, 551 U.S. 393, 422 (2007) (Alito, J., concurring) (emphasis added). As this Court has never applied intermediate scrutiny—as the court did below—to regulations restricting student speech, this case presents precisely the issue raised in Justice Alito's concurrence.

regulated only if it would substantially disrupt school operations or interfere with the right of others." 240 F.3d at 214. The court went on to hold that because the policy at issue restricted "non-vulgar, non-sponsored student speech," the school "must therefore satisfy the *Tinker* test * * * * " *Id.* at 216. Respondent's argument that the Third Circuit applied *Tinker* merely because viewpoint discrimination was involved cannot be squared with the Third Circuit's own analysis.

Although respondent insists that *Tinker* applies solely to viewpoint-based restrictions (Opp. 11-17), respondent cites no statements in *Tinker* itself or any other decision of this Court saying so—and for good reason, because there are none. To the contrary, *Tinker* itself confirms that it is not limited to cases of viewpoint discrimination.[2] In all events, respondent's

---

[2] As the *Tinker* Court explained, "[i]f a regulation were adopted by school officials [1] *forbidding discussion of the Vietnam conflict, or* [2] *the expression by any student of opposition to it* 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" absent a reasonable forecast of disruption. 393 U.S. at 513 (emphasis added). The first example is a content-based restriction. The second is viewpoint-based. Both restrictions, the Court stated, are "obvious" examples of censorship that violate the First Amendment absent a reasonable forecast of disruption. After all, the ban in *Tinker* applied to all armbands—not just ones opposing the war. *Id.* at 504 ("[*A*]*ny* student wearing an armband to school would be asked to remove it, and if he refused he would be suspended until he returned without the armband.") (emphasis added).

merits-based argument concerning the reach of *Tinker* only confirms the importance of the issue and the necessity of this Court's review to resolve the entrenched 3-3 split.[3]

---

[3] Respondent attempts to distinguish the Fourth Circuit's decision in *Newsom* by arguing that the court was not confronted with a "content-neutral" speech regulation. Opp. 16. But if, as respondent contends, *Tinker* applies only to viewpoint-based regulations, then the Fourth Circuit should not have applied *Tinker* in *Newsom*, because the speech restriction struck down in that case was viewpoint-neutral. See 354 F.3d at 252.

Moreover, petitioner's position is that the speech regulation here is not content-neutral, either. Pet. 9 (citing Pet. App. 12-13). A speech regulation banning the First Amendment or "Edwards 08" on a shirt but allowing "Go Indians" (the school mascot) or "Waxahachie Debate Club" is content-based. Respondent suggests (and the court below agreed) that, because "McCain 08" is also prohibited, the restriction is somehow content-neutral. Opp. 23. That argument confuses content neutrality with viewpoint neutrality. A speech regulation that allowed "McCain 08," but prohibited "Edwards 08," would be viewpoint-based and indisputably unconstitutional even under respondent's theory. Although a restriction that prohibits both is viewpoint-neutral, it is not content-neutral. *Boos* v. *Barry*, 485 U.S. 312, 319 (1988); *Consol. Edison Co.* v. *Pub. Serv. Comm'n*, 477 U.S. 530, 537 (1980). A restriction prohibiting all political speech on shirts, while allowing other forms of favored speech, is the very definition of a content-based restriction. But no matter how the speech restriction at issue here is categorized, this case presents an ideal vehicle to resolve the conflict as to whether *Tinker* applies to all restrictions on student speech, or only to viewpoint-based restrictions.

B. This Case Is An Ideal Vehicle For Resolving The Split

This case presents an optimal vehicle for resolving the conflict and clarifying the limits on student-speech restrictions. There are no disputed fact issues. Respondent has conceded, as the Fifth Circuit recognized (Pet. App. 7-8), that the political message petitioner sought to express was not disruptive; not lewd, vulgar, or obscene; not school-sponsored; and did not advocate the use of drugs, alcohol, or any other activity harmful to young people. This case thus squarely presents the purely legal issue that has divided the circuits. Resolution of that issue will determine the outcome of this case, as the Fifth Circuit acknowledged. *Ibid.* (acknowledging that under *Tinker* petitioner "would prevail" on his free-speech claim).

Contrary to respondent's assertions (Opp. 17), the interlocutory nature of the court of appeals' erroneous decision, in the circumstances presented here, supports immediate review. Where, as here, "there is some important and clear-cut issue of law that is fundamental to the further conduct of the case and that would otherwise qualify as a basis for certiorari, the case may be reviewed despite its interlocutory status." ROBERT L. STERN, ET AL., SUPREME COURT PRACTICE 259 (8th ed. 2002).

There is no possibility that proceedings in the lower court may obviate the need for the Court's intervention. The district court—which has already

stated that the issue presented by the petition is dispositive and should be decided by this Court (Pet. App. 27)—has entered a stay pending this Court's disposition of the petition. Dkt. #54. And the court of appeals' resolution of the legal issues renders the final judgment in this case all but a foregone conclusion.

The prudential considerations in this case weigh heavily in favor of immediate review. The issue presented warrants this Court's review for the reasons set forth in the petition: (1) the divided courts of appeals' resolution of that issue is inconsistent with the decisions of this Court and other courts of appeals (Pet. 3), and (2) the issue presents a vitally important and recurring question of constitutional law. *Id.* at 13. If left in place, the erroneous court of appeals ruling would provide misleading guidance and force the district court to issue a final judgment based on fundamentally mistaken principles of law. Given the fact that the court of appeals' erroneous decision has widened an already entrenched conflict among the courts of appeals, this Court should review the court of appeals' decision now.

C. The Scope Of Student Speech Rights Under *Tinker* Is An Important Issue Warranting This Court's Review

Respondent does not dispute that the scope of student speech rights under *Tinker* is an exceptionally important, recurring issue of constitutional

magnitude. Indeed, it is an issue that affects nearly 50 million public school students, their parents, and school officials across the Nation. See U.S. DEPARTMENT OF EDUCATION, NATIONAL CENTER FOR EDUCATION STATISTICS, DIGEST OF EDUCATION STATISTICS, 2008 (NCES 2009020). This Court's review is needed now to resolve the pervasive confusion about the scope of student speech rights—uncertainty that can only spawn more litigation (and put constitutional freedoms at risk) as long as it persists.

Respondent errs in attempting to downplay the need for this Court's review by suggesting that the decision below is limited to "dress codes." Opp. 17. It is not. Pet. App. 12. Any doubt on that score was removed by the Fifth Circuit's recent rejection of *Tinker* in reviewing—and upholding—restrictions on literature distribution by public-school students under the same standard applied in the instant case. *Morgan* v. *Plano Indep. Sch. Dist.*, No. 08-40707, 2009 WL 4265219, at *1 (5th Cir. Dec. 1, 2009).

At the same time, respondent exaggerates both the scope of petitioner's as-applied challenge and the consequences of a ruling in his favor. See Opp. 17-18. For example, respondent opines that all dress codes restricting speech are doomed under *Tinker*. Opp. 23. That is not so. See, e.g., *Barr* v. *Lafon*, 538 F.3d 554, 564 (6th Cir. 2008) (holding that ban on wearing the Confederate flag was justified under *Tinker*) (quoting *Tinker*, 393 U.S. at 511), cert. denied, 130 S. Ct. 63 (2009). *Tinker* itself was a "dress code" case, involving a prohibition against wearing armbands. Thus, to the

extent logos and messages on clothing are distracting, *Tinker* permits schools to ban them. 393 U.S. at 514. And schools may categorically ban *all* student speech that is "vulgar," "lewd," "indecent," or "plainly offensive." *Bethel Sch. Dist. No. 403* v. *Fraser*, 478 U.S. 675, 677-79 (1986). Petitioner agrees that *Tinker* should not be used to evade otherwise rational and legitimate dress codes and uniform policies. But neither should schools be permitted to use their authority to impose such codes as cover for denying students free-speech rights otherwise guaranteed by *Tinker*, *Fraser*, *Hazelwood*,[4] and *Morse*.

Respondent's concern that a ruling in petitioner's favor will result in students enjoying greater free speech rights than adults (Opp. 17-18) is misplaced. A significant amount of speech properly may be banned in public schools under *Tinker*, *Fraser*, *Hazelwood*, and *Morse* that could not be justified outside the school context. See, e.g., *Fraser* at 682 (noting that "the First Amendment gives a high school student the classroom right to wear Tinker's armband, but not Cohen's jacket") (internal quotation marks and citation omitted). Respondent's invocation of forum analysis is inapposite, because students are not seeking access to government property—they are compelled by government itself to be there. See *Morse*, 551 U.S. at 424 (Alito, J., concurring). And reasonable time, place, and manner regulations are perfectly consistent with *Tinker*. 393 U.S. at 513.

---

[4] *Hazelwood Sch. Dist.* v. *Kuhlmeier*, 484 U.S. 260 (1988).

It is the Fifth Circuit's approach—not petitioner's—that raises serious concerns. The approach adopted by the Fifth Circuit is "potentially especially hostile to the speech that is constitutionally most important," because if "schools can presumptively suppress all student speech and permit only what they explicitly approve, controversial political speech has little chance for approval, and religious speech may have even less chance." Br. of *Amici* Cato Institute, *et al.*, 22-23.[5]

Perhaps recognizing as much, respondent attempts to narrow its speech restriction to the school day only. Opp. 25. But the policy is not so limited, and applies to all school events at all times on school grounds, including after-school events such as football games. It is thus against school policy for a student—old enough to serve in the military, to vote, and to be charged with a crime as an adult—to wear a shirt to a football game expressing his or her preference for President of the United States or allegiance to the Constitution—the very speech that "the First Amendment was designed to protect," *Morse*, 551 U.S. at 403.

But the school policy allows that student to wear a shirt emblazoned with whatever message the school

---

[5] Respondent misunderstands petitioner's argument regarding a total ban on all words in the context of *O'Brien*. See Opp. 26. Petitioner's position is that under *O'Brien*, the school's policy of indiscriminately allowing buttons and bumper stickers on shirts—with no restrictions whatsoever on size or number—negates any state interest in banning political speech neatly and professionally printed on shirts.

deems to "promote the school district and its instructional programs" (Pet. App. 30-31). That is precisely the sort of restriction singled out by Justice Alito in *Morse* as raising particular constitutional concern. See 551 U.S. at 422 (Alito, J., concurring).

If, under *Tinker*, the First Amendment requires that public schools students be permitted to wear armbands opposing the war, it is difficult to understand how public school students may be prohibited from wearing shirts that support the troops—or a presidential candidate, or the First Amendment itself.

* * *

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

KELLY SHACKELFORD
HIRAM STANLEY SASSER, III
ROGER L. BYRON
LIBERTY LEGAL INSTITUTE
903 East 18th Street,
Suite 230
Plano, Texas 75074
972.423.3131

RYAN L. BANGERT
BAKER BOTTS LLP
2001 Ross Avenue, Suite 600
Dallas, Texas 75201
214.953.6915

R. TED CRUZ
ALLYSON N. HO
Counsel of Record
CRAIG A. STANFIELD
MORGAN, LEWIS &
BOCKIUS LLP
1000 Louisiana, Suite 4000
Houston, Texas 77002
713.890.5000

ALBERT C. LAMBERT
MORGAN, LEWIS &
BOCKIUS LLP
1111 Pennsylvania
Avenue, N.W.
Washington, DC 20004
202.739.3000

Counsel for Petitioner