No. 07-1409

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

M.A.L., a minor child, by and through his parents and next friends, M.L. and S.A.,
Plaintiff-Appellee,

v.

STEPHEN KINSLAND, *et al.*,
Defendants-Appellants.

On Appeal from the United States District Court
For the Eastern District of Michigan

BRIEF *AMICUS CURIAE* OF THE NATIONAL LEGAL FOUNDATION, INC.,

in support of Plaintiffs-Appellees
Supporting affirmance

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INTEREST OF AMICUS

The National Legal Foundation (NLF) is a public interest law firm dedicated to the defense of First Amendment liberties and to the rights protected by the First Amendment. The NLF and its donors and supporters are vitally concerned with the outcome of this case because of the effect it will have on the constitutional rights of students within the public schools.

The NLF submits its brief by consent of all parties.

ARGUMENT

I. THE DISTRICT COURT'S DECISION SHOULD BE AFFIRMED BECAUSE IT WILL NOT LEAD TO CONFUSING AND COMPLEX LEGAL RULES AND IT COMPORTS WITH CONTROLLING SUPREME COURT PRECEDENT.

Amicus National School Boards Association (hereinafter NSBA) argues that the District Court should be reversed because its holding would cause "confusion and complexity" for school officials across the nation and that it would conflict with the state school boars associations' model school board policies. Brief for National School Boards Association, *et al.* as *Amici Curiae* Supporting Appellants at 3, 7, *M.A.L. v. Kinsland*, 07-1409 (6th Cir. July 23, 2007). This Court should not hesitate to affirm the District Court for two reasons. First, the District Court's analysis under *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), will not lead to confusing and complex legal rules. Second, the federal courts should not deprive students of their constitutional free speech rights

simply because school officials are concerned about redrafting their policies regarding the constitutional rights of students.

A. The District Court's Decision Should Be Affirmed Because it Will Not Lead to Confusing and Complex Legal Rules.

While the NSBA is concerned about confusion regarding *Tinker*, as applied by the District Court, it would be relatively simple to apply. If a student's exercise of his free speech rights causes a substantial disruption to the operation of the school, then the school officials can regulate that speech through under *Tinker*. However, policies addressing disruptions cannot be based upon "undifferentiated fear or apprehension of disturbance" but rather must be based upon evidence of past disruption or a reasonable forecast of future disruptions. *Tinker*, 393 U.S. at 508. Therefore, there has to be a likelihood of substantial disruption; the rule is not complicated. While schools may have to wrestle with balancing student free speech with the educational goals of the school, they are already required to do so under the Constitution.

NSBA further states that it would not be "difficult to imagine other contexts in which litigants might seek to impose *Tinker*'s more rigid standard on educator decisions." Brief for National School Boards Association, *supra*, at 13. NSBA suggests that cases about student dress codes, school uniform policies, and the use of portable electronic devices are examples of those that might be brought under *Tinker* in the future and that this possibility would create an increased burden on

school officials. However, just as schools cannot trample students' rights in literature distribution cases, neither can they do so in any other type of case. Once again, school officials are under a duty to obey the Constitution, not to make their own jobs easier.

B. The District Court's Decision Should Be Affirmed Because it Comports With the *Tinker* Analysis.

The NSBA's other reservation regarding the District Court's opinion regarded the "model school board policies" in this Circuit. Brief for National School Boards Association, *supra*, at 7. If this Court affirms the District Court's analysis under *Tinker*, many of these policies will not survive constitutional scrutiny. Additionally, NSBA worries that this analysis would affect "many outcomes" of cases that school officials have encountered. *Id.* at 11. However, constitutional analysis of student's free speech should not turn on school board policies, but rather it should follow the Constitution and Supreme Court precedent. If these policies and previous "outcomes" are inconsistent with the Constitution they should be amended to withstand constitutional scrutiny and not the other way around.

II. THE DISTRICT COURT'S DECISION SHOULD BE AFFIRMED BECAUSE THE DECISIONS OF OTHER COURTS THAT HAVE APPLIED FORUM ANALYSIS TO STUDENT FREE SPEECH IGNORE THE PLAIN LANGUAGE OF *TINKER*.

In this case, the District Court correctly held that carving out an exception

based on time, place and manner restrictions to *Tinker* "eviscerates its essential holding and significantly harms First Amendment jurisprudence." *M.A.L. v. Kinsland*, 2007 U.S. Dist. LEXIS 6365, *25 (E.D. Mich. Jan. 30, 2007).

In *Tinker*, a case involving students protesting the military conflict in Vietnam by wearing black armbands, the Supreme Court held that students' expressive rights could not be restricted by the school unless the expression "'materially and substantially interfer[es] with the requirements of appropriate discipline in the operation of the school.'" 393 U.S. at 505, *quoting Burnside* v. *Byars*, 363 F.2d 744, 749 (5th Cir. 1966). Despite *Tinker*'s clearing holding, some courts have since held that the occurrence or forecast of substantial disruption is not required for public schools to regulate student expression. *See, e.g. Bery v. City of New York*, 97 F.3d 689, 696 (2nd Cir. 1996); *Muller v. Jefferson Lighthouse Sch.*, 98 F.3d 1530 (7th Cir. 1996); *Williams v. Spencer*, 622 F.2d 1200, 1206 (4th Cir. 1980). These cases ignored or paid lip service to *Tinker* but went on to address speech restrictions under forum analysis and often upheld under time, place and manner restrictions despite an absence of substantial disruption. However, these holdings are erroneous under *Tinker*. As a court in the Eastern District of Pennsylvania noted, the *Tinker* Court did not even address what type of forum the school constituted. *Slotterback v. Interboro Sch. Dist.*, 766 F. Supp. 280, 288-89 (E.D. Penn. 1991). Nevertheless, that court proceeded with a forum

analysis so that it would be consistent with other courts that have interpreted student free speech under *Tinker*. *Id.* at 291.

The only exceptions that the Supreme Court has ever recognized under *Tinker* are those cases that recognize that "student First Amendment rights are 'applied in light of the special characteristics of the school environment.'" *Morse v. Frederick*, 127 S. Ct. 2618, 2627 n.2 (2007), *quoting Tinker*, 393 U.S. at 506. Those cases are *Bethel School District No. 403 v. Fraser*, 478 U.S. 675, 680 (1986) (holding that "school boards have the authority to determine 'what manner of speech in the classroom or in school assembly is inappropriate."); *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 570 (1988) (holding that "the standard articulated in *Tinker* . . . need not also be the standard for determining when a school may refuse to lend its name and resources to the dissemination of student expression"); and *Morse*, 127 S. Ct. at 2628 (noting that "deterring drug use by schoolchildren is an 'important – indeed, perhaps compelling' interest.").

Additionally, the District Court is not the only court to recognize that *Tinker* and not forum analysis should control student free speech cases. (It is interesting to note that while *Amici* NSBA recognized that there were multiple cases that had applied *Tinker* in this manner, Brief of National School Boards Association, *supra*, at 5, Appellants incorrectly asserted that this was only the second case to do so. Brief for Appellants at 20, *M.A.L. v. Kinsland*, 07-1409 (6th Cir. July 16, 2007).)

For example, in *Raker v. Frederick County Public Schools*, 470 F. Supp. 2d 634, 639 (W.D. Va. 2007), the district court agreed with the student that "any time, place or manner regulation must be supported by a finding of disruption sufficient to satisfy the *Tinker* standard." The court held that "the Regulation's restriction of the distribution of written materials to before and after school fails even the least exacting reasonableness test, especially when viewed in light of *Tinker's* disruption principle." *Id.* at 641. That court issued a preliminary injunction prohibiting the school district's time, place, and manner restriction absent evidence of a substantial disruption to the operation of the school. *Id.* at 642.

At least two federal courts of appeals, including this Court, have taken this same approach. In *Lowery v. Euverard*, 2007 FED App. 0295P (6th Cir. Aug. 3, 2007), the appellants argued their case under forum and viewpoint discrimination analysis, but this Court rejected their argument, and proceeded to decide the case under *Tinker*, *id.* at *14-15, having previously determined that all school speech cases must be decided within the *Tinker-Fraser-Hazelwood* tripartite analysis. *Id.* at *10. Also, in an unpublished opinion from the Eleventh Circuit, the court applied *Tinker* to an as-applied challenge to a school's literature distribution policy, with no regard to a separate time, place or manner restriction, where a student had sought to participate in a national pro-life event similar to M.A.L.

Heinkel v. Sch. Bd., 194 Fed. Appx. 604 (11th Cir. Aug. 22, 2006). [1]

Therefore, the District Court was correct in deciding this case under *Tinker*, holding that for a time, place and manner restriction to be valid it must anticipate a substantial disruption to the school's operation. The court noted that *Fraser* and *Hazelwood* were not analogous to the present case, because M.A.L.'s speech is neither sexually explicit nor school sponsored. *M.A.L.*, 2007 U.S. Dist. LEXIS 6365, *16. Furthermore, while the District Court decision was issued six months before the Supreme Court released the *Morse* opinion, neither is it analogous because M.A.L was not advocating illegal drug use.

III. THE DISTRICT COURT'S DECISION SHOULD BE AFFIRMED BECAUSE IN ADDITION TO THE FACT THAT MOST OF THE CASES APPELLANTS CITE ARE BAD LAW UNDER *TINKER*, SEVERAL OF THEM ARE ALSO INAPPOSITE.

Some of the cases relied upon by Appellants are simply inapposite because they do not address literature distribution. One such case is *LoPresti v. Galloway Township Middle School*, 885 A.2d 962 (N.J. Super. 2004), where students were restricted to their assigned tables for their lunch session to facilitate a more efficient period. The *LoPresti* court distinguished *Tinker* from the facts before it, and that language illustrates why *LoPresti* does not further Appellants' position in the instant case. The court noted that the policy "does not prohibit the student

[1] Admittedly, *Heinkel* upheld the policy on the record before it based on a reasonable forecast of future disruptions. However, *Amicus'* argument is that *Tinker* should control.

from discussing particular topic or expressing their opinion as to any matter. It merely requires that during the thirty-minute lunch lesion, students are to sit at a designated table . . . ." *Id.* at 967. This is substantially different from the instant case where the school's policy is directly focused on M.A.L.'s expression.

Additionally, in cases such as *Canady v. Bossier Parish School Board*, 240 F.3d 437 (5th Cir. 2001), courts have held that *Tinker* does not prohibit mandatory school dress codes. *Canady* held that clothing can, and often does, have communicative content, *id.* at 441, but that the case was not governed by *Tinker* because no student had been disciplined for trying to exercise their free speech rights. *Id.* at 443. As in *LoPresti*, *Canady* is inapposite to the instant case because it does not involve literature distribution, or any other modes of pure speech.

CONCLUSION

Therefore, as the Court held in *Tinker*

> the record does not demonstrate any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities, and no disturbances or disorders on the school premises in fact occurred. Th[e] petitioner[] merely went about [his] ordained rounds in school. [His] deviation consisted only in [refusing to speak, and when questioned regarding his silence, providing a leaflet]. [He was silent] to exhibit [his] disapproval of the [the legal status of abortion] and [his] advocacy of a [pro-life viewpoint], to make [his] views known, and, by [his] example, to influence others to adopt them. [He] neither interrupted school activities nor sought to intrude in the school affairs or the lives of others. [He] caused discussion outside of the classrooms, but no interference with work and no disorder. In the circumstances, our Constitution does not permit officials of the State to deny their form

of expression.

Tinker, 393 U.S. at 514.

For the foregoing reasons, this Court should affirm the District Court's judgment.

Respectfully submitted
this 11th day of September 2007,

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CERTIFICATE OF SERVICE

I hereby certify that I have duly served the attached Brief *Amicus Curiae* of National Legal Foundation in the case of *M.A.L. v. Kinsland, et al.*, No. 07-1409, on all required parties by sending one electronic copy and by depositing two paper copies in the United States mail, first class postage, prepaid on September 11, 2007 addressed as follows:

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