No. 24-1770

In the United States Court of Appeals for the Ninth Circuit

B.B., a minor by and through her mother, Chelsea Boyle,

Plaintiffs-Appellants,

v.

CAPISTRANO UNIFIED SCHOOL DISTRICT; JESUS BECERRA, an individual in his individual and official capacities; CLEO VICTA, an individual in her individual and official capacities; and DOES 1 through 50, inclusive,

Defendants-Appellees.

On Appeal from the United States District Court
for the Central District of California
Honorable David O. Carter, District Judge

AMICUS BRIEF OF PARENTS DEFENDING EDUCATION IN SUPPORT OF APPELLANTS AND REVERSAL

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Amicus Curiae Parents Defending Education hereby certifies that it has no parent company and no publicly held corporation owns 10% more of its stock.

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INTEREST OF *AMICUS CURIAE*[1]

Parents Defending Education ("PDE") is a nationwide, grassroots membership organization whose members include parents, students, and other concerned citizens. PDE's mission is to prevent—through advocacy, disclosure, and, if necessary, litigation—the politicization of K-12 education, including government attempts to coopt parental rights and to silence students who express opposing views.

This case directly implicates PDE's mission, and its outcome will have real-world consequences for PDE's members. Students have First Amendment rights, and they do not "shed [them] at the schoolhouse gate." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969). The district court's legal errors affect the free-speech rights of students and thus the children of PDE's members. If the district court's decision is upheld, then K-12 students throughout the Ninth Circuit can suffer discrimination based on their viewpoints on important philosophical, religious, and political topics of our day. *Cf. Iancu v. Brunetti*, 588 U.S. 388, 393 (2019) ("[A] core postulate of free speech law: The government may not discriminate against speech based on the ideas or opinions it conveys."). PDE's mission is to prevent such outcomes.

[1] No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money intended to fund the brief's preparation or submission; and no person other than *amicus curiae* PDE contributed money intended to fund the brief's preparation or submission.

SUMMARY OF ARGUMENT

The Supreme Court has long recognized that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker*, 393 U.S. at 506. Yet when B.B., a first-grade student, wrote "any life" on her own drawing of "Black Lives Mat[t]er" to express her belief that all human life is equal in value, Capistrano Unified School District punished her and prohibited her from drawing again. The district court upheld the school's censorship because it reflexively deferred to the school administrators' determination that the speech was derogatory and not protected by the First Amendment.

The district court was wrong. To pass constitutional muster, the District's regulation of B.B.'s speech must, at a minimum, overcome two obstacles: (1) it must be viewpoint neutral; and (2) it must be consistent with the demanding *Tinker* standard. *See, e.g.*, *Barr v. Lafon*, 538 F.3d 554, 571 (6th Cir. 2008); *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1265-80 (11th Cir. 2004). But contra the district court, the District falls short of both.

***First*,** the District all but admits that it engaged in viewpoint discrimination. The District punished B.B.'s speech because of a generalized feeling that the viewpoint her speech conveyed could be "racially insensitive" or "hurt[ful]." *B.B. v. Capistrano Unified Sch. Dist.*, 2024 WL 1121819, at *4-5 (C.D. Cal. Feb. 22). But giving offense is a viewpoint, so punishing speech because it's insensitive or hurtful is viewpoint discrimination. Especially here because the District promoted speech on one side of the debate

(messages like "Black Lives Matter") while punishing the other side of that same debate (messages like "All Lives Matter"). The District's viewpoint discrimination alone requires reversal.

Second, to satisfy *Tinker*, the District must put forth "evidence that [the school's censoring is] necessary to avoid material and substantial interference with schoolwork" or "invasion of the rights of others." *Tinker*, 393 U.S. at 511, 513. That is a "demanding standard," which the District did not come even close to meeting. *Mahanoy Area Sch. Dist. v. B.L. ex rel. Levy*, 594 U.S. 180, 193 (2021). The District provided no evidence that any student was harmed in any way by B.B.'s speech or that any student would be reasonably expected to be injured by the speech, let alone injured beyond the mere discomfort from unpopular speech. But it's well-established that *Tinker* requires far more than hurt feelings or discomfort, even when the speech is deeply offensive or disparaging. *See, e.g.*, *C.R. v. Eugene Sch. Dist. 4J*, 835 F.3d 1142, 1152 (9th Cir. 2016); *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 210-17 (3d Cir. 2001) (Alito, J.).

For either reason, this Court should reverse the district court and hold that the District violated B.B.'s First Amendment rights.

ARGUMENT

I. The District has joined the growing trend of schools using speech codes to punish student speech on topics of public concern.

Race is a "sensitive political topi[c]" that is "undoubtedly [a] matte[r] of profound value and concern to the public." *Janus v. AFSCME*, 585 U.S. 878, 914 (2018) (cleaned up); *accord, e.g.*, *Meriwether v. Hartop*, 992 F.3d 492, 508 (6th Cir. 2021) ("[S]peech about

'race, gender, and power conflicts' addresses matters of public concern."); *Saxe*, 240 F.3d at 210 (speech about "values" lies "at the heart of moral and political discourse"). The First Amendment gives both sides the freedom to promote their beliefs in the marketplace of ideas, without the government tipping the scales. "[L]earning how to tolerate speech … of all kinds is 'part of learning how to live in a pluralistic society,' a trait of character essential to 'a tolerant citizenry.'" *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507, 538 (2022). Indeed, "tolerance, not coercion, is our Nation's answer. The First Amendment envisions the United States as a rich and complex place where all persons are free to think and speak as they wish, not as the government demands." *303 Creative LLC v. Elenis*, 600 U.S. 570, 603 (2023). This is especially true where, as here, the "speech occupies the highest rung of the hierarchy of First Amendment values and merits special protection." *Janus*, 585 U.S. at 914 (cleaned up).

Yet there's a growing trend of schools picking one side of the debate over the other. Schools are increasingly adopting speech codes that forbid students from sharing their deeply held convictions on race and other controversial topics. Speech codes prohibit expression that would be constitutionally protected outside school, punishing students for unpopular speech by labeling it "harassment," "bullying," "hate speech," or "incivility"—categories so broad that school officials can use them to punish speech based on one's firmly held views. *See Spotlight on Speech Codes 2021*, Foundation for Individual Rights in Education (FIRE) at 10, perma.cc/S22E-76Q3. But when speech codes impose vague, overbroad, or viewpoint-based restrictions on speech, they are

unconstitutional. *See, e.g.*, *Saxe*, 240 F.3d at 215-16 (K-12 speech policy punishing "harassment" was overbroad because it "prohibit[ed] a substantial amount of non-vulgar, non-sponsored student speech").[2]

Despite the Constitution, however, schools are not only adopting these codes but actively using them to crack down on speech involving controversial topics like race. For example, a student was forced to change because he was wearing a shirt that said, "There are only two genders." Hunter, *Student Continues Fight to Wear 'There Are Only Two Genders' Shirt in Appeals Court*, Wash. Exam'r (Feb. 7, 2024), perma.cc/E7GM-NF5P. Another student was reprimanded for wearing clothes that said, "Let's Go Brandon." *Students Sue After Michigan School District Forces Them to Remove 'Let's Go Brandon' Sweatshirts*, FIRE (Apr. 25, 2023), perma.cc/J3MJ-5AV8. Other examples abound. *E.g.*, Griffin, *Colorado Middle-Schooler Kicked Out of Class for 'Don't Tread on Me' Patch That Teacher Claims Originated with Slavery*, N.Y. Post (Aug. 30, 2023), perma.cc/5NA9-PGF3; Gstalter, *Principal Told Teen to Remove Trump 'MAGA' Apparel on School's 'America Pride*

[2] *See also, e.g.*, *PDE v. Linn Mar Cmty. Sch. Dist.*, 83 F.4th 658, 668-69 (8th Cir. 2023) (K-12 policy prohibiting "intentional and/or persistent refusal ... to respect a student's gender identity" was unconstitutional); *Flaherty v. Keystone Oaks Sch. Dist.*, 247 F. Supp. 2d 698, 701-04 (W.D. Pa. 2003) (speech policy prohibiting "abusive," "inappropriate," and "offen[sive]" language was overbroad); *Smith ex rel. Smith v. Mount Pleasant Pub. Schs.*, 285 F. Supp. 2d 987, 990, 995 (E.D. Mich. 2003) (speech policy prohibiting "verbal assault" was overbroad because it allowed "curtailment of speech that questions the wisdom or judgment of school administrators and their policies, or challenges the viewpoints of [other] students"); *Westfield High School L.I.F.E. Club v. City of Westfield*, 249 F. Supp. 2d 98, 123-24 (D. Mass. 2003) (school policy allowing only "responsible" speech was likely unconstitutional).

Day,' The Hill (Apr. 13, 2019), perma.cc/7X3M-D2PJ; Luca, *Colusa Teacher Threatens to Kick Student Out of Virtual Class Over 'Trump 2020' Flag*, ABC10 (Sept. 23, 2020), perma.cc/BKR4-658R; Daley, *High School Cheerleaders on Probation for Holding MAGA Sign at Football Game*, WCNC (Sept. 16, 2019), perma.cc/D46Y-ZKAL; Passoth, *Clark County School District Sued by Pro-Life Students Over Alleged First Amendment Violations*, Fox5 (Oct. 4, 2022), perma.cc/99M7-SUHZ.

In line with this trend, the District here punished speech only on one side of the race debate. According to the District, it's fine to express views promoting the idea that "Black Lives Matter," but it violates its speech code to express the view that "All Lives Matter." In short, the District has shut down one side of the debate, preventing all meaningful discussion on race.

II. The District unconstitutionally punished B.B.'s speech.

The framers designed the Free Speech Clause to "protect the 'freedom to think as you will and to speak as you think.'" *303 Creative*, 600 U.S. at 584. They did so because "they saw the freedom of speech 'both as an end and as a means.'" *Id.* "An end because the freedom to think and speak is among our inalienable human rights," and "[a] means because the freedom of thought and speech is indispensable to the discovery and spread of political truth." *Id.* (cleaned up). "[I]f there is any fixed star in our constitutional constellation, it is the principle that the government may not interfere with an uninhibited marketplace of ideas." *Id.* at 584-85 (cleaned up). The First Amendment thus protects "an individual's right to speak his mind regardless of whether the government

considers his speech sensible and well intentioned or deeply misguided, and likely to cause anguish or incalculable grief." *Id.* at 586 (cleaned up).

Students have First Amendment rights too, and they do not "shed" those rights "at the schoolhouse gate." *Tinker*, 393 U.S. at 506. America's public K-12 schools are "the nurseries of democracy," and "[o]ur representative democracy only works if we protect the 'marketplace of ideas.'" *Mahanoy*, 594 U.S. at 190. Schools must "ensur[e] that future generations understand the workings in practice of the well-known aphorism, 'I disapprove of what you say, but I will defend to the death your right to say it.'" *Id.*

Given these bedrock principles, the Supreme Court has recognized only four "specific categories of speech that schools may regulate in certain circumstances," *id.* at 187:

> (1) "'indecent,' 'lewd,' or 'vulgar' speech uttered during a school assembly on school grounds," *id.* (quoting *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986));
>
> (2) "speech, uttered during a class trip, that promotes 'illegal drug use,'" *id.* at 188 (quoting *Morse v. Frederick*, 551 U.S. 393, 408 (2007));
>
> (3) "speech that others may reasonably perceive as 'bearing the imprimatur of the school,' such as that appearing in a school-sponsored newspaper," *id.* (alteration omitted) (quoting *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988)); and
>
> (4) on-campus and some off-campus speech that "'materially disrupts classwork or involves substantial disorder or invasion of the rights of others,'" *id.* (quoting *Tinker*, 393 U.S. at 513).

Importantly, the fourth category requires schools to meet a "demanding standard." *Id.* at 193. This is an "objective inquiry." *N.J. ex rel. Jacob v. Sonnabend*, 37 F.4th

412, 426 (7th Cir. 2022). *Tinker* "places the burden of justifying student-speech restrictions squarely on school officials." *Id.* To justify barring speech, a school must "show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Tinker*, 393 U.S. at 509. "[U]ndifferentiated fear or apprehension of disturbance is not enough." *Id.* at 508. There's no "generalized 'hurt feelings' defense to a [K-12] school's violation of the First Amendment rights of its students." *Zamecnik v. Indian Prairie Sch. Dist. No. 204*, 636 F.3d 874, 877 (7th Cir. 2011). Instead, the school must "reasonably … forecast" that the speech at issue will cause "substantial disruption of or material interference with a school activity" or invade the rights of others. *Pinard v. Clatskanie Sch. Dist. 6J*, 467 F.3d 755, 759 (9th Cir. 2006).

But even if a school's speech regulation passes *Tinker*, the regulation may still violate the First Amendment for another reason. Regardless of whether the speech is disruptive or invades the right of another under *Tinker*, public schools cannot engage in "viewpoint discrimination." *Barr*, 538 F.3d at 571. In short, a school seeking to regulate student speech must show, at a minimum, that its regulation is (1) viewpoint neutral and (2) satisfies the demanding standard under *Tinker*. Here, the District flunks both requirements and thus violated the First Amendment.

A. The District impermissibly discriminated based on viewpoint.

"If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the

idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989). At all times, "[t]he government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Rosenberger v. Rector and Visitors of UVA*, 515 U.S. 819, 829 (1995). Time and again, the Supreme Court has reaffirmed that speech restrictions "based on viewpoint are prohibited." *Minn. Voters All. v. Mansky*, 585 U.S. 1, 11 (2018); *see, e.g.*, *Matal v. Tam*, 582 U.S. 218, 223 (2017) (plurality) ("Speech may not be banned on the ground that it expresses ideas that offend."); *Iancu*, 588 U.S. at 393 (same); *Am. Freedom Def. Initiative v. King Cnty.*, 904 F.3d 1126, 1131 (9th Cir. 2018) (same).

The First Amendment's prohibition on viewpoint discrimination applies no differently in the public-school setting. Thus, even if a school's regulation is "consistent with ... the *Tinker* standard," it will still be unconstitutional if it fails the Supreme Court "prohibition on viewpoint discrimination." *Barr*, 538 F.3d at 571; *e.g.*, *Speech First v. Cartwright*, 32 F.4th 1110, 1127 n.6 (11th Cir. 2022) ("[E]ven if [the school] could (per *Tinker*) restrict harassing speech that disrupts the school's functions, it couldn't do so, as it has here, based on the viewpoint of that speech."); *Holloman*, 370 F.3d at 1280 ("[T]his fundamental prohibition against viewpoint-based discrimination extends to public schoolchildren."); *cf. Nurre v. Whitehead*, 580 F.3d 1087, 1095 n.6 (9th Cir. 2009) (indicating that viewpoint-based discrimination would independently violate the First Amendment even when the *Tinker* standard was satisfied); *Waln v. Dysart Sch. Dist.*, 54 F.4th 1152, 1163 n.7 (9th Cir. 2022) (same).

This makes sense. After all, viewpoint discrimination is an "'egregious form of content discrimination.'" *Iancu*, 588 U.S. at 393. It's "poison to a free society." *Id.* at 399 (Alito, J., concurring). And it's "the greatest First Amendment sin." *Honeyfund.com Inc. v. Governor*, 94 F.4th 1272, 1277 (11th Cir. 2024). For this reason, "[t]he Supreme Court has consistently held that the government may not regulate on the basis of viewpoint *even within a category of otherwise proscribable speech*." *Cartwright*, 32 F.4th at 1127 n.6 (emphasis added) (citing R.*A.V. v. City of St. Paul*, 505 U.S. 377, 383-90 (1992)). So "regardless of whether [a student's] expression [i]s constitutionally protected in itself," the student still "has the First Amendment right to be free of viewpoint-based discrimination and punishment." *Hollman*, 370 F.3d at 1265. Meeting *Tinker*'s standard thus doesn't save viewpoint-discriminatory restrictions. *Cartwright*, 32 F.4th at 1127 n.6.

The District effectively concedes that it punished B.B. because of the viewpoint she expressed. Because the official thought messages like "All Lives Matter" are "racist," the District punished B.B. *See* Dist. Ct. Doc. 77 at 3, #9-10 (school official punished B.B. because "the drawing was 'inappropriate' *and* 'racist'"); *Capistrano*, 2024 WL 1121819, at *1 ("Becerra told B.B. that the Drawing was 'inappropriate' and 'racist.'"). The district court also recognized that the District doled out punishment based on the viewpoint B.B. conveyed, explaining that the District punished B.B.'s drawing because it "included a phrase similar to 'All Lives Matter' … that is widely perceived as racially insensitive." *Id.* at *4-5. That's textbook viewpoint discrimination. "Giving offense is a viewpoint," and silencing speech because it could offend "is viewpoint discrimination."

Matal, 582 U.S. at 243; *see, e.g.*, *Iancu*, 588 U.S. at 393 ("the government cannot discriminate against 'ideas that offend'"); *Child Evangelism Fellowship of New Jersey Inc. v. Stafford Twp. Sch. Dist.*, 386 F.3d 514, 527 (3d Cir. 2004) (Alito, J.) ("To exclude a group simply because it is controversial or divisive is viewpoint discrimination. A group is controversial or divisive because some take issue with its viewpoint."). The District also "'disapprov[es] of a subset of messages it finds offensive.'" *Iancu*, 588 U.S. at 393. The district court's legal rule confirms as much. In that court's view, "whe[n] speech is directed at a 'particularly vulnerable' student based on a 'core identifying characteristic,' such as race, sex, religion, or sexual orientation, educators have greater leeway to regulate it." *Capistrano*, 2024 WL 1121819, at *3. In other words, schools can punish speech based on "minority" characteristics but not other characteristics.

That the District permits (indeed, promotes) the other side of the race debate confirms that the District's censorship of B.B.'s speech is viewpoint discriminatory. The District apparently had no issue with the portion of B.B.'s drawing saying "Black Lives Mat[t]er," which is itself political speech associated with a controversial political movement. The District also had a "picture displayed that included the phrase 'Black Lives Matter,' along with a cl[e]nched fist, that B.B. saw every day." Opening Br. (Doc. 10.1) at 2 (citing ER-102–03). And B.B.'s drawing occurred shortly after B.B.'s "teacher … introduced B.B. to the concept of 'Black Lives Matter.'" *Id.* (citing ER-95-97; ER-102–03). Simply put, the District "license[s] one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules." *R.A.V.*, 505 U.S. at 392.

But allowing B.B. to write a phrase associated with one side of a controversial debate but punishing her for writing a phrase associated with the other side of that same debate violates the First Amendment.

In short, the District cannot censor B.B.'s speech just because it disagrees with her message. "To hold differently would be to treat [B.B.'s] expression as second-class speech and eviscerate th[e] [Supreme] Court's repeated promise that [students] do not 'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.'" *Kennedy*, 597 U.S. at 531 (quoting *Tinker*, 393 U.S. at 506). The District's viewpoint discrimination alone requires reversing the district court.

B. The District also failed to meet its burden under *Tinker*.

The District's regulation of B.B.'s speech violates *Tinker*, which itself requires reversing the district court. Everyone agrees that this case involves "pure speech" and, at a minimum, "is governed by *Tinker*." *Capistrano*, 2024 WL 1121819, at *3. To pass *Tinker*, the District must put forth "*evidence* that [prohibiting the speech] is *necessary* to avoid material and substantial interference with schoolwork" or "invasion of the rights of others." *Tinker*, 393 U.S. at 511, 513 (emphases added). *Tinker* is a "demanding standard." *Mahanoy*, 594 U.S. at 193. "*Tinker* places the burden on the school to justify student speech restrictions." *Norris ex rel. A.M. v. Cape Elizabeth Sch. Dist.*, 969 F.3d 12, 25 (1st Cir. 2020) (collecting cases). This is an "objective inquiry." *Jacob*, 37 F.4th at 426.

The district court upheld the District's punishment solely on the invasion-of-the-rights-of-others prong. In its view, the District met this prong because (1) the First

Amendment doesn't cover "politically controversial topics" when that speech is deemed "derogatory" by school officials and (2) the district court had to defer to the "schoolteachers'" assertion that the speech was not worthy of First Amendment protection. *Capistrano*, 2024 WL 1121819, at *3-5. The district court's reasoning is deeply flawed and would permit schools to censor a great deal of First Amendment-protected speech on a school's mere say-so. The First Amendment requires far more.

1. There is no First Amendment exception to derogatory or denigrating speech. The First Amendment protects offensive speech, especially when the speech concerns controversial topics of our day. Regardless, here, the District provided no significant evidence that punishing phrases like "All Lives Matter" is necessary to prevent the invasion of the rights of others.

a. Contra the district court, the invasion-of-the-rights-of-others prong does not cover any speech that some subset might consider "derogatory" or "denigrat[ing]." *Capistrano*, 2024 WL 1121819, at *3. And rightly so because such a principle would be akin to a prohibition on speech that merely offends a potential listener. Though "[t]he precise scope of *Tinker*'s 'interference with the rights of others' language is unclear," it is "certainly not enough that the speech is merely offensive to some listener." *Saxe*, 240 F.3d at 217.[3] This circuit has held as much: "[S]peech that 'is merely offensive to some

[3] *See, e.g.*, *Wynar v. Douglas Cnty. Sch. Dist.*, 728 F.3d 1062, 1072 (9th Cir. 2013) (same); *Linn Mar*, 83 F.4th at 667 (same); *Kuhlmeier v. Hazelwood Sch. Dist.*, 795 F.2d 1368, 1376 (8th Cir. 1986), *rev'd on other grounds*, 484 U.S. 260 (1988) ("school officials are

listener' ... does not fall within *Tinker*'s scope." *C.R.*, 835 F.3d at 1152; *accord Saxe*, 240 F.3d at 215 ("The Supreme Court has held time and again, both within and outside of the school context, that the mere fact that someone might take offense at the content of speech is not sufficient justification for prohibiting it."). Even "disparaging" or "deeply offensive" speech, "including statements that impugn another's race," is protected. *See id.* at 206; *Zamecnik*, 636 F.3d at 878 ("There is no doubt that the slogan ['Be Happy, Not Gay'] is disparaging. But it is not the kind of speech that would materially and substantially interfere with school activities." (cleaned up)). So a contention that some students might encounter speech that could "hurt" or be perceived as "insensitive"—*i.e.*, speech that merely offends the listener—is insufficient to meet the invasion prong. *Capistrano*, 2024 WL 1121819, at *4.

It is no answer to say that a desire to avoid "harassment" justifies punishing B.B. *Capistrano*, 2024 WL 1121819, at *5. As then-Judge Alito explained in a famous student-speech case, there is no First Amendment exception for "harassing" or "discriminatory" speech. *Saxe*, 240 F.3d at 209-10. The government "cannot avoid the strictures of the First Amendment simply by defining certain speech as 'bullying' or 'harassment'" or discrimination. *Linn Mar*, 83 F.4th at 667. "There is no categorical 'harassment exception' to the First Amendment's free speech clause." *Saxe*, 240 F.3d at 204. "Anti-discrimination laws and policies serve undeniably admirable goals, but when those goals

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justified in limiting student speech, under [the invasion-of-the-rights-of-others] standard, only when publication of that speech could result in tort liability for the school").

collide with the protections of the Constitution, they must yield—no matter how well-intentioned." *Fellowship of Christian Athletes v. San Jose Unified Sch. Dist. Bd. of Educ.*, 82 F.4th 664, 695 (9th Cir. 2023) (en banc); *accord Green v. Miss USA, LLC*, 52 F.4th 773, 792 (9th Cir. 2022). Thus, neither a court nor a school may point to discrimination, bullying, or harassment generally to justify censoring speech. Far more is needed to justify restricting speech under *Tinker*. The District failed to satisfy that high bar here.

The District put forth no meaningful evidence that any student was harmed by the speech, let alone "serious[ly] or severe[ly]." *Mahanoy*, 594 U.S. at 188. At most, the District pointed to the testimony of the mother of the student B.B. gave her drawing to who said that messages like "All Lives Matter" can "hurt." *Capistrano*, 2024 WL 1121819, at *4. But vague, subjective, and unsubstantiated statements made by an upset parent of the listening student are wholly insufficient to meet the District's demanding burden under *Tinker*. If it were otherwise, then any parent could veto the First Amendment because she didn't like what a student said to her child. That can't be right.

But even if the statement from M.C.'s mother was relevant, its significance is not. There's no "generalized 'hurt feelings' defense to a [public] school's violation of the First Amendment rights of its students." *Zamecnik*, 636 F.3d at 877. Evidence that speech might "hurt" is not enough to justify prohibiting speech, let alone showing that it was "*necessary*" to punish the speaker as well. *Tinker*, 393 U.S. at 511, 513 (emphasis added).

The district court's reliance on the general dialogue around the slogans "Black Lives Matter" and "All Lives Matter" is similarly insufficient. *Capistrano*, 2024 WL 1121819, at *4 n.4.[4] *Tinker* "requires a specific and significant fear of disruption [or invasion of rights of others], not just some remote apprehension." *Saxe*, 240 F.3d at 211. But general evidence of an ongoing discussion is not evidence of a "specific and significant fear" of harm *at the school*. *Id.* The district court's conclusory footnote asserting that B.B.'s speech "can be seen as an offensive response to BLM" is nothing more than "mere speculation" that simply "won't do." *Jacob*, 37 F.4th at 426. At best, the District restricted B.B.'s speech based on "a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Tinker*, 393 U.S. at 509. And it did so without providing evidence that any student was harmed in any way by B.B.'s speech or any persuasive evidence to support a reasonable expectation of an invasion of the right of another. *See id.*

b. The district court resisted these conclusions by relying on cases like *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166 (9th Cir. 2006), and *PDE v. Olentangy Loc. Sch. Dist. Bd. of Educ.*, 684 F. Supp. 3d 684 (S.D. Ohio 2023). There are many problems with the court's reliance.

[4] Appellants argue that "nothing in the record" shows that adding "any life" to a "Black Lives Matter" drawing is "similar in any meaningful way" to the phrase "All Lives Matter." Opening Br. (Doc. 10.1) at 15. As PDE explains, even if this Court disagrees with Appellants, the District still violated the First Amendment by either discriminating based on viewpoint or not overcoming *Tinker*'s demanding burden.

Start with *Harper*. That opinion is nonbinding, wrongly decided, and at any rate, distinguishable. *Harper* is nonbinding because the Supreme Court vacated *Harper* as moot, 549 U.S. 1262 (2007), voiding that Ninth Circuit decision. Yet the district court followed *Harper* as if it were binding, never questioning if the decision aligned with prevailing precedent. *See Capistrano*, 2024 WL 1121819, at *3-4. The now-void majority opinion is also wrong. There, the majority concluded that schools could regulate "derogatory and injurious remarks directed at students' minority status such as race, religion, and sexual orientation" under the invasion prong. *Harper*, 445 F.3d at 1183. But neither the Constitution nor Supreme Court precedent justified the panel majority's new exception to students' free-speech rights. As the dissent explained: "The 'rights of others' language in *Tinker* 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." *Id.* at 1198 (Kozinski, J., dissenting). The invasion prong, the dissent emphasized, does not give school administrators "the power to define the First Amendment rights of students out of existence by giving others the right not to hear that speech." *Id.* Thus, even under the invasion prong, "[n]ot all statements that demean other students can be banned by schools," and "'school officials are not free to decide that only one side of a topic is open for discussion because the other side is too repugnant or demoralizing to listen to.'" *Id.* at 1200-01. Yet that is precisely what the district court sanctioned here. This Court can—and should—reject the reasoning of the nonbinding majority opinion in *Harper* and avoid the "innumerable

problems" from adopting a rule that "derogatory" speech involving a "minority" is unprotected speech. *Id.* at 1201.

In any event, *Harper* is critically different from the case here for at least two reasons. First, *Harper* concerned a t-shirt with the words "Homosexuality Is Shameful Romans 1:27" on it. *Id.* at 1171 (majority) (cleaned up). In contrast, B.B.'s message was merely that "any life" matters. This message is not inherently "degrad[ing]" and represents no "verbal assaul[t]." *Id.* at 1178, 1181. Quite the opposite. The district court even acknowledged its "inclusive denotation." *Capistrano*, 2024 WL 1121819, at *4. Second, *Harper* made clear that the school's actions were only constitutionally permissible because they were "no more than necessary to prevent the intrusion on the rights of other students. Aside from prohibiting the wearing of the shirt, the School did not take the additional step of punishing the speaker." 445 F.3d at 1183. Yet the District here exceeded what *Harper* says is "necessary"—taking the unconstitutional action of punishing B.B. for her pure speech.

The district court's reliance on *Olentangy* fares worse. That decision is on appeal, *see* No. 23-3630 (6th Cir.), and for the reasons PDE and its many amici explain, *see, e.g.*, Doc. 28 (opening brief); Doc. 79 (reply brief); Doc. 60 (FIRE brief); Doc. 47 (ACLU brief), the district court's decision is deeply flawed and is likely to be reversed. As the ACLU explained, "[y]outh and inexperience are not justifications for the government to suppress student expression…. When students encounter ideas from others that they find challenging or even offensive, the appropriate role of the school generally is not to

shield them by way of selective suppression. Its role is to teach students how to engage in discourse, a skill they will need in adult society: how to engage with, adapt to, reject, or seek to change views with which they disagree." *Id.* at 1. The District there, as here, flunked its obligation.

Holding otherwise would mean students *do* "shed their constitutional rights … at the schoolhouse gate." *Tinker*, 393 U.S. at 506. "[D]iscomfort and unpleasantness" will "always accompany an unpopular viewpoint." *Id.* at 509. "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." *Id.* at 508. "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." *Id.* at 508-09 (citation omitted). So courts cannot simply relabel that discomfort an "interference with the rights of others." *Capistrano*, 2024 WL 1121819, at *3. Allowing courts to do so—as the district court did here—would eviscerate students' essential First Amendment rights. And it would allow public schools to ignore their duty to expose students to unpopular expression. *See Mahanoy*, 594 U.S. at 190 (schools must "protect the 'marketplace of ideas,'" and "[t]hat protection must include the protection of unpopular ideas"); *id.* at 195 (Alito, J., concurring) ("public schools have the duty to teach students that freedom of speech, including unpopular speech, is essential to our form of self-government").

2. The district court concluded that it must blindly defer to school administrators' determinations on whether the speech is harmful, will offend peers, and is not protected by the First Amendment. It claimed that it was okay to abdicate its duty to adjudicate constitutional issues because schools are better situated than courts to decide whether speech like "All Lives Matter" should be punished and because B.B. is in elementary school, not high school. The district court is wrong.

a. Per the district court, unyielding "deference to schoolteachers is especially appropriate" here because "today … what is harmful or innocent speech is in the eye of the beholder." *Capistrano*, 2024 WL 1121819, at *4. If anything, the court's "eye of the beholder" rationale proves its view is wrong. *Tinker* is an "*objective* inquiry," *Jacob*, 37 F.4th at 426 (emphasis added), but the court's deference hinges on a subjective justification. The First Amendment would mean little if protection disappeared based solely on the listener's subjective reaction and school administrator's mere say-so. In any event, the district court also claimed that "[t]eachers are far better equipped than federal courts at identifying when speech crosses the line from harmless schoolyard banter to impermissible harassment." *Capistrano*, 2024 WL 1121819, at *5. But precedent teaches that courts can't abdicate their duty to decide constitutional issues: The Supreme Court has "been unmistakably clear that any deference must exist within constitutionally prescribed limits, and that deference does not imply abandonment or abdication of judicial review." *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 217 (2023) (cleaned up). "'[T]rust us'" is not good enough. *Id.* Yet the district court

did precisely that. It abandoned judicial review and did not hold the District to the same review as everyone else. If the district court had, it would have concluded that the District did not come close to overcoming its demanding burden here.

This is not to downplay or dismiss the odious nature of racial discrimination or racial harassment. But the district court blindly deferred to the judgment of school administrators that conflated (without support) such harassment and discrimination with the speech that B.B. expressed. There is no evidence that B.B. wishes to bully or harass anyone at school. Rather, B.B.'s only desire was to express her belief that all human life is valuable and show children of all races getting along. The district court agreed that B.B.'s intention was "innocent." *Capistrano*, 2024 WL 1121819, at *4. And the district court never cited any evidence that any student was adversely affected by the drawing or was reasonably expected to be.

b. The district court also acknowledged that it reached its result only by "[g]iving great weight to the fact that the students involved were in first grade." *Capistrano*, 2024 WL 1121819, at *4. The court's use of age is deeply flawed.

To begin with, that students are younger does not exempt the school from *Tinker*'s demanding burden. As Appellants point out, *Barnette* involved students who were "eight- and eleven-years-old at the time the controversy began," and *Tinker* involved a "thirteen-year-old in junior high school." Opening Br. (Doc. 10.1) at 17-18 (citing, *e.g.*, *W.V. St. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943); *Tinker*, 393 U.S. at 504).

The district court's "high schoolers only" rule for the First Amendment thus conflicts with landmark Supreme Court precedents.

The district court also seemed to think that an "elementary school" cannot be part of the "'marketplace of ideas,'" so "the downsides of regulating speech there is not as significant as it is in high schools, where students are approaching voting age and controversial speech could spark conducive conversation." *Capistrano*, 2024 WL 1121819, at *4. But that thought doesn't withstand scrutiny. The school had a "picture displayed that included the phrase 'Black Lives Matter,' along with a cl[e]nched fist, that B.B. saw every day," and "B.B.'s teacher … introduced B.B. to the concept of 'Black Lives Matter.'" Opening Br. (Doc. 10.1) at 2 (citing ER-95–97; ER-102–03). Plus, that B.B. made the drawing in the first place—adding the phrase "any life" to the "Black Lives Mat[t]er" slogan—shows that B.B. is "aware" of race and racial differences. In short, "nothing in the first amendment postpones the right of … speech until high school." *Hedges v. Wauconda Comm. Sch. Dist. No. 18*, 9 F.3d 1295, 1298 (7th Cir. 1993).

It's true this Court has said that the age of the "targeted studen[t]" is "relevant to the analysis." *C.R.*, 835 F.3d at 1153. But the speech is not *targeted* here. "A general statement of" an opinion "is vastly and qualitatively different from bullying that targets and invades the rights of an individual student." *Doe v. Hopkinton Pub. Sch.*, 19 F.4th 493, 506 (1st Cir. 2021). A statement like "All Lives Matter" is such a general opinion protected by the First Amendment regardless of the students' ages. In any event, *C.R.* concerned speech that was "sexual harassment" by an older student to "younger" students,

835 F.3d at 1147, and this Court concluded that sexually explicit speech and harassment can be uniquely "damaging to [a] less mature audience," *id.* at 1153 (cleaned up). But nothing about the speech here involves "harassment" about "human sexuality" or any similar topic.

CONCLUSION

This Court should reverse the district court.

Dated: July 22, 2024

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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9th Cir. Case Number(s) 24-1770

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I certify that on July 22, 2024, I electronically filed the foregoing with the Clerk of Court using the CM/ECF System, which will automatically send email notification to all counsel of record.

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