

No. \_\_\_\_\_

---

---

**In The  
Supreme Court of the United States**

---

---

TYLER CHASE HARPER, ET AL.,

*Petitioners,*

vs.

POWAY UNIFIED SCHOOL DISTRICT, ET AL.,

*Respondents.*

---

---

**On Petition For Writ Of Certiorari  
To The United States Court Of Appeals  
For The Ninth Circuit**

---

---

**PETITION FOR WRIT OF CERTIORARI**

---

---

BENJAMIN W. BULL  
*Counsel of Record*  
GARY MCCALED  
JORDAN LORENCE  
ALLIANCE DEFENSE FUND  
15333 N. Pima Rd., Ste. 165  
Scottsdale, AZ 85260  
(480) 444-0020

KEVIN THERIOT  
ALLIANCE DEFENSE FUND  
15192 Rosewood  
Leawood, KS 66224  
(913) 685-8000

ROBERT TYLER  
ADVOCATES FOR FAITH & FREEDOM  
2490 Las Brisas Rd.  
Murrieta, CA 92565  
(951) 304-7583

*Attorneys for the Petitioners*

---

---

## QUESTIONS PRESENTED

A school district in the State of California broadly prohibits students from expressing any “negative” views. Pursuant to this policy, school officials permit students to express what school officials deem “positive” views of homosexual behavior, but prohibit students from expressing what school officials deem to be “negative” views on this topic. A divided Ninth Circuit upheld the denial of preliminary injunctive relief against this viewpoint discrimination.

1. Did the Ninth Circuit err in holding, in conflict with opinions of the Third Circuit and this Court, that a high school student’s “negative” speech may be censored because it allegedly “interferes with the rights of other students” who perceive it as “demeaning” or “derogatory?”
2. Did the Ninth Circuit err in holding, in conflict with the decisions of the Third, Second, and Sixth Circuits, and this Court, that high school officials are permitted to censor student viewpoints on one side of a debate?
3. Should this Court vacate the decision below under *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950), where petitioner Tyler Chase Harper’s graduation has rendered moot his request for a preliminary injunction?

**PARTIES**

Petitioner Tyler Chase Harper (“Chase”) brought suit by and through his parents Ron and Cheryl Harper and was a Plaintiff-Appellant before the Ninth Circuit. Chase’s sister Kelsie Harper was added as a party to the ongoing proceedings at the district court level after Chase appealed the District Court’s denial of his motion for preliminary injunction to the Ninth Circuit. *Harper v. Poway Unified School Dist.*, 445 F.3d 1166, 1173 n.9 (9th Cir. 2006). Appendix 8a (“App.”). Kelsie is filing a motion in this Court, simultaneously with the present petition, to intervene as a petitioner for purposes of this petition for certiorari, and conditionally joins Chase herein.

Besides the Respondent Poway Unified School District (“School”), the following are respondents and were Defendants-Appellees before the Ninth Circuit: Jeff Mangum, Linda Vanderveen, Penny Ranftle, Steve McMillan, and Andy Patapow, individually and in their official capacities as Members of the School Board; Dr. Donald A. Phillips, individually and in his official capacity as Superintendent of the School; Scott Fisher, individually and in his official capacity as Principal of Poway High School; Lynell Antrim, individually and in her official capacity as Assistant Principal of Poway High School; Ed Giles, individually and in his official capacity as Vice Principal of Poway High School; and David LeMaster, individually and in his official capacity as a teacher at Poway High School.

## TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED .....	i
PARTIES.....	ii
TABLE OF CONTENTS .....	iii
TABLE OF AUTHORITIES.....	vi
DECISIONS BELOW.....	1
JURISDICTION .....	1
CONSTITUTIONAL PROVISIONS AND POLICIES ....	1
STATEMENT OF THE CASE .....	2
A. Facts Material to Consideration of the Questions .....	2
1. The School’s policies banning offensive speech.....	2
2. The Harpers’ religious views.....	3
3. The School’s approval of student speech endorsing homosexual behavior .....	3
4. The Harpers’ speech .....	4
5. The School’s censorship of speech.....	5
6. The School’s attempt to coerce Chase to change his religious beliefs .....	6
7. Negative viewpoints banned.....	7
8. Chase’s speech caused no disruption.....	8
B. Course of Proceedings .....	8
REASONS FOR GRANTING THE WRIT .....	10

## TABLE OF CONTENTS – Continued

	Page
I. THE NINTH CIRCUIT’S HOLDING CONFLICTS WITH THE THIRD CIRCUIT’S DETERMINATION THAT NEGATIVE, DEMEANING, AND DEROGATORY SPEECH DOES NOT INFRINGE UPON THE RIGHTS OF OTHER STUDENTS, AS WELL AS THIS COURT’S CASES PROTECTING OFFENSIVE SPEECH .....	12
A. Conflict with the Third Circuit .....	13
B. The Ruling Conflicts with this Court’s Precedent Regarding “Rights of Others” ....	15
1. There is no right not to be offended .....	16
2. The Ninth Circuit’s limitations on its new rule do not save it.....	18
II. THE NINTH CIRCUIT’S AUTHORIZATION OF VIEWPOINT CENSORSHIP BY SCHOOLS CONFLICTS WITH DECISIONS OF OTHER CIRCUITS AND THIS COURT .....	20
A. There is a Conflict in the Circuits Regarding the Permissibility of Discrimination Against Student Viewpoints in Public Schools .....	21
1. Conflict with the Sixth Circuit.....	22
2. Conflict with the Second Circuit .....	23
3. Conflict with the Third Circuit .....	24
B. The Ninth Circuit’s Authorization of Viewpoint Discrimination by School Officials Conflicts with the Decisions of this Court ....	25

## TABLE OF CONTENTS – Continued

	Page
III. THE NINTH CIRCUIT'S OPINION MUST BE VACATED FOR MOOTNESS IF KELSIE HARPER IS NOT PERMITTED TO INTERVENE FOR PURPOSES OF THIS PETITION .....	27
A. Vacatur is Necessary When the Appellant Does Not Intentionally Moot the Case .....	28
B. Vacatur is Necessary to Prevent an Unreviewable Decision From Acting as Law of the Case in Future Proceedings .....	28
CONCLUSION .....	29

## TABLE OF AUTHORITIES

Page

## CASES

<i>Anderson v. Green</i> , 413 U.S. 557 (1995) (per curiam).....	27
<i>Arizonans for Official English v. Arizona</i> , 520 U.S. 43 (1997) .....	27
<i>Bd. of Sch. Comm'rs of Indianapolis</i> , 420 U.S. 128 (1975) .....	28
<i>Blackwell v. Issaquena County Bd. of Educ.</i> , 363 F.2d 749 (5th Cir. 1966).....	16, 17
<i>Castorina ex rel. Rewt v. Madison County Sch. Bd.</i> , 246 F.3d 536 (6th Cir. 2001).....	11, 21, 22
<i>City Council of Los Angeles v. Taxpayers for Vincent</i> , 446 U.S. 789 (1984) .....	25
<i>Coates v. Cincinnati</i> , 402 U.S. 611 (1971) .....	20 n.4
<i>Cook v. Colgate Univ.</i> , 992 F.3d 17 (2d Cir. 1993) .....	28
<i>Dambrot v. Cent. Michigan Univ.</i> , 839 F. Supp. 477 (E.D. Mich. 1993) .....	14 n.1
<i>DeFunis v. Odegaard</i> , 416 U.S. 312 (1974) .....	28
<i>Doe v. Madison Sch. Dist. No. 321</i> , 177 F.3d 789 (9th Cir. 1999).....	28
<i>Donovan ex rel. Donovan v. Punxsutawney Area Sch. Bd.</i> , 336 F.3d 211 (3d Cir. 2003) .....	28
<i>Firefighters Local Union No. 1784 v. Stotts</i> , 467 U.S. 561 (1984) .....	29

## TABLE OF AUTHORITIES – Continued

	Page
<i>Forsyth County, Ga. v. The Nationalist Movement</i> , 505 U.S. 123 (1992) .....	18
<i>Great Western Sugar Co. v. Nelson</i> , 442 U.S. 92 (1979) .....	27
<i>Guiles v. Marineau</i> , 461 F.3d 320 (2d Cir. 2006) .....	11, 21, 23, 24
<i>Harper v. Poway Unified Sch. Dist.</i> , 345 F. Supp. 2d 1096 (S.D. Cal. 2004) .....	1
<i>Harper v. Poway Unified Sch. Dist.</i> , 445 F.3d 1166 (9th Cir. 2006) .....	<i>passim</i>
<i>Harper v. Poway Unified Sch. Dist.</i> , 455 F.3d 1052 (9th Cir. 2006) .....	1, 11, 18
<i>Honig v. Students of California Sch. for the Blind</i> , 471 U.S. 148 (1985) .....	29
<i>Keyishian v. Bd. of Regents</i> , 385 U.S. 589 (1967) .....	18
<i>Kuhlmeier v. Hazelwood Sch. Dist.</i> , 795 F.2d 1368 (8th Cir. 1986) .....	13
<i>Lamb’s Chapel v. Ctr. Moriches Sch. Dist.</i> , 508 U.S. 384 (1993) .....	11, 25
<i>Mellen v. Bunting</i> , 327 F.3d 355 (4th Cir. 2003) .....	28
<i>Murphy v. Fort Worth Indep. Sch. Dist.</i> , 334 F.3d 470 (5th Cir. 2003) .....	28
<i>Porter v. Ascension Parish Sch. Bd.</i> , 393 F.3d 608 (5th Cir. 2004) .....	22
<i>R.A.V. v. St. Paul</i> , 505 U.S. 377 (1992) .....	11, 18, 22, 25, 26

## TABLE OF AUTHORITIES – Continued

	Page
<i>Rosenberger v. Rector &amp; Visitors of the Univ. of Va.</i> , 515 U.S. 819 (1995) .....	11, 22, 25
<i>Saxe v. State Coll. Area Sch. Dist.</i> , 240 F.3d 200 (3d Cir. 2001) .....	<i>passim</i>
<i>Slotterback v. Interboro Sch. Dist.</i> , 766 F. Supp. 280 (E.D. Pa. 1991) .....	13
<i>Sypniewski v. Warren Hills Reg'l Bd. of Educ.</i> , 307 F.3d 243 (3d Cir. 2002) .....	24, 25
<i>Terminiello v. Chicago</i> , 337 U.S. 1 (1949) .....	17
<i>Texas v. Johnson</i> , 491 U.S. 397 (1989) .....	13
<i>Tinker v. Des Moines Indep. Sch. Dist.</i> , 393 U.S. 503 (1969) .....	<i>passim</i>
<i>U.S. Bancorp v. Bonner</i> , 513 U.S. 18 (1994) .....	28
<i>United States v. Eichman</i> , 496 U.S. 310 (1990) .....	13
<i>United States v. Munsingwear, Inc.</i> , 340 U.S. 36 (1950) .....	i, 12, 27
<i>Univ. of Texas v. Camenisch</i> , 451 U.S. 390 (1981) .....	29
<i>UWM Post, Inc. v. Bd. of Regents of the Univ. of Wisconsin Sys.</i> , 774 F. Supp. 1163 (E.D. Wis. 1991) .....	14 n.1
<i>West Virginia State Bd. of Educ. v. Barnette</i> , 319 U.S. 624 (1943) .....	11, 12, 16, 17

## TABLE OF AUTHORITIES – Continued

Page

## CONSTITUTION, STATUTES AND REGULATIONS

U.S. Const. amend. I .....	<i>passim</i>
U.S Const. amend. XIV, § 1.....	2
28 U.S.C. § 1254(1).....	1
28 U.S.C. § 2106 .....	27
Federal Rules of Civil Procedure § 62(c).....	10
California Civil Code § 52.1 .....	8

## MISCELLANEOUS

Carpenter, Dale, <i>Right Result Under a Bad Precedent</i> , April 21,2006, <a href="http://volokh.com/archives_2006_04_16_2006_04_22.shtml">http://volokh.com/archives_2006_04_16_2006_04_22.shtml</a> .....	15 n.2
FEDERAL PRACTICE AND PROCEDURE § 4478.5 (2d ed. 2006).....	28
Hudson, David L., <i>Tinkering With Tinker Standards?</i> , Aug. 9, 2006, <a href="http://www.fac.org/analysis.aspx?id=17253">http://www.fac.org/analysis.aspx?id=17253</a> .....	15 n.2
Oberst, Michael, <i>9th Circuit Was Wrong to Let School Censor Student’s T-Shirt</i> , LOS ANGELES DAILY JOURNAL, Aug. 23, 2006, page 8 .....	15 n.2
Unified School District Administrative Regulation 5.28.1.....	2
Volokh, Eugene, <i>Sorry, Your Viewpoint is Excluded from First Amendment Protection</i> , April 20, 2006, <a href="http://volokh.com/posts/1145577196.shtml">http://volokh.com/posts/1145577196.shtml</a> .....	15 n.2
<i>When Students Speak</i> , WASH. POST, Aug. 7, 2006, page 14 .....	15 n.2

## DECISIONS BELOW

The decision of the district court denying a preliminary injunction is reported as *Harper v. Poway Unified School Dist.*, 345 F. Supp. 2d 1096 (S.D. Cal. 2004). App. 82a. The 2-1 decision of the court of appeals affirming the district court's order is reported as *Harper v. Poway Unified School Dist.*, 445 F.3d 1166 (9th Cir. 2006). App. 1a. The decision of the court of appeals denying rehearing *en banc* over five dissenting votes is reported at *Harper v. Poway Unified School Dist.*, 455 F.3d 1052 (9th Cir. 2006). App. 135a. The decision of the Ninth Circuit denying Petitioners' motion for vacatur is not reported. App. 133a.

## JURISDICTION

The Ninth Circuit rendered its 2-1 panel decision on April 20, 2006, and amended the opinion on May 31, 2006. Petitioner filed a petition for rehearing *en banc* on April 28, 2006 and a request for vacatur due to mootness on July 26, 2006. The United States Court of Appeals denied the petition for rehearing *en banc* (which was dissented from by five judges), and the request for vacatur on July 31, 2006. This Court has jurisdiction under 28 U.S.C. § 1254(1) if the Motion to Intervene of Kelsie J. Harper, currently pending before this Court, is granted. If the motion to intervene is denied, this Court has jurisdiction only to vacate the Ninth Circuit's opinion and the District Court's opinion, because Chase has graduated and his request for a preliminary injunction is moot.

## CONSTITUTIONAL PROVISIONS AND POLICIES

The First Amendment to the United States Constitution provides as follows:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of

speech, or the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. I.

The first section of the Fourteenth Amendment to the United States Constitution provides as follows:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

The regulations of the Poway Unified School District governing student expression in public schools are set forth in the Appendix at 187a-201a.

## **STATEMENT OF THE CASE**

### **A. Facts Material to Consideration of the Questions**

#### **1. The School's policies banning offensive speech**

The School has published a student policy handbook that includes a section entitled "Socially Responsible Behavior." According to section C.3.e of this section, clothing that "promote[s] or portray[s] . . . violence or hate behavior including derogatory connotations directed toward sexual identity" violates the school dress code. App. 323a. Poway Unified School District Administrative Regulation 5.28.1 gives the following examples of hate behavior: "2. The presence of symbols or words considered offensive to persons of a specific gender, race, ethnicity, religion, sexual orientation, or the mentally or physically challenged. . . ." App. 189a.

Additionally, the School has prepared “Poway High School Student Handbook.” App. 318a-338a. In this guide, harassment is defined as “unwanted and unwelcome behavior from other students or staff members that interferes with another individual’s life.” App. 333a. Defendants’ policies explain that all “[n]egative comments or behavior based on race, ethnicity, sexual orientation, religion, or gender” are prohibited for students and staff. App. 191a, 192a.

## **2. The Harpers’ religious views**

Chase Harper was sixteen years old and a sophomore at Poway High School in the Poway Unified School District at the time of the acts alleged in the initial complaint. App. 144a, 146a, 148a. He has since graduated. App. 313a, 314a. Kelsie Harper is currently a junior at Poway High. App. 148a. Both believe the Bible is the inspired Word of God, and that homosexual behavior is contrary to the teachings of the Bible. App. 148a. Because they believe that homosexual behavior is damaging to both the participants and to society at large, the Harpers believe they have a moral and religious obligation to warn classmates and others of that danger. App. 148a, 149a.

## **3. The School’s approval of student speech endorsing homosexual behavior**

The School authorizes students and staff at Poway High School to annually observe a “Day of Silence.” App. 179a, 180a. The “Day of Silence” is a national event sponsored by GLSEN—a professional advocacy organization for those engaged in homosexual behavior. App. 231a. In 2004 this event occurred on April 21. The purpose of the Day of Silence is to endorse, promote, and encourage legal protection and tolerance of homosexual behavior—behavior that the Harpers believe is harmful to those who engage in it. App. 148a, 149a. Participating students refuse to speak during the school day. App.

149a. Students and staff members support legal protection and tolerance of homosexual behavior by wearing expressive T-shirts, placing duct tape over their mouths with written messages on the tape, posting flyers and posters around campus, wearing buttons on clothing, and engaging in other expression. App. 175a, 179a-181a. The School-approved speech of students observing the Day of Silence includes: displaying posters with the words “Stop the Hate,” “fags,” “queers,” “that’s so gay,” and “loser;” and wearing T-shirts with a purple square and yellow “equal” sign on them. App. 180a. The School has also permitted male students to wear T-shirts stating “I Kiss Boys.” *Id.* The Gay-Straight Alliance student club sponsored the Day of Silence in 2004. App. 144a.

Apart from the Day of Silence, the School permits student speech and debate regarding the subject matter of acceptance of homosexual behavior, “tolerance,” and related issues. App. 179a-181a. But the School censors student speech that does not support homosexual behavior. App. 180a-181a.

#### **4. The Harpers’ speech**

On April 21, 2004, Chase wore an expressive homemade T-shirt in response to other students’ speech supporting the “Day of Silence.” App. 149a-150a. On the front of the shirt, he placed words that read: “I will not accept what God has condemned.” The back of the shirt read “Homosexuality is shameful. Romans 1:27.” App. 149a. On the following day, April 22, 2004, he wore a similar shirt. The message on the back remained the same, but he altered the front so that it read: “Be ashamed. Our school has embraced what God has condemned.” App. 150a. Kelsie Harper would like to engage in this same speech at school, but has been prohibited by school policy from doing so. App. 148a, 149a, 150a-153a.

## 5. The School's censorship of speech

During his second class period on April 22, 2004, Chase was told by his teacher, David LeMaster, that he was in violation of the school dress code and must either remove the T-shirt or report directly to the school office. App. 150a. Chase chose to report to the school office, where he met with Assistant Principal Lynell Antrim. Ms. Antrim informed Chase that his T-shirt was in violation of the dress code because it was "homemade" and because the words on the T-shirt were "inflammatory." *Id.* She instructed him to replace the T-shirt and offered him the opportunity to return to class if he would comply with her instruction. App. 150a, 151a. Chase declined to replace the T-shirt. He was instructed to wait until the principal would be available to discuss disciplinary action against him, and was eventually sent to Principal Scott Fisher's office. App. 151a.

Mr. Fisher told Chase that his T-shirt was too "aggressive" and that wearing it would not be tolerated at Poway High School. App. 151a. Although Chase had been told by Ms. Antrim that it was the homemade nature of his T-shirt that violated the dress code, App. 150a, Mr. Fisher told him that it did not matter whether the T-shirt was homemade or professionally manufactured. App. 151a. Mr. Fisher stated the penalty would be the same either way because the content was inflammatory. *Id.*

At the end of the interview, Mr. Fisher commended Chase for being courteous and respectful. App. 151a. Mr. Fisher informed him that although his punishment would be mitigated because of his courtesy and respect, Chase would still be suspended from school. *Id.* He would also have to stay in the office for the remainder of the school day, at which time he would be required to leave the school grounds by the most direct route. *Id.* Chase was not allowed to leave the office without an escort. App. 152a. Except for supervised visits to the restroom, he stayed in

the office for the rest of the day. *Id.* Throughout the afternoon, various school officials visited Chase, some of whom conversed with him about the situation. *Id.*

#### **6. The School's attempt to coerce Chase to change his religious beliefs**

While Chase was detained in the office, he was interrogated by an armed deputy sheriff. App. 152a. The deputy's firearm was openly visible to Chase during the entire interview. *Id.* The deputy showed Chase his badge and took several pictures of him, but did not arrest him. *Id.* The deputy told Chase the purpose of his visit was to ascertain whether Chase was a dangerous student, to find out why he wore the T-shirt, and to determine whether he would engage in similar behavior in the future. *Id.* He also told Chase that he should not be offensive to others, since Christianity is based on love, not hate. App. 153a.

At the end of the day, Chase was told to collect his things and report to Assistant Principal Ed Giles' office. *Id.* Upon entering Mr. Giles' office, Chase was directed to close the door, which he did. *Id.* Mr. Giles told Chase that he knew Chase's family and youth pastor. *Id.* He told Chase that he was a Christian too, but that he leaves his faith "in the car." *Id.* Mr. Giles told Chase that he must also "leave his faith in the car" because his beliefs were offensive to others. App. 153a; *but see* App. 360a. Chase respectfully told Mr. Giles that he could not leave his faith in the car. App. 153a.

After this visit, Chase was told he was free to go home, but that he was to leave campus immediately and must remain off-campus for the rest of the day. App. 153a. He was not even permitted to go to his locker to collect his homework. App. 154a. Chase complied with these instructions and went directly home. *Id.*

The School provides on its website a number of resources for parents to help them address a variety of

issues with their children, including drugs, alcohol, depression, and “gender issues.” App. 197a-199a. Under gender issues, the School offers links to only two websites. The first, [www.familyacceptance.com](http://www.familyacceptance.com), is described as “answer[ing] questions and discuss[ing] religious aspects” of gender issues. The site poses the question: “Is Homosexuality a Sin?” In response, the site clearly states that the Bible does not say homosexual behavior is a sin, and accuses those who say otherwise of “hypocrisy.” App. 202a-203a. A second site, [www.bidstrup.com/parents.htm](http://www.bidstrup.com/parents.htm), claims to address “what the bible experts have to say” about homosexual behavior being a sin. It goes on to explain that homosexual behavior is not a sin, and provides a bibliography of books that support this position. App. 204a. The School does not provide a link to any site that provides the view that homosexual behavior is sinful.

## **7. Negative viewpoints banned**

Chase’s parents were not notified of the situation until shortly before the end of the school day on April 22, 2004. App. 154a. At that time, Assistant Principal Giles telephoned Ron Harper and informed him that his son had been detained and suspended for the day for wearing an expressive T-shirt. *Id.* Ron Harper was initially told that “homemade T-shirts were not allowed.” *Id.* When Ron Harper stated that he had seen other homemade T-shirts at the school in the past, he was then told that “only positive community messages were allowed.” App. 154a. Shirts with “negative” messages were not allowed. *Id.*; see also App. 348a (Ms. Antrim discussed with Chase Harper ways that he “could bring a positive light onto this issue without condemnation”); App. 358a (Mr. Giles told Ron Harper “we did not want messages that carried with them a negative tone.”). Ron Harper was also told that the principal had the discretion to determine whether a message was positive or negative. App. 154a. Other students expressing a “positive” viewpoint by wearing

“straight pride” T-shirts have also been censored by the School. App. 179a, 184a.

### **8. Chase’s speech caused no disruption**

The following day, Ron Harper went to school to discuss his son’s suspension. At that time, he was told that Chase had conducted himself honorably and had shown respect to school administrators at all times. App. 154a. He was also informed there had been no disruptions, altercations, or other incidents among students at the school giving rise to Chase’s suspension. *Id.* At no point during or after Chase’s suspension did any school or government official make reference to any complaint by another student regarding Chase’s T-shirt or to any disruption caused by his T-shirt. App. 150a-154a. Mr. Giles only speculated that Chase’s T-shirt might “incite a reaction from opposing positions.” App. 174a-176a. In fact, when Ms. Antrim reported the situation to Principal Fisher, her only concern was that the T-shirt was “inflammatory in nature” with no mention of any disruption. App. 340a. Chase never witnessed any hostile or unsettling confrontations or any disruptions to the operations of the school on either day that he wore his expressive T-shirts. App. 174a-176a. This fact was also confirmed by another student, Joel Rhine. App. 181a.

### **B. Course of Proceedings**

Chase filed a Verified Complaint and Demand for Jury Trial on June 2, 2004 alleging six causes of action. The first five arise under the United States Constitution: free speech, free exercise, equal protection, due process, and the Establishment Clause. The sixth cause of action arises under California Civil Code § 52.1. The Complaint seeks a preliminary and permanent injunction prohibiting Defendants from further violating students’ constitutional rights and a declaratory judgment declaring various school

board policies unconstitutional. Chase also seeks damages and attorneys' fees.

Defendants filed a Motion to Dismiss on June 22, 2004. Chase filed a Motion for Preliminary Injunction on July 12. Both motions were heard together on August 26 before the Honorable John A. Houston of the Southern District of California. The district court on November 4, 2004, denied Chase's Motion for Preliminary Injunction and denied Defendants' Motion to Dismiss Plaintiff's freedom of speech, free exercise, and Establishment Clause causes of action. App. 82a-131a. The court granted the Motion to Dismiss without prejudice as to the equal protection cause of action and with prejudice as to the due process cause of action, but denied the motion as to the remaining causes of action. *Id.* Chase filed a Notice of Appeal from the denial of the preliminary injunction on November 19, 2004.

On November 17, 2004, prior to Defendants filing an answer, Chase filed a First Amended Verified Complaint attempting to add his sister, Kelsie J. Harper, as an additional Plaintiff. Ms. Harper is currently a junior at Poway High School who desires to engage in the same, or substantially the same, expression as Chase. The First Amended Verified Complaint re-alleged each cause of action in total, out of an abundance of caution, so as not to waive any issues on appeal. It also amended the equal protection cause of action. Defendants filed a Motion to Dismiss as to the First Amended Verified Complaint on December 10, 2004. On February 22, 2005, the district court granted the Defendants' Motion to Dismiss all of Kelsie's claims in the First Amended Verified Complaint, as well as Chase's due process and damages claims. All other claims, including Chase's equal protection claim, were permitted to proceed. Plaintiffs Tyler Chase Harper and Kelsie Harper moved the district court for permission to file a Second Amended Verified Complaint through their parents on August 10, 2005, alleging all previous claims as

well as two additional state law claims. App. 143a-172a. The district court granted the motion on November 4, 2005. The Second Amended Verified Complaint is currently before the District Court; cross-motions for summary judgment are pending.

After filing his notice of appeal, Chase filed a Motion for Injunction Pending Appeal on December 20, 2004 pursuant to FRCP § 62(c). That motion was summarily denied on March 30, 2005. Judge Reinhardt authored the Ninth Circuit's split opinion affirming the denial of preliminary injunction on April 20, 2006, and amended the opinion on May 31, 2006. Judge Thomas joined Judge Reinhardt's opinion. Judge Kozinski strongly dissented.

Petitioner filed a petition for rehearing *en banc* on April 28, 2006 and a request for vacatur due to mootness on July 26, 2006. The United States Court of Appeals denied the petition for rehearing *en banc* on July 31, 2006. Judge O'Scannlain dissented from the denial of rehearing and his opinion was joined by four other judges: Kleinfeld, Tallman, Bybee, and Bea. Petitioner's request for vacatur was denied on July 31, 2006.

### **REASONS FOR GRANTING THE WRIT**

The Ninth Circuit held, over a vigorous dissent, that school officials are permitted to censor the "negative" side of a political debate if the views expressed may be considered "demeaning" or "derogatory." The court held that this viewpoint censorship is justified because the speech infringes upon the rights of other students, citing *Tinker v. Des Moines Indep. Sch. Dist.*, 393 U.S. 503 (1969). This novel First Amendment theory means that students may express their view that homosexual behavior should be approved, even encouraged, but students holding the contrary view can—and arguably must be—censored. Under the Ninth Circuit's rule, school officials would have been justified in censoring Mary Beth Tinker's

armband if other students could have felt demeaned by her negative view of the Vietnam War. The ruling conflicts with the decision of other circuits and this court in two distinct ways.

First, the Ninth Circuit's application of *Tinker* directly conflicts with the Third Circuit's determination that the "infringe upon the rights of other students" language does not authorize the wholesale prohibition of speech perceived as negative, demeaning, or derogatory. *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200 (3d Cir. 2001). The Ninth Circuit's holding is also at odds with decisions of this Court discussing infringing upon the rights of others in the school context. *See, e.g., West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943).

The second conflict arises from the Ninth Circuit's authorization of viewpoint discrimination. Under its decision, "school administrators are now free to give one side of debatable public questions a free pass while muzzling voices raised in opposition." App. 140a. (O'Scannlain, joined by Kleinfeld, Tallman, Bybee, and Bea, dissenting from denial of rehearing *en banc*). This sanctioning of viewpoint censorship in public schools conflicts with relevant decisions of the Sixth, Second, and Third Circuits. *See Castorina ex rel. Rewt v. Madison County Sch. Bd.*, 246 F.3d 536 (6th Cir. 2001); *Guiles v. Marineau*, 461 F.3d 320 (2d Cir. 2006); *Saxe*. It also directly conflicts with this Court's cases prohibiting viewpoint discrimination. *See, e.g., Tinker; R.A.V. v. St. Paul*, 505 U.S. 377 (1992); *Lamb's Chapel v. Center Moriches School Dist.*, 508 U.S. 384 (1993); *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995).

The desire of school officials to protect the sensibilities of students does not justify excluding perceived "negative" and "offensive" views from First Amendment protection. Such censorship effectively undercuts the very purpose of the First Amendment—to protect and promote debate. The Ninth Circuit has authorized schools to "prescribe what

shall be orthodox in politics, nationalism, religion, or other matters of opinion,” *Barnette*, 319 U.S. at 642, by mandating censorship of only the “negative” side of the political debate on homosexual behavior (and in theory, any other controversial issue). This Court’s review is necessary.

If Kelsie’s motion to intervene is denied, this Court should grant certiorari for purposes of vacating the Ninth Circuit’s and District Court’s opinions. Chase’s graduation this past June involuntarily renders his request for a preliminary injunction moot. The lower court decisions denying the motion for preliminary injunction must therefore be vacated under *United States v. Munsingwear, Inc.*, 340 U.S. 36 (1950) because the Petitioner was not given the opportunity to take advantage of the entire appellate process.

**I. THE NINTH CIRCUIT’S HOLDING CONFLICTS WITH THE THIRD CIRCUIT’S DETERMINATION THAT NEGATIVE, DEMEANING, AND DEROGATORY SPEECH DOES NOT INFRINGE UPON THE RIGHTS OF OTHER STUDENTS, AS WELL AS THIS COURT’S CASES PROTECTING OFFENSIVE SPEECH.**

*Tinker* held that a high school student’s expression of opposition to the Vietnam War by wearing a black armband could not be censored by officials because it did not “materially disrupt[] classwork or involve[] substantial disorder or invasion of the rights of others. . . .” 393 U.S. at 513. The Ninth Circuit latched onto the “invasion of the rights of others” language as authority for school officials to censor any student speech that may be perceived by other students as demeaning or derogatory. App. 24a-25a.

This holding directly conflicts with the Third Circuit’s determination in *Saxe* that a high school speech policy

which prohibited negative, demeaning, and derogatory speech was unconstitutional. It also conflicts with a fair reading of *Tinker* and this Court's line of cases holding that offensive speech is exactly what the First Amendment is designed to protect. *See, e.g., 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 offensive or disagreeable."); *United States v. Eichman*, 496 U.S. 310, 319 (1990) (same).

### A. Conflict with the Third Circuit

*Saxe* struck down a public school district's anti-harassment policy that banned harassment such as "derogatory remarks, jokes, demeaning comments or behaviors," and "negative name calling and degrading behavior. . . ." 240 F.3d at 202-03. Like the Harpers, the plaintiffs sued because "[t]hey believe, and their religion teaches, that homosexuality is a sin [and] . . . they have a right to speak out about the sinful nature and harmful effects of homosexuality." *Id.* at 203.

In analyzing the "rights of others" prong of *Tinker*, the Third Circuit observed:

The precise scope of *Tinker's* "interference with the rights of others" language is unclear; at least one court has opined that it covers only independently tortious speech like libel, slander or intentional infliction of emotional distress. *See Slotterback v. Interboro Sch. Dist.*, 766 F. Supp. 280, 289 n. 8 (E.D.Pa. 1991); *see also Kuhlmeier v. Hazelwood Sch. Dist.*, 795 F.2d 1368, 1375 (8th Cir. 1986), *rev'd on other grounds*, 484 U.S. 260, 108 S.Ct. 562, 98 L.Ed.2d 592 (1988).

*Id.* at 217. In determining what speech might infringe upon the rights of others, the court held that "it is certainly not enough that the speech is merely offensive to some listener." *Id.*

In an effort to avoid the obvious conflict with *Saxe*, the Ninth Circuit claimed that it did not authorize the censorship of merely offensive speech, and limited its holding to “derogatory” and “demeaning” speech. App. 20a, n.21, App. 25a-27a. But even assuming that there is a meaningful, non-vague distinction between these terms (a very dubious proposition), the unconstitutional policy in *Saxe* also censored “derogatory” and “demeaning” speech, in addition to offensive speech. 240 F.3d at 202-03.

Because the Policy’s “hostile environment” prong does not, on its face, require any threshold showing of severity or pervasiveness, it could conceivably be applied to cover any speech about some enumerated personal characteristics the content of which ***offends someone. This could include*** much “core” political and religious speech: the Policy’s “Definitions” section lists as examples of covered harassment “***negative***” or “***derogatory***” ***speech*** about such contentious issues as “racial customs,” “religious tradition,” “language,” “sexual orientation,” and “values.” Such speech, ***when it does not pose a realistic threat of substantial disruption***, is within a student’s First Amendment rights.

*Id.* at 217 (emphasis added). *See also id.* at 202-03 (unconstitutional policy in *Saxe* prohibited “derogatory” and “demeaning” speech).<sup>1</sup>

The Ninth Circuit conceded that its opinion conflicts with *Saxe*’s observation that “offensive” speech does not violate the “rights of others” prong of *Tinker* “when it does not pose a realistic threat of substantial disruption.” App. 20a, n.21 (referring to *Saxe*, 240 F.3d at 217). The Ninth

---

<sup>1</sup> Other federal courts have stricken prohibitions on “demeaning” speech. *See Dambrot v. Cent. Michigan Univ.*, 839 F. Supp. 477 (E.D. Mich. 1993); *UWM Post, Inc. v. Bd. of Regents of the Univ. of Wisconsin Sys.*, 774 F. Supp. 1163 (E.D. Wis. 1991).

Circuit disagreed because “[t]he two prongs of *Tinker* are stated in the alternative.” *Id.* But *Tinker* itself supports the Third Circuit’s reading in the following passage:

[T]he record fails to yield evidence that the school authorities had reason to anticipate that the wearing of the armbands would substantially interfere with the work of the school or impinge upon the rights of other students. Even an official memorandum prepared after the suspension that listed the reasons for the ban on wearing the armbands made no reference to the anticipation ***of such disruption.***

393 U.S. at 509 (emphasis added).

The Third Circuit’s reading of *Tinker* makes the most sense because it avoids the prospect of students who are offended or feel demeaned censoring the speech of other students—a “Heckler’s Veto.” In any event, this circuit split over the proper reading of *Tinker* warrants this Court’s review.<sup>2</sup>

### **B. The Ruling Conflicts with this Court’s Precedent Regarding “Rights of Others.”**

The Ninth Circuit’s broad reading of “rights of others” conflicts with this Court’s cases holding there is no right to be protected from offensive speech. The court’s attempt to

---

<sup>2</sup> The confusion the Ninth Circuit’s opinion has created is confirmed by numerous legal commentators. *See, e.g.*, Eugene Volokh, *Sorry, Your Viewpoint is Excluded from First Amendment Protection*, April 20, 2006, <http://volokh.com/posts/1145577196.shtml>; *When Students Speak*, WASH. POST, Aug. 7, 2006 at A14 (pointing out the need for this Court to review this case); Michael Oberst, *9th Circuit Was Wrong to Let School Censor Student’s T-Shirt*, LOS ANGELES DAILY JOURNAL, Aug. 23, 2006, at 8; Dale Carpenter, *Right Result Under a Bad Precedent*, April 21, 2006, [http://volokh.com/archives\\_2006\\_04\\_16-2006\\_04\\_22.shtml](http://volokh.com/archives_2006_04_16-2006_04_22.shtml); David L. Hudson Jr., *Tinkering with Tinker Standards?*, Aug. 9, 2006, <http://www.fac.org/analysis.aspx?id=17253>.

limit its authorization of censorship to demeaning and derogatory speech about minorities or core characteristics only complicates matters.

**1. There is no right not to be offended.**

This Court has *never* carved out from First Amendment protection speech that offends others. Such offence, contrary to the Ninth Circuit, is not a cognizable invasion of third party rights that could justify censorship of viewpoints. In *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), this Court held that a student’s right not to salute the flag and recite the pledge of allegiance is protected by the Free Speech and Free Exercise Clauses of the First Amendment, observing:

The freedom asserted by these appellees **does not bring them into collision with rights asserted by another individual**. . . . [T]he refusal of these persons to participate in the ceremony **does not** interfere with or **deny rights of others** to do so.

319 U.S. at 630 (emphasis added). “Rights of others” refers to other students’ First Amendment rights to salute the flag and recite the pledge. It certainly does not refer to the rights of other students not to be offended by any perceived lack of patriotism on the part of the non-participating students.

Reading *Tinker* in light of *Barnette* can only lead to the conclusion that “infringing on the rights of others” does not mean simply offending them with negative, derogatory, or demeaning speech. Otherwise, schools could—as happened here—censor one side of a political or religious debate merely because another student may take offense.

*Tinker*’s citation to *Blackwell v. Issaquena County Bd. of Educ.*, 363 F.2d 749 (5th Cir. 1966), as an example of when other’s rights are infringed shows that something

more than offensive or derogatory speech is needed to infringe on the rights of others. 393 U.S. at 513. In *Blackwell*, the Fifth Circuit rejected the free speech claims of students distributing buttons protesting racism at school. The students actually “accosted other students by pinning the buttons on [other students] even though they did not ask for one.” 363 F.2d at 751. Obviously, students have a right not to be physically accosted and forced to speak in a way that violates their beliefs. *See Barnette*.

But they do not have a “right” to be protected from speech that may offend them because it is negative, derogatory, or demeaning.

Any 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. But our constitution says we must take this risk, *Terminiello v. Chicago*, 337 U.S. 1 (1949); and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.

*Tinker*, 393 U.S. at 508-09.

No doubt many students with relatives fighting in Vietnam felt demeaned and offended by Mary Beth Tinker’s speech condemning the war. But this is exactly the type of speech that needs protecting—especially in the high school context.

The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools. The classroom is peculiarly the marketplace of ideas. The Nation’s future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, rather than through any kind of authoritative selection.

*Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967) (internal citations, quotations and editing marks omitted).

Without this protection, those feeling offended or demeaned by another’s speech can have it censored—the classic Heckler’s Veto. This Court has routinely rejected this type of censorship. “Speech cannot be . . . punished or banned, simply because it ***might offend*** a hostile mob.” *Forsyth County, Ga. v. The Nationalist Movement*, 505 U.S. 123, 135-36 (1992) (emphasis added) (addressing restriction based on adverse listener reaction to, *inter alia*, a demonstration in opposition to Martin Luther King Day). See also *R.A.V.*, 505 U.S. at 389 (“a State may not prohibit only that commercial advertising that depicts men in a ***demeaning*** fashion.” (emphasis added)).

The Ninth Circuit majority’s “unprecedented-and unsupportable-expansion of the right to be let alone as including a right not to be offended has no basis in *Tinker* or its progeny. . . .” App. 139a (O’Scannlain, dissenting from denial of rehearing *en banc*).

## **2. The Ninth Circuit’s limitations on its new rule do not save it.**

The Ninth Circuit claimed its holding permits speech that is offensive, and is merely authorizing censorship of “derogatory and injurious remarks directed at students’ minority status,” or “core characteristics.” App. 25a-27a.<sup>3</sup> But how should “core characteristics” or “minority” be defined? The Ninth Circuit offered no definition—despite being castigated by the dissent for failing to do so—but merely mentioned “race, religion, and sexual orientation” as non-exclusive examples of “minority” features. App. 27a. This only complicates matters.

---

<sup>3</sup> The court also asserted that its holding does not apply to political speech, App. 26a, but in another part of the opinion concedes that Chase’s speech is core political speech. *Id.* at App. 14a.

In defining what is a minority—and hence protected—do we look to the national community, the state, the locality or the school? In a school that has 60 percent black students and 40 percent white students, will the school be able to ban t-shirts with anti-black racist messages but not those with anti-white racist messages, or vice versa?

App. 63a (Kozinski, dissenting). Worse, the status of the “minority” limitation is in question because the Ninth Circuit conceded in a footnote that censorship of derogatory and demeaning speech about core characteristics of “majority” students may also be permitted. App. 27a, n.28.

Further complications arise from the court’s use of the phrase “core identifying characteristics,” sometimes interchangeably with “minority status.” For instance, the test is first stated as: “Public school students who may be injured by verbal assaults on the basis of a core identifying characteristic such as race, religion, or sexual orientation, have a right to be free from such attacks while on school campuses.” App. 17a. No attempt is made to define “core identifying characteristics.” “Race, religion, or sexual orientation” are only listed as examples.

Read broadly, this would protect students from being disparaged based on any characteristic that two of my colleagues consider to be “core.” Presumably this could include race, nationality, sex, weight class, hair color and religion—but not political affiliation.

App. 62a-63a n.11 (Kozinski, dissenting) (citing the confusing way the majority articulates its new test). Even if the Ninth Circuit could adequately define these terms, they have not explained why students who happen to find

themselves in the majority have diminished free speech protection.<sup>4</sup>

Furthermore, there is no meaningful difference between “derogatory” and “offensive” for First Amendment purposes. Derogatory remarks can be offensive and offensive remarks can be derogatory. The Third Circuit essentially treated them as synonyms in *Saxe*. 240 F.3d at 217 (saying that “offensive” speech includes “‘derogatory’ speech about such contentious issues as ‘racial customs,’ ‘religious tradition,’ ‘language,’ ‘sexual orientation,’ and ‘values.’”) Derogatory speech is offensive speech and is protected by the First Amendment—even in public high schools.

The Ninth Circuit has given school officials unbridled discretion to restrict thought-provoking speech that is arbitrarily deemed derogatory or demeaning, which is speech the First Amendment was designed to protect. Its misapplication of *Tinker* not only conflicts with the decisions of the Third Circuit, but with those of this Court—warranting certiorari.

## **II. THE NINTH CIRCUIT’S AUTHORIZATION OF VIEWPOINT CENSORSHIP BY SCHOOLS CONFLICTS WITH DECISIONS OF OTHER CIRCUITS AND THIS COURT.**

The Ninth Circuit majority held that public schools can censor a student’s viewpoint merely because administrators or other students may think it is demeaning or derogatory. This decision conflicts with rulings in the Sixth, Second,

---

<sup>4</sup> Minorities have no more right to suppress the views of the majority than the majority has a right to suppress minority views. See *Coates v. Cincinnati*, 402 U.S. 611, 616 (1971) (speech of individuals cannot be punished “because their ideas, their lifestyle, or their physical appearance is resented by the majority of their fellow citizens”).

and Third Circuits regarding content and viewpoint discrimination in public schools. See *Castorina ex rel. Rewt v. Madison County Sch. Bd.*, 246 F.3d 536 (6th Cir. 2001); *Guiles v. Marineau*, 461 F.3d 320 (2d Cir. 2006); *Saxe v. State College Area Sch. Dist.*, 240 F.3d 200 (3d Cir. 2001).

The decision below also conflicts with this Court’s holding that student speech cannot be censored merely “to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.” *Tinker*, 393 U.S. at 509.

**A. There is a Conflict in the Circuits Regarding the Permissibility of Discrimination Against Student Viewpoints in Public Schools.**

The Ninth Circuit held that “a school may prohibit student speech, even if the consequence is viewpoint discrimination, if the speech violates the rights of other students or is materially disruptive.” App. 30a. The Court therefore authorized the School to censor Chase Harper’s non-disruptive criticism of homosexual behavior and the “Day of Silence,” but permitted the speech of other students who spoke in *favor* of these. The Ninth Circuit upheld this viewpoint discrimination despite the fact that the observance of the “Day of Silence” involves the disruptive behavior of students refusing to speak in class—even if called upon by a teacher—and caused enough disruption in past years to warrant intervention by school officials, including a meeting with the student club sponsoring the event. App. 343a, 347a. There is absolutely no evidence in the record that the disruption on past “Days of Silence” was caused by those—like Chase—opposed to the Day of Silence.

The Fifth Circuit has also opined that viewpoint censorship may be permissible if it causes material disruption or would infringe upon the rights of other

students. See *Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608, 615 (5th Cir. 2004). But it has never actually applied that rule to any set of facts. Taking the Fifth Circuit's rule at face value, there is a clear split between the Ninth and Fifth Circuits on one side, and the Sixth, Second, and Third Circuits on the other, over whether viewpoint discrimination is permissible in public schools.

### 1. Conflict with the Sixth Circuit

In *Castorina*, the Sixth Circuit considered whether confederate flag T-shirts worn by two high school students could be censored if the school allowed students to wear Malcolm X T-shirts. 246 F.3d at 539-41. The court held that “even if there has been racial violence that necessitates a ban on racially divisive symbols, the school does not have the authority to enforce a viewpoint-specific ban on racially sensitive symbols. . . .” 246 F.3d at 544.

The court noted that school officials in *Tinker* also engaged in viewpoint discrimination, and subsequent decisions by this Court have emphasized this type of content-based censorship is presumed unconstitutional.

Central to the decision was the fact that the school district did not ban other clothing that expressed controversial views, including Iron Crosses, which were often understood as symbols of Hitler and the Nazis. *Tinker*, 393 U.S. at 506-511. . . . This aspect of the decision is consistent with a number of later Supreme Court decisions signaling that viewpoint-specific speech restrictions are an egregious violation of the First Amendment. See, e.g., *Rosenberger* [] (“Discrimination against speech because of its message is presumed to be unconstitutional”), *R.A.V. v. St. Paul*, [] (striking down a Minnesota hate-speech statute on the basis of impermissible viewpoint discrimination).

*Id.* at 540. Given that Chase Harper’s “negative” speech was the only side of the debate on homosexual behavior that was censored, in the Sixth Circuit this would be considered an impermissible “targeted ban.” *Id.* at 541. Here the viewpoint discrimination was even more egregious since there was no evidence that Chase’s speech was remotely disruptive, App. 154a, 175a, while the refusal to speak by those observing the Day of Silence—which the School allowed—obviously interfered with the ability of teachers to conduct class and caused actual disruption in the past. App. 343a, 347a.

## 2. Conflict with the Second Circuit

The Second Circuit recently struck down a school’s ban on a 13-year-old middle school student’s T-shirt depicting President Bush as a drug-abusing drunk in *Guiles v. Marineau*. The shirt contained images of alcohol and drug use in contravention of a school policy banning such depictions. 461 F.3d at 321. In response to complaints, school officials required the student to place duct tape over the offending images. *Id.* The court found that the shirt caused no disruption, though it did “raise the ire of one fellow student whose politics evidently were opposed to Guiles’s.” *Id.*

Finding that the school’s censorship violated the student’s free speech rights, the court reviewed this Court’s cases on student speech and concluded (without mentioning the *Harper* decision): “*Tinker* established a protective standard for student speech under which it **cannot be suppressed based on its content**, but only because it is substantially disruptive.” *Id.* at 326 (emphasis added).

This is strikingly different from the Ninth Circuit’s ruling in the case at hand, that *Tinker* permits censorship of “negative” student speech that is “demeaning” or “derogatory”—even if there is no material disruption. The

Second Circuit effectively disagreed with this holding by observing that allowing the ban of speech because it might be offensive or cause resentment cannot be reconciled with *Tinker*. Otherwise, “the rule of *Tinker* would have no real effect because it could have been said that the school administrators in *Tinker* found wearing anti-war armbands offensive and repugnant to their sense of patriotism and decency.” *Guiles* at 328.

### 3. Conflict with the Third Circuit

The Third Circuit held in *Saxe v. State College Area School Dist.* that speech deemed to be harassing is still protected by the First Amendment, 240 F.3d at 204-10: “there is also no question that the free speech clause protects a wide variety of speech that listeners may consider deeply offensive, including statements that impugn another’s race or national origin or that denigrate religious beliefs.” *Id.* at 206. The court determined that a “disparaging comment” is censored by anti-harassment policies “precisely because of its sensitive subject matter and because of the odious viewpoint it expresses. This sort of content- or viewpoint-based restriction is ordinarily subject to the most exacting First Amendment scrutiny.” *Id.* at 206-07.

The Third Circuit later held in *Sypniewski v. Warren Hills Reg’l Bd. of Educ.*, 307 F.3d 243, 268 n.27 (3d Cir. 2002), that “[t]he history of racial difficulties in Warren Hills provides a substantial basis for legitimately fearing disruption from the kind of speech prohibited by the policy.” 307 F.3d at 262. Nevertheless, citing *R.A.V.*, the court determined that the policy could be unconstitutional if a “subcategory of disruptive speech had been singled out simply because the school officials disfavored the views expressed.” *Id.* at 268 n.27.

This is precisely what the Defendants did and the Ninth Circuit approved in this case. Chase’s “negative” speech was

no more disruptive than that of other students whose “positive” views on homosexual behavior had in fact caused disruption in the past. Censoring only Chase’s views conflicts with the Third Circuit’s rulings in *Saxe* and *Sypniewski*.

**B. The Ninth Circuit’s Authorization of Viewpoint Discrimination by School Officials Conflicts with the Decisions of this Court.**

The Ninth Circuit’s opinion conflicts with this Court’s decisions regarding student speech and viewpoint discrimination. “[T]o justify prohibition of a particular opinion, . . . [the state] must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.” *Tinker*, 393 U.S. at 509.

When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant. Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.

*Rosenberger*, 515 U.S. at 829 (citations omitted). *See also Lamb’s Chapel v. Center Moriches School Dist.*, 508 U.S. at 394 (“The principle that has emerged from our cases ‘is that the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others.’” (quoting *City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984))).

The Ninth Circuit defends its approval of viewpoint and content-based censorship by limiting it to speech that may “injure students with respect to their core characteristics.” App. 33a. But as *R.A.V.* shows, this is no response.

*R.A.V.* struck down St. Paul's ordinance that prohibited "'fighting words' that insult, or provoke violence, 'on the basis of race, color, creed, religion or gender.'" 505 U.S. at 391. The unconstitutional ordinance was strikingly similar to the Ninth Circuit's new rule which permits censorship of "derogatory and injurious remarks directed at students' minority status such as race, religion, and sexual orientation." App. 27a. The St. Paul ordinance was unconstitutional because it discriminated against viewpoint. "[F]ighting words' that do not themselves invoke race, color, creed, religion, or gender—aspersions upon a person's mother, for example—would seemingly be usable ad libitum in the placards of those arguing in favor of racial, color, etc., tolerance and equality, but could not be used by those speakers' opponents." *R.A.V.*, 505 U.S. at 391.

Under the Ninth Circuit's rule, derogatory and injurious remarks that are not directed at race, religion, or sexual orientation can be used by students arguing in favor of, for instance, tolerance and equality for those engaged in homosexual behavior, but not by those students like the Harpers who oppose such behavior.

Thus, a school could *not* ban a T-shirt saying all homophobic bigots are misbegotten,<sup>5</sup> but *could* ban one saying those who tolerate or engage in homosexual behavior are. *Id.* at 392. Indeed, the School permitted those students participating in the Day of Silence to use words like "fags," "queer," "that's so gay," and "loser," App. 180a, but prohibited Chase from using the much milder word, "shameful." The Ninth Circuit "has no such authority to license one side of a debate to fight freestyle,

---

<sup>5</sup> Assuming for the moment that being "homophobic" or misbegotten are not "core characteristics" of a "minority," as these terms have yet to be defined by the Ninth Circuit.

while requiring the other to follow Marquis of Queensberry rules.” *Id.*

**III. THE NINTH CIRCUIT’S OPINION MUST BE VACATED FOR MOOTNESS IF KELSIE HARPER IS NOT PERMITTED TO INTERVENE FOR PURPOSES OF THIS PETITION.**

Chase’s sister, Kelsie Harper, has conditionally joined this petition by filing a motion to intervene concurrently with Chase’s filing of this petition. If her motion is not granted, the request for a preliminary injunction will be moot because Chase graduated this past June. App. 311a-313a. In that event, the Ninth Circuit and district court opinions regarding Chase’s motion for preliminary injunction should therefore be vacated. *See Anderson v. Green*, 413 U.S. 557, 560 (1995) (per curiam) (ordering such disposition of a moot case).

Under 28 U.S.C. § 2106, this Court has the authority to vacate any judgment brought before it for review, and may remand the case and direct the entry of any judgment “as may be just under the circumstances.” When a civil case from a federal court has become moot while on its way to, or pending before, this Court, the “established practice” is to reverse or vacate the judgment and remand with a direction to dismiss. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 71 (1997) (quoting *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950)). This course of action “has been followed in countless cases in this Court.” *Great Western Sugar Co. v. Nelson*, 442 U.S. 92, 92 (1979).

Vacatur “clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance.” *Munsingwear*, 340 U.S. at 40. Vacatur is particularly appropriate here.

**A. Vacatur is Necessary When the Appellant Does Not Intentionally Moot the Case.**

Determining whether vacatur is appropriate is an equitable question, and the primary factor is the fault of the parties in causing the appeal to become moot. *U.S. Bancorp v. Bonner*, 513 U.S. 18, 25-26 (1994). If the party seeking relief does not intentionally cause the mootness, vacatur is appropriate. *Id.* at 25.

Chase's graduation from high school was the normal culmination of his education; it was not a deliberate effort to escape the consequences of the decision below. This Court has, on multiple occasions, vacated lower court decisions when a student's graduation rendered the appeal nonjusticiable. *E.g.*, *DeFunis v. Odegaard*, 416 U.S. 312, 320 (1974); *Bd. of Sch. Comm'rs of Indianapolis*, 420 U.S. 128, 129-30 (1975). The courts of appeals have consistently done the same. *E.g.*, *Donovan ex rel. Donovan v. Punxsutawney Area Sch. Bd.*, 336 F.3d 211, 218 (3d Cir. 2003); *Mellen v. Bunting*, 327 F.3d 355, 365 (4th Cir. 2003); *Murphy v. Fort Worth Indep. Sch. Dist.*, 334 F.3d 470, 471 (5th Cir. 2003); *Doe v. Madison Sch. Dist. No. 321*, 177 F.3d 789, 799 (9th Cir. 1999); *Cook v. Colgate Univ.*, 992 F.3d 17, 19-20 (2d Cir. 1993).

**B. Vacatur is Necessary to Prevent an Unreviewable Decision From Acting as Law of the Case in Future Proceedings.**

Although Chase's motion for preliminary injunction is now moot, Chase also seeks damages, and the remainder of the case is moving forward in the district court. This tilts the equities even further in favor of vacatur. Not only has his graduation stripped Chase of the ability to seek review of the Ninth Circuit's decision, but that decision will also be law of the case for his motion for summary judgment and any subsequent appeals. *See* 18B CHARLES A. WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND

PROCEDURE § 4478.5 (2d ed. 2006) (“A fully considered appellate ruling on an issue of law made on a preliminary injunction appeal . . . [is] law of the case for further proceedings in the trial court on remand and in any subsequent appeal”). Thus, the risk of harm from an unreviewable decision is compounded.

Vacatur is the only way to ensure that the rights of all parties are preserved and that no one will be prejudiced by a decision that could not be reviewed. “The purpose of vacating a judgment when it becomes moot while awaiting review is to return the legal relationships of the parties to their status prior to initiation of the suit.” *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 595 (1984) (Blackmun, J., dissenting). Moreover, the issues in this case will still be litigated and ruled upon—this time with a complete record—on the parties’ cross-motions for summary judgment. The equities strongly favor vacating the lower courts’ decisions.

This Court has already in other cases vacated the judgment of the Court of Appeals on a motion for preliminary injunction because the motion—but not the underlying case—had become moot. *See Univ. of Texas v. Camenisch*, 451 U.S. 390, 394 (1981); *Honig v. Students of California Sch. for the Blind*, 471 U.S. 148, 149-50 (1985). This Court should do the same here (if Kelsie’s motion to intervene is not granted).

## CONCLUSION

The Ninth Circuit has endorsed suffocating political correctness in our Nation’s public schools. The School has taken sides in one of the greatest political, philosophical, and religious debates of our time. This Court should grant certiorari.

Alternatively, this Court should vacate the judgment of the United States Court of Appeals for the Ninth Circuit based on mootness, and remand the case to that court with

directions to (1) vacate the judgment of the district court with respect to Mr. Harper's motion for preliminary injunction, and (2) order the dismissal of Mr. Harper's motion for preliminary injunction as moot.

Respectfully submitted,            October 26, 2006

BENJAMIN W. BULL  
*Counsel of Record*

GARY MCCALED  
JORDAN LORENCE  
ALLIANCE DEFENSE FUND  
15333 N. Pima Rd., Ste. 165  
Scottsdale, AZ 85260  
(480) 444-0020

KEVIN THERIOT  
ALLIANCE DEFENSE FUND  
15192 Rosewood  
Leawood, KS 66224  
(913) 685-8000

ROBERT TYLER  
ADVOCATES FOR FAITH  
& FREEDOM  
2490 Las Brisas Rd.  
Murrieta, CA 92565  
(951) 304-7583

*Attorneys for Petitioners*