No. 08-1050

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

ALEXANDER NUXOLL, *et al.*,	)	On Appeal from the
	)	United States District Court
Plaintiffs-Appellees,	)	for the Northern District of
	)	Illinois, Eastern Division
v.	)	
	)	No. 07-1586
INDIAN PRAIRIE SCHOOL	)	
DISTRICT #204, *et al.*,	)	The Honorable
	)	William T. Hart,
Defendants-Appellants.	)	Judge presiding

BRIEF OF *AMICUS CURIAE*
THE AMERICAN CIVIL LIBERTIES UNION OF ILLINOIS
IN SUPPORT OF NEITHER PARTY

Harvey Grossman
John Knight
Adam Schwartz
THE ROGER BALDWIN FOUNDATION
OF ACLU, INC.
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Dated: February 15, 2008

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No.: 08-1050

Short Caption: Alexander Nuxoll, et al. v. Indian Prairie School District #204, et al.

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-government 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.

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==========

Attorney's signature: /s/ Harvey Grossman Date: 2/15/08

Attorney's Printed Name: Harvey Grossman

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

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Attorney's signature: /s/ Adam Schwartz Date: 2/15/08

Attorney's Printed Name: Adam Schwartz

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

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STATEMENT OF INTEREST OF *AMICUS*

The American Civil Liberties Union ("ACLU") of Illinois is a statewide, nonprofit, nonpartisan organization with more than 22,000 members dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. The ACLU of Illinois has frequently advocated in support of the First Amendment right to free speech, and also the right to be free from discrimination, both as direct counsel and as *amicus curiae*. The ACLU of Illinois has special expertise regarding the intersection of competing civil rights and civil liberties, based on decades of relevant litigation on behalf of scores of clients. Because this case involves the balancing of free speech and freedom from discrimination, its proper resolution is a matter of significant concern to the ACLU of Illinois and its members.

INTRODUCTION

This appeal requires this Court to balance and reconcile two competing and equally important legal rights. First, public high school students have a fundamental right to freedom of speech, including the in-school expression of controversial and even offensive messages. *See, e.g., Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503 (1969) (reversing the dismissal of a lawsuit brought by students seeking to wear black armbands to protest the Vietnam War); *Newsom v. Albemarle Sch. Bd.*, 354 F.3d 249 (4th Cir. 2003) (reversing the denial of a preliminary injunction against enforcement of a public high school ban on clothing that depicts weapons, as applied to a t-shirt with the words "NRA" and "shooting sports camp" superimposed on the silhouettes of men holding firearms); *Chandler v. McMinnville Sch. Dist.*, 978 F.2d 524 (9th Cir. 1992) (reversing the dismissal of a lawsuit brought by students who were barred from wearing buttons using the word

"scab" to describe replacement teachers hired during a strike); *Barber v. Dearborn Pub. Schs.*, 286 F. Supp. 2d 847 (E.D. Mich. 2003) (granting a preliminary injunction to protect a t-shirt calling President Bush an "international terrorist").[1]

Second, public high school students have a fundamental right to freedom from discrimination on the basis of protected status, including race, ethnicity, nationality, religion, sex, gender identity, sexual orientation, and disability status. Accordingly, schools in certain circumstances have a legal duty to prevent student-on-student harassment. *See, e.g., Davis v. Monroe Bd. of Educ.*, 526 U.S. 629 (1999) (allowing a Title IX claim to proceed against a school that allegedly failed to stop student-on-student unwanted sexual fondling); *Nabozny v. Podlesny*, 92 F.3d 446 (7th Cir. 1996) (allowing an Equal Protection claim to proceed against a school that allegedly failed to stop student-on-student anti-gay violence, threats, and directed epithets).

Here, the principal legal issue is when public high schools may restrict on-campus student speech that disparages other people on the basis of a protected status.[2] This issue has been litigated in other courts. *Morrison v. Boyd County Bd. of Educ.*, 507 F.3d 494 (6th Cir. 2007) (facial challenge to a school harassment policy); *Harper v. Poway Sch. Dist.*, 445 F.3d 1166 (9th Cir. 2006) (a t-shirt stating "homosexuality is shameful"),

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[1] The First Amendment also protects the right of students to self-identify as gay. *Henkle v. Gregory*, 150 F. Supp. 2d 1067, 1070, 1074-75 (D. Nev. 2001). It further protects gay-straight alliances on equal terms with other student groups to be recognized and supported by public schools. *Straights and Gays for Equality v. Osseo Sch. Dist.*, 471 F.3d 908 (8th Cir. 2006); *GSA of Okeechobee High Sch. v. Okeechobee Sch. Bd.*, 483 F. Supp. 2d 1224 (S.D. Fla. 2007); *Boyd County High School GSA v. Boyd County Bd. of Educ.*, 258 F. Supp. 2d 667 (E.D. Ky. 2003).

[2] Among other things, this case does not require this Court to address restrictions on speech (1) in elementary and junior high schools, (2) by school teachers and other employees, and/or (3) by high school students while they are off-campus.

vacated, 127 S. Ct. 1484 (2007); *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200 (3rd Cir. 2001) (Alito, J.) (facial challenge to a school harassment policy); *Nixon v. Northern Sch. Dist.*, 383 F. Supp. 2d 965 (S.D. Ohio 2005) (a t-shirt stating "homosexuality is a sin, Islam is a lie, abortion is murder"); *Chambers v. Babbitt*, 145 F. Supp. 2d 1068 (D. Minn. 2001) (a sweatshirt stating "straight pride").

In resolving this issue, this Court must fully protect both of the underlying critical freedoms – freedom of speech and freedom from discrimination. This brief of *amicus curiae* the ACLU of Illinois suggests a path to do so.

First, this Court should hold that controversies like this one are controlled by the following standard set forth in *Tinker*: whether public high school officials can "reasonably . . . forecast" that the disputed student speech, which disparages other people on the basis of protected status, will (i) cause a "substantial disruption of or material interference with school activities," or (ii) "impinge upon the rights of other students." 393 U.S. at 509, 514. The decision of the district court below did not apply this correct standard from *Tinker*, instead relying in significant part on its interpretation of this Court's decisions in *Muller v. Jefferson Lighthouse School*, 98 F.3d 1530 (7th Cir. 1996), and *Brandt v. Chicago Board of Education*, 480 F.3d 460 (7th Cir. 2007). *See Zamecnik v. Indian Prairie Sch. Dist.*, 2007 WL 1141597, **9-10 (N.D. Ill. Apr. 17, 2007). Consequently, a proper resolution of this appeal may require this Court to further explain or reconsider *Muller* and *Brandt* in light of the subsequent decision of the Supreme Court in *Morse v. Frederick*, 127 S. Ct. 2618 (2007). *See infra* Part I.

Second, since the "disruption" prong of *Tinker* is considerably defined in existing case law, and because the facts here are not so egregious as to fall within the disruption

prong, *amicus* suggests that the inquiry of most significant import is whether speech that disparages protected classes "impinges upon the rights of other students" by constituting "harassment," as that term has been judicially defined for decades. Under this body of law, in-school expression by a public high school student is harassment unprotected by the First Amendment only when it is reasonably forecast by school officials to be severe or pervasive enough (i) to significantly hinder a reasonable student in obtaining an education because of his or her protected identity category, or (ii) to significantly harm a reasonable student's physical, mental, or emotional well-being because of his or her protected identity category. Application of this case-specific legal standard is fact-intensive. Sometimes such expression will be protected speech, and other times it will be unprotected harassment. *See infra* Part II.

Third, in light of the existing undeveloped factual record in this case, it is not possible to meaningfully apply this harassment test to the planned expressive activity of plaintiff-appellant Alexander Nuxoll. His plans are vague and inchoate. Among other things, it is unknown what words Mr. Nuxoll will use to express his religious beliefs in opposition to homosexuality; what means he will use to communicate these words; how frequently he will express his message(s); whether he will address his message(s) directly to gay students; and whether he will be joined by other students, and if so how many and in what manner. Accordingly, this Court should affirm the district court's denial of Mr. Nuxoll's motion for a preliminary injunction allowing him to engage in such undefined speech, and remand with instructions to apply the foregoing legal standards to a more complete factual record. However, when a court ultimately reaches the merits of the challenged speech policy of defendant-appellee District 204 – which broadly bans all

derogatory speech about protected classes – that policy should be struck down on its face, as it unconstitutionally conflicts with the measured and case-specific analysis that *Tinker* requires. *See infra* Part III.

ARGUMENT

I. THIS CASE IS CONTROLLED BY *TINKER*.

Tinker provides the test that generally applies to most on-campus student expression: whether school officials can reasonably forecast that the disputed speech will substantially disrupt school activities or invade the rights of others. 393 U.S. at 509. The Supreme Court has created three narrow exceptions to this *Tinker* rule: (i) schools can prohibit sexually lewd student speech in a school-sponsored setting, *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675 (1986); (ii) schools can prohibit student speech in a school-sponsored forum, if doing do is reasonably related to legitimate school concerns, *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988); and (iii) schools can prohibit student speech that advocates illegal drug use, *Morse* 127 S. Ct. 2618. *See infra* Part I(A).

Two decisions of this Court – *Muller* and *Brandt* – conflict with the foregoing Supreme Court authority. Indeed, the district court's misapplication of the Supreme Court's decisions rests in significant part on its interpretation of *Muller* and *Brandt*. *See Zamecnik*, 2007 WL 1141597, **9-10. Thus, *Muller* and *Brandt* should be distinguished, or their analysis modified. *See infra* Part I(B).

Here, *Tinker* provides the controlling legal standard. *See infra* Part I(C).

A. Supreme Court decisions.

In *Tinker*, the Court ruled that the First Amendment protects the right of public school students to wear black armbands protesting the Vietnam War. 393 U.S. at 514. Two of the plaintiffs were high school students (aged 15 and 16), and one plaintiff was a junior high school student (aged 13). *Id.* at 504. The Court held that a public school may prohibit student speech only when it would "substantial[ly] disrupt[]" school activities, or "impinge upon the rights of other students." *Id.* at 509, 514. On the other hand, a public school cannot prohibit student speech "to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Id.* at 509. The Court reasoned that public school students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Id.* at 506. Moreover: "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." *Id.* at 512.

In three subsequent cases, the Supreme Court created narrow exceptions to the generally applicable *Tinker* test. First, the Court in *Fraser* permitted a public school to punish a student because his speech was (i) filled with sexual innuendo, and (ii) delivered at a school-sponsored assembly before a captive audience. 478 U.S. at 685.

Second, the Court in *Kuhlmeier* upheld a school's decision to remove from the school-sponsored student newspaper articles about divorce and teen pregnancy. 484 U.S. at 274. In doing so, the Court held that when a school sponsors student speech, the school may restrict that speech if doing so is "reasonably related to legitimate pedagogical concerns." *Id.* at 273. The court also stated that "[a] school need not

tolerate student speech that is inconsistent with its basic educational mission." *Id.* at 266. However, nothing in *Kuhlmeier* suggests that the speech-restrictive legal standards articulated therein apply to a student's own message that is not sponsored by the school.

Most recently, the Court in *Morse* held that schools may restrict student speech "that can reasonably be regarded as encouraging illegal drug use." 127 S. Ct. at 2622. The Court determined that a banner stating "Bong Hits 4 Jesus" comprised such unprotected speech. The Court reasoned that illegal drug use causes special harms for young people. *Id.* at 2627-29. Reaching this conclusion, the Court clarified the interplay between the general rule created by *Tinker* and the exceptions created by *Fraser* and *Kuhlmeier.* The Court explicitly rejected the school's argument that it may proscribe any "offensive" speech, explaining that the use of that word in *Fraser* "should not be read to encompass any speech that could fit under some definition of 'offensive,'" and reasoning that "much political and religious speech might be perceived as offensive to some." *Id.* at 2629. The Court also held that *Kuhlmeier* was not "control[ling]" because "no one would reasonably believe that [the student]'s banner bore the school's imprimatur." *Id.* at 2627.

Justice Alito (joined by Justice Kennedy) wrote an opinion concurring with the majority in *Morse*. He stated that this new carve-out from *Tinker* for speech promoting illegal drug use "stand[s] at the far reaches of what the First Amendment permits." *Id.* at 2638. He also recognized that the First Amendment bars public schools from censoring student speech on the grounds of alleged interference with a school's "educational mission," because that standard "can easily be manipulated in dangerous ways," and "would give public school authorities a license to suppress speech on political and social issues based on disagreement with the viewpoint expressed." *Id.* at 2637. It is likely that

one of the "dangerous" applications that Justice Alito had in mind was school efforts (as here) to enact prophylactic bans on student speech that disparages protected classes. *See Saxe*, 240 F.3d 200 (Alito, J.) (striking down a public school's harassment policy).

B. Seventh Circuit decisions.

Two pre-*Morse* decisions of the Seventh Circuit – *Muller* and *Brandt* – state that *Fraser* and *Kuhlmeier*, and not *Tinker*, provide the proper legal standard to evaluate student expression that is neither school-sponsored nor sexually lewd. *See also Zamecnik*, 2007 WL 1141597, **9-10 (so interpreting these decisions). These two cases are distinguishable from the case at bar. Moreover, the conclusion in these cases cannot be reconciled with Supreme Court authority.

First, this Court in *Muller* upheld an elementary school policy (1) requiring students to pre-clear materials that they wished to distribute to other students, and (2) prohibiting the distribution of certain materials, including "insulting" materials. 98 F.3d at 1534 n.2. Judge Manion (writing for himself) began the Court's principal opinion with an extended discussion of the young age of the children involved, concluding that it is "unlikely" that *Tinker* applies to elementary schools. *Id.* at 1535-39. The two-judge Court majority then stated that the "pedagogical reasonableness" standard from *Kuhlmeier* applied to the challenged speech restrictions, because "an elementary school under its custodial responsibilities may restrict . . . speech that would crush a child's sense of self-worth." *Id.* at 1540. Similarly, again citing *Kuhlmeier*, the majority stated that a school may suppress student speech that is "inconsistent with its basic educational mission." *Id.* at 1542. Finally, though the case involved proposed leaflets that were not derogatory about anyone, *id.* at 1532, 1541, the majority in dicta asserted that a public

school could prohibit student speech that is "racially and religiously bigoted," or that "promot[es] hate." *Id.* at 1541.

Muller is easily distinguished: it involved an elementary school, while this case involves a high school. Thus, *Muller* is no barrier to this Court now holding that in a public high school, *Tinker* provides the legal standard for student speech that is neither lewd, nor school-sponsored, nor in advocacy of illegal drug use.

Moreover, *Muller* erred by applying *Kuhlmeier* to student speech that was not school-sponsored. As Judge Rovner persuasively argued in her separate *Muller* opinion concurring in the judgment, *Tinker* provides the proper standard for student speech in an elementary school that is not school-sponsored, though speech that would pass *Tinker* muster in a high school will not always pass *Tinker* muster in an elementary school. 98 F.3d at 1546-47. Judge Rovner's opinion was vindicated by the Supreme Court's majority opinion in *Morse*, which squarely held that *Kuhlmeier* does not control where "no one would reasonably believe that [the disputed student speech] bore the school's imprimatur." 127 S. Ct. at 2627. Also, Justice Alito's *Morse* concurrence states that schools cannot suppress student speech solely because it assertedly interferes with the school's "educational mission." *Id.* at 2637. Hopefully, a future lawsuit involving free speech for elementary school students will provide a vehicle for this Court to undo the error in *Muller*, and hold that *Tinker* applies to student speech in an elementary school that is not school-sponsored. Here, it would needlessly compound the error in *Muller* to apply *Kuhlmeier* instead of *Tinker* to such speech in a high school.

Second, this Court in *Brandt* held that a public elementary school did not violate the First Amendment by prohibiting eighth-graders from wearing a particular t-shirt.

There, one-quarter of the students belonged to a gifted program. These students called themselves "gifties." In a school election to select the graduating class's t-shirt, the gifties voted as a bloc for a t-shirt depicting a crude drawing of a smiling youth. When the school announced that another shirt won, the gifties felt the election had been stolen on a technicality. The gifties protested by wearing their preferred t-shirt, with the addition of the words "gifties 2003." *See generally* 480 F.3d at 462-63, 469-70. Citing *Muller*, this Court expressed "doubts whether the constitutional privilege to engage in protest demonstrations in the name of free speech extends to eighth graders." *Id.* at 466. Then, citing *Kuhlmeier*, this Court stated that a school can censor student speech that is "inconsistent with [the school's] basic educational mission." *Id.* at 467. It also stated that the disputed speech restriction was "reasonable." *Id.* at 467, 468. Finally, after rejecting the school's assertion that the disputed t-shirt ridiculed disabled students, this Court in dicta stated that schools may ban student speech that is "offensive" to the disabled. *Id.* at 468.

The case at bar is easily distinguished from *Brandt*: that case (like *Muller*) involved an elementary school, and this case involves a high school.

Moreover, the Court's holding and reasoning in *Brandt* (as in *Muller*) cannot be reconciled with the Supreme Court's recent *Morse* decision. As just explained, the *Morse* majority held that *Kuhlmeier* does not control speech that is not school-sponsored, 127 S. Ct. at 2627, and Justice Alito's concurrence rejected the application of *Kuhlmeier*'s "educational mission" language to such speech, *id.* at 2637. Moreover, the *Morse* majority rejected the school's argument that it may ban speech merely because it is "offensive," despite the use of that term in *Fraser*. *Id.* at 2629. Thus, *Brandt* erred by

failing to apply *Tinker* to a student's own speech in an elementary school, and that error should not now be extended to such speech in a high school.[3]

C. ***Tinker* applies here.**

Assuming that Mr. Nuxoll's planned expression is not school-sponsored, *cf. Kuhlmeier*, contains no sexually lewd content, *cf. Fraser*, and does not advocate illegal drug use, *cf. Morse*, it must be evaluated under the generally applicable *Tinker* rule.

II. THE GENERAL APPLICATION OF *TINKER* TO STUDENT SPEECH THAT DISPARAGES PROTECTED CLASSES.

Given the applicability of *Tinker*, the controlling legal question is whether high school officials can "reasonably . . . forecast" that in-school student speech that disparages protected classes will (i) cause a "substantial disruption of or material interference with school activities," or (ii) "impinge upon the rights of other students." *Tinker*, 393 U.S. at 509, 514. This brief will separately address each *Tinker* prong.

A. "Substantial disruption of school activities."

Based on reported cases to date, derogatory speech about protected classes usually does not disrupt school activities within the meaning of *Tinker*. *See Harper*, 445 F.3d at 1193-97 (Kozinski, J., dissenting) (opining that a t-shirt stating "homosexuality is shameful" was not disruptive, even though several students were "off-task talking about" the shirt, and there were "tense" conversations about the shirt); *Nixon*, 383 F. Supp. 2d at

[3] Two other Seventh Circuit decisions should be briefly noted. First, in a qualified immunity appeal, this Court held that an elementary school student failed to clearly establish a right to wear t-shirts criticizing her school. *Baxter v. Vigo Sch. Corp.*, 26 F.3d 728, 736-38 (7th Cir. 1994). This Court did not resolve whether such a right existed. In any event, this case is distinct because it involves a high school, and *Tinker* should apply in neither elementary schools nor high schools. Second, in *Gernetzke v. Kenosha School District*, 274 F.3d 464, 466 (7th Cir. 2001), this Court upheld restrictions on the images that students could paint in school-sponsored murals in the main school hallway. The speech here, on the other hand, is not school-sponsored.

973 (holding that a school could not "reasonably anticipat[e]" that a t-shirt with anti-Muslim and anti-gay messages would provoke a disruption, simply because some students are Muslims or gay); *Chambers*, 145 F. Supp. 2d at 1071-72 (holding that school officials could not reasonably forecast that a "straight pride" t-shirt would cause a disruption). *See also Tinker*, 393 U.S. at 508 (stating that "hostile remarks" from other students were not sufficient to show a "disrupt[ion]").

Exceptions might exist when a particular school experiences on-campus violence between members of a protected class and other students. In some of these cases, it might be possible to reasonably forecast that such violence will be re-ignited by derogatory speech about that particular protected class. *Compare Scott v. Alachua Sch. Bd.*, 324 F.3d 1246, 1249 (11th Cir. 2003) (holding that a public school could prohibit the display of the Confederate flag, in light of recent race violence at that school); *West v. Derby Sch. Dist.*, 206 F.3d 1358, 1362, 1366 (10th Cir. 2000) (same); *Melton v. Young*, 465 F.2d 1332, 1333 (6th Cir. 1972) (same); *with Bragg v. Swanson*, 371 F. Supp. 2d 814, 826-27 (S.D. W. Va. 2005) (holding that a public school could not prohibit the display of the Confederate flag, in light of the absence of prior race violence at that school). *See also Castorina v. Madison Sch. Bd.*, 246 F.3d 536, 544 (6th Cir. 2001) (in a Confederate flag case, remanding to determine whether there had been prior race violence at that school).[4] However, violence involving one protected class will not justify a ban on derogatory speech about another protected class. *Chambers*, 145 F. Supp. 2d at 1072

[4] In one public school Confederate flag case, the court erroneously applied *Fraser*'s "reasonableness" standard, instead of *Tinker*'s "disruption" standard. *Denno v. Volusia Sch. Bd.*, 218 F.3d 1267, 1274 (11th Cir. 2000).

(holding that in-school race violence could not justify suppression of a "straight pride" t-shirt).

B. "The rights of other students": in general.

Tinker's "rights of others" language must be carefully interpreted to protect freedom of speech while ensuring equal educational opportunity. As Justice Brennan explained in his *Kuhlmeier* dissent, this language "must be limited to rights that are protected by law." 484 U.S. at 289. Similarly, as Judge Kozinski stated in his *Harper* dissent, this language "can only refer to traditional rights, such as those against assault, defamation, invasion of privacy, extortion and blackmail, whose interplay with the First Amendment is well established." 445 F.3d at 1198. Otherwise, the "rights of others" prong of *Tinker* will become an exception that unduly swallows the rule.

Thus, for example, a public high school may restrict on-campus student speech that comprises true threats or fighting words, as those terms are defined in well-established First Amendment jurisprudence. In certain limited circumstances, student speech that disparages protected classes might comprise such unprotected speech. And as explained below, such expression may in limited circumstances comprise unprotected "harassment," as that term is defined in decades-old non-discrimination jurisprudence, and properly limited by the First Amendment.

C. "The rights of other students": harassment in particular.

In *Saxe*, the Third Circuit struck down as substantially overbroad a public school policy banning student speech that, among other things, created an "offensive environment." 240 F.3d at 216-17. Reviewing decades of anti-discrimination case law in the workplace and educational institutions, then-Judge Alito explained that whether

conduct is "harassment" often depends upon whether it is so "severe" or "pervasive" that the victims are "effectively denied equal access to an institution's resources and opportunities." *Id.* at 205-06. The court observed that "[w]hen laws against harassment attempt to regulate oral or written expression . . . , we cannot turn a blind eye to the First Amendment implications." 240 F.3d at 206. On the other hand, some "application of anti-harassment law to expressive speech can survive First Amendment scrutiny," especially when "a school or workplace audience is 'captive' and cannot avoid the objectionable speech." *Id.* at 209-10. The challenged speech policy failed muster under the "rights of others" prong of *Tinker*, because it did not require "any threshold showing of severity or pervasiveness," and thus could apply to speech that was merely "offen[sive]." *Id.* at 217.

Judge Kozinski reached the same conclusion, dissenting in *Harper*. There, a single student wore a t-shirt stating "homosexuality is shameful" during the pro-gay "Day of Silence" and on the following day. 445 F.3d at 1171-72. Judge Kozinski opined:

> The interaction between harassment law and the First Amendment is a difficult and unsettled one because much of what harassment law seeks to prohibit, the First Amendment seems to protect. *See Saxe* . . . . Certainly, state law cannot trump the First Amendment by defining "harassment" as any conduct that another person finds offensive; far too much core First Amendment speech would thus be squelched. *See* Eugene Volokh, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. Rev. 1791 (1992). Harassment law might be reconcilable with the First Amendment, if it is limited to situations where the speech is so severe and pervasive[5] as to be tantamount to conduct. *See Saxe*, 340 F.3d at 204-10. . . . [I]t is quite clear that Harper's lone message was not sufficiently severe and pervasive to meet the standard . . . .

[5] As explained herein, the "severe or pervasive" standard is properly stated in the disjunctive and not the conjunctive.

Id. at 1198 (citations omitted). *See also Nixon*, 383 F. Supp. 2d at 974 (holding that a student's "silent, passive expression of opinion" by wearing a t-shirt with anti-Muslim and anti-gay messages did not invade "the rights of others").

The Sixth Circuit recently reached a similar conclusion in a First Amendment challenge to a school harassment policy. *Morrison*, 507 F.3d 494. On the one hand, if the policy had been limited to speech "that is sufficiently severe, pervasive, or objectively offensive that it adversely affects a student's education or creates a hostile or abusive educational environment," then the policy would have "tack[ed] quite closely to the *Tinker* standard." *Id.* at 505. On the other hand, if the policy had extended more broadly to speech that "convey[s] hatred, contempt, or prejudice," then the policy would not have satisfied *Tinker*. *Id.* The court remanded for a determination of what speech was banned by the policy. *Id.* at 506.

The foregoing student speech cases are well-grounded in harassment jurisprudence. The "severe or pervasive" standard was first applied by the Supreme Court to workplace discrimination under Title VII. *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 67 (1986). The Court enunciated a similar standard for student-on-student gender harassment in schools under Title IX, requiring that it be "so severe, pervasive, and objectively offensive that it can be said to deprive victims of access to the educational opportunities or benefits provided by the school." *Davis*, 526 U.S. at 650. Because of the similarity of the standards, Title VII cases are used to interpret Title IX.

Smith v. Perry Twp. Sch. Dist., 128 F.3d 1014, 1023 (7th Cir. 1997).[6]

"Harassment need not be severe *and* pervasive to impose liability; one or the other will do." *Hostetler v. Quality Dining, Inc.*, 218 F.3d 798, 808 (7th Cir. 1993) (emphasis in original). Thus, a single particularly severe incident can comprise harassment. *Doe v. School Dist. No. 19*, 66 F. Supp. 2d 57, 62 (D. Me. 1999). *See also Rodgers v. Western-Southern Life Ins. Co.*, 12 F.3d 668, 674 (7th Cir. 1993) (holding that there is no "magic number" of incidents to establish harassment).

As to words in particular, liability generally will not be established by "simple acts of teasing and name-calling," *Davis*, 526 U.S. at 652, but might be shown *inter alia* by "an unambiguously racial epithet." *Cerros v. Steel Tech., Inc.*, 288 F.3d 1040, 1047 (7th Cir. 2001). *See also Montgomery v. Sch. Dist. No. 709*, 109 F. Supp. 2d 1081, 1084 (D. Minn. 2000). Indeed, words alone in some cases can establish actionable harassment. *Jackson v. Quanex Corp.*, 191 F.3d 647, 662 (6th Cir. 1999); *Bryant*, 334 F.3d at 931; *Theno v. Tonganoxie Sch. Dist.*, 377 F. Supp. 2d 952, 968 (D. Kan. 2005).

The following are among the factors that public high school officials and courts should consider in making the fact-intensive, case-by-case determination of whether in-school student speech that disparages a protected class is unprotected harassment:

1) The age of the students. *Davis*, 526 U.S. at 651; *Saxe*, 240 F.3d at 206.

2) Whether the expression includes identity-based epithets, such as "nigger" or "faggot." *Cerros*, 288 F.3d at 1047; *Montgomery*, 109 F. Supp. 2d at 1084.

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[6] The severe or pervasive standard has also been applied to: (i) race harassment under Title VI, *Bryant v. Garvin County Sch. Dist.*, 334 F.3d 928, 934 (10th Cir. 2003); *Monteiro v. Tempe Union Sch. Dist.*, 158 F.3d 1022, 1033 (9th Cir. 1998); (ii) disability harassment under the Rehabilitation Act and the ADA, *Werth v. Milwaukee*, 472 F. Supp. 2d 1113, 1127-29 (E.D. Wis. 2007); *K.M. v. Hyde Park Sch. Dist*, 381 F. Supp. 2d 343, 359 (S.D.N.Y. 2005); and (iii) sexual orientation harassment under state non-discrimination statutes, *L.W. v. Toms River Sch. Bd.*, 915 A.2d 535, 547 (N.J. 2007).

3) Whether the expression is directed or targeted at a specific individual or individuals. *Carr v. Allison Gas Turbine Div.*, 32 F.3d 1007, 1010 (7th Cir. 1994).

4) The demeanor of the speaker when expressing the message. *Baskerville v. Culligan Intern. Co.*, 50 F.3d 428, 431 (7th Cir. 1995).

5) The context of the expression, including but not limited to (a) whether there is a pattern of expression, *Saxe*, 240 F.3d at 206 (emphasizing "frequency" and "the number of individuals involved"); (b) whether the expression is closely linked to unprotected conduct, including but not limited to violence or threats; (c) the time and place of the expression, such as whether the expression is relevant to a school assignment (such as classroom discussion); and/or (d) whether the school had already tried remedial efforts that have been ineffective in ensuring the education of all students, *L.W.*, 915 A.2d at 551.

The harassment test is contextual, depending on "a constellation of surrounding circumstances, expectations, and relationships." *Davis,* 526 U.S. at 651. Harassing words and conduct are not evaluated one by one, but are considered cumulatively. *Rodgers*, 12 F.3d at 675; *Theno*, 377 F. Supp. 2d at 968; *L.W.*, 915 A.2d at 409.

In some circumstances, a public high school need not wait for prohibited harassment to occur before taking appropriate action. Under *Tinker*, the issue is whether school authorities can "reasonably . . . forecast" the harm. 393 U.S. at 514. The schools' prerogative to make reasonable forecasts regarding the impact of derogatory speech provides appropriate "play in the joints" between, on the one hand, potential lawsuits brought by student speakers alleging excessive restriction of protected derogatory speech, and on the other hand, potential lawsuits brought by minority students alleging insufficient restriction of unprotected harassing speech. For example, there is no Title IX damage liability unless a student proves that the harassment burdened her education with a "concrete, negative effect," such as "dropping grades, becoming homebound or hospitalized due to harassment, or physical violence." *Gabrielle M. v. Park Forest-*

Chicago Heights Sch. Dist., 315 F.3d 817, 823 (7th Cir. 2003).[7] But a school need not delay restricting derogatory speech until after such harm has already occurred; rather, it can restrict such speech when there is a reasonable forecast of such harm.

In deciding whether derogatory speech crosses the line to unprotected harassment, public schools and courts should be mindful that freedom of thought and expression are indispensable to the pursuit of knowledge and the dialogue and dispute that characterize meaningful education. Among other things, students have the right to hold and to express views that others may find repugnant or offensive. *See Saxe*, 240 F.3d at 215.

Finally, First Amendment protection for certain kinds of derogatory class-based expression does not prevent public high schools from taking a host of actions to ensure the education of all students. Among other things, schools may:

1) Prohibit students from engaging in any unwanted touching of the body or personal property of another student, and from engaging in any threats of the same.

2) Prohibit faculty and other school employees from engaging in any in-school derogatory speech about protected classes.

3) Regularly incorporate tolerance and diversity into the curriculum.

4) Every time a student engages in protected in-school speech that disparages a protected class, publicly announce the school's position of tolerance. *See, e.g., Downs v. Los Angeles Sch. Dist.*, 228 F.3d 1003, 1014 (9th Cir. 2000) (stating that schools may "advocate" for "gay and lesbian awareness").

5) Encourage and openly support the formation of student clubs that promote tolerance and diversity, including but not limited to Gay Straight Alliances.

In short, schools usually should not turn in the first instance to the blunt instrument of censorship, which typically will be a far less effective tool than those listed

[7] In contrast, Title VII requires neither "tangible psychological injury," *Harris v. Forklift Sys., Inc.* 510 U.S. 17, 21-22 (1993), nor interference with work performance, *Dey v. Colt Constr. & Dev. Co.*, 28 F.3d 1446, 1454-55 (7th Cir. 1994).

above to create a school culture of tolerance and respect, and thereby to ensure equal educational opportunity for all students.

III. THE SPECIFIC APPLICATION OF *TINKER* TO THIS CASE.

A. Plaintiff's proposed expression.

On the presently undeveloped factual record, it is impossible to ascertain whether Mr. Nuxoll's planned expression will comprise harassment. Mr. Nuxoll has described his plans as follows:

> Because other students have communicated their support for homosexual behavior at NVHS, I wish to counter with my religious beliefs about homosexual behavior at NVHS. *For example*, I want to wear a t-shirt with the message "Be Happy, Not Gay" . . . . I want to express the message of "Be Happy, Not Gay" on the days following the "Day of Silence" at NVHS, as well as other times during these school years. I want to express this message through t-shirts and buttons. . . . In fact, I want to share this message as soon as possible . . . . I also want to bring my Bible to school, distribute cards with Bible verses during non-instructional time, and discuss my religious beliefs about homosexual behavior with classmates. I want to conduct these activities as soon as I can and at various times throughout the year . . . .

D. 43-10 at ¶¶ 9, 12, 13, 14 (emphasis added). *See also* Pl. Br. at p. 8 (similarly describing Mr. Nuxoll's expressive plans).[8]

Mr. Nuxoll's declaration of his intentions raises numerous unanswered questions. First, what will be the particular substance of his speech about his "religious beliefs about homosexual behavior"? He states that one "example" is "Be Happy, Not Gay," showing that he plans to express other messages, too. He specifically declares an intention to communicate "Bible verses" on this subject, but doesn't say which ones. It is unclear whether Mr. Nuxoll plans to express still other messages relating to homosexuality, and

[8] As used herein, "D" means the CM/ECF docket of the district court; and "Pl. Br." means Mr. Nuxoll's recent appellate brief.

whether any of those messages will include epithets or threatening language.[9] Second, with what frequency will Mr. Nuxoll express his beliefs? He variously states that he would like to express his messages on the day after each annual "Day of Silence"; at "other times during the school year"; and "as soon as possible." It is unclear whether he plans to engage in this speech most school days, or even every school day. Third, what is the medium of Mr. Nuxoll's expression? He variously identifies t-shirts, buttons, cards for distribution, and discussion with classmates. Fourth, will Mr. Nuxoll directly confront other students with any of these messages? Fifth, how many of Mr. Nuxoll's classmates will participate in the expression of these various messages, with what frequency, and by what means?

Without answers to any of these questions, it is impossible to apply the foregoing harassment standard to Mr. Nuxoll's planned expression. Accordingly, this Court should affirm denial Mr. Nuxoll's motion for a preliminary injunction protecting such undefined speech, and remand for further proceedings, including discovery.

B. Other matters.

Two other aspects of the factual record are now sufficiently clear to allow an application of the foregoing harassment legal standard.

First, plaintiffs earlier sought a preliminary injunction that would have allowed two students (Mr. Nuxoll and fellow plaintiff Heidi Zamecnik) on the day following the 2007 "Day of Silence" to wear t-shirts expressing their religious views regarding

[9] At least one Bible verse contain threatening language: read literally, Leviticus 20:13 seems to require that men who have sex with men "shall surely be put to death." *See* www.KingJamesBible.com. The ACLU of Illinois of course does not express an opinion on whether the Bible should be interpreted to condemn or affirm LGBT relationships.

homosexuality, apparently with the message "Be Happy, Not Gay." D. 8 at pp. 1-2; D. 43-2 at ¶¶ 21-23, 37; D. 43-3 at ¶¶ 9, 11. This proposed expression by itself would not constitute harassment, and thus would not violate the "rights of others" prong of *Tinker*: the content of the message is not severe; and two students on one day per year expressing the message by means of undirected t-shirts is not pervasive. *See Nixon*, 383 F. Supp. 2d at 967 (protecting a t-shirt stating "homosexuality is a sin, Islam is a lie"); *Chambers*, 145 F. Supp. 2d at 1074 (protecting a t-shirt stating "straight pride"); *Harper*, 445 F.3d at 1207 (Kozinski, J., dissenting) (opining that the court should protect a t-shirt stating "homosexuality is shameful"). *See generally supra* Part II(C).[10]

Second, defendant-appellee District 204 has adopted policies that broadly ban derogatory speech about protected classes. Specifically, its Policy #710.07 bans "garments or jewelry with messages, graphics, or symbols . . . which are derogatory . . . or discriminatory . . . ." D. 43-6 at p. 5. The student handbook quotes this policy. D. 43-7 at p. 2. The student handbook also bans "racial, ethnic or religious slurs, derogatory comments, innuendoes, or any other related action." D. 43-8. A school list of "examples of acts of misconduct" likewise prohibits "derogatory comments that refer to race, ethnicity, religion, gender, sexual orientation, or disability." D. 43-9 at p. 2. District 204 in this litigation has characterized the foregoing policies as "a prohibition against the use of slurs or derogatory comments that refer to race, ethnicity, religion, gender, sexual orientation or disability." D. 26 at pp. 3, 10. It also has taken the position that these policies prohibit two students from wearing the "Be Happy, Not Gay" shirt. *Id.* at p. 7.

[10] In light of the findings of the district court regarding the history at Mr. Nuxoll's school, *Zamecnik*, 2007 WL 1141597, *3, this expression also would not run afoul of the "disruption" prong of *Tinker*. *See supra* Part II(A).

Plaintiffs charge that these policies violate the First Amendment on their face. D. 47-3 at p. 17; Pl. Br. at p. 43-45. That is correct. These policies catch within their net a broad array of student expression that comprises protected speech, and not harassment. These policies thus directly contradict the measured and case-specific analysis required by *Tinker*. *See Broaderick v. Oklahoma*, 413 U.S. 601, 610-18 (1973) (discussing the substantial overbreadth doctrine). *See, e.g., Saxe*, 240 F.3d at 217 (striking down a school harassment policy); *Harper*, 445 F.3d at 1201-07 (Kozinski, J., dissenting) (opining that the court should have struck down a school harassment policy); *Morrison*, 507 F.3d at 505-06 (holding that a policy much like District 204's would violate *Tinker*). *See generally supra* Part II(C).

CONCLUSION

For the foregoing reasons, *amicus curiae* the ACLU of Illinois respectfully suggests that this Court do the following. First, this Court should hold that *Tinker* provides the applicable legal standard for public high schools and courts to evaluate on-campus student speech, including that which disparages protected classes. Second, this Court should hold that under *Tinker*, public high schools can restrict such speech on the grounds that it comprises unprotected "harassment" only if school officials reasonably forecast that such speech will be severe or pervasive enough to (i) significantly hinder a reasonable student in obtaining an education because of his or her protected identity category, or (ii) significantly harm a reasonable student's physical, mental, or emotional well-being because of his or her protected identity category. Third, because it is not possible on the presently undeveloped factual record to ascertain whether Mr. Nuxoll's expression will comprise unprotected harassment, this Court should affirm the district court's denial of Mr. Nuxoll's motion for a preliminary injunction, and remand for further proceedings, including discovery. Finally, when a court ultimately reaches the merits of District 204's speech policy, the policy should be struck down on its face.

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CERTIFICATE OF COMPLIANCE

As required by Fed. R. App. P. 32(a)(7)(C), I certify that this brief complies with the word limits for proportionally spaced briefs. It contains 6,834 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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CERTIFICATE OF SERVICE

I, ADAM SCHWARTZ, hereby certify that on the 15th day of February, 2008, I served the foregoing BRIEF OF AMICUS CURIAE, by Federal Express and facsimile, to the persons shown below:

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