No. 16-1234

IN THE

Supreme Court of the United States

Nero Unified School District,

PETITIONER,

v.

Michael Naranjo,

RESPONDENT.

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

BRIEF FOR RESPONDENT

Cody W. Hearrell, Esq.
Sotomayor & O'Connor, LLP
454 Main St.
Everycity, Everystate 15041

Sandara Sotomayor, Esq.
Sotomayor & O'Connor, LLP
454 Main St.
Everycity, Everystate 15041

COUNSEL FOR RESPONDENT

March 10, 2017

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 Respondent's speech to be regulated by Petitioner, the Nero School District?

PARTIES TO THE PROCEEDING

Plaintiff-appellant in the proceedings below was Michael Naranjo.

Defendant-appellee in the proceedings below was Nero Unified School District.

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STATEMENT OF JURISDICTION

The court of appeals entered judgment on March 16, 2016. (R. at 22). Petitioner filed a Petition for Writ of Certiorari on April 15, 2016. (R. at 23). This Court granted the Petition on January 6, 2017. (R. at 24). This Court's jurisdiction rests on 28 U.S.C. § 1254(1) (2012).

STANDARD OF REVIEW

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.

CONSTITUTIONAL PROVISION INVOLVED

Relevant provisions of the U.S. Constitution are reproduced in the appendix to this brief.

STATEMENT OF THE CASE

Michael Naranjo, the respondent in this action, filed suit against petitioner, Nero School District, for infringement of his first amendment rights. (R. at 3). Mr. Naranjo created a Facebook group titled "Nero is Anti-Gay" to allow concerned students to express their opinions in protest of the school district's employment practices. (R. at 3). The Facebook group focused on the Petitioner's recent employment of a school teacher who writes an anti-LGBT blog. (R. at 2). Mr. Naranjo did not possess direct control over the content posted by other student-members. (R. at 6). The Facebook group did not contain threats of violence or physical harm. (R. at 7).

The Facebook group primarily contained innocuous posts by students, however, it also included a sexually-explicit drawing created by Mr. Naranjo. (R. at 15). Mr. Naranjo did not bring the drawing to school, nor did he ever access the Facebook group while on school property. (R. at 6). The illustration entered the school by an unknown person and circulated on-campus, prompting complaints from the school community. (R. at 7). At no time did the conversation, postings, or drawings of the Facebook group pose any sort of danger to the school, school community, or community at large. (R. at 7). Petitioner demanded that Mr. Naranjo remove the online group from Facebook. (R. at 4). Mr. Naranjo refused, asserting his First Amendment rights. (R. at 7). Petitioner suspended Mr. Naranjo until he deletes the Facebook group. (R. at 7).

On October 17, 2015, Mr. Naranjo filed a motion for a preliminary injunction in the United States District Court for the Fifteenth Circuit to allow him to return to school. (R. at 11). The District Court applied the *Tinker* standard and denied his motion for preliminary injunction. (R. at 18). The Court of Appeals for the Fifteenth Circuit entered judgment for Mr. Naranjo and reversed the District Court's decision and remanded for further proceedings on March 16, 2016. (R. at 22). Petitioner field a Petition for Writ of Certiorari to the United States Supreme Court on April 15, 2016. (R. at 23). This Court granted the Petition on January 6, 2017. (R. at 24).

SUMMARY OF THE ARGUMENT

I. The Fifteenth Circuit correctly held that *Tinker* and its progeny do not govern off-campus student speech. Under the First Amendment, a student's off-campus speech receives protection provided the speech does not establish a threat of violence or an impending substantial disruption to the school community. Previously, this Court has restricted a school's authority to regulate off-campus speech and established limited exceptions to the narrow context of an off-campus school sanctioned activity or related function. Accordingly, this Court should hold that *Tinker* and its progeny do not govern student speech outside of the school setting.

II. Regardless if this Court applies the *Tinker* standard to off-campus speech, Petitioner lacked the authority to restrict Mr. Naranjo's speech because his speech did not substantially disrupt the school environment. *Tinker* and its progeny only apply to off-campus speech in circumstances which establish a foreseeable substantial disruption or violent/threatening language directed towards the school community. For Mr. Naranjo, his speech originated outside the regulation of the Petitioner because it did not contain violent/threatening language that could reasonably substantiate a substantial disruption inference. Additionally, his speech did not contain illegal subject matter, lewd/obscene language, nor language bearing the imprimatur of the school. Accordingly, this Court should affirm the ruling of the Fifteenth Circuit Court and hold the Petitioner violated Michael's First Amendment rights by disciplining his off-campus speech.

ARGUMENT

I. THE FIFTEENTH CIRCUIT COURT CORRECTLY HELD THAT *TINKER* AND ITS PROGENY DO NOT GOVERN OFF-CAMPUS STUDENT SPEECH, BUT RATHER, THAT SUCH SPEECH DESERVES ROBUST FIRST AMENDMENT PROTECTION WHEN IT ORIGINATES OUTSIDE THE DOMINION OF SCHOOL AUTHORITY.

A. This Court has consistently upheld important First Amendment safeguards for student speech, and has explicitly restricted a school's authority to interfere with a student's right to free speech.

The First Amendment protects and upholds freedom of speech for all Americans by limiting government regulations that would infringe upon the free expression of individuals. *See* U.S. CONST. amend. I. Within our society, American schools develop young citizens by inspiring uninhibited, free-flowing, unrepressed, robust exchanges of ideas which inherently require the application and protection of freedom of speech. *See Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505 (1969) (evaluating the responsibilities of the education process and the challenges presented with freedom of speech in the school setting). The education system, empowered through federal and state agencies, assigns its governmental authority to school administrators so they may govern and maintain the public school system as a cohesive learning environment. *See Tinker*, 393 U.S. at 507. Despite its discretionary functions, the authority bestowed upon school principals and administrators cannot supersede, nor infringe upon, the inalienable rights inherent to every student covered by the Constitution. *Id.* (highlighting the important discretionary functions given to school boards cannot infringe on students' freedoms granted in the Bill of Rights))

School administrators cannot abuse their authority to quickly discipline speech which merely generates trivial arguments, political discord, or emotional disagreements between students. *See Guiles v. Marineau*, 461 F.3d 320, 330 (2d Cir. 2006) (holding that a school violated a student's First Amendment rights for discipline resulting from a politically controversial t-shirt which did not create a substantial disruption). Instead, school administrators must exercise extreme diligence and certainty in their determination that a foreseeable substantial disruption warrants such extraordinary discipline to interfere with a student's First Amendment rights. *See id.*

School administrators must carefully weigh each instance of student speech because the education process relies heavily on freedom of speech in order to develop pedagogical learning. *See Tinker*, 393 U.S. at 512. In order to ensure effective educational instruction, students must have the ability to openly discuss, without fear of discipline, thoughts which may challenge established views that deviate from accepted societal norms. *See id.* (stating education necessitates a wide exposure to robust ideas instead of limited ideas from authoritative selection); *see also Morse v. Frederick*, 551 U.S. 393, 400 (2007) (analyzing the outer boundaries of school authority in regulating student speech). As a result, controversy arises when school administrators unjustly attempt to regulate student speech occurring outside of school. *Id.*

B. Under the restrictive *Tinker* standard, a school may only regulate student speech if it could foreseeably lead to a substantial disruption of the educational process.

In *Tinker*, this Court defined school speech as any on-campus expressions made by students on school property during school hours, provided the speech does not materially or substantially interfere with the operation of the school. *Id.* at 513. More specifically, this Court held the First Amendment permits students to participate in passive, peaceful protests on-campus without interference or discipline from school administration. *Id.* at 514 (holding that students who wore black armbands on-campus to protest the Vietnam war, constituted an acceptable form of school speech which received First Amendment protections). This Court reasoned that administrators do not retain absolute authority over students because the Constitution views students as "persons" afforded free expression of their viewpoints. *Id.* at 511.

In the cases following *Tinker*, this Court clarified the responsibility and authority of schools in regulating on-campus student speech, particularly when the speech infringes upon the rights of others. *See Hazlewood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 276 (1988) (holding that a school appropriately censored on-campus student speech by preventing publication of a school news article

which infringed upon the privacy rights of a pregnant student); *see also Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 684 (1986) (permitting a school to discipline a student in response to an on-campus presentation containing an extend sexual metaphor which infringed upon the rights of a particular female student); *see Morse*, 551 U.S. at 400 (permitting school administrators to punish a student for speech which promoted illegal drug use which could reasonably affect the health and safety of fellow students).

In each of these cases, the Court reasoned that school administrators have the authority to restrict a student's right to free speech only when the student's speech infringes or violates the Constitutional rights and learning ability of other students. *See Kuhlmeier*, 484 U.S. at 266 (stating that a school may discipline speech inconsistent with the school's basic educational mission). Consequently, school administrators *do not* have the authority to violate a student's speech which does not impede the learning ability of other students. *See id.* (emphasis added). This Court did not draft *Tinker* and its progeny to preserve the authority of school administrators, but rather to protect the learning ability of students within the classroom (i.e. on-campus). *See id.; see also Fraser*, 478 U.S. at 681 (reviewing the historical role of learning in the schoolhouse (i.e. on-campus) and the limited authority administrators have in disciplining student speech). Accordingly, *Tinker* constrains its application to the schoolhouse and does not extend to empower school administrators to interfere with a student's First Amendment rights for statements made off-campus. *See id.* Expanding school authority to govern non-disruptive student speech outside of a school setting could open an unending pattern of censorship that would infringe upon the free speech rights of students outside of the schoolhouse. *See Tinker*, 393 U.S. at 511.

C. The *Tinker* progeny cases arguably allow a school to regulate off-campus speech, but only in limited circumstances when the speech occurs at a school-sanctioned event, or threatens the safety of the school community.

The progeny of cases following *Tinker*, expanded the standard restricting on-campus student speech, and allowed school districts to regulate off-campus speech only in two distinct scenarios: (1) when the off-campus speech originated during a school-sanctioned activity (i.e. field trips, sporting events, college days, etc.), or (2) when the off-campus speech originated in private (i.e. outside of a school sanctioned activity) *and* included threats of violence, intimidation, or harm to members of the school community. *See Morse,* 551 U.S. at 400 (emphasis added) (holding that student expression at a school-sponsored and school-supervised off-campus event constitutes a form of on-campus school speech); *see also J. S. ex. rel. Snyder v. Blue Mountain Sch. Dist.,* 650 F.3d 915, 931 (3d Cir. 2011) (holding that a school district could not regulate off-campus student speech containing a vulgar parody of a school administrator because the speech did not create a foreseeable substantial disruption); *see Bell v. Itawamba Cty. Sch. Bd.,* 799 F.3d 379, 392 (5th Cir. 2015) (applying the *Tinker rule* to conclude a student did not receive First Amendment protection for off-campus speech in the form of a YouTube music video which threatened violence to specific educators).

Additionally, the Ninth Circuit recently expanded the authoritative boundaries of school districts to allow regulation of off-campus speech which occurred in close proximity to the schoolhouse and contained harmful language of sexual harassment. *C.R. v. Eugene Sch. Dist.,* 835 F.3d 1142, 1150 (9th Cir. 2016) (ruling that sexual harassment and bullying between students which occurred off-campus in close physical proximity to the school, permitted regulation of the bully student). The Ninth Circuit distinguished *Eugene* from previous Circuit court rulings by reasoning that the speech at issue surpassed free speech and became sexual harassment which consequently infringed upon the rights and safety of the victim students. *Id.* at 1152. School districts must maintain a safe and secure learning environment for all students, and the sexual harassment near campus produced a reasonably foreseeable future disruption on-campus. *Id.* Although the Ninth

Circuit permitted the school district to regulate the off-campus speech, it agreed with other Circuit courts that mere offensive speech alone does not establish sufficient grounds for schools to regulate off-campus speech. *Id.* at 1152; *see also Bell*, 799 F.3d at 402; *see also Blue Mt*., 650 F.3d at 932.

Overall, this Court has yet to establish a precedent under *Tinker* or its progeny which would allow school administrators unfettered free reign to regulate off-campus student speech in all scenarios. *See Morse*, 551 U.S. at 404 (evaluating recent Supreme Court decisions and lower court rulings to analyze the extent of authority for school administrators); *see also Blue Mt.*, 650 F.3d at 932 (stating that injustice would result in adapting a rule which allowed punishment of all off-campus speech absent situations of substantial disruption). If courts granted school administrators the ability to censor off-campus speech regardless of the circumstance, then a dictatorial environment permitting suppression of all speech for anyone 18 years old or younger would soon arise. *See Tinker*, 393 U.S. at 511 (stating that students should not be regarded as closed-circuit recipients for pre-selected information/propaganda which the State decides acceptable to communicate). Accordingly, this Court should rule that *Tinker* and its progeny do not apply to off-campus speech and school administrators do not have the authority to regulate non-disruptive student speech occurring off-campus.

II. EVEN IF THIS COURT APPLIES THE *TINKER* STANDARD TO OFF-CAMPUS SPEECH, THE COURT SHOULD HOLD THAT PETITIONER LACKED THE AUTHORITY TO RESTRICT MR. NARANJO'S SPEECH, GIVEN THAT HIS SPEECH DID NOT SUBSTANTIALLY DISRUPT THE SCHOOL ENVIRONMENT.

A. Mr. Naranjo's speech did not include violent threats, illegal subject matter, or lewd/obscene language.

The First Amendment protects student expression which does not materially or substantially interfere with the education process within the schoolhouse. *Tinker*, 393 U.S. at 513. In defining a substantial disruption, this Court has evaluated factors including: (1) whether the speech contained violent threats of harm to the school community; (2) whether the speech promoted illegal subject matter; and (3) whether the speech contained extremely lewd, obscene or offensive language. *See Kuhlmeier*, 484 U.S. at 268. Each respective factor does not automatically constitute a substantial disruption, nor does each factor automatically grant school administrators with the authority to regulate off-campus speech. *See id.* Instead, this Court requires school administrators to utilize due diligence in determining if a substantial disruption may develop from the speech at issue. *See id.*

In evaluating what constitutes language of violence, harassment, and intimidation, the student speech must create a reasonable interpretation that the speaker intends to inflict injury, inspire fear, or harm the physical safety of other students. *Id.* at 396; *see also Wynar v. Douglas Cty. Sch. Dist.*, 728 F.3d 1062, 1068 (9th Cir. 2013) (holding that a student's off-campus speech detailing plans for a school shooting supported a violent interpretation and depriving the speech from First Amendment protection); *see also Lavine v. Blaine Sch. Dist.*, 257 F.3d 981, 990 (9th Cir. 2001) (holding that a student's poem depicting plans for a school shooting established a reasonable interpretation that a substantial disruption could occur). While the implications of such violent student speech could lend itself to a knee-jerk reaction permitting schools to discipline, the interest in protecting students' First Amendment rights supersedes any hasty retaliatory punishment, and requires schools to appropriately pause and consider the mental scienter, intent, and purpose of the student speaker. *See Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608, 617 (5th Cir. 2004) (stating that a student's intention or lack of intention may determine whether the speech constitutes a "true threat" potentially causing a substantial disruption to the health and safety of the school community). The courts note that school administrators have a challenging role in interpreting

student speech, and must make difficult deliberations as to what constitutes violent, harassing, or intimidating language. *See Morse,* 551 U.S. at 410.

Accordingly, school administrators must act as quasi-judicial entities in examining the content of a student's speech, balancing the interest of protecting the school community versus protecting an individual student's constitutional right to free speech. *See id.* at 618. In determining whether the speech creates a substantial disruption on campus, the Fifth Circuit in *Bell* detailed a four factor test which includes: (1) the nature, content, and seriousness of the speech; (2) the relationship of speech to the school; (3) the intent of the speaker to publish or conversely keep private, and (4) the manner in which the speech reached the school community. *Bell*, 799 F.3d at 398. Although not universally adapted by all courts, this Court should follow the substantial disruption test because it addresses the evaluation of student speech and considers the student speaker's mental state, intent, and purported violent content of the speech before considering any punishment or discipline. *See Porter*, 393 F.3d at 617.

Applying the substantial disruption test to the current case, this Court should rule that Petitioner violated Mr. Naranjo's First Amendment right because the Facebook group and sexually-explicit drawing did not create a substantial disruption with school operations. *See Bell*, 799 F.3d at 398. In reviewing the first two factors simultaneously, Mr. Naranjo's speech may create a behavioral issue of misconduct in relation to school policies, but, this alone does not justify an interference with his constitutional rights to free speech. *See id*. Addressing the final two factors, Mr. Naranjo did not create a public platform on-campus to disrupt the school, but rather he published his speech within an off-campus Facebook group. *See id.* The originating location (off-campus) inherently displays his intent to safeguard against a controversial discussion that would potentially cause disruption at school. *See id*. Although Petitioner may wish to quickly subdue the off-campus speech in order to prevent further controversy, Petitioner cannot punish Mr. Narnajo for

his off-campus speech unless it produced a reasonable interpretation of violence. *See Morse*, 551 U.S. at 410.

Separate from the substantial disruption test, School administrators may regulate student speech when the speech promotes illegal activity such as drug use, physical or domestic abuse, criminal gang membership, or underage drinking. *See Morse*, 551 U.S. at 400 (holding that student's speech which promoted illegal drug use by stating "BONG HiTS 4 JESUS" and similar situations of illegal promotions warranted sanctions by school administrators). Administrators must review the intentions and mental scienter of the speaker to determine whether the speech advocates illegal activity or conversely brings awareness for victims of the illegal activity. *See id.* at 402 (reviewing the plain language of the student's banner to determine whether a promotional or satirical anti-drug interpretation applies). Additionally, this Court has held that a school may regulate student speech if it illegally infringes on the rights of others through privacy violations, copyright protections, or intellectual property infringement. *See Kuhlmeier*, 484 U.S. at 276 (upholding a school district's censorship of student speech in a school newspaper article which discussed a pregnant teenage student because the speech violated the privacy rights of the pregnant student).

Lastly, this Court has distinguished First Amendment protection afforded to speech containing lewd, indecent, or morally offensive language when it occurs on-campus or off-campus, respectively. *See Fraser*, 478 U.S. at 685 (ruling a school district did not violate a student's rights to free speech when it punished the student for an on-campus presentation containing an explicitly graphic and extended sexual metaphor); *but see J.C. ex rel. R.C. v. Beverly Hills Unified Sch. Dist.*, 711 F.Supp.2d 1094, 1101 (C.D. Cal. 2010) (holding a student's vulgar presentation made on-campus received appropriate punishment, but noting the same lewd speech made off-campus would receive First Amendment protection). In considering the need for discipline in the education

process, school districts do not violate a student's First Amendment rights by punishing on-campus speech interpreted as lewd, indecent, or morally offensive. *See id*. at 1101. However, school districts cannot punish students for the same vulgar speech if made off-campus. *Thomas v. Bd. of Educ., Granville Central Sch. Dist.,* 607 F.2d 1043, 1050 (2d Cir. 1979) (stating that school administrators cannot punish a student for publishing allegedly indecent, lewd, or morally obscene articles off-campus).

In this case, Petitioner's evaluation of Mr. Naranjo's drawing may yield a lewd, indecent, or morally offensive interpretation for on-campus purposes. *See id.* However, the First Amendment protects Mr. Naranjo's off-campus speech regardless of its alleged crude vulgarity. *See id*. Essentially, if Mr. Naranjo produced lewd and offensive speech on-campus, then his speech would certainly receive appropriate punishment because it would most likely produce a substantial disruption to the school environment. *See Fraser*, 478 U.S. at 685. However, since Mr. Naranjo developed the speech off-campus in a private members-only Facebook group, his speech cannot receive punishment regardless of how lewd, indecent, or offensive because it did not occur as part of the on-campus environment. *See Beverly Hills*, 711 F.Supp.2d at 1101. Petitioner may argue that once Mr. Naranjo's drawing arrived on-campus, it transformed into on-campus speech permitting regulation based on its sexually-explicit nature. *See id*. However, this argument fails to address how the alleged sexually-explicit drawing substantial disrupted the school environment. *See B.H. ex. rel. Hawk v. Easton Area Sch. Dist.*, 725 F.3d 293, 315 (3d Cir. 2013) (holding that lewd speech does not automatically yield a substantial disruption, particularly when the speech addresses an underlying social issue of public importance).

Additionally, this Court must recognize that across our country, millions of teenagers attend school each day, and conceivably thousands of these teenage students produce/circulate sketches, doodles, and drawings that have sexually-explicit undertones. *See id.* If this Court begins to

legislate morality, particularly within teenage artwork, the overwhelming number of students citing First Amendment violations could bog down the court system and drain judicial resources to a grinding halt. *See id*. at 317. Similarly, allowing school districts to regulate lewd student speech on an individual basis without clear criteria would create limitless standards and inconsistencies for student speech across state and cultural jurisdictions (i.e. offensive student speech in Texas may be socially acceptable in California). *See id.* Accordingly, it would behoove this Court to prohibit any punishment for Mr. Naranjo's off-campus speech based on vulgarity as a direct violation of his First Amendment rights. *See id.*

B. Mr. Naranjo's speech did not reflect the imprimatur of the school.

In *Kuhlmeier*, this Court also noted that school administrators could regulate student speech which creates a reasonable imprimatur of the school. *Id.* at 281. Within the context of *Kuhlmeier*, the court interpreted an imprimatur as any publication that reasonably establishes an interpretation that school administrators have officially approved/licensed the publication. *See id.* at 271. In *Kuhlmeier*, this Court stated that schools have a public policy interest in regulating speech unofficially made on their behalf and any deceptive speech bearing the school's imprimatur could infringe upon the school's rights. *Id.* at 281. Presumably, examples of imprimaturs could include images of school logos, letterhead, or mascots. *See id.* However, this Court in *Morse* extended imprimaturs to include a publication which did not bear a school-related image, but instead originated at a school function. *See Morse*, 551 U.S. at 405 (reasoning that a student poster displayed at a school event produced a deceitful imprimatur whereby the school promoted student drug use). This Court reasoned that such imprimaturs, when coupled with controversial student speech, could be regulated by school authorities because they produce an agenda contrary to the school's values and educational mission. *See id.*

Here, Mr. Naranjo's speech contained in the Facebook group did not produce an imprimatur, nor did his speech promote or advocate any illegal activity. *See id.* at 400. Mr. Naranjo did not create a fake/mock website deceitfully tricking internet users into believing they were viewing Petitioner's official school website, instead he used Facebook, a social media website open to the general public. *See id.* At the group's creation, Mr. Naranjo titled the group "Nero is Anti-Gay," and a reasonable person reading the title would deduce this website does not bear Petitioner's imprimatur because a school would be very unlikely to make such a statement. *See Kulhmeier,* 484 U.S. at 276. Additionally, the Facebook group conspicuously identified itself as a members-only forum to discuss the lack of diversity in homosexual educators at Petitioner's school, and does not substantiate an argument promoting infringement of Petitioner's rights or imprimatur. *See id.*

C. Mr. Naranjo's speech did not meet the requirements of the "Substantial Nexus," "Foreseeability," or O'Brien tests utilized by courts to determine the constitutionality and scope of speech regulation.

In addition to the substantial disruption test, some circuit courts have used other tests which permit regulation of student speech, and analyze factors such as geographic distance/causal link to the schoolhouse, the foreseeability that the speech would reach the schoolhouse, and the potential furthering of government interests through disciplining student speech. *See Kowalski v. Berkeley Cnty. Sch.,* 652 F.3d 565, 576 (4th Cir. 2011) Similarly, as discussed below, the "sufficient nexus" test, "foreseeability" test, and "*O'Brien* test" do not establish sufficient grounds permitting Petitioner to regulate Mr. Naranjo's right to free speech. *Id.*

In applying the *Tinker* standard to off-campus speech, the scope of a school districts' authority to regulate the speech decreases because the further away the speech occurs from campus, the less likely it will cause a substantial disruption. *Layshock ex. rel. Layshock v. Hermitage Sch. Dist.,* 650 F.3d 205, 216 (3d Cir. 2011) (holding that student speech originating off-campus through

a fake website profile did not establish a sufficient nexus between the speech and a substantial disruption to the school community). In *Eugene*, the court reviewed student speech containing sexual harassment which occurred off-campus at a nearby park adjacent to school property. *See Eugene*, 835 F.3d at 1148. The court ruled that the speech occurred geographically close enough in proximity to the schoolhouse to establish a sufficient nexus to the school environment and permitted school administrators to discipline the harassing student accordingly. *See id.*; *see also Thomas*, 607 F.2d at 1049 (holding that an off-campus student publication circulated in close proximity to the school provided a sufficient nexus to the schoolhouse).

In addition to geography, a sufficient nexus may result when the off-campus speech at issue directly correlates to a substantial disruption to the learning environment of the school. *See Layshock*, 650 F.3d at 214 (holding that a student's disparaging fake Facebook profile of a school principal did not establish a sufficient nexus strong enough to establish a substantial disruption to the schoolhouse). As described in *Layshock*, the off-campus threshold for infringing upon a student's First Amendment rights requires extraordinary student speech that surpasses trivial humor or disparaging comments. *Id.* In order to establish a sufficient nexus, the speech must directly connect to the school environment in such a way that a substantial disruption may occur. *Id.*

Here, Petitioner cannot substantiate a sufficient nexus between Mr. Naranjo's Facebook group and a potential disruption to the schoolhouse. *See Eugene*, 835 F.3d at 1148. Mr. Naranjo's speech occurred off-campus, far removed from the geographic proximity of school property and therefore fails to sufficiently meet any location-based standard for regulation. *See id.* Additionally, Mr. Naranjo did not bring the sexually-explicit drawing to campus nor did the drawing originate on-campus, therefore it likewise fails to meet a geography based sufficient nexus. *See Layshock*, 650 F.3d at 216. Furthermore, unlike *Layshock*, Mr. Naranjo's Facebook group did not contain

offensive language directed to school administrators, and therefore, did not permit Petitioner from violating Mr. Naranjo's First Amendment rights to free speech. *See id.*

In determining foreseeability, school administrators may regulate any student speech which might reasonably lead to a foreseeable substantial disruption of school activities. *Wisniewski v. Bd of Educ.*, 494 F.3d 34, 38 (2d. Cir. 2007) (holding that a student's text message containing a violent icon towards a school teacher met the foreseeability test). The issue of foreseeability creates ambiguous definitions, however, *Wisniewski* interpreted foreseeability as the potential likelihood the student speech would impact the school environment in the near future. *See id.*

Here, Mr. Naranjo's Facebook group does not support a reasonable interpretation of an imminent foreseeable harm or impact to the school community. *See id.* The language contained within the group contained peaceful language with the motive to open conversation to advocate inclusion of diversity. *See id.* Petitioner cannot argue that the Facebook group displayed even the remotest tendency for any impending foreseeable discord which would lead to an impact/substantial disruption rooted in violence or harm. *See id.*

A further test developed by this Court in *O'Brien,* interprets the applicability of government regulation to student speech when (1) it furthers an important or substantial government interest, (2) the government interest does not relate to the suppression of free expression, and (3) the purported restriction on the First Amendment freedoms does not surpass basic/minimal necessity in furthering the government's interest. *United States v. O'Brien*, 391 U.S. 367, 377 (1968) (holding that a Vietnam war protestor who burned his draft card in violation of a federal statute did not receive First Amendment protections because the statute intended to further a government interest and not to suppress freedom of speech); *see also Canady v. Bossier Parish Sch. Bd.,* 240 F.3d 437, 440 (5th Cir. 2001) (applying the *O'Brien* test to a school district's mandatory policy of uniform dress code which furthered a government interest and did not intend to suppress constitutional rights).

In this case, Petitioner's regulation of Mr. Naranjo's speech, did not serve to further any governmental interest, but rather hindered the governmental interest of having an educational learning process through robust conversations between students. *See O'Brien*, 391 U.S. at 377. Addressing the second factor, allowing Petitioner to regulate Mr. Naranjo's speech would by definition result in a suppression of his free expression. *See id.* Lastly, restricting Mr. Naranjo's First Amendment freedoms would surpass basic necessity in furthering Petitioner's interests because any infringement surpasses Petitioner's need to maintain a learning environment. *See id.*

CONCLUSION AND PRAYER

This Court should find that *Tinker* and its progeny do not govern student speech outside the school and therefore should agree with the Fifteenth Circuit's holding that off-campus student speech deserves ordinary First Amendment protection. Even if this Court holds the *Tinker* standard applies to off-campus speech, the Court should find that Petitioner lacked the authority to regulate Mr. Naranjo's speech because neither the creation of the Facebook group, nor the sexually explicit drawing satisfied the "substantial disruption" requirement. Additionally, Mr. Naranjo's speech did not meet the threshold requirements of the sufficient nexus test, foreseeability test, or *O'Brien* test to permit Petitioner to regulate his speech. Accordingly, Mr. Naranjo respectfully requests this Court to affirm the Fifteenth Circuit's decision and hold that *Tinker* does not apply to off-campus speech. In the alternative, Mr. Naranjo prays that this Court find Petitioner lacked the authority to restrict Mr. Naranjo's off-campus speech.

Respectfully Submitted,
/s/ Cody W. Hearrell
Cody W. Hearrell, Esq.
Counsel of Record
Sotomayor & O'Connor, LLP
454 Main St.
Everycity, Everystate 15041

DATED: March 10, 2017

CERTIICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been furnished by U.S. mail to Rey Blanco, Esq., Counsel of Record, 1 Neverending Ave., Everycity, Everystate 15

APPENDIX

U.S. CONST. amend. I – Freedom of Speech.

> "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ."