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 OF *AMICUS CURIAE* FOUNDATION FOR INDIVIDUAL RIGHTS AND EXPRESSION IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provisions

Rules

INTEREST OF *AMICUS CURIAE*[1]

The Foundation for Individual Rights and Expression (FIRE) is a nonpartisan, nonprofit organization dedicated to defending the individual rights of all Americans to free speech and free thought—the essential qualities of liberty. Because public schools prepare the next generation of Americans to live and participate in our pluralist democracy, FIRE promotes and defends these rights for students nationwide.

Since 1999, FIRE has successfully vindicated students' individual rights through public advocacy, strategic litigation, and participation as *amicus curiae* in cases that implicate expressive rights under the First Amendment. *See, e.g.*, Brief for FIRE as *Amicus Curiae*, *Mahanoy Area Sch. Dist. v. B.L. ex. rel. Levy*, 594 U.S. 180 (2021); Brief for FIRE as *Amicus Curiae*, *C1.G ex rel. C.G. v. Siegfried*, 38 F.4th 1270 (10th Cir. 2022). FIRE opposes attempts to censor students' protected expression and litigates against schools that wrongfully silence or discipline student speakers. *See, e.g.*, *I.P. ex rel. B.P. v. Tullahoma City Sch.*, 4:23-cv-00026 (E.D. Tenn. filed July 19, 2023); *D.A. v. Tri Cnty. Area Schs.*, 123-cv-00423, 2024 WL 3924723 (W.D. Mich. Aug. 23, 2024), *appeal docketed*, No. 24-1769 (6th Cir. Sept. 11, 2024).

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[1] Under Rule 37.6, *amicus* FIRE affirms that no counsel for a party authored this brief in whole or in part, and that no person other than *amicus* or its counsel contributed money intended to fund preparing or submitting this brief. *Amicus* affirms that all parties received timely notice of its intent to file this brief. Rule 37.2.

Here, instead of teaching students to discuss controversial topics, the school censored Petitioner's passive non-disruptive expression, subjectively fearing possible future psychological harm to other students. To ensure our public grade schools educate the next generation of Americans about the First Amendment in both word and deed, FIRE files this brief in support of Petitioner.

SUMMARY OF ARGUMENT

Just three years ago, the Supreme Court reaffirmed the longstanding rule that that "students do not 'shed their constitutional rights to freedom of speech or expression,' even 'at the schoolhouse gate.'" *Mahanoy Area Sch. Dist. v. B.L.*, 594 U.S. 180, 187 (2021) ("*Mahanoy*"). It has been the law for more than half a century that student speech is presumptively protected unless it falls into two narrow categories: it either substantially disrupts the school environment or it invades the rights of others on campus. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513–14 (1969). The decision below, however, merges these two categories, waters them down, and empowers school administrators to restrict speech based on vague and generalized forecasts of adverse psychological reactions to speech.

In this case, L.M.'s school prohibited him from wearing a non-obscene, non-vulgar shirt stating, "There Are Only Two Genders," because the message "would cause students in the LGBTQ+ community to feel unsafe." App. 5a. The school even banned him from wearing the same shirt on which he covered the words "Only Two" with a piece of tape on which he

wrote "CENSORED" so that the message read, "There Are [CENSORED] Genders." *Id*.

The district court denied L.M.'s request for a preliminary injunction and later entered final judgment against him, reasoning that the shirt constituted an impermissible "invasion of the rights of others" under *Tinker*. App. 77a–79a. The First Circuit affirmed on alternative grounds, adopting a novel test that would allow schools to censor speech that neither targets nor harasses a specific student.

The test the First Circuit articulated empowers school administrators to censor passive, silently expressed speech that targets no student in particular if the student's expression: (1) "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'"; and (2) "the demeaning message is reasonably forecasted to 'poison the educational atmosphere' due to its serious negative psychological impact on students with the demeaned characteristic and thereby lead to 'symptoms of a sick school—symptoms therefore of substantial disruption.'" App. 34a–35a. The "poisoned atmosphere" and "sick school" concepts serve as proxies for "substantial disruption." App. 35a. The First Circuit's formulation thus conflates and waters down the "substantial disruption" and "invasion of the

rights of others" prongs of *Tinker* and conflicts with holdings of other circuits.[2]

The First Circuit's approach cannot be reconciled with *Tinker*, in which this Court protected student expression as an essential part of the educational enterprise, not as some luxury at odds with the school's purpose. Because of that commitment, deviations from *Tinker*'s constitutional rule must be narrowly conceived and non-speculative. The exception for speech that "invades the rights of others" was fashioned to address cases of extreme, targeted conduct, such as direct physical interference with another student's person, and not—as here—speech that provokes disagreement or personal discomfort. And the "substantial disruption" exception was not intended to permit censorship because of school officials' vague misgivings about *potential* future negative effects on the school environment.

The First Circuit's claim that it was applying the *Tinker* standard could not be further from the truth. Instead, it essentially merged the two exceptions while at the same time diluting traditional protections for student speech. And it did so by undervaluing the importance of student speech and the reasons this Court recognized students' rights in the first place. The First Circuit's novel test is incapable of reasoned application and a recipe for unthinking deference to

[2] Petitioner has ably described the circuit splits that the First Circuit's decision created. Accordingly, to avoid repeating those arguments, FIRE refers the Court to the Petition. Pet. 18–36.

school officials to save students from "sick schools," whatever that may mean.

The constitutional damage the First Circuit wrought is ultimately unnecessary to address reasonable concerns about student misconduct. *Tinker*'s "invasion of the rights of others" prong already protects students from targeted speech-based tortious conduct. *See Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 217 (3d Cir. 2001) (Alito, J.).

And Congress and this Court, through Title VI and Title IX and their implied private rights of action, have established antidiscrimination protections for students, rendering schools liable for deliberate indifference to student-on-student harassment known to the school. *See Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629 (1999).

If the First Circuit's broad expansion of *Tinker*'s "invasion of the rights of others" exception is allowed to stand, school administrators nationwide will wield it to censor unpopular or dissenting viewpoints—miseducating students about their expressive rights in our pluralist society. This Court should grant *certiorari* to reverse the First Circuit and reaffirm *Tinker*'s limitations on schools' ability to censor non-disruptive student speech.

ARGUMENT

I. *Tinker* Makes Protection for Student Speech the Rule, Not the Exception.

Protection for students' right to free speech is embedded in an essential purpose of public education: teaching young Americans what it means to live in our pluralistic society in which people may freely disagree on issues both large and small. For that reason, exceptions to the constitutional norm must be limited, narrowly framed, and justified by non-speculative reasons.

A. Free Speech is Essential to Public Education.

Under *Tinker*, a school may limit student speech only when that speech will "materially disrupt[] classwork or involve[] substantial disorder or invasion of the rights of others." 393 U.S. at 513.

Mahanoy reaffirmed *Tinker* in concluding that our schools must protect even "a student's unpopular expression." 594 U.S. at 190. Because "America's public schools are the nurseries of democracy," they necessarily have a "strong interest in ensuring that future generations understand the workings in practice of the well-known aphorism, 'I disapprove of what you say, but I will defend to the death your right to say it.'" *Id*.

America's public schools must prepare students to "live in this relatively permissive, often disputatious, society." *Tinker*, 393 U.S. at 509. And the fact that schools "are educating the young for citizenship is reason for scrupulous protection of Constitutional

freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." *West Virginia St. Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943).

This protection does not wane because someone deems expression "controversial" or "offensive." *See, e.g.*, *Mahanoy*, 594 U.S. at 189–91 (reaffirming that public schools may not regulate students' off-campus speech merely because it is offensive). While "[a]ny word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance," this Court made clear more than a half-century ago "our Constitution says we must take this risk." *Tinker*, 393 U.S. at 508.

Not all student speech is protected, to be sure.[3] This Court has steadfastly maintained that the limits are the exception, not the rule.

B. *Tinker*'s "Substantial Disruption" Prong is Narrow and Non-Speculative.

This Court carefully circumscribed *Tinker*'s exceptions to free speech protections in our schools. In that regard, the "substantial disruption" prong does not extend to school authorities' vague misgivings about *potential* future negative effects on the school environment. Rather, the Court focused on the need

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[3] *See Morse v. Frederick*, 551 U.S. 393 (2007); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988); *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

to avoid materially disruptive conduct that would impede schools' ability to function.

The "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." *Tinker*, 393 U.S. at 508. There must be evidence that the school authorities had reason to anticipate substantial material interference with the work of the school or invasion of the rights of others. *Id*. at 509. The "mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint," no matter how urgent, cannot justify censorship of student speech. *Id*.

Nothing in *Tinker* or this Court's subsequent decisions suggests that a school may suppress unpopular or offensive student speech in light of vague speculation that unwanted speech will sometime in the future cause attendance or test scores to deteriorate. To the contrary, *Mahanoy* reaffirmed that *Tinker* sets forth a "demanding standard," that requires a showing of "substantial disruption" of a specific school activity. 594 U.S. at 193. The focus, as *Tinker* and *Mahanoy* show, is *not* on distant harms that might result from others' reactions to the student's speech but on whether that speech will presently cause *material* disruption that would interfere "with the requirements of appropriate discipline in the operation of the school." *Tinker*, 393 U.S. at 513.

This Court has always focused on whether the student's speech, given its time or place, would materially disrupt "classwork or involve[] substantial disorder or invasion of the rights of others." *Id*. Thus,

given the need for discipline to permit the school to do its work, a student could not "interrupt[] school activities nor [seek] to intrude in the school affairs or lives of others," 393 U.S. at 514. But the Court was clear that students who engage in passive displays of pure speech while otherwise going around their "ordained rounds in school," who merely express an unpopular or controversial message through their garb without actively disrupting the affairs of the school, cannot be censored. *Id*.

C. *Tinker*'s "Invasion of the Rights of Others" Exception Requires Physical or Coercive Conduct That Targets Individuals.

Tinker's "invasion of the rights of others" exception is limited to cases of extreme, targeted conduct—direct physical interference with another student's person, for example, or compelling or coercing another student to speak. It does not properly apply to speech that provokes disagreement or discomfort.

Tinker's discussion of this exception was informed by actions in other cases decided at the time and is intentionally narrow. The Court looked to two Fifth Circuit cases decided on the same day by a panel that reached opposite conclusions based on differing facts: *Blackwell v. Issaquena County Board of Education*, 363 F.2d 749 (5th Cir. 1966), and *Burnside v. Byars*, 363 F.2d 744 (5th Cir. 1966). *See Tinker*, 393 U.S. at 505 & n.1.

In *Burnside*, the panel held the First Amendment protected student speech and enjoined school authorities at a Mississippi school from enforcing a ban on "freedom buttons" that read "One Man One Vote." The students wearing them neither caused a

commotion nor disrupted classes, and the Fifth Circuit found "the presence of 'freedom buttons' did not hamper the school in carrying on its regular schedule of activities." 363 F.2d at 748, 749.

In *Blackwell*, however, more than 150 students at a segregated school in Mississippi wore "freedom buttons" to classes, but did not confine their actions to a passive display of their message. They distributed the buttons in school hallways and "accosted other students by pinning the buttons on them even though they did not ask for one." *Blackwell*, 363 F.2d at 751. That caused a younger student to begin crying and created a "state of confusion, disrupted class instruction, and resulted in a general breakdown of orderly discipline" in the school. *Id*. The same panel of judges for the two cases found that the ban on buttons in *Blackwell* was appropriate, in part because the students "disturbed other students who did not wish to participate in the wearing of the buttons," which showed a "complete disregard for the rights of their fellow students." *Id*. at 753.

Tinker's "invasion of the rights of others" prong draws on this distinction, *Tinker*, 393 U.S. at 505 & n.1, and does not address generally offensive or controversial speech. Instead, it focuses on active conduct interfering with another student's right not to be targeted with harassing conduct or coercion compelling them to speak.

Other decisions addressing this exception similarly require something far beyond speech that is "merely offensive to some listener" to trigger the invasion of the rights of others exception. *Saxe v. State Coll. Area Sch. Dist*., 240 F.3d 200, 217 (3d Cir. 2001) (Alito, J.). *Saxe* held a school's anti-harassment policy violated a

student's right to free expression because the school authorities invoked it to prohibit him from expressing his view that "homosexuality is a sin." *Id*. at 203. The Third Circuit explained that such policies could not survive First Amendment scrutiny if they barred speech without requiring a "threshold showing of severity or pervasiveness." *Id*. at 217. Otherwise, the court explained, such policies "could conceivably be applied to cover any speech about some enumerated personal characteristics the content of which offends someone." *Id*.[4]

The First Circuit itself earlier endorsed a requirement that the speech must be targeted at another student before school authorities may invoke the "invasion of the rights of others" exception. *See Norris ex rel. A.M. v. Cape Elizabeth Sch. Dist*., 969 F.3d 12, 29 & n.18 (1st Cir. 2020). *Norris* involved a sticky note stating "THERE'S A RAPIST IN OUR SCHOOL AND YOU KNOW WHO IT IS" that a female student posted in a restroom without targeting a specific student. *Id*. at 14. Instead, the school authorities punished the student only because they concluded the note contributed to the bullying of another student and therefore invaded that other student's rights. *Id*. at 28–29. The court explained that there "must be a reasonable basis for the administration to have determined both that the student speech targeted a specific student and that it

[4] In *Saxe*, then-Judge Alito further noted that some courts have expressly held the invasion of the rights of others prong is so narrow that it covers "only independently tortious speech" like defamation or intentional infliction of emotional distress. 240 F.3d at 217 (citing *Slotterback v. Interboro Sch. Dist*., 766 F. Supp. 280, 289 n.8 (E.D. Pa. 1991); *Kuhlmeier v. Hazelwood Sch. Dist*., 795 F.2d 1368, 1375 (8th Cir. 1988)).

invaded that student's rights." *Id*. at 29. This narrow construction is true to *Tinker*. But the First Circuit abandoned it here, instead reconceptualizing *Tinker*'s broad protection of student speech in ways the *Tinker* Court would not recognize.

II. The First Circuit's Novel Test Cannot be Reconciled With *Tinker*.

The First Circuit purported to apply *Tinker* in approving restrictions on student speech, but it did no such thing. It instead reformulated the *Tinker* exceptions to create a new test for limiting speech that greatly expands administrators' discretion to restrict non-disruptive expression. The impressionistic approach the First Circuit approved is incapable of reasoned application.

A. The First Circuit Reimagined *Tinker*'s Exceptions.

Although the First Circuit purported to apply *Tinker* to this case, doing so required a great deal of interpretation. The district court had ruled that L.M.'s generalized message to no one in particular violated the rights-of-others. App. 19a; App. 77a–78a. The First Circuit, however, was not so sure, and expressed uncertainty "as to when, if ever, the rights-of-others limitation applies to passive and silent expression that does not target any specific student or students." App. 20a–21a. The court instead determined that the passive display of "There Are Only Two Genders" violated *Tinker*'s substantial disruption exception. App. 54a. Perhaps not entirely convinced of its own reasoning, the First Circuit hedged its bet by suggesting that perhaps both exceptions might apply, and that the difference

between them "may be more semantic than real." App. 36a.

To reach this conclusion, the First Circuit looked almost exclusively to a suspect split-panel decision of the Seventh Circuit, *Nuxoll ex rel. Nuxoll v. Indian Prairie School District*, 523 F.3d 668 (7th Cir. 2008). App. 26a–29a. Relying on *dicta* in *Nuxoll*, the First Circuit formulated a test permitting school authorities to punish passive displays of student speech that they find demeaning as materially disrupting the activities of the school without having to satisfy any objective standard. App. 34a–35a.

Nuxoll addressed a student's desire to wear a "Be Happy, Not Gay" T-shirt for a "straight pride" event to be held on the first school day after his school held a homosexual tolerance event. 523 F.3d at 670. The school maintained an anti-harassment policy forbidding derogatory comments that referred to race, ethnicity, religion, gender, sexual orientation, or disability. *Id*. The district court had denied injunctive relief, and the Seventh Circuit reversed on the facts before it, reasoning that the shirt's slogan did not constitute harassment. At the same time, in *dicta*, the court articulated the basis for the broader rule the First Circuit eventually adopted here. *Id*. at 676.

Although there was no evidence the plaintiff's shirt in *Nuxoll* would lead to any threatened material disruption of school activities, the panel majority suggested that even passive derogatory comments about deeply rooted personal characteristics can "strike a person at the core of his being" and "poison the school atmosphere." *Id*. at 671. The majority speculated that plaintiff might cause a "deterioration

in the school's ability to educate its students" if his anti-gay message, based on his interpretation of the Bible, prompted others to make negative statements about the Bible, thereby affecting the atmosphere of the school so that it was not conducive for learning. *Id*. at 672.

Although it correctly rejected the school's argument that its policy was justified under *Tinker*'s invasion of the rights of others exception—noting people "do not have a legal right to prevent criticism of their beliefs or for that matter their way of life"[5]—the Seventh Circuit majority nevertheless accepted that schools may forecast substantial disruption that does not actually disturb the school's activities. It explained that school authorities may do so when they fear speech or expression could have potential psychological effects on other students that might "poison the educational atmosphere" and thereby cause substantial disruption.

To elevate such vague concerns to outweigh constitutional protections, the majority belittled the value of student debate on issues of public importance. *Nuxoll*, 523 F.3d at 674 ("[A]dult debates on social issues are more valuable than debates among children."). But as this Court more recently clarified in *Mahanoy*, student speech cannot be so easily trivialized as being "unworthy of … robust First Amendment protections." 594 U.S. at 193. For "'what otherwise might seem a trifling and annoying instance of individual distasteful abuse of a privilege, these fundamental societal values are truly

[5] 523 F.3d at 672 (citing *R.A.V. v. City of St. Paul*, 505 U.S. 377, 394 (1992), and *Boos v. Barry*, 485 U.S. 312, 321 (1988)).

implicated.'" *Id*. (quoting *Cohen v. California*, 403 U. S. 15, 25 (1971)). Without the benefit of this later Supreme Court guidance, the *Nuxoll* majority undervalued the First Amendment guarantees at issue and abdicated its role as a protector of student free expression. Instead, it adopted a "judicial policy of hands off (within reason) school regulation of student speech." *Nuxoll*, 523 F.3d at 671.

From the deeply flawed majority opinion in *Nuxoll*, the First Circuit divined the novel test it applied in this case, allowing school authorities to censor student expression if they forecast it might have subjectively harmful psychological effects on other students.[6]

Under the First Circuit's test, schools can censor passive, silently expressed pure speech that does not target any student if the student's expression demeans a deeply rooted personal characteristic of personal identity and that message is "reasonably forecasted to 'poison the educational atmosphere'" of the school. App. 34a–35a. This test fundamentally redefines the concept of substantial disruption.

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[6] The court also looked to other circuits' decisions about passive displays of controversial messaging, mainly ones that concerned display of highly inflammatory symbols—such as the Confederate Battle Flag—in districts that had experienced disruption based on racial tensions. App. 25a–26a (discussing *West v. Derby Unified Sch. Dist. No. 260*, 206 F.3d 1358 (10th Cir. 2000)); App. 30a–31a (discussing *Sypniewski v. Warren Hills Reg'l Bd. of Educ.*, 307 F.3d 243 (3d Cir. 2002)). Such cases have no bearing on this case where there was no similar history of tension or fights among students over gender issues.

To whatever extent this amorphous standard can be understood and applied, it is far afield from *Tinker*.

B. The First Circuit's Test Abandons this Court's Protection of Student Speech.

The First Circuit's test ignores this Court's holdings in *Tinker*, *Mahanoy*, and other decisions touching on the importance of protecting students' speech that does not threaten substantial, material disruption of school activities. It is subjective, amenable to manipulation, and impervious to reasoned application. *Minnesota Voters All. v. Mansky*, 585 U.S. 1, 23 (2018) (government must support its "good intentions with a law capable of reasoned application").

The First Circuit's test improperly prioritizes school authorities' desires to avoid injured feelings above the need for Courts to protect unpopular and controversial student expression. Worse, it does so by deferring to school authorities' subjective fears of undefined psychological harms, throwing off the constitutional guardrails established by *Tinker* and *Mahanoy*.

Comparing the facts in *Nuxoll* to those in this case illustrates the impracticability of the First Circuit's test. Both circuits have now embraced the same rule. But in *Nuxoll*, the Seventh Circuit found that the slogan "Be Happy, Not Gay" on a T-shirt is "tepidly negative," does not demean gay students, and is unlikely to cause psychological harm. 523 F.3d at 676. Here, however, the First Circuit concluded that "There Are Only Two Genders" (and even worse, "There Are [CENSORED] Genders") is demeaning

and likely to cause serious psychological harm to transgender or nonbinary students. App. 48a, 54a. This is no test at all. How can any school administrator objectively determine what speech will "poison the educational atmosphere" or lead to a "sick school"? And how can any court review such amorphous, subjective determinations? As this Court has held, "the State must draw a reasonable line" and "articulate some sensible basis for distinguishing what may come in from what must stay out." *Mansky*, 585 U.S. at 16.

These two decisions provide no guidance to identify "tepid" criticism from demeaning comments that strike a person at the core of their being. Which comments will cause psychological harm, and which will not? Which will lead to "symptoms of a sick school," and thus justify censorship and punishment? How are school authorities to navigate such waters other than by censoring a vast amount of student expression? The Seventh Circuit's answer, after dismissing the importance of student speech, was generally to defer to school administrators—except, oddly, in the case before it—and the First Circuit has now adopted this dangerously deferential approach.

Such deference to authority cannot be squared with *Tinker*, where this Court made clear that public schools are not "enclaves of totalitarianism" and students "may not be confined to the expression of those sentiments that are officially approved." 393 U.S. at 511. Rather, "[i]n the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views." *Id*. The decision below swaps out the "specific showing of constitutionally

valid reasons" that *Tinker* required for impressionistic mush that provides no standard of review.

In the current polarized environment, and subject to the push and pull of the culture wars in our society, schools are likely to censor broad swaths of controversial matters of public debate and disagreement. But this Court's precedents teach that because schools are the nurseries of democracy, they cannot simply shield students from the realities of our diverse and disputatious society. Instead, schools must prepare students to learn the values of tolerance and civil debate. Curtailing debate for fear of upsetting students runs contrary to the promise of the First Amendment. Instead, it runs dangerously close to institutionalizing the heckler's veto.

By censoring passive displays of subjectively offensive speech touching on personal characteristics, schools will potentially render entire areas of discussion off-limits based on nebulous fears that some students may suffer some negative consequence at some future time, even without actual disruption or interference with school activities.

III. Censorship is Not Necessary to Prevent Harassment Based on Protected Personal Characteristics.

Censorship of student speech is not the answer to the First Circuit's concerns about student-on-student harassment. Existing laws and pedagogical strategies provide a superior—and constitutional—alternative.

There is no need to expand *Tinker*'s substantial disruption exception to reach speech that does not

threaten immediate and substantial disruption of educational activities. To the extent that student conduct targeting a protected personal characteristic actually affects another student's access to an educational opportunity or benefit, this Court has found an implied cause of action based on objective anti-harassment standards. *See Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629 (1999) (implied right of action exists under Title IX); *Alexander v. Sandoval*, 532 U.S. 275 (2001) (implied right of action exists under Title VI).

The *Davis* Court held that a student may hold a school liable for deliberate indifference to harassing conduct "so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims' educational experience, that the victim-students are effectively denied equal access to an institution's resources and opportunities." *Id.* at 651.

This Court in *Davis* observed that school students "often engage in insults, banter, teasing, shoving, pushing, and gender-specific conduct that is upsetting to the students subjected to it. Damages are not available for simple acts of teasing and name-calling among school children, however, even where these comments target differences in gender." *Id.* at 651–52. Unlike the First Circuit's subjective test, *Davis* requires that the behavior "have the systemic effect of denying the victim equal access to an educational program or activity," not simply that a school authority fears some subjective psychological harm that will one day potentially lead to declining test scores or absenteeism. *Id.* at 652.

Courts and schools have been applying *Davis* and its objective standard for decades without difficulty. *See, e.g.*, *Jennings v. Univ. of N. Carolina*, 482 F.3d 686 (4th Cir. 2007); *Stafford v. George Washington Univ.*, 18-cv-2789, 2019 WL 2373332 (D.D.C. June 5, 2019); *T.E. v. Pine Bush Cent. Sch. Dist.*, 58 F. Supp. 3d 332 (S.D.N.Y. 2014). There is no good reason to expand *Tinker* as the First Circuit has, which will create considerable uncertainty and lead to censorship of much student freedom of expression otherwise protected by the First Amendment.

As courts have recognized, student expression that targets another student, rises to a sufficient level of pervasiveness and severity, and adversely affects that student's learning, such as harassment or bullying, may be banned or punished under *Tinker*'s invasion of the rights of others exception.

Such verbal abuse is not protected under *Tinker* when it crosses the line into tortious conduct, such as defamation or intentional infliction of emotional distress. Thus, school authorities are already equipped to stop students from engaging in the kinds of targeted speech or expressive conduct that other students cannot ignore. And they can do so without the need to engage in speculation about subjective psychological harms and attenuated projections of a toxic educational environment.

CONCLUSION

For the foregoing reasons, this Court should grant *certiorari* to reject the First Circuit's attempt to expand *Tinker*'s exceptions to authorize censorship based on amorphous and subjective fears of adverse future effects.

November 12, 2024

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