No. 06-595

In The

Supreme Court of the United States

TYLER CHASE HARPER, *et al.*,
Petitioners,

v.

POWAY UNIFIED SCHOOL DISTRICT, *et al.*,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF AMICUS CURIAE OF THE NATIONAL LEGAL FOUNDATION,

in support of the *Petitioners*

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INTEREST OF AMICUS CURIAE[1]

The National Legal Foundation (NLF) is a 501c(3) non-profit corporation organized to defend, restore, and preserve constitutional liberties, family rights, and other inalienable freedoms. The NLF and its donors and supporters are vitally concerned with the outcome of this case because of its public interest litigation and educational activities relating to the right to religious expression.

SUMMARY OF THE ARGUMENT

Poway Unified School District's censoring of Chase Harper's speech constitutes a heckler's veto. Both the district court and the Ninth Circuit blessed the heckler's veto. Both relied upon this Court's decision in *Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969) in so doing. However, the district court misunderstood *Tinker's* "material disruption" standard and the Ninth Circuit misunderstood *Tinker* "right's of other" standard. This Court should grant *certiorari* to clarify that Tinker was intended to protect against heckler's vetoes, not to throw the door wide open to them.

ARGUMENT

One need look no further than this Court's first discussion of the heckler's veto doctrine to understand the error committed by the district court and the Ninth Circuit in the instant case. In *Brown v. Louisiana*, 383 U.S. 131, 133, n.1 (1966), this Court stated "[p]articipants in an orderly demonstration in a public place are not chargeable with the danger, unprovoked except by the fact of the constitutionally protected demonstration itself, that their critics might react with disorder or violence."

This Court knew that a heckler's veto could have crippled the Civil Rights movement in this country. In fact, in *Brown*, this

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[1] The parties have consented to the filing of this brief. Copies of the letter of consent accompany this brief. No counsel for any party has authored this brief in whole or in part. No person or entity has made any monetary contribution to the preparation or submission of this brief, other than the *Amicus Curiae*, its members, and its counsel.

Court took pains to mention that that case was "the fourth time in little more than four years that this Court has reviewed convictions by the Louisiana courts for alleged violations, in a civil rights context, of that State's breach of the peace statute." *Id.* at 133. If Louisiana was a little slow to get the message, this Court was more than willing to keep granting *certiorari*[2] until the message came through loud and clear: The First Amendment will not tolerate a heckler's veto.

This Court knew that the heckler's veto was one of the majority's weapons of choice against the rights of a minority. Now, the two lower courts in this case have taken that weapon and blessed its use by a minority against the majority. Such error cannot stand. Just as this Court recognized the importance of granting *certiorari* when a heckler's veto was being used against a minority, so it should recognize the importance of grant *certiorari* when a heckler's veto is being used against the majority.

After all, as this Court wrote in *Brown*:

> A State or its instrumentality may, of course, regulate the use of its libraries or other public facilities. But it must do so in a reasonable and nondiscriminatory manner, equally applicable to *all* and administered with equality to *all*. It may not do so as to some and not as to all. It may not provide certain facilities for whites and others for Negroes. And it may not invoke regulations as to use—whether they are *ad hoc* or general—as a pretext for pursuing those engaged in lawful, constitutionally protected exercise of their fundamental rights.

Id. at 143 (emphasis added). *Mutatis mutandis*, this sentence might read "A State or its instrumentalities may, of course, regulate the use of its public schools. But it must do so in a reasonable and nondiscriminatory manner, equally applicable to

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[2] Brown came before this Court on *certiorari* as did two of the other three cases this Court referenced: *Taylor v. Louisiana*, 370 U.S. 154 (1962); and *Garner v. Louisiana*, 368 U.S. 157 (1961). Only *Cox v. Louisiana*, 379 U.S. 536 (1965) came on appeal. Furthermore, Garner v. Louisiana was actually three consolidated cases.

all and administered with equality to *all*. It may not do so as to some and not as to all. It may not provide certain rights to those with a pro-homosexual message and other (lesser) rights for those with an anti-homosexual message. And it may not invoke regulations—whether they are dress codes, harassment policies or *ad hoc* Day of Silence decisions—as a pretext for pursuing those engaged in lawful, constitutionally protected exercise of their fundamental rights."

Neither the district court's "substantial disruption" rationale nor the Ninth Circuit's "rights of others" rationale can disguise the Poway's hecklers' veto. Neither rationale is faithful to this Court's jurisprudence. We will look at each in turn.[3]

I. THE DISTRICT COURT'S "SUBSTANTIAL DISRUPTION" RATIONALE IS A MASK FOR POWAY'S HECKLER'S VETO BECAUSE THERE SIMPLY WAS NO DISRUPTION ATTRIBUTABLE TO CHASE'S SPEECH.

The district court's faulty decision is surprisingly analogous to *Brown* and the three cases it references—*Cox v. Louisiana*, 379 U.S. 536 (1965); *Taylor v. Louisiana*, 370 U.S. 154 (1962); and *Garner v. Louisiana*, 368 U.S. 157 (1961). As the *Brown* Court wrote about the earlier three cases (and it was equally true of *Brown* itself, 383 U.S. at 139-40), "[i]n none was there evidence that the participants planned or intended disorder. In none were there circumstances which might have led to a breach of the peace chargeable to the protesting participants." 383 U.S. at 133. The key here, of course, is that any violence must be chargeable to the protestor. Here there is absolutely no evidence of any violence chargeable to Chase Harper.[4]

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[3] This brief will examine both rationales for two reasons. First, if this Court grants *certiorari* in this case, it should not just reversed the Ninth Circuit's judgment. Rather, it should make clear on remand that the Ninth Circuit cannot then affirm the trial court on its original grounds. Second, as will become evident below, not all courts make a sharp distinction between these two prongs. Thus anything said about the errors of one court's reasoning will be helpful in seeing the flaws in the other court's reasoning.

[4] As will be demonstrated below, this is true even under the standards applicable in the school setting.

For example, in *Taylor*, 370 U.S. at 155-56—perhaps the most analogous of all the cases due to the presence of a large number of people who strongly opposed the protestors' message—

> [a]t the trial there was testimony that immediately upon petitioners' entry into the waiting room many of the people therein became restless and that some onlookers climbed onto seats to get a better view. Nevertheless, respondent admits these persons moved on when ordered to do so by the police. There was no evidence of violence. The record shows that the petitioners were quiet, orderly, and polite. The trial court said, however, that the mere presence of Negroes in a white waiting room was likely to give rise to a breach of the peace. It held the mere presence of the Negroes in the waiting room, as part of a preconceived plan, was sufficient evidence of guilt.

This Court, of course, rejected that argument.

Similarly, in *Garner v. Louisiana*, 368 U.S. at 174, this Court noted that in each of the three consolidated cases "[t]he undisputed evidence shows that the police who arrested the petitioners were left with nothing to support their actions except their own opinions that it was a breach of the peace for the petitioners to sit peacefully in a place where custom decreed they should not sit."

In the case at hand, there was nothing to show that Chase Harper did anything to threaten violence. Rather he did exactly what the civil rights protestors did; he engaged in expressive activities pursuant to his First Amendment rights.

"But wait," one might answer, "he is in school and the standards are different." True, but this Court has already made the adjustment for the school setting: that's what *Tinker v. Des Moines Independent School District*, 393 U.S. 503 (1969), was all about. After all, *Tinker* was decided just three years after Brown and arose in the same cultural milieu of social protest. In *Tinker*, this Court cited *Terminiello v. Chicago*, 337 U.S. 1 (1949), arguably the *leading* heckler's veto case, and famously addressed

the school's ability to anticipate violence:

> The District Court concluded that the action of the school authorities was reasonable because it was based upon their fear of a disturbance from the wearing of the armbands. But, in 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, and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.
>
> In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint. Certainly where there is no finding and no showing that engaging in the forbidden conduct would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school," the prohibition cannot be sustained.

Tinker, 393 U.S. at 508-09. This is the extent of the adjustment necessary—and allowed—for the school setting. Anything more would gut—rather than modify—the application of the heckler's veto doctrine in the public schools.

Numerous courts have helpfully commented on the *Tinker*

standard. One such case is *Butts v. Dallas Independent School District*, 436 F.2d 728 (5th Cir. 1971). There school officials forced students to remove black armbands that they wore in support of the Vietnam Moratorium. The court wrote that

> Our difference with the trial court therefore is that we do not agree that the precedential value of the *Tinker* decision is nullified whenever a school system is confronted with disruptive activities or the possibility of them. Rather we believe that the Supreme Court has declared a constitutional right which school authorities must nurture and protect, not extinguish, unless they find the circumstances allow them no practical alternative. As to the existence of such circumstances, they are the judges, and if within the range where reasonable minds may differ, their decisions will govern. But there must be some inquiry, and establishment of substantial fact, to buttress the determination.

Id. at 732.

Furthermore, the *Butts* court was emphatic that even an expected disruption is not the end of the analysis:

> We assume that the School Board was not necessarily required by the First Amendment to wait until disruption actually occurred. Likewise, we agree that, antecedently considered, as they had a right and duty to consider the problem, disruption on [the day of protest] was proved to be a likely contingency. We do not agree that this expectation sufficed *per se* to justify suspending the exercise of what we are taught by *Tinker* is a constitutional right. What more was required at least was a determination, based on fact, not intuition, that the expected disruption would probably result from the exercise of the constitutional right and that foregoing such

> exercise would tend to make the expected disruption substantially less probable or less severe.

Id. at 731.

Significantly, in that case, those opposed to the black armbands organized a counter protest by wearing white armbands. Just as in the present case, *Harper v. Poway Unified School District.*, 445 F.3d 1166, 1171-72, the school authorities in *Butts* decided to shut down one side of the debate and permit the other side to engage in its expressive activities.[5] *Butts*, 436 F.2d at 730-31. The Fifth Circuit upbraided the school district for doing exactly what Poway has done:

> [N]o use apparently was made of [the available] machinery to bring leaders of the white armband faction together with the black armbands to agree on mutual respect for each other's constitutional rights. If this had been tried and failed, the failure would have tended to establish that armbands of all colors should be banned. In short, it appears to us that the school system was confronted with a rapidly developing crisis, for which it had no policy predetermined, and instead of obtaining an answer through democratic processes, it responded with a hasty ukase.

Butts, 436 F.2d at 732.

It is important to note the factual circumstances under which the Fifth Circuit made all of the above pronouncements. As already noted, a counter protest was underway in the same school at the same time. *Id.* Furthermore, the black arm band wearers had also protested outside the school in the morning and one of their banners had been torn down by an opponent. *Id.* at 730. Furthermore, school administrators feared that the white armband wearers would actually tear the black armbands off of the arms of

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[5] While the school authorities intended to require the removal of the white armbands as well, the court noted that the record indicates that that did not happen. *Id.* at 731.

their wearers. *Id.* at 731. Finally, school administrators were worried about the agenda of the national organizers of the Moratorium, which was in part to disrupt schools. *Id.*

It was in this context that the Fifth Circuit made all of the statements quoted above. Furthermore, that court shut the door on the all-too-easy excuse that administrators on the ground should not be second guessed: "Therefore, even in the school environment, where no doubt restraints are necessary that the First Amendment would not tolerate on the street, something more is required to establish that they would cause 'disruption' than the *ex cathedra* pronouncement of the superintendent." *Id.* at 732.

The Fifth Circuit understood that even in situations much more volatile than that faced by Poway, a heckler's veto simply cannot be tolerated. This same court provided additional important insights in another case, *Shanley v. Northeast Independent School District*, 462 F.2d 960 (5th Cir. 1972). First, the court addressed the concern over "negative" expression:

> The school administration also expressed concern at what it believed to be the "negative" attitude of the newspaper and at the criticism, overt and covert, of the school administration. "Negativism" is, of course, entirely in the eye of the beholder, and presumably the school administration's eye became fixed upon the criticism by the students. As those to whom public and private criticism, of widely varying degrees of intention and rationality, has been directed, we can say with some pained assurance that "criticism" like "controversy" is not a bogey, at least not in a democracy. Of course, constructive criticism is far more helpful than any other sort of critique. But almost any effort to explain a different mode of operation or approach serves to illuminate the issue being questioned. If the criticism is irrational or ill-intentioned, then surely the American citizenry, even that of high school age, will have enough good sense to attach that much more credibility to the criticized actors and their actions. Without discussing any

> ramifications, since no discussion is compelled, suffice it to say that aversion to "criticism" is not a constitutionally reasonable justification for forbidding the exercise of First Amendment expression. The First Amendment's protection of speech and expression is part of the Bill of Rights precisely because those governed and regulated should have the right and even the responsibility of commenting upon the actions of their appointed or elected governors and regulators.

Id. at 973, n.10. Everything the *Shanley* court wrote about criticism of its school officials applies with equal force to Harper's criticism of his school's sponsorship of the Day of Silence. And by logical extension it applies to the activities of students who participated in what the school sponsored.

Shanley involved the suppression of an "underground" student newspaper and, therefore, some of the court's discussion of "prior restraint" is inapplicable here. However, the *Shanley* court's main teaching is germane:

> However, we must emphasize in the context of this case that even reasonably forecast disruption is not *per se justification* for prior restraint or subsequent punishment of expression afforded to students by the First Amendment . . . . "[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute . . . is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public

> inconvenience, annoyance, or unrest. [citing cases]. There is no room under our Constitution for a more restrictive view." *Terminiello v. Chicago*, 337 U.S. at 4, 69 S. Ct. at 896, 93 L. Ed. at 1135; *see also Shelton v. Tucker*, 1960, 364 U.S. 479, 81 S. Ct. 247, 5 L. Ed. 2d 231.

Id. (alteration in original).

The *Shanley* court had no hesitation adapting a strong version of the *Terminiello* standard to the school context. Of course, in so doing it was following this Court's lead from *Tinker*, 393 U.S. at 508. What this Court and the Fifth Circuit understood was that even in our public schools the heckler's veto must be minimized to the greatest extent possible.

And the Fifth Circuit has not been the only court to properly apply this Court's *Tinker* standard. In an in-school literature distribution case, the Seventh Circuit again thought it helpful to analogize from a non-school setting: "Consider a parallel: the police are supposed to preserve order, which unpopular speech may endanger. Does it follow that the police may silence the rabble-rousing speaker? Not at all. The police must permit the speech and control the crowd; there is no heckler's veto." *Hedges v. Wauconda Community Unit Sch. Dist. No. 118*, 9 F.3d 1295, 1299 (7th Cir. 1993). In that case, an important issue was the need to distinguish between private student speech and the school's speech. In that context, the court made a point about educating listeners rather than squelching speakers that applies with equal force here:

> School districts seeking an easy way out try to suppress private speech. Then they need not cope with the misconception that whatever speech the school permits, it espouses. Dealing with misunderstandings--here, educating the students in the meaning of the Constitution and the distinction between private speech and public endorsement--is, however, what schools are for. After hearing conflicting expert testimony the district court found: "*Issues and Answers* by itself does not appear school sponsored and . . . even junior high

> students probably would not think that it was school sponsored if it were passed out to them by a student standing alone on the school stairs before classes begin." Yet Wauconda proposes to throw up its hands, declaring that because misconceptions are possible it may silence its pupils, that the best defense against misunderstanding is censorship. What a lesson Wauconda proposes to teach its students! Far better to teach them about the first amendment, about the difference between private and public action, about why we tolerate divergent views. Public belief that the government is partial does not permit the government to *become* partial. Students therefore may hand out literature even if the recipients would misunderstand its provenance. The school's proper response is to educate the audience rather than squelch the speaker.

Id. at 1300 (citation omitted).

Similarly here, Poway has not tried to educate its students about divergent views. Rather it has become partial. It sponsors the Day of Silence and then shuts down opposing viewpoints.

Finally, an example of properly understanding the *Tinker* standard is offered by the district court in *Boyd County High School Gay Straight Alliance v. Board of Education*, 258 F. Supp. 2d 667, 689-90 (E.D. Ky. 2003). That case involved a school's attempt to disallow a Gay Straight Alliance Club to meet. There the court issued a preliminary injunction and therefore discussed the likelihood of success on the merits under the Equal Access Act, 20 U.S.C. § 4071 (2000). *Boyd County*, 258 F. Supp. 2d at 693. However, the court noted that the Equal Access Act had incorporated the *Tinker* standard and used that standard in its analysis. In so doing, it provided some useful guidance.

First, the *Boyd County* court set the stage by emphasizing that what this Court had done in *Tinker* was to reject the heckler's veto, by quoting (with added emphasis) this Court's instruction that it must be the conduct *of the protestors* that would cause the substantial disruption, and by noting this Court's use of

Terminiello. *Id.* at 689. It then quoted the same language from *Terminiello* that the *Shanley* court used (see above), thereby also adapting a strong version of the *Terminiello* standard to the school setting. The *Boyd County* court quoted one additional line from *Terminiello*: "the alternative [i.e., permitting a heckler's veto] would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups." *Id*. at 690 (quoting *Terminiello*). Such a result would be especially incongruous in our public schools, which serve to teach our students how to participate in the market place of ideas.

The *Boyd County* court then put a fine point on it:

> Assuming *arguendo* that the anti-GSA faction at [Boyd County High School] was sufficiently disruptive to 'materially and substantially interfere with the requirements of appropriate discipline,' Defendants are not permitted to restrict Plaintiffs' speech and association as a means of preventing disruptive responses to it. *Tinker,* 393 U.S. at 509. . . . *Tinker* and *Terminiello* are designed to prevent Defendants from punishing students who express unpopular views instead of punishing the students who react to those views in a disruptive manner.

Id. at 690.

Just as Boyd County High School could not squelch the speech of the pro-homosexual club, neither can Poway squelch Chase's speech on the other side of the issue.

Thus, we have seen that a number of courts have properly understood the application of *Tinker*. Unfortunately, a number of courts have lowered the threshold to the point of *permitting* a heckler's veto in the name of *Tinker*. Just one very recent example is provided by *Heinkel v. School Board*, 2006 U.S. App. LEXIS 21626 (Aug. 22, 2006), where the Eleventh Circuit upheld censorship with *no* evidence of disturbance indicated in the record.

In light of the strong version of *Terminiello* that *Tinker* (and *Butts*, *Shanley*, *Hedges*, and *Boyd County*) call for, the approach of *Heinkel* and other courts must be wrong. The district court below is also included in that number. Therefore, this Court

should grant *certiorari* to give the needed guidance to those courts that have transmogrified *Tinker*'s "substantial disruption" prong from an eye of a needle through which few restrictions will pass into a thrown-open barn door through which virtually any restriction will pass.

II. THE NINTH CIRCUIT'S "RIGHT OF OTHERS" RATIONALE IS A MASK FOR POWAY'S HECKLER'S VETO BECAUSE THE NINTH CIRCUIT IGNORED THE ESTABLISHED MEANING OF THOSE RIGHTS.

This Court should grant *certiorari* for another reason as well. Because no real threat of substantial disruption exists in this case, the Ninth Circuit did not hang its hat on that prong of *Tinker*. As the panel dissent explained, there is little to nothing in the record to show disruption of Poway's classrooms or non-classroom operations. *Harper*, 445 F.3d at 1193-94 (Kozinski, J., dissenting). As for the former, one teacher reported some students who were "off-task." *Id.* at 1171. This level of disruption cannot be grounds for squelching Chase's speech. After all in *Tinker* itself, one class was "wrecked," and students' minds were diverted from their lessons. *Tinker*, 393 U.S. at 517 (Black, J., dissenting). As for the latter, the record again is little different from the record in *Tinker* and less severe than the cases discussed above. In *Tinker* there were warnings back and forth between students, and students made fun of each other. Here, there were tense discussions and recollections of "an altercation" the previous year. As the dissent explained, students apparently learned to conduct themselves more peacefully during the second year since no altercations were reported. *Harper*, 445 F.3d at 1194 (Kozinski, J., dissenting). And, of course, critically, there was no indication in the record that the altercation had been the fault of the anti-Day of Silence students generally or of Chase Harper specifically.

Presumably, the panel majority knew that the panel dissent was correct in its demonstration that Chase's speech could not be squelched under *Tinker's* "material disruption" prong. Presumably, that is why the majority hung its hat on the "rights of others" prong. However, the majority achieved nothing more than cloaking a heckler's veto in another mantel. This is equally

impermissible and constitutes another reason why this Court should grant *certiorari*. Heckler's vetoes must be unmasked, no matter what their disguise.

The panel majority several times invoked but—significantly—declined to rely upon California state law. *Id.* at 1176, 1179-81. Thus, the only rights the panel relied upon were the right to be secure and the right to be let alone. *Id.* at 1178. However, the panel inexplicably failed to note the clarity with which this and other courts have defined those rights. Had the rights been properly explicated, the court would have reached the opposite conclusion. Because it did not, this Court should grant *certiorari* to re-emphasize that improper interpretations of the rights of others will not be allowed to turn *Tinker* into a license for heckler's vetoes.

A. The Ninth Circuit's "Right to be Let Alone" Rationale is a Mask for Poway's Heckler's Veto Because that Right Merely Protects Students from Importuning by Speakers—Something that did not Occur Here.

We look first at the right to be let alone. This Court delivered the classic articulation of the First Amendment aspect[6] of this right in *American Steel Foundries v. Tri-City Central Trades Council*, 257 U.S. 184, 204 (U.S. 1921), a labor picketing case, writing

> How far may men go in persuasion and communication and still not violate the right of those whom they would influence? In going to and from work, men have a right to as free a passage without obstruction as the streets afford, consistent with the right of others to enjoy the same privilege. We are a social people and the accosting by one of another in an inoffensive way and an offer by one to communicate and discuss information with a view to

[6] It must be "the privacy interest in avoiding unwanted communication" *Hill v. Colorado*, 530 U.S. 703, 716 (2000), implicated here. Neither the Fourth or Fifth Amendments are at issue here and these are the other issues implicated by the right to be let alone.

> influencing the other's action are not regarded as aggression or a violation of that other's rights. If, however, the offer is declined, as it may rightfully be, then persistence, importunity, following and dogging become unjustifiable annoyance and obstruction which is likely soon to savor of intimidation. From all of this the person sought to be influenced has a right to be free . . . .

In *Hill*, 530 U.S. at 717, this Court quoted the above passage in its entirety and used it to describe the pertinent portion[7] of the right to be let alone. It also made it clear that the right applies with varying force in the labor context as well as in one's home, near one's home, near a medical facility, in Central Park, or in "confrontational" situations. *Id*. at 716. Surely the right to be let alone is not a completely different animal in the school setting. In fact, the most natural reading of the Ninth Circuit's opinion is that it considered the Chase's expression to constitute a confrontational situation.

Thus, we can clearly ascertain whether the right to be let alone was implicated by Chase's speech. It was not. There is nothing in the record to indicate that Chase persisted, importuned, followed, dogged, or intimidated. By refusing to face foursquarely what the right to be let alone covers, the Ninth Circuit was able to claim that the right was violated. Nothing could be farther from the truth. This Court should grant *certiorari* to clarify that the right to be let alone means in *Tinker* exactly what it means in every other context—nothing more and nothing less. Schools may not invoke the right to be left alone to disguise a heckler's veto. And courts may not bless such disguises.

B. The Ninth Circuit's "Right to be Secure" Rationale is a Mask for Poway's Heckler's Veto Because that Right Protects Students' Safety and no Students' Safety was Threatened Here.

Finally, this Court should grant *certiorari* to clarify that invoking the right to be secure does not give schools or courts

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[7] See note 6.

carte blanche to ride roughshod over *Tinker*. Again, the right to be secure has a discernable meaning. The right to be secure is the right to be safe. Indeed, this is the teaching of the opinions that the Ninth Circuit cited—and twisted. The Ninth Circuit appeared[8] to rely upon *West v. Derby Unified School District*, 206 F.3d 1358 (10th Cir. 2000); *Sypniewski v. Warren Hills Regional Board of Education*, 307 F. 3d 243, 264 (3rd Cir. 2002); and *Muller by Muller v. Jefferson Lighthouse School*, 98 F.3d 1530, 1540 (7th Cir. 1996) for its view of the right to be secure.

However, these cases do not support—indeed, they contradict—the Ninth Circuit's view that Chase's message violates the right of other students to be secure. The Ninth Circuit cites these case for the proposition that the right to be secure includes things such as the right of students to be free from (read "the right to squelch") speech that is "detrimental . . . to their psychological health and well-being." *Harper*, 445 F.3d at 1179. However, each case is clear that it is concerned about one thing: the physical safety of students.

So for example, in *West v. Derby Unified School District*, 206 F.3d 1358 (10th Cir. 2000), the court noted that both the Ku Klux Klan and the Aryan Nation were recruiting public school students, that a *series* of racial incidents had occurred, that at least one fight had occurred, and that graffiti had included not only "KKK" (obviously standing for Ku Klux Klan) but also "KKKK" (standing for Ku Klux Klan Killer) and "Die Nigger." It is beyond all cavil that the right to be secure there was the right to be safe.

The same is true of *Sypniewski v. Warren Hills Regional Board of Education*, 307 F. 3d 243, 264 (3rd Cir. 2002). We note first that only a portion of the school policy at issue there was upheld while the remainder was struck. Furthermore, the important point here is that students' safety was at issue, contrary to the Ninth Circuit's use of the case. Specifically, the court noted that the school district initially refused to adopt a policy restricting

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[8] *Amicus* says "appeared" because the Ninth Circuit also relied upon numerous periodicals (which are suspect, as per the dissent's critique 445 F.3d at 1199 (Kozinski, J., dissenting)); because it also cited *Saxe v. State College Area School District*, 240 F.3d 200, 217 (3rd Cir. 2001), but primarily for propositions at odds with the Ninth Circuit's position; and because it is difficult to ascertain the difference between what the court was writing about the right to be let alone and the right to be secure.

speech or expression even in the face of significant racial tension. *Id.* at 248. However, the district did eventually adopt such a policy. However, after *months* of racial tension and *numerous* incidents, the district finally put policies in place only when "[i]t was the consensus of the Board of Education and [the Superintendent] that there had been significant disruption in the school and that the minority population was at significant risk from, not only verbal and intimidating harassment but also, increasingly, *the risk of physical violence*." *Id*. at 249 (emphasis added). Yet to the extent that the court even addressed the right of students to be secure (it quoted the phrase from *Tinker* several times, but never engaged in a separate analysis), it did not permit the district to "secure" students from speech that would harm their self esteem or "strike[ ] at a core identifying characteristic." *Harper*, 455 F.3d at 1182, n.27. To the contrary, the court enjoined enforcement of a provision of the Harassment Policy that banned derogatory terms or racial slurs if they caused ill will. *Sypniewski*, 307 F.3d at 262.

In fact, the use of *Sypniewski* by the Ninth Circuit is somewhat of a mystery. The following passage shows both that *Sypniewski* did not make a clean distinction between *Tinker's* "substantial disruption" prong and its "rights of others" prong and that the "right to be secure" must—by the logical implications of the passage—mean the right to physical safety, not the right to be free from encountering hurtful speech:

> the language of the Warren Hills policy appears to cover speech that is not subject to lawful regulation under *Tinker*. Understood broadly, it seems likely there will be a good deal of speech that creates "ill will" that does not substantially interfere with the rights of other students or with the operation of the school as an educational institution. There may also be some harassment "by name calling" that does not genuinely threaten disruption.

Sypniewski, 307 F.3d at 262.

Finally, the Ninth Circuit relied upon *Muller by Muller v. Jefferson Lighthouse School,* 98 F.3d 1530 (7th Cir. 1996). This is

even more of a mystery. First, *Muller* never even discussed the right to be secure. Rather it made a few passing references to the "rights of others." *Id*. at 1536, 1542. However, the *Muller* court's main use of *Tinker* was to question its applicability to the elementary school context. *Id*. at 1535-39. Ultimately, the court assumed without deciding that *Tinker* is applicable in elementary schools. *Id*. at 1539. However, *Muller's* comments, quoted by the Ninth Circuit, about restricting speech "'that could crush a child's sense of self worth,'" *Harper*, 455 F.3d at 1179 (quoting *Muller,* 98 F.3d at 1540) are explicitly limited to elementary schools, *Muller,* 98 F.3d at 1539, and to *their* "delicate 'custodial and tutelary' environment," *id*. The *Muller* court did *not* link the propriety of such restrictions to the right of other students to be secure. Furthermore, the *Muller* court—again being uncomfortable with applying *Tinker* in the elementary school context—grounded the legitimacy of these restrictions on *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988), not on *Tinker*.

Thus, none of the cases that the Ninth Circuit relied upon supports its position. Therefore, the Ninth Circuit is left with nothing but its own *ipse dixit* to support its assertion that "[b]eing secure involves not only freedom from physical assaults but from psychological attacks . . . ." *Harper*, 445 F.3d at 1178. Once again, the Ninth Circuit's view blesses Poway's heckler's veto. Schools can and must protect students' right to be secure, *i.e.*, their right to be safe. However, they cannot invoke that duty to avoid another duty—their protection of their students First Amendment rights. Two of the very cases the Ninth Circuit cited, *West* and *Sypniewski*, show schools and courts wrestling with the hard questions in contexts much more volatile that that facing Poway. Poway, in contrast, appears to have engaged in a course of action that the *Hedges* court would call "the easy way out," 9 F.3d at 1299: "it has throw[n] up its hands, declaring that . . . . the best defense . . . is censorship." *Id*. And the Ninth Circuit—instead of following the path of the *West* and *Sypniewski* courts and thereby restricting expression in the name of the right of students to be secure only where students' safety is threatened—has blessed Poway's heckler's veto.

This Court should grant *certiorari* to clarify that the Ninth Circuit's view of the right to be secure is erroneous and that of the

other Circuits is correct.

CONCLUSION

This Court should grant *certiorari* in this case for one very simple reason: The decisions of the district court and the Ninth Circuit ignore the lessons of the Civil Rights movement. A heckler's veto cannot be used to silence minorities. But neither can it be used to silence majorities. The goal is *equality*. *Brown v. Louisiana*, 383 U.S. 131, 143 (1966).

This Court in *Tinker* has already made all the school-appropriate adjustment to the heckler's veto doctrine that the First Amendment will allow. When real fear of disruption exists, when students are dogging and following each other, or when students are threatening each other's safety, schools can and must act. However, when schools take "the easy way out," they stand *Tinker* on its head. Therefore, this Court should grant *certiorari* to once again reiterate what should have long ago become axiomatic: "students . . . [do not] shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker*, 393 U.S. at 506.

Respectfully submitted,

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