_____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2011

CAUSE NO. 10-9101

MICHAEL FERNANDO,

Petitioner,

v.

MURANO UNIFIED SCHOOL DISTRICT,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES

COURT OF APPEALS FOR THE FIFTIETH CIRCUIT

BRIEF FOR RESPONDENT

TAYLOR A. PACK ELLIS
COUNSEL FOR RESPONDENT

QUESTIONS PRESENTED

I. Whether student speech outside the school setting is governed by *Tinker v. Des Moines Independent Community School District*, 393 U.S. 504 (1969).

II. If so, whether application of the *Tinker* standard and its progeny allow Petitioner‘s speech to be regulated by Respondent, the Murano School District.

TABLE OF CONTENTS

TABLE OF AUTHORITIES CITED

CONSTITUTION

CASES

_____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2011

CAUSE NO. 10-9101

MICHAEL FERNANDO,

Petitioner,

v.

MURANO UNIFIED SCHOOL DISTRICT,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES

COURT OF APPEALS FOR THE FIFTIETH CIRCUIT

BRIEF FOR RESPONDENT

OPINIONS BELOW

The opinions of the District and Appeals Courts
have not been reported. The opinions appear in the record.

STATEMENT OF JURISDICTION

The court of appeals entered judgment on September 30, 2010. (R. at 20). Petitioner filed his petition for writ of certiorari on December 30, 2010. (R. at 21). This Court granted the petition on June 7, 2011. (R. at 22). This Court's jurisdiction rests on 28 U.S.C. § 1254(1) (2000). A district court's fact findings and the reasonable inferences to be drawn from them are reviewed for clear error. Its legal conclusions are reviewed *de novo*.

STATEMENT OF FACTS

On September 14, 2009 Murano I High School ("Murano") requested the removal of offensive content regarding school authorities from a Facebook group page created by Michael Fernando ("Fernando") a few weeks prior. (R. at 6-7, 15). When Fernando refused, Murano resorted to one of the few disciplinary measures available and suspend Fernando until he removed such content from the group page. (R. at 12). The suspension was in direct reaction to the considerable disturbance the webpage cause at the school. (R. at 12).

Fernando created the group page, called "Murano is Anti-Gay", on his personal computer during out-of-school hours. (R. at 3). He claimed he created the page to express his opinion about Murano Unified School District's ("District") hiring decisions and to provide a forum for other students to share their opinions. (R. at 6). The Facebook group page quickly became popular among Murano students; the entire senior class joined the group and as well as students from the lower grades. (R. at 6). Student members posted various comments, photographs, links and drawings to the group page. (R. at 4, 6, 12, 15). Some of the most offensive content was posted by Fernando, which depicted school teachers and administrators in sexually explicit drawings. (R. at 15). Although Fernando claims to have not intended the drawing to be shown at the campus and did not know who brought it to the school, the drawing did manifest on the school campus. (R. at 6).

School authorities found Fernando's offensive digital printout in a school classroom. (R. at 6). This printout had been passed around during class and caused students to stop paying attention to their lessons. (R. at 15). Students frequently referenced the posted drawings, comments, and links during class; and as a result, teachers reported having greater difficulty with maintaining control in their classrooms. (R. at 12). Subsequent investigation also revealed that

students frequently accessed Facebook on school computers, personal laptops, and mobile phones while they were in school. (R. at 2). Murano subsequently instituted website blocking software on school computers to minimize access to Facebook from the school campus. (R. at 10). Additionally, many students and parents complained to the school regarding the website's increasingly offensive and sexually explicit content. (R. at 2, 15). Some parents even threatened to remove their children from Murano because of the problems the group page has caused. (R. at 14).

Teachers and administrators continued to be offended and ridiculed by their students for over a month, which inevitably affected instruction. (R. at 14). Students were constantly distracted by Fernando's inappropriate posts and some students banded together to oppose any and all disciplinary measures imposed by Murano. (R. at 14). As the district court found, Fernando's student expression had a serious disruptive effect on the school environment, affecting teachers, administrators, students, and the community at large (R. at 17).

On October 17, 2009, Petitioner, Fernando, filed a motion for preliminary injunction to enjoin the District from continuing his suspension with the District Court for the Southern District of Lovelystate. (R. at 6, 11). In denying Petitioner's motion, the court held that the school speech cases, specifically *Tinker v. Des Moines Independent Community School District*, applied to both on-campus and off-campus student expression because the relevant question is the effect on the school, not the location of the speech. (R. at 16-17). Applying the test from *Tinker*, the court found evidence of serious disruption of the school environment. (R. at 17). The Court of Appeals for the Fiftieth Circuit affirmed what it called the "thorough and well-reasoned opinion of the court below." (R. at 20). On December 30, 2010, Fernando filed a Writ of Certiorari to the United States Supreme Court which was granted. (R. at 21, 22).

SUMMARY OF ARGUMENT

I.

This Court has interpreted the First Amendment guarantee of free speech to provide for regulation in certain circumstances. Speech related to the school setting is certainly one of the circumstances. The rights of students to speak freely must be balanced against society's interest in education and socially appropriate behavior.

Schools may regulate student speech in spite of its original creation off-campus, when the speech has a sufficient nexus to the school. The essence of the issue is the effect the speech has on the school, not the location where it took place. The requisite nexus may be forged when the student's speech was carried onto campus by the student himself or by a fellow classmate, was accessed at the school by the student or other students, or if it was directed at persons in school and/or acted on by them.

Fernando's conduct clearly created the required nexus to the school campus to support regulation pursuant to the Tinker standard. His expression was physically manifested on the school's campus through a digital printout and through students accessing the site at school and on school computers. This literally brought the speech on-campus and forged the required nexus. Additionally, Fernando's speech was directed at the school and its student body which also establishes the required nexus. Thus, a sufficient nexus between Fernando's speech and the school existed to allow for its regulation as school speech.

II.

The Murano Unified School District was justified in regulating Fernando's speech pursuant to *Tinker* and its progeny because it created a substantial disruption at the school and contained lewd and vulgar content. *Tinker's* requirement of a substantial disruption is satisfied

when school authorities demonstrate the behavior actually caused material disruption of classwork, substantial disorder, invasion of the rights of others, or that it was reasonably foreseeable that the behavior would cause such results.

Fernando's speech clearly caused a substantial disruption at the school. His expression caused classroom disruption by increasing teacher's difficulty with discipline and instruction during class time. School disorder was evident through the adverse effects on all elements of the school community; students, teachers and parents were very upset, school officials were kept from their other necessary functions, and additional school resources were required to address access to the speech at school. The weight of this evidence only further supported by the fact that such disruption need only be reasonably foreseeable by school officials. Thus, Murano had the authority to regulate Fernando's speech.

Fernando's speech may also be regulated pursuant to *Tinker's* progeny, specifically under the lewd and vulgar exception to First Amendment rights at the school. Following *Tinker*, this Court held that a school need not tolerate a student's nominating speech given in front of a school audience that contained sexually offensive innuendo. Thus, school authorities have the ability to regulate and punish lewd and vulgar speech because it is inappropriate for the school setting. Since Fernando's speech is sufficiently tied to the school it may be appropriately regulated under this standard because it included sexually explicit content.

ARGUMENT

I. STUDENT SPEECH WHICH ORIGINATED OUTSIDE THE SCHOOL SETTING IS PROPERLY GOVERNED BY *TINKER* WHEN THAT SPEECH HAS A SUFFICIENT NEXUS TO THE SCHOOL.

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 Constitution provides that Congress shall not abridge the right to free speech. U.S. Const. amend. I. However, this Court has interpreted this First Amendment right to permit reasonable regulation of speech in certain circumstances. *Tinker v. Des Moines Independent Community School District*, 393 U.S. 504, 513 (1969). The freedom to express unpopular and controversial viewpoints must be balanced against society's interest in teaching students the boundaries of socially appropriate behavior. *Fraser*, 478 U.S. at 681. Importantly, schools have the comprehensive authority to prescribe and control conduct in the schools, within constitutional limits. *Tinker*, 393 U.S. at 507. This authority extends to student conduct in and out of the classroom. *Id.* at 513.

Specifically, student speech originating off-campus is properly governed by the *Tinker* standard when it has created a sufficient nexus with the school. *E.g.*, *Kowalski v. Berkeley Cnty. Schs.*, 652 F.3d 565, 573 (4th Cir. 2011), *cert. denied*, 80 U.S.L.W. 3247 (U.S. Jan. 17, 2012) (No. 11–461) (finding a sufficient nexus existed between student's website created off-campus and the school's pedagogical concerns); *Boucher v. Sch. Bd. of the Sch. Dist. of Greenfield*, 134 F.3d 821, 829 (7th Cir. 1998) (finding a sufficient nexus existed between the student's article created off-campus and the school when it was distributed on-campus by another student); *J.S. ex rel. H.S. v. Bethlehem Area Sch. Dist*., 807 A.2d 847, 865 (Pa. 2002) (finding a sufficient nexus existed between student's website and school campus to consider the speech as occurring on-campus). *But see, J.S. ex rel. Snyder v. Blue Mountain Sch. Dist*., 650 F.3d 915, 926 (3d Cir. 2011) (en banc), *cert. denied*, 80 U.S.L.W. 3266 (U.S. Jan. 17, 2012) (No. 11-502) (assuming without deciding that the *Tinker* test applies to website speech harassing a school administrator).

The heart of the issue is the effect that speech has on the school, not the metaphysical location of that speech. *Kowalski*, 652 F.3d at 573. Courts must decide if the student's speech

interfered with the school's legitimate interest in maintaining order in the school and protecting the well-being and educational rights of its students. *Id*. at 572. This notion supports extension of school authority over off-campus speech when that speech affects the school. *See Id*. at 573.

The required nexus may be forged when the student's speech reaches the school in a meaningful way. *Kowalski*, 652 F.3d at 574. This may occur when the speech is carried onto campus by the student himself or by a fellow classmate. *Boucher*, 134 F.3d at 829. Internet speech may reach the school when the student who created the speech or other students access the website while on the school's campus. *Beussink v. Woodland R-IV Sch. Dist*., 30 F. Supp. 2d 1175, 1180 (E.D. Mo. 1998). *See also Bethlehem*, 807 A.2d at 865 (finding the student facilitated the on-campus nature of the speech by accessing the website on a school computer in a classroom and showing it to other students). However, the temporal relation of the speech to the school may be too attenuated to provide for regulation. *Porter v. Ascension Parish Sch. Bd*., 393 F.3d 608, 615 (5th Cir. 2004), *cert. denied*, 544 U.S. 1062 (2005) (finding a student drawing created two years prior to its being brought to campus did not create the necessary nexus because it was too removed from the school in time).

Additionally, a court could allow regulation of off-campus speech if it determined the speech was directed at, received by, and/or acted upon by persons in the school. *Kowalski*, 652 F.3d. at 573. Especially significant are facts tending to show that the speech was targeted at the school, its students, or its personnel, making it inevitable that the speech would reach the school grounds. *See e.g.*, *Doninger v. Niehoff*, 642 F.3d 334, 348 (2d Cir. 2011), *cert. denied*, 80 U.S.L.W. 3065 (U.S. Oct. 31, 2011) (No. 11-113) (allowing regulation of student speech where the student's blog post directly pertained to a school event and encouraged other students to contact the school administration); *Wisniewski v. Bd. of Educ. of the Weedsport Cent. Sch. Dist*.,

494 F.3d 34, 39-40 (2d Cir. 2007), *cert. denied*, 552 U.S. 296 (2008) (finding it foreseeable that student's off-campus IM would come to the school when the targeted audience comprised fellow students); *Bethlehem*, 807 A.2d at 865 (finding the student website was aimed at the specific audience of other students and school district community members, which brought it within the school's authority to regulate).

Applying the school speech jurisprudence, Fernando's expression clearly created the required nexus to the school campus to be regulated pursuant to the *Tinker* standard. *See Tinker*, 393 U.S. at 513. The physical manifestation of Fernando's speech on-campus created a sufficient nexus with the school. *See Boucher*, 134 F.3d at 829. Even though Fernando did not bring the printout to the school himself, its physical presence at the school supports creation of the required nexus. *See Id.* Furthermore, students had access and did access the webpage from the school campus. Such actions clearly brought the speech onto the school's campus and established the nexus between the speech and the school. *See Beussink*, 30 F. Supp. 2d at 1180. There is no implication that the span of time between Fernando's creation of the speech and its manifestation on-campus was too attenuated to allow for regulation, as only two weeks had passed. *See Porter*, 393 F.3d at 615.

In addition, Fernando's speech was directed at the school, the school administration, and the school's students, thus making it on-campus speech. *See Doninger*, 642 F.3d at 348. All members of the page were other Murano students. The topic of the page was regarding the school's hiring practices and displeasure with school administrators and teachers. Given that the audience compromised students and that the topic of the page was the school district, it was reasonably foreseeable that a student would bring the speech to the school's campus. *See*

Kowalski, 652 F.3d at 573. It was also reasonably foreseeable that it would come to the attention of school authorities. *Wisniewski*, 494 F.3d at 39-40.

Thus, the District was justified in regulating Fernando's off-campus speech pursuant to *Tinker* because it established a sufficient nexus to the school to be considered on-campus speech. *See Tinker*, 393 U.S. at 513.

II. THE MURANO UNIFIED SCHOOL DISTRICT WAS JUSTIFIED IN REGULATING FERNANDO'S SPEECH PURSUANT TO *TINKER* AND ITS PROGENY BECAUSE IT CREATED A SUBSTANTIAL DISRUPTION AT THE SCHOOL AND INCLUDED LEWD AND VULGAR CONTENT.

A. *Tinker's* requirement of a substantial disruption is satisfied when school authorities demonstrate the behavior actually caused material disruption of classwork, substantial disorder, invasion of the rights of others, or that it was reasonably foreseeable that the behavior would cause such results.

The standard set forth in *Tinker* requires that the student's speech materially and substantially interferes with the requirements of appropriate discipline in the operation of the school. *Tinker v. Des Moines Independent Community School District*, 393 U.S. 504, 509 (1969). This Court defines this requirement satisfied by conduct which materially disrupts classwork, involves substantial disorder, or invades the rights of others. *Id.* at 513. An undifferentiated fear of disturbance is not enough to warrant interference with freedom of expression. *Id.* at 509. However, if the school can reasonably forecast the speech to be substantially disruptive or to create material interference with school activities, it would be justified in regulating such speech. *Id.* at 514. This Court also holds that in order to justify regulation of speech, the school must also show it was more than a mere desire to avoid the discomfort and unpleasantness that generally accompanies an unpopular viewpoint. *Id.* at 509. *See also Beussink v. Woodland R-IV Sch. Dist.*, 30 F. Supp. 2d 1175, 1180 (E.D. Mo. 1998) (holding the speech protected where the principal immediately decided to suspend the student

upon seeing speech he characterized as upsetting instead of acting upon any actual or reasonable fear of substantial disruption).

The speech in *Tinker* involved students wearing black arm bands to school in protest of the United States participation in the Vietnam War. *Tinker*, 393 U.S. at 504. There was no indication from the record that the work of the school or any class was disrupted due to this expression. *Id.* at 508. There were a few students who made hostile remarks to the students wearing arm bands but there were no threats of violence on the school campus. *Id.* This Court concluded that the school appeared to regulate this speech because it wished to avoid controversy regarding the Vietnam War. *Id.* at 510. All together there was insufficient evidence that a substantial disruption occurred at the school to justify the school's regulation of Tinker's speech. *Id.* at 514.

Several courts have illustrated what will constitute a substantial disruption of classwork. Such a disruption could be caused by students passing around, reading, and reacting to another student's speech. *Bystrom v. Fridley High Sch*., 686 F. Supp. 1387, 1392 (D. Minn. 1987), *aff'd.*, 855 F.2d 855 (8th Cir. 1988). This activity could cause a teacher to have diminished control of his or her classroom or would interfere with instruction and study. *C.f. Killion v. Franklin Reg'l Sch. Dist*., 136 F. Supp. 2d 446, 455 (W.D. Pa. 2001) (citing cases of sufficient classroom disruption but finding no evidence that teachers were incapable of teaching or controlling their class). General ramblings in class that only last for a few minutes, when the teacher is able to regain control of the classroom quickly, will not qualify as substantial disruption. *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist*., 650 F.3d 915, 929 (3d Cir. 2011) (en banc), *cert. denied*, 80 U.S.L.W. 3266 (U.S. Jan. 17, 2012) (No. 11-502). The longevity of the effect in the classroom is

significant. *See Bethlehem*, 807 A.2d at 674 (showing a classroom was affected in the long-term when the teacher stopped teaching a class and was replaced by a substitute teacher).

Similarly, other courts have illustrated what will constitute substantial disorder in the school. Creating low student morale, student anxiety, or upsetting students qualifies as a substantial disorder in the school. *J.S. ex rel. H.S. v. Bethlehem Area Sch. Dist*., 807 A.2d 847, 869 (Pa. 2002). Disorder is evident when school authorities encounter serious interference with their required duties. *Doninger v. Niehoff*, 642 F.3d 334, 349 (2d Cir. 2011), *cert. denied*, 80 U.S.L.W. 3065 (U.S. Oct. 31, 2011) (No. 11-113) (student blog post encouraging others to contact school authorities caused a large amount of phone calls and emails to the principal). However, only needing to rearrange schedules to deal with problems surrounding student speech will not interfere with school administrator's required function enough to sustain regulating the student's speech. *Snyder*, 650 F.3d at 929. There is also support for regulating speech when there was evidence that school resources were diverted to address the problems created by the student speech. *Boucher v. Sch. Bd. of the Sch. Dist. of Greenfield*, 134 F.3d 821, 827 (7th Cir. 1998) (where the school's computer administrators had to diagnose system weaknesses and change computer passwords). In its broadest form, substantial disorder not only affects teachers, students, and school officials, but can also affect parents, evident when they contact the school to express great concern for their children's wellbeing and continued instruction as a result of student speech. *Bethlehem*, 807 A.2d at 869.

Disorder is also possible whenever student speech is aimed at harassment and bullying, since it is an essential function of the school to prevent such behavior. *Kowalski v. Berkeley Cnty. Schs.*, 652 F.3d 565, 572 (4th Cir. 2011), *cert. denied*, 80 U.S.L.W. 3247 (U.S. Jan. 17, 2012) (No. 11–461). Moreover, harassing and bulling speech directly collides and interferes

with the rights of others, which is also a *Tinker* criterion for regulation. *Id.* at 547. However, the relevant issue of Fernando's speech and Murano's regulation is the substantial disruption and disorder his speech caused at the school.

All of these illustrations consist of evidence of disruption that has actually occurred on-campus. However, a school need not wait for actual disruption to occur for it to be justified in regulating speech if it is reasonably foreseeable that the speech will cause disruption. *Snyder*, 650 F.3d at 928. A school is justified in controlling speech when it reasonably believes that the speech would cause disruption at the school if left unregulated. *Tinker*, 393 U.S. at 514. The court in *Doninger* found it reasonably foreseeable that substantial disruption would stem from an inciting and misleading blog post regarding a school activity. *Doninger*, 642 F.3d at 349. Another court found it reasonably foreseeable that an IM icon depicting violence against a teacher would cause substantial disruption. *Wisniewski v. Bd. of Educ. of the Weedsport Cent. Sch. Dist.*, 494 F.3d 34, 39–40 (2d Cir. 2007), *cert. denied*, 552 U.S. 296 (2008). Similarly, the *Boucher* court found it reasonably foreseeable that disruption due to possible interference with school computers and networks could be substantial. *Boucher*, 134 F.3d at 827. However, such predictions should not be based on prior similar acts, especially when such prior acts never caused disruption. *Killion*, 136 F. Supp. 2d at 455.

There is ample evidence illustrating the substantial disruption Fernando's speech caused at the school campus. Fernando's expression created substantial interference with classwork. *See Tinker*, 393 U.S. at 513. Teachers had greater difficulty in maintaining control and discipline in their classrooms because students were constantly distracted by talk about the posts from Fernando's webpage; this interfered with instruction and learning. *See Bystrom*, 686 F. Supp. at 392. This effect in the classroom continued to cause problems for a long period of time,

with some Murano teachers continuing to have trouble maintaining classroom decorum. *See Bethlehem*, 807 A.2d at 674

Fernando's speech also caused substantial disorder in the school. *See Tinker*, 393 U.S. at 513. Students have complained to the school regarding the increasingly offensive and vulgar content of the webpage indicating their distress over the speech. *See Bethlehem*, 807 A.2d at 869. School administrators have been pulled away from their work to deal with the influx of complaints over Fernando's webpage and disciplinary problems stemming from it. *See Doninger*, 642 F.3d at 349. Additionally, school resources were diverted to implement computer software to block Facebook access at the school. *See Boucher*, 134 F.3d at 827. And most broadly, parents, encompassing an essential component or the school community, were upset and concerned over the effect the website was having on the school. *See Bethlehem*, 807 A.2d at 869.

The weight of the evidence regarding substantial disruption of classwork and substantial disorder at the school in Fernando's case is in stark contrast to the *de minimus* disruption of cases where the student's speech was protected. *See e.g.*, *Snyder*, 650 F.3d at 929 (minimal disruption caused by general student ramblings; only a few minutes were lost on class discipline because teachers were easily able to regain control of class; teachers only had to rearrange their schedules to address issues caused by the speech); *Killion*, 136 F. Supp. 2d at 455 (teachers were not incapable of teaching or controlling their classes); *Beussink*, 30 F. Supp. 2d at 1178–79 (no disruption caused by viewing the site at the school campus and minimal disruption caused by delivery of disciplinary notice to the offending student).

Furthermore, when a reasonably foreseeable fear of disruption would suffice to regulate speech under the *Tinker* standard, the evidence illustrates actual, tangible substantial disruption.

See Tinker, 393 U.S. at 514. Surely, Murano could have reasonably believed that a foreseeable substantial disruption would occur at the school campus because of Fernando's offensive and inciting speech. *See e.g*., *Doninger*, 642 F.3d at 349; *Wisniewski*, 494 F.3d 34, 39–40; *Boucher*, 134 F.3d at 827. Thus, there is abundant evidence of actual substantial disruption and reasonably foreseeable substantial disruption caused at the school by Fernando's speech which justified Murano's regulation of that speech. *See Tinker*, 393 U.S. at 513.

B. Fernando's speech may also be regulated pursuant to *Tinker's* progeny, specifically under the exception to First Amendment rights at the school for speech that is lewd and vulgar.

Following *Tinker*, this Court found acceptable regulation of student speech which did not involve substantial disruption in three instances. The first exception to the application of *Tinker* to school speech involved offensively lewd and indecent speech that took place at the school campus. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986). In *Fraser*, a student used sexual innuendo in a student government nomination speech which he delivered to the student body during a school-sponsored assembly. *Id.* at 677–78. This Court stated that the right to freedom of speech and expression in the school must be balanced against the interest of schools in teaching its students the boundaries of socially appropriate behavior. *Id.* at 681. It is an appropriate function of public schools to prohibit the use of vulgar and offensive language because it relates to the schools interest in educating its students on the proper modes of discourse and mature conduct in civilized society. *Id.* at 683. Furthermore, the determination of what language is inappropriate for the classroom and other school-related activities properly rests with the school board. *Id.* This Court later refined its holding from *Fraser* by stating that had the student delivered the speech outside the school, the speech could not have been properly regulated by the school. *Morse v. Frederick*, 551 U.S. 393, 397 (2007).

This Court's next major exception to *Tinker* involved regulation of student speech that could be construed as having the school's endorsement. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 270–71 (1988). This Court evaluated the constitutionality of a school regulating the content of a student-produced, school-sponsored newspaper. *Id.* at 260. It decided that the First Amendment is not violated by school authorities exercising control over student speech in school-sponsored expressive activities, as long as the regulation is reasonably related to pedagogical concerns. *Id.* at 273.

Most recently, this Court held that schools may control speech at school related activities that can reasonably be construed to promote illegal drugs. *Morse*, 551 U.S. at 397. The case arose from a group of students displaying a banner that read "BONG HiTS 4 JESUS" while at a school sanctioned event taking place both in front of and across the street from the school campus. *Id.*

It is sufficiently established that Fernando's expression can be considered on-campus speech because it physically made its way to the school campus and was directed at the school and its community. *See e.g*., *Doninger*, 642 F.3d at 348; *Kowalski*, 652 F.3d at 573; *Bethlehem*, 807 A.2d at 865. Therefore, it can also be regulated pursuant to *Fraser* regardless of where it occurred. *See Morse*, 551 U.S. 397. *Compare Kowalski*, 652 F.3d at 573 (not applying *Fraser* because regulation under *Tinker* was satisfied, but noting that the speech could have been regulated under *Fraser* because the originally off-campus speech was determined to be on-campus speech and contained sexual lewd content), *and Bethlehem*, 807 A.2d at 673–74. (applying *Tinker* and *Fraser* to student website because the speech contained lewd, vulgar and offensive content regarding school teachers and authorities), *with Layshock v. Hermitage Sch. Dist*., 650 F.3d 205, 219 (3d Cir. 2011) (en banc), *cert. denied*, 80 U.S.L.W. 3266 (U.S. Jan. 17,

2012) (No. 11-502) (only allowing application of *Fraser* for originally off-campus speech where there is also evidence of a substantial disruption on-campus due to the speech), *and Snyder*, 650 F.3d 932 (holding *Fraser* not applicable where student speech is brought to campus at the request of school officials or where it is not physically brought to campus at all other than by word of mouth).

Fernando's expression, the digital printout found on-campus, was of a vulgar and lewd nature, depicting school officials in a sexually explicit manner. Certainly this is the type of vulgar and offensive speech a school need not tolerate and would be justified in regulating to protect its student body from such expression. *See Fraser*, 478 U.S. at 683. There should be no impediment to apply *Fraser* to Fernando's speech for lack of a substantial disruption as such a disturbance is evidenced above. *See Layshock, 650 F.3d at 219.* Nor should application be barred for an insufficient relationship between Fernando's speech and the school; it was not brought on-campus at the request of a school authority and it was not merely a verbal recount but an actual physical manifestation. *See Snyder*, 650 F.3d 932. Fernando's was no less offensively lewd or vulgar than Fraser's. *See Fraser*, 578 U.S. at 687. Whereas Fraser used sexual innuendo verbally, Fernando's digital drawing was sexually explicit and viewable, making it that much more offensive. *See Id.*

Neither *Kuhlmeier* nor *Morse* are controlling because it is clear that Fernando's speech could not be construed as being endorsed by the school nor did it involve promoting illegal drugs. *See Kuhlmeier*, 484 U.S. at 270–71; *See Morse*, 551 U.S. at 397. However, Fernando's expression was of an offensively lewd and vulgar nature bringing it within the category of speech that may be regulated by the school. *See Fraser*, 478 U.S. at 683.

CONCLUSION

Respondent respectfully requests this Court affirm the Fiftieth Circuit's decision and find that the Murano Unified School District was justified in regulating Petitioner's speech. This Court should find that a sufficient nexus was established between Fernando's speech and the school to bring it within school speech jurisprudence. In doing so, this Court will uphold the compelling interest schools have in maintaining instruction, discipline and decorum on their campuses. In applying the *Tinker* and *Fraser* standards to Fernando's speech, this Court should find that it qualifies for regulation under these guidelines because it caused a substantial disruption at the school and contained offensively lewd and vulgar content. Rejecting Petitioner's argument that his speech was insufficiently related to the school and furthermore failed to cause the required disruption will solidify the current jurisprudence regarding school related speech.

PRAYER

For these reasons, Respondent prays this Court affirm the decision of the court below.

_____

Taylor A. Pack Ellis
Counsel for the Respondent

CERTIFICATE OF SERVICE

Counsel for Respondent certifies that this brief has been prepared and served on all opposing counsel in compliance with the Rules of the Freshman Moot Court Competition.

_____

Taylor A. Pack Ellis
Counsel for the Respondent