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

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QUESTIONS PRESENTED

(1) Whether student speech outside the school setting is governed by *Tinker v. Des Moines Indep. Sch. Dist.,* 393 U.S. 503 (1969) and its progeny?

(2) 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-respondent in the proceedings below was Michael Naranjo.

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

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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, 2016. (R. at 24). This Court's jurisdiction rests on 28 U.S.C. § 1254(1) (2012). 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 PROVISIONS AND STATUTES

The First Amendment of the U.S. Constitution states:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

STATEMENT OF THE CASE

Nero Unified School District ("Petitioner") indefinitely suspended Respondent, Michael Naranjo ("Naranjo"), for refusing to delete a Facebook group Naranjo created off campus. (R. at 2). Naranjo is an eighteen-year-old senior at Nero High School, and an excellent student, athlete, and leader. (R. at 3, 6). Naranjo created the Facebook group—"Nero is Anti-Gay"—to protest Petitioner's hiring of a teacher who writes an anti-LGBT blog, and to provide a forum for other students to express opinions on the matter. (R. at 2, 6).

While Naranjo never advertised, displayed, or accessed the group on campus, the group grew in popularity and Nero High School's entire senior class and some underclassmen joined the group. (R. at 6, 21). Facebook is not affiliated with Naranjo or Petitioner, and Naranjo had no control over the various expressions other students posted. (R at 6, 8, 16) Further, Naranjo had no control over students accessing the group on campus, or the unknown student who brought one of Naranjo's drawings to campus. (R. at 7).

Following complaints from a few parents and students, Petitioner requested Naranjo delete the Facebook group and its content, or face indefinite suspension. (R. at 2, 9, 21). Naranjo refused, and after two weeks, Petitioner indefinitely suspended Naranjo. (R. at 2, 12, 16, 21). In protest, Naranjo created a second Facebook group, which other students have refrained from joining out of fear of punishment from Petitioner. (R. at 2.) Further, Naranjo filed a complaint with the United States District Court for the Southern District of Everystate seeking—among other things—an order enjoining Petitioner from enforcing the suspension. (R. at 4). Applying the test established in *Tinker v. Des Moines Indep. Cmty. Sch. Dist*, the district court found Naranjo was unlikely to succeed on the merits of the claim and denied Naranjo's request for a preliminary injunction. (R. at 17-18).

Following the district court's denial, Naranjo filed a notice of appeal with the United States Court of Appeals for the Fifteenth Circuit. (R. at 19). The Fifteenth Circuit granted appeal and considered whether *Tinker* and its progeny may govern off-campus student speech, and if so, whether applying *Tinker* and its progeny allow Petitioner to regulate Naranjo's speech. (R. at 20). The Fifteenth Circuit reversed and remanded the district court's ruling, and ordered the district court to apply the First Amendment. (R. at 22). The Fifteenth Circuit found *Tinker* and its progeny did not apply to Naranjo's case and, therefore, the court declined to address whether *Tinker's* analysis permitted Petitioner to regulate Naranjo's speech. (R. at 22).

This Court granted certiorari to determine whether *Tinker* and its progeny may govern off-campus student speech, and if so, whether applying *Tinker's* standard allows Petitioner to regulate Naranjo's speech. (R. at 24).

SUMMARY OF THE ARGUMENT

I. The court of appeals correctly held that the First Amendment—not *Tinker* and its progeny—should govern the analysis of Naranjo's Facebook group and drawing. Applying *Tinker* to Naranjo's off-campus speech goes against *Tinker's* purpose—to protect students in light of the special characteristics of the school environment. Further, because Naranjo's speech addresses the hiring practices of a public school district—a matter of public concern—Naranjo's speech is entitled to the First Amendment's highest level of protection and should not be limited by *Tinker*. Finally, extending *Tinker's* reach off campus will impede *Tinker's* protective purpose by silencing students and exposing schools to greater harm. Therefore, this Court should uphold the court of appeals' decision and issue the requested preliminary injunction, or remand the matter for further proceedings governed by the First Amendment.

II. If *Tinker* and its progeny are applied, Petitioner is not permitted to regulate Naranjo's speech because Naranjo's speech did not cause a substantial disruption to the school environment or interfere with the rights of others. Petitioner's delay in disciplinary action evidences the slight and immaterial impact of Naranjo's speech on the school environment. Equating the complaints of a few parents and students with the violence forecasted in *Bell v. Itawamba Cty. Sch. Bd.* and *Wynar v. Douglas Cty. Sch. Dist.* trivializes the disruptions the *Tinker* standard was enacted to prevent. Further, Naranjo's indefinite suspension is disproportionate to the alleged harm caused to the school environment. Finally, *Tinker's* purpose is to enable school administrators to preserve the school environment and protect the rights of students without violating the First Amendment. Petitioner has not acted to protect the school environment but rather to preserve Petitioner's public image at the expense of Naranjo's education and future. If this Court applies *Tinker* and its progeny, the Court should find that Naranjo's actions did not substantially disrupt the school environment or interfere with the rights of others, and issue the requested relief.

ARGUMENT

I. THE COURT OF APPEALS' DECISION TO APPLY THE FIRST AMENDMENT—NOT *TINKER* AND ITS PROGENY—IS CORRECT, BECAUSE NARANJO'S SPEECH OCCURRED OFF CAMPUS, ADDRESSED A MATTER OF PUBLIC CONCERN, AND, PUNISHING NARANJO'S SPEECH WOULD IMPEDE *TINKER*'S GOAL OF PROTECTING STUDENTS IN LIGHT OF THE SPECIAL CHARACTERISTICS OF THE SCHOOL ENVIRONMENT

Tinker should not apply to speech originating off-campus—especially if the speech is non-violent or addresses a matter of political concern. The First Amendment guarantees freedom from laws abridging the right to free speech. U.S. Const. amend. I. One of *Tinker's* fundamental principles is that students and teachers do not shed First Amendment rights to free speech at the schoolhouse gate. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

Tinker does not give schools absolute authority or the right to censor student speech at will. *Id*. at 511. Rather, *Tinker* allows schools—under narrowly tailored circumstances—to discipline students for speech which either substantially disrupts the school environment or interferes with the rights of others. *Id*. at 506. *Tinker* provides an avenue—in light of the special characteristics of the school—for schools to protect students entrusted to the school's care. That said, because *Tinker* necessarily limits students' rights, *Tinker's* application must be controlled. Allowing Petitioner to discipline Naranjo for non-violent off-campus speech addressing a matter of political concern, goes beyond *Tinker's* necessary limits and, therefore, this Court should affirm the court of appeals' decision that *Tinker* does not apply.

A. *Tinker* Should Not Apply To Off-Campus Speech Unless The Speech Forecasts A Threat Of On-Campus Violence

Naranjo's speech should not be analyzed under the *Tinker* standard because Naranjo's speech occurred off campus. Naranjo's position as a student at Nero High School does not automatically classify everything Naranjo says as school speech governed by *Tinker*. *Tinker*'s reach must be limited. To date, this Court has limited *Tinker* to speech occurring in primary or secondary school environments. *See Morse v. Frederick*, 551 U.S. 393, 397 (2007) (allowing schools to limit speech promoting harmful activity—specifically, illegal drug use—in a secondary school environment); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 275 (1988) (allowing schools to limit speech releasing students' sensitive information in a school newspaper); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986) (permitting schools to limit lewd, vulgar, or profane speech occurring on campus). Because Naranjo created the Facebook group and drawing off campus, and because Naranjo never intended the group or drawing to reach the campus, this Court should not apply *Tinker*.

By allowing regulation of certain types of on-campus speech, *Tinker* provides a way to protect students in light of the special characteristics of the school environment. *Morse*, 551 U.S. at 424 (Alito, J., concurring). The special characteristics of the school environment place children together in close quarters under the guidance and supervision of teachers, who educate, discipline, and protect students. *Id.* The nature of the controlled environment demands the school place the physical safety and well being of students above all other rights. *Id*. Therefore, school administrators have latitude to run the school as necessary, provided the school's arm of authority does not extend off campus. *See Thomas v. Bd. of Ed., Granville Cent. Sch. Dist.*, 607 F.2d 1043, 1044 (2d Cir. 1979) (holding disciplinary action for an off-campus student newspaper must conform to the restrictions of the First Amendment—not *Tinker*).

That said, the school environment's special characteristics and educational mission are not synonymous. *Morse*, 551 U.S. at 423 (Alito, J., concurring). The special characteristics of the school environment encompass the school's responsibility and control over students' physical safety. *Id*. at 424. Conversely, schools define the educational mission on a state-by-state and school-by-school basis. *Id*. at 423. For example, some schools may define the educational mission as directing students toward certain political, social, or religious views. *Id*. Allowing schools to hide behind *Tinker* while punishing students for any statement conflicting with the broadly defined educational mission of the school, exceeds *Tinker's* scope. Therefore, *Tinker* should be limited to protecting the school environment in light of the special characteristics of the school, not the school's educational mission. While Petitioner has broad power to sculpt the school's educational mission, Petitioner cannot use *Tinker* to justify silencing Naranjo for mere critiques.

In *Boucher*, a student was suspended for writing an article teaching students to hack the school's computer system. *Boucher v. Sch. Bd. of Sch. Dist. of Greenfield*, 134 F.3d 821, 823 (7th Cir. 1998). The *Boucher* court distinguished the student's article from a mere critique of the school because the article included a call to action allowing school administrators to reasonably forecast harm to school property. *Id*. at 828. Conversely, Naranjo's Facebook group and drawing merely critique Petitioner's hiring practices. Naranjo has not called students to action allowing Petitioner to forecast harm to school property, or the lives of other students. Instead, Naranjo made available a forum for students to critique Petitioner's anti-LGBT hiring practices. *Tinker* allows Petitioner to correct conduct, which substantially disrupts the school environment, not beliefs contrary to Petitioner's own.

Tinker's protection of the special characteristics of the school environment allows regulating conduct, not belief. In *Morse*, this Court found that disciplining a student for a sign advocating illegal drug use was proper under *Tinker's* standard of analysis. *Morse*, 551 U.S. at 409. That said, Justices Alito and Kennedy indicated in Justice Alito's concurring opinion that had the student's message gone beyond advocating conduct to addressing belief—specifically, the legalization of drugs—*Tinker* would not permit censorship. *See Id*. at 422 (5-4 decision) (Alito, J., concurring) (indicating speech regarding the legalization of drugs is political, beyond *Tinker's* reach, and would alter the Court's holding). While schools may regulate student speech promoting conduct threatening the special characteristics of the school environment, schools may not become enclaves of totalitarianism—regulating speech that does not conform to the school's approved beliefs. *Tinker*, 393 U.S. at 511. Naranjo's speech addressed the belief that Petitioner was wrong to hire a teacher with an anti-LGBT blog. While Naranjo's belief may directly conflict with Petitioner's position, Petitioner may not regulate Naranjo's speech merely because

the speech advances a belief with which Petitioner does not wish to contend. *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966). Punishing students for interrupting class, addresses conduct essential to preserving special characteristics of the school environment. *Id*. at 748. Indefinitely suspending Naranjo for creating an off-campus Facebook group regulates belief, which is outside *Tinker's* standard of review, and, therefore, violates the First Amendment.

Finally, if this Court determines *Tinker's* reach may extend off campus, these rare circumstances should be limited to speech threatening physical safety. While applying *Tinker* to off-campus speech presents a matter of first impression for this Court, lower courts have applied *Tinker* to off-campus speech forecasting on-campus violence. *See Bell v. Itawamba Cty. Sch. Bd.*, 799 F.3d 379, 393 (5th Cir. 2015) (en banc), *cert. denied*, 136 S. Ct. 1166 (2016) (forecasting on-campus violence against a coach through a rap song); *Wynar v. Douglas Cty. Sch. Dist.*, 728 F.3d 1062, 1064 (9th Cir. 2013) (suspending a student for sending messages threatening on-campus violence against students and teachers via Myspace). In comparison, Naranjo's speech occurred off campus, only made its way to campus through the acts of another student, and did not cause physical harm to students or teachers. Stretching *Tinker* beyond the schoolhouse gate should impose a higher burden on Petitioner to establish that inaction would expose students to catastrophic harm. Petitioner cannot meet this burden. Therefore, this Court should find *Tinker's* analysis unsuitable when applied to Naranjo's non-violent, off-campus speech.

B. *Tinker* Should Not Apply To Political Speech Addressing A Matter Of Public Concern.

While violent speech may warrant extending *Tinker's* reach off campus, political speech—both on and off campus—should receive greater levels of protection. In *Burnside,* the court held that the First Amendment protects communicating matters of public concern against

infringement by state officials such as public schools. *See Burnside*, 363 F.2d at 749 (disciplining students for wearing buttons promoting civil rights activism violates students' First Amendment rights). Further, in *Phelps*, the Court acknowledged that political speech on a matter of public concern merits the highest level of protection under the First Amendment. *Snyder v. Phelps*, 562 U.S. 443, 452 (2011) (citing *Connick v. Myers*, 461 U.S. 138, 145 (1983)). Political speech addressing a matter of public concern should exceed *Tinker*'s authority. Naranjo is dissatisfied with Petitioner's hiring practices—a matter of public concern—and Naranjo is providing a forum for other concerned citizens to express dissatisfaction. Therefore, this Court should find that Naranjo's political speech evades *Tinker's* authority.

Addressing dissatisfaction with current conditions is one of the primary functions of political speech. *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949). Naranjo and other students participated in the Facebook group because of dissatisfaction with Petitioner's hiring practices. Petitioner's response attempts to silence dissenting opinions by threatening suspension. Petitioner acts to preserve public image and political will at the expense of Naranjo's rights and future—a future Petitioner has a privilege to foster and duty to protect. This is not to argue that Naranjo's right to political speech is limitless even off campus, only that Naranjo's speech is distinct from the "substantive evil" standard of *Terminiello* or the hate speech allowed in *Phelps*. *See Phelps,* 562 U.S. at 443 (permitting the church to picket a soldier's funeral with anti-homosexual signs because the speech addressed a matter of public concern); *Terminiello*, 337 U.S. at 4 (censoring speech requires evidence of a clear and present danger of serious substantive evil rising far above public inconvenience, annoyance, or unrest). Naranjo's Facebook group may be an annoyance, and complaints from parents and students may signal unrest, but political criticism of Petitioner's hiring practices can hardly be classified as "substantively evil."

Finally, In *Tinker*, the school violated the students' First Amendment rights by suspending students for wearing armbands protesting the Vietnam War—the 1960's seminal political issue. *Tinker*, 393 U.S. at 514. Similarly, gay rights occupy a prominent platform in today's political climate. In *Phelps*, members of Westboro Baptist Church held signs thanking God for dead soldiers—alleged evidence of God's judgment on America's pro-homosexual culture. *Phelps*, 562 U.S. at 447. The *Phelps* Court held that because the signs addressed a matter of public concern—gay rights—the church was entitled to the highest levels of protection available under the First Amendment. *Id*. at 444. Because Naranjo's drawing and Facebook group address the implications of a prominent political issue on a public school district's hiring practices, Naranjo's speech deserves the First Amendment's highest protection.

C. Punishing Naranjo Will Make It More Difficult To Preserve The Special Characteristics Of The School Environment And Protect Students In The Future.

Compelling Naranjo to remove the Facebook group to protect the special characteristics of the school environment, actually exposes the school to greater harm. Students play a vital role in school safety because students are often the first to know of pending danger. In *Wynar*, the school became aware of a threat of on-campus violence because concerned students informed a teacher of a student's violent Myspace messages. *Wynar*, 728 F.3d at 1066. In *Bell*, Justice Dennis' dissent addresses the silencing effect that disciplinary actions can have on students' willingness to expose on-campus threats like sexual harassment. *See Bell*, 799 F.3d 379, 403 (Dennis, J., dissenting) (addressing a matter of public concern entitled the student to higher protection as a whistleblower exposing sexual harassment by a school coach). Unfortunately, Petitioner's overreaching disciplinary action may silence student whistleblowers and impede Petitioner's duty to protect students.

Suspending Naranjo has silenced student speech at Nero High School. While the entire senior class joined "Nero is Anti-Gay," students have not joined Naranjo's second Facebook group—protesting Petitioner's punishment—because students fear being suspended for participating. Protecting the special characteristics of the school environment requires students feel safe to speak out against wrongdoing and injustice. Suspending Naranjo in hopes of preserving Petitioner's public image exposes Nero High School to greater harm. The delicate balance between school discipline and student speech should err on the side promoting student speech because student silence opens the door for catastrophic harm. Therefore, this Court should find *Tinker* does not apply to Naranjo's off-campus speech.

II. IF *TINKER* IS APPLIED, NARANJO'S SPEECH DOES NOT VIOLATE *TINKER'S* STANDARD BECAUSE NARANJO'S SPEECH DOES NOT BREACH *TINKER'S* MINIMUM THRESHOLD, PETITIONER'S ACTIONS CONFIRM NARANJO'S SPEECH HAD MINIMAL IMPACT ON THE SCHOOL ENVIRONMENT, AND NARANJO'S SPEECH DOES NOT FIT AN ESTABLISHED *TINKER* EXCEPTION.

Violating *Tinker's* standard requires evidence of substantial disruption to the school environment or interference with the rights of others. *Tinker*, 393 U.S. at 506. Even if *Tinker* is applied to Naranjo's off-campus speech, this Court should find that Naranjo's speech did not violate *Tinker's* standard. In finding Naranjo's speech did not violate *Tinker's* standard, this Court will further solidify *Tinker*'s narrowly tailored scope and protect students' First Amendment rights. While other courts have held students' First Amendment rights are not necessarily co-extensive with the rights of adults in other settings, schools still must balance protecting the school environment while respecting fundamental rights. *Bell*, 799 F.3d at 682; *LaVine v. Blaine Sch. Dist.*, 257 F.3d 981, 987 (9th Cir. 2001).

A. Naranjo's Speech Does Not Violate *Tinker's* Minimum Threshold Because Naranjo's Speech Is Merely Unpleasant To Some.

Courts applying *Tinker* have not crafted bright line definitions of substantial disruption or interference with the rights of others, preferring instead to apply *Tinker* on a case-by-case basis, looking at all surrounding circumstances. *Lavine*, 257, F.3d at 989. Regardless, some substantially disruptive circumstances require little qualification. *See Wynar*, 728 F.3d at 1072 (perpetrating an on-campus shooting represents quintessential interference with the rights of other students). By contrast, some situations—although uncomfortable—do not rise to the level of violating *Tinker*'s standard. *See Tinker*, 393 U.S. at 509 (regulating contrary viewpoints merely because the speech is unpopular or unpleasant, is not permitted). Further, student speech does not cause a substantial disruption with the school environment or interference with the rights of others merely because the speech offends some listener. *See C.R. v. Eugene Sch. Dist. 4J*, 835 F.3d 1142, 1152 (9th Cir. 2016), *petition for cert. filed*, 85 U.S.L.W. 3368 (U.S. Jan. 24, 2017) (No. 16-940) (noting speech which is "merely offensive to some listener" does not constitute a substantial disruption or interference with the rights of others under *Tinker* (citing *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 217 (3d Cir. 2001))). A few complaints from parents, teachers, and students indicate that although some may find Naranjo's viewpoint unpleasant, Naranjo's speech does not breach the minimum threshold of substantial disruption or interference with the rights of others. Further, Petitioner's delayed response affirms the minimal impact Naranjo's speech had on the school environment.

B. Petitioner's Delay And Severity Of Punishment Contradict Allegations That Naranjo's Speech Caused Substantial Disruption Under *Tinker*'s Standard Of Analysis.

Petitioner's disciplinary delay indicates Petitioner does not regard the complaints of a few students, parents, and teachers, as a substantial disruption to the school environment. A

substantial disruption with the special characteristics of the school environment interferes with the school to such a degree that the school is unable to fulfill its purpose until the disruption is corrected. *See Bell*, 799 F.3d at 399 (threatening speech destroys the ability to teach and, therefore, the school's purpose). Some states, recognizing the need to equip schools to quickly respond to threats and regain control of the school environment have passed statutes permitting emergency expulsion. *See LaVine*, 257 F.3d at 990 (applying a Washington statute permitting emergency expulsion for threats of substantial disruption to the educational environment). True substantial disruptions demand an immediate response to regain control of the school environment. Petitioner claims Naranjo created a substantial disruption on campus and yet took no disciplinary action against Naranjo for two weeks.

Substantial disruptions demand immediate reactions. In *LaVine*, the student argued that the school's punishment was merely retributive and would jeopardize the student's future military employment. *Id*. at 986. The *LaVine* court reasoned that the immediacy of the school's response to the student's threat of violence, substantiated the school's interest in preventing disruption. *See Id*. at 991 (calling a school counselor and convening a meeting of school officials immediately after discovering a student's violent poem substantiated the school's intent to protect the school, not punish the student). Further, in *Bell*, the court determined the primary purpose for extending *Tinker* to off-campus speech is to allow school administrators to react quickly to perceived threats against students and faculty. *Bell*, 799 F.3d at 393.

Petitioner tarried because Naranjo's speech did not substantially disrupt the school environment or interfere with the rights of others. If Naranjo's speech violated *Tinker's* standard, Petitioner would not have allowed the disruption to linger for fourteen days. Petitioner gave Naranjo time to consider the pending indefinite suspension to coerce Naranjo into removing a

message with which Petitioner does not wish to contend. Therefore, Petitioner's actions defy *Tinker's* intended purpose—to protect the school environment—and indicate Naranjo's speech did not cause a substantial disruption.

Further, the severity of Naranjo's punishment as compared to moderate responses in other cases reveals Petitioner's goal was preserving public image—not protecting the school environment from substantial disruption. In *Wisniewski*, a student was suspended for a drawing depicting the death of a teacher. *Wisniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist.*, 494 F.3d 34, 35 (2d Cir. 2007). The student's suspension lasted for one semester during which time the district provided alternative education and permitted the student to rejoin the class the following semester. *Id*. at 37. Similarly, the catastrophic harm forecast in *Bell* and *Wynar*—on-campus violence—was also met with temporary suspensions. *Bell*, 799 F.3d at 385; *Wynar*, 728 F.3d at 1070.

The few complaints Petitioner received from parents, students, and teachers, cannot rival the threat of potential on-campus violence. Yet, Naranjo's punishment—indefinite suspension without alternative education—is more severe. Naranjo's suspension will last until Naranjo deletes the Facebook group and the group's content, or this Court enjoins Petitioner from enforcing the suspension. This is not punishment, but coercion. Petitioner's goal is not securing and protecting the educational environment, but preserving Petitioner's public image by forcing Naranjo to relent.

Finally, in *LaVine*, the school's emergency expulsion letter threatened the student's chances for military employment. *LaVine*, 257 F.3d at 986. Because the emergency expulsion's purpose was protecting the school environment, the school revised the expulsion letter to help preserve the student's future military prospects. *Id*. Indefinitely suspending Naranjo—a high

school senior—threatens Naranjo's ability to graduate. Unlike the school in *LaVine*, Petitioner's actions preserve public image at the expense of Naranjo's future. Further, Petitioner's actions send a message to students who dare speak out against Petitioner in the future. Petitioner hides self-preservation under a cloak of substantial disruption. Applying *Tinker* will encourage other schools to do the same, turning educational environments into enclaves of totalitarianism.

C. Naranjo Should Not Be Punished Under An Established *Tinker* Exception, Or For The Conduct Of Other Students.

To date, this Court has addressed three specific categories of speech, which permit school censorship without requiring evidence of actual or reasonably forecasted disruption. *Bell*, 799 F.3d at 391; *See, e.g., Morse*, 551 U.S. at 425 (regulating on-campus speech threatening physical safety) (Alito, J., concurring); *Kuhlmeier*, 484 U.S. at 271 (permitting the school to regulate student speech reasonably perceived to bear the imprimatur of the school); *Fraser*, 478 U.S. at 683 (holding lewd, indecent, or offensive speech causes substantial disruption within the school environment). Arguing that Naranjo's speech violated one of *Tinker*'s exceptions fails because Naranjo's speech cannot be classified as lewd, bearing the imprimatur of the school, or threatening physical harm to students.

First, Classifying Naranjo's speech as "lewd" under *Fraser*'s standard ignores the fact that Naranjo's intended audiences were voluntary participants in the Facebook group. Students willingly joining and voluntarily contributing to a Facebook group are different from students subjected to speech at mandatory school assemblies. *Fraser*, 478 U.S. at 677. Second, suggesting Naranjo's Facebook group bore the imprimatur of the school implies people reasonably believed "Nero is Anti-Gay" spoke on Petitioner's behalf. A school-sponsored publication created and distributed on campus, is reasonably understood to speak on behalf of the school. *Kuhlmeier*, 484 U.S. at 271. Believing Naranjo's Facebook group—created off-campus and open to the public—

speaks on behalf of a public high school merely because a portion of the school's name appears in the group title is a tenuous and unreasonable connection. Third, Naranjo's speech cannot be classified as a threat to physical safety under *Morse* because Naranjo's speech does not advocate illegal drug use or forecast on-campus violence. *Morse*, 551 U.S. at 424 (Alito, J., concurring). Therefore, Petitioner cannot justify violating Naranjo's First Amendment rights by classifying Naranjo's speech under one of *Tinker's* narrow exceptions.

Finally, arguing Naranjo's speech should be considered on-campus speech because Naranjo's drawing was found on campus and because students accessed the group from campus, fails because it punishes Naranjo for the actions of other students. In *Porter*, a student was suspended when the student's violent drawing was brought to campus by the student's younger brother. *Porter v. Ascension Par. Sch. Bd.*, 393 F.3d 608, 612 (5th Cir. 2004). The *Porter* court held the drawing did not constitute on-campus student speech because the drawing was completed at home and the student never intended the drawing to reach the campus. *Id*. at 615. Similarly, in *Blue Mountain*, a student was suspended for creating an explicit drawing of the school's principal off-campus. *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 921 (3d Cir. 2011). The *Blue Mountain* court reasoned that the student's off-campus speech did not become on-campus speech merely because another student printed and brought the drawing to campus. *Id*. at 933. Here, Naranjo created a Facebook group and drawing off campus and never accessed, or distributed the group's content on campus. Naranjo's drawing was only found on campus because of the unilateral acts of another student. Further, Naranjo had no control over students who accessed or discussed the group on campus. Therefore, this Court should find Naranjo's speech does not constitute on-campus student speech, and refuse to allow Naranjo to be punished for the actions of other students.

CONCLUSION

Tinker should not govern this Court's analysis because Naranjo's Facebook group and drawing were created off-campus and address a political issue of public concern. Applying Tinker to Naranjo's speech requires widening *Tinker's* scope beyond the tolerances of the First Amendment and would lead to a progressive atrophy of First Amendment rights. If this Court expands *Tinker's* scope, the expansion should be limited to off-campus speech permitting a reasonable forecast of on-campus violence.

Even if applied, *Tinker's* standard is not violated because Naranjo's speech did not cause a substantial disruption to the special characteristics of the school environment or interfere with the rights of others. Therefore, this Court should affirm the court of appeals' judgment.

For these reasons, Naranjo prays this Court affirm the judgment of the United States Court of Appeals for the Fifteenth Circuit, and issue the requested preliminary injunction, or, remand the matter for further proceedings governed by the First Amendment.

Respectfully submitted,

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CERTIFICATE 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., 1 Neverending Ave., Everycity, Everystate 15002.

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