No. 10-9101

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER 2011

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 THE RESPONDENT

Sidney Mandella

Counsel for Respondent

QUESTIONS PRESENTED

I. Whether student speech outside the school setting is governed by *Tinker v. Des Moines Independent School District*, 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 School District?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

OPINION BELOW

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

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*.

JURISDICTION

The court of appeals entered judgment on September 30, 2010. R. 20. Petitioner filed his petition for writ of certiorari on December 30, 2010. R. 21. This Court granted the petition on June 7, 2011. R. 22. This Court's jurisdiction rests on 42 U.S.C. § 1983 and 28 U.S.C. § 1331.

STATEMENT OF THE CASE

A. Factual Background

This case arose after Murano High School student Michael Fernando created a Facebook page to protest the hiring of a teacher at the school. Entitled "Murano is Anti-Gay," the webpage was designed to draw attention to a recently hired teacher that writes an anti-LGBT blog. R. 2. The membership was made up entirely of Murano students, who quickly began posting links, photos, drawings, and comments on the page. R. 15.

Though the webpage was created off-campus, it came to the attention of school officials when a teacher found a printout from the website depicting school administrators in sexually explicit drawings. R. 15. In addition, concerned parents and students began complaining about the offensive content on the page, while teachers complained that they were having a difficult time controlling their classrooms because students were constantly discussing the website. R. 2. Administrators at Murano High School asked Fernando to remove the offensive material from the page. R. 15. Fernando refused and was suspended until he removes the offensive content. R. 15.

B. Procedural Background

Fernando brought a § 1983 claim against the school claiming a violation of his free speech rights, and moved for a preliminary injunction to enjoin the school from continuing his suspension. R. 15. The district court denied Fernando's motion finding that the school properly suspended him. The court applied *Tinker v. Des Moines Independent School District*, determining that the school could regulate the speech because it caused a substantial disruption. R. 16.

Fernando appealed the judgment of the district court, but it was affirmed by the Court of Appeals for the same reasons given by the district court. R. 20. This Court granted certiorari to review the issues presented. R. 21.

SUMMARY OF THE ARGUMENT

I.

The United States Supreme Court recognizes that students have free speech rights, though they are not coextensive with the rights of adults. In the school setting, it is important that school officials have the authority to regulate student speech that disrupts schoolwork. The Supreme Court has applied this rule to speech that occurs on school grounds; however, with advances in technology, speech that occurs off-campus can have a disruptive impact on-campus. Though the speech does not originate on school grounds, school authorities should be allowed to regulate the student speech because of its disruptive effects on the school. The same tests created by the Supreme Court to determine when school authorities can regulate on-campus speech also apply to speech that occurs off-campus.

II.

The school properly regulated Fernando's speech because it did cause a material and substantial disruption with the work and discipline of the school. Fernando's speech was disruptive because it undermined the authority of school, distracted students from their schoolwork, and diverted the time and resources of the school to managing the growing disruption. This disruption was substantial enough to warrant Fernando's suspension until he removes the offensive content from the webpage. Additionally, pursuant to *Tinker*, school officials could reasonably forecast that Fernando's speech would continue to cause disruption if unrestrained.

ARGUMENT

I. STUDENT SPEECH OUTSIDE THE SCHOOL SETTING IS GOVERNED BY *TINKER* BECAUSE THE SCHOOLHOUSE GATE IDENTIFIED IN *TINKER* IS A FLEXIBLE CONCEPT.

Student speech that occurs off-campus falls under the *Tinker* standard because the schoolhouse gate is no longer a rigid concept. Advances in technology have made defining school boundaries by the physical perimeter of the school impractical. School officials can use *Tinker* to regulate speech that negatively impacts the school despite the fact that the speech may have been initiated off-campus.

Tinker and its Progeny

The foundational student free speech case is *Tinker v. Des Moines Independent Community School District*, where the United States Supreme Court ruled that on-campus student speech is protected under the First Amendment. 393 U.S. 503, 506 (1969). However, the Court recognized that schools also have a legitimate interest in maintaining a disciplined environment conducive to learning. *Id.* at 507. Thus, the *Tinker* Court held that school authorities may regulate on-campus student speech if it causes a "material and substantial interference" with the order and discipline of the school. *Id.* at 511. The Court further held that the school need not wait for a disturbance to occur, but may regulate speech if school authorities can reasonably "forecast" that the speech will cause a "substantial disruption" with school activities. *Id.* at 514. *Tinker* creates a balancing test, weighing the academic concerns of the school with the free speech rights of students. *See id.* at 511.

Similarly, *Tinker*'s progeny employs the balancing test, expanding the scope of *Tinker* to more areas where a school can legitimately regulate or prohibit student speech. In all of these cases the Court held that the school need not show a material and substantial disruption, as

required in *Tinker*. In *Bethel School District No. 403 v. Fraser*, the Court held that school authorities can prohibit speech that is "lewd, indecent, or offensive." 478 U.S. 675, 683 (1986) (holding that school legitimately disciplined student for delivering sexually explicit speech at school assembly). Regulation is proper because of the societal interest in teaching students the "boundaries of socially appropriate behavior." *Id.* at 681. *Hazelwood School District v. Kuhlmeier* recognizes the right of schools to regulate school-sponsored speech when the regulation is related to "legitimate pedagogical concerns." 484 U.S. 260, 273 (1988) (holding that school's editorial control over student newspaper did not violate student free speech). Finally, the most recent student free speech case from the Supreme Court is *Morse v. Frederick*. 551 U.S. 393 (2007). In *Morse*, the Court allowed the school to discipline a student for speech that occurred outside the school, at a school-sanctioned event, because it promoted illegal drug use. *Id.* at 397. The *Morse* Court recognized that school authority may extend beyond the school campus. In sum, *Tinker* and its progeny allow the school to regulate speech if it causes a material and substantial disruption, if it is lewd, if it encourages illegal drug use, or if it is school-sponsored. More importantly, these cases establish a balancing test to weigh the interests of maintaining a well-order school, while respecting students' free speech rights.

The Concept of the Schoolhouse Gate

The concept of the schoolhouse gate was first described in *Tinker*, where the Court held that students do not "shed their constitutional rights" once they enter "the schoolhouse gate." *Tinker*, 393 U.S. at 506. Though seemingly a fixed concept, the schoolhouse gate has necessarily become more flexible with technological advances. Many lower courts recognize that the schoolhouse gate is no longer constructed only of "the bricks and mortar" that make up the physical boundaries of the school. *Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205, 216 (3d Cir.

2011). The overwhelming presence of cell phones, the ease of access to the internet, and the constant social networking via websites like Facebook allow speech to be "everywhere at once." *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 940 (3d Cir. 2011). As a result an effort to define the boundaries of student free speech by the actual physical boundaries of a campus is "a recipe for serious problems" for schools. *Layshock*, 650 F.3d at 221.

The problems with a rigid concept of the schoolhouse gate are well-illustrated by the case at bar. Fernando's speech, though it was initiated off-campus, rapidly spread to the school through the social networking mediums. Once student speech is public, especially if it is directed at or is about the school, the physical boundaries of the campus are no longer a useful tool for determining whether or not the school has the authority to regulate it. Technology has blurred the concept of the schoolhouse gate, and school officials must be able to act accordingly.

The *Tinker* Balancing Test

Tinker establishes a balancing test that helps weigh the competing interests of the school district's need to maintain a well-ordered school environment with the constitutional right to free speech. While acknowledging students' First Amendment rights, it also allows schools the freedom to regulate speech in order to maintain the proper learning environment. In *Tinker* the Court emphasized that the school can regulate or prohibit speech that "materially disrupts classwork." *Tinker,* 393 U.S. at 513. *Tinker*'s progeny employs this balancing test. *Fraser* recognizes that "freedom to advocate unpopular… views" needs to be "balanced against… society's countervailing interest" in educating students on the "boundaries of socially appropriate behavior." *Fraser*, 478 U.S. at 681. *Hazelwood* describes the "legitimate pedagogical concerns" of the school that can justify control over "school-sponsored expressive activities." *Hazelwood*, 484 U.S. at 273.

Whether acknowledging an application of *Tinker*'s balancing test or not, the circuit courts do engage in weighing of interests in deciding whether student speech can be regulated by the school. For instance, in *Kowalski v. Berkeley County Schools* the court grants that the school's concern in preventing the bullying and harassment of its students is superior to a student's free speech that occurs off-campus because school officials are the "trustees of the student body." 652 F.3d 565, 573 (4th Cir. 2011). The *Layshock* court stated that any student First Amendment inquiry must also consider the distinctive "nature of the school environment." *Layshock*, 650 F.3d at 212. The concurring opinion in *Layshock* makes it clear that the real analysis in a student free speech case is not where the speech initially occurred, but about "how to balance the need" for a well-ordered school environment with "respect for free speech." *Id.* at 221 (Jordan, J., concurring).

These cases demonstrate that *Tinker* is not about where the speech occurred. *Tinker* is about providing courts with a balancing test with which to weigh the important right to free speech against the important need to maintain order in schools. A limitation on the school's ability to discipline a student merely because his or her highly disruptive speech was initiated off-campus cannot be tolerated. *Layshock*, 650 F.3d at 221 (Jordan, J., concurring) (recognizing that reliance on physical property lines is insufficient for purposes of disciplining student that engages in disruptive speech). *Tinker* and its progeny do not impose rigid limits on the school and its ability to regulate student speech; rather they allow schools the freedom to continue to ensure the well-being of the student body by permitting regulation of speech that disrupts schoolwork.

Quality and Quantity of Contacts with the School

Speech that technically occurs off-campus can quickly become on-campus speech. When this happens it can reasonably be perceived as on-campus speech, regardless of where it was

initiated, such that the school can justify its regulation. This can be seen in circuit cases. For instance, in *Boucher v. School Board of the School District of Greenfield* a student was disciplined for contributing an article to an underground newspaper that gave step-by-step instructions on how to hack into the school's computers. 134 F.3d 821, 822 (7th Cir. 1998). The article was written at home and distributed on-campus, but its physical presence on the campus was not the sole reason the school was able to punish Boucher. The court found that since the article was distributed on campus, was directed to the student body and called for "on-campus activity," the school was justified in interpreting it as in-school speech. *Id.* at 829. Thus the court had no issue with applying a *Tinker* analysis to the facts of that case.

Another example of off-campus speech that became on-campus speech is *LaVine v. Blaine School District*, where a student showed his English teacher a poem with violent imagery, including shooting other students and suicide. 257 F.3d 981, 984 (9th Cir. 2000). Against the backdrop of a recent spree of school shootings combined with some past disciplinary problems with the student poet, the court ruled that it was reasonable for school officials to perceive it as a threat to the school. *Id.* at 990. Because the poem was brought on-campus and could reasonably be perceived as being directed at the school, the court easily applied *Tinker*. *Id.* at 989.

In contrast, when the speech's contact with the school is minimal and is not directed at the school, the courts decline to allow the speech's regulation. For example, in *Porter v. Ascension Parish School Board* the court held that a student drawing depicting the school under siege could not be regulated by the school because it did not constitute "student speech on… school premises." 393 F.3d 608, 615 (5th Cir. 2004). Though the speech made its way onto campus, it did not do so in a meaningful way. *Id.* The drawing, which was two years old, was inadvertently brought to a middle school by Porter's younger brother where it came to the

attention of school officials. *Id.* at 611. Since it was never meant to be seen by anyone other than his family, the court did not find that it was directed at the school such that it could justify the disciplinary measures imposed on Porter. *Id.* at 615.

Another case that demonstrates that the contacts with the school must be meaningful is *Thomas v. Board of Education, Granville Central School District*. 607 F.2d 1043 (2d Cir. 1979). In this case, students were disciplined after their underground newspaper was discovered by school authorities. *Id.* at 1045. The newspaper was actually stored on-campus, some of it was compiled on campus, and one teacher even provided assistance on "questions of grammar and content." *Id.* at 1045. However, the court found that the contacts with the school were "*de minimis*." *Id.* at 1050. The court noted that the students made every effort to ensure that the newspaper did not have an impact on campus. *Id.* The content, though vulgar, was not directed at the school, they took care to make sure it was distributed only off-campus, and almost all the work for the paper was done off-campus. *Id.* The court held that *Tinker* did not apply and the school's regulation of the newspaper was unreasonable. *Id.* However, even the *Thomas* court recognized that there may be some situations where speech from a "remote locale" "incites substantial disruption." *Id.* at 1052. In such circumstances, regulation would be permissible. *Id.*

The important thread that runs through these cases is that the schoolhouse gate is a flexible concept. Most courts do apply *Tinker* to weigh the competing interests of the schools and the students. Cases where the courts do not defer to the judgments of the school district, such as *Thomas* or *Porter*, are anomalies. Though some of the circuit court opinions describe Orwellian scenarios where the school can punish a student for making a rude comment about a school official at a private party, the above cases demonstrate that only certain kinds of speech will fall under the school's authority to regulate. *J.S.*, 650 F.3d at 933. If the speech is directed at the

school or "could reasonably be expected" to have an impact at the school, then it falls under *Tinker*. *Kowalski* 652 F.3d at 573. On the other hand, speech that is carefully calculated to remain outside the school will not be subject to the school's authority. The worst-case scenarios described by some courts envisioning the school's ability to reach into students' homes are unfounded. Using the *Tinker* standards, courts are perfectly capable of distinguishing the speech that, by its impact on the campus, is subject to school regulation.

Fernando's speech could reasonably be construed as meant to reach the school. The webpage being titled "Murano is Anti-Gay" is very clearly directed at the school. R. 2. Furthermore, all the contributors to the page were students at Murano High School. *Id.* It was thus quite foreseeable that the speech would reach and impact the school; explicit drawings did in fact make their way to campus. R. 15. Since the speech was about the school, directed at the school and its students, and did make it to campus, there exists a "nexus" that is "sufficiently strong to justify" its regulation. *See Kowalski*, 652 F.3d at 573.

Tinker and its progeny can apply to student speech that occurs both on and off campus because *Tinker*'s essential holding is the creation of a balancing test. Even as technology advances and the on/off-campus boundaries become increasingly blurred, school officials will still have a way to maintain order and discipline in their schools. Speech that was initiated off-campus can be regulated when it reaches and impacts the school in a meaningful way. Speech that is directed at, or could be expected to reach, the school can therefore fall under the legitimate regulations of the school. Fernando's speech was initiated off-campus, but it was so connected with the school that application of *Tinker* and its progeny is appropriate.

II. APPLICATION OF *TINKER* AND ITS PROGENY ALLOW PETITIONER'S SPEECH TO BE REGULATED BECAUSE THE SPEECH CAUSED A MATERIAL AND SUBSTANTIAL DISRUPTION, AND BECAUSE SCHOOL OFFICIALS COULD REASONABLY FORECAST MORE DISRUPTION

The school district is justified in regulating Fernando's speech because *Tinker* and its progeny allow school officials to prohibit speech that interferes with the work and discipline of the school. Furthermore, *Tinker* allows the schools to regulate speech if they can reasonably forecast that the speech will cause disruption if unregulated. Because Fernando's speech caused a material and substantial disruption, and school officials could reasonably anticipate more disruption, Murano was justified in suspending Fernando until he removes the offensive content.

School Properly Regulated Speech because it Caused Disruption

While students undoubtedly have a right to free speech, the *Tinker* court recognized that this right is limited. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 507 (1969). The Court stated that speech that "materially disrupts classwork" is "not immunized" by the First Amendment. *Id.* at 513. Though this is central to the holding in *Tinker*, the Court does not define what constitutes a material and substantial disruption. *Guiles ex rel. Guiles v. Marineau*, 461 F.3d 320, 326 (2d Cir. 2006). Furthermore, no real consensus exists among the circuit courts on what is meant by a material and substantial disruption.

The *Tinker* Court itself was in disagreement about what constituted a material and substantial disruption. The majority held that although the black armbands did cause hostile comments, warnings, and a dispute in a math class, there was "no indication" that schoolwork was "disrupted." *Tinker*, 393 U.S. at 508. However, in his dissenting opinion, Justice Black argued that the disruption was substantial enough to warrant the speech's regulation. *Id.* at 515 (Black, J., dissenting). Justice Black pointed out that that the mere absence of "boisterous and loud disorder" is not indicative that there was absolutely no disruption. *Id.* at 518. He explained that the protest "did divert students' minds" from their schoolwork. *Id.* Further, Black argued that the majority's holding opened up the door for more disruption because students "will be… able

and willing" to "defy their teachers." *Id.* at 525. The lack of consensus on what constitutes a material and substantial disruption is further played out in the circuit courts.

J.S. ex rel. Snyder v. Blue Mountain School District is another example of a court in disagreement about the definition of material and substantial disruption. 650 F.3d 915 (3d Cir. 2011). The *J.S.* court held that the school could not punish a student for creating a derogatory profile about her school principal because "no disruptions occurred." *Id.* at 929. However, six dissenting judges found that this conclusion was erroneous because the majority failed to take into account the seriousness of the misconduct. *Id.* at 941 (Fisher, J., dissenting). The dissenters argued that J.S.'s conduct was disruptive because it undermined school authority, disrupted the classroom environment and impaired the ability of teachers to effectively perform their job functions. *Id.* at 945. Like Justice Black in *Tinker*, the *J.S.* dissenters also conclude that had J.S. not been punished, it was foreseeable that more students would be encouraged to "personally attack" the principal and other school officials. *Id.* at 947.

Other courts impose a more lenient standard on the schools in determining what constitutes disruption. For example, in *Doninger v. Niehoff*, a student was disqualified from running for senior class secretary after posting lewd and misleading information on her blog about the school administration. 527 F.3d 41, 45 (2d Cir. 2008), *aff'd in part, rev'd in part*, 642 F.3d 334 (2d Cir. 2011), *cert denied*, 132 S. Ct. 499 (2011). The school argued that there was sufficient disruption to justify the disciplinary measure because the language encouraged many to flood the school administration with calls and emails, it diverted school resources from their "core educational responsibilities" by calling on administrators to manage the growing anger of the student body, and it caused school officials to "miss or be late" to school functions. *Id.* at 51. The court found that this was enough to constitute a material and substantial disruption. *Id.*

The *Doninger* court also recognized that the student's conduct risked "frustration of the proper operation" of the student government, and that it undermined the "values that student government" is supposed to promote. *Id.* at 52. This, the court found, created substantial disruption because Doninger's conduct was a violation of the school policy of "civility and cooperative conflict resolution." *Id.* Thus, undermining school policy and school authority can qualify as substantial disruption. *Id.* The *Doninger* court points to a similar case, *Lowery v. Euverard*, 497 F.3d 584 (6th Cir. 2007), to suggest that it is not alone in holding that an undermining of school authority constitutes substantial disruption. *Id.* In *Lowery* a football team circulated a petition designed to get their coach, Euverard, fired. *Lowery*, 497 F.3d at 585. The court found that this conduct created substantial disruption because attacking the coach's authority "necessarily undermin[ed] his ability" to be an effective leader. *Id.* at 594. The *Lowery* court also provided a hypothetical example, where a student is disciplined for making a "smart aleck" comment to a teacher. *Id.* Though the teacher would have a difficult time proving that this specific incident disrupted school activities, the court noted that allowing this incident to go unpunished would "clearly negatively affect" the overall ability of a school to "maintain order and discipline." *Id.* The court concluded that signing a petition designed to fire the football coach was tantamount to a declaration of disrespect for this school official. *Id.* Finally, the court noted that while the players were free to continue "their campaign" to have the coach fired, they were not free to "continue to play football" while "actively working to undermine" the coach's authority. *Id.* at 600.

Doninger and *Lowery* are pertinent to analyzing Fernando's speech because both courts recognize that undermining school authority is a disruption in itself. *See Doninger*, 527 F.3d at 52; *Lowery*, 584 F.3d at 594. Speech that undermines school authority encourages other students

to act similarly. *J.S.* 650 F.3d at 945 (Fisher, J., dissenting). If Fernando were not disciplined it would "demonstrate to the student body" that this sort of offensive speech is "acceptable behavior." *Id.* As Justice Black points out in his *Tinker* dissent, the Constitution does not compel school officials to "surrender control" of public schools to its students. *Tinker*, 393 U.S. at 526 (Black, J., dissenting). A policy that requires school officials to tolerate the conduct engaged in by Fernando and his fellow students would amount to just this. In sum, the school was justified in regulating Fernando's speech because it caused a material and substantial disruption by undermining school authority.

Finally, the disruption caused by Fernando's speech went beyond undermining school authority. The website did materially interfere with daily school activities. There is evidence that the webpage was frequently accessed and discussed on school grounds during school hours, and because of this, students were quite distracted from their school work. R. 2. Additionally, numerous complaints from teachers, parents, and students diverted school resources to manage the growing discontent. R. 17. Many courts would find that these facts constitute sufficient disruption to justify disciplinary actions against the student whose speech caused the trouble. *See J.S.*, 650 F.3d at 944 (Fisher, J., dissenting); *Doninger*, 527 F.3d at 51

School Could Reasonably Forecast Substantial Disruption

Even assuming *arguendo* that Fernando's speech did not cause sufficient disruption to warrant his suspension, school officials were still justified in their actions because *Tinker* allows schools to regulate speech when they can reasonably forecast that the speech will cause disruption. *Tinker*, 393 U.S. at 514. Murano High School officials could reasonably forecast that Fernando's speech would cause more disruption because of the problems that had already occurred at the school.

Tinker does not require that school officials wait for disruption to occur before they may take action. *Id.* at 513. When the school can point to facts that might "reasonably have led" school officials to "forecast substantial disruption," the school may regulate that speech, regardless of whether any disruption has actually occurred. *Id.* at 514. Moreover, "*Tinker* does not require certainty" that disruption will occur; it simply requires that the forecast of disruption be "reasonable." *Lowery*, 497 F.3d at 592. In the present case, Murano officials can point to specific facts that led them to reasonably forecast disruption. Therefore they were justified in suspending Fernando.

Tinker suggests that a forecast is reasonable when the school's decision is based on the facts surrounding the speech that "might reasonably portend disruption." *LaVine*, 257 F.3d at 989. Lower courts have recognized that evidence of past disruption can "support an inference" of disruption in the future. *Boucher*, 134 F.3d at 827. For example, in the *LaVine* case, the court recognized that the school's emergency expulsion of a student that wrote a poem about a school shooting was reasonable. *LaVine*, 257 F.3d at 985. Because several school shootings had recently occurred in the surrounding area, school officials nationwide were on alert for any warning signs that might indicate potential violence in the school. *Id.* at 984. Based on this background, the court found that the actions taken by the school were reasonable. *Id.* at 989.

A.M. ex rel. McAllum v. Cash is another case where the court recognized that past disruption supported a policy of speech regulation. 585 F.3d 214 (5th Cir. 2009). In this case, two students challenged a school policy that prohibited the display of the Confederate flag on school grounds. *Id.* at 217. The girls were referred to the "administration for discipline" for carrying purses that displayed the Confederate flag. *Id.* The policy was enacted because of prior racial incidents at the school, some involving the Confederate flag. *Id.* at 218. Though the court found that the

purses did not cause any disruption, they held that the school's policy was reasonable because school officials "reasonably anticipated" that display of the flag would cause "substantial disruption." *Id.* at 222. The court recognized that the school policy was based on "ample, uncontroverted evidence" of past racial incidents. *Id.* Thus, the court upheld the policy despite the fact the purses did not cause any disruption.

Similarly, the disciplinary actions of Murano High School are permissible because the school could reasonably forecast that the speech would lead to more disruption. The material on the website was becoming increasingly offensive in content, leading to more complaints from students and parents. R. 2. Teachers were already having trouble maintaining control of their classrooms. R. 15. Since the content of the website had so quickly escalated to an inappropriate level, it was reasonable for the school district to assume that, if unrestrained, the conduct would rapidly continue to spiral out of control. It is not necessary for Murano officials to wait for riots in the hallways to justify suspending Fernando. Based on what had already occurred at the school, officials were justified in concluding that disciplinary action was reasonable to prevent future disruption. Finally, school officials at Murano did not have to be certain that disruption would occur; since their forecast was reasonable, their disciplinary measures should be sustained.

CONCLUSION

First, *Tinker* and its progeny apply to student speech that is initiated off-campus. The schoolhouse gate identified in *Tinker* is necessarily a flexible concept, and can no longer be defined solely by the physical boundaries of the school. Through the use of cell phones and social networking websites, speech that may have been initiated off-campus doesn't stay off-campus for very long. *Tinker* allows regulation of off-campus speech because it creates a balancing test to weigh the interests of the school against students' right to free speech. Using this test, student speech that negatively impacts the school environment will be subject to regulation. The lower courts properly applied *Tinker* to Fernando's speech because the speech had a sufficient and significant connection to the school.

Next, *Tinker* and its progeny allow the school to regulate Fernando's speech. Under *Tinker*, a school may regulate speech that causes a material and substantial disruption in the school environment. *Tinker* also allows schools to regulate speech prospectively; that is, school officials are not required to wait for a disruption to occur before prohibiting or regulating speech. If school officials can forecast that the speech will cause a disruption, it may be regulated. Both of these apply to Fernando's case. Not only did the speech cause a material and substantial disruption, but also it was reasonable for school officials to conclude that his speech would continue to cause disruption if not properly restrained. Accordingly, the school was justified in suspending Fernando until the offensive content is removed from the website.

In sum, the decisions of the lower courts should be affirmed because *Tinker* applies to speech that is initiated off-campus. Applying *Tinker* to this case shows that the speech was properly regulated because it did disrupt school activities and it was reasonable for school officials to forecast more disruption.

PRAYER

For these reasons, Respondent prays the Court will affirm the lower court's judgment and find that Murano High School authorities properly suspended Michael Fernando for his disruptive speech.

Sidney Mandella

Counsel for the Respondent

CERTIFICATE OF SERVICE

Student certifies that this brief has been prepared and served on all opposing counsel.

Sidney Mandella