

No. 07-1289

**In The
Supreme Court of the United States**

ESTELLE ROONEY; BELTMORE SCHOOL BOARD,

Petitioners,

v.

ROBERT CALVIN,

Respondent.

**ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTEENTH CIRCUIT**

BRIEF FOR RESPONDENT

Questions Presented

- I. Whether the First Amendment allows public school administrators to prohibit a student standing off school grounds from displaying a message that references illegal drugs at a student-attended, faculty-supervised event.
- II. Whether the Fourteenth Circuit correctly applied the principles of qualified immunity in holding that public school administrators could be liable in damages for punishing a student who stood off school grounds and displayed a banner that contained a reference to illegal drugs at a student-attended, faculty-supervised event.

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The unofficial opinion and order of the United States District Court for the Southern District of York, *Calvin v. Rooney*, Civil Docket No. 06-0063, is unreported and is set forth in the Record. R. 3-8. The unofficial opinion and order of the United States Court of Appeals for the Fourteenth Circuit, *Calvin v. Rooney*, Civil Docket No. 07-0112, is unreported and is set forth in the Record. R. 9-14.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The Order Granting Certiorari was issued in *Calvin v. Rooney*, Docket No. 07-1289.

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.” U.S. CONST. amend. I.

STATEMENT OF THE CASE

Respondent Robert Calvin (“Calvin”) exercised his First Amendment right to free speech by unfurling a banner that read “Bong Hits 4 Bush” during the town of Belmore’s annual President’s Day Parade. R. 3,4. Despite the fact that Calvin, an adult citizen, unfurled his banner in a public park, while attending a public, non-school sponsored event, the principal of his high school, petitioner Estelle Rooney (“Rooney”) demanded Calvin take down the banner. R. 4. When Calvin refused based on his First Amendment rights to express himself, Rooney confiscated the banner claiming it was embarrassing to her and the school because it displayed a pro-drug message that undermined the Presidency. R. 4,5. Rooney claims she told Calvin to remove the sign because the pro-drug message contradicted school policy and was inappropriate for a school event. R. 4.

Despite her concern for the school’s image, Rooney failed to provide adequate supervision at the parade. While Rooney allowed students to leave class to attend the parade, she did not require students to attend nor did she require them to obtain parental permission as is customarily required for off-campus, school-sponsored events. R. 3,4. Moreover, Rooney asked, but did not require teachers to attend the event with their students. R. 4. As a result, the majority of students attended the parade, but only approximately ten teachers attended to provide supervision. R. 4. Due to the lack of supervision, several students who left school never went to the parade, and some students left the scene before the parade passed through. R. 4. In addition, several students engaged in unruly behavior, including throwing merchandise samples distributed at the event, shouting, and becoming involved in minor altercations. R. 4. The school did not punish any of these students. R. 4, n.3.

Half of the students watched the parade from in front of the school building, while half viewed the parade from the public park across the street. R. 4. Calvin joined the students in the park, never setting foot on school grounds. R. 4. When the parade approached, Calvin and several friends unfurled the ten foot by four foot banner, evoking laughter from the crowd. R. 4. They chose this spot because it was in front of some television camera crews, and Calvin and his friends hoped the news outlets would broadcast the banner. R. 10. Calvin did not choose the banner's message to promote drug use; rather, he chose the message because he thought it was funny and because he wanted to prove to himself, other students, and school faculty that students have First Amendment rights to express themselves regardless of whether school officials agree with them. R. 4, n.4.

After the parade, Calvin went to Rooney's office, where she demanded he tell who helped him hold the banner. R. 5. Calvin refused to name the other students, reaffirming his free speech rights to display the message. R. 5. Rooney then suspended Calvin from school for ten days for his violation of school policy that prohibits "personal items describing or depicting ... drugs ... or any other language or insignia deemed obscene, offensive, or generally disruptive to the learning environment and/or educational objectives." R. 5. Neither Rooney nor the Beltmore School Board ("Board") (collectively "petitioners") contends that Rooney confiscated the banner because it actually disrupted or was likely to disrupt class work. R. 10. The only shred of evidence of any disruption was that some pro-drug graffiti appeared at the high school in the weeks following Calvin's display. R. 7.

Calvin exhausted the Board's internal review process, and the Board affirmed his suspension. R. 5. Calvin then filed suit in the United States District Court for the Southern District of York against petitioners seeking damages and declaratory and injunctive relief. R. 3. The petitioners moved for summary judgment, claiming that they did not violate Calvin's constitutional rights and that qualified immunity shielded them from any potential liability. R. 3.

The district court found that Calvin's display qualified as "speech" protected by the First Amendment (R. 6) but granted the summary judgment motion holding that petitioners could constitutionally prohibit and punish Calvin's speech under the standard this Court established in *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675 (1986). R. 7-8.

The United States Court of Appeals for the Fourteenth Circuit vacated the lower court opinion, holding that petitioner's actions unconstitutionally abridged Calvin's First Amendment right to free speech under the standard this Court established in *Tinker v. Des Moines Cmty. Sch. Dist.*, 393 U.S. 503 (1969). R. 12. Moreover, the Fourteenth Circuit rejected petitioners' claim for qualified immunity, concluding that the case law clearly established the governing standard for student speech cases such that Rooney could not have reasonably believed her conduct was lawful. R. 13.

SUMMARY OF ARGUMENT

Pursuant to this Court's binding precedent, the Fourteenth Circuit correctly determined that Calvin had a First Amendment right to display his banner. When he unfurled the banner, Calvin was standing off school grounds attending a non-school sponsored event, thus he is entitled to the full protection of the First Amendment. Even in the context of the case law governing student-speech cases, Calvin was well within his constitutionally-protected rights to display his banner.

The rule this Court articulated in *Tinker v. Des Moines Cmty. Sch. Dist.* clearly governs this case. Calvin's banner contained no profane or obscene language, thus the rule from *Bethel Sch. Dist. No. 403 v. Fraser* is inapplicable. Moreover, because Calvin's banner did not materially or substantially disrupt school activities, nor threaten to cause such a disruption, Rooney had no justification for sanctioning the speech under *Tinker*. Her actions violated Calvin's First Amendment rights.

Furthermore, petitioners are not entitled to qualified immunity because, pursuant to the standard set forth in *Saucier v. Katz*, petitioners violated Calvin's constitutional rights; the governing case law clearly established Calvin's constitutional rights at the time of the violation; and Rooney could not have reasonably believed that her actions were lawful.

ARGUMENT

I. THE CIRCUIT COURT CORRECTLY CONCLUDED THAT CALVIN HAD A FIRST AMENDMENT RIGHT TO DISPLAY HIS BANNER OFF SCHOOL GROUNDS AT A NON-SCHOOL SPONSORED EVENT, AND ROONEY’S ACTIONS VIOLATED THIS RIGHT UNDER *TINKER*.

The First Amendment to the United States Constitution provides that “Congress shall make no law ... abridging the freedom of speech.” U.S. CONST. amend. I. This Court has consistently maintained that freedom of speech is a fundamental principle of this country’s constitutional system. *E.g.*, *The New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964). Calvin’s banner was written speech that clearly falls within the First Amendment’s protections; moreover, even viewed as conduct, Calvin’s display intended to convey a humorous and controversial message that expressed his First Amendment rights. *See Texas v. Johnson*, 491 U.S. 397, 404 (1989) (recognizing that the First Amendment applies to the spoken and written word and extends to conduct that intends to convey a particularized message); *see also Cohen v. California*, 403 U.S. 15, 18 (1971) (maintaining that a jacket with the words “Fuck the draft” was speech for the purposes of assessing whether the State’s punishment of the wearer violated his First Amendment rights); *Tinker*, 393 U.S. at 505 (recognizing that the wearing of armbands to protest the Vietnam War was “closely akin to ‘pure speech’”).

At the time Calvin unfurled his banner, he was standing off school grounds attending a public, non-school sponsored event. R. 4. This Court’s relevant student speech cases deal only with student speech occurring on school grounds. *See Tinker*, 393 U.S. 503 (concerning students’ rights to wear black arm bands to school in protest of the Vietnam War); *Fraser*, 478 U.S. 675 (concerning student’s right to deliver a lewd and obscene speech on school grounds at a school-sponsored assembly); *Hazelwood Sch.*

Dist. v. Kuhlmeier, 484 U.S. 260 (1988) (concerning students’ rights to publish school-sponsored newspaper published in journalism class). Because Calvin’s speech occurred off school grounds at a public event, he is entitled to full protection of the First Amendment. See *Hazelwood*, 484 U.S. at 271 (discussing *Tinker* as applying to “personal expression that happens to occur on school premises”); *Fraser*, 478 U.S. at 688 (“If respondent had given the same speech outside of the school environment, he could not have been penalized simply because government officials considered his language to be inappropriate.”) (Brennan, J., concurring).

Even applying the rules governing student-speech cases, the Fourteenth Circuit correctly concluded that Calvin’s banner falls within his First Amendment right to free speech under *Tinker v. Des Moines Cmty. Sch. Dist.* R. 12. This Court clearly established that school children do not abandon their constitutional rights when they enter the schoolhouse gate. *Tinker*, 393 U.S. at 506; *Fraser*, 478 U.S. at 680; *Hazelwood*, 484 U.S. at 266. Justice Brennan writing for this Court in *Keyishian v. Board of Regents* maintained that “[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools. The classroom is peculiarly the ‘marketplace of ideas.’” 385 U.S. 589, 603 (1967) (internal citation omitted). Moreover, the law affords substantial protections to the lion’s share of student speech, allowing school regulation only when the speech threatens to materially interfere with or substantially disrupt school activities. *Tinker*, 393 U.S. at 509. In articulating the *Tinker* standard, this Court balanced the constitutional rights of students to freely express themselves with the rights of school administrators to control conduct in the schools. *Tinker*, 393 U.S. at 507. Post-*Tinker*, this Court identified narrow circumstances in

which school administrators can regulate speech that does not threaten to disrupt school activities: when the speech is (1) lewd, vulgar, obscene, or plainly offensive, *Fraser*, 478 U.S. 683-85, or (2) school-sponsored and the school's actions are reasonably related to legitimate pedagogical concerns, *Hazelwood*, 484 U.S. at 273. As Calvin's banner does not fall within either of these narrow circumstances, the *Tinker* rule applies.

A. *Fraser* Does Not Apply Because Calvin's Banner Was Not Obscene Or Profane, And He Unfurled It Off School Grounds At A Non-School Sponsored Event.

Petitioner's reliance on *Bethel Sch. Dist. No. 403 v. Fraser* is misplaced, as this case is distinguishable in law and in fact. In *Fraser*, this Court carved out an exception to *Tinker* precisely because the student speech, a speech filled with explicit sexual innuendo given at a school-sponsored assembly, gave rise to legitimate concerns among school administrators that the student's "vulgar and lewd" speech undermined the school's basic educational mission. *Fraser*, 478 U.S. at 685. This Court determined that the school acted appropriately by disassociating itself from the speech to make the point to students that "vulgar speech and lewd conduct is wholly inconsistent with the 'fundamental values' of public school education." *Id.* at 685-86. Thus, following *Fraser*, schools may regulate vulgar, lewd, or indecent student speech, even when the speech does not pose a risk of materially interfering with or substantially disrupting school activities. *Id.* at 683-85. Such speech connotes sexual innuendo or profanity, synonymous with the student speech in *Fraser*. *Guiles v. Marineau*, 461 F.3d 320, 327 (2d Cir. 2006). This Court has also characterized the type of speech that invokes *Fraser* as "plainly offensive," *Fraser*, 478 U.S. at 684; *Hazelwood*, 484 U.S. at 271, n. 4, and the petitioners assert that Calvin's banner contained plainly offensive speech. However, this Court's language in *Fraser* suggests that "plainly offensive" language is also synonymous with lewd, vulgar and

indecent speech. *See Fraser*, 478 U.S. at 683 (“The pervasive sexual innuendo in Fraser’s speech was plainly offensive to both teachers and students.”) Moreover, in support of its holding in *Fraser*, this Court cited cases that concerned vulgarity, obscenity and profanity. *See id.*, at 684-85 (discussing precedent cases). Several Federal Circuits have also emphasized that *Fraser* only applies to speech that is synonymous with sexual innuendo and profanity. *See Guiles*, 461 F.3d at 328 (characterizing plainly offensive speech as “something less than obscene but related to that concept, that is to say speech containing sexual innuendo and profanity”); *Frederick v. Morse*, 439 F.3d 1114, 1118-19 (9th Cir. 2006) (“The phrase ‘Bong Hits 4 Jesus’ may be funny, stupid or insulting, depending on one’s point of view, but it is not ‘plainly offensive’ in the way sexual innuendo is.”); *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 213 (3d Cir. 2001) (Alito, J.) (“*Fraser* permits a school to prohibit words that ‘offend for the same reasons that obscenity offends.”). Here, because Calvin’s banner did not contain any speech pertaining to sexual innuendo or profanity, the *Fraser* standard is inapplicable as a matter of law.

Furthermore, this Court in *Fraser* made clear that it was the manner of the offending student’s speech, rather than the content, that warranted censorship and punishment. *See Fraser*, 478 U.S. at 682-83 (discussing a school’s right to prohibit an “offensive form of expression” and inappropriate “modes of expression” and concluding that the school has discretion to determine what “manner of speech in the classroom or school assembly is inappropriate”); *see also Newsom v. Albemarle County Sch. Bd.*, 354 F.3d 249, 256 (4th Cir. 2003) (“When speech in school falls within the lewd, vulgar, and plainly offensive rubric, it can be said that *Fraser* limits the form and manner of speech,

but does not address the content of the message.”). Here, Rooney did not intend to regulate the manner of the speech, but rather the content. The banner contained no profane or vulgar terms that offended civility. Rather, Rooney’s concern involved the message itself—a pro-drug message that undermined the Presidency. Rooney punished *what* Calvin had to say, not *how* he chose to say it. She did not find the manner of speech to be vulgar, lewd, obscene, or plainly offensive; she merely found its message to be embarrassing. R. 4. Such concern does not trigger the legal standard this Court established in *Fraser*.

Moreover, the Fourteenth Circuit correctly determined that to apply *Fraser* to this case, where the speech did not contain patently vulgar or obscene language, would permit school administrators to define what is “plainly offensive” on an ad-hoc, haphazard basis. R. 11. Certainly, the Board’s attempt to create an anti-drug environment is laudable and legitimate. Yet, surely this Court in *Fraser* did not intend to permit schools to censor and punish students whenever their speech landed outside the bounds of any conceivable legitimate policy. Under such a regime, a school could punish a student for advocating safe sex because it violates the school’s abstinence policy. *Cf. Newsom*, 354 F.3d at 257 (applying *Tinker*, and distinguishing *Fraser*, in assessing whether a school’s anti-weapons policy permitted school officials to censor and punish nonviolent and non-threatening images of weapons). Such a result would eviscerate *Tinker*, leaving students with no constitutionally-protected right to speech that challenges a school’s policy, despite this Court’s oft-quoted pronouncement in *Tinker* that students retain their constitutional rights within the schoolhouse gate. Applying the student speech cases as the petitioners interpret them allows a school to punish students for wearing anti-war

armbands because such armbands are plainly offensive to the school's mission of inculcating patriotism during a time of war. Both history and logic belie this result.

Even if this Court deemed that the message on Calvin's banner is "plainly offensive," the political nature of the banner's message "Bong Hits 4 Bush" would implicate *Tinker*. This Court distinguished the speech in *Fraser* from that in *Tinker* because it was "unrelated to any political viewpoint." *Fraser*, 478 U.S. at 685. In this case, the message, while coarse, involved the President of the United States, thus giving onlookers a reasonable impression that the message was politically motivated. Rooney demanded Calvin take down the banner because it undermined the Presidency (R. 4), thus evidencing her intent to quell political speech. The fact that Calvin did not intend to make a political statement about the President is of no moment, as Rooney could not possibly have known Calvin's intent when she ordered him to remove the banner. Moreover, while Calvin intended his banner to be funny, he also intended it as a test of his and other students' First Amendment rights, (R. 4, n.4) thus intending to convey a political message.

In addition to the inapplicability of *Fraser's* legal standard, the Fourteenth Circuit correctly noted that this case is factually distinguishable from *Fraser*. Not only did Calvin's banner lack plainly offensive language, Calvin unfurled the banner off school grounds. He exercised his free speech rights at a public event attended by students who chose to view the parade along with numerous Beltmore citizens. R. 4. The parade afforded various sights and sounds for onlookers to enjoy, and any students viewing the parade could easily avert their gaze from Calvin's banner. *See Cohen*, 403 U.S. at 21 (asserting that individuals located in a public courthouse could avert their eyes from a

man's jacket bearing the words "Fuck the Draft" to avoid further offense). In stark contrast, the student in *Fraser* delivered his speech at a mandatory school assembly that was part of a school-sponsored program in self-government, wherein the students provided the speaker a captive audience. *Fraser*, 478 U.S. at 677. Students could not easily avert their attention from the speech. Moreover, in *Fraser*, the student speech invoked obvious embarrassment among some students, and this Court took issue with the offense that the lewd sexual innuendo would cause female and younger students. *Fraser*, 478 U.S. at 678, 683. Calvin's banner had no such impact. Here, even if the language is "plainly offensive," the factual scenario in which Calvin expressed the language does not give rise to the same concerns present in *Fraser* and thus provides no legal justification for Rooney's actions.

Several other Federal Circuits determined that student speech violating a school's anti-drug or anti-weapons policy does not invoke the "plainly offensive" standard established in *Fraser*. In *Guiles v. Marineau*, the Second Circuit concluded that images of a martini glass, alcohol, and lines of cocaine on a student's t-shirt did not implicate *Fraser*. *Guiles*, 461 F.3d at 329. The court rejected the school's argument that images of illegal drugs and alcohol are plainly offensive because they undermine the school's anti-drug message, reasoning that if *Fraser* is broad enough to be triggered whenever a school decides a student's expression conflicts with its educational mission, *Tinker* would lose all effect. *Id.* at 330. Similarly, in *Frederick v. Morse*, the Ninth Circuit declined to apply *Fraser* in determining whether a student's banner displaying the message "Bong Hits 4 Jesus" merited constitutional protection. *Frederick*, 439 F.3d at 1119. The court reasoned that *Fraser* focused on the sexual nature of the offensiveness of student speech,

thus Fraser did not apply to the banner because it was not “plainly offensive in the way sexual innuendo is.” *Id.* In *Newsom v. Albemarle County Sch. Bd.*, the Fourth Circuit applied *Tinker* to assess whether a school’s ban on clothing depicting weapons violated a student’s free speech rights. *Newsom*, 354 F.3d at 257. The court emphasized that images depicting weapons that were neither violent nor threatening clearly fall under the *Tinker* disruption standard, thus rejecting the notion that under *Fraser*, a school could censor all images of weapons because they undermine the school’s “Guns and School Don’t Mix” policy. *Id.* at 260.

In *Boroff v. Van Wert City Bd. of Educ.*, 220 F.3d 465 (6th Cir. 2000), the Sixth Circuit interpreted *Fraser* to allow school officials to prohibit a student from wearing a t-shirt deemed offensive, but not obscene, even where the shirt did not cause a substantial disruption of school activities. *Id.* at 470. However, the factual circumstances in *Boroff* are entirely distinguishable from the facts of this case. Most glaringly, the student in *Boroff* wore his t-shirt to school, *id.* at 467, while Calvin never set foot on school grounds, R. 4. Further, the t-shirt in *Boroff*, which featured the rock group Marilyn Manson, depicted a three-headed Jesus with the text “See No Truth. Hear No Truth. Speak No Truth” on the front and the word “BELIEVE” with the letters “LIE” highlighted on the back. *Boroff*, 220 F.3d at 469. The court reasoned that the figure was offensive because it mocked a religious figure, which was contrary to the school’s educational mission to be respectful of others’ beliefs. *Id.* Moreover, the court pointed to the band’s lyrics that encourage suicide and use profanity and racial slurs as being contrary to the school’s mission of establishing a core of values promoting human dignity and worth. *Id.* at 470. Lastly, the court noted that the rock group’s highly publicized use

of drugs was cause for concern because of the rock group's influence on students. *Id.* Thus, even if this Court adopts the standard applied by the Sixth Circuit, *Fraser* is still inapplicable to Calvin's banner: the banner did not mock any core belief system concerning religion or other deeply personal values; the banner contained no racially insensitive, profane, or violent language; and, while the banner referenced drug use, there was no suggestion that Calvin's potential influence on other students invoked the school's censorship and punishment.

B. Rooney's Actions Violated Calvin's Free Speech Rights Under *Tinker* Because Calvin's Banner Did Not Threaten To Materially Interfere With Or Substantially Disrupt School Activities.

In *Tinker*, this Court held that students may express controversial opinions if they do so without "materially and substantially interfere(ing) with the requirements of appropriate discipline in the operation of the school and without colliding with the rights of others." *Tinker*, 393 U.S. at 513 (alteration in original). Applying the rule, this Court struck down a policy that prohibited students from wearing black armbands to protest the Vietnam War. *Id.* at 514. This Court rejected the lower court's conclusion that school authorities could ban the armbands and punish the wearers based on a reasonable fear of a disturbance. *Id.* at 509. This Court emphasized that "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." *Id.* This Court recognized that any variation from the school's mission may cause trouble or inspire fear, but that the Constitution commands us to take that risk. *Id.*

As *Tinker* makes clear, school officials cannot base their actions on a desire merely to avoid controversy that may stem from unpopular expression. *Id.* School officials must reasonably forecast substantial disruption of or material interference with school activities. *Id.* While this Court did not define what constitutes "substantial

disruption” or “material interference,” *Tinker* did allude to “threats [and] acts of violence on school premises.” *Id.* at 508. Here, Calvin unveiled the banner off school grounds at a public, non-school sponsored event. R. 4. Moreover, the banner, far from inciting a disturbance among the crowd, evoked laughter. R. 4. Student disturbances involving the throwing of free samples, shouting and minor fighting occurred before Calvin and his friends unveiled the banner. R. 4. Further, even if Rooney’s account of the incident is accurate, her admonition that the banner contradicted school policy and was inappropriate for a school event (R. 4) falls far short of a legitimate concern that the banner would cause substantial disruption or material interference with school activities. *See Frederick*, 439 F.3d at 1123 (concluding that the school could not censor off-campus student speech that conflicted with the school’s mission of discouraging drug use because that rationale did not demonstrate reasonable concern about the likelihood of substantial disruption to the school’s educational mission). Thus, Rooney violated the protective standard established in *Tinker* by suppressing student expression based on its content, rather than its potential to be substantially disruptive to school activities.

In *Guiles*, the Second Circuit applied *Tinker*, concluding that the censorship of images of illegal drugs on a student’s t-shirt worn in school violated the student’s free speech rights. *Guiles*, 461 F.3d at 330. The court relied on school officials’ inability to demonstrate that the t-shirt caused any disruption in the school, or to show they had a reasonable belief that it would. *Id.* *See also Newsom*, 354 F.3d at 260 (concluding that, under *Tinker*, a school ban on clothing depicting weapons was unconstitutionally overbroad because it was not necessary to maintain order and discipline at the school considering the lack of any evidence that such clothing ever caused disruption at the

school or threatened to cause disruption in the future). This case is highly analogous to both *Guiles* and *Newsom*, as Rooney cannot demonstrate that the banner caused disruption in the school or that she had a reasonable impression that it would. Even construing the facts most favorably to Rooney, her justification for confiscating the banner was that the message contradicted the school’s anti-drug policy, not that the banner did or would cause school disruption. R. 4, 10. Moreover, the potential link between Calvin’s Banner and pro-drug graffiti found on the school in the ensuing weeks (R. 7, n.5) does not justify Rooney’s actions, as she did not confiscate the sign in anticipation of such consequences. See *Frederick*, 439 F.3d at 1116 (noting that the emergence of pro-drug graffiti on school grounds did not provide a post-hoc justification for a school principal’s unlawful confiscation of a “Bong Hits 4 Jesus” banner displayed off school grounds, where the principal did not act based on an anticipation of such consequences).

Moreover, this case is distinguishable from cases where Federal Circuits upheld censorship under *Tinker*. Several courts applied *Tinker* in upholding school officials’ ability to punish students for displaying the Confederate flag on school premises, where the school boards’ bans on Confederate symbols stemmed from documented incidents of racial tension and altercations among students. See *Scott v. Sch. Bd. of Alachua County*, 324 F.3d 1246, 1249 (11th Cir. 2003) (emphasizing that racial tensions and fights gave school officials reason to believe that Confederate flag was likely to cause disruption at the school); *West v. Derby Unified Sch. Dist.*, 206 F.3d 1358, 1366-67 (10th Cir. 2000) (same); *Melton v. Young*, 465 F.2d 1332, 1334-35 (6th Cir. 1972) (same). Similarly, in *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166 (9th Cir. 2006), the Ninth Circuit held

that a student's t-shirt condemning homosexuality collided with the rights of other students and thus did not warrant protection under *Tinker*. *Id.* at 1178. In all of these cases, previous incidents of violence led to the policies prohibiting the images. As these cases illustrate, the student speech must pose some threat of disruption either to school activities or to the rights of other students to fall outside of *Tinker's* broad protections. As Calvin's speech meets neither criterion, Rooney's censorship and punishment violated Calvin's free speech rights under *Tinker*.

II. THE FOURTEENTH CIRCUIT CORRECTLY APPLIED THE PRINCIPLES OF QUALIFIED IMMUNITY BECAUSE GOVERNING CASE LAW CLEARLY ESTABLISHED CALVIN'S RIGHTS AND ROONEY ACTED UNREASONABLY IN VIOLATING THOSE RIGHTS.

As the preceding discussion details, the Fourteenth Circuit correctly determined that Rooney violated Calvin's free speech rights. Thus, Calvin meets the first prong of the qualified immunity test that this Court established in *Saucier v. Katz*, 533 U.S. 194, 201 (2001). Additionally, Calvin meets the other two requirements of *Saucier*: his rights were "clearly established" and Rooney could not have had a reasonable belief that her actions were lawful. *See id.* at 201-02 (establishing the elements of qualified immunity).

A. Supreme Court Precedent Along With Various Federal Circuit Decisions Clearly Established Calvin's First Amendment Rights To Display The Banner.

Saucier requires that for a right to be clearly established "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what [she] is doing violates that right." *Id.* at 202. Sufficient clarity rests in the legal standard itself, and thus does not require previous application to a similar set of facts. *Hope v. Pelzer*, 536 U.S. 730, 741 (2002). As this Court made clear in *Saucier*, a court's determination

of a clearly established right depends on a case-specific analysis. *Saucier*, 533 U.S. at 201.

In this litigation, this Court’s binding precedent clearly establishes a student’s free speech rights: (1) *Fraser* governs vulgar, lewd, obscene, and plainly offensive speech, *Fraser*, 478 U.S. at 683-85; *Hazelwood*, 484 U.S. at 272 n.4; (2) *Hazelwood* governs school-sponsored speech, *Hazelwood*, 484 U.S. at 273; and (3) *Tinker* governs all other student speech. *Guiles*, 461 F.3d at 325; *Saxe*, 240 F.3d at 214; *Chandler v. McMinnville Sch. Dist.*, 978 F.2d at 524, 529 (9th Cir. 1992). As the student speech in question contained no vulgar, lewd, obscene or plainly offensive language, and the student displayed the speech off school grounds at a non-school sponsored event, the circumstances of this case unambiguously identify *Tinker* as the governing rule. Under *Tinker*, it is well established that school authorities cannot censor student speech unless that speech threatens to substantially interfere with or materially disrupt school activities. *See Tinker*, 393 U.S. at 513; *see also Seamons v. Snow*, 206 F.3d 1021, 1030 (10th Cir. 2000) (rejecting a school official’s claim for qualified immunity noting that extensive case law establishes that school authorities may not penalize student speech when that speech is “non-disruptive, non-obscene, and not school-sponsored”).

The suggestion that the case law is not clearly established because the lower court incorrectly applied *Fraser* is wholly unpersuasive. Such a suggestion implies that anytime an appellate court overturns a ruling on constitutional doctrine, that doctrine is not, by definition, clearly established. Such an approach conflates a split in the law with the inevitability that human judges will misapply clearly established case law. In *Wilson v. Layne*, 526 U.S. 603 (1999), this Court emphasized several factors that led to its

finding of qualified immunity, including a split of authority among the Federal Circuits regarding whether the challenged action was constitutional. *Id.* at 618. Moreover, at the time the challenged action took place, there were no judicial opinions establishing that the practice was unlawful, and the parties challenging the action failed to identify a consensus of controlling or persuasive authority establishing that a reasonable government actor could not have believed his actions were lawful. *Id.* at 617.

None of the factors this Court relied on in *Wilson* is present in this case. At the time Rooney confiscated Calvin's sign, *Tinker* and *Fraser* clearly established that school officials could not sanction student speech merely because it was contrary to school policy, unless that speech threatened to disrupt school activities, collided with the rights of others, or contained obscene or profane language. Calvin cites this Court's own precedent in addition to persuasive Federal Circuit decisions holding that school officials cannot censor and punish student speech merely because it offends a school's policy. *See Tinker*, 393 U.S. at 513 (concluding that a student can express a controversial opinion if he or she does so without materially and substantially interfering with school activities); *Guiles*, 461 F.3d at 330 ("*Fraser* cannot be so broad as to be triggered whenever a school decides a student's expression conflicts with its 'educational mission' or claims a legitimate pedagogical concern."); *Frederick*, 439 F.3d at 1120 ("There has to be some limit on the school's authority to define its mission in order to keep *Fraser* consistent with the bedrock principle of *Tinker* that students do not 'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.'"); *Newsom*, 354 F.3d at 260 (applying *Tinker* to conclude a dress code banning all images of weapons was constitutionally overly broad despite school's argument that such images conflict with its

“Guns and Schools Don’t Mix” policy). Moreover, Federal Circuits have consistently held that school officials can censor student speech only where that speech threatens to disturb school activities or contains speech that is obscene, profane or mocking of other students’ deeply-held belief systems. Certainly, no Federal Circuit has held that a school official can censor student speech because it threatens to embarrass her or the school board.

B. Rooney Had No Reasonable Belief That Her Actions Were Lawful Because Governing Case Law Clearly Established Calvin’s First Amendment Rights.

In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), this Court decided that once a court concludes “the law was clearly established, the immunity defense ordinarily should fail, since a reasonably competent public official should know the law governing [her] conduct.” *Id.* at 818-19. Not only does this Court’s binding authority and the Federal Circuit’s persuasive authority clearly establish the law governing student speech cases, but Rooney herself knew the controlling cases, as she participated in a graduate-level law and education course. R. 12. Thus, Rooney knew under what limited circumstances *Fraser* would apply, and she knew the stringent rule in *Tinker*: school officials cannot prohibit controversial student speech absent a substantial threat of disruption to school activities or a collision with the rights of other students. *Tinker*, 393 U.S. at 513. See *Frederick*, 439 F.3d at 1124 (emphasizing that the principal who wrongly censored a banner reading “Bong Hits 4 Jesus” was aware of the relevant law through participating in an advanced law course, indicating that she knew the law regarding student speech was clearly established).

The Fourteenth Circuit correctly maintained that it is immaterial that no previous case in the Fourteenth Circuit applied *Tinker* to facts exactly like the ones presented in

this case. R. 12-13. In *Hope v. Pelzer*, this Court concluded that “officials can still be on notice that their conduct violates established law even in novel factual circumstances.” *Hope*, 536 U.S. at 741; *see also Holloman v. Harland*, 370 F.3d 1252 (11th Cir. 2004) (emphasizing that it is not unreasonable to expect school officials to be able to apply the *Tinker* standard despite the lack of a factually similar case). Moreover, at least one other circuit applied *Tinker* to facts highly analogous to the facts of this case. In *Frederick*, the Ninth Circuit concluded that a school principal who censored an off-campus “Bong Hits 4 Jesus” banner because it contradicted the school’s anti-drug policy could not have reasonably, but mistakenly, believed that her conduct did not violate the student’s clearly established constitutional rights under *Tinker*. *Frederick*, 439 F.3d at 1124. The court reasoned that the facts did not pose a novel question because *Tinker* clearly established the rationale that a student’s promotion of a view contrary to school or government policy does not in itself warrant school sanctions infringing on the student’s free speech rights. *Id.*

In fact, petitioners do not even contend that Rooney forecasted that Calvin’s banner would substantially disrupt or materially interfere with school activities. R. 10. Rooney’s rationale for confiscating the banner suggests she merely wanted to avoid the embarrassment that the sign might cause her and the school, particularly because it undermined the Presidency. R. 4. Thus Rooney’s justification raises three insurmountable obstacles to her claim for qualified immunity. First, Rooney’s statement indicates that she did not perceive the language on the banner to be analogous to the lewd and offensive language in *Fraser* that undermined the school’s educational mission. At the least, she merely found the message embarrassing, and at the most, she considered it

contrary to school policy—an inadequate justification for censorship under *Tinker* or *Fraser*. Second, she considered Calvin’s banner to contain a political message, thus even if the language was offensive under *Fraser*, the political nature of the message clearly implicates *Tinker*. Thus, Rooney’s claim that *Fraser* applies to this case is inconsistent not only with her knowledge of precedent but also with her justification at the time she confiscated the banner. As *Tinker* clearly applies, the third obstacle becomes clear: this Court established in *Tinker* that school officials cannot base their actions on a desire merely to avoid controversy that may stem from unpopular expression. *Tinker*, 393 U.S. at 509. That is exactly what Rooney did in this case.

As *Tinker* made clear, the mere existence of a policy does not automatically negate a student’s free speech rights. Rooney studied *Tinker*. She knew the rule. Her knowledge of the case law in combination with the circumstances in this case—the lack of profane or obscene language, the student was standing off school grounds attending a non-school sponsored event—unequivocally put Rooney on notice that she could not enforce the policy in accordance with Calvin’s constitutional rights. In a highly analogous case, the Ninth Circuit concluded in *Frederick*, that despite the school’s policy against displaying material that advertises or promotes the use of illegal drugs, no reasonable school official could have believed that censorship of a student’s “Bong Hits 4 Jesus” banner, unveiled off school grounds at a non-school sponsored event, was lawful. *Frederick*, 439 F.3d at 1124. Similarly, in this case, Calvin meets the second and third prongs of the qualified immunity test: governing case law clearly established Calvin’s free speech rights, and Rooney could not have reasonably believed that her actions did not infringe on these rights.

CONCLUSION

For the reasons stated above, the decision of the United States Court of Appeals for the Fourteenth Circuit should be affirmed.

Respectfully submitted,

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