NO. 11-17858

UNITED STATES COURT OF APPEALS
FOR THE
NINTH CIRCUIT

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

Plaintiffs-Appellants,

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,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
HONORABLE JAMES WARE
Case No. CV10-02745 JW

BRIEF *AMICI CURIAE* OF MEMBERS OF CONGRESS, THE AMERICAN CENTER FOR LAW AND JUSTICE, AND THE COMMITTEE TO PROTECT THE AMERICAN FLAG IN SUPPORT OF PETITION FOR REHEARING

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Amicus, the American Center for Law and Justice, by and through its undersigned counsel, hereby certifies that it has no parent corporation and that no publicly held corporation owns 10% or more of its stock.

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT i

TABLE OF AUTHORITIES iii

INTEREST OF AMICI 1

ARGUMENT 3

REHEARING IS NECESSARY TO ADDRESS AN EXCEPTIONALLY IMPORTANT ISSUE REGARDING THE CONSTITUTIONAL LIMITATIONS ON THE AUTHORITY OF SCHOOL OFFICIALS TO RESTRICT STUDENT SPEECH 3

CONCLUSION 10

TABLE OF AUTHORITIES

CASES

Bethel Sch. Dist. v. Fraser, 478 U.S. 675 (1986) 3

Ctr. for Bio-Ethical Reform, Inc. v. Los Angeles Cnty. Sheriff Dep't, 533 F.3d 780 (9th Cir. 2008) 9

Dariano v. Morgan Hill Unified Sch. Dist., 2014 U.S. App. LEXIS 3790 (9th Cir. Feb. 27, 2014) 3-4

Forsyth Cnty. v. Nationalist Movement, 505 U.S. 123 (1992) 9

Harper v. Poway Unified Sch. Dist., 445 F.3d 1166 (9th Cir. 2006), *judgment vacated on other grounds sub nom. Harper ex rel. Harper v. Poway Unified Sch. Dist.*, 549 U.S. 1262 (2007) 6

Holloman v. Harland, 370 F.3d 1252 (11th Cir. 2004)..... 10-11, 12

Keyishian v. Board of Regents, 385 U.S. 589 (1967).....7, 8

Lavine v. Blaine Sch. Dist., 257 F.3d 981 (9th Cir. 2001).....3

Pleasant Grove City v. Summum, 555 U.S. 460 (2009) 1

Scott v. Sch. Bd. of Alachua Cnty., 324 F.3d 1246 (11th Cir. 2003) 6

Shelton v. Tucker, 364 U.S. 479 (1960).....7

Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969) .....*passim*

West v. Derby Unified Sch. Dist. No. 260, 206 F.3d 1358 (10th Cir. 2000) 6

Zamecnik v. Indian Prairie Sch. Dist. # 204, 636 F.3d 874 (7th Cir. 2011) 11

INTEREST OF AMICI[1]

Amici, Members of Congress Steven Palazzo, Rob Bishop, Jim Bridenstine, Jeff Duncan, Blake Farenthold, Bill Flores, Randy Forbes, Trent Franks, Phil Gingery, Tim Huelskamp, Mike Kelly, Steve King, Jack Kingston, Doug LaMalfa, Cynthia Lummis, Jeff Miller, Joe Pitts, Scott Tipton, Randy Weber, and Lynn Westmoreland, are currently serving in the One Hundred Thirteenth Congress.

Amicus, the American Center for Law and Justice (ACLJ) is an organization dedicated to the defense of constitutional liberties secured by law. ACLJ attorneys have argued numerous cases before the Supreme Court of the United States and participated as amicus curiae in a number of significant cases involving the Free Speech Clause of the First Amendment, including, most notably, *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009).

This brief is also filed on behalf of the ACLJ's Committee to Protect the American Flag, which consists of more than 84,000 Americans who seek to preserve the right of citizens of this nation, including public school students, to express themselves through peaceful, patriotic displays of the American flag.

[1] No party's counsel in this case authored this brief in whole or in part. No party or party's counsel contributed any money intended to fund preparing or submitting this brief. No person, other than *amici*, their members, or their counsel contributed money that was intended to fund preparing or submitting this brief. Because all parties did not consent to the filing of this brief, *amici* have filed this brief along with a motion for leave to file, pursuant to Fed. R. App. P. 29(a).

Amici have dedicated time and effort to defending and protecting Americans' First Amendment freedoms. Their commitment to the integrity of the United States Constitution and Bill of Rights compels them to support the petition for rehearing because the panel's decision, if allowed to stand, would establish dangerous and disturbing precedent that directly threatens the ongoing viability of public schools as "peculiarly the marketplace of ideas" in which students are encouraged to engage in wide open, robust debate.

In the public school context, while school officials possess authority to prevent substantial disruption of their school's functions, that authority has its constitutional limits. This case, in fact, precisely demonstrates why schools cannot escape constitutional scrutiny even in the face of substantial disruption. The school officials' actions in this case represent a perfect storm of unconstitutional action—by empowering a heckler's veto through the use of viewpoint discrimination.

School officials should not be permitted to single out and silence one side of a debate, while permitting the other side's expression to continue without restriction, solely because the latter group of speakers threatened violence in reaction to the speech of the former. Such a decision empowers violence, incentivizes further disruption, and targets disfavored speech for punishment.

This Court should grant the petition for rehearing to address the exceptionally important question of the means by which public school officials are

constitutionally permitted to restrict speech in their efforts to prevent material disruption within their schools.

ARGUMENT

REHEARING IS NECESSARY TO ADDRESS AN EXCEPTIONALLY IMPORTANT ISSUE REGARDING THE CONSTITUTIONAL LIMITATIONS ON THE AUTHORITY OF SCHOOL OFFICIALS TO RESTRICT STUDENT SPEECH.

"School officials do not possess absolute authority over their students," and they "cannot suppress expressions of feelings with which they do not wish to contend." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969) (quotation omitted). While "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings," *Bethel School District v. Fraser*, 478 U.S. 675, 682 (1986), this Court has recognized that "deference [to the decisions of school authorities] does not mean abdication; there are situations where school officials overstep their bounds and violate the Constitution." *Lavine v. Blaine Sch. Dist.*, 257 F.3d 981, 988 (9th Cir. 2001). This case presents precisely such a situation.

As the panel decision notes, on May 5, 2009, and again on May 5, 2010, a group of students at Live Oak High School ("Live Oak") engaged in expression on the school campus demonstrating their Mexican heritage. For example, they "walk[ed] around with the Mexican flag," *Dariano v. Morgan Hill Unified School District*, 2014 U.S. App. LEXIS 3790, *4 (9th Cir. Feb. 27, 2014), and wore "the

colors of the Mexican flag." *Id.* at *15. Other students, expressing their American patriotism, "hung a makeshift American flag," *id.* at *4, and "wore American flag clothing." *Id.* at *5.

On both occasions, the students demonstrating their Mexican heritage reacted inappropriately to the American patriotic speech: they used "profane language," *id.* at *5; one student "shoved a Mexican flag at [one of the students wearing American flag clothing] and said something in Spanish expressing anger at [the student's] clothing," *id.*; and another student among "a group of Mexican students" expressed "concern[] about a group of students wearing the American flag, and said that 'there might be problems.'" *Id.* at *6.

By contrast, the students expressing patriotism through their displays of the American flag posed no threat of danger. The panel's opinion acknowledges as much, in that school officials did not restrict the patriotic expression of students wearing the colors of the Mexican flag because they did not fear for their safety. *Id.* at *16-17.

Purporting to apply the framework set forth in *Tinker*, the panel upheld as constitutional the 2010 decision by Defendants-Appellees to require students wearing the American flag in too "prominent" of a manner, *id.* at *7, to either turn their clothing inside out or leave school, while leaving entirely unrestricted the

expressive displays of the Mexican flag by the very students who threatened disruption of the school environment.

The panel's decision is not supported by *Tinker*; in fact, it threatens to do precisely what the *Tinker* Court warned against: "strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." 393 U.S. at 507.

In *Tinker*, the Supreme Court acknowledged the authority of public school officials to restrict students' First Amendment freedoms when "necessary to avoid material and substantial interference with schoolwork or discipline." *Id.* at 511. While the Supreme Court has held that evidence of such necessity could potentially support a viewpoint-based speech restriction, *i.e.*, "the prohibition of expression of one particular opinion," *id.*, the facts presented in this case are markedly different from those in *Tinker* and its progeny in three constitutionally significant ways. These important distinctions require a different outcome from the one reached by the panel.

First, the viewpoint of the student petitioners here—American patriotism expressed through the display of the American flag—is not inherently abusive or discriminatory. The school speech cases on which the panel decision relies, and in which courts have applied *Tinker* so as to permit school officials to impose viewpoint-based speech restrictions, involved expression that was, by its very

nature, considered abusive, inflammatory, explosive, or intrusive into the rights of others. For example, in *Harper v. Poway Unified School District*, this Court upheld as constitutional a decision by school officials to prohibit a student from wearing a T-shirt bearing a written message that "condemn[ed] and denigrate[d] other students on the basis of their sexual orientation." 445 F.3d 1166, 1170 (9th Cir. 2006), *judgment vacated on other grounds sub nom. Harper ex rel. Harper v. Poway Unified Sch. Dist.*, 549 U.S. 1262 (2007). The very nature of the message expressed on the student's clothing, this Court explained, "'collide[d] with the rights of other students' in the most fundamental way," *id.* at 1178 (quoting *Tinker*, 393 U.S. at 508), because it constituted a "verbal assault[] on the basis of a core identifying characteristic," from which students "have a right to be free . . . while on school campuses." *Id.*

Similarly, in *Scott v. School Board of Alachua County*, the Eleventh Circuit held that school officials acted within constitutional bounds when they prohibited students from displaying the Confederate flag on school grounds because it is a symbol closely linked to the institution of slavery, is for many "innately offensive," and is commonly "associated with racial prejudice." 324 F.3d 1246, 1248-49 (11th Cir. 2003); *see also West v. Derby Unified Sch. Dist. No. 260*, 206 F.3d 1358, 1366-67 (10th Cir. 2000) (upholding application of school district policy prohibiting students from "wearing or possession of items depicting or

implying *racial hatred or prejudice*" to student's drawing of a Confederate flag) (emphasis added).

Unlike the messages and symbols at issue in the foregoing cases, the symbol at issue here is one that, perhaps more than any other, is associated with the notions of freedom, liberty, honor, and valor and is regularly displayed as an expression of pride in the greatness of this nation. If nowhere else, at least in this country's public institutions, and perhaps especially those of education, the American flag is a symbol to be revered and respected by government officials, not treated as offensive, abusive, or intruding upon the rights of others.

Second, the display of the American flag by the student petitioners was part of a debate among students in which school officials chose to silence one viewpoint while approving continued expression of a counter viewpoint. In discussing the "vital" need for "vigilant protection of constitutional freedoms . . . in the community of American schools," *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967) (quoting *Shelton v. Tucker*, 364 U.S. 479, 487 (1960)), the Supreme Court has recognized public schools as "peculiarly the 'marketplace of ideas,'" in which future leaders are to be "trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, [rather] than through any kind of authoritative selection." *Id.* (internal quotations omitted). To ensure preservation of this type of open and meaningful exchange, school officials

are expressly forbidden to "confine[]" students "to the expression of those sentiments that are officially approved." *Tinker*, 393 U.S. at 511.

Thus, while it may be constitutionally permissible for school officials to silence expression of a single viewpoint that they reasonably anticipate will "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school," *id.* at 509 (quotations omitted), it is an entirely separate matter—and one that is highly constitutionally suspect—for them to simultaneously permit, entirely unrestricted, expression of a counter viewpoint on precisely the same issue, indeed, the very viewpoint to which the restricted speech was intended as a direct response. Such an approach exhibits, intentionally or not, official support for and favoritism toward one side of a debate among student groups and threatens to severely undermine the basic protections afforded by the First Amendment, "which does not tolerate [governmental rules] that cast a pall of orthodoxy over the [school campus]." *Keyishian*, 385 U.S. at 603.

Finally, and perhaps the most unsettling of the unique facts presented here, Defendants-Appellees' decision to silence displays of the American flag resulted from complaints and threats of violence issued by the very students who were then rewarded by being permitted to continue expressing their own patriotic sentiments. Such a decision constitutes the patent sanctioning of the most insidious kind of heckler's veto, in which the heckler not only succeeds in silencing expression he

finds objectionable but also gains the privilege of disseminating, without restriction, his own counter viewpoint.

As this Court has explained, the term "heckler's veto" is used to "describe restrictions on speech that stem from listeners' negative reactions to a particular message." *Ctr. for Bio-Ethical Reform, Inc. v. Los Angeles County Sheriff Dep't*, 533 F.3d 780, 788 (9th Cir. 2008). Such restrictions are blatant violations of the First Amendment principle that "[s]peech cannot . . . be punished or banned, simply because it might offend a hostile mob." *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 134-135 (1992).

Even in the public school context, where administrators possess greater authority to restrict student expression, the Supreme Court has rejected the implementation of the heckler's veto:

> 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.

Tinker, 393 U.S. at 508-09 (internal citation omitted). Thus, when the *Tinker* Court spoke of school officials restricting student speech in order to avoid disruption and maintain proper discipline, for example in the face of threats of violence, it spoke approvingly of such restrictions in the event of "disorder or disturbance *on the part*

of [the students whose speech was to be restricted]," 393 U.S. at 508 (emphasis added), not a disruption occasioned by students whose very aim was to express their own viewpoint while succeeding in having an opposing viewpoint silenced.

Other circuits, heeding the *Tinker* Court's guidance, have acknowledged the impropriety of silencing student speakers on the basis of negative, even hostile, reactions from other students. In *Holloman v. Harland*, 370 F.3d 1252 (11th Cir. 2004), the court addressed the decision by school officials to punish a student who, during recitation of the Pledge of Allegiance, stood and silently raised a fist into the air in protest of punishment received by a fellow classmate for his refusal to recite the Pledge. *Id.* at 1260-61. The school officials defended the punishment, in part, on the grounds that "other students were disturbed by his demonstration." *Id.* at 1274. While reaffirming "the right of public educational institutions 'to adopt and enforce reasonable, non-discriminatory regulations as to the time, place and manner of student expressions and demonstrations,'" *id.* at 1271, and even acknowledging that "the same constitutional standards do not always apply in public schools as on public streets," *id.* at 1276, the court had no difficulty recognizing the officials' suppression of the student's protected speech on these grounds as fundamentally—and constitutionally—flawed.

"Allowing a school to curtail a student's freedom of expression based on such factors," the court explained, "turns reason on its head." *Id.* at 1275. Logic, and

more importantly, fundamental notions of what is just and right, recoil at such decisions. As the *Holloman* Court noted,

> If certain bullies are likely to act violently when a student [engages in protected expression], it is unquestionably easy for a principal to preclude the outburst by preventing the student from [speaking]. To do so, however, is to sacrifice freedom upon the alter [sic] of order, and allow the scope of our liberty to be dictated by the inclinations of the unlawful mob. . . . If bullies disrupted classes and beat up a student because he wasn't wearing fancy enough clothes, the proper solution would not be to force the student to wear Abercrombie & Fitch or J. Crew attire, but to protect the student and punish the bullies. . . . The same analysis applies to a student with long hair, who is doing nothing that the reasonable person would conclude is objectively wrong or directly offensive to anyone. The fact that other students might take such a hairstyle as an incitement to violence is an indictment of those other students, not long hair.

Id.; *see also Zamecnik v. Indian Prairie Sch. Dist. # 204*, 636 F.3d 874, 879 (7th Cir. 2011) ("Statements that while not fighting words are met by violence or threats or other unprivileged retaliatory conduct by persons offended by them cannot lawfully be suppressed because of that conduct. Otherwise free speech could be stifled by the speaker's opponents' mounting a riot, even though, because the speech had contained no fighting words, no reasonable person would have been moved to a riotous response.").

The prohibition against a heckler's veto set forth in *Tinker* and applied in *Holloman* operates with even greater force in a situation where, as here, protected student speech is met with threats of violence from other students who wish not only to squelch that particular expression but also to simultaneously disseminate a

differing viewpoint on the same issue. While there were undoubtedly a variety of means by which Defendants-Appellees could have handled the situation with which they were presented—even, perhaps, avenues that included some level of restriction on the display of the American flag (*e.g.*, imposition of a uniform policy applicable to all students)—the decision to (1) treat the patriotic expression of displaying the American flag as an offensive and abusive point of view; (2) ban that constitutionally protected expression based solely on threats of disruption issued by other students; and then (3) *privilege the countervailing viewpoint of the potential aggressors* by permitting it to continue unrestricted, was not within the range of constitutionally permissible options.

Whatever the appropriate measure of deference due the decisions of school administrators, "we cannot afford students less constitutional protection simply because their peers might illegally express disagreement through violence instead of reason." *Holloman*, 370 F.3d at 1276. "Principals have the duty to maintain order in public schools, but they may not do so while turning a blind eye to basic notions of right and wrong." *Id.* Because the speech restriction imposed by Defendants-Appellees, and upheld by the panel, was not only plainly wrong, but directly threatens to reduce the freedom of speech on public school campuses to "a right . . . so circumscribed that it exists in principle but not in fact," *Tinker*, 393 U.S. at 513, this Court should grant the petition for rehearing.

CONCLUSION

Because of the need to address an exceptionally important question regarding the means by which public school officials may constitutionally restrict protected student speech, this Court should grant the petition for rehearing.

Dated: March 23, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on March 23, 2014. All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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