No. 10-9101

IN THE

Supreme Court of the United States

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 PETITIONER

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March 9, 2012

QUESTIONS PRESENTED

I. Whether student speech outside the school setting is governed by *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 504 (1969) and its progeny.

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

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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 CASE

Petitioner, Michael Fernando (Petitioner), disputes the Fiftieth Circuit's holding that this case involves student expression that is materially disruptive to the Respondent school. (R. at 16-17). On or about September 9, 2009, Petitioner, a straight-A student and captain of his high school's basketball team, created a Facebook group called "Murano is Anti-Gay" to protest his school's recent hiring of a teacher who writes an anti-gay blog. (R. at 2). Facebook is a public forum that is not associated with Respondent in any way. (R. at 6). Petitioner created his Facebook group and accessed it entirely outside of the school environment and outside of school hours. *Id.* Members of the Facebook group posted content on the public forum at their own discretion without the approval or control of Petitioner. *Id.* The vast majority of the postings on Petitioner's webpage were harmless depictions of teenage life. (R. at 15). A few postings contained sexually themed drawings. *Id.* On or about September 14, 2009, Respondent discovered a printout of one of Petitioner's drawings in a classroom. (R. at 15). Petitioner was not responsible for bringing the printout to school and the identity of the responsible party is unknown. *Id.* Respondent demanded Petitioner remove his Facebook group from the public

forum but Petitioner refused on First Amendment grounds. (R. at 4). On September 28, 2009, Respondent suspended Petitioner from school until he deleted his Facebook group. *Id.*

Petitioner filed a motion for preliminary injunction in the United States District Court for the Southern District of Lovelystate on October 17, 2009. (R. at 6-11). The District Court denied Petitioner's motion on October 30, 2009, reasoning that Petitioner's speech was a material and substantial disruption to his school. (R. at 15-17). On December 30, 2009, Petitioner's appeal to the Fiftieth Circuit was granted (R. at 19) and on September 30, 2010, the Fiftieth Circuit affirmed the district court ruling (R. at 20). On June 7, 2011, Petitioner was granted certiorari by this Court. (R. at 22). Petitioner respectfully requests this Court reverse the decision of the Fiftieth Circuit Court of Appeals because Petitioner's speech should not be governed by *Tinker* and its progeny and, if it is, should not be restricted under the *Tinker* standard.

SUMMARY OF THE ARGUMENT

I.

In remaining faithful to the fundamental right of the First Amendment, this Court should reject the Fiftieth Circuit's overreaching application of *Tinker* and its progeny to this case. This Court's decisions in *Tinker* and its progeny have never explicitly expanded restrictions of "student speech" outside the school's sphere of influence. The speech in this case should not be governed by *Tinker* and its progeny since it occurred entirely on a public forum, away from school grounds and outside of school hours. Petitioner's speech was merely unpopular with the people it was designed to criticize and is exactly the kind of speech the First Amendment was designed to protect.

II.

Even if this Court determines that Petitioner's Facebook page is "student speech," he should still prevail because Petitioner's speech does not fall within any of the narrowly defined situations where this Court ruled "student speech" could be regulated. Petitioner's speech cannot reasonably be interpreted as causing a material and substantial disruption to the school environment or imposing on the rights of others. Petitioner's speech on a public forum did not reflect the imprimatur of his school, did not encourage illegal activity and was not directed at students in a school setting in a lewd or vulgar manner. For these reasons, Petitioner's speech should not be subject to regulation permitted in *Tinker* and its progeny.

ARGUMENT

I. THIS COURT SHOULD ESTABLISH THAT THE FIRST AMENDMENT GOVERNS SPEECH OCCURRING OUTSIDE THE SCHOOL SETTING AND REJECT THE FIFTIETH CIRCUIT'S OVERREACHING APPLICATION OF *TINKER* AND ITS PROGENY TO THIS CASE.

The Fiftieth Circuit Court of Appeals improperly applied *Tinker* and its progeny in determining that Petitioner's speech, that occurred entirely off-campus, was "student speech" and did not enjoy the same First Amendment protection as other speech. *See* (R. at 17); *Morse v. Frederick*, 551 U.S. 393, 410 (2007); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 276 (1988); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 686 (1986); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969). The First Amendment forbids Congress, and the states, from abridging the right of free speech. U.S. Const. amend. I. In *Tinker* and its progeny, this Court sliced out extremely narrow exceptions to the fundamental First Amendment right, known as "student speech," that permitted the reasonable regulation of certain speech-connected acts in highly restricted situations. *Morse*, 551 U.S. at 410; *Kuhlmeier*, 484 U.S. at

276; *Fraser*, 478 U.S. at 686; *Tinker*, 393 U.S. at 513. The extreme narrowness of the "student speech" exception is clear, as evidenced by this Court's unwillingness to expand its scope in *Tinker* and its progeny. *See Morse*, 551 U.S. at 410; *Kuhlmeier*, 484 U.S. at 276; *Fraser*, 478 U.S. at 686; *Tinker*, 393 U.S. at 513.

A. Expression outside the schoolhouse gate is not classified as "student speech" in this Court's rulings in *Tinker* and its progeny.

The narrow exceptions to the First Amendment under *Tinker*, allowing for regulation of certain "student speech," must only be applied with extreme care and discretion. *Tinker*, 393 U.S. at 513-14. This Court intentionally set an extraordinarily high standard, clarifying "student speech" exceptions just three times since *Tinker*. *See Morse*, 551 U.S. at 410; *Kuhlmeier*, 484 U.S. at 276; *Fraser*, 478 U.S. at 686-87. In *Tinker* itself, this Court established that "student speech" on campus could be restricted if it could reasonably lead educators to expect disruption of school activities. *Tinker*, 393 U.S. at 513. In *Morse*, this Court held that a school could restrict student speech that encouraged illegal drug use at a school sanctioned activity. *Morse*, 551 U.S. at 410. In *Kuhlmeier*, this Court ruled that schools could restrict student speech in school newspapers published on-campus because they are not a public forum. *Kuhlmeier*, 484 U.S. at 276. In *Fraser*, this Court determined that schools could restrict student speech that was lewd, vulgar and sexual in nature on school grounds. *Fraser*, 478 U.S. at 686-87. This case is distinguished from *Tinker* and its progeny because Petitioner's speech took place entirely outside of his school's sphere of influence, therefore, Petitioner's speech should not be classified as "student speech." *See* (R. at 15); *Morse*, 551 U.S. at 410; *Kuhlmeier*, 484 U.S. at 267; *Fraser*, 478 U.S. at 686-87; *Tinker*, 393 U.S. at 513-14.

This Court proclaimed in *Citizens United* that the benefit of any doubt must be given to the First Amendment over stifling speech. *Citizens United v. FEC*, 130 S.Ct. 876, 891 (2010). The Fiftieth Circuit clearly stifled Petitioner's speech when it claimed that the advent of the Internet makes the distinction between on-campus speech and off-campus speech irrelevant because the Internet is available "everywhere." (R. at 17). In *Citizens United*, this Court refused to redraw constitutional lines to accommodate new media or technology. *Citizens United*, 130 S.Ct. at 891. The Fiftieth Circuit interpreted this to mean that there are no more distinctions between on-campus speech and off-campus speech. (R. at 17). However, the *Citizens United* decision actually states that this Court should not alter how it interprets the Constitution merely because the speech is communicated through a new media or technology. *Citizens United*, 130 S.Ct. at 891. Since the *Citizens United* decision affirms that new media and technology do not change the well-established distinction between on-campus speech and off-campus speech, this Court's precedent classifying speech occurring outside the school environment as speech protected by the First Amendment should be followed. *See* U.S. Const. amend. I; *Citizens United*, 130 S.Ct. at 891.

The Internet is just the latest in a long history of evolving communication mediums. Newspapers, periodicals, telephones, radios, televisions and cellular phones all expanded the ability for people to communicate. All of these communication mediums are "everywhere" yet the Fiftieth Circuit does not suggest that their advent eliminates the distinction between on-campus speech and off-campus as they claim with the Internet. (R. at 17). In fact, the Internet is easier to control since select websites can be barred from access on school computers with a simple website blocking program. *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 921 (3d Cir. 2011) (en banc).

Even if this Court agrees with the Fiftieth Circuit's reasoning, that speech by students on the Internet is automatically school speech because the Internet is "everywhere," this reasoning should not apply to Petitioner. *See* (R. at 15). This case arises from a drawing printed from a website off-campus by an unknown individual, not from access to the website itself on school property. *Id.* School officials in this case object to the speech expressed on the piece of paper, not the website. *Id.* The fact that the Petitioner utilized the Internet to communicate, should not automatically categorize his speech as "student speech" under *Tinker*. *See Tinker*, 393 U.S. at 513-14.

B. This Court should resolve the circuit split on the definition of "student speech" by establishing that "student speech" does not include merely unpopular speech occurring entirely off-campus.

This Court declined to establish a black line definition for "student speech," despite having ample opportunity to do so in *Tinker* and its progeny. *Morse*, 551 U.S. at 410; *Kuhlmeier*, 484 U.S. at 267; *Fraser*, 478 U.S. at 687; *Tinker*, 393 U.S. at 514. In the absence of a clear definition of "student speech" from this Court, the circuit courts split on their interpretations of whether *Tinker* and its progeny should apply to cases where speech by students occurs away from school. *Thomas v. Bd. Of Educ., Granville Cent. Sch. Dist.*, 607 F.2d 1043, 1053 (2d Cir. 1979) (holding that school officials cannot punish students for producing a satirical publication outside of school); *Boucher v. Sch. Bd. of Greenfield*, 134 F.3d 821, 829 (7th Cir. 1998) (holding that the "relevant test" for application of the *Tinker* standard is whether school administrators think the speech will be disruptive). The Fiftieth Circuit improperly applied other circuit court interpretations of *Tinker* and its progeny, to widen the First Amendment exception for school speech to include speech occurring entirely outside the school setting. *See* (R. at 16).

The Fiftieth Circuit cites dicta in *Thomas*, where the Second Circuit envisions the possibility of a future case where there is a school disruption from a remote location, to justify its disregard for the distinction between on-campus speech and off-campus speech. (R. at 16-17). The Fiftieth Circuit fails to mention that the Second Circuit only brought up this scenario to say they would not address it because it was not applicable to their case. *Thomas*, 607 F.2d 1043, 1052 n.17. Since this dicta in *Thomas* is not applicable to the *Thomas* case, the Fiftieth Circuit should not have applied it to the case at bar either. *See id.*

The Fiftieth Circuit ignored the ultimate ruling in *Thomas* when it concluded there is no distinction between on-campus speech and off-campus speech on the Internet. *See* (R. at 16-17); *Thomas*, 607 F.2d 1043 at 1050. The *Thomas* Court ruled that merely unpopular speech by students taking place off-campus and on a student's own time enjoys the same First Amendment freedom as the public at large. *Thomas*, 607 F.2d at 1051. The Second Circuit warns of the "chilling effect" of silencing free speech because it is unpopular with those it intends to criticize. *Thomas*, 607 F.2d at 1052. In the present case, Petitioner experienced the "chilling effect" of being silenced while exercising his First Amendment right because his off-campus artistic expression was unpopular with the very school officials it lampooned. *See* (R. at 15). Chief Judge Kaufman's opinion goes on to imagine educators with this power abusing it by suspending students for reading unpopular magazines or watching X-rated movies at home. *Thomas*, 607 F.2d at 1051. Respondent abused its power when it suspended Petitioner for merely unpopular speech occurring entirely off-campus. *See* (R. at 17). This Court should end Respondent's abuse of power and resolve the circuit split on the definition of "student speech" by ruling that "student speech" does not include merely unpopular expressions outside the school's sphere of influence. *See Thomas*, 607 F.2d at 1051.

C. Expression can only be considered "student speech" under *Tinker* and its progeny if it is directed at school and is intentionally distributed on campus.

It is not necessary for the Court to decide whether a drawing would constitute a threat or offense in the eyes of a reasonable person if the creator did not intentionally communicate it in a way that it would lose its First Amendment protection. *Porter v. Ascension Parish Sch.*, 393 F.3d 608, 617 (5th Cir. 2004). In *Porter*, a student created a sketch at home of a siege on his school then put it away in his closet for two years. *Id.* at 611. The drawing was later discovered on a school bus when the student's brother inadvertently took the pad of paper containing the drawing to school. *Id.* The Fifth Circuit determined that the sketch was protected by the First Amendment and did not qualify as "student speech" because it was created at home with no intention of ever being taken to school. *Id.* at 615. The *Porter* Court ruled that if a drawing was not intentionally communicated to a school, then the school does not have the authority to punish the creator for the message it contains. *Id.* at 618. Likewise in this case, the controversial drawing was created at the Petitioner's home and the Petitioner never intended to distribute it at school. (R. at 15). An unknown person printed the drawing from a website and took it to campus against the wishes of the Petitioner. *Id.* Since Petitioner did not direct his drawing at Respondent or intentionally distribute it on campus, Petitioner's speech should be protected by the First Amendment and not be considered "student speech" that could be governed by *Tinker* and its progeny. *See Porter*, 393 F.3d at 615.

II. EVEN IF PETITIONER'S FACEBOOK PAGE IS "STUDENT SPEECH," IT SHOULD NOT BE RESTRICTED BECAUSE IT DOES NOT FALL UNDER ANY OF THE DEFINED STANDARDS IN *TINKER* AND ITS PROGENY.

Justice Alito, in his concurrence to the *Morse* decision, wisely warned against expanding the narrowness of the *Tinker* standard because the First Amendment could be manipulated in dangerous ways if any student's speech could be censored for being labeled interference with the

school's educational mission. *Morse*, 551 U.S. at 423. In *Thomas*, the Second Circuit warned about the "chilling effect" of creating a "silence born of fear" if schools were allowed to quash speech on a public forum just because educators didn't approve of something one of its students said. *Thomas*, 607 F.2d at 1048. The Fiftieth Circuit Court of Appeals erred when it manipulated and expanded the *Tinker* standard in dangerous ways to censor Petitioner's speech merely because Respondent claimed Petitioner's speech interfered with the school's educational mission. *See* (R. at 17).

This Court limited "student speech" restrictions to cover just four narrow circumstances where the need to maintain order in the school environment outweighed the fundamental First Amendment right of students. *Morse*, 551 U.S. at 410; *Kuhlmeier*, 484 U.S. at 267; *Fraser*, 478 U.S. at 687; *Tinker*, 393 U.S. at 514. A test to determine whether "student speech" is authorized is outlined in *Chandler*. *Chandler v. McMinnville Sch. Dist.*, 978 F.2d 524, 529 (9th Cir. 1992). Speech that is lewd, vulgar or obscene is covered by *Fraser*; speech that is school-sponsored is covered by *Kuhlmeier*; and speech that materially disrupts class work or invades the rights of others is covered by *Tinker*. *Id.* This Court later added, in *Morse*, that "student speech" advocating illegal drug use could also be regulated. *Morse*, 551 U.S. at 410. Since Petitioner's speech does not fall within any of the narrowly defined situations where this Court ruled "student speech" could be regulated, Petitioner's freedom of speech should not be stifled. *See* (R. at 17); *Morse*, 551 U.S. at 410; *Kuhlmeier*, 484 U.S. at 267; *Fraser*, 478 U.S. at 687; *Tinker*, 393 U.S. at 514. This Court should overturn the Fiftieth Circuit's misguided widening of the standards of *Tinker* and its progeny to the facts of this case, and thaw the "chilling effect" of a "silence born of fear" that would undoubtedly descend upon schoolyards across the nation if this Court does not act. *See* (R. at 17).

A. Petitioner's speech was not a material and substantial disruption to his school's environment and did not infringe on the rights of others.

The *Tinker* standard allows for "student speech" to be reasonably regulated if it materially disrupts class work, involves substantial disorder or invades the rights of others. *Tinker,* 393 U.S. at 513. The Fiftieth Circuit made the erroneous assumption that Petitioner's speech caused serious disruptive effects at the Respondent school. (R. at 17). The Fiftieth Circuit bases its assumption on Respondent's characterization of students passing around notes and gossiping during class as a "great disturbance." (R. at 12). If students passing around notes and gossiping during class qualifies as a "great disturbance," then every classroom, in every school in America, is greatly disturbed on a daily basis by bad jokes, dating updates and teen idols. Distracted students are normal in any school and can hardly be blamed on Petitioner's drawing that was never intended to be distributed on campus. *See* (R. at 6). The Fiftieth Circuit's assumption that the school and entire community was affected by Petitioner's drawing (R. at 17) is not supported by the facts alleged in the Respondent's memorandum in opposition to the Petitioner's motion for preliminary injunction. (R. at 12). Respondent provided no evidence of the "many complaints from parents" that the Fiftieth Circuit accepts as fact. (R. at 15). A "great disturbance" at school would certainly entail dozens of documented complaints, students not attending classes and an inability to teach lessons.

An example of a "great disturbance" is evidenced in *Kowalski,* where a high school student created a MySpace.com group attacking another student by claiming she had herpes. *Kowalski v. Berkeley Cnty. Sch.*, 652 F.3d 565, 567 (4th Cir. 2011) (en banc). In *Kowalski,* the "great disturbance" forced the victim to withdraw from school, encouraged other students to join in the harassment and the blatantly violated the school's bullying policy. *Id.* at 575. The *Kowalski* Court ruled that the *Tinker* standard applied because the website creator threatened

another student and violated the victim's right to be "secure and let alone." *Id.* at 574. In the case at bar, no "great disturbances" resembling those in *Kowalski* are alleged by Respondent, only that "some" teachers reported having "some" difficulty maintaining control of students. (R. at 12); *Kowalski*, 652 F.3d at 574.

Petitioner's speech is more accurately analogous to *Tinker* itself, where this Court ruled that wearing black armbands to protest the Vietnam War was free speech protected by the First Amendment because it could not reasonably lead educators to expect disruption of school activities. *Tinker*, 393 U.S. at 513. In this case, Petitioner's satirical drawing protested the hiring of a teacher who writes an anti-gay blog. (R. at 2). It is unreasonable for Respondent to expect material and substantial disruption to school activities from a simple satirical protest drawing. *See* (R. at 17); *Tinker*, 393 U.S. at 513. Since the facts of this case do not support Respondent's allegation that Petitioner's speech materially and substantially disrupted classwork, the *Tinker* standard limiting "student speech" on these grounds should not apply to this case. *See* (R. at 15-17); *Tinker*, 393 U.S. at 513.

There is also no evidence that Petitioner's speech infringed on the rights of others, which would subject it to "student speech" restrictions on that prong of the *Tinker* standard. *See* (R. at 15-17); *Tinker*, 393 U.S. at 513. Circuit court decisions applying the *Tinker* standard to "student speech" infringing on the rights of others contained threats to the safety of classmates. *Doninger v. Niehoff*, 527 F.3d 41, 44-47 (2d Cir. 2008); *Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist.*, 494 F.3d 34, 35-37 (2d Cir. 2007). In *Doninger*, a high school student created a blog inciting other students to cause unrest in retaliation for canceling a school event. *Doninger*, 527 F.3d at 45. The Second Circuit ruled that the *Tinker* standard applied to *Doninger* because the blog threatened attacks on the school. *Id.* at 53. In *Wisniewski*, a middle school student posted a

drawing on the Internet of one of his teachers being shot. *Wisniewski*, 494 F.3d at 36. The *Wisniewski* Court ruled that the *Tinker* standard applied because the violent image was a threat that created a foreseeable risk to the teacher and others. *Id.* at 40. *Doninger* and *Wisniewski* are distinguished from this case because Petitioner's speech contained no threats and no person claimed they feared for their safety. (R. at 7); *Doninger*, 527 F.3d at 44-47; *Wisniewski*, 494 F.3d at 35-37. It is unreasonable for Respondent to interpret a satirical drawing void of references to violence as infringing on the rights of others. *See* (R. at 17); *Doninger*, 527 F.3d at 45; *Wisniewski*, 494 F.3d at 36. Since Petitioner was punished for expressing views that were not threatening, "student speech" restrictions under the *Tinker* standard should not apply to this case. *See* (R. at 7); *Tinker*, 393 U.S. at 513.

B. Petitioner's speech took place on a public forum and did not reflect the imprimatur of his school.

In *Kuhlmeier*, this Court ruled that schools could restrict "student speech" in campus newspapers since school-sponsored publications are not public forums and their content might reasonably reflect the imprimatur of the school. *Kuhlmeier*, 484 U.S. at 271. This case is distinguished from *Kuhlmeier* because Petitioner's speech occurred entirely on a public forum. (R. at 15); *Kuhlmeier*, 484 U.S. at 263. Petitioner created his Facebook webpage on his own time, with his own resources, on a forum designed for access to the public at large. (R. at 15). Since no reasonable person could believe that Petitioner's Facebook webpage was sponsored by Respondent, it could not reasonably reflect the imprimatur of the school and the "student speech" restriction this Court imposed under *Kuhlmeier* does not apply to this case. *See* (R. at 17); *Kuhlmeier*, 484 U.S. at 271.

In *Thomas*, the Second Circuit refused to apply "student speech" restrictions to high school students who created a satirical publication because no one could reasonably believe that the school sanctioned it. *Thomas*, 607 F.2d at 1048. The *Thomas* Court ruled that the publication was a public forum since it had scant and insignificant school contacts and in no way represented the school. *Id.* at 1050. In *Blue Mountain* and *Layshock*, the Third Circuit clearly established that non-disruptive speech occurring on the public forum of the Internet does not reasonably reflect the imprimatur of a school and is therefore outside the "student speech" restrictions of *Tinker* and its progeny. *Blue Mountain*, 650 F.3d at 936; *Layshock ex rel. Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205, 219 (3d Cir. 2011) (en banc). The *Blue Mountain* Court refused to impose "student speech" restrictions on a middle school student who copied a photograph of her principal from her school's website, then used it to create a fake Internet profile suggesting the principal was a pedophile sex addict. *Blue Mountain*, 650 F.3d at 936. Similarly in *Layshock*, the Third Circuit refused to apply "student speech" restrictions on a high school student who copied a photograph of his principal from his school's website and used it to invent a satirical Internet profile on a public forum called MySpace.com. *Layshock*, 650 F.3d at 219. The *Blue Mountain* and *Layshock* Courts held that the First Amendment did not allow educators to exert authority over "student speech" on a public forum. *Blue Mountain*, 650 F.3d at 936; *Layshock*, 650 F.3d at 219. Since Petitioner created a satirical webpage on Facebook, which is a well-known public forum, it could not reasonably reflect the imprimatur of the Respondent school. *See* (R. at 15).

Judge Jordon went further in his concurring opinion in *Layshock*, arguing that speech by students in a public forum will most likely lack a "reasonable nexus" to creating disorder. *Layshock*, 650 F.3d at 221. In this case, Petitioner had even less interaction with his school while creating his website than the students in *Blue Mountain* and *Layshock* since Petitioner's

controversial drawing was entirely original and he never accessed Respondent's website to steal material for his website. *See* (R. at 15); *Blue Mountain*, 650 F.3d at 920; *Layshock*, 650 F.3d at 207. Petitioner's website was designed and maintained on a public forum, unassociated with school activities and only occasionally poked fun at school officials in a way similar to both *Blue Mountain* and *Layshock*, therefore, this case lacks the "reasonable nexus" to reflect the imprimatur of the Respondent school. *See* (R. at 15); *Blue Mountain*, 650 F.3d at 936; *Layshock*, 650 F.3d at 219.

C. Petitioner's speech did not encourage illegal activity.

Justice Alito, in his concurrence to the *Morse* decision, was reluctant to expand the *Tinker* standard to cover any new restrictions on "student speech" because he feared that any expansion of the *Tinker* standard could potentially allow manipulation of the First Amendment in dangerous ways. *Morse*, 551 U.S. at 423. Similarly, Justice Breyer in his *Morse* concurrence expressed concern that interpreting the *Tinker* standard too broadly could authorize unreasonable viewpoint-based restrictions. *Id.* at 426. In *Morse*, this Court ruled that a school could ban a sign advocating illegal drug use at a school-sponsored event. *Id.* at 410. Justice Alito and Justice Breyer were only willing to slightly widen the scope of the *Tinker* standard to cover *Morse* because the government's interest in protecting young people from illegal activity, including drug abuse, justified placing restrictions on "student speech" at school sponsored events. *Morse*, 551 U.S. at 423-26.

A similar situation occurs in *Boucher*, where the Seventh Circuit restricted the speech of a high school student who wrote an article instructing classmates how to hack into his school's computer system. *Boucher*, 134 F.3d at 822. The *Boucher* Court ruled that the government has a public policy interest in securing the integrity of government computer systems, and teaching

others to break into them is advocating illegal activity. *Id.* at 829. In this case, Petitioner merely created a satirical drawing and did not advocate illegal activity. (R. at 15). The warnings of Justice Alito and Justice Breyer should be heeded and "student speech" restrictions should not be dangerously expanded from speech advocating illegal activity to speech advocating a personal viewpoint. *See Morse*, 551 U.S. 423-26. Since Petitioner's speech did not advocate illegal activity there is no legitimate government interest in restricting Petitioner's speech, and the restrictions on "student speech" this Court imposed under *Morse* do not apply to the facts of this case. *See* (R. at 17); *Morse*, 551 U.S. at 423.

D. Petitioner's speech was not directed at students in a school setting in a lewd or vulgar manner.

This Court ruled in *Fraser* that "student speech" can be regulated, if it is lewd and directed at a school assembly. *Fraser*, 478 U.S. at 686-87. While it may be Respondent's opinion that Petitioner's drawing is sexually explicit, the drawing was not directed at students in a school setting. (R. at 17). In fact, Petitioner never directed his speech at the school community at all. (R. at 15). An unknown person printed Petitioner's drawing from the Internet and brought it to school without Petitioner's knowledge or permission. *Id.* Since Petitioner played no part in printing his controversial drawing from his webpage or bringing it to school, the "student speech" restrictions this Court imposed under *Fraser* do not apply to this case. *See* (R. at 15); *Fraser*, 478 U.S. at 686-87.

In *Porter*, the Fifth Circuit refused to apply the *Tinker* standard to a student's drawing of a siege on his school because the speech was not directed at his school. *Porter*, 393 F.3d at 617. The *Porter* Court ruled that the vulgar drawing was protected by the First Amendment because it only turned up on a school bus when it was inadvertently taken there by the artist's brother two

years after its creation. *Id.* Similarly in this case, the controversial drawing was taken to school by an unknown third party through no fault of Petitioner. (R. at 15). Since Petitioner did not direct his speech at his school in a lewd or vulgar manner, First Amendment protection should extend to Petitioner's drawing. *See* U.S. Const. amend. I; (R. at 15); *Porter*, 393 F.3d at 617.

CONCLUSION

In remaining faithful to the fundamental right of the First Amendment, this Court should reject the Fiftieth Circuit's overreaching application of *Tinker* and its progeny to this case. Petitioner respectfully requests that this Court reverse the decision of the Fiftieth Circuit because Petitioner's speech should not be governed by *Tinker* and its progeny and, if it is, should not be restricted under the *Tinker* standard. Respectfully submitted on this 9th day of March, 2012.

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