No. 12345

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 Supreme Court
For the Fifteenth Circuit

BRIEF FOR RESPONDENT

BRITTANY N. OLSEN
Counsel of Record
Fictional Law Firm, P.C.
One Camino Santa Maria
San Antonio, Texas 78250
Telephone: (210) 123-4567
Email: bolsen@email.com

Counsel for Respondent

QUESTIONS PRESENTED FOR REVIEW

I. 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.

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

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The Opinion and Order of the Fifteenth Circuit (R. at 21-22) is unreported. The United States District Court for the Southern District of Everystate's Opinion and Order Denying Plaintiff's Motion for Preliminary Injunction (R. at 15-18) is unreported.

STATEMENT OF JURISDICTION

The United States Court of Appeals for the Fifteenth Circuit entered judgement in favor of Respondent 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 AND STATUTORY PROVISIONS INVOLVED

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

I. Facts of the Case

The Nero Unified School District ("District") operates all public primary and secondary schools in the city of Everycity, Everystate, including Nero High School ("Nero"). (R. at 3). Nero is dedicated to the academic and social instruction of the city's youth, and has been entrusted with instilling core values which will enable its students to mature into responsible adults. (R. at 12). Michael Naranjo is an eighteen-year-old high-school student at Nero. (R. at 6). He is an outstanding young man and straight-A student who maintains a 4.0 GPA, takes advanced placement classes, and is captain of the high school's varsity basketball team. (R. at 6).

On September 9, 2015, while off-campus and during out-of-school hours, Michael used his personal computer to create a Facebook group called "Nero is Anti-Gay." (R. at 3). Nero had recently hired a teacher who writes an anti-LGBT blog under a pseudonym. (R. at 2). Clearly upset and disappointed by the school's and, by extension, the District's apparent support of anti-LGBT views, Michael created the group to express his opinions about the District's hiring decisions and to provide a forum for other concerned students to share their opinions as well. (R. at 6).

Facebook is a publicly accessible social networking website which is not in any way associated with Nero, Michael, or Everystate. (R. at 6). Although Michael did not advertise or display the group webpage at school, the group became popular. (R. at 6). The group consisted of his entire senior class, as well as students from the school's lower grades. (R. at 21). Members posted comments, links to other webpages, pictures, digital drawings, and video clips, but Michael did not have any control over the postings. (R. at 6). Most of the posts were harmless depictions of average teenage lives, but some of the postings were somewhat provocative and controversial.

(R. at 15). For instance, a few of Michael's postings depicted school teachers and administrators in sexually explicit drawings. (R. at 15).

The contents of the Facebook group came to the attention of school authorities when a teacher found a printout of one of the provocative drawings posted by Michael in his classroom. (R. at 15). Michael did not intend the drawing to be shown on campus and does not know who brought it to campus. (R. at 7). The drawing unexpectedly made its way to campus without his knowledge. (R. at 6). Nero has not contested this. (R. at 15). Shortly thereafter, on or about September 14, Nero administrators demanded that Michael delete the Facebook group. (R. at 4). When Michael refused, the District held a disciplinary hearing and suspended him. (R. at 2). On September 28, 2015, Michael was officially suspended, subject to his deletion of the Facebook group. (R. at 4). The suspension remains in effect until the Facebook group is deleted. (R. at 2).

II. Disposition of the Case

Plaintiff-Respondent, Michael Naranjo, filed a civil action against the Nero Unified School District (Nero), Defendant-Petitioner, in the United States for the Southern District of Everystate on October 7, 2015. (R. at 3-4). In his complaint, Naranjo alleged Nero violated his First Amendment rights and sought equitable relief pursuant to 42 U.S.C. § 1983. (R. at 3-4). Specifically, Naranjo alleged that Nero violated his First Amendment rights when it prohibited his Facebook group (web page) and its postings and suspended him for refusing to take down the web page. (R. at 3-4). Nero answered the complaint on October 12, 2015, requesting Naranjo's request for relief be denied. (R. at 5). On October 30, 2015, the District Court rendered judgement in favor of Nero, holding *Tinker* does apply, and thus, Naranjo is not likely to succeed on the merits. (R. at 15-18).

Naranjo timely appealed the judgement of the District Court to the United States Court of Appeals for the Fifteenth Circuit on November 1, 2015. (R. at 19). On March 16, 2016, the Court of Appeals reversed the judgement of the District Court, holding that *Tinker* and its progeny do not apply to the case, and remanded the case with instructions that the District Court should apply ordinary First Amendment analysis. (R. at 21-22). Nero filed a petition for writ of certiorari on April 15, 2016. (R. at 23). This Court granted certiorari on January 6, 2017. (R. at 24).

SUMMARY OF THE ARGUMENTS

Student speech is protected by the First Amendment of the United States Constitution, but speech within the school setting may be governed by *Tinker* and its progeny. The application of *Tinker* and its progeny are limited to on-campus speech, off-campus speech which reaches the school setting, and off-campus speech which is violent, threatening, or harassing and intentionally directed at the school community. The application of *Tinker* and its progeny in Michael's case does not enable the Nero Unified School District to regulate Michael's speech, because Michael's speech does not meet the standard of *Tinker* and is not characteristic of the type of speech which may be restricted under *Fraser*, *Kuhlmeier*, or *Morse*.

ARGUMENTS

I. If Student Speech Outside the School Setting is not of a Violent, Threatening, or Harassing Nature and is not Intentionally Directed at the School, the Speech should be Governed by the First Amendment, not *Tinker* and its Progeny

A. Student Speech is Protected under the First Amendment

All citizens of the United States are granted certain individual rights and liberties, such as the freedom of speech, by the First Amendment of the United States Constitution. Though not

absolute, the right to free speech is protected against punishment or censorship, unless it is likely to produce a "clear and present danger" of a substantive evil which "rises far above" reasonable levels of public annoyance, inconvenience, or unrest. *Terminiello v. City of Chicago*, 337 U.S. 1, 4 (1949). Thus, one is free to voice his opinions and share his thoughts, even if others disagree with, or are offended by, it. *See, Cohen v. California*, 403 U.S. 15 (1971) (Vietnam War protestor who wore a "Fuck the Draft" jacket in a courthouse was protected by the First Amendment).

Accordingly, students also have a right to free speech, as they do not shed their constitutional rights "at the schoolhouse gate." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969). Therefore, when a school seeks to extend its "dominion beyond these bounds," it must comply with the same "constitutional commands" that bind other government institutions. *Thomas v. Bd. of Ed., Granville Cent. Sch. Dist.*, 607 F.2d 1043, 1045 (2d Cir. 1979). *See also, Burch v. Barker*, 861 F.2d 1149, 1150 (9th Cir. 1988) (a school policy that effectively curtails communications among students which are not perceivably affiliated with the school violates the First Amendment); *Tinker*, 393 U.S. at 511 (prohibition of students wearing black armbands at school in protest of the Vietnam War abridges students' First Amendment rights); *Burnside v. Bryars*, 363 F.2d 744, 748-49 (5th Cir. 1966) (a regulation banning the wearing of "freedom buttons" at school is an unnecessary infringement on students' right to free speech). Similarly, the First Amendment has been held to prohibit school officials from "reaching beyond the schoolyard" to inflict discipline which might otherwise be appropriate within the school setting. *Layshock ex rel. Layshock v. Hermitage Sch. Dist.*, 650 F.3d 205, 207 (3d Cir. 2011). *See e.g., Id.* at 207 (punishment of a student for creating a fake, offensive internet profile of his principal while off-campus transcends the First Amendment right of expression); *Killion v. Franklin Regional School District*, 136 F.Supp.2d 446 (W.D. Pa. 2001) (school exceeded its

constitutional bounds when it suspended a student for lewd comments he made about an athletic director in an email sent to classmates).

In general, schools cannot infringe on students' right to "free and unrestricted expression" as provided by the First Amendment. *Shanley v. Ne. Indep. Sch. Dist., Bexar Cty., Tex.*, 462 F.2d 960, 969 (5th Cir. 1972). However, the United States Supreme Court, in recognizing students' First Amendment rights should be applied in light of the school's "special characteristics," established a general rule for regulating student speech within the school setting in *Tinker*. *Tinker*, 393 U.S. at 506. In this landmark case, students wearing black armbands at school in protest of the Vietnam War, a symbolic act "closely akin to pure speech," were constitutionally protected under the First Amendment. *Id*. at 505. The Supreme Court found the school's policy prohibiting the wearing of black armbands at school was merely an effort to avoid possible controversy resulting from the expression. Therefore, the school's actions were unreasonable, as "fear or apprehension of disturbance" does not justify an infringement of one's freedom of speech. *Id*. at 504-510. The Court held that in the absence of an actual or nascent, material and substantial interference with the school's work or a collision with the rights of other students to be secure and to be let alone, the school's prohibition of the speech was not constitutionally permissible. *Id*. at 508, 511. Courts thereafter applied this standard, which has become known as the *Tinker* test, to determine whether a school may regulate student speech within the school setting without violating students' First Amendment rights.

Following *Tinker*, three Supreme Court cases established categorical exceptions to the *Tinker* standard, thus creating "types" of on-campus speech a school may regulate. *See, Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986) (offensively lewd and indecent speech on school property); *Hazelwood Sch. Dict. v. Kuhlmeier*, 484 U.S. 260 (1988) (school-sponsored speech or

expressive activities reasonably believed to bear the school's imprimatur); *Morse v. Frederick*, 551 U.S. 393 (2007) (speech promoting illegal drug use or other unique threats to the physical safety of students).

In *Fraser*, a student delivering a nominating speech at a school assembly violated the school's "disruptive-conduct rule" when he used an elaborate, graphic, and explicit sexual metaphor to refer to his candidate. *Fraser*, 478 U.S. at 678-679. In congruence with earlier Supreme Court decisions which recognized free speech rights may be limited where the speech is sexually explicit and the audience may include children, the Court held that prohibiting offensively lewd and indecent speech at school does not violate a student's First Amendment rights, because the rights of students in public school are not "automatically coextensive" with that of "adults in other settings" and schools must be considerate of the "sensibilities of [other] students." *Id*. at 681, 682. The Court concluded that in the interest of protecting minors from exposure to lewd and vulgar speech, the school acted within its permissible authority when it disciplined the student for his offensively lewd and indecent speech. *Id*. at 685.

In *Kuhlmeier*, a high school principle deleted articles from a student newspaper, which he believed impinged upon the privacy rights of students affected by divorce and teen-pregnancy. *Kuhlmeier*, 484 U.S. at 263. The students responsible for the articles alleged the censorship violated their First Amendment rights. However, the Court decided because the school newspaper was part of the school curriculum, rather than a "public forum," the school may regulate speech "disseminated under its auspices" or appearing to represent the school. *Id*. at 271. The Court held that school officials may, without offending the First Amendment, exercise editorial control over student speech in "school-sponsored expressive activities," as long as their actions reasonably relate to "legitimate pedagogical concerns." *Id*. at 273.

In *Morse*, a high school principal suspended a student for displaying a "BONG HiTS 4 JESUS" banner at an off-campus, school-sanctioned event, an act which violated school policy because it encouraged illegal drug use. *Morse*, 551 U.S. at 397. The Court determined the student's conduct constituted on-campus speech because it occurred during normal school hours at "an approved social event," and thus concluded the principal did not violate the student's right to free speech by confiscating the banner and disciplining him. *Id*. at 400-403. The Court held school officials may, consistent with the First Amendment, restrict student speech at a school event, when that speech is reasonably viewed as promoting illegal drug use. *Id*. at 403.

These three exceptions to the *Tinker* standard enable schools to regulate on-campus speech which may not meet the substantial disruption factor of the *Tinker* test. On-campus speech falling outside of these categories may be governed by *Tinker*. *Killion*, 136 F.Supp.2d at 453. However, all of these are limited in their application capacity outside the school setting.

B. Tinker and its Progeny Apply only to Student Speech within the School Setting, Unless Student Speech Outside the School Setting is Violent, Threatening, or Harassing and Intentionally Directed at the School Community

Tinker and its progeny involved student speech within the school setting, and thus established specific rules and speech regulation standards for on-campus speech. However, the regulatory power of *Tinker* and its progeny loses its viability when student speech occurs outside the school setting, a limitation alluded to in *Fraser* when the Court notes the student's speech would have been protected had he given it under different circumstances, where the school's interests were not involved. *Fraser*, 478 U.S. at 689. *See also, J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 932 (3d Cir. 2011) (court refuses to justify school's disciplining the student's lewd and offensive speech based on *Fraser*, because *Fraser* does not apply to off-campus

speech); *Killion,* 136 F.Supp.2d at 456 (lewd and obscene speech in an email to other students is not punishable under *Fraser* because it was created off-campus).

Similarly, with the exception of off-campus speech that is violent, threatening, or harassing and intentionally directed at the school community, many district and circuit courts have declined to apply *Tinker* to off-campus speech which does not reach within the school setting or cause a substantial disruption. *See, e.g.*, *Layshock,* 650 F.3d at 207 (school district cannot punish a student under *Tinker* for creating an offensive online profile of his principal while off-campus when the speech did not disrupt the school environment and was not related to a school event); *Shanley*, 462 F.2d at 975 (school cannot prohibit dissemination of student newspaper when distribution occurs off-campus and does not substantially disrupt school activities); *Emmett v. Kent Sch. Dist. No. 415*, 92 F. Supp. 2d 1088, 1090 (W.D. Wash. 2000) (regulation of an unofficial high school homepage containing mock obituaries of friends, which was created from home and intended for a student audience, is beyond the school's control when there was no intent to threaten or intimidate other students and the web page did not cause a substantial disruption); *Thomas*, 607 F.2d at 1045 (school cannot punish students for an offensive and obscene newspaper publication when use of school property is minimal and the newspaper was distributed outside the school).

In addition to identifying the limitations of *Tinker* and its progeny, subsequent circuit and district courts cases have helped further define and distinguish "on-campus" and "off-campus" speech, discern the line between the two, and establish general guidelines as to when off-campus speech may be subject to *Tinker* and its progeny. For instance, on-campus speech, as established in *Tinker* and its progeny, involves speech that occurs at school or at a school-sponsored activity, or is somehow affiliated with the school. Off-campus speech, on the other hand, originates and exists outside the school setting and does not appear to represent the school. In certain situations,

however, *Tinker* may apply to off-campus speech – that is, depending on the nature of the speech and the intent of the speaker.

Although the Second, Fourth, Fifth, Eighth, and Ninth Circuits have all applied *Tinker* to off-campus speech, it is significant to note that, in most of those cases, the speech at issue was violent, threatening, or harassing and intentionally directed at the school community. *See*, W*isniewski v. Bd. of Educ. of Weedsport Cent. Sch. Dist.*, 494 F.3d 34, 40 (2d Cir. 2007) (disciplining a student for a potentially threatening IM icon graphic, which suggested a teacher be shot and killed, that he shared online to friends is permissible under *Tinker* because the violent and threatening speech was intentionally communicated to other students, making it reasonably foreseeable the communication would cause a disruption); *Kowalski v. Berkley Cty. Sch.*, 652 F.3d 565, 574 (4th Cir. 2011) (*Tinker* applied to online student speech which harassed, bullied, and intimidated a specific student, because the nature of the speech and student's intent to communicate the messages made it reasonably foreseeable the speech would reach the school and create a risk of substantial disruption); *Bell v. Itawamba Cty. Sch. Bd.*, 799 F.3d 379, 396 (5th Cir. 2015) (*Tinker* governs when off-campus student speech about a school shooting is intentionally directed at the school community and may be reasonably understood by school officials to threaten, harass, and intimidate a member of the school); *D.J.M ex rel. D.M. v. Hannibal Pub. Sch. Dist. No. 60*, 647 F.3d 754 (8th Cir. 2011) (*Tinker* applies to off-campus speech which involves threats of shooting specific students on campus when the speaker intentionally communicates the threat and the risk of substantial disruption at school is reasonably foreseeable); *Wynar v. Douglas Cty. Sch. Dist.*, 728 F.3d 1062, 1069 (9th Cir. 2013) (a school may restrict student speech under *Tinker*, regardless of whether it is on-campus or off-campus speech, when faced with an identifiable threat of violence intentionally directed at the school or any of its members); *LaVine v. Blaine Sch. Dist.*,

257 F.3d 981, 989 (9th Cir. 2001) (*Tinker* applies to off-campus student speech about a school shooting which was intentionally brought to school by the student, because it was reasonable for the school to forecast a substantial disruption). Thus, the speech in those cases created an actual or reasonably foreseeable risk of substantial disruption to the school environment, which made the application of *Tinker* appropriate.

The above-referenced court decisions in the various circuit and district courts indicate the application of *Tinker* and its progeny are limited to on-campus speech, off-campus speech within the school setting, and off-campus speech which is violent, threatening, or harassing and intentionally directed at the school community. Therefore, such factors are required for *Tinker* and its progeny to apply to off-campus speech. Absent these factors, speech outside of the school setting is protected by the First Amendment. For example, where intent for the speech to reach the school community or to do harm is lacking, the school may not be justified in disciplining a student for his off-campus speech. *See*, *Emmett*, 92 F. Supp. 2d at 1090 (W.D. Wash. 2000) (disciplining a student for his unofficial high school webpage which contained mock obituaries of friends was not permissible, because although the intended audience was fellow students, there was no intent to threaten or intimidate); *Layshock*, 650 F.3d at 208 (although the student intended for the mock MySpace profile of his school principal to be seen by other students, he did not intend to harm or intimidate the principal). Further, the "intent" element is not satisfied when another individual brings the speaker's speech to school. *See*, *Porter v. Ascension Par. Sch. Bd.*, 393 F.3d 608 (5th Cir. 2004) (student was protected under the First Amendment when a drawing he created from home, depicting a violent siege on the school, was brought to school without his knowledge or permission); *Killion*, 136 F. Supp. 2d at 456-457 (punishing a student for an offensive "Top Ten" list about a school official, which was created from home and emailed to other students and

brought to school without his knowledge or permission by another individual, is not permissible under *Tinker* or *Fraser,* because Fraser does not apply to off-campus speech and the speech did not cause a substantial disruption). Thus, it is clear that a speaker's intent is an integral part in determining whether the off-campus speech should be subject to *Tinker* and its progeny. *Bell*, 799 F.3d at 395.

There is no support in these decisions that *Tinker* and its progeny may be applied to student speech outside the school setting when the speech does not pose an actual or reasonably foreseeable threat or danger to the school based on the violent, threatening, or harassing nature of the speech, and when there is no intent for the speech to reach the school community or to do harm. In Michael Naranjo's case, the speech originated and existed outside the school setting, there was no intent for the speech to reach within the school setting, the nature of the speech was not violent or threatening, and the speech did not pose and actual or foreseeable threat or danger to the school which would make a substantial disruption reasonably foreseeable. Clearly, Michael's speech does not meet the required elements necessary to apply *Tinker* and its progeny. Therefore, Michael's speech should be governed by the First Amendment, not *Tinker* and its progeny.

II. The Application of *Tinker* and its Progeny in Michael's Case does not Permit Regulation of the Speech by the Nero School District, because Michael's Speech does not Satisfy the Standard for *Tinker* or its Progeny.

If *Tinker* and its progeny applied in Michael's case, the Nero School District ("District") would not be able to regulate his speech, because the *Tinker* standard has not been met and the speech does not fall within the exceptions to *Tinker*. As previously mentioned, student speech may be regulated under *Fraser*, *Kuhlmeier*, or *Morse* when the *Tinker* standard has not been met. However, here, *Kuhlmeier* and *Morse* would not apply, because the Facebook page neither appears to represent the school, nor promotes illegal drug use or other reckless behavior. There would

perhaps be some discussion with regard to the application of *Fraser*, given that the drawing that appeared at school has been characterized by the District Court, Southern District of Everystate as "incendiary and provocative." But the details of the facts are lacking in this area, and without more information, one cannot properly determine whether the drawing reaches the level of lewd, vulgar, and indecency necessary to invoke *Fraser*. Additionally, while the Court's decision in *Fraser* is highly influential in the realm of student speech cases and deserves the utmost respect and deference, it is worth noting the decision was made twenty years ago and the habits and manners of civility and the moral values of society have since changed with regard to what is considered lewd and indecent.

According to the analysis above, the application of *Tinker* is limited to on-campus speech, off-campus speech which reaches the school setting, and off-campus speech which is violent, threatening, or harassing and intentionally directed at the school community. The facts of Michael's case do not support the application of *Tinker* under these criteria. First, Michael's Facebook page was created online from home and not during school hours. Although he accessed it regularly and occasionally added new posts or comments, he never did so at school or during school hours. In this sense, Michael's speech is considered off-campus speech, because it originated and existed outside the school setting. *See*, *Layshock*, 650 F.3d at 219 (fake MySpace page of principal created from home is off-campus speech); *Bell*, 799 F.3d at 391 (rap song created from home and posted online constitutes off-campus speech).

Second, Michael's off-campus speech did not reach the school setting. Michael never advertised or displayed the Facebook page at school. Although other students may have accessed the webpage at school from their personal electronic devices, they did so by their own free will and not at the behest of Michael. Based on the circuit and district courts' lack of attention to this

type of "appearance" at school, it is reasonable to infer such appearances, as momentary and solitary as they can be, do not constitute speech presence within the school setting. Thus, in the cases involving off-campus speech which was neither violent, threatening, nor harassing, like Michael's speech, the courts typically recognized such speech as appearing on campus only when a physical, hard copy of the speech appeared at school. Even then, disciplinary actions against the students were not permitted, because off-campus speech brought on campus does not necessarily give the school the right to discipline the student for his speech. *Killion*, 136 F.Supp.2d at 455. *See*, *Id*. at 456 (student was not disciplined until hard copies of his "Top Ten" email were found in the teachers' lounge at school); *J.S. ex rel. Snyder*, 650 F.3d at 932 (student did not get in trouble for her lewd and indecent, fake MySpace profile of her principal until the principal had her bring a copy of it to school).

A physical copy of one of Michael's sexually explicit drawings was brought to school without his knowledge or permission by an unidentified individual. While this may qualify as appearing within the school setting, courts have distinguished between speech intentionally brought to school by the speaker and speech brought to school by an individual other than the speaker, as only the former can be objectively perceived as a manifestation of the speaker's intent to bring the speech within the school setting. *Compare LaVine*, 257 F.3d at 986 (student purposefully brought his off-campus speech, a poem about school shooting, to school, where it became subject to *Tinker*), *with Porter*, 393 F.3d at 615 (student's drawing depicting school siege, which was brought to school without his knowledge, was protected by the First Amendment because the speech was not intentionally brought on the school premises, nor directed at the school). Because Michael's speech only appeared at school unintentionally, his speech is still considered off-campus speech, as the fact that a copy of the online material is brought to school

does not transform off-campus speech into on-campus speech. *J.S. ex rel. Snyder*, 650 F.3d at 932. Furthermore, this fact shows that Michael did not intended for his speech to reach the school setting.

Third, Michael's speech was directed at a certain group of students at the school, as he created the Facebook group to create awareness about the school's hiring an allegedly anti-LGBT teacher and to provide a forum for discussion of the matter; but, it was not intentionally directed at the school community at large, as he did not intend for it to be brought to school. The Fifth Circuit recognized the importance of this difference in *Porter*. There, the student's off-campus speech was protected, because the court found that by not purposefully taking the drawing to school himself, the student did not intend for his drawing to reach the school community. *Porter*, 393 F.3d at 615. As *Bell* explains, intent for the off-campus speech to reach the school community buttressed by deliberate action to bring about that result supports the application of *Tinker*. *Bell*, 799 F.3d at 395. Absent that, however, and the speaker should receive the full protection afforded by the First Amendment for off-campus speech. Since Michael did not intend for his drawing or the contents of the Facebook page to reach the school, he did not intentionally direct his speech at the school community. Thus, his speech should be treated as off-campus speech, and protected by the First Amendment. Even if, however, Michael's speech was intentionally directed at the school community, this factor alone does not automatically make off-campus speech subject to *Tinker*. *See*, *Thomas*, 607 F.2d 1043 (student-created "offensive, indecent, and obscene" newspaper was intentionally directed at the school community and appeared on campus, but was still classified as off-campus speech and not subject to *Tinker*). Whether speech is intentionally directed at the school community can be an important factor in cases involving violent, threatening, or harassing speech, since *Tinker* may govern when off-campus speech is intentionally directed at the school

community and reasonably understood "to threaten, harass, and intimidate," *Bell*, 799 F.3d at 396. However, Michael's speech is neither violent, threatening, nor harassing.

Finally, if *Tinker* is applicable, the District cannot regulate Michael's speech unless it shows the speech caused a material or substantial disruption of, or interference with, school activities, or led school officials to reasonably anticipate a substantial disruption. *Tinker*, 393 U.S. at 509. The school must also show its actions were prompted by more than a desire to avoid the discomfort and unpleasantness that may accompany unfavorable student speech, as this is not enough to justify the prohibition of student speech. *Id.* The District has not shown Michael's speech caused an actual or reasonably foreseeable disruption. Neither the Facebook page nor drawing posed any sort of danger to the school community, and none of the teachers, administrators, or students felt they were in danger. Although the drawing found on campus alerted school officials to the existence of the Facebook page, which they found inappropriate, any disturbance caused by the web page or drawing was minimal. After all, the Facebook page was only "active" for three school days before school officials asked Michael to delete it. It is unlikely the webpage attracted extensive attention in such a short period of time. Thus, it appears the actions of Nero school officials were not instigated by any urgent need to protect the safety of its school members or mitigate a substantial disruption, but rather prompted by their displeasure with the content of the Facebook page. However, "[d]isliking or being upset" over a student's speech is "not an acceptable justification" for restricting speech under *Tinker*. *Beussink ex rel. Beussink v. Woodland R-IV Sch. Dist.*, 30 F. Supp. 2d 1175, 1180 (E.D. Mo. 1998). Furthermore, the few complaints the school received about the Facebook page are not unlike any other complaints the school must deal with on a regular basis; and, no student or teacher has left the school or threatened to leave as a result of Michael's speech. Based on these facts, the substantial disruption element

of the *Tinker* standard has not been met. Therefore, the District should not be allowed to regulate Michael's speech.

CONCLUSION

Michael's speech is protected by the First Amendment and the District has not satisfied the elements necessary to permit regulation of the speech under *Tinker* and its progeny. Because Michael's speech constitutes student speech outside the setting, *Tinker* and its progeny are not applicable. While *Tinker* may apply to off-campus speech which is violent, threatening, or harassing and intentionally directed at the school community, Michael's speech does not meet this qualification. Even if *Tinker* and its progeny were applicable, Michael's speech is not characteristic of the type of speech which may be restricted under *Kuhlmeier*, *Morse*, or *Fraser*; and, his speech did not cause a material or substantial disruption, which is necessary to restrict the speech under *Tinker*. Therefore, regardless of whether Michael's speech is considered on-campus or off-campus student speech, it is protected under the First Amendment and the District is not constitutionally permitted to regulate it. For the foregoing reasons, Respondent prays this Court affirm the judgment of the Fifteenth Circuit Court of Appeals and render judgment in favor of Respondent Michael Naranjo.

Respectfully Submitted,

/s/ Brittany Olsen _____

BRITTANY N. OLSEN
Counsel of Record
Fictional Law Firm, P.C.
One Camino Santa Maria
San Antonio, Texas 78250
Telephone: (210) 123-4567
Email: bolsen@email.com

Counsel for Respondent

March 10, 2017

CERTIFICATE OF SERVICE

Undersigned counsel for Respondent certifies that this brief has been prepared and served upon all opposing counsel in compliance with the Rules of the Supreme Court of the United States by certified mail on this 10th day of March, 2017 to:

Rey Blanco, Esq.
Attorney for Petitioner
Blanco & Blanco, LLP
1 Neverending Ave.
Everycity, Everystate 78228

/s/ Brittany N. Olsen_____
Brittany N. Olsen
Counsel for Respondent