No. 14-720

In the

Supreme Court of the United States

JOHN DARIANO, *et al*,

Petitioners,

v.

MORGAN HILL UNIFIED SCHOOL DISTRICT, *et al*,

Respondents.

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

AMICUS CURIAE BRIEF OF CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONERS

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IDENTITY AND INTEREST OF AMICUS CURIAE

Amicus, Center for Constitutional Jurisprudence[1] was established in 1999 as the public interest law arm of the Claremont Institute, the mission of which is to restore and uphold the principles of the American Founding, including protecting the theory underlying our republic that we are endowed with unalienable rights and the function of government is to protect those rights.

In addition to providing counsel for parties at all levels of state and federal courts, the Center has participated as amicus curiae before this Court in several cases of constitutional significance. Most recently, the Center has participated as amicus curiae in cases involving freedom of speech in *McCullen v. Coakley*, 134 S. Ct. 2518 (2014) and *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334 (2014). The Center has also participated as amicus curiae in a prior case involving the meaning of the American flag and the republic for which it stands, *Elk Grove Unified School District v. Newdow*, 542 U.S. 1 (2004).

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[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Consent of Petitioner and of Respondent has been lodged with the Clerk. All parties waived any objections to late notice of the filing of this brief.

Pursuant to Rule 37.6, amicus curiae affirms that no counsel for any party authored this brief in any manner, and no counsel or party made a monetary contribution in order to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

First Amendment jurisprudence rejects government suppression of speech or expressive conduct merely because the message finds disfavor with a restive audience. Silent passive display of the flag of the United States of America – a national symbol of Union, liberty, and equality – is an exemplary form of expressive conduct and within the scope of constitutional free speech guarantees.

In *Dariano v. Morgan Hill Unified Sch. Dist.*, 767 F.3d 764 (9th Cir.2014), the Court of Appeals stumbled badly in its consideration of free speech principles. The ruling erodes the heckler's veto doctrine. It effectively empowers schools to silence speech or expression by students where others create or threaten to create a hostile environment in response. The Court of Appeals misconstrued the standard for student speech restrictions in *Tinker v. Des Moines Independent Community Sch. Dist.*, 393 U.S. 503 (1969). The errors of its ruling were compounded by its highly dubious invocation of cases involving school suppression of Confederate flag displays as a basis for school suppression of American flag displays. But the two flags have distinct meanings with divergent histories. Even a cursory consideration of American Civil War history reveals this.

This Court should grant the petition for writ of certiorari in order to reaffirm the First Amendment's heckler's veto doctrine. This case offers the Court an opportunity to dispel the backward idea that the American flag can be restricted by mistaken

analogies to the meaning of the Confederate flag and its effect on audiences.

REASONS TO GRANT REVIEW

I. The Court of Appeals' Ruling Misconstrues Supreme Court Precedent and Erroneously Seeks to Read Into It an Exception to the Heckler's Veto Doctrine.

The Court of Appeals' decision below stumbled badly in its consideration of free speech principles. It misconstrued this Court's jurisprudential standard for restricting student speech set forth in *Tinker*, 393 U.S. 503. At the expense of student free speech rights, the Court of Appeals effectively created a schoolyard exception to the heckler's veto doctrine.

This Court's First Amendment jurisprudence makes clear that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker*, 393 U.S. at 506. To be sure, "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings," Bethel *Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682 (1986). The rights of students must be considered "in light of the special characteristics of the school environment." *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266 (1988) (quoting *Tinker*, 393 U.S. at 506). But the Ninth Circuit's ruling here turned the special characteristics of the school environment into a no-speech zone.

When considering the "special characteristics of the school environment," the Court has instead recognized that "schools, as instruments of the state, may determine that the essential lessons of civil,

mature conduct cannot be conveyed in a school that tolerates lewd, indecent, or offensive speech and conduct." *Fraser,* at 683. Also, "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns." *Hazelwood*, 484 U.S., at 273. But where neither of the circumstances identified in *Fraser* or *Hazelwood* obtain, for all other student speech, restriction is permitted only when the school reasonably believes that the speech will substantially and materially interfere with schoolwork or discipline. *See Tinker*, 393 U.S., at 513.

Neither of the qualifications identified in *Fraser* or *Hazelwood* obtain in this case. Therefore *Tinker* applies.

Unfortunately, the Court of Appeals erroneously deemed *Tinker* an affirmation of the power of school officials to restrict free speech rights whenever third parties threaten to cause disruption in response. It regarded restriction of student speech and expression as a "readily-available" and therefore less burdensome step for school officials to take in protecting students compared to "precisely identify[ing] the source of a violent threat." *See Dariano*, 767 F.3d, at 778.

By elevating concerns about convenience to school officials and subordinating speech interests of students, the Court of Appeals disregarded *Tinker*'s recognition that:

> 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, *Terminiello v. Chicago*, 337 U.S. 1 (1949); 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.

Tinker, 393 U.S. at 508-509. A critical rationale behind the heckler's veto doctrine is the importance of ensuring that such "hazardous freedom" and "openness" be preserved.

But the Court of Appeals' decision did more than merely subordinate student rights of speech and expression relative to school officials' convenience. It deemed irrelevant whether the sources of the "substantial disruption" to the school's mission originates from speech or expression of the student or from another student who threatens harm. In other words, the Court of Appeals excluded from consideration the rights of the student speaker and the wrongs by other students. As the Court of Appeals put it, "[i]n the school context, the crucial distinction is the nature of the speech, not the source of it." *Dariano*, 767 F.3d, at 778. The record in this case undisputedly shows that the school suppressed the speech of students because of what other students might in response. The decision thereby transformed *Tinker* into an exception to the heckler's veto doctrine.

As Judge O'Scannlain aptly put it in his dissent from denial of rehearing en banc, "far from abandoning the heckler's veto doctrine in public schools, *Tinker* stands as a dramatic reaffirmation of it." *Dariano*, 767 F.3d, at 770 (O'Scannlain, J., dissenting). Indeed, "[t]he heckler's veto doctrine is one of the oldest and most venerable in the First Amendment jurisprudence." *Id.* at 769-770 (O'Scannlain, J., dissenting) (citing *Terminiello*, 337 U.S. at 5). This Court's decisions are not indifferent or neutral when it comes to the source of potential harm. Rather, the heckler's veto doctrine emphasizes protections for the right to speak or express viewpoints free from restrictions meant to placate or reward would-be hostiles or mobs. *See, e.g., Cox v. Louisiana*, 379 U.S. 536, 550 (1965) ("constitutional rights may not be denied simply because of hostility to their assertion or exercise.")

Moreover, by reading into *Tinker* a new exception to the heckler's veto doctrine, the Court of Appeals "sends a clear message to public school students: by threatening violence against those with whom you disagree, you can enlist the power of the State to silence them." *Dariano*, 767 F.3d at 770 (O'Scannlain, dissenting). The decision's rejection of the importance in distinguishing the source of disruption effectively dismissed another critical underlying rationale behind the heckler's veto: prohibiting government suppression of speech or expressive conduct merely because the message finds disfavor with a restive audience. Thus, the Ninth Circuit's decision adopted an exception that swallowed the rule in the school context.

This Court's review is therefore necessary to correct the Court of Appeals' misconstruing of *Tinker* and its mistaken fashioning of an exception to the heckler's veto doctrine.

II. Review Is Necessary To Clarify that Public Display or Expression of the American Flag Is Protected Speech and Cannot Be Censored By Erroneously Analogizing The Nation's Symbol of Union, Liberty, and Equality to the Confederate Flag.

There is nothing more bewildering in the Court of Appeals' ruling than its analogizing the supposed "substantial disruption" posed by silent, passive display of the American flag to display of the Confederate flag. In the Court of Appeals' words, "the legal principle that emerges from the Confederate flag cases is that what matters is substantial disruption or a reasonable forecast of substantial disruption, taking into account either the behavior of a speaker—*e.g.*, causing substantial disruption alongside the silent or passive wearing of an emblem—or the reactions of onlookers." *Dariano*, 767 F.3d, at 778. The prior section's overview of the heckler's veto doctrine and *Tinker* supply reason enough for rejecting the Court of Appeals' so-called "legal principle." But more needs be said. Public display or expression of the American flag is emphatically protected by the First Amendment. The American flag's meaning as a symbol of our nation's union and cherished ideals and its special history are sharply different from the meaning and history behind the Confederate flag. Display of the flag that stands for freedom cannot be

deemed a substantial disruption for legally suppressing freedom of speech.

A. The Meaning and History of the American Flag Are Rooted in the Most Fundamental Ideals of the Declaration of Independence and the Constitution: Union, Liberty, and Equality.

The American flag is a special symbol of our sovereign nation, of its highest ideals, and of its basic governing principles. Its thirteen stripes that alternate red and white trace back to the original "thirteen united States of America" that announced their separation from Great Britain to the world with the pronouncement: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness." Declaration of Independence (1776); 4 U.S.C. § 1. *See also Texas v Johnson*, 491 U.S. 397, 422 (1989) (Rehnquist, C.J., dissenting) (discussing the Continental Congress's adoption of the Stars and Stripes.) The flag's fifty stars of white in a blue field stand for the states that now form our Union. 4 U.S.C. § 1. *See also* 4 U.S.C. § 2; Executive Order No. 10834 (1959) (establishing the current design of the flag).

Over the years this Court has had occasion to remark on the meaning of the American flag. In the words of Justice John Marshall Harlan:

> [T]o every true American the flag is the symbol of the nation's power, the emblem of freedom in its truest, best sense. It is not extravagant to say that to all lovers of the

> country it signifies government resting on the consent of the governed; liberty regulated by law; the protection of the weak against the strong; security against the exercise of arbitrary power; and absolute safety for free institutions against foreign aggression.

Halter v. Nebraska, 205 U.S. 34, 43 (1907). "The flag is the symbol of our national unity, transcending all internal differences, however large, within the framework of the Constitution." *Minersville School Dist. v. Gobitis*, 310 U.S. 586, 596 (1940) (overruled on other grounds by *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943)). "The very purpose of a national flag is to serve as a symbol of our country," *Johnson,* 491 U.S. at 405, and of its proud traditions "of freedom, of equal opportunity, of religious tolerance, and of good will for other peoples who share our aspirations," *Id.*, at 437 (Stevens, J., dissenting) (quoted in *Elk Grove Unified School Dist. v. Newdow*, 542 U.S., at 6 (2004). "[T]he flag holds a lonely place of honor in an age when absolutes are distrusted and simple truths are burdened by unneeded apologetics." *Johnson*, 491 U.S. at 421 (1989) (Kennedy, J., concurring).

B. History of the Civil War Brings the Symbolic Meaning of the American Flag into Sharper Focus.

The Civil War experience reaffirmed the permanency of the Union for which the flag stands. Upon taking the oath of office, President Abraham Lincoln declared, "in contemplation of universal law, and of the Constitution, the Union of these States is perpetual." Abraham Lincoln, First Inaugural

Address (1861), THE COLLECTED WORKS OF ABRAHAM LINCOLN (Roy P. Basler, ed.), VOL. IV 252 (1953). He traced the lineage of the Union from the Articles of Association (1774) through the Declaration of Independence (1776), the Articles of Confederation (1778) to the charter of 1787 that was ordained and established in order "to form a more perfect union." *Id*. at 253 (citing U.S. Constitution, Preamble). No mere resolution by a state could dissolve their connection to the Union. *Id*. President Lincoln acknowledged that the nation was divided: "One section of our country believes slavery is *right*, and ought to be extended, while the other believes it is wrong, and ought not to be extended." *Id*. at 258. Yet in contemplation of the nature of the Union, Lincoln emphatically rejected that any constitutional right for a state to secede from it, declaring: "Plainly, the central idea of secession, is the essence of anarchy." *Id*. at 256.

"[I]t has often occurred that insults to a flag have been the cause of war," *Halter*, 205 U.S., at 41. To most minds, the lowering of the American flag by rebel forces at Fort Sumter in April, 1861 constituted the symbolic beginning of the American Civil War caused by sectional conflict over slavery. In the words of Ulysses S. Grant, "[a]s soon as slavery fired upon the flag it was felt, we all felt, even those who did not object to slaves, that slavery must be destroyed." John Russell Young, AROUND THE WORLD WITH GENERAL GRANT 416 (1879).

Civil War came. "The Union troops marched to the sound of 'Yes We'll Rally Round The Flag Boys, We'll Rally Once Again.'" *Johnson*, 491 U.S., at 423 (Rehnquist, C.J., dissenting). And "[b]y war's end,

the American flag again flew over 'an indestructible union, composed of indestructible states.'" *Id.*, at 424 (1989) (Rehnquist, C.J., dissenting) (quoting *Texas v. White*, 7 U.S. (Wall.) 700, 725 (1869)).

The Union's victory in war and the ratification of the Thirteenth Amendment ultimately destroyed slavery. *See* U.S. CONST, Amend. XIII. Thus, not only did the Civil War experience ensure the perpetuation of the Union, it brought about a "new birth of freedom" for a nation, under God, that had been "conceived in liberty and dedicated to the proposition that all men are created equal." Abraham Lincoln, Gettysburg Address (1863), THE COLLECTED WORKS OF ABRAHAM LINCOLN 23 (Roy P. Basler, ed.), VOL. VII (1953).

At the ceremony where the American flag was raised once again at Fort Sumter, it was declared:

> Under this sun, under that bright child of the sun, our banner, with the eyes of the nation and the world upon us, we repeat the syllable of God's Providence and recite the solemn decrees: NO MORE DISUNION! NO MORE SECESSION! NO MORE SLAVERY!

Henry Ward Beecher, Oration of the Rev. Henry Ward Beecher, on the Raising of "The Old Flag" at Sumter, April 14, 1865, ORATION AT THE RAISING OF "THE OLD FLAG" AT SUMTER; AND SERMON ON THE DEATH OF ABRAHAM LINCOLN, PRESIDENT OF THE UNITED STATES 19 (1865). With the Union preserved and the blight of slavery removed, the American flag would even more clearly stand for the nation's founding ideals of Union, liberty, and equality. *See Newdow*, 542 U.S. at 6 n1 (discussing the 1892 proposal

for the Pledge of Allegiance and observing, "the phrase 'one Nation indivisible' had special meaning because the question whether a State could secede from the Union had been intensely debated and was unresolved prior to the Civil War.")

C. The History of the Civil War Brings the Symbolic Meaning of the American Flag into Sharper Contrast with the Confederate Flag.

The Southern States that formed the so-called "Confederate States of America" rejected the Union's claim to being perpetual. The Confederacy was therefore premised on the idea of secession. *See, e.g., White*, 74 U.S., at 722-724 (describing process by which the State of Texas seceded from the Union and the Confederacy was formed).

"The Southern States, to formalize their separation from the Union, adopted the 'Stars and Bars' of the Confederacy." *Johnson*, 491 U.S. at 424 (Rehnquist, C.J., dissenting). The first Union officer casualty of the Civil War was Col. Elmer Ellsworth, shot after removing the Confederate flag atop a building in Alexandria, Virginia, where it had been visible to eyes in Washington, D.C. *See* Abraham Lincoln, Letter to Ephraim D. and Phoebe Ellsworth (May 25, 1861), THE COLLECTED WORKS OF ABRAHAM LINCOLN (Roy P. Basler, ed.), VOL. IV 333 (1953). The loss of life that took place at the Battle of Gettysburg later furnished the occasion for President Lincoln's famous Address. "The Gettysburg Address presupposes the truth of the great proposition set forth originally in the Declaration of Independence." Harry V. Jaffa, A NEW BIRTH OF FREEDOM: ABRAHAM

LINCOLN AND THE COMING OF THE CIVIL WAR 80 (2000).

The Confederacy's rejection of liberty and equality, on the other hand, was epitomized in the so-called "Corner Stone Speech" of Confederate Vice President Alexander H. Stephens. "Stephens's speech, more than any other is the Gettysburg Address of the Confederate South." Jaffa, A NEW BIRTH OF FREEDOM 216. Stephens's speech set out the ideological basis for the Confederacy, and for which the Confederate flag stood:

> Our new government is founded upon exactly the opposite idea [to the idea of equality in the Declaration of Independence]; its foundations are laid, its corner stone rests upon the great truth that the negro is not equal to the white man. That slavery—subordination to the superior race, is his natural and normal condition.

Alexander H. Stephens, Speech Delivered on the 21st March, 1861, in Savannah, Known as "the Corner Stone Speech," Reported in the Savannah Republican, ALEXANDER H. STEPHENS IN PUBLIC AND PRIVATE WITH LETTERS AND SPEECHES 721 (1866).

D. Concerns about the Confederate Flag's Meaning and History or Reactions to its Display Provide No Basis for Censoring Display of the American Flag.

In light of the history of the Confederacy:

> It is the sincerely held view of many Americans, of all races, that the confederate flag is a symbol of racial separation and oppres-

> sion. And, unfortunately, as uncomfortable as it is to admit, there are still those today who affirm allegiance to the confederate flag precisely because, for them, that flag is identified with racial separation. Because there are citizens who not only continue to hold separatist views, but who revere the confederate flag precisely for its symbolism of those views, it is not an irrational inference that one who displays the confederate flag may harbor racial bias against African-Americans.

U.S. v. Blanding, 250 F.3d 858, 861 (4th Cir. 2001). *See also Dixon v. Coburg Dairy, Inc.*, 369 F.3d 811, 823-825 (4th Cir. 2004) (Gregory, J., concurring in the judgment) (describing "Lost Cause" advocacy and racial tensions tied to the Confederate flag). Of course, some other Americans contend that the Confederate flag may be seen as a symbol of southern heritage and of decentralized government, *see Scott v. School Board of Alachua County*, 324 F.3d 1236, 1248-1249 (11th Cir. 2003), leading at least one court to conclude that both viewpoints are correct. *Id.* at 1249. In grappling with the meaning and strong feelings of reaction to the Confederate flag, a number of lower courts have upheld school restrictions of its display by students. *Dariano*, 767 F.3d, at 772 n8 (O'Scannlain, J., dissenting) (listing cases).

The point here is not to settle whether it constitutes vulgar or offensive speech subject to regulation by school officials under *Fraser*, or to otherwise settle the degree of protection First Amendment protection students might have in displaying it. Rather,

the point is that the Confederate flag's own meaning and history "certainly provides no support for banning displays of the American flag." *Dariano*, 767 F.3d, at 773. (O'Scannlain, J., dissenting).

More than that, this Court has previously affirmed that display of the flag serves important public ends. "We concede that the Government has a legitimate interest in preserving the flag's function as an 'incident of sovereignty.'" *U.S. v. Eichman*, 496 U.S. 310, 316 n6 (1990). Those public ends are particularly relevant in schools, as "the Pledge of Allegiance evolved as a common public acknowledgement of the ideals that our flag symbolizes. Its recitation is a patriotic exercise designed to foster national unity and pride in those principles." *Newdow*, 542 U.S., at 6; 4 U.S.C. § 4.

As this Court acknowledged in *Fraser*.

> The process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; schools must teach by example the shared values of a civilized social order. Consciously or otherwise, teachers—and indeed the older students—demonstrate the appropriate form of civil discourse and political expression by their conduct and deportment in and out of class.

478 U.S. at 683. Protecting the ability of students to engage in civil discourse and political expression through display of the American flag furthers the process of educating for citizenship. Banning such student expression on account of uncivil conduct by those who wish to stifle such expression does not.

The Court should grant the petition and ultimately dispel the notion that Confederate flag can be invoked to censor peaceful display of the American flag.

CONCLUSION

Amicus urges this Court to grant the petition for writ of certiorari to vindicate the free speech rights of the petitioning students and to reaffirm the First Amendment heckler's veto doctrine. This Court should clarify that display of the American flag, our nation's symbol of Union, liberty, and equality, is protected speech and cannot be restricted by bad analogy to the Confederate flag.

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Respectfully submitted,

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