No. 08-1050

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

ALEXANDER NUXOLL, a minor child, by and through his parents and next friends, Michael and Penny Nuxoll,
Plaintiff-Appellant,

v.

INDIAN PRAIRIE SCHOOL DISTRICT NO. 204
BOARD OF EDUCATION, *et al.*,
Defendants-Appellees.

On Appeal From The United States District Court
For The Northern District Of Illinois, Eastern Division
Judge William T. Hart

BRIEF *AMICUS CURIAE* OF THE NATIONAL LEGAL FOUNDATION,

in support of Plaintiff-Appellant
Urging reversal

Steven W. Fitschen
Counsel of Record for *Amicus Curiae*
Barry C. Hodge
Nathan A. Driscoll
The National Legal Foundation
2224 Virginia Beach Blvd., St. 204
Virginia Beach, VA 23454
(757) 463-6133

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 08-1050

Short Caption: *Nuxoll v. Indian Prairie School District No. 204 Board of Education*

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. **Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.**

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3): The National Legal Foundation

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court: The National Legal Foundation

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and: None

ii) List any publicly held company that owns 10% or more of the party's or amicus' stock: None

Attorney's Signature: ________________________ Date: 2/21/08
Attorney's Printed Name: Steven W. Fitschen

Please indicate if you are *Counsel of Record* for the above listed parties pursuant to Circuit Rule 3(d). **Yes_X_ No ___**

Address: The National Legal Foundation
2224 Virginia Beach Blvd., St. 204
Virginia Beach, VA 23454
Phone Number: (757) 463-6133
Fax Number: (757) 463-6055
Email Address: nlf@nlf.net

TABLE OF CONTENTS

DISCLOSURE STATEMENT i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF THE ARGUMENT 1

ARGUMENT 2

I. THE DISTRICT COURT ERRED BECAUSE A HECKLER'S VETO CANNOT BE EMPLOYED TO FORECLOSE FREEDOM OF SPEECH 2

A. The Substantial Disruption Rationale Would be a Disguise for the Heckler's Veto Because there Simply was no Disruption Attributable to Nuxoll's Speech. 4

B. The District Court Erred by Relying on a "Psychological Attack" Prong that Does Not Exist. 10

C. The District Court's "Rights of Others" Rationale is a Disguised Heckler's Veto Because the Court Ignored the Established Meaning of those Rights. 14

1. The District Court's "Right to be Let Alone" Rationale is a Disguised Heckler's Veto Because that Right Protects Students from Importuning by Speakers, which did not Occur Here. 15

2. The "Right to be Secure" Rationale is a Disguised Heckler's Veto Because that Right Protects Students' Safety and no Student's Safety would be Threatened here. 16

II. THE DISTRICT COURT ERRED BECAUSE SCHOOL ADMINISTRATORS ARE DILUTING NUXOLL'S MESSAGE BY RESTRICTING HIS CHOSEN MESSAGE. 17

III. THE DISTRICT COURT ERRED BECAUSE SCHOOL OFFICIALS ARE COMPELLING SPEECH BY REFUSING TO ALLOW NUXOLL TO EXPRESS ANY MESSAGE WHICH IS NOT TOLERANT OF HOMOSEXUALITY. 19

IV. THE DISTRICT COURT ERRED BECAUSE IT MISCONSTRUED SEVERAL OF THIS COURT'S PRECEDENTS. 20

CONCLUSION 21

CERTIFICATE OF COMPLIANCE 22

CERTIFICATE OF SERVICE 23

Table of Authorities

Cases: **Page(s)**

Am. Steel Foundries v. Tri-City Cent. Trades Council, 257 U.S. 184 (1921) 15

Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986) 11

Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000) 19

Boyd County High Sch. Gay Straight Alliance v. Bd. of Educ., 258 F. Supp. 2d 667 (E.D. Ky. 2003) 9-10

Brandt v. Bd. of Educ., 480 F.3d 460 (7th Cir. 2007) 2, 20

Brown v. Louisiana, 383 U.S. 131 (1966) 2-3, 5

Butts v. Dallas Indep. Sch. Dist., 436 F.2d 728 (5th Cir. 1971) 6-7

Cox v. Louisiana, 379 U.S. 536 (1965) 4

Garner v. Louisiana, 368 U.S. 157 (1961) 4

Griggs v. Fort Wayne Sch. Bd., 359 F. Supp. 2d 731 (N.D. Ind. 2005) 20-21

Harper v. Poway Unified Sch. Dist., 127 S. Ct. 1484 (2007) 13-14

Harper v. Poway Unified Sch. Dist., 445 F.3d 1166 (9th Cir. 2006) 10-11, 17

Harper v. Poway Unified Sch. Dist., No. 04-01103 (S.D. Cal. Feb. 112, 2008) *available at* https://ecf.casd.uscourts.gov/cgi-bin/login.pl 14

Hazelwood Sch. Dist. v. *Kuhlmeier*, 484 U.S. 260 (1988) 11

Hedges v. Wauconda Cmty. Unit Sch. Dist. No. 118, 9 F.3d 1295 (7th Cir. 1993) 9

Heinkel v. Sch. Bd., 194 F. App'x 604 (11th Cir. 2006) 10

Hill v. Colorado, 530 U.S. 703 (2000) 15

Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557 (1995) 17-18

Morse v. Frederick, 127 S. Ct. 2618 (2007) 10-13

Muller v. Jefferson Lighthouse Sch., 98 F.3d 1530 (7th Cir. 1996) 2, 20-21

Shanley v. Northeast Indep. Sch. Dist., 462 F.2d 960 (5th Cir. 1972) 7-8

Sypniewski v. Warren Hills Reg'l Bd. of Educ., 307 F.3d 243 (3rd Cir. 2002) 16-17

Taylor v. Louisiana, 370 U.S. 154 (1962) 4

Terminiello v. Chicago, 337 U.S. 1 (1949) 5, 8-9

Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969) 1, 5, 8, 10

West v. Derby Unified Sch. Dist., 206 F.3d 1358 (10th Cir. 2000) 16

Zamecnik v. Indian Prairie School District No. 204 Bd. of Educ., No. 07-1586,
2007 U.S. Dist. LEXIS 94411 (N.D. Ill. Dec. 21, 2007) 14, 18

Zamecnik v. Indian Prairie Sch. Dist. No. 204 Bd. of Educ., No. 07- 1586,
2007 U.S. Dist. LEXIS 28172 (N.D. Ill. Apr. 17, 2007) 14, 19

STATUTES:

Equal Access Act, 20 U.S.C. § 4071 (2006) 9

OTHER SOURCES:

Brief for Alliance Defense Fund as *Amicus Curiae*, *Morse v. Frederick*,
2007 U.S. Lexis 8514 (2007) 14

INTEREST OF *AMICUS CURIAE*

The National Legal Foundation (NLF) is a public interest law firm dedicated to the defense of First Amendment liberties and to the restoration of the moral and religious foundation upon which America was built. The NLF and its donors and supporters are concerned with the outcome of this case because of the effect it will have on First Amendment liberties and on student speech in schools.

This Brief is filed pursuant to consent by Counsel of Record for the Appellant and a Motion for Leave to File a Brief *Amicus Curiae*.

SUMMARY OF THE ARGUMENT

This Brief makes two arguments not made by the party it supports, Mr. Nuxoll, and expands upon two arguments made by Nuxoll. First, the district court erred when it allowed a heckler's veto to foreclose Nuxoll's freedom of speech. Second, school administrators are diluting Nuxoll's freedom of speech by forbidding him to express his preferred message. Third, school administrators are compelling speech because they are preventing any message that is not tolerant of homosexuality. Finally, the district court erred because it misconstrued this Court's precedent.

As to the first point, under a proper analysis of *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), Nuxoll's free speech would not constitute a substantial disruption and to proscribe it under that prong would disguise a heckler's veto. The heckler's veto doctrine is applicable to schools through *Tinker* and subsequent precedent. Additionally, the district court erred in relaying on the putative "psychological attack" prong that some courts have misconstrued from Supreme Court precedent. Furthermore, a review of

precedent shows that the district court misapplied the “Rights of Others” rationale, allowing a disguised heckler’s veto.

As to the second point, the district court erred in denying the preliminary injunction because Appellees dilute Nuxoll’s message by permitting only promotion of heterosexuality and prohibiting criticism of homosexuality. School administrators’ actions violate Nuxoll’s right to determine his own message by prohibiting speech they find intolerant.

As to the third point, Appellees compelled speech by permitting only messages that are tolerant of homosexuality. By restricting his right to determine his own message, Appellees are compelling Nuxoll to express a preferred message or none at all.

As to the final point, the district court erred in denying the preliminary injunction because it misconstrued several of this Court’s precedents. *Brandt v. Board of Education*, 480 F.3d 460 (7th Cir. 2007), and *Muller v. Jefferson Lighthouse School*, 98 F.3d 1530 (7th Cir. 1996), are simply not applicable to this case. Additionally, by accepting the erroneous reading of *Muller* from another court, the District Court erred in its application of *Tinker*.

ARGUMENT

I. THE DISTRICT COURT ERRED BECAUSE A HECKLER’S VETO CANNOT BE EMPLOYED TO FORECLOSE FREEDOM OF SPEECH.

Indian Prairie School District is squelching student speech and the court below approved this constitutional violation. One look at the United States Supreme Court’s first discussion of the heckler’s veto doctrine illustrates the error committed by the district court here. In *Brown v. Louisiana*, 383 U.S. 131, 133, n.1 (1966), the Supreme Court stated “[p]articipants in an orderly demonstration in a public place are not chargeable with the danger, unprovoked except by the fact of the constitutionally protected demonstration itself, that their critics might react with disorder or violence.”

The Supreme Court knew that a heckler's veto could have crippled the Civil Rights movement in this country. In fact, the *Brown* Court took pains to mention that that case was "the fourth time in little more than four years that [the Supreme Court had] reviewed convictions by the Louisiana courts for alleged violations, in a civil rights context, of that State's breach of the peace statute." *Id.* at 133. If Louisiana was a little slow to get the message, the Supreme Court was more than willing to keep granting *certiorari* until the message came through loud and clear: The First Amendment will not tolerate a heckler's veto.

The Court knew that the heckler's veto was one of the majority's weapons of choice against the rights of a minority. Now, the district court in this case has taken that weapon and blessed its use by a minority against the majority. Such error cannot stand.

The Supreme Court wrote in *Brown*:

> A State or its instrumentality may, of course, regulate the use of its libraries or other public facilities. But it must do so in a reasonable and nondiscriminatory manner, equally applicable to *all* and administered with equality to *all*. It may not do so as to some and not as to all. It may not provide certain facilities for whites and others for Negroes. And it may not invoke regulations as to use—whether they are *ad hoc* or general—as a pretext for pursuing those engaged in lawful, constitutionally protected exercise of their fundamental rights.

Id. at 143 (emphasis added). *Mutatis mutandis*, this sentence might read "A State or its instrumentalities may, of course, regulate the use of its public schools. But it must do so in a reasonable and nondiscriminatory manner, equally applicable to *all* and administered with equality to *all*. It may not do so as to some and not as to all. It may not provide certain rights to those with a pro-homosexual message and other (lesser) rights for those with an anti-homosexual message. And it may not invoke 'tolerance' or a listener's potential psychological bruising as a pretext for pursuing those engaged in lawful, constitutionally protected exercise of their fundamental rights."

The heckler's veto doctrine, discussed below, has application in public schools. There, it must be employed in conjunction with the test from *Tinker*. Traditionally, courts have considered *Tinker* to be concerned with evaluating whether non-vulgar student speech threatened a substantial disruption to the running of schools. *See infra*, Section I. A. However, the court below did not analyze Nuxoll's T-shirt under that test. Rather, the court construed *Tinker* as containing a second prong, the putative "rights of others" prong. Thus, it might seem appropriate to address the fallacies with the district court's approach first.

However, a proper understanding of *Tinker* and how it relates to the heckler's veto doctrine is foundational to any discussion of the issues presented by this case. Furthermore, should this Court, as *Amicus* urges, reject the district court's approach, it will need to conduct a proper *Tinker* analysis. Thus, Section I. A. of the Brief will first address the traditional *Tinker* analysis and demonstrate that under such an analysis, the school's actions are unconstitutional. Second, Section I. B. will demonstrate that the district court's version of the putative "rights of others" prong of *Tinker* cannot be valid under Supreme Court precedent. Third, Section I. C. will demonstrate that even should *some* version of the "rights of others" analysis constitute a separate prong under *Tinker*, the school's actions are unconstitutional under that prong.

A. The Substantial Disruption Rationale Would be a Disguise for the Heckler's Veto Because there Simply was no Disruption Attributable to Nuxoll's Speech.

First, in this case, any attempt to assert the "substantial disruption" rationale as a means of foreclosing Nuxoll's First Amendment rights would be an error surprisingly analogous to the error in *Brown* and the three cases it references—*Cox v. Louisiana*, 379 U.S. 536 (1965); *Taylor v. Louisiana*, 370 U.S. 154 (1962); and *Garner v. Louisiana*, 368 U.S. 157 (1961). As the *Brown* Court wrote about those cases, "[i]n none was there evidence that the participants planned or

intended disorder. In none were there circumstances which might have led to a breach of the peace chargeable to the protesting participants." 383 U.S. at 133. The key is that any violence must be chargeable to the protestor. In this case, there is no possibility of violence chargeable to Nuxoll.

"But wait," one might answer, "he is in school and the standards are different." True, but the Supreme Court has already made that adjustment for the school setting: that is what *Tinker* was all about. After all, *Tinker* was decided just three years after *Brown* and arose in the same cultural milieu of social protest. In *Tinker*, the Supreme Court cited *Terminiello v. Chicago*, 337 U.S. 1 (1949), arguably the *leading* heckler's veto case, and famously addressed the school's ability to anticipate violence:

> The District Court concluded that the action of the school authorities was reasonable because it was based upon their fear of a disturbance from the wearing of the armbands. But, in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. 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, 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.
>
> In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it 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. Certainly where there is no finding and no showing that engaging in the forbidden conduct would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school," the prohibition cannot be sustained.

Tinker, 393 U.S. at 508-09 (citation omitted). This is the extent of the adjustment necessary—and allowed—for the school setting. Anything more would gut—rather than modify— the heckler's veto doctrine in the public schools.

Numerous courts have helpfully commented on the *Tinker* standard. One such case is *Butts v. Dallas Independent School District*, 436 F.2d 728 (5th Cir. 1971). There, school officials forced students to remove black armbands worn in support of the Vietnam Moratorium. The court wrote:

> [W]e do not agree that the precedential value of the *Tinker* decision is nullified whenever a school system is confronted with disruptive activities or the possibility of them. Rather we believe that the Supreme Court has declared a constitutional right which school authorities must nurture and protect, not extinguish, unless they find the circumstances allow them *no practical alternative*.

Id. at 732 (emphasis added).

The *Butts* court emphasized that even an expected disruption is not outcome determinative:

> We assume that the School Board was not necessarily required by the First Amendment to wait until disruption actually occurred. Likewise, we agree that, antecedently considered, as they had a right and duty to consider the problem, disruption on [the day of protest] was proved to be a likely contingency. We do not agree that this expectation sufficed *per se* to justify suspending the exercise of what we are taught by *Tinker* is a constitutional right. What more was required at least was a determination, based on fact, not intuition, that the expected disruption would probably result from the exercise of the constitutional right and that foregoing such exercise would tend to make the expected disruption substantially less probable or less severe.

Id. at 731.

Significantly, those opposed to the black armbands organized a counter protest by wearing white armbands. The school authorities decided to silence one side of the debate and permit the other side to engage in its expressive activities. *Id.* at 730-31. The Fifth Circuit upbraided the school district for doing so:

> [N]o use apparently was made of [the available] machinery to bring leaders of the white armband faction together with the black armbands to agree on mutual respect for each other's constitutional rights. If this had been tried and failed, the failure would have tended to establish that armbands of all colors should be

> banned. In short, it appears to us that the school system was confronted with a rapidly developing crisis, for which it had no policy predetermined, and instead of obtaining an answer through democratic processes, it responded with a hasty ukase.

Id. at 732.

The factual circumstances under which the Fifth Circuit made the above pronouncements are important. As noted, a counter protest was underway in the same school, at the same time. *Id.* Furthermore, the black armband wearers had also protested outside the school in the morning and one of their banners had been torn down. *Id.* at 730. School administrators feared that the white armband wearers would actually tear the black armbands off of their wearers. *Id.* at 731. Finally, school administrators were worried about the agenda of the national organizers of the Moratorium, which was in part, to disrupt schools. *Id.*

In this context, the Fifth Circuit made the statements quoted above. Furthermore, that court rejected the all-too-easy excuse that administrators on the ground should not be second guessed: "Therefore, even in the school environment, where no doubt restraints are necessary that the First Amendment would not tolerate on the street, something more is required to establish that they would cause 'disruption' than the *ex cathedra* pronouncement of the superintendent." *Id.* at 732.

The Fifth Circuit understood that even in situations much more volatile than the instant case, a heckler's veto simply cannot be tolerated. The Fifth Circuit provided additional insights in another case, *Shanley v. Northeast Independent School District*, 462 F.2d 960 (5th Cir. 1972). First, the court addressed the concern over "negative" expression:

> "Negativism" is, of course, entirely in the eye of the beholder, and presumably the school administration's eye became fixed upon the criticism by the students. As those to whom public and private criticism, of widely varying degrees of intention and rationality, has been directed, we can say with some pained assurance that "criticism" like "controversy" is not a bogey, at least not in

> a democracy. … If the criticism is irrational or ill-intentioned, then surely the American citizenry, even that of high school age, will have enough good sense to attach that much more credibility to the criticized actors and their actions. … [A]version to "criticism" is not a constitutionally reasonable justification for forbidding the exercise of First Amendment expression.

Id. at 972, n.10. Everything the *Shanley* court wrote about criticism of the school officials applies with equal force to Nuxoll's criticism of the views of the Day of Silence participants.

Shanley involved the suppression of an "underground" student newspaper and the court's discussion of "prior restraint" is applicable here.

> [W]e must emphasize in the context of this case that even reasonably forecast disruption is not *per se justification* for prior restraint or subsequent punishment of expression afforded to students by the First Amendment:
> … .
>
> > "[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute … is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. [citing cases]. There is no room under our Constitution for a more restrictive view."
>
> *Terminiello v. Chicago*, 337 U.S. at 4.

Id. at 973 (alteration in original).

The *Shanley* court had no hesitation adapting a strong version of the *Terminiello* standard to the school context. In so doing, it was following the lead of the Court in *Tinker*, 393 U.S. at 508. Both courts understood that even in our public schools, the heckler's veto must be minimized as much as possible.

The Fifth Circuit has not been the only court to properly apply the *Tinker* standard. In a school literature distribution case, this Court thought it helpful to analogize from a non-school

setting: "Consider a parallel: the police are supposed to preserve order, which unpopular speech may endanger. Does it follow that the police may silence the rabble-rousing speaker? Not at all. The police must permit the speech and control the crowd; there is no heckler's veto." *Hedges v. Wauconda Cmty. Unit Sch. Dist. No. 118*, 9 F.3d 1295, 1299 (7th Cir. 1993). This Court then prohibited the school from allowing heckler's vetoes.

Another example of properly understanding *Tinker* is found in *Boyd County High School Gay Straight Alliance v. Board of Education*, 258 F. Supp. 2d 667, 689-90 (E.D. Ky. 2003). That case involved a school's attempt to ban a Gay Straight Alliance Club. There the court used *Tinker* to analyze a claim under the Equal Access Act, 20 U.S.C. § 4071 (2006). *Id.* at 693. In so doing, it provided some useful guidance.

First, the *Boyd County* court emphasized that *Tinker* had rejected the heckler's veto. The court quoted the same language from *Terminiello* that the *Shanley* court used, thereby also adapting a strong version of *Terminiello*. *Id*. at 689. The court then quoted one additional line from *Terminiello*: "'the alternative [i.e., permitting a heckler's veto] would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups.'" *Id*. at 690 (quoting *Terminiello*, 337 U.S. at 4-5). Such a result would be especially incongruous in our public schools, which serve to teach our students how to participate in the market place of ideas.

The court then put a fine point on it:

> Assuming *arguendo* that the anti-GSA faction … was sufficiently disruptive to "materially and substantially interfere with the requirements of appropriate discipline," Defendants are not permitted to restrict Plaintiffs' speech and association as a means of preventing disruptive responses to it. … *Tinker* and *Terminiello* are designed to prevent Defendants from punishing students who express unpopular views instead of punishing the students who react to those views in a disruptive manner.

Id. (citation omitted).

Just as Boyd County could not squelch pro-homosexual speech, neither can Indian Prairie squelch anti-homosexual speech.

The above courts are among those that have properly applied *Tinker*. Unfortunately, a number of courts have misapplied *Tinker* to the point of *permitting* a heckler's veto in its name. Just one example is provided by *Heinkel v. School Board*, 194 F. App'x 604 (11th Cir. 2006), where the Eleventh Circuit upheld censorship with *no* evidence of disturbance indicated in the record.

In light of the strong version of *Terminiello* that *Tinker* (and *Butts*, *Shanley*, *Hedges*, and *Boyd County*) call for, the approach of *Heinkel* and the court below must be wrong.

B. The District Court Erred by Relying on a "Psychological Attack" Prong that Does Not Exist.

The recent Supreme Court decision in *Morse v. Frederick*, 127 S. Ct. 2618 (2007), demonstrates that the expansive interpretation of the "rights of others" prong of *Tinker* as employed by the court below, following the lead of the Ninth Circuit in *Harper v. Poway Unified School District*, 445 F.3d 1166 (9th Cir. 2006), does not exist.

Most courts have silently passed over the "rights of others" language from *Tinker*. The language is often quoted ("There is here no evidence whatever of … [a] collision with the rights of other students to be secure and to be let alone." *Tinker,* 393 U.S. at 508), but then is not given any analysis whatsoever. This makes sense because preventing disruption subsumes protecting the rights of others to be let alone and to be safe. Thus, it is appropriate to discuss them in a *Tinker* analysis. However, it is fallacious to expand the doctrine of "the rights of others" to include the right to, e.g., not see a message on a T-shirt. The *Harper* court characterized this as a

"psychological attack," 445 F.3d at 1178, and opined that the "rights of others" prong, therefore, permits schools to censor such shirts.

The best way to view *Tinker* is that there are not two prongs; rather "the rights of others" concerns are subsumed by the material and substantial disruption analysis. But in any event, in *Morse*, eight justices are on record regarding *Tinker's* holding.[1] The "psychological attack" version of the "rights of others" prong is nowhere in sight.

Writing for himself and four other justices,[2] Chief Justice Roberts declared that

> *Tinker* held that student expression may not be suppressed unless school officials reasonably conclude that it will "materially and substantially disrupt the work and discipline of the school." … The only interest the Court discerned underlying the school's actions was the "mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint," or "an urgent wish to avoid the controversy which might result from the expression." That interest was not enough to justify banning "a silent, passive expression of opinion, unaccompanied by any disorder or disturbance."

Morse, 127 S. Ct. at 2626 (citations omitted).

Even more enlightening was Justice Alito's opinion (joined by Justice Kennedy):

> The Court is also correct in noting that *Tinker,* which permits the regulation of student speech that threatens a concrete and "substantial disruption," does not set out the only ground on which in-school student speech may be regulated … .
>
> But I do not read the opinion to mean that there are necessarily any grounds for such regulation that are not already recognized in the holdings of this Court. In addition to *Tinker*, the decision in the present case allows the restriction of speech advocating illegal drug use; *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986), permits the regulation of speech that is delivered in a lewd or vulgar manner as part of a middle school program; and *Hazelwood School Dist.* v. *Kuhlmeier*, 484 U.S. 260 (1988), allows a school to regulate what is in essence the school's own speech, that is, articles that appear in a publication that is an official school organ. I join the opinion of the Court on the understanding that the

---

[1] Justice Breyer was the only not to discuss *Tinker*, because he would have decided the case based on qualified immunity. *Morse*, 127 S. Ct. at 2638.

[2] Justice Thomas did not accept the majority's approach, but joined the opinion because he thought it would undermine *Tinker* which he would like to see overturned. *Morse*, 127 S. Ct. at 2636. His characterization of *Tinker's* holding is important though. He, too, mentions only the material and substantial disruption/discomfort/unpleasantness language. *Id.* at 2633.

> opinion does not hold that the special characteristics of the public schools necessarily justify any other speech restrictions.
>
> The opinion of the Court does not endorse the broad argument … that the First Amendment permits public school officials to censor any student speech that interferes with a school's "educational mission." This argument can easily be manipulated in dangerous ways, and I would reject it before such abuse occurs. The "educational mission" of the public schools is defined by the elected and appointed public officials … and by the school administrators and faculty. As a result, some public schools have defined their educational missions as including the inculcation of whatever political and social views are held by the members of these groups.
>
> … The "educational mission" argument would give public school authorities a license to suppress speech on political and social issues based on disagreement with the viewpoint expressed. The argument, therefore, strikes at the very heart of the First Amendment.

Id. at 2637 (Alito, J., concurring) (some citations omitted).

Alito's opinion is especially important because it shows what a "rights of others" analysis should look like. It deals with physical safety, not psychological attack, and is subsumed within the substantial disruption analysis:

> The special characteristic that is relevant in this case is the threat to the physical safety of students. School attendance can expose students to threats to their physical safety that they would not otherwise face. … During school hours … parents are not present to provide protection and guidance, and students' movements and their ability to choose the persons with whom they spend time are severely restricted. Students may be compelled on a daily basis to spend time at close quarters with other students who may do them harm. Experience shows that schools can be places of special danger.
>
> In most settings, the First Amendment strongly limits the government's ability to suppress speech on the ground that it presents a threat of violence. But due to the special features of the school environment, school officials must have greater authority to intervene before speech leads to violence. And, in most cases, *Tinker*'s "substantial disruption" standard permits school officials to step in before actual violence erupts.

Id. at 2638 (Alito, J., concurring) (citations omitted).

The three justices in dissent took the same view of *Tinker*:

> The district justified its censorship on the ground that it feared that the expression of a controversial and unpopular opinion would generate disturbances. Because the school officials had insufficient reason to believe that those disturbances

> would “materially and substantially interfere with the requirements of discipline in the operation of the school,” we found the justification for the rule to lack any foundation and therefore held that the censorship violated the First Amendment.

Id. at 2644 (Stevens, J., dissenting). Again, the “psychological attack” version of the “rights of others” is nowhere in sight.

In addition to this consistent view of *Tinker*, the majority also undercuts the “psychological attack” approach:

> Petitioners urge us to adopt the broader rule that Frederick’s speech is proscribable because it is plainly “offensive” as that term is used in *Fraser*. We think this stretches *Fraser* too far; that case should not be read to encompass any speech that could fit under some definition of “offensive.” After all, much political and religious speech might be perceived as offensive to some.

Id. at 2629 (citations omitted).

Only one passage out of all of this contains the expression “the rights of others.” Justice Stevens quotes the school’s policy (where it occurs twice), that had obviously copied language from *Tinker*. He then opines:

> There is absolutely no evidence that Frederick’s banner’s reference to drug paraphernalia “willfully” infringed on anyone’s rights or interfered with any of the school’s educational programs. On its face, then, the rule gave Frederick wide berth “to express [his] ideas and opinions” so long as they did not amount to “advocacy” of drug use. If the school’s rule is, *by hypothesis*, a valid one, it is valid *only insofar* as it scrupulously preserves adequate space for constitutionally protected speech. When First Amendment rights are at stake, a rule that “sweeps in a great variety of conduct under a general and indefinite characterization” may not leave “too wide a discretion in its application.”

Id. at 2647 (Stevens, J., dissenting) (citations and footnote omitted; alteration in original; emphasis added).

All of this cannot be oversight by the eight justices. *Morse* and *Harper* were under consideration at the same time. The Court granted Harper’s *certiorari* petition, vacated the judgment, and ordered the appeal to be dismissed as moot. *Harper v. Poway Unified Sch. Dist.*,

127 S. Ct. 1484 (2007). While the Court was considering *Harper*, an amicus brief was filed in *Morse* that argued that the "rights of others" could not encompass "psychological attacks." Brief for Alliance Defense Fund as *Amicus Curiae*, *Morse v. Frederick*, 2007 U.S. Lexis 8514 (2007).

Thus, while the vacatur may not prevent *Harper*'s citation as persuasive authority, *Zamecnik v. Indian Prairie School District No. 204 Board of Education*, No. 07-1586, 2007 U.S. Dist. LEXIS 28172, at *21 (N.D. Ill. Apr. 17, 2007) (as adopted in *Zamecnik v. Indian Prairie School District No. 204 Board of Education*, No. 07-1586, 2007 U.S. Dist. LEXIS 94411, at *15 (N.D. Ill. Dec. 21, 2007)), it ought to be clear that *Harper's* analysis has been repudiated by the Supreme Court.[3]

Schools must protect students' right to be secure, i.e., their right to be safe. However, they cannot invoke that duty to avoid another, the protection of students' First Amendment rights.

C. The District Court's "Rights of Others" Rationale is a Disguised Heckler's Veto Because the Court Ignored the Established Meaning of those Rights.

Even should this Court disagree and hold that a separate "rights of others" prong exist, it should still reject the district court's analysis under that prong. A proper *Tinker* analysis, as discussed above, stands guard against a heckler's veto, whereas the district court's analysis disguises a heckler's veto.

[3] After the Ninth Circuit dismissed the appeal pursuant to the Supreme Court's order, Harper filed a motion for reconsideration under FRCP 60(b)(5). While the *Harper* district court did not take this approach in its denial of that motion, in light of the above analysis it should have, and its refusal to do so is no impediment to this Court recognizing the consistent views of the justices in *Morse*. *Harper v. Poway Unified Sch. Dist.*, No. 04-01103 at 9 (S.D. Cal. Feb. 12, 2008) (order denying Plaintiff's motion for reconsideration) *available at* https://ecf.casd.uscourts.gov/cgi-bin/login.pl (after logging into CM/ECF, Run Query for 04-01103, select "History/Documents," Run Query, and select document 174).

1. *The District Court's "Right to be Let Alone" Rationale is a Disguised Heckler's Veto Because that Right Protects Students from Importuning by Speakers, which did not Occur Here.*

The Supreme Court delivered the classic articulation of the First Amendment aspect[4] of the right to be let alone in *American Steel Foundries v. Tri-City Central Trades Council*, 257 U.S. 184, 204 (1921), a labor picketing case, writing:

> How far may men go in persuasion and communication, and still not violate the right of those whom they would influence? In going to and from work, men have a right to as free a passage without obstruction as the streets afford, consistent with the right of others to enjoy the same privilege. We are a social people, and the accosting by one of another in an inoffensive way, and an offer by one to communicate and discuss information with a view to influencing the other's action, are not regarded as aggression or a violation of that other's rights. If, however, the offer is declined, as it may rightfully be, then persistence, importunity, following and dogging, become unjustifiable annoyance and obstruction which is likely soon to savor of intimidation. From all of this the person sought to be influenced has a right to be free … .

In *Hill v. Colorado*, 530 U.S. 703, 717 (2000), the Supreme Court quoted that passage in its entirety and used it to describe the privacy portion of the "right to be let alone". It also made it clear that the right applies with varying force in the labor context as well as in one's home, near one's home, near a medical facility, in Central Park, or in "confrontational" situations. *Id*. at 716. The "right to be let alone" cannot be a completely different animal in the school setting.

We can ascertain whether the right to be let alone would be implicated by Nuxoll's speech. It would not. There is nothing in the record to indicate that the plaintiff plans to persist, importune, follow, dog, or intimidate anyone. By refusing to face squarely what the "right to be let alone" covers, the district court was able to claim that the right was violated. Nothing could

---

[4] It must be "the privacy interest in avoiding unwanted communication," *Hill v. Colorado*, 530 U.S. 703, 716 (2000), implicated here. Neither the Fourth or Fifth Amendments are at issue here, and these are the only other issues implicated by the right to be let alone.

be farther from the truth. *Tinker's* right to be let alone means exactly what it means in every other context. Schools may not invoke the right to be left alone to disguise a heckler's veto. And courts may not bless such disguises.

2. *The "Right to be Secure" Rationale is a Disguised Heckler's Veto Because that Right Protects Students' Safety and no Student's Safety would be Threatened here.*

Invoking the right to be secure does not give schools or courts *carte blanche* to eviscerate *Tinker*. Again, the right to be secure has a discernable meaning: the right to be safe. For example, in *West v. Derby Unified School District*, 206 F.3d 1358, 1362 (10th Cir. 2000), the Tenth Circuit noted that both the Ku Klux Klan and the Aryan Nation were recruiting public school students, a *series* of racial incidents had occurred, at least one fight had occurred, and graffiti had included not only "KKK" but also "KKKK" (standing for Ku Klux Klan Killer) and "Die Nigger." It is beyond all cavil that the right to be secure there was the right to be safe.

The Third Circuit has held similarly. *Sypniewski v. Warren Hills Reg'l Bd. of Educ.*, 307 F.3d 243, 264 (3rd Cir. 2002). There, only a portion of the school policy was upheld, while the remainder was struck. Furthermore, students' safety was at issue. The court noted that the school district initially refused to adopt a policy restricting speech even in the face of significant racial tension. *Id.* at 248. However, after *months* of racial tension and *numerous* incidents, the district finally put policies in place only when "[i]t was the consensus of the Board of Education and [the Superintendent] that there had been significant disruption in the school and that the minority population was at significant risk from, not only verbal and intimidating harassment but also, increasingly, *the risk of physical violence*." *Id*. at 249 (emphasis added). Yet to the extent that the court even addressed the right of students to be secure (it quoted the phrase from *Tinker*, but never engaged in a separate analysis), *id.* at 253, it did not permit the district to "secure"

students from speech that would harm their self esteem or "strike[ ]at a core identifying characteristic." *Harper*, 445 F.3d at 1182, n.27. To the contrary, the court enjoined enforcement of a provision of the Harassment Policy that banned derogatory terms or racial slurs if they caused ill will. *Sypniewski*, 307 F.3d at 262.

The following passage shows both that *Sypniewski* did not make a clean distinction between *Tinker's* "substantial disruption" prong and its "rights of others" prong and that the "right to be secure" must mean the right to physical safety, not the right to be free from encountering hurtful speech:

> [I]t seems likely there will be a good deal of speech that creates "ill will" that does not substantially interfere with the rights of other students or with the operation of the school as an educational institution. There may also be some harassment "by name calling" that does not genuinely threaten disruption.

Id.

II. THE DISTRICT COURT ERRED BECAUSE SCHOOL ADMINISTRATORS ARE DILUTING NUXOLL'S MESSAGE BY RESTRICTING HIS CHOSEN MESSAGE.

By restricting Nuxoll's message to only that which promotes heterosexuality rather than that which criticizes homosexuality, school officials are diluting his message. In *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 573 (1995), the Supreme Court made clear that the general rule is "that the speaker has the right to tailor the speech, [which] applies not only to expressions of value, opinion, or endorsement, but equally to statements of fact the speaker would rather avoid." The Court also stated that the power to determine the perspective of the message is in the hands of the speaker, not the government. *Id.* at 575. Interference with the expressed message "for no better reason than promoting an approved message or discouraging a disfavored one," *id.* at 579, is not allowed because it changes the message the speaker intends to express. Ultimately, the Court held that "disapproval

of a private speaker's statement does not legitimize the use of … power to compel the speaker to alter the message by including one more acceptable to others." *Id.* at 581.

The *Hurley* Court upheld the right of the South Boston Allied War Veterans Council to refuse to let the Irish-American Gay, Lesbian and Bisexual Group of Boston to march in their St. Patrick's Day-Evacuation Day Parade. *Id.* at 566. If the Veterans Council allowed the Irish-American Group to march in the parade it would be easy for onlookers to view the message of the group and believe that it was promoted and supported by the Veterans Council. *Id.* at 575. The Court reasoned that requiring the Veterans Council to include the Irish-American Group's message would dilute the Veterans Council's message of celebrating St. Patrick's Day and the evacuation of British troops from Boston in 1776. *Id.* at 572-73.

School administrators prohibit Nuxoll's shirt from including his message: "Be Happy, Not Gay." *Zamecnik*, 2007 U.S. Dist. LEXIS 94411, at *14. They interfere with his message by altering it to portray a message more tolerable to those around them. School administrators have stated that the message supporting heterosexuality, "Be Happy, Be Straight," is acceptable because it is not derogatory. *Id.* at *5. Nuxoll's anti-homosexuality message should not be forbidden because it is not favored by everyone in the school, nor because it is a "negative" perspective of homosexuality instead of a positive perspective of heterosexuality. As a private speaker, Nuxoll has the right to determine his message. By asking Nuxoll to wear a shirt with an altered message, school administrators are diluting his message for one that is more palatable to homosexuality supporters.

III. THE DISTRICT COURT ERRED BECAUSE SCHOOL OFFICIALS ARE COMPELLING SPEECH BY REFUSING TO ALLOW NUXOLL TO EXPRESS ANY MESSAGE WHICH IS NOT TOLERANT OF HOMOSEXUALITY.

Furthermore, by only permitting Nuxoll to express a message promoting heterosexuality instead of an anti-homosexual message, school officials are compelling Nuxoll to speak a different message. The Supreme Court in *Boy Scouts of America v. Dale*, 530 U.S. 640, 653 (2000), looked at the significant burden compelled speech has on speakers and the effect it has on the original message. Relying on its opinion in *Hurley,* the Court found that the speaker alone gets to choose the message, and so any interference with the message restricts his rights. *Id.* at 654.

The Court in *Dale* reasoned that if the government required the group to allow homosexuals to be scout leaders it would force the Boy Scouts to send a message supporting homosexual behavior, which is against its beliefs. *Id.* at 652-53. The Court concluded that the rights of the Boy Scouts, as a private group with the right to determine its message, would be significantly burdened by such compelled speech. *Id.* at 653, 659. Even though society has become more accepting of homosexuality, the freedoms of those who do not support homosexuality cannot be limited, but in fact need to be more heartily protected. *Id.* at 660. The Court ruled that the Boy Scouts have the right to select their leaders, and send a message consistent with the beliefs against homosexuality. *Id.* at 656.

In this case, Nuxoll is given the choice of not wearing an expressive shirt or wearing one with a message promoting heterosexuality. *Zamecnik*, 2007 U.S. Dist. LEXIS 28172, at *4-6. The school officials are compelling him to send a message that, while not necessarily contradictory of his beliefs, is different from his original anti-homosexuality message. By promoting a message supportive of heterosexuality, the student is not able to express his actual

opinion on homosexuality. Nuxoll's rights are burdened in that he is being forced to alter his stance on homosexuality, and is compelled to keep that perspective hidden. School officials are compelling Nuxoll's speech.

IV. THE DISTRICT COURT ERRED BECAUSE IT MISCONSTRUED SEVERAL OF THIS COURT'S PRECEDENTS.

The court below misapplied this Court's decisions in *Brandt v. Board of Education*, 480 F.3d 460 (7th Cir. 2007), and *Muller v. Jefferson Lighthouse School*, 98 F.3d 1530 (7th Cir. 1996).

First, *Brandt* simply has no application here. It involved a direct rebellion against school officials because of an aspect of the administration of an elementary school. *Brandt,* 480 F.3d at 462. The instant case does not involve an elementary school, a protest, or a challenge to school officials' administration of the school.

Second, there are several problems with relying on *Muller* here. First, it is self-limited to the elementary school context. 98 F.3d at 1535. Second, Muller *won* his as-applied challenge below on the religious speech at issue, and the school did not appeal that decision. *Id.* at 1535. Thus, *Muller* speaks to facial challenges and is not controlling here.

A larger problem exists with the district court's use of *Muller:* the district court adopted the reading of *Muller* advanced by *Griggs v. Fort Wayne School Board*, 359 F. Supp. 2d 731 (N.D. Ind. 2005). According to *Griggs*, this Court has adopted a different approach to *Tinker* than every other Court of Appeals. *Id*. at 740. According to *Griggs*, this Court "announced that, absent a public forum, the *Hazelwood* test ('reasonably related to legitimate pedagogical concerns') applies to *all* student speech." *Id. Griggs,* and the court below, concluded that *Muller* precluded *Tinker's* application to the cases before them. This conclusion was erroneous for two reasons. First, the debate among the three judges on the *Muller* panel was over whether

to apply *Tinker* in the elementary context, not the mis-reading discussed above. Second, the *Griggs* court also miscounted. Neither of the concurring judges on the three judge panel joined Section II of the majority opinion, which rejected the use of *Tinker* in elementary schools. *Muller*, 98 F.3d at 1545, 1547. Thus, only one vote existed to discard *Tinker* in that context. It is simply not true that *Muller* teaches that "absent a public forum, the *Hazelwood* test … applies to *all* student speech." 359 F. Supp. 2d at 740.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the district court.

Respectfully submitted,
this 21st day of February, 2008.

____

Steven W. Fitschen
Counsel of Record for *Amicus Curiae*,
2224 Virginia Beach Blvd., St. 204
Virginia Beach, VA 23454
(757) 463-6133

CERTIFICATE OF COMPLIANCE

Pursuant to F.R.A.P. 32.2.7(C), the undersigned certifies that this brief complies with the type-volume limitations of F.R.A.P. 32.2.7(B). Exclusive of the exempted portions, this Brief contains 7,000 words in 12 point Times New Roman font. This total was calculated with the Word Count function of Microsoft Office Word 2007.

____

Steven W. Fitschen
Counsel of Record for *Amicus Curiae*

CERTIFICATE OF SERVICE

I hereby certify that I have duly served the attached Brief *Amicus Curiae* of the National Legal Foundation in the case of *Nuxoll v. Indian Prairie School District #204 Board of Education,* No. 08-1050 on all required parties by depositing the required number of paper and electronic copies in the United States mail, first class postage, prepaid on February 21, 2008, addressed as listed below. The required number of paper and electronic copies were filed in the same manner on the same date.

Nathan W. Kellum
Alliance Defense Fund
Suite 107
699 Oak Leaf Office Lane
Memphis, TN 38117
Counsel for Alexander Nuxoll, *Plaintiff-Appellant*

John F. Canna
Canna & Canna
10703 W. 159th Street
Orland Park, IL 60467-4531
Counsel for Indian Prairie School District No. 204 Board of Education, *et al.*, *Defendants-Appellees*

____

Steven W. Fitschen
Counsel of Record for *Amicus Curiae*
The National Legal Foundation
2224 Virginia Beach Boulevard, Ste. 204
Virginia Beach, Virginia 23454
(757) 463-6133