No. 14-720

IN THE

Supreme Court of the United States

JOHN DARIANO AND DIANNA DARIANO, ON BEHALF OF THEIR MINOR CHILD, M.D.; KURT FAGERSTROM, JULIE ANN FAGERSTROM, ON BEHALF OF THEIR MINOR CHILD, D.M.; KENDAL JONES AND JOY JONES, ON BEHALF OF THEIR MINOR CHILD, D.G.,

Petitioners,

v.

MORGAN HILL UNIFIED SCHOOL DISTRICT; NICK BODEN, IN HIS OFFICIAL CAPACITY AS PRINCIPAL, LIVE OAK HIGH SCHOOL; AND MIGUEL RODRIGUEZ, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY AS ASSISTANT PRINCIPAL, LIVE OAK HIGH SCHOOL,

Respondents.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The question presented is whether this Court should grant certiorari to review a fact-specific application of the settled standard of *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), when:

(a) the Court of Appeals properly followed this Court's precedent, finding that the Constitution was not violated when school officials made an on-the-spot decision to remove students from harm's way when credible threats of violence and disruption were received – threats serious enough that the same students stayed home from school succeeding days, and which disrupted activity on campus for several days – rather than waiting for violence to actually erupt;

(b) the "circuit split" claimed by Petitioners does not exist; and

(c) there are serious jurisdictional questions surrounding Petitioners' claims.

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SUMMARY AND INTRODUCTION

There is simply "no compelling reason" why the decision below, a vanilla application of *Tinker*, common sense and the protection of schoolchildren, needs either affirmation or reversal by this Court. Sup. Ct. R. 10.

Contrary to what the Petition argues, this decision is not inconsistent with this Court's decision in *Tinker*, but rather applies the same "disruption" standard as *Tinker*. The difference in result in the two cases is because *Tinker* involved much less threat and disruption, yet far more severe and punitive actions by school officials, than in the present case.

Contrary to what the Petition argues, this decision does not enshrine a "heckler's veto," a concept that is in any event inapt to the special characteristics of a school setting.

Finally, contrary to what the Petition argues, this decision does not represent a split in Circuit-level authority. Both the other cases the Petition contends show a "split" employ the same *Tinker* standard applied here. Both found school actions unconstitutional because, unlike here, there was no disruption or threat of disruption, while the school's actions were more punitive. Those courts would have ruled the same way the Ninth Circuit did here if confronted with the same facts as here.

Similarly, there are no conflicting Circuit-level decisions on other issues present here. There are no decisions holding that a school official:

— must wait until violence has actually erupted to step in and protect students;

— cannot take reasonable measures to protect students until the proverbial first punch is thrown; or

— must treat a student wearing flag-themed clothing differently than any other student, or expose him to more danger.

Nor is a one-afternoon limit on clothes worn at school – taken in response to threats that day, not a matter of pre-existing or even temporary "policy" – otherwise such an "important federal question" as to justify this Court's review. This is a case about a reasonable "time, place and manner" restriction. School officials on the scene had ample reason to believe violence and disruption were about to happen. School officials across the Nation act against a backdrop of the need to prevent another Santee, Columbine, Littleton, or any of the hundreds of school shootings that have happened since *Tinker* was decided. This is a case about school actions to protect students, which had the incidental effect of "regulating" the dress of two students on one afternoon. Not the expression of any particular opinion, nor regulation of any expression at any other time.

Even were there any certiorari-worthy issues presented, this case is a poor vehicle to decide them because there is little if any live controversy left. Student-petitioners have since graduated. Respondents' actions taken were not pursuant to any continuing school policy, and there is no prospect that the same events will recur at the school. The only Respondents left are the current

assistant principal, against whom Petitioners cannot win prospective relief, and the former assistant principal, who would all but certainly be entitled to qualified immunity against any damages claim.

Petitioners' real goals or complaints have little to do with student or speech freedom in general. "[T]here is never a legitimate basis for banning the display of an American flag on an American public school campus." Pet. 18. This categorical statement mis-states the nature of this case, and misreads the Constitutional issues involved.

First, this case does not involve banning the flag. This is a case about whether local school officials, in the face of credible threats to the students involved and by extension danger to the entire school, acted within the Constitution by asking two students to either turn their shirts inside out or go home with excused absences for the day. The flag flew over the school that day like every other; the students involved were not punished; they and other students were free to wear the exact same clothes any other day; and there is no evidence they were prohibited from verbally expressing their opinions – about America, about Cinco de Mayo, about most anything else – on that or any day.

Second, Petitioners are seeking to create a content-based distinction in First Amendment jurisprudence. According to Petitioners, the ordinary deference paid to school regulation of student dress and expression should disappear whenever the flag is involved – even, here, when there is no flag involved, but clothing with a flag "theme." There is no Constitutional basis for such a distinction, especially in the context of safety at schools.

Similarly, Petitioners complain that the school's actions and the Ninth Circuit's decision "provides a dangerous lesson in civics to our public school students." Pet. 18. Petitioners may believe a different "civics lesson" was appropriate that day, but that is a matter for local school boards and educators to consider. It is not a matter of Constitutional import.

School administrators are on the scene, have greater personal knowledge of the situation and actors involved, and are entrusted with the care and safety of schoolchildren. The law properly treats their on-the-spot decisions with deference. The decision below does no more than that, and there is no need for this Court's action on this matter.

COUNTER-STATEMENT OF THE CASE

School administrators acted against a backdrop and history of events that are as significant to this Court's determination as they are absent from the Petition.

On cross-motions for summary judgment brought by each side, the district court found as follows:

> (1) In the six years that Defendant Boden was principal at Live Oak, he personally observed at least thirty fights on campus. [3 ER 308, ¶ 5.] Some of these fights involved gangs, and others were between Caucasian and Hispanic students. (Id.) A police officer is present on campus every day to ensure safety on school grounds. [2 ER 171:18-24, 201:11-16.]

(2) On Cinco de Mayo in 2009, a verbal exchange and altercation arose between a group of predominantly white and a group of Mexican students. [2 ER 61-66.] This altercation involved an exchange of profanities and threats were made. (Id.) A makeshift American flag was put on one of the trees on campus. (Id.) A group of Caucasian students began clapping and chanting "USA" as this flag went up. (Id.) This was in response to a group of Mexican students walking around with the Mexican flag. One Mexican student shouted "fuck them white boys, fuck them white boys." (Id.) [Assistant] Principal Rodriguez directed the minor to stop using such profanity. (Id.) The minor responded by saying "But Rodriguez, they are racist. They are being racist. Fuck them white boys. Let's fuck them up." (Id.) [Assistant] Principal Rodriguez removed the minor from the area. (Id.)

(3) When Plaintiff M.D. wore an American flag shirt to school on Cinco de Mayo 2009, he was approached by a male student who shoved a Mexican flag at him and said something in Spanish expressing anger at Plaintiffs' clothing. [2 ER 129:15-20.]

(4) Many of the students involved in the May 2009 altercation were still students at Live Oak in May of 2010. [2 ER 76:8-12.]

(5) On the morning of Cinco de Mayo 2010, a female student approached Plaintiff

M.D., motioned to his shirt, and said "why are you wearing that, do you not like Mexicans?" [2 ER 125:25-126:7.] Plaintiffs D.G. and D.M. were also confronted about their clothing by female students before brunch break. [2 ER 188:22-189:7, 215:18-216:5.]

(6) As Defendant Rodriguez was leaving his office before brunch break on May 5, 2010, a Caucasian student approached him and said, "You may want to go out to the quad area. There might be some—there might be some issues." [2 ER 53:20-25.]

(7) During brunch break on May 5, 2010, another student called [Assistant] Principal Rodriguez over to a group of Mexican students and said that she was concerned about a group of students wearing the American flag and said that "there might be problems." [2 ER 58:3-7.] [Assistant] Principal Rodriguez took her statement to mean that there might be some sort of physical altercation. [2 ER 60:13-15.] A group of Mexican students also asked Defendant Rodriguez "why do they get to wear their flag when we don't get to wear our flag?" [2 ER 56:1-3.]

(8) Defendant Rodriguez was directed by Defendant Boden to have the students either turn their shirts inside out or take them off. [2 ER 68:23-69:5.] Plaintiffs refused to do so. [2 ER 71:1-4.]

> (9) While meeting with Plaintiffs about their attire, Defendant Rodriguez explained that he was concerned for their safety. [2 ER 77.] Plaintiffs did not dispute that their attire put them at risk of violence. (Id.) Plaintiff D.M. stated that he was "willing to take on that responsibility" in order to continue wearing his shirt. (Id.)
>
> (10) Following Plaintiffs' departure from school they received numerous threats from other students. Plaintiff D.G. received a threat of violence via text message on May 6th. [3 ER 237:11-240:1.] He received another threatening call from a male saying he was outside of D.G.'s home that same night. (Id.) Plaintiffs D.M. and M.D. also were threatened with violence. [3 ER 241:15-242:3.] A student at Live Oak overheard a group of male students saying that some gang members would come down from San Jose to "take care of" Plaintiffs. [3 ER 239:2-5.] Based on these threats, Plaintiffs did not go to school on May 7. [3 ER 240:1.]

1 ER 11-12 (the district court's record citations have been replaced with Ninth Circuit excerpts of record ("ER") citations).

On Cinco de Mayo 2010, during his ordinary morning rounds, Assistant Principal Rodriguez received comments from some students who were worried about other students who were wearing shirts with American flag logos or designs in the school quad. 2 ER 53-58, 66:24-67:2. Student-petitioners and two other students wearing

flag-motif clothes sat in the middle of the quad, with Norteno-affiliated students at one end of the quad, and Sureno-affiliated students at the other end. 2 ER 144:9-145:1.

Based on the history and threats recounted in paragraphs 1-9 of the district court's opinion quoted above, Principal Boden directed Assistant Principal Rodriguez to ask these five students to either turn their shirts inside out or take them off. 2 ER 68:23-70:17, 72:20-73:1. When the students declined to do so, Rodriguez called them into his office for further conversation. 2 ER 70:20-71:15. They moved to a conference room, where they were joined by parents and Principal Boden, who took charge of the meeting. 2 ER 33-35. Assistant Principal Rodriguez said that other students had indicated to him that "the shirts either were or were going to cause a disruption." 2 ER 138:16-25. He said he was concerned for their safety (2 ER 148:12-14, 214:19-22) and was trying to prevent a conflict. 2 ER 148:22-25. Principal Boden also told the students that it was his responsibility to keep "all 1300 students" safe. 2 ER 45:7-46:3, 77:11-25, 191:9-11, 217:1-3.

Eventually three students (student-petitioners D.M. and D.G and another student not a party to this suit) were asked to either turn their shirts inside out or go home for the day with excuse absences. The other two students (student-petitioner M.D. and another student not a party to this suit) were allowed to return to class. Principal Boden permitted student-petitioner M.D. to return to class because the imagery on M.D.'s shirt was less blatant and prominent, which Principal Boden considered a "significant difference in terms of what [he] saw as being potential for targeting." 2 ER 37:5-7. He had a "sense

that it was not as prominent a display, and therefore, less likely for [M.D.] to be singled out, targeted for any possible recrimination." 2 ER 37:15-18.

Neither Boden nor Rodriguez cited, or relied upon, any District policy about the flag. 2 ER 190:17-25, 213:8-10, 228:22-229:10; 3 ER 236:23-25. To the contrary, when questioned what policy prohibited the wearing of an American flag, they (correctly) denied that such a policy existed. 2 ER 155:15-16, 229:5-14.

Student-petitioners D.M. and D.G chose to go home. They were given excused absences, and were not disciplined for their choice. 2 ER 40:20-24, 157:14-19, 175:24-176:5, 219:12-16. Student-petitioner M.D., who had been allowed to return to class, was removed from school for the rest of the day by his mother because he "was not in a good mood." 2 ER 156:6-7. He considers himself "somewhat of a hot head." 2 ER 156:19-21. The students who left school and their parents contacted the media that very afternoon. 2 ER 98-100, 107-118, 152:18-25, 181:20-182:1, 218:5-24.

The next day, May 6, saw considerable disruption. Media crews, protestors and police all came to the school campus. 2 ER 104:3-11. The District's superintendent received about 5,000 emails in an eight-hour period, which shut down the District's school server multiple times. 2 ER 83:14-16; 90:1-4. "There were many anti-immigration themed messages." 2 ER 90:7-8.

In response to the tumult, about 70 to 80 students walked out of class. 2 ER 91:6-23. According to a parent of one of the student-petitioners: "There was a man in a

wheelchair with an American flag and a bunch of the male students went up to him, got in his face and ripped that flag out of his hands." 3 ER 244:1-4. Another parent heard a Hispanic student and the man in the wheelchair shouting "Viva Mexico" and "F-U, F-U" back and forth, as they had a "tug of war over the flag." 2 ER 104:16-105:4. The three student-petitioners received threats. 2 ER 124:22-125:10, 178:21-179:18; 3 ER 237:11-240:1, 241:15-242:3.

Events were sufficiently tumultuous that none of the three student-petitioners went to school even the next day, May 7. 2 ER 178:21-25 ("afraid to go to school" because of "[a]ll the threats I had been receiving"), 192:16-18, 197:5-7 ("My parents didn't think it would have been safe for me."), 230:4-9 ("after talking to the police").

The students' parents brought suit on the students' behalf under 42 U.S.C. § 1983 against Morgan Hill Unified School District, Principal Boden, and Assistant Principal Rodriguez, alleging, inter alia, a violation of the students' First Amendment right to freedom of expression. Pet. App. 24.

All proceedings against Boden were stayed in the District Court after he filed bankruptcy. *Id.* at 39 n.2. The District Court dismissed all claims against the school district on sovereign immunity grounds, and Petitioners did not appeal that decision to the Ninth Circuit. *Id.* at 25, 47.

The district court applied *Tinker* and granted summary judgment, finding that "the school officials reasonably forecast[ed] that Plaintiffs' clothing could cause a substantial disruption with school activities"

(1 ER 13), and that Petitioners therefore had no First Amendment claim. The district court order also granted judgment on Petitioners' equal protection, due process, and California constitutional claims. 1 ER 14-18. The district court's order did not address Principal Boden because of the automatic stay in bankruptcy. 1 ER 3, n.2.

The students appealed. Rodriguez had at that point left the district's employ, so his successor in office was automatically named as defendant in the suit in his official capacity. Pet. App. 39 n.2. Accordingly, the appeal was limited to Petitioners' official capacity suit against Rodriguez's successor and their personal capacity suit against Rodriguez.

The Court of Appeals affirmed. Pet. App. 20 ("We affirm . . . as to the only defendant party to this appeal, Assistant Principal Miguel Rodriguez . . . .). Applying the *Tinker* test, the court found that "evidence of nascent and escalating violence at Live Oak," *id.* at 27, particularly the warnings of "physical fighting," *id.* at 29, "reasonably … led school authorities to forecast substantial disruption of or material interference with school activities," *id.* at 35 (quoting *Tinker*, 393 U.S. at 514). The court found that "school officials' actions were tailored to avert violence and focused on student safety," *id.* at 28, and concluded that "both the specific events of May 5, 2010, and the pattern of which those events were a part made [the school officials' decisions that day] reasonable," *id.* at 32. The school officials' decision was not an impermissible heckler's veto, the Ninth Circuit reasoned, because of the special nature of the school context:

> To require school officials to precisely identify the source of a violent threat before taking readily-available steps to quell the threat would burden officials' ability to protect the students in their charge — a particularly salient concern in an era of rampant school violence, much of it involving guns, other weapons, or threats on the internet — and run counter to the longstanding directive that there is a distinction between "threats or acts of violence on school premises" and speech that engenders no "substantial disruption of or material interference with school activities."

Id. at 29–30 (quoting *Tinker*, 393 U.S. at 508, 514). Finding no constitutional violation, the court found no reason to reach the qualified immunity defense.

The Ninth Circuit denied rehearing en banc, over a dissenting opinion.

As the above shows, Petitioner's slanted statement of the case contains several inaccuracies. For example, the Petition recites that "Because it was Cinco de Mayo, Respondents were concerned that some students on campus might react negatively toward Petitioners' American flag shirts. Consequently, 'Boden directed Rodriguez to have the students either turn their shirts inside out or take them off.'" Pet. at 2. What actually happened, as the above shows, is that there were expressed and articulated threats that school officials on the ground determined were credible. To protect against the threatened violence, Respondents asked some (but not all) students wearing clothes including a flag motif to "either turn their shirts

inside out or take them off." That it was Cinco de Mayo is background, but it was not the reason for the school's actions. The Petition tries to paint a picture of some sort of "Cinco de Mayo vs. the American flag" culture war, but the actual facts of this case are just about protecting schoolchildren.[1]

Similarly, the Petition complains about "Respondents' decision banning Petitioners' American flag clothing to avoid unrealized and unarticulated student unrest." Pet. at 5. As the district court's findings make clear, there was no "ban," and there was far more underlying Respondents' actions than "unrealized and unarticulated student unrest." As the district court found, "the school officials reasonably forecast that Plaintiffs' clothing could cause a substantial disruption with school activities." 1 ER 13. "[T]he Court finds that these school officials were not unreasonable in forecasting that Plaintiffs' clothing exposed them to significant danger … [and so] did not violate the First Amendment." 1 ER 13-14.

1. The amicus briefs in support of Petitioners exhibit similar mischaracterizations of the facts, trying to gin up a controversy far beyond what the facts allow. *See, e.g.*, Amicus Curiae Brief of Center for Constitutional Jurisprudence at 3 ("[T]he Ninth Circuit's ruling here turned the special characteristics of the school environment into a no-speech zone."); Amicus Curiae Brief of Alliance Defending Freedom at 15 (school administrators should have cancelled the school's Cinco de Mayo celebration, and by not doing so engaged in "viewpoint discrimination"), 18 ("Respondents clearly favored the views of students celebrating Cinco de Mayo over those protesting the festivities."), 21 ("vicious circle of moral inculcation and censorship").

WHY THE PETITION SHOULD NOT BE GRANTED

The petition should not be granted because there is "no compelling reason" why the decision below needs either affirmation or reversal by this Court. Sup. Ct. R. 10. There is neither a conflict with this Court's prior decisions, nor a conflict with other Circuit-level decisions, nor any otherwise significant question presented.

A. The Ninth Circuit's decision properly applies this Court's prior decision in *Tinker,* particularly as student speech doctrine has been subsequently elaborated by this Court.

1. The decision applies the same test as this Court's decision in *Tinker*, to very different facts.

Tinker empowers schools to regulate student speech that "might reasonably [lead] school authorities to forecast substantial disruption of or material interference with school activities." *Tinker*, 393 U.S. at 514. In *Tinker*, principals adopted a policy banning armbands from school, punishable by suspension. 393 U.S. at 504. Five students were suspended under the policy for wearing armbands, despite no facts "which might reasonably have led school officials to forecast substantial disruption … or material interference." *Id.* at 514. The official memorandum prepared after the suspensions made no reference to anticipated disruption, and school officials testified that the policy was directed against "the principle of demonstration." *Id*. at 509 n.3. Even the dissent acknowledged that "the few armband students did not

actually 'disrupt' the classwork." *Id.* at 518 (Black, J. dissenting).

By focusing on disruption as the test, *Tinker* allows school officials the flexibility to act reasonably and preemptively to prevent interference with school operations. It recognizes that First Amendment rights of students in public schools are limited because of "the special characteristics of the school environment." *Tinker*, 393 U.S. at 506.

Thus, *Tinker* allows school officials to restrict student speech as necessary to prevent any substantial disruption in schools *regardless of its source*:

> [C]onduct by the student, in class or out of it, which *for any reason* — whether it stems from time, place, or type of behavior — materially disrupts classwork or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.

Id. at 513 (emphasis added).

Petitioners misread *Tinker* as categorically barring any consideration of audience reaction. To be sure, mere "discomfort" in the audience does not rise to the level of substantial disruption. 393 U.S. at 509. But by authorizing schools to regulate expression that causes substantial disruption "for any reason," *id.* at 513, the *Tinker* test permits schools to address all manner of threats — regardless of the causal chain between the speech and the disruption, and even if that causal chain runs in part

through the minds of listeners. True, in *Tinker* this Court stated that the armbands were unaccompanied by "disruptive conduct by those participating in it." Pet. 8 (quoting *Tinker*, 393 U.S. at 505). That was a fact in the case but not dispositive. Instead, the decision rested on the fact that the speech "caused discussion outside of the classrooms, but no interference with work and no disorder." *Tinker*, 393 U.S. at 514. The basis for the *Tinker* decision was not that the speakers themselves were nondisruptive, but that no disruption at all resulted from the speech.

Other than the fact that both this case and *Tinker* involve students and First Amendment challenges, little else about the facts of the cases is comparable. The threat and disruption level was significantly higher in the present case than in *Tinker*; unlike *Tinker*, there is no indication that the school's actions were part of an effort to suppress any view or controversy; and the school's actions here were more minimal and focused than in *Tinker*.

First, the threat and disruption in the record here was significantly higher than in *Tinker*.

> Although *Tinker* guides our analysis, the facts of this case distinguish it sharply from *Tinker*, in which students' "pure speech" was held to be constitutionally protected. 393 U.S. at 508. In contrast to *Tinker*, in which there was "no evidence whatever of petitioners' interference, actual or nascent, with the schools' work or of collision with the rights of other students to be secure and to be let alone," *id.*, there was evidence of nascent and escalating violence at

Live Oak. On the morning of May 5, 2010, each of the three students was confronted about their clothing by other students, one of whom approached student M.D. and asked, "Why are you wearing that? Do you not like Mexicans[?]" Before the brunch break, Rodriguez learned of the threat of a physical altercation. During the break, Rodriguez was warned about impending violence by a second student. The warnings of violence came, as the district court noted, "in [the] context of ongoing racial tension and gang violence within the school, and after a near-violent altercation had erupted during the prior Cinco de Mayo over the display of an American flag." Threats issued in the aftermath of the incident were so real that the parents of the students involved in this suit kept them home from school two days later.

…

[¶¶]

[W]hereas the conduct in *Tinker* expressly did "not concern aggressive, disruptive action or even group demonstrations," 393 U.S. at 508, school officials at Live Oak reasonably could have understood the students' actions as falling into any of those three categories, particularly in the context of the 2009 altercation. The events of 2010 took place in the shadow of similar disruptions a year earlier, and pitted racial or ethnic groups against each other.

> Moreover, students warned officials that there might be physical fighting at the break.

Pet. App. 27, 29.

Second, unlike *Tinker*, there is no indication that the actions toward petitioner students were part of an effort to suppress any view or controversy.

> The minimal restrictions on the students were not conceived of as an "urgent wish to avoid the controversy," as in *Tinker*, *id*. at 510, or as a trumped-up excuse to tamp down student expression. The controversy and tension remained, but the school's actions presciently avoided an altercation. Unlike in *Tinker*, where "[e]ven an official memorandum prepared after the [students'] suspension that listed the reasons for the ban on wearing the armbands made no reference to the anticipation of such disruption," *id*. at 509, school officials here explicitly referenced anticipated disruption, violence, and concerns about student safety in conversations with students at the time of the events, in conversations the same day with the students and their parents, and in a memorandum and press release circulated the next day.

Pet. App. 27-28.

Third, the school's actions here were more minimal and focused than in *Tinker*, were not punitive, and were narrowly tailored to specific circumstances on one day.

> [S]chool officials' actions were tailored to avert violence and focused on student safety, in at least two ways. For one, officials restricted the wearing of certain clothing, but did not punish the students. School officials have greater constitutional latitude to suppress student speech than to punish it. In *Karp*, we held that school officials could "curtail the exercise of First Amendment rights when they c[ould] reasonably forecast material interference or substantial disruption," but could not discipline the student without "show[ing] justification for their action." 477 F.2d at 176; *cf. Wynar*, 728 F.3d at 1072 (upholding expulsion, despite its "more punitive character," as a justified response to threats); *LaVine v. Blaine Sch. Dist.*, 257 F.3d 981, 992 (9th Cir. 2001).
>
> For another, officials did not enforce a blanket ban on American flag apparel, but instead allowed two students to return to class when it became clear that their shirts were unlikely to make them targets of violence. The school distinguished among the students based on the perceived threat level, and did not embargo all flag-related clothing.

Pet. App. 28-29. In *Tinker*, in contrast, the students "were all sent home and suspended from school until they would come back without their armbands." 393 U.S. at 504.

The decision here is perfectly consistent with *Tinker*. The difference in result is attributable to different facts, not any different legal principle.

2. The decision is also consistent with this Court's post-*Tinker* jurisprudence.

This Court has long accorded deference to decisions by school authorities necessary to maintain order in the school environment. School officials have a difficult job. Not least among their challenges is keeping America's students safe in the shadow of recent national tragedies involving school violence. *See* Pet. App. 30 (recognizing student safety as "a particularly salient concern in an era of rampant school violence, much of it involving guns, other weapons, or threats on the internet"); *see also New Jersey v. T.L.O.*, 469 U.S. 325, 339 (1985) ("Maintaining order in the classroom has never been easy, but in recent years, school disorder has often taken particularly ugly forms: drug use and violent crime in the schools have become major social problems."). Thirty years after *New Jersey v. T.L.O.*, after Columbine and Santee and other names, some burned into the national psyche and others already forgotten by most, protecting schoolchildren hasn't gotten any easier.

Since *Tinker*, the Court has consistently held in favor of school districts when reviewing school decisions limiting student speech. *E.g.*, *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986) (school may proscribe lewd speech at assembly); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988) (school may impose reasonable limits on student speech in school newspaper). Deference is appropriate because judges are not well positioned to second-guess "the on-the-ground expertise and experience of school administrators." *Christian Legal Soc. v. Martinez*, 561 U.S. 661, 686 (2010). The school administrators are on the scene, have greater personal knowledge of the situation and

the actors involved, and are entrusted with the care and safety of schoolchildren. Deference to school authorities is particularly appropriate when a case concerns a one-time, "on the spot" decision. *Morse v. Frederick*, 551 U.S. 393, 409–10 (2007). In *Morse*, this Court upheld a disciplinary suspension unrelated to student safety, whereas here the principal took a non-punitive action to head off imminent violence and threats of physical injury. The Ninth Circuit's decision in the present case follows from *Morse* and this Court's other post-*Tinker* cases.

B. This decision does not enshrine a "heckler's veto," if that notion even applies in a school setting.

The Petition misrepresents the circumstances of this case to support the untenable claim that school officials somehow "incentivized" the source of the threats and un-Constitutionally restricted the "speech" of the student petitioners. Again, the decision below shows how wrong Petitioners are.

> We recognize that, in certain contexts, limiting speech because of reactions to the speech may give rise to concerns about a "heckler's veto." But the language of *Tinker* and the school setting guides us here. Where speech "for any reason . . . materially disrupts classwork or involves substantial disorder or invasion of the rights of others," school officials may limit the speech. *Tinker*, 393 U.S. at 513. To require school officials to precisely identify the source of a violent threat before taking readily-available steps to quell the threat would burden officials' ability to protect the students in their charge—a

> particularly salient concern in an era of rampant school violence, much of it involving guns, other weapons, or threats on the internet—and run counter to the longstanding directive that there is a distinction between "threats or acts of violence on school premises" and speech that engenders no "substantial disruption of or material interference with school activities." *Id.* at 508, 514; *see also id.* at 509, 513.
>
> In the school context, the crucial distinction is the nature of the speech, not the source of it. The cases do not distinguish between "substantial disruption" caused by the speaker and "substantial disruption" caused by the reactions of onlookers or a combination of circumstances.

Pet. App. 29-30 (footnote and citations omitted).

This Court's post-*Tinker* decisions have similarly held that the effect on the listeners may be a reason to restrict school speech. Thus, in *Bethel*, 478 U.S. 675, the school was allowed to proscribe lewd speech because of its effect on young listeners. In *Morse*, 551 U.S. 393, the school was allowed to proscribe speech that readers might consider to condone drug use.

Student-petitioners said they were willing to "take on that responsibility" for "getting beaten up today … a broken arm or broken leg," and one testified he would have worn the clothing even if he had known it risked being shot. 2 ER 77, 149:11-17. School officials were not constitutionally obligated to allow let them run such risks,

or to thereby imperil other students. The willingness of student-petitioners to engage in fights over clothing supports the reasonableness of administrators to perceive that trouble is afoot, and their actions to avoid it.

Petitioners cite *Center for Bio-Ethical Reform, Inc. v. Los Angeles County Sheriff Department*, 533 F.3d 780 (9th Cir. 2008) for the proposition that the heckler's veto doctrine applies in public schools and certiorari should therefore be granted. Petitioners' contention is doubly flawed.

First, *Bio-Ethical Reform* is factually inapposite. *Bio-Ethical Reform* is not a student case; the speakers were adults, associated with a foundation. 533 F.3d at 784. *Bio-Ethical Reform* is not a school case; the speakers orated on a public street, "a traditional public forum," *id.* at 786, and sheriffs (not school administrators) removed the speakers, *id.* at 783. *Bio-Ethical Reform* is not a substantial disruption case; children were merely slow to class and some students discussed the images. *Id.* at 788.

Second, even if there were a conflict between the Ninth Circuit's decision in this case and its decision in *Bio-Ethical Reform*, that would be an argument against certiorari, not in favor of it. When a Circuit's decisions are in conflict, the matter would be for the Court of Appeals itself to resolve. *Wisniewski v. United States*, 353 U.S. 901, 902 (1957) (per curiam). In the Ninth Circuit as in many others, "the appropriate mechanism for resolving an irreconcilable conflict is an en banc decision." *Atonio v. Wards Cove Packing Co.*, 810 F.2d 1477, 1478–79 (9th Cir. 1987) (en banc). There is no reason to depart from that principle here on account of *Bio-Ethical Reform*.

C. This decision does not represent a split in Circuit-level authority.

The Petition claims review is necessary because of a purported conflict with the rulings in two other decisions: *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1259 (11th Cir. 2004) and *Zamecnik v. Indian Prairie School District No. 204*, 636 F.3d 874, 875 (7th Cir. 2011). These decisions do not a certiorari-worthy conflict make. All apply the same "substantial disruption" standard originally set forth in *Tinker*. Neither of the other decisions involved administrators undertaking limited, non-punitive measures designed to protect students in situations where there was a reasonable perception of imminent violence. Both involved actual punishments inflicted with the express intent to suppress the student's message.

1. *Holloman v. Harland*: no punishment where no disruption (unlike here).

In *Holloman*, the school "punished [the student] for expressing a viewpoint [the school] found repugnant, rather than for any disruption he purportedly caused." 370 F.3d at 1265. School officials told the student that his speech showed a lack of "responsibility, morals and values." 370 F.3d at 1261. The school then told the student

> that he would have to serve three days' detention and could not receive his diploma until after he completed his punishment. In addition, [principal] Harland required [student] Holloman to apologize to [teacher] Allred's class. …¶ Since graduation was that Friday,

> there was not enough time left in the school year for Holloman to serve his detentions while still being able to receive his diploma on graduation day. Harland consequently offered Holloman the opportunity to receive a paddling instead. Holloman agreed and, with Allred watching, was paddled by Harland.

370 F.3d at 1261. The Eleventh Circuit ruled against the school because there was no disruption from the student's silent fist-raising during the Pledge: "Hollman's activity … had virtually no impact on the class." 370 F.3d at 1261, 1280. That is in contrast to the facts here, where the "impacts" tincluded: threats that continued for several days (2 ER 124:22-125:10, 178:21-179:18; 3 ER 237:11-240:1, 241:15-16); dozens of students walking out of class the next day (2 ER 91:6-23); the school computer system flooded with anti-immigrant messages and shut down several times (2 ER 83:14-16; 90:1-8); and a hostile confrontation on the street in front of the school involving the public as well as students (2 ER 104-105, 3 ER 244:1-4).

"The intent behind" the school's acts in *Holloman* were "to dissuade him from exercising a constitutional right." 370 F.3d at 1268-69. Such an intent is wholly dehors the evidence here, where the only motivation in the record is to protect against disruption and violence.

The *Holloman* court would likely have reached the same result in the present case as did the Ninth Circuit: "student expression may unquestionably be regulated when doing so 'contributes to the maintenance of order and decorum within the educational system" that is more than a "mere theoretical possibility of discord, or even some

de minimis, insubstantial impact on classroom decorum." 370 F.3d at 1271, citations omitted.

2. *Zamecnik v. Indian Prairie*: no punishment where no threat of disruption, and audience reaction is relevant.

Zamecnik also applies the same principles, and thus presents no real conflict requiring this Court's resolution. There, the school banned a particular message on the ground that it found the words used "derogatory" or "demeaning" to other students. "To justify prohibiting their display the school would have to present 'facts which might reasonably lead school officials to forecast substantial disruption' [citing *Tinker*, *LaVine v. Blaine School District*, 257 F.3d 981, 989 (9th Cir. 2001) and other cases] … but the school had presented no such facts in response to the motion for a preliminary injunction." 636 F.3d at 876. In contrast, the school administrators in the present case had, as the district court found, plenty of "facts which might reasonably lead school officials to forecast substantial disruption."

Zamecnik applied the same "substantial disruption" test as the Ninth Circuit did here. "To justify prohibiting their display the school would have to present 'facts which might reasonably lead school officials to forecast substantial disruption.'" 636 F.3d at 876, citing *Tinker*, 393 U.S. at 514. Moreover, the Seventh Circuit explicitly considered audience reaction in determining whether speech caused school disruption. *Id.* at 880 ("[T]he anger engendered by Zamecnik's wearing a T-shirt that said 'Be Happy, Not Gay' did not give rise to substantial disruption.") *Zamecnik* thus proves the opposite of

Petitioners' claim. The difference in outcome from this case was attributable to different facts, not a different legal standard — Zamecnik's T-shirt did not trigger substantial, or any, disruption; the students' T-shirts here did.

Zamecnik distinguished between schools and a public forum: "A city can protect an unpopular speaker from the violence of an angry audience by deploying police, but that is hardly an apt response to students enraged by a T-shirt." 636 F.3d at 879. Schools have "paternalistic" responsibilities, including "the responsibility of protecting them from being seriously distracted from their studies by offensive speech during school hours." *Id.* at 880. *Tinker*, which mentioned heckler's veto in schools, created a test to address it: the substantial disruption test.

D. The Ninth Circuit decision does not equate the American and Confederate flags by discussing student speech cases involving Confederate flags.

The final argument in the Petition further illustrates how far it is from presenting any certiorari-worthy issue. Petitioners assert that the decision below "essentially analogizes the American flag to the Confederate flag," Pet. 16-17, or depends on "an ethical or moral equivalency between the American flag … and the Confederate flag." Pet. 18. Not so, not even close. Petitioners confuse the decision's honest canvass of student speech cases with saying that all restricted student speech is the same. The decision no more equates the American flag with the Confederate flag than it equates the student's clothing in this case to the "bong hits" sign in *Morse*. The decision is, and Respondents' actions were, properly focused on the effect of the speech, not any purported message.

This is clear from the text of the decision, which is notably unquoted in this portion of the Petition. "We respect the American flag, and know that its meaning and its history differ greatly from that of the Confederate flag." Pet. App. 31. "Nevertheless, the legal principle that emerges from the Confederate flag cases [as well as others] 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." *Id.* Most significantly, "the reasoning in these cases is founded on *Tinker*." *Id.* The Petition cannot contest this reasoning, so it attempts instead to fan some emotional reaction. It could not possibly be improper to rely on student speech cases that rely on this Court's decision in *Tinker*: indeed, it would be derelict to ignore those cases.

E. This case is a poor vehicle to decide any question presented.

When the events giving rise to their suit occurred, Petitioners were students. They sued the school district, the principal, and the then–assistant principal. Their complaint sought injunctive and declaratory relief, as well as nominal damages.

Two of the original defendants are no longer part of the case. The District Court dismissed all claims against the school district. Principal Boden declared bankruptcy, and the District Court stayed the case as to him. Petitioners did not appeal either ruling.

That leaves as Respondents then–Assistant Principal Rodriguez (in his personal capacity) and his successor (in her official capacity). Petitioners' only possible claim against the successor is for prospective relief; she was not a participant in the events, so she cannot be liable for damages. Conversely, because Rodriguez no longer works for the school, Petitioners cannot seek prospective relief against him; the only claim against him can be for nominal damages.

Both of these remaining claims face substantial Article III standing and mootness challenges. Petitioners bear the burden of demonstrating standing and the existence of an Article III "Case" or "Controversy." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). The burden of proof on these elements "subsists through all stages of federal judicial proceedings, trial and appellate." *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477 (1990).[2]

Petitioners cannot meet their burden. At minimum, the substantial uncertainty over these questions strongly militates against certiorari. If the legal issue is as significant as Petitioners claim, this Court will have the opportunity to review it in a future case.

1. Petitioners lack standing to sue the current Assistant Principal for prospective relief.

Petitioners lack standing to seek prospective relief from Rodriguez's successor. There is no realistic prospect

2. These jurisdictional arguments were not raised below, but jurisdictional challenges are "not subject to waiver" and may be addressed at any time. *United States v. Hays*, 515 U.S. 737, 742 (1995).

that Petitioners will suffer the same injury again, for two reasons. First, their claims were mooted by their graduation from high school. Second, this case does not involve a school policy or consistent practice regarding school attire. Rather, it concerns a one-off, fact-specific balancing judgment on the basis of the particular circumstances presented on May 5, 2010.

a. Although Petitioners were students when they filed this case, they have since graduated.

The Petition fails to disclose the fact that Petitioners have already graduated from high school.[3] A party may not seek prospective relief from a challenged practice or decision to which she will never again be subjected. *Camreta v. Greene*, 131 S. Ct. 2020, 2034 (2011). "[I]t is not enough that a dispute was very much alive when suit was filed, or when review was obtained in the Court of Appeals," the claims are moot if Petitioners' injuries are no longer redressable by this Court. *Lewis*, 494 U.S. at 478–79.

Thus, a student's graduation moots a claim for prospective relief regarding actions by school officials. *See*

3. The complaint indicates that Petitioners were freshmen and sophomores in May 2010. 3 ER 249–50. Therefore the students' expected high school graduation dates were in 2012 or 2013. A more recent news article reports that: "In many ways, everyone has moved on. The boys have gone off to college." Howard Mintz, *Free Speech and the American Flag: Lawsuit Over T-Shirt Controversy at Morgan Hill School Lives On*, San Jose Mercury News (Oct. 15, 2013, 11:40 AM), http://www.mercurynews.com/ci_24319738/free-speech-and-american-flag-lawsuit-over-controversial.

DeFunis v. Odegaard, 416 U.S. 312 (1974) (per curiam); *see also Cole v. Oroville Union High Sch. Dist.*, 228 F.3d 1092, 1098 (9th Cir. 2000) ("It is well-settled that once a student graduates, he no longer has a live case or controversy justifying declaratory or injunctive relief against a school's action or policy."). *Defunis* requires dismissal of Petitioners' claims for injunctive and declaratory relief. In *Defunis*, this Court refused to consider the merits of a student's claims because a determination "of the legal issues tendered by the parties [was] no longer necessary to compel" the student's admission to law school. 416 U.S. at 317. A similar principle is applicable here: Petitioners request an injunction that would have no real-world effect.

Petitioners' claims do not qualify for the exception to mootness for claims that are capable of repetition, yet evading review. As this Court has held, "just because this particular case did not reach the Court until the eve of the petitioner's graduation … it hardly follows that the issue he raises will in the future evade review." *DeFunis*, 416 U.S. at 319. In any event, that exception applies only where the challenged action is "in its duration too short to be fully litigated prior to its cessation or expiration," and where there is a "reasonable expectation that the *same complaining party* would be subjected to the *same action* again." *Lewis*, 494 U.S. at 481 (citations omitted) (emphases added). Petitioners do not qualify for the exception because the issue cannot repeat involving them. Petitioners' claims for prospective relief expired in an Article III sense when they left high school.

b. There is no prospect that the same events will recur at the school.

Even aside from their graduation, Petitioners cannot meet their burden of showing future injury because of the one-off nature of their alleged injuries. Litigants cannot receive prospective relief merely by relying on the fact of past injury. Instead, to receive declaratory and injunctive relief, petitioners must show a "real and immediate threat" that they will again be subject to the First Amendment violation they assert. *City of Los Angeles v. Lyons*, 461 U.S. 95, 105 (1983).

Petitioners have not met, and cannot meet, this burden. The most Petitioners could show is that they were injured in the *past*. However, just as Lyons could not show that he "would have another encounter with the police" to justify prospective relief against chokeholds, *Lyons*, 461 U.S. at 105–06, Petitioners cannot show that they will have another encounter with the school administration, let alone that any such encounter would have the same fact-specific result.

Neither Boden nor Rodriguez relied upon any school or district policy about the flag or flag-themed clothing. 2 ER 190, 213; 3 ER 236. In other words, this case is not *Tinker*, where the school had a policy specifically targeting armbands. *See Tinker*, 393 U.S. at 504 (principals "met and adopted a policy that any 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.").

Boden's decision that day relied on specific information he received about the possibility of school disruption. That information was only relevant within the context of that specific day of the school year in the specific context of the recent history of disruptions from inter-student racial tension at that particular school. Informed by particular "warnings of violence" that he received and the near-violent altercation that had erupted during the previous year's Cinco de Mayo celebration, Boden made a tailored decision that, for that day only, students would be asked not to wear certain kinds of American flag apparel. Pet. App. 27–28.

There is no possibility, let alone a "real and immediate threat," that Petitioners will ever again find themselves in those circumstances. As a result, Petitioners lack standing to seek prospective relief.

2. Petitioners cannot succeed in their suit against Rodriguez in his individual capacity.

Because prospective relief is barred by standing and mootness, Petitioners' only remaining claim is against Rodriguez in his individual capacity. This claim alone cannot sustain a live controversy in this case because Rodriguez did not commit the acts that gave rise to Petitioners' complaint, and in any event he enjoys qualified immunity from suit.

a. Petitioners lack standing to sue Rodriguez in his individual capacity for actions that he did not commit.

Petitioners do not have Article III standing for their nominal damages claim against Rodriguez because he did not cause their injuries. Standing requires show "a causal connection between the injury and the conduct complained of." *Lujan*, 504 U.S. at 560. "[A] federal court [may] act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court." *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41–42 (1976).

Here, Petitioners' alleged injury resulted from the decisions of Principal Boden, who is not before this Court. As the Ninth Circuit recognized, "Boden directed Rodriguez to have the students either turn their shirts inside out of take them off." Pet. App. 23. Boden also made the decision that two students whose shirts contained less prominent American flag images could return to class. *Id.* at 23–24. Boden remained in charge throughout. *See* 3 ER 311 ("On May 5, 2010, I [Principal Boden] was the sole decision maker, and I directed the conduct of Assistant Principal Rodriguez regarding what action to take with respect to the student plaintiffs."). Rodriguez did not have responsibility for the actions being challenged and thus cannot be subjected to suit in federal court in his individual capacity.

The fact that the principal and the school district are not before this Court has obvious vehicle implications for this case, entirely apart from Article III. This case would

be a poor vehicle to review the question presented because Rodriguez's actions are only a small subset of the relevant events. The Court should not grant certiorari to review the reasonableness of a one-off decision made by a junior school administrator who was not the primary decision-maker on the day in question.

b. In any event, Rodriguez enjoys qualified immunity against any damages claim.

Qualified immunity bars Petitioners from obtaining even nominal damages from Rodriguez. Qualified immunity shields federal and state officials from personal liability unless the official violated "clearly established statutory or constitutional rights . . . ." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). This Court has made clear that personal-capacity damage claims should only rarely defeat qualified immunity. A violation of a clearly established right occurs when "*every* 'reasonable official would have understood that what he is doing violates that right.'" *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2083 (2011) (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)) (emphasis added). This standard is meant to protect "all but the plainly incompetent" officials. *Id.* at 2085 (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)). The issue was briefed below, but the Ninth Circuit did not reach the issue.

Rodriguez's strong immunity defense counsels against granting review. The District Court and a panel of three Ninth Circuit judges found no constitutional violation, and the Ninth Circuit en banc declined to rehear the case. Hence, this case does not concern a violation of a *clearly established* constitutional right. While no court below ruled on immunity, it was extensively briefed in both the

District Court and Court of Appeals. This Court should not grant certiorari to expend "scarce judicial resources on difficult questions that have no effect on the outcome of the case." *Pearson v. Callahan*, 555 U.S. 223, 236–37 (2009) (holding courts have discretion to rule on immunity before reaching the constitutional claim). Any merits holding by this Court would be at serious risk of being an advisory opinion.

3. Even if Petitioners could maintain a claim for nominal damages, their interest would be insufficient to justify this Court's review.

Even if Petitioners' claim against Rodriguez for nominal damages survived his standing and qualified immunity defenses, it would be too thin a reed to support their constitutional challenge. To warrant review of a constitutional question on a damages claim, the potential for recovery must not be "so insubstantial" that a favorable ruling will in all likelihood leave the plaintiff with only nominal damages. *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 8–9 (1978). Petitioners' claims are insubstantial for two reasons.

First, Petitioners' claim essentially amounts to a few nominal dollars. "[A]n individual controversy is rendered moot, in the strict Art. III sense, by payment and satisfaction" of a judgment, settlement, or other arrangement that provides petitioner with the relief sought. *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 400 (1980). A case that could be so easily mooted is not one to which this Court should devote its scarce certiorari resources.

Second, the practical realities of emotional and financial investment do not justify allowing Petitioners to continue litigating a case they have already lost at the district and circuit levels. An interest "in attorney's fees is, of course, insufficient to create an Article III case or controversy," and the Court should be wary of permitting constitutional litigation to proceed when a party's motivation is "to obtain reimbursement of sunk costs." *Lewis*, 494 U.S. at 480. Similarly, "[e]motional involvement in a lawsuit is not enough to meet the case-or-controversy requirement; were the rule otherwise, few cases could ever become moot." *Ashcroft v. Mattis*, 431 U.S. 171, 173 (1977). This case should not continue simply because inertia and legally irrelevant considerations keep it in motion.

The cumulative weight of the vehicle problems in this case further demonstrates that a grant of certiorari would be imprudent.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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