No. 24-410

IN THE

Supreme Court of the United States

L.M., A MINOR BY AND THROUGH HIS FATHER AND STEPMOTHER AND NATURAL GUARDIANS, CHRISTOPHER AND SUSAN MORRISON.,

Petitioner,

v.

TOWN OF MIDDLEBOROUGH, MASSACHUSETTS, *ET AL.*

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF FOR *AMICUS CURIAE* AMERICANS FOR PROSPERITY FOUNDATION, IN SUPPORT OF PETITIONER

CYNTHIA FLEMING CRAWFORD
Counsel of Record
CASEY MATTOX
AMERICANS FOR PROSPERITY FOUNDATION
4201 Wilson Blvd., Suite 1000
Arlington, VA 22203
(571) 329-2227
ccrawford@afphq.org
Counsel for Amici Curiae

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INTEREST OF *AMICUS CURIAE*[1]

Americans for Prosperity Foundation ("AFPF") is a 501(c)(3) nonprofit organization committed to educating and empowering Americans to address the most important issues facing our country, including civil liberties and constitutionally limited government. As part of this mission, it appears as *amicus curiae* before federal and state courts.

AFPF is committed to ensuring the freedom of expression guaranteed by the First Amendment for all Americans, including students. Campuses are not just a place where free expression should be protected; it is vital to their mission. And they are uniquely positioned to instill in the next generation an appreciation for free speech. This is why "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) (citation omitted).

SUMMARY OF ARGUMENT

Freedom of speech in schools is a fraught topic. With young people compelled by law to spend the bulk of their days confined alongside people with whom they may disagree, and obliged to learn material imbued with political messaging, the typical safety valves for unwelcome speech, such as walking away or simply averting one's eyes, may be unavailable. At the same time, teachers and administrators have an

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[1] No counsel for a party authored this brief in whole or in part and no person other than *amicus* or its counsel made any monetary contributions to fund the preparation or submission of this brief. AFPF timely notified counsel for all parties of its intent to file this brief.

interest in keeping the peace, even if that peace may come at the cost of conformity. Teachers and administrators naturally have viewpoints, which may seem self-evidently correct to them but egregiously wrong to others.

Moreover, school staff—whether they like it or not—are agents of the state; and the speech they silence is consequently censored by the government. The shoals of this dilemma are navigated daily with many small resolutions disturbing the scales of justice but having little effect on development of the law.

But when cultural or political issues invade the schoolhouse gate, especially those that affect students personally, the standard applied to silence students takes on constitutional proportions. And when government censorship itself becomes the subject of critique the school cannot, consistent with the First Amendment, silence that criticism lightly.

This case presents important questions that this Court should consider. First, it arises from the proposition that new "rights" may be created that jump the line to supersede speech rights—such as the purported right to never to be exposed to challenges about an identity-related viewpoint. Second, it presents a method for silencing core political speech that should be rejected, based on allowing the censor to infer meaning from protected words that can be shoehorned into a First Amendment exception.

Sadly, this case is not alone. The recent case of *D.A. v. Tri County Area Schools*,[2] demonstrates how

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[2] *D.A. a minor, by and through his mother B.A., and X.A., a minor, by and through his mother, B.A. v. Tri County Area Schools*, 2024 WL 3924723 *1 (W.D. MI August 23, 2024).

the sarcastic phrase "Let's Go Brandon" was regulated as profanity,[3] even though the words themselves are facially anodyne. Like here, a school dress code was the vehicle, as if censoring content on a shirt is like requiring closed-toed shoes in shop class.

These approaches are facilitated by diminishing the *Tinker* material disruption standard[4] and misinterpreting the Vietnam War protests of *Tinker* as rosy days in which the right side inevitably prevailed. But *Tinker* stands for the opposite proposition: that schools don't get to decide who's right and speech implicating highly-charged controversies is protected. The *Tinker* disruption standard is rigorous, sheltering the speaker unless narrow, well-defined exceptions apply.[5] Likewise, the *Tinker* "rights of others" standard,[6] which was applied by the District Court, should be read to reconcile conflict between established rights—not as a catch-all

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[3] *See, e.g.*, *Bethel School Dist. No. 403 v. Fraser,* 478 U.S. 675, 683 (1986) ("Surely it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse.").

[4] *Tinker v. Des Moines Ind. Comm. School Dist.*, 393 U.S. 503, 513 (1969) ("he may express his opinions, even on controversial subjects like the conflict in Vietnam, if he does so without materially and substantially interfering with the requirements of appropriate discipline in the operation of the school and without colliding with the rights of others.") (cleaned up).

[5] *See, e.g., Chaplinsky v. New Hampshire*, 315 U.S. 568, 569, 573 (1942) (accepting the New Hampshire Supreme Court's narrowing of a state statute covering "any offensive, derisive or annoying word," to reach only those words that would strike the average person as being "plainly likely to cause a breach of the peace by the addressee.").

[6] *Tinker*, 393 U.S. at 513.

for school administrators to select winners and losers between differences of opinion.

The Court should grant the petition to resolve the standard applicable to a student's untargeted ideological speech that promotes a viewpoint different from the school's preferred viewpoint.

ARGUMENT

I. CORE SPEECH RIGHTS CANNOT BE SUPPLANTED BY A NOVEL VIEWPOINT-BASED "RIGHT".

Viewpoint-based discrimination is presumptively unconstitutional. Only against this background can one determine whether an exception applies. Within the school setting, such exceptions are limited by *Tinker* to: 1) conflicting rights; or 2) material disruption. *Tinker*, 393 U.S. at 513. Applying the "conflict of rights" test here largely requires plowing new ground—a task the District Court was willing to undertake, but the Court of Appeals was not. But, although novel under the *Tinker* framework, conflict of constitutional rights outside of schools is the courts' bread and butter, which, at a minimum, requires identifying the rights allegedly in conflict. It does not turn, as decided by the District Court here, on a government agent declaring that there is a "common understanding" and wielding alleged majority opinion to silence dissent.

A. Viewpoint Discrimination is Presumptively Invalid, even in Schools.

"Discrimination against speech because of its message is presumed to be unconstitutional." *Rosenberger v. Rector & Visitors of Univ. of Virginia,*

515 U.S. 819, 828 (1995). "When the government targets . . . particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant." *Id*. at 829. The Constitution "demands that content-based restrictions on speech be presumed invalid . . . and that the Government bear the burden of showing their constitutionality." *Ashcroft v. ACLU*, 542 U.S. 656, 660 (2004) (cleaned up).

Although *Tinker* provides some leeway for schools, neither of the *Tinker* exceptions allows for viewpoint-based discrimination. Here, the censorship was indubitably viewpoint based. Nevertheless, both lower courts held that *Tinker* allowed the school to silence the viewpoint it disfavored.

The District Court based its holding of the "rights of others" prong of *Tinker*. App. 5a. The Court of Appeals nominally rejected that approach and instead applied the more developed "material disruption" prong. App. 36a. However, the bulk of the analysis at both levels turned on students' feelings[7] about seeing a message that contradicted their perceptions[8] and not on any manifest or imminent disruption.

If love means never having to say you're sorry,[9] then the courts below interpreted *Tinker* to mean never having to hear you're wrong.

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[7] App. 46a (the message was "no less likely to 'strike a person at the core of his being' than it would if it demeaned the religion, race, sex, or sexual orientation of other students.").

[8] App. 48a, ("the message expresses the view that students with different beliefs about the nature of their existence are wrong,") (cleaned up).

[9] Erich Segal. Love Story. (Harper & Row) 1970.

But that is not the law. Instead, the law robustly protects speech on public issues even if others find that speech distasteful or hurtful. *Mahanoy Area Sch. Dist. v. B. L. by & through Levy*, 594 U.S. 180, 191 (2021) (citing *Snyder v. Phelps*, 562 U.S. 443, 461 (2011) (First Amendment protects "even hurtful speech on public issues to ensure that we do not stifle public debate")). And the government is not authorized to impose its own balancing test on the benefits and costs of allowing certain viewpoints while silencing others. *United States v. Alvarez*, 567 U.S. 709, 717 (2012) ("In light of the substantial and expansive threats to free expression posed by content-based restrictions, this Court has rejected as startling and dangerous a free-floating test for First Amendment coverage based on an ad hoc balancing of relative social costs and benefits.") (cleaned up). The exceptions to this approach are narrow and "confined to the few historic and traditional categories of expression long familiar to the bar," such as inciting imminent lawless action or defamation. *Id*. (collecting cases). This case presents none of those exceptions.

Tinker created a carve-out to speech rights for students in recognition of "special characteristics of the school environment." 393 U.S. at 506. But that carve-out was not based on viewpoint, nor could it have been. *Texas v. Johnson,* 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."). Any limitation on student speech rights must be squared with this general principle.

Although in *Morse v. Frederick* the Court recognized an extension of school authority to "speech that can reasonably be regarded as encouraging illegal drug use," 551 U.S. 393, 396 (2007), this enlargement inspired a majority of the Court to write separately. Seven justices described the holding in *Morse*, as "adding to the patchwork of exceptions to the *Tinker* standard" *Id.* at 422 (Thomas, J. concurring); "standing at the far reaches of what the First Amendment permits", *Id.* at 425 (Alito, J. concurring); "rais[ing] a host of serious concerns," *Id.* at 426 (Breyer, J. dissenting); and "inventing out of whole cloth a special First Amendment rule permitting the censorship of any student speech that mentions drugs." *Id.* at 446 (Stephens, J. dissenting).

The Court's reluctance in *Morse* to recognizing exceptions to *Tinker* should counsel against creating another exception here.

B. There Will Always be Important New Issues to Rationalize Quelling Speech.

The history of the First Amendment is riddled with attempts to stifle speech that is allegedly so outrageous, dangerous, offensive, or simply wrong that it should not be protected. Often, the plaintiff has identified speech that at least has the potential to be harmful in some way—whether via outrage or emotional distress. But the argument that *this time it's different* has consistently failed before this Court, and rightly so.

Here, the school argues for a new exemption from the First Amendment applicable to speech that could be interpreted as demeaning to people with a specific characteristic, even if the speech does not expressly do

so. App. 15a, 20a, 21a. Thus, the school argues that it may silence speech that invades the rights of other students to "a safe and secure educational environment," because "some students and staff complained that the Shirt made them upset." App. 77a, 68a. The Court of Appeals applied a similar "blow to the psyche" framing. App. 40a. But, even taking these claims as true, how may one calibrate what "upset" means, or how one could be not "safe and secure" vis-à-vis speech with no accompanying threat or actual disruption, while determining whose emotional state—the listener or the speaker—is more material for constitutional purposes?

Although protecting the psychological states of young people can be a laudable goal, the notion that the First Amendment can be suspended because some deem the speech to be harmful to children's psyches has been rejected by this Court. In the context of violent video games, for example, the Court rebuffed "California's effort to regulate violent video games" as "the latest episode in a long series of failed attempts to censor violent entertainment for minors," *Brown v. Ent. Merchants Ass'n*, 564 U.S. 786, 804 (2011)—notwithstanding the opinion of the California Assembly that a "reasonable person, considering the game as a whole, would find [it] appeals to a deviant or morbid interest of minors," that is "patently offensive to prevailing standards in the community as to what is suitable for minors." *Id.* at 789.

Nor is it sufficient to argue that this time it's more important. That argument has been rejected even in times of war. *Tinker*, 393 U.S. at 504; *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). And in *Brown*, the Court explained the

constitutionally significant difference between speech that falls into an historically unprotected category and allowing government to create new categories. *Brown* 564 U.S. at 791 ("From 1791 to the present, the First Amendment has permitted restrictions upon the content of speech in a few limited areas, and has never included a freedom to disregard these traditional limitations.") (cleaned up). Thus, although the "Government argued . . . that it could create new categories of unprotected speech by applying a 'simple balancing test' that weighs the value of a particular category of speech against its social costs and then punishes that category of speech if it fails the test," . . . the Court "emphatically rejected that 'startling and dangerous' proposition."." *Brown v.* 564 U.S. at 792 (quoting *United States v. Stevens*, 559 U.S. 460, 470 (2010)).

But good intentions are a harsh taskmaster, and there will always be categories of speech that would-be safekeepers find compelling enough to bypass First Amendment protections—especially as relates to children. But surely, what the First Amendment forbids the California Assembly from doing, exercising its near-plenary police powers, a school cannot simply proclaim as being beyond the reach of the Constitution.

C. The State Cannot Declare a "Common Understanding" to be Unassailable.

The Court of Appeals resolved this case by relying on a "shared understanding" that school officials may bar messages that target no specific student if: "the expression is reasonably interpreted to demean one of those characteristics of personal identity, **given the**

common understanding that such characteristics-are 'unalterable or otherwise deeply rooted' and that demeaning them 'strike[s] a person at the core of his being.'" App. 34a (emphasis added, citations omitted).

The Constitution provides no authority for the government to declare a "common understanding" between controversial viewpoints. And this Court has recognized that when it comes to public opinion, *i.e.*, "common understanding"—even where there is a broad consensus, the government does not get to silence alternative viewpoints.

For example, in *Iancu v. Brunetti*, the question was whether the trademark FUCT could be denied trademark registration under the provision of the Lanham Act that "prohibits registration of trademarks that 'consist of or comprise immoral or scandalous matter,'" 588 U.S. 388, 388 (2019) (cleaned up). This Court held that it could not, because the prohibition was unconstitutionally viewpoint-based, relying as it did on assigning ideas to two categories, "those inducing societal nods of approval and those provoking offense and condemnation." *Id.* at 394. Although the government's idea was to deny registration only if the marks would be "offensive or shocking to **a substantial segment of the public . . . i**ndependent of any views that they may express," *Id.* at 397 (cleaned up) (emphasis added), that alleged common understanding could not overcome the "facial viewpoint bias in the law results [that] in viewpoint-discriminatory application." *Id.* at 395. The Court rejected the attempt, holding, 'once the "immoral or scandalous' bar is interpreted fairly, it must be invalidated." *Id.* at 398.

Likewise, the government cannot bar political speech based on how it may make the public feel about someone else. In *Boos v. Barry*, the issue was whether the District of Columbia could prohibit "the display of any sign within 500 feet of a foreign embassy if that sign tends to bring that foreign government into 'public odium' or 'public disrepute.'" 485 U.S. 312, 315 (1988). The Court held that the display clause of the law was content based, and "operates at the core of the First Amendment by prohibiting petitioners from engaging in classically political speech" which could not be excused by the government's proposed "dignity" standard. *Id*. at 318, 322.

The Court compared the proposed *Boos* "dignity" standard to the "outrageousness" standard it had rejected in *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55–56 (1988), as being "so inherently subjective that it would be inconsistent with our longstanding refusal to punish speech because the speech in question may have an adverse emotional impact on the audience." *Boos*, 485 U.S. at 322 (cleaned up).

Even if the audience has broadly negative feelings, that is not sufficient for shutting down debate. And, if the public cannot dictate what is true, then the government cannot lawfully do so, even if it believes that "everyone agrees." From the caustic satirical political cartoons at issue in *Hustler*, 485 U.S. at 54, to the display of a red flag as a symbol of opposition, *Stromberg v. California*, 283 U.S. 359, 361 (1931), dissenting voices have been protected and "it is clear that our political discourse would have been considerably poorer without them." *Hustler*, 485 U.S. at 55.

Indeed, the perceived need to silence dissent disproves the claim that a common understanding exists, otherwise there would be no dissent to silence. In the end, the school is merely choosing sides and imposing the viewpoint it favors. This, it cannot do.

II. *TINKER* WAS DECIDED AGAINST A BACKDROP OF HEIGHTENED ANXIETY AND DID NOT HAVE A FORGONE CONCLUSION.

Attempts to broaden the *Tinker* material disruption standard to include anticipated negative psychological impacts seem to stem, at least in part, from a perception that the conflict in *Tinker* wasn't very severe. But a closer examination of the facts surrounding *Tinker* shows that the dispute there was at least as ripe for disruption as the dispute here. Indeed, the *Tinker* standard, read in the context of the time, is rigorous and requires "substantial disruption of or material interference with school activities" to justify censorship of passive expression. 393 U.S. at 512–14. Whatever "substantial" and "material" mean, it's more than the "upset" feelings that were in ready supply in *Tinker*.

Some background on the events in *Tinker* sheds light on what was at stake. Thirty years after *Tinker* was decided, Professor John W. Johnson[10] discussed some facts of *Tinker* that were not included in the official record.[11] He first focused on the often-

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[10] Professor and Head of the Department of History at the University of Northern Iowa, Cedar Falls, Iowa.

[11] John W. Johnon, *Behind the Scenes in Iowa's Greatest Case: What is Not in the Official Record of Tinker v. Des Moines Independent Community School District*, Drake Law Review,

overlooked, third named plaintiff, Christopher Eckhardt, and his experiences leading up to the litigation. Chris Eckhardt was fifteen and a sophomore at Roosevelt high school in 1965. *Id*. at 475. "On the day before the December 1965 armband demonstration, word circulated in various Des Moines schools that a protest of some sort was imminent." *Id*. at 477. The protest organization letter summarized the concerns of the organizers surrounding the 12-hour truce proposed by the "National Liberation Front (Vietcong)" and Senator Robert Kennedy's suggestion to extend the truce.[12] The letter proposed wearing black armbands and fasting over the holiday season as well as foregoing New Year's Eve celebrations to gather and discuss the "complex war and possible ways of ending the killing of Vietnamese and Americans." *Id*. It was a matter of life and death that engaged prospective protesters to make personal sacrifice to make their point.

On the other hand, gym teachers and coaches at Roosevelt were upset about the possibility of a protest against the Vietnam War.[13] "Instead of conducting calisthenics to the chant of 'Beat East High'—as was usually the case" . . . "gym teachers on that day encouraged students to substitute the phrase 'Beat the Vietcong.'" Johnson at 477. "However, the phrase may also have sprung from the students themselves."

Vol. 48, p. 473 (2000), https://drakelawreview.org/wp-ontent/uploads/2016/09/johnson.pdf (internal citations omitted).

[12] *We Mourn*, protest organization letter available at: https://www.docsteach.org/documents/document/we-mourn;

[13] Johnson, at p. 477.

Id. at n 32. The prevailing sentiment was hostile to the protestors' viewpoint.

"The coaches at Roosevelt also made it known that students wearing armbands to class were communist sympathizers and that they, as coaches and teachers, could not be held responsible for what might happen to students who demonstrated such a lack of patriotism." *Id*. at 477. Chris was personally confronted by "a group of angry male students who screamed at them: 'If you [wear armbands tomorrow] . . . you'll find our fists in your face and our foot up your ass.'" *Id*. at 477. And the following day, while walking to the principal's office to turn himself in for wearing the armband in defiance of school policy, "the captain of the football team" . . . "attempted to rip the armband off his jacket. After a brief scuffle, the football player left Eckhardt with words to the effect that he had better take the armband off in the principal's office or he would come looking for him." *Id*. at 478. And even after Chris arrived at the principal's office, "students filed by the glass enclosed office and taunted him with caustic remarks like 'you're dead.'" *Id*. at 478. There was confrontation and the potential for further trouble.

In a recent interview, Mary Beth Tinker discussed the schools banning the armbands "because of the 'intense feelings' they might inspire"[14] as well as the Tinker family's experience. "The Tinkers were . . . subject to a barrage of hate and harassment. Red

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[14] Sophie Hayssen, *Students' Right to Protest at School Was Affirmed by Tinker v. Des Moines,* teenVOGUE, December 16, 2021, available at: https://www.teenvogue.com/story/supreme-court-student-free-speech-tinker

paint was tossed on their driveway; they were called communists; and they even received death threats." *Id*.

Clearly, there was more going on than a mild difference of opinion.

Moreover, like L.M.'s Taped Shirt, by wearing the armband to school, Chris considered himself to be protesting school policy by "intentionally breaking a rule that he believed to be unjust." *Id*. at 478. Similar to the school's justification here, the Des Moines director of secondary education defended the prohibition saying, "For the good of the school system, we don't think this should be permitted" . . . "school officials believe the educational program would be disturbed by the students wearing armbands."[15]

Tinker thus bears strong similarities to this case, in which the facts were largely undisputed, the protest was passive, feelings ran high, and fears of substantial disruption, while not fanciful, gave undue weight to a subset of students being "upset." This case thus is an ideal vehicle for addressing any proposed curtailment of *Tinker*, just as the "facts of Tinker [came] pretty close to a perfect vehicle for a decision recognizing student speech rights. Not only were the plaintiffs engaged in core political speech, but they also engaged in that speech silently. Their expression

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[15] Jack Magarrell, *D. M. Schools Ban Wearing of Viet Truce Armbands*, Des Moines Register, (December 15, 1965). Available at: https://www.docsteach.org/documents/document/schools-ban-armbands

did not involve the assertion of any false facts; nor did it threaten any sort of harm to others."[16]

To the extent *Tinker* is at risk of being narrowed to exclude protection for speech that could affect the mental states of other students, Mary Beth Tinker herself, discussing her work as a part-time advocate for students' rights and her passion for health and activism, provided some wise words: "I was so lucky to be able to work as a nurse with young people throughout my career. And then I was able to put it together with my experience wearing the black armbands in the Supreme Court case," . . . "I've learned it's good for their health when young people can express their feelings."[17]

To that end, this case provides an opportunity to resolve any ambiguity surrounding the substantial disruption standard. As Jonathan Friedman, director of free expression and education at the nonprofit organization PEN America described it, "*Tinker* . . . left open the stipulation that students have a right to free speech, unless their speech causes 'substantial disruption.' The vagueness of that term leaves students vulnerable to overreach by their school," . . . "It's like playing a game without knowing the rules," . . . "We need clarity around where that line should

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[16] Mary-Rose Papandrea, *The Great Unfulfilled Promise of* Tinker, 105 Va. L. Rev. Online (Dec 30, 2019).

[17] Sophie Hayssen, *Students' Right to Protest at School Was Affirmed by Tinker v. Des Moines,* teenVOGUE, December 16, 2021, available at: https://www.teenvogue.com/story/supreme-court-student-free-speech-tinker

be."[18] To the extent Mr. Friedman is right, any such clarification should be made with a clear-eyed view of the fraught environment in which *Tinker* was decided.

III. SPEECH DOES NOT LOSE PROTECTION BY CALLING IT SOMETHING ELSE.

One of most tempting ways to censor speech is to characterize it as something that can be regulated, such as commercial activity, *303 Creative LLC v. Elenis*, 600 U.S. 570, 593 (2023), or government speech, *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 527 (2022). Here, the school seeks to regulate speech via its dress code. But embedding a speech code in a dress code does not change the nature of words as pure speech. A secondary maneuver is to replace the express message with an inference that can be shoehorned into a constitutional exception.

Here, the school did both. The Court should make clear that schools cannot regulate speech by proxy, either via a dress code or an inferred message.

A. A Speech Code Embedded in a Dress Code is Still a Speech Code.

It may seem self-evident, but speech on a shirt is still speech, which does not lose its First Amendment protection because the words are on a garment. *See, e.g.*, *Cohen v. California*, 403 U.S. 15 (1971). Nevertheless, this distinction without a difference has been significant in this case as well as appearing in

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[18] Hayssen,, quoting Jonathan Friedman, director of free expression and education at the nonprofit organization PEN America, available at: https://www.teenvogue.com/story/supreme-court-student-free-speech-tinker

others, in which schools have incorporated speech codes[19] into their dress codes.

Here, there were two distinct instances of censorship, one relative to the Two-Genders Shirt, and one relative to the Taped Shirt. The messages used different words and made different points. One might expect that a difference in message would merit discrete consideration under the fact-specific inquiry of *Tinker*. Instead, the court below concluded that the difference in message did not matter because the underlying garment was the same. App. 56a. The First Circuit also found it "significant" that the dress code's "hate-speech provision applies only to apparel and then only when worn 'to school'" App. 60a. It is unclear how this distinction can be squared with *Tinker*, in which armbands were also worn to school.

Middleborough's dress code is not an outlier, incorporating both speech and clothing rules within a single policy. The bulk of the code relates directly to clothing items, focusing on safety, "wheeled shoes"; being sufficiently clothed, "tank tops or basketball shirts"; being overly concealed, "outer coats"; and hygiene, "neat and clean." To that extent, the "dress code" is fairly characterized as relating to the attributes of the garment.

The remaining sections, prohibiting: 1) references to alcohol, etc. 2) hate speech; and potentially, 3) apparel unacceptable to our community standards, are more properly characterized as speech codes,

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[19] *See e.g., Doe v. Univ. of Mich.*, 721 F. Supp. 852, 856, 867–69 (E.D. Mich. 1989) (holding unconstitutional a speech code that prohibited speech that "'stigmatizes or victimizes' on the basis of an invidious factor").

where the speech in question happens to be located on a garment. To some extent the prohibitions fall within a known exception to the First Amendment as recognized by this Court, such as relating to alcohol, which could presumably escape constitutional scrutiny under *Morse*, 551 U.S. 393 (promoting illegal drug use). Likewise, vulgar writing could fall under *Bethel School District*, 478 U.S. at 677 (lewd speech during a student assembly). And, in some narrow circumstances, "targeting" could be considered a "true threat", *Counterman v. Colorado*, 600 U.S. 66, 74 (2023) (citing *Virginia v. Black*, 538 U.S. 343, 359 (2003)); or incitement to imminent lawless action, *Id.* at 73 (citing *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (*per curiam*)). But notably, all of these cases arose under the Speech Clause of the First Amendment, and thus any rules imposed by the school under provisions that regulate speech would likewise be governed by the First Amendment.

Unfortunately, relying on dress codes to obscure speech regulation—often viewpoint based—is not uncommon. Thus, this Court should clarify when, if ever, embedding speech regulation within a dress code escapes First Amendment significance. A uniform code requiring, for example, "a choice of two colors of polo or oxford shirts and navy or khaki pants," *Canady v. Bossier Par. Sch. Bd.*, 240 F.3d 437, 439 (5th Cir. 2001), is different in kind from forbidding "polo shirts with messages," except those approved by the school. *Palmer ex rel. Palmer v. Waxahachie Indep. Sch. Dist.*, 579 F.3d 502, 505 (5th Cir. 2009). The first is a content-neutral requirement "justified without reference to the content of the regulated speech." *Ward v. Rock Against Racism*, 491 U.S. 781,

791–92 (1989) (collecting cases). The second is not. Whether the speech is on clothing is immaterial. *Waln v. Dysart Sch. Dist.*, 54 F.4th 1152, 1161–62 (9th Cir. 2022) (applying strict scrutiny to graduation cap speech code).

This distinction was obscured here by allowing the dress code to excuse censorship: "We also note that Middleborough interpreted the message in applying a dress code and thus in the context of assessing a particular means of expression that is neither fleeting nor admits of nuance." App. 49a. *See also* App. 51a–52a. ("In addition, Middleborough was enforcing a dress code, so it was making a forecast regarding the disruptive impact of a particular means of expression and not of, say, a stray remark on a playground, a point made during discussion or debate, or a classroom inquiry."). But neither the Constitution nor this Court's precedent allows speech to be treated differently simply because it is located on clothing. And the practice of embedding speech regulation within a dress code should not be fostered as a means of circumventing the First Amendment and imposing viewpoint regulation on students.

B. The Government's Inference Cannot Displace the Speaker's Message.

"Sir Thomas, tho we have not one Word or Deed of yours to object against you, yet we have your Silence, which is an evident sign of the Malice of your Heart"[20]

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[20] The Trial of Sir Thomas More Knight, Lord Chancellor of England, for High-Treason in denying; the King's Supremacy,

Like Sir Thomas More, who could not be convicted on his own words and thus was convicted by projecting treasonous meaning onto his silence, censorship of L.M.'s Taped Shirt was rationalized by projecting an interpretation onto his message to maximize the school's censorship power.

Possibly the most troubling analysis pertaining to the Taped Shirt is the District Court's holding that although L.M.'s original message had been effaced, his protest message could be censored by inferring the message had more than one meaning. App. 80a. ("while a message protesting censorship would not invade the rights of others, the school administrators could reasonably conclude that the Taped Shirt did not merely protest censorship but conveyed the 'censored' message and thus invaded the rights of the other students"). The Court of Appeals adopted that argument, finding that "even if two words were covered up" "students would know the words written on the Taped Shirt," App. 56a. Thus, even though the message had been changed, the school could persist in censoring L.M. based on inferring a (literally) underlying message in addition to the visible message.

Not only were L.M.'s actual words set aside as the basis for the censorship, but his expressed intent was deemed irrelevant in light the school's preferred interpretation. App. 77a ("His intent is not relevant to

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May 7, 1535. the 26th of Henry VIII. http://law2.umkc.edu/faculty/projects/ftrials/more/moretrialreport.html

the question of whether the school permissibly concluded that the Shirt invades the rights of others.")'; App. 55a ("L.M. contends he wore that shirt to protest Middleborough's March 21 actions. But we . . . focus on the reasonableness of the school administration's response, not on the intent of the student.") (cleaned up). The notion that the government can replace a speaker's intended message with its own interpretation to maximize its censorial powers appears to be novel. The ratchet effect in which a student can be censored by recasting a message as something potentially more amenable to censorship should be rejected.

The approach in, *D.A. v. Tri County Area Schools*, is similar. There, the free speech exception for lewd, vulgar, or profane words was stretched to include ordinary words that could reasonably be interpreted as having a profane meaning as well as a core political message. *Tri County Area Schools*, 2024 WL 3924723 *1. There the issue was whether students could be prohibited from wearing shirts that included the phrase *Let's Go Brandon*. *Id*. at *1. The court acknowledged that the students intended the phrase as political speech but denied that it was the kind of political speech the First Amendment protects because they understood it to be a euphemism for a phrase that includes profanity. *Id*. at *10, 12. Instead, the court held that, if the political interpretation could be stripped away, and the non-profane words interpreted to the be equivalent of profanity, then the school could censor the speech.[21] Thus, like here, the

[21] The opinion consistently uses the phrase "Let's Go Brandon" without obscuring any of the words, while eschewing the phrase

school was empowered to choose which message the speaker was sending and evade constitutional protection by censoring the message it chose to infer.

It cannot be, and is not, the law that government can substitute its own interpretation of a speaker's message to downgrade the constitutional protection that speech enjoys. *See, e.g., Matal v. Tam*, 582 U.S. 218, 244–46 (2017) (rejecting the argument that the name "The Slants", which not only identified the band but also expressed a view about social issues, could be restricted under the disparagement clause of the Lanham Act). If anything, the thrust of this Court's precedent has been to extend protection to facially profane language to protect the message, *e.g. Cohen*, 403 U.S. at 16, 21 (First Amendment protects "fuck the draft" as political message), rather than extending censorship to facially non-profane language to prohibit a message, *Iancu*, 588 U.S. at 388 (First Amendment also protects "FUCT.").

It likewise, should not be the law that schools may elect to replace protected speech with lesser-protected speech to maximize their own censorship authority even if both phrases express the same message.

CONCLUSION

For the foregoing reasons, this Court should grant the petition.

"Fuck Joe Biden" and instead using "F*** Joe Biden." 2024 WL 3924723 at *1, 2, 8, 9, 10, 11, 12. The court's use of "***" appears to indicate that using a proxy for potentially offensive words makes a difference.

Respectfully submitted,

CYNTHIA FLEMING CRAWFORD
Counsel of Record
CASEY MATTOX
AMERICANS FOR PROSPERITY FOUNDATION
4201 Wilson Blvd. Suite 1000
Arlington, VA 22203
(571) 329-2227
ccrawford@afphq.org

Counsel for Amici Curiae

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