

No. 07-55224

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

Tyler Chase Harper, et al.
Plaintiffs-Appellants

v.

Poway Unified School District, et al.
Defendants-Appellees

**Appeal from the United States District Court
for the Southern District of California
The Honorable John A. Houston, Presiding
District Court No. CV-04-1103**

**BRIEF *AMICUS CURIAE* OF
AMERICAN CIVIL LIBERTIES UNION OF
SAN DIEGO & IMPERIAL COUNTIES
IN SUPPORT OF PLAINTIFFS-APPELLANTS
AND REVERSAL OF JUDGMENT**

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CORPORATE DISCLOSURE STATEMENT

Undersigned counsel for amicus curiae American Civil Liberties Union of San Diego & Imperial Counties (ACLU-SDIC) states that ACLU-SDIC is a California non-profit corporation with no parent, subsidiary, or stock held by any person or entity, including any publicly held company.

DATED: April 2, 2008

David Blair-Loy
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INTRODUCTION

Poway High School's policies ban student speech deemed "offensive," "negative," or "derogatory" on numerous grounds. In 2004, on the day after the School allowed a Day of Silence sponsored by the Gay-Straight Alliance, the School relied on its policies to prohibit Chase Harper from displaying a shirt that said, "Be ashamed. Our school embraced what God has condemned.... Homosexuality is shameful. Romans 1:27."

This important free speech case has returned here after the court's earlier opinion was vacated as moot. Appellants present a question previously reserved by the court – whether the School's speech policies are unconstitutional on their face. This brief addresses a central issue in that inquiry – whether the policies can be justified on the ground they restrict speech that invades the rights of other students. The court previously discussed "invasion of rights of others" at length. The court's analysis is appropriate in some aspects, though it requires certain refinements to protect both freedom of speech and equal educational opportunity. A careful balancing of free speech and equal opportunity leads to the conclusion that the policies violate the First Amendment.

It is proper to recognize the unconscionable harassment suffered by many lesbian, gay, bisexual, and transgender (LGBT) students. Under *Tinker*, it is also appropriate to analyze invasion of rights of others independently of material and

substantial disruption. However, it is respectfully suggested the previous opinion's discussion of that issue undermines the First Amendment while doing little to prevent harassment.

Of course, schools have the right and duty to protect students from unlawful harassment. But they may not prohibit the expression of an idea, as Poway High School does, merely because it is offensive or repugnant to some or many. The function of education "is to stimulate thought, to explore ideas, to engender intellectual exchanges. Bad ideas should be countered with good ones, not banned by the courts." *Monteiro v. Tempe Union High Sch. Dist.*, 158 F.3d 1022, 1032 (9th Cir. 1998).

Though a school may advocate its own position, it may not ban student speech because it finds the speech offensive or disapproves of the student's viewpoint. To ban ideas because they are controversial strikes at the heart of the First Amendment and the spirit of open discourse essential to public education in a democratic republic. The "vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Healy v. James*, 408 U.S. 169, 180 (1972) (internal quotations omitted). If it is to retain any force in public schools, the First Amendment must protect the ideas of both Chase Harper and the Gay-Straight Alliance.

The mere expression of an idea, without more, cannot amount to prohibited harassment or invade the rights of others. In certain circumstances, some forms of speech may contribute to prohibited harassment and invade the rights of other students. However, a school may not ban the peaceful expression of an idea, standing alone, in the name of anti-harassment. In any case, it is doubtful a school can solve the problem of harassment merely by banning certain speech, and the court should not suggest otherwise, even inadvertently.

INTEREST OF AMICUS CURIAE

The American Civil Liberties Union (“ACLU”) is a nationwide, nonprofit, nonpartisan organization with more than 550,000 members dedicated to the principles of liberty and equality embodied in the Constitution. The American Civil Liberties Union of San Diego & Imperial Counties is one of the ACLU’s local affiliates, with roughly 8,000 members. Since its founding in 1920, the ACLU has frequently defended the First Amendment, both as direct counsel and as amicus curiae in courts throughout the country. In particular, the ACLU is regularly involved in cases involving both freedom of speech and equal educational opportunity for public school students.

The ACLU submits this brief to discuss the proper balance between freedom of speech and equal educational opportunity in analyzing whether and how

“invasion of rights of others” may justify regulating student speech. All parties to this appeal have consented to the ACLU’s submission of this brief.

ARGUMENT

A policy restricting speech is “unconstitutional on its face if it prohibits a substantial amount of protected expression.”¹ *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 244 (2002); *see also Sypniewski v. Warren Hills Reg’l Bd. of Educ.*, 307 F.3d 243, 259 (3d Cir. 2002) (school speech policy overbroad if likely that its “very existence will inhibit free expression to a substantial extent”). Though courts might not require “the same level of precision in drafting school disciplinary policies as is expected” in drafting criminal laws, speech codes “are disfavored under the First Amendment because of their tendency to silence or interfere with protected speech.” *Sypniewski*, 307 F.3d at 260.

¹ Appellants do not concede Mr. Harper’s speech was unprotected. “Technically, the overbreadth doctrine does not apply if the parties challenging the [policy] engage in the allegedly protected expression. This does not mean that plaintiffs cannot challenge [the policy] on its face, however, if the [policy] restricts their own constitutionally protected conduct. Plaintiffs may seek directly on their own behalf the facial invalidation of overly broad [policies] that ‘create an unacceptable risk of the suppression of ideas’; thus, whether the ‘overbreadth doctrine’ applies to their First Amendment challenge is more of a technical academic point than a practical concern.” *Nunez v. City of San Diego*, 114 F.3d 935, 949-50 (9th Cir. 1997) (citations omitted). Since Mr. Harper’s message was censored and other appellants are chilled from expressing a similar message in the future, appellants show both “injury in fact and ability satisfactorily to frame the issues in the case” and thus have standing. *Clark v. City of Lakewood*, 259 F.3d 996, 1011 (9th Cir. 2001).

The School’s policies ban “[n]egative comments ... based on race, ethnicity, sexual orientation, religion, or gender ... symbols or words considered offensive to persons of a specific gender, race, ethnicity, religion, sexual orientation, or the mentally or physically challenged ... exalting own gender, race, ethnicity, religion, sexual orientation, or mental or physical status ... derogatory connotations toward sexual identity ... [or] unwanted or unwelcome behavior ... that interferes with another individual’s life.” *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1202-03 (9th Cir. 2006) (Kozinski, J., dissenting), *vacated*, 127 S. Ct. 1484 (2007) (*Harper I*). The policies survive only if they restrict speech that “materially disrupts classwork or involves substantial disorder or invasion of the rights of others.”² *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969).

The School prohibits any speech deemed “offensive,” “negative,” or “derogatory,” no matter how peaceful. The policies ban even “silent, passive expression of opinion, unaccompanied by any disorder or disturbance.” *Tinker*, 393 U.S. at 508. Therefore, they cannot be justified as necessary to prevent substantial disruption, which requires more than the “mere desire to avoid the

² The policies reach far beyond the exceptions to *Tinker*: school-sponsored or vulgar speech or advocacy of illegal drug use. *See Morse v. Frederick*, 127 S. Ct. 2618, 2626-29 (2007). *Morse* stands “at the far reaches of what the First Amendment permits” and cannot justify censorship beyond the “grave and in many ways unique threat” of illegal drug use. *Id.* at 2638 (Alito, J., concurring).

discomfort and unpleasantness that always accompany an unpopular viewpoint.”³
Id. at 509; *see also Chandler v. McMinnville Sch. Dist.*, 978 F.2d 524, 531 (9th Cir. 1992) (“The passive expression of a viewpoint ... ‘is certainly not in the class of those activities which inherently distract students and break down the regimentation of the classroom.’”). Because the challenged policies do not require material disruption or substantial disorder, they must stand or fall on whether they properly regulate speech that invades the rights of others under *Tinker*.

I. THOUGH “INVASION OF RIGHTS OF OTHERS” REQUIRES INDEPENDENT ANALYSIS, THE MERE EXPRESSION OF AN IDEA CANNOT INVADE THE RIGHTS OF OTHERS UNDER *TINKER*.

Most student speech cases center on substantial disruption. However, invasion of rights of others must be analyzed independently. *See Tinker*, 393 U.S. at 508-13 (speech in “collision with the rights of other students,” or that would “impinge upon the rights of other students,” or result in “invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of

³ The events surrounding Mr. Harper’s message undermine any claim the policies are justified by a history of substantial disruption. *Cf. Sypniewski*, 307 F.3d at 262. Mr. Harper displayed his message for two days, one of which was the 2004 Day of Silence, and the only reaction was “students off-task talking about the shirt” and what may have been a “tense verbal conversation” or “peaceful discussions wherein differing viewpoints were communicated.” *Harper I*, 445 F.3d at 1171-72 & n.5. This is not substantial disruption. *Tinker*, 393 U.S. at 508 (“hostile remarks” do not justify censorship).

speech”). It is proper to discuss invasion of rights of others in light of the evolving intersection of free speech and equal educational opportunity. However, careful definition is required to ensure invasion of rights of others does not become an exception that swallows the rule.

A. The “rights of others” may include freedom from unlawful harassment, under clearly established and defined anti-harassment law developed after *Tinker* was decided.

Few “courts have defined the parameters of ‘invasion of the rights of others.’” *Kuhlmeier v. Hazelwood Sch. Dist.*, 795 F.2d 1368, 1375 (8th Cir. 1986), *rev’d on other grounds*, 484 U.S. 260 (1988). The *Tinker* Court did not discuss the issue in detail. It noted only that students wearing black armbands to protest the Vietnam War “neither interrupted school activities nor sought to intrude in the school affairs or the lives of others.” 393 U.S. at 514.

As a result, the “precise scope of *Tinker*’s ‘interference with the rights of others’ language is unclear.” *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 217 (3d Cir. 2001). *Tinker* apparently took the language from *Blackwell v. Issaquena*, 363 F.2d 749 (5th Cir. 1966), where some students accosted others and pinned buttons to their clothing. On those facts, *Blackwell* upheld a school regulation forbidding students to wear the buttons in light of the “commotion, boisterous conduct, [and] collision with the rights of others” associated with the buttons. 363 F.2d at 754.

Invasion of rights of others should not be confined to the physical accosting that occurred in *Blackwell*. However, it must be carefully limited to protect freedom of speech while ensuring equal educational opportunity. Education includes learning to understand and respond to controversial ideas:

Maintaining a school community of tolerance includes the tolerance of such viewpoints as expressed by “Straight Pride.” While the sentiment behind the “Straight Pride” message appears to be one of intolerance, the responsibility remains with the school and its community to maintain an environment open to diversity and to educate and support its students as they confront ideas different from their own.

Chambers v. Babbitt, 145 F. Supp. 2d 1068, 1069, 1073 (D. Minn. 2001). Students benefit from “an environment where they can openly express their diverging viewpoints and when they learn to tolerate the opinions of others.” *Barber v. Dearborn Pub. Schs.*, 286 F. Supp. 2d 847, 858 (E.D. Mich. 2003).

With those precepts in mind, the court should recognize that if “rights of others” is “to have any content, it must be limited to rights that are protected by law. ‘Any yardstick less exacting than [that] could result in school officials curtailing speech at the slightest fear of disturbance,’ a prospect that would be completely at odds with this Court’s pronouncement that the ‘undifferentiated fear or apprehension of disturbance is not enough [even in the public school context] to overcome the right to freedom of expression.’” *Hazelwood*, 484 U.S. at 289 (Brennan, J., dissenting) (citations omitted).

As stated elsewhere, “Limiting school action under the invasion-of-rights justification to torts or potential torts means that a school can refer to previously defined legal standards to decide if it may constitutionally restrain student expression ... [S]chool officials are justified in limiting student speech, under this standard, only when ... that speech could result in tort liability for the school.”

Kuhlmeier, 795 F.2d at 1375-76.

Of course, state tort law cannot define the First Amendment out of existence by declaring speech unlawful. Because *Tinker* is a First Amendment decision, it must be interpreted under constitutional standards, with due regard for the unique context of public education.

Therefore, at a minimum, “rights of others” could include “traditional rights, such as those against assault, defamation, invasion of privacy, extortion and blackmail, whose interplay with the First Amendment is well established.” *Harper I*, 445 F.3d at 1198 (Kozinski, J., dissenting). On this rationale, “fighting words” or “true threats,” *see, e.g., Virginia v. Black*, 538 U.S. 343, 359 (2003), may also invade the rights of others.

But “invasion of the rights of others” need not be so limited. In certain circumstances, some speech may form part of a course of targeted harassment unprotected by the First Amendment that schools may, indeed must, prohibit and prevent. *See, e.g., Reese v. Jefferson Sch. Dist. No. 14J*, 208 F.3d 736, 739 (9th

Cir. 2000) (sexual harassment under Title IX); *Flores v. Morgan Hill Unified Sch. Dist.*, 324 F.3d 1130, 1135 (9th Cir. 2003) (discriminatory failure “to enforce the District’s disciplinary, anti-harassment and anti-discrimination policies to prevent physical and emotional harm” to LGBT students); *Bryant v. Independent Sch. Dist. No. I-38*, 334 F.3d 928, 932-34 (10th Cir. 2003) (Title VI racial harassment claim based in part on “racial slurs, graffiti ... and notes placed in students’ lockers and notebooks ... T-shirts adorned with the confederate flag, swastikas, KKK symbols, and hangman nooses”); *Ray v. Antioch Unified School Dist.*, 107 F. Supp. 2d 1165, 1169 (N.D. Cal. 2000) (“same sex harassment is a form of harassment actionable under Title IX”). Though the legal right to be free from harassment in school has developed since *Tinker* was decided, no cogent reason appears to exclude it from “the rights of others” protected by *Tinker*.

Therefore, the court may properly recognize the intersection between equal educational opportunity and freedom of speech. The “free speech clause protects a wide variety of speech that listeners may consider deeply offensive,” and when “laws against harassment attempt to regulate oral or written expression on such topics, however detestable the views expressed may be, we cannot turn a blind eye to the First Amendment implications.” *Saxe*, 240 F.3d at 206. However, this is not to say “no application of anti-harassment law to expressive speech can survive First Amendment scrutiny. Certainly, preventing discrimination in the workplace

– and in the schools – is not only a legitimate, but a compelling, government interest.” *Id.* at 209. Speech “that would ‘substantially interfer[e] with a student’s educational performance’ may satisfy the *Tinker* standard,” but it is “not enough that the speech is merely offensive to some listener” without the “showing of severity or pervasiveness” required by anti-harassment law.⁴ *Id.* at 217; *see also Sypniewski*, 307 F.3d at 264-65 (“The mere fact that expressive activity causes hurt feelings, offense, or resentment does not render the expression unprotected.”).

Perhaps a school need not wait for prohibited harassment to occur before taking appropriate action. Just as schools can regulate speech based on specific, concrete “facts which might reasonably” lead them “to forecast substantial disruption of or material interference with school activities,” *Tinker*, 393 U.S. at 514, the same standard may apply to preventing unlawful harassment.⁵ However, to regulate speech in order to prevent harassment, the school must “point to a well-

⁴ In seeking to prevent harassment, schools should be sensitive to viewpoint neutrality. *Cf. Castorina v. Madison County Sch. Bd.*, 246 F.3d 536, 542 (6th Cir. 2001) (finding viewpoint discrimination where “school has banned only certain racial viewpoints without any showing of disruption”).

⁵ According to news reports, two “former students recently won a suit against the School for failing to protect them from students who harassed them because they are gay.” *Harper I*, 445 F.3d at 1172 n.6. It is not clear what the current speech policies have to do with the prior conduct, which though detestable, cannot necessarily justify banning a single student’s peaceful expression of an idea. *Cf. Free Speech Coalition*, 535 U.S. at 245 (“The prospect of crime ... by itself does not justify laws suppressing protected speech”).

founded expectation” of targeted harassment based on “specific and significant fear ... not just some remote apprehension.” *Saxe*, 240 F.3d at 211-12. Otherwise, the *Tinker* standard would become a sword for censorship rather than a shield for protecting speech.

In specific cases, courts or administrators might consider whether certain speech forms part of a pattern of violence or other abusive conduct that has substantially impaired students’ educational opportunities. *Cf. United States v. Cassel*, 408 F.3d 622, 632 (9th Cir. 2005) (depending on circumstances, “same act may mean that a person is engaging in constitutionally proscribable intimidation [or] only that the person is engaged in core political speech”). But under any circumstance, invasion of rights of others under *Tinker* must be tethered to clearly established and specifically defined legal doctrines, such as anti-harassment law, that respect both freedom of speech and equal educational opportunity.

B. If mere expression of an idea, without more, can “invade the rights of others,” as the School’s policies suggest, the First Amendment would cease to exist in public schools.

Unfortunately, the School’s speech policies far exceed appropriate restrictions on prohibited harassment. As shown by Mr. Harper’s experience, the policies prohibit the expression of any idea deemed “offensive,” “negative,” or “derogatory,” no matter how peacefully or passively the idea is expressed. The

policies prohibit such ideas regardless of whether they are targeted at an individual or merely displayed to the school in general.

The School thus prohibits the non-vulgar expression of any offending idea, including but not limited to Mr. Harper's message, without any showing of severity or pervasiveness. Such a rule goes much farther than necessary or appropriate to protect students from invasion of legally recognized rights. The court should thus make clear that the mere expression of an idea, without more, cannot amount to harassment or invade the rights of other students.

Nothing is more central to the First Amendment than the principle that government may not ban a controversial idea. *Virginia v. Black*, 538 U.S. 343, 358 (2003) ("hallmark ... of free speech is to allow 'free trade in ideas' – even ideas that the overwhelming majority of people might find distasteful or discomfoting"); *Texas v. Johnson*, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."); *Street v. New York*, 394 U.S. 576, 592 (1969) ("the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers"). "The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought. To preserve these freedoms, and to protect

speech for its own sake, the Court’s First Amendment cases draw vital distinctions between words and deeds, between ideas and conduct.” *Free Speech Coalition*, 535 U.S. at 253.

This principle applies with equal force in public schools. The “fundamental values of ‘habits and manners of civility’ essential to a democratic society must, of course, include tolerance of divergent political and religious views, even when the views expressed may be unpopular,” and the First Amendment protects the “undoubted freedom to advocate unpopular and controversial views in schools and classrooms.” *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986).⁶

Thus, 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.” *Saxe*, 240 F.3d at 215. This court has therefore rejected the suggestion there is any “subclass of words that are inherently disruptive” in the school setting. *Chandler*, 978 F.2d at 530 n.1.

The First Amendment would not exist in public schools if officials could censor any idea deemed offensive or repugnant. “If school officials were permitted

⁶ *Fraser* regulates the form, not content, of student speech and cannot justify a prohibition on “offensive” ideas. *Morse*, 127 S. Ct. at 2629; *Newsom v. Albemarle County Sch. Bd.*, 354 F.3d 249, 256 (4th Cir. 2003).

to prohibit expression to which other students objected, absent any further justification, the officials would have a license to prohibit virtually every type of expression.” *Clark v. Dallas Indep. Sch. Dist.*, 806 F. Supp. 116, 120 (N.D. Tex. 1992); *see also Nixon v. Northern Local Sch. Dist. Bd. of Educ.*, 383 F. Supp. 2d 965, 973 n.11 (S.D. Ohio 2005) (“If the mere fact that other students will likely find a message offensive justified a school’s regulation of expression, then a student’s right to freely express himself would be greatly diminished.”).⁷

It is no answer to suggest, as did a School official, that an idea such as Mr. Harper’s should be expressed in a more “positive way.” (ER 10, p. 197.) Within the limits on student speech, the “First Amendment mandates that we presume” students, “not the government, know best both what they want to say and how to say it.... [T]he government, even with the purest of motives, may not substitute its judgment as to how best to speak for that of speakers and listeners; free and robust debate cannot thrive if directed by the government.” *Riley v. National Fed’n of the Blind*, 487 U.S. 781, 790-91 (1988).

Nor can schools censor speech on the claim it is inconsistent with their “educational mission,” because such an “argument would give public school authorities a license to suppress speech on political and social issues based on

⁷ Reactions of listeners are not “secondary effects” that justify regulation of

disagreement with the viewpoint expressed.” *Morse*, 127 S. Ct. at 2637 (Alito, J., concurring). To allow such a result would strike “at the very heart of the First Amendment.” *Id.* (Alito, J., concurring). The First Amendment thus “protects the nondisruptive expression of ideas” in public schools. *Sypniewski*, 307 F.3d at 259.

Accordingly, it is mistaken to suggest an idea such as Mr. Harper’s may be censored as a matter of law because it is inherently “capable of causing psychological injury” as a “verbal assault” that is “derogatory and injurious.” *Harper I*, 445 F.3d at 1178, 1183. By itself, such an idea is pure speech, both political and religious, entitled to the highest possible First Amendment protection. Standing alone, it is neither severe nor pervasive under anti-harassment law, and thus it cannot invade the rights of other students under *Tinker*. The First Amendment must protect the ideas of both Chase Harper and those who disagree with him.

Other cases may present “tension between anti-harassment laws and the Constitution’s guarantee of freedom of speech.” *Saxe*, 240 F.3d at 209. However, the court “need not map the precise boundary between permissible anti-discrimination legislation and impermissible restrictions on First Amendment

student speech. *Saxe*, 240 F.3d at 209.

rights today.” *Id.* at 210.⁸ For present purposes, it is sufficient to decide the School’s policies unconstitutionally prohibit substantial amounts of speech protected by *Tinker*, because they ban the non-vulgar expression of ideas that neither cause substantial disruption nor invade the rights of other students.

Because the policies require no “threshold showing of severity or pervasiveness” or any connection to any pattern of harassment, they “could conceivably be applied to cover any speech about some enumerated personal characteristics the content of which offends someone. This could include much ‘core’ political and religious speech” that “is within a student’s First Amendment rights.” *Saxe*, 240 F.3d at 217. Speech that “interferes with another individual’s life” does not necessarily amount to “harassment” sufficient to justify censorship. (ER 4, p. 129.) All speech potentially “interferes” with someone else’s life to the extent it seeks to inform, provoke, or persuade. That is the purpose of freedom of speech. *Johnson*, 491 U.S. at 408-09 (speech “may indeed best serve its high

⁸ *Cf.* Office for Civil Rights, U.S. Department of Education, *Protecting Students from Harassment and Hate Crime: A Guide for Schools*, p. 20 (September 1999) (OCR Report) (“Whether or not speech or expression that is alleged to constitute harassment is protected by the First Amendment will generally depend upon the facts and context involved, including the type and timing of the speech, the nature of the forum in which the speech takes place, and the educational level and age of the students involved.”) (http://eric.ed.gov/ERICDocs/data/ericdocs2sql/content_storage_01/0000019b/80/17/9a/71.pdf (as of 4/2/08).)

purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger”).

In short, the policies ban almost any idea to which the School might object as “offensive,” “negative,” or “derogatory.” But an idea, standing alone, cannot invade the rights of other students, no matter how controversial the idea. The School’s policies prohibit substantial, if not immense, amounts of protected speech when judged in relation to any arguably “legitimate sweep,” and thus they improperly deter constitutionally protected speech.⁹ *Virginia v. Hicks*, 539 U.S. 113, 118-19 (2003). As a result, Poway High School’s speech policies are unconstitutional on their face.

C. As a practical matter, censorship is a blunt instrument ill-suited to preventing harassment and may in fact promote the message to which the school objects or drive harassment underground.

Apart from upholding the First Amendment, schools may more effectively prevent harassment through active outreach, training, and education rather than resorting in the first instance to the blunt instrument of censorship, which often has

⁹ The fact that a small part of the policies might be valid – for example, the prohibition of “obscene or profane” speech – does not cure their overbreadth. Also, this court is “without power to adopt a narrowing construction” of the policies “unless such a construction is reasonable and readily apparent.” *Boos v. Barry*, 485 U.S. 312, 330 (1988); *ACLU of Nevada v. Heller*, 378 F.3d 979, 986 (9th Cir. 2004). The policies contain no “substantial textual anchor” permitting the court to conform them to *Tinker* “without rewriting” them entirely, which the court cannot do. *Sypniewski*, 307 F.3d at 263.

the unintended effect of promoting the censored message. Indeed, the publicity surrounding this case has resulted in far more dissemination of Mr. Harper's message than would have occurred if the school had simply allowed him to wear his shirt without incident. At the same time, schools may advocate a different position in response. *Downs v. Los Angeles Unified Sch. Dist.*, 228 F.3d 1003, 1014 (9th Cir. 2000) (school "may decide not only to talk about gay and lesbian awareness and tolerance in general, but also to advocate such tolerance").

Schools have abundant means to reduce or prevent harassment without banning ideas. *See generally* OCR Report at 23-29. Indeed, the suggestion that mere censorship prevents harm could have the effect of discouraging schools from engaging in sustained efforts to prevent or reduce harassment. Censorship may not curtail or eliminate harassment and instead may only drive it underground. To address harassment, schools would do far better to advocate, teach, and promote respect for all students, while upholding freedom of speech. Such measures would demonstrate a more profound commitment to preventing harassment than merely banning certain forms of speech. The court may take a strong stand against harassment while upholding the First Amendment by encouraging schools to pursue effective anti-harassment measures beyond mere censorship.

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D. The court previously analyzed invasion of rights of others based on cases that do not squarely apply to the issue.

In its previous analysis of invasion of the rights of others, the court relied on several main cases that do not clearly address the issue. *Hill v. Colorado*, 530 U.S. 703 (2000) (cited in *Harper I*, 445 F.3d at 1178) does not support a generalized “right to be let alone” that trumps the First Amendment right to express controversial ideas, inside or outside a school. The Court expressly noted “whether there is a ‘right’ to avoid unwelcome expression is not before us in this case.” *Id.* at 718 n.25.

Instead, *Hill* upheld on narrower grounds a statute that prohibited, within 100 feet of a health care facility, the conduct of “‘knowingly approach[ing]’ within eight feet of another person, without that person’s consent, ‘for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person.’” *Id.* at 707.

The Court held the statute was a content-neutral, narrowly tailored time, place, and manner regulation. *Id.* at 725-26. Significantly, it did not prohibit speech. It merely required that in the unique circumstance of access to clinic entrances certain speakers must remain at least eight feet from listeners without consent to approach closer, in order “to protect those who enter a health care facility from the harassment, the nuisance, the persistent importuning, the following, the dogging, and the implied threat of physical touching that can

accompany an unwelcome approach within eight feet of a patient by a person wishing to argue vociferously face-to-face and perhaps thrust an undesired handbill upon her.” *Id.* at 724.

The Court emphasized the “statute does not provide for a ‘heckler’s veto’ but rather allows every speaker to engage freely in any expressive activity communicating all messages and viewpoints subject only to the narrow place requirement imbedded within the ‘approach’ restriction,” and noted:

The purpose of the Colorado statute is not to protect a potential listener from hearing a particular message. It is to protect those who seek medical treatment from the potential physical and emotional harm suffered when an unwelcome individual delivers a message (whatever its content) by physically approaching an individual at close range In offering protection from that harm, while maintaining free access to health clinics, the State pursues interests constitutionally distinct from the freedom from unpopular speech

Id. at 718 n.25, 734. Therefore, *Hill* has no bearing on the present case, in which the School’s policies directly prohibit “unpopular speech” based on content.¹⁰

Also, the vacated opinion relied on dicta in student speech cases resting on different grounds. First, the opinion cited *Chandler* for the claim that “vulgar, lewd, obscene, indecent, and plainly offensive speech ‘by definition, may well

¹⁰ For similar reasons, the court’s recent discussion of a “content-neutral” time, place, and manner “captive audience rule” does not apply to the School’s overbroad content-based speech policies. *Berger v. City of Seattle*, 512 F.3d 582, 606 (9th Cir. 2008).

“impinge[] upon the rights of other students,” even if the speaker does not directly accost individual students with his remarks.”” *Harper I*, 445 F.3d at 1177-78 (quoting *Chandler*, 978 F.2d at 529). However, the cited portion of *Chandler* merely distinguished *Fraser* from *Tinker* and held that schools may censor vulgar speech without regard to *Tinker*. It does not stand for an expansive definition of “rights of others.”

Second, the opinion relied on *West v. Derby Unified School District No. 260*, 206 F.3d 1358 (10th Cir. 2000). In that case, the court stated:

The evidence in this case ... reveals that based upon recent past events ... officials had reason to believe that a student’s display of the Confederate flag might cause disruption and interfere with the rights of other students to be secure and let alone.

Id. at 1366. The opinion makes clear, however, that the court relied entirely on substantial disruption, *not* invasion of the rights of others, to uphold a ban on Confederate flags. The court held school officials had specific, concrete “evidence from which they could reasonably conclude that possession and display of Confederate flag images, when unconnected with any legitimate educational purpose, would likely lead to a material and substantial disruption of school discipline.” *Id.* at 1361-62; *see also Saxe*, 240 F.3d at 212 (*West* holding based on “concrete threat of substantial disruption”). Therefore, *West*’s cursory reference to “rights of other students” does not show that offensive speech by itself invades the rights of others.

Third, the vacated opinion noted that “[s]tudents cannot hide behind the First Amendment to protect their ‘right’ to abuse and intimidate other students at school.” *Harper I*, 445 F.3d at 1178 (quoting *Sypniewski*, 307 F.3d at 264). However, the *Sypniewski* court merely upheld a school policy banning racial slurs, “items depicting or implying racial hatred or prejudice,” or other “racially divisive” material, due to a specific and well-founded “history of racial difficulties” which provided “substantial evidence of disruption that constitutes a solid foundation for fear of future disruption.” *Sypniewski*, 307 F.3d at 260 n.17, 262. In so doing, the court commented, “There is no constitutional right to be a bully,” and schools may prevent “harassment by name calling” even when it “does not involve a racial component.” *Id.* at 264. That dictum, though uncontroversial, does not suggest the non-vulgar expression of a controversial *idea* invades the rights of others.

Fourth, the vacated opinion relied on *Muller v. Jefferson Lighthouse School*, 98 F.3d 1530 (7th Cir.1996) for the claim that elementary schools may restrict speech “that could crush a child’s sense of self-worth.” *Harper I*, 445 F.3d at 1179 (quoting *Muller*, 98 F.3d at 1540). *Muller* concerned an elementary school’s pre-screening policy for leaflets that students wished to distribute, which is not the issue before this court. In any event, the cited dictum, even if a correct statement of the law, which need not be decided here, applies only to the unique context of

elementary schools, where *Tinker* may operate differently than in a high school. *See Muller*, 98 F.3d at 1546-47 (Rovner, J., concurring) (“Given the difference in age and maturity between grammar school and high school students ... speech that would be relatively innocuous in a high school setting may nonetheless ‘substantially interfere with the work of the school or ... the rights of other students’ in the context of a grammar school.”) (citation omitted).

It is respectfully suggested the vacated opinion placed undue reliance on dicta that do not address the issue here – how to define “invasion of the rights of others” in a way that both upholds the First Amendment and respects the right to equal educational opportunity in a secondary school. Under a proper balance of free speech and equal opportunity, the expression of an idea, standing alone, cannot invade the rights of other students.

II. THE FIRST AMENDMENT CANNOT DEPEND AS A MATTER OF LAW ON THE CONCEPT OF “VULNERABLE MINORITY,” THOUGH SUCH STATUS MAY BE RELEVANT IN INDIVIDUAL CASES.

In an effort to uphold the First Amendment right to engage “in controversial political speech,” the vacated opinion suggested invasion of rights of others should be limited to “instances of derogatory and injurious remarks directed at students’ minority status such as race, religion, and sexual orientation,” or “a core characteristic of particularly vulnerable students.” *Harper I*, 445 F.3d at 1182-83.

Unfortunately, that formulation does not sufficiently protect First Amendment freedoms. The concept of a vulnerable minority is inherently ambiguous and could create an exception that would swallow the First Amendment. The definition of “minority” depends on whether “we look to the national community, the state, the locality, or the school.” *Id.* at 1201 (Kozinski, J., dissenting). Racial, ethnic, or religious groups that are minorities in one place may be majorities elsewhere. For example, Caucasians are a minority in many schools and comprise only 43 percent of California’s population. Teresa Watanabe, “California Is Leading the Nation in Diversity,” *L.A. Times*, May 17, 2007. The definition of “minority” varies across time and place and cannot support a coherent exception to the First Amendment as a matter of law.

The qualitative issue of who is “vulnerable” varies as well. For example, LGBT students may be far less vulnerable in one school than another. In some schools, conservative Christians could be deemed an oppressed minority, justifying censorship of “Gay Pride,” “Homophobia Is a Sin,” “Fundamentalism Is Bigotry,” “Bigots for Jesus,” “The Christian Right is Neither,” or “God is Dead,” on the ground that such ideas are “verbal assaults” on the core identifying characteristic of religion. The shifting vulnerability of different groups of students across time and place cannot provide a coherent basis for restricting student speech.

For these reasons, the “vulnerable minority” concept cannot provide a doctrinal basis for censoring speech as a matter of law. However, particular students may comprise a vulnerable minority in a given school, and such context may be relevant to the factual question whether prohibited harassment has occurred or is likely to occur in that school.

Moreover, while LGBT students often face significant difficulty and harassment, it is inappropriate to make universal findings that all LGBT students are equally vulnerable to and injured by certain speech as a matter of law. The experiences of LGBT students may share commonalities but also depend on circumstances and are best left to particular factfinding rather than universal pronouncements that gloss over individual circumstances.

The vacated opinion suggested certain speech, standing alone, inherently “serves to injure and intimidate” LGBT students, “as well as to damage their sense of security and interfere with their opportunity to learn,” and is “detrimental not only to their psychological health and well-being, but also to their educational development.” *Harper I*, 445 F.3d at 1178-79. The district court made no findings of fact on the question whether an idea by itself, not part of any course of targeted harassment, is inherently destructive.

The First Amendment aside, judicial notice cannot be used to make such a finding on appeal. The opinion relied on “studies” consisting of six law review

articles and two internet sites. *Id.* at 1179-80. The “mere fact of publication does not perforce qualify a source as sufficiently accurate so as to form a basis for judicial notice.” *New West Urban Renewal Co. v. Westinghouse Elec. Corp.*, 909 F. Supp. 219, 229 (D.N.J. 1995). The opinion did not rely on matters equivalent to “scientific law,” which “properly are subject to judicial notice.” *Daubert v. Merrell Dow Pharmaceuticals, Inc.* 509 U.S. 579, 592 n.11 (1993).

In some cases, a court may rely on “the writings and studies of social science experts on legislative facts” without taking judicial notice. *Dunagin v. City of Oxford*, 718 F.2d 738, 748 n.8 (5th Cir.1983); *cf. Planned Parenthood Affiliates of Calif. v. Van de Kamp*, 181 Cal. App. 3d 245, 268 n.9 (1986) (court properly relied on “declarations by health care professionals and references to statistical and sociological studies,” because “matters of fact embodied in the declarations are essentially undisputed” and “studies are of the type typically relied on by courts deciding sexual privacy cases”). Though anti-LGBT harassment is widespread and intolerable, it is not undisputed as a matter of law that an idea, standing alone, is tantamount to such harassment.¹¹

¹¹ As recently argued, “The overall portrait of gay teenagers during the past thirty years has evolved from a population under siege to the possibility of resiliency.” Ritch C. Savin-Williams, *The New Gay Teenager* 67 (Harvard Univ. Press 2005). This is not to minimize the prevalence or severity of harassment, but to note there is support for the position that LGBT students may not be inherently injured by the

In any event, the cited sources do not conclude the mere expression of an idea, standing alone, causes significant injury. The opinion cited sources describing “violence and verbal and physical abuse ... general problems suffered by gay and lesbian youths during their school years ... [and] physical abuse or threats.” *Harper I*, 445 F.3d at 1199. Certainly, such violence, abuse, and threats are intolerable. However, the citations do not suggest a mere idea, without more, is responsible for or equivalent to the violence, abuse, and harassment faced by LGBT students – not least because the opinion did not define “verbal abuse” or disaggregate it from physical abuse.

The vacated opinion noted the California legislature found that “[h]arassment on school grounds directed at an individual on the basis of personal characteristics or status creates a hostile environment and jeopardizes equal educational opportunity as guaranteed by the California Constitution and the United States Constitution.” *Harper I*, 445 F.3d at 1181 n.25 (quoting Calif. Educ. Code § 201(c)). Even if it could, the legislature did not suggest that mere ideas amount to harassment or create a hostile environment. First, the statute contemplates harassment “directed at an individual,” rather than the mere statement of an idea. Second, California defines “harassment” as “conduct based

expression of an idea, apart from targeted harassment, and thus the inappropriateness of taking judicial notice on that point.

upon protected status that is severe or pervasive, which unreasonably disrupts an individual's educational or work environment or that creates a hostile educational or work environment.” 5 Calif. Code Regs. § 4910(1). An idea, standing alone, cannot be severe, pervasive, or unreasonably disruptive.

Again, this is not to say courts should not recognize the difficulties endured by LGBT or other students. But those difficulties do not justify banning the non-vulgar expression of an idea, unconnected to any substantial disruption or legally recognized harassment, no matter how controversial, offensive, or repugnant the idea may be. The First Amendment requires government to respond to ideas with more ideas. It cannot simply ban an idea it does not like. If it could, the First Amendment would be meaningless.

CONCLUSION

It is respectfully suggested the Court should find Poway High School's speech policies unconstitutional and reverse the district court's judgment.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify this brief is proportionally spaced, has a typeface of 14 points or more, and based on the word count function of the software used to prepare the brief contains 6903 words, in compliance with Fed. R. App. P. 29(d), excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

DATED: April 2, 2008

David Blair-Loy

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I hereby certify that on the date set forth below an original and 15 copies of the foregoing brief were sent via overnight mail to the Clerk of the United States Court of Appeals for the Ninth Circuit, 95 Seventh St., San Francisco, CA, 94110-3939, and two copies were sent via United States mail, postage prepaid to:

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