IN THE

Supreme Court of the United States

No. [redacted] 21

JOHH F. TINKER, *Et Al., Appellants,*

v.

THE DES MOINES INDEPENDENT COMMUNITY SCHOOL DISTRICT, *Et Al., Appellees.*

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

MOTION OF THE UNITED STATES NATIONAL STUDENT ASSOCIATION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE*

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Pursuant to Rule 42 of the rules of this Court *Amicus* initially sought permission from the parties to file a friend of the court brief in support of Appellant. Appellant granted this permission on April 5, 1968. However, on April 12, Appellees denied permission. In light of the short period of time remaining in which to prepare the final brief, *Amicus* has appended the brief to the motion.

MOTION OF THE UNITED STATES NATIONAL STUDENT ASSOCIATION FOR LEAVE TO FILE A BRIEF AS *AMICUS CURIAE*

I. INTEREST OF THE AMICUS CURIAE

Amicus United States National Student Association (USNSA) is a confederation of over three hundred college and university student governments. USNSA is engaged in programs to enhance student academic freedom and is a signatory to the *Joint Statement on the Rights and Freedoms of Students* endorsed by the Association of American Colleges, the National Association of Women Deans and Counselors, the National Association of Student Personnel Administrators, and the American Association of University Professors.

The USNSA and its member student governments have a significant interest in the present case because the challenged school regulation seriously inhibits the freedom of expression of high school students. A decision upholding the regulation would lend weight to the position of some college authorities who contend that free expression on the college campus is always subordinate to all general college rules and regulations, however restrictive of expression they may be. The decision which *Amicus* and Appellants support, however, would increase the academic freedom of college students by necessary inference because it would protect this freedom, to a degree, for high school students. Moreover, an increased degree of academic freedom for high school students would better enable them to develop an independent comprehension of current social, political, and economic issues. The high school student, upon entering college, could then benefit more

significantly from exposure to the diverse currents of higher education. Ultimately, the nation as a whole would reap this benefit in the form of a citizenry better prepared to deal with the complexities of a modern, changing society.

USNSA, through educational projects and participation as an *Amicus*, seeks to pursue these goals by encouraging the protection of First Amendment rights for college students, present and future. The reasons for this concern were forcefully stated by this Court over twenty-five years ago in *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 637 (1943):

> "The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures—Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes."

For these reasons USNSA considers its interest in this case significant and asks to be represented before this Court.

II. QUESTIONS OF LAW TO BE PRESENTED BY AMICUS

1. *Amicus* will argue that public high school officials cannot, consistent with the First and Fourteenth Amendments, forbid symbolic expression by students on school premises until this expression imminently threatens orderly operation of the classroom or other

facility. Appellants do not base their argument on this proposition, but contend that the school regulation prohibiting arm bands constituted an invalid censorship of speech. *Amicus* will argue that regulations which infringe upon student speech are invalid *per se*, and that symbolic expression by students on school premises cannot be curtailed except upon a factual showing that the specific expression imminently threatens disruption of a legitimate school operation. *See, e.g., West Virginia Board of Education v. Barnette*, 319 U.S. 624, 633, 639 (1943); *cf. Niemotko v. Maryland*, 340 U.S. 268, 271-72 (1951); *Kunz v. New York*, 340 U.S. 290, 293-94 (1951); *Terminiello v. Chicago*, 337 U.S. 1, 4-5 (1949); *Burnside v. Byars*, 363 F.2d 744, 748-49 (5th Cir. 1966); *Dickey v. Alabama Board of Education*, 273 F. Supp. 613, 619-21 (M.D. Ala. 1967). *But see Ferrell v. Dallas Independent School District*, — F.2d —, No. 24301 (5th Cir. Mar. 29, 1968).

Because this argument merits presentation and differs fundamentally from that of Appellants, *Amicus* respectfully requests leave of the Court to develop it in a brief.

2. *Amicus* will further argue that the academic freedom decisions of this Court have direct bearing upon the instant case in that free inquiry by students at the level of secondary education is chilled by the decision of the lower court. In a series of cases beginning with *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957), this Court has stressed the overriding importance of free inquiry and expression in educational institutions. The Court in *Sweezy said*:

> "Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understand-

> ing; otherwise our civilization will stagnate and die."

See also Whitehill v. Elkins, 389 U.S. 54, ___, 88 S. Ct. 184, 187 (1967); *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967); *cf. Dombrowski v. Pfister*, 380 U.S. 479 (1965).

The instant case illustrates a regulation in an educational setting which induces conformity in thought and action, although no state interests are threatened wih imminent disruption. *Amicus* will argue that the principles of *Sweezy*, *Whitehill*, and *Keyishian* therefore have direct relevance to resolution of this controversy, and support a reversal. Moreover, *Amicus* will rely in part upon literature from the sphere of adolescent psychology which indicates that high school regulations restrictive of student expression tend to inhibit a student's ability and desire to explore political and social issues of a controversial nature. Appellants have not developed this line of inquiry.

* * * * *

For the above reasons the United States National Student Association respectfully requests leave of this Court to file a brief as *Amicus Curiae*.

CERTIFICATE OF SERVICE

This is to certify that the motion of the United States National Student Association for leave to file a brief as *Amicus Curiae* has been served upon the following counsel of record, by airmail postage prepaid, this 10th day of May, 1968:

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encouraging the protection of First Amendment rights for college students, present and future. The reasons for this concern were forcefully stated by this Court over twenty-five years ago in *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 637 (1943):

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For these reasons USNSA considers its interest in this case significant and has asked to be represented before this Court.

II. SUMMARY OF FACTS

The facts are reported in the District Court's opinion styled *Tinker v. Des Moines Independent Community School District*, 258 F. Supp. 971 (S.D. Iowa 1966), *aff'd mem. by an equally divided court*, 383 F.2d 988 (8th Cir. 1967) (en banc). *Amicus* will summarize and stress the particular facts material to the First Amendment arguments presented in this brief.

Appellants John and Mary Tinker grew up in a religious setting where opposition to violent warfare was an important element of religious belief (R. 11, 12, 21, 26). Like many students similarly situated they learned of a plan to wear black arm bands to school as a symbolic expression of grief for the victims of the war in Vietnam. The arm bands were also an endorsement of Senator Robert F. Kennedy's proposal that the Christmas truce of 1966 be extended indefinitely.

The school authorities, however, promulgated a regulation to prevent this form of expression. The students could choose between wearing the arm bands and not continuing their secondary education. Mary Tinker chose to test the restriction in a peaceful and orderly way. She attended school on the morning and into the afternoon of December 16 wearing an arm band. Miss Tinker created no disorder in the school during that time (R. 21-24). Nonetheless, the school authorities, upon discovering her expression, summarily ordered her to return home. Another appellant, Christopher Eckhardt, also wore an arm band to school on December 16. He went directly to the principal's office that morning and was summarily suspended (R. 27). John Tinker wore an arm band the following day. He attended classes during the morning and afternoon. Although John Tinker created no disturbance he too was ordered to leave the school (R. 13-15).

General reasons stated for the prior restriction of arm bands on this occasion included the following: (1) that arm bands were inappropriate dress for students, (2) that other students would be forced to view the arm bands against their will, (3) that appropriate assemblies were held on national holidays to honor war dead, (4) that other students might wear arm bands of different colors, and (5) that other students, friends of a young man killed in Vietnam, might create a disturbance (S.R. 27).

After a full hearing the District Court dismissed the complaint and held that:

> "School officials must be given a wide discretion and if, under the circumstances, a disturbance in school discipline is reasonably to be anticipated, actions which are reasonably calculated to prevent such a disruption must be upheld by the Court."

258 F. Supp. at 973.

The Eighth Circuit Court of Appeals ultimately heard the controversy *en banc*, divided evenly, and accordingly affirmed without opinion. 383 F.2d 988. This Court

granted certiorari on March 4, 1968.—U.S.—, 88 S. Ct. 1050.

III. ARGUMENT

PUBLIC HIGH SCHOOL OFFICIALS CANNOT, CONSISTENT WITH THE FIRST AND FOURTEENTH AMENDMENTS, SUPPRESS SILENT SYMBOLIC EXPRESSION BY STUDENTS ON SCHOOL PREMISES UNTIL THIS EXPRESSION IMMINENTLY THREATENS ORDERLY OPERATION OF THE CLASSROOM OR OTHER SCHOOL FACILITY.

The unquestionably leading case on the First Amendment rights of high school students is *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943) (compulsory flag salute case). In a carefully reasoned opinion Mr. Justice Jackson there held that

> "censorship or suppression of expression of opinion is tolerated by our Constitution only when the expression presents a clear and present danger of action of a kind the State is empowered to prevent and punish."

319 U.S. at 633. The Court specifically rested its decision in *Barnette* on free expression grounds, rather than the alternate rationale of interference with free exercise of religion. 319 U.S. at 634. *Barnette*, as *Tinker*, concerned students in a classroom who silently expressed an opinion which might prove offensive to their classmates. Nonetheless *Barnette* recognized that the State interest was insufficient to justify suppression, and that the State could not restrict the students' expression unless necessary "to prevent grave and immediate danger to interests which the State may lawfully protect." 319 U.S. at 639. The State interests asserted in the instant case are no greater than in *Barnette*. An interest in requiring unifrom student garb hardly rises to the stature of the First Amendment. An interest in protecting other students from seeing arm bands is also no greater than that of preventing West Virginia students from seeing some of their friends refuse to salute the American flag. Nor is the interest in preventing speculative disturbances caused by students whose friend had been killed in Vietnam any different from requiring students to

salute the American flag in order to please friends whose fathers or relatives might have been risking their lives in World War II.

In its opinion the lower court held that "if, under the circumstances, a disturbance in school discipline is reasonably to be anticipated, actions which are reasonably calculated to prevent such a disruption must be upheld . . . ." 258 F. Supp. at 973. The District Court found support in *United States v. Dennis*, 183 F.2d 201, 212 (2d Cir. 1950), *aff'd*, 341 U.S. 494 (1951). *Dennis*, however, expressly approved *Barnette*, and stated that the clear and present danger test retained its validity in the broad range of cases not involving danger to national security. Chief Justice Vinson, writing for the Court, said, 341 U.S. at 508-09:

> "In this case [*Dennis*] we are squarely presented with the application of the 'clear and present danger' test, and must decide what that phrase imports. We first note that many of the cases in which this Court has reversed convictions by use of this or similar tests have been based on the fact that the interest which the State was attempting to protect was itself too insubstantial to warrant restriction of speech. In this category we may put such cases as . . . *West Virginia Board of Education v. Barnette*, 1943, 319 U.S. 624 . . . ."

Moreover, numerous other cases decided by this Court have cited *Barnette* with approval. *See, e.g., Brown v. Louisiana*, 383 U.S. 131, 146 n.5 (1966) (Mr. Justice Brennan, concurring); *Baggett v. Bullitt*, 377 U.S. 360, 371 (1964) (opinion of the Court by Mr. Justice White); *School District of Abington v. Schempp*, 374 U.S. 203, 226 (1963) (opinion of the Court by Mr. Justice Clark); *Torasco v. Watkins*, 367 U.S. 488, 492 n.7 (1961) (opinion of the Court by Mr. Justice Black); *Braunfeld v. Brown*, 366 U.S. 599, 603 (1961) (opinion of the Court by Mr. Chief Justice Warren); *Speiser v. Randall*, 357 U.S. 513, 536 (1958) (Mr. Justice Douglas, concurring); *McCollum v. Board of*

Education, 333 U.S. 203, 232 (1948) (Mr. Justice Jackson, concurring). Also, this Court has continued to apply the clear and present danger standard or a similar test in free expression cases coming before it. *See, e.g., Elfbrandt v. Russell*, 384 U.S. 11, 18 (1966) ("A statute touching [First Amendment] rights must be 'narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the State.' "); *Wood v. Georgia*, 370 U.S. 375, 384 (1962) (The clear and present danger test is " 'a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterance can be punished.' "); *cf. DeGregory v. New Hampshire*, 383 U.S. 825, 835 (1966) (To infringe upon First Amendment rights there must be a "showing of 'overriding and compelling state interest.' "). And, this Court has consistently held that high school students are no less citizens because of their ages. The Court in *Barnette* called for "scrupulous protection of Constitutional freedoms of the individual if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." 319 U.S. at 637. Moreover, the *Barnette* Court expressly held that free expression was the issue before it, not free exercise of religion. 319 U.S. at 634-35 & n.15 ("Nor does the issue as we see it turn on one's possession of particular religious views or the sincerity with which they are held."). However, where high school students sought protection for their free exercise of religion or freedom from regulations respecting an establishment of religion, this Court has accepted its historical responsibility to secure these rights. *See, e.g., Engel v. Vitale*, 370 U.S. 421 (1962); *McCollum v. Board of Education*, 333 U.S. 203 (1948). Finally, in the sphere of juvenile correction, the Court has again reaffirmed the proposition that "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone." *In re Gault*, 387 U.S. 1, 14 (1967).

The overall impact of the decisions, then, is that a

state cannot relegate its young citizens to second-class status where rights of political expression are concerned. It cannot infringe upon these basic First Amendment interests until their exercise creates an imminent threat to an overriding State interest such as orderly operation of the classroom. The record in this case reveals the transparency of any argument that orderly operation of the school was endangered by the wearing of arm bands. A speculative probability of future disorder, moreover, would leave the First Amendment rights of these students to the whims of the least secure of their mentors. For these reasons the decision of the lower court cannot stand.

It could be argued that *Barnette* stands for no more than the proposition that school officials cannot compel an affirmation of political belief from their students. Here, however, as in *Barnette*, there is " 'the brutal compulsion that requires a sensitive and conscientious child to stultify himself in public'." 319 U.S. at 635 n.15. Here the students wished only to express themselves in the most silent and least obnoxious way, in much the same manner as pupils wearing "freedom buttons" in Philadelphia, Mississippi classrooms, *see Burnside v. Byars*, 363 F.2d 744 (5th Cir. 1966), or similar arm bands to mourn the death of Dr. Martin Luther King. *Barnette*, moreover, refutes any such wooden translation in its reliance on *Stromberg v. California*, 283 U.S. 359 (1931), in which "Chief Justice Hughes led this Court in holding that the display of a red flag as a symbol of opposition by peaceful and legal means to organized government was protected by the free speech guaranties of the Constitution." *Barnette, supra*, at 633.

The few instances in which this Court has tolerated limitations on the unrestricted rights of expression for young people have been marked by wholly different considerations from those present in this case. They therefore have no bearing upon the present controversy. *See, e.g., Ginsberg v. New York*, — U.S. —, 36 U.S.L.W. 4295 (April 23, 1968) (upholding state

"criminal obscenity statute which prohibits the sale to minors under 17 years of age of material defined to be obscene on the basis of its appeal to them whether or not it would be obscene to adults." 36 U.S.L.W. at 4295); *Zorach v. Clauson*, 343 U.S. 306 (1952) (upholding New York City released time system for religious instruction); *Prince v. Massachusetts*, 321 U.S. 158, 170 (1944) (state can regulate child labor even though *conduct* involved was sale of religious literature).

1. PRIOR RESTRAINTS ON SILENT SYMBOLIC EXPRESSION ARE INVALID **PER SE** UNLESS NARROWLY DRAWN TO AVOID ADMINISTRATIVE ABUSE AND PROTECT LEGITIMATE, OVERRIDING STATE INTERESTS.

The lower court's decision in *Tinker* squarely validates the asserted power of a state board of education to place prior restraints upon the exercise of First Amendment rights by high school students on school premises and in the classroom. An important issue before this Court, therefore, must be not only the limits upon the school's authority in punishing expression, but the limits on the school in promulgating general regulations which purport to satisfy legitimate school interests where they conflict with the First Amendment rights of students. The *Tinker* standard accords undue weight to the discretion of school administrators. It would permit prior restraints of a broad nature, and of the character which violate the First Amendment under settled principles announced by this Court. On the issue of prior regulation of student expression, the Court in *Tinker* said:

> "School officials must be given a wide discretion and if, under the circumstances, a disturbance in school discipline is reasonably to be anticipated, actions which are reasonably calculated to prevent such a disruption must be upheld by the Court. In the case now before the Court, the regulation of the defendant school district was, under the circumstances, reasonable and did not deprive the

> plaintiffs of their constitutional right to freedom of speech."

258 F. Supp. at 973. This standard is in direct conflict with the principles of *Barnette* where this Court recognized that administrative discretion by school boards was always subject to the important limits placed on all official authority by the Bill of Rights. Justice Jackson there said:

> "The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures—Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights."

319 U.S. at 637. Literally read, the *Tinker* decision would validate any school regulation of student expression on school premises or in the classroom whenever the whim or convenience of school authorities saw fit to impose rules with some rational relationship to school order and discipline. However well-intentioned, rules resting on such slim foundations could be used to convert public high schools into quiet military academies. As this Court recently said concerning an ordinance which purported to protect order on public sidewalks:

> "Literally read, therefore, . . . this ordinance says that a person may stand on a public sidewalk in Birmingham only at the whim of any police officer of that city. *** Instinct with its ever present potential for arbitrarily suppressing First Amendment liberties, that kind of law bears the hallmark of a police state."

Shuttlesworth v. Birmingham, 382 U.S. 87, 90-91 (1965). Numerous other decisions by this Court have reiterated the important proposition that no government official may be given the discretion to restrict free speech merely when a reasonable basis exists for doing so. *See, e.g., Kunz v. New York*, 340 U.S. 290,

293-94 (1951) ("Although this Court has recognized that a statute may be enacted which prevents serious interference with normal usage of streets and parks, . . . we have consistently condemned licensing systems which vest in an administrative official discretion to grant or withhold a permit upon broad criteria unrelated to proper regulation of public places."); *Niemotko v. Maryland*, 340 U.S. 268, 271-72 (1951) (This Court has "condemned statutes and ordinances which required that permits be obtained from local officials as a prerequisite to the use of public places, on the grounds that a license requirement constituted a prior restraint on freedom of speech, press, and religion, and, in the absence of narrowly drawn, reasonable and definite standards for the officials to follow, must be invalid."); *cf. Feiner v. New York*, 340 U.S. 315 (1951). The regulation in *Tinker* is one step removed from the stage of a permit in that it constitutes a blanket prohibition of a particular form of expression on school premises and in the classroom. Moreover, the lower court's decision authorizes this and like regulations whenever school authorities have a "reasonable" basis to predict disruption and take "reasonable" steps to prevent it. Such an authorization is patently overbroad under the decisions in *Barnette*, *Kunz*, and *Niemotko*. *Compare Hammond v. South Carolina State College*, 272 F. Supp. 947 (D.S.C. 1967) (college rule prohibiting "parades, celebrations, and demonstrations" without prior approval of college authorities invalidated as a prior restraint in absence of "showing of a clear and present danger, of riot, disorder, or immediate threat to public safety, peace, or order." 272 F. Supp. at 950).

Amicus recognizes that a high school has a legitimate and substantial interest in maintaining order in the classroom and on school premises. A student speaker who attempts to incite his classmates to riot need not be allowed to continue his presentation. Nor could students be allowed to bring neon signs or large political posters into their classrooms. Conduct which would

inevitably create major disorders in the classroom can certainly be stopped at the outset or prevented by narrow prior regulation. The case presented here, however, is different in kind and degree. Arm bands hardly differ from normal attire such as boy scout uniforms, scarves, school sweatshirts, or yo-yo sweaters. Moreover, the appellants were not seeking to speak before their classes nor to do any more than that which is done by students wearing campaign buttons or freedom buttons.

Accordingly, *Amicus* respectfully urges this Court to hold that school regulations which amount to prior restraints on speech are presumptively invalid unless narrowly drawn to prevent administrative abuse and protect legitimate, overriding school interests. *Kunz v. New York, supra; Niemotko v. Maryland, supra; see also NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288, 307-08 (1964); *Shelton v. Tucker*, 364 U.S. 479, 488 (1960).

2. A PRIOR RESTRAINT ON SYMBOLIC EXPRESSION CANNOT BE JUSTIFIED BY THE MERE REASONABLE POSSIBILITY OF HOSTILE REACTION TO THE EXPRESSION.

In a considerable line of cases this Court has settled the question of whether one's First Amendment rights depend upon his being well received by those who hear or see his expression. Nonetheless, citing no cases, the lower court justified its position in part on the possibility that "the reactions and comments of other students as a result of the arm bands would be likely to disturb the disciplined atmosphere required for any classroom." 258 F. Supp. at 973. Recently this Court reiterated the proposition that persons exercising their First Amendment rights cannot be suppressed because of the possibility of adverse reaction by others. *Brown v. Louisiana*, 383 U.S. 131 n.1 (1966):

> "Participants in an orderly demonstration in a public place are not chargeable with the danger, unprovoked except by the fact of the constitutionally protected demonstration itself, that their

> critics might react with disorder or violence. *See Cox v. State of Louisiana* . . . , 379 U.S. at 551-552 . . . *Wright v. State of Georgia*, 373 U.S. 284, 293 . . . , *cf. Terminiello v. Chicago*, 337 U.S. 1 . . . . *Compare Feiner v. People of State of New York*, 340 U.S. 315 . . . . *Chaplinsky v. State of New Hampshire*, 315 U.S. 568 . . . *cf. Niemotko v. State of Maryland*, 340 U.S. 268, 289 . . . (concurring opinion of Frankfurter, J.). See generally on the problem of the "heckler's veto," KALVEN, THE NEGRO AND THE FIRST AMENDMENT, pp. 140-160 (1965)."

This position is a sound one because:

> "A 'function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.' "

Cox v. Louisiana, 379 U.S. 536, 551-52 (1965) (with reference to the breach of the peace conviction). The fact that appellants in this controversy were exercising their silent symbolic expression on school premises and in classrooms is of no greater weight in this case than it was in *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943), where this Court did not even consider the hostility argument sufficiently meritorious to justify discussion. In *Barnette*, as here, the "sole conflict is between authority and rights of the individual." 319 U.S. at 630. "Nor is there any question in this case that [the students' behavior] is peaceable and orderly." *Id.* The *Tinker* record affirmatively establishes this point.

For these reasons *Amicus* respectfully urges this Court to reaffirm the proposition that a prior restraint on the silent symbolic expression of high school students cannot be justified by the mere reasonable possibility of some hostile reaction from their fellow students. To do otherwise would make First Amendment rights depend for their exercise upon the agreement of

those who hold a contrary opinion. The right to speak would then be narrowed to the meaningless right to agree.

3. IN ORDER TO ENCOURAGE AN ATMOSPHERE OF FREE INQUIRY AND TOLERANCE TOWARD MINORITY BELIEFS, HIGH SCHOOL AUTHORITIES HAVE AN AFFIRMATIVE OBLIGATION TO LIMIT RESTRAINTS ON STUDENT EXPRESSION TO THE LEAST RESTRICTIVE ALTERNATIVE AVAILABLE FOR THE PROTECTION OF LEGITIMATE, OVERRIDING SCHOOL INTERESTS.

The importance of maintaining an atmospheree of free inquiry in high school and college classrooms is a point to which this Court has given special recognition. In *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967), Justice Brennan wrote:

> "Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us . . . . That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom."

Although *Keyishian* involved state employee loyalty oaths, the basic principle is applicable to preventing coerced conformity in the high school classroom. High school students cannot be viewed simply as information absorbing subjects of the State. If students are to become mature, creative individuals they must be taught to understand the use of ideas associated not only with mathematics and chemistry, but also with the Bill of Rights. The lesson of appellants and their associates in *Tinker* thus far has been that silent symbolic expression will not be tolerated by authority nor by the courts. They have seen that "the import of words in the Bill of Rights very often fails to get off the printed page and into real life." Brennan, *Education and the Bill of Rights*, 113 U. PA. L. REV. 219 (1964).

To suppress student expression which involves a mere reasonable tendency to cause possible disorder, as the Court in *Tinker* did, is to defeat and chill young people in what may well be their initial efforts at independent evaluation of political questions. This form

of suppression compounds the failure of secondary education to encourage active inquiry into current social, political, and economic questions, and teaches students to ignore uncomfortable aspects of modern problems. *See* J. Henry, *Education for Stupidity*, 10 N.Y. REVIEW OF BOOKS No. 9, at 20 (May 9, 1968). The problem posed by this case, moreover, is part of the larger problem of suppression of critical thought and expression by high school teachers, *see* H. ZEIGLER, THE POLITICAL LIFE OF AMERICAN TEACHERS 93-144 (1967), and of college teachers as well. *See* W. P. METZGER, ACADEMIC FREEDOM IN THE AGE OF THE UNIVERSITY 139-93 (1955). *See also* C. EATON, *Academic Freedom Below the Potomac*, *in* THE FREEDOM-OF-THOUGHT STRUGGLE IN THE OLD SOUTH 216-17 (1964 ed.); A. MEIKLEJOHN, *The Freedom of Scholars and Teachers*, in POLITICAL FREEDOM 125-47 (1965 ed.). Moreover, to a large extent, the recent uprisings of students in American universities can be attributed to denials of the rights of free expression and association, and obstinate failure by educators to undertake educational reform. *See, e.g.*, E. WILLIAMSON & J. COWAN, THE AMERICAN STUDENTS' FREEDOM OF EXPRESSION 150-70 (1966); Rossman, *The Movement and Educational Reform*, in *Symposium — Youth 1967 — The Challenge of Change*, 36 AM. SCHOLAR No. 4, at 594-600 (1967); Peterson, *The Student Left in American Higher Education*, in *Symposium — Students and Politics*, J. AM. ACAD. OF ARTS & SCIENCES 293-317 (Winter, 1968).

While this Court certainly has no power to initiate educational reform, its role in protecting free discussion is inescapably relevant to all aspects of the academic freedom problem outlined above. *See, e.g.*, Van Alstyne, *Student Academic Freedom and the Rule-Making Powers of Public Universities*, 2 LAW IN TRANS. QUART. 1 (1965) (discussion of areas in which students may be able to seek a redress of grievances through peaceful litigation); Washington Post, April

27, 1968, at A4, col. 5 (speech by Harvard law professor and AAUP President, Clark Byse: "Far better, it seems to me, for students to be encouraged to utilize the orderly processes of the courts than to strike, sit in, or engage in other confrontations . . . ."); *cf.* T. I. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 13 (1967 ed.) ("[F]reedom of expression, far from causing upheaval, is more properly viewed as a leavening process, facilitating necessary social and political change and keeping a society from stultification and decay."). To encourage student innovation and expression in the classroom and on school premises, then, is one reason why the First Amendment principles of academic freedom should be applied in this case.

Of special relevance to the problem of student expression in high school are the findings of psychologists who have studied the interrelations between student creativity, free expression, and conformity. These findings need not be viewed as conclusive or final, but they do indicate that a maximum of free student expression would encourage the development of creative students, and would deter, to a degree, the stifling effects of group conformity.

In discussing the factors which encourage the development of creative individuals, Vinacke found it "generally agreed that encouragement and reward for originality constitute essential conditions" for the development of creative individuals." W. E. VINACKE, FOUNDATIONS OF PSYCHOLOGY 213 (1968). He further found that "parents, school, and peer groups all exert heavy pressures towards conformity, again at the cost of varied experience and the questioning and exploration typical of creativity." *Id.* The findings of Vinacke are typical of those by other respected authorities on adolescent psychology. W. J. MCKEACHIE & C. L. DOYLE, PSYCHOLOGY 587-93 (1966); B. R. MCCANDLESS, CHILDREN AND ADOLESCENTS 357, 367-77, 399-401 (1961). These all support a careful, but full application of the First Amendment to high school

students, because they indicate that free expression promotes creativity and is consistent with the progress-oriented underpinnings of that Amendment.

The encouragement of student development, of course, is not the only legitimate goal of secondary education. The school must be able to maintain quiet in the classroom and avoid violent controversy on or near school premises. This the school can do, however, by punishing the perpetrators of noise or violence, rather than by maintaining strict conformity of dress and expression. Administrative convenience has never been given a preferred placed in the Constitution when First Amendment rights were at stake, and when less restrictive alternatives were readily available for the satisfaction of legitimate government interests. A line of cases in this Court so holds. *Elfbrandt v. Russell*, 384 U.S. 11, 18 (1966), for example, reaffirmed the established principle that

> "legitimate legislative goals 'cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.'"

Elfbrandt applied this principle in the context of the government interest in preventing "subversion" by school teachers. The context of student expression is one of similar character. Appellants are accused of expression which might lead to disorder in the classroom. The disorder, however, could have been prevented, if it had materialized, by rules regulating the conduct of appellants and other students. Hostility by other students could have been regulated by general admonitions to all students that they should respect the views of those with whom they disagree. In future cases school authorities should be required to pursue their goals by such less restrictive alternatives. Of similar import to *Elfbrandt* is *Lamont v. Postmaster General*, 381 U.S. 301, 310 (1965), where this Court stated that

"in the area of First Amendment freedoms, gov-

> ernment has the duty to confine itself to the least intrusive regulations which are adequate for the purpose."

Again, *Lamont* concerned the government interest in stopping "subversion" by curtailing mail from a particular group of totalitarian countries. Yet this Court held that the requirement that recipients take an affirmative step to receive the mail was an abridgment of First Amendment rights, and could not be upheld because the government had more direct means of preventing totalitarian subversion. *See also McGowan v. Maryland*, 366 U.S. 420, 462 (1961) ("[I]f the object sought by the reglation could with equal effect be achieved by alternate means which do not substantially impede those . . . practices, the regulation cannot be sustained.").

Amicus therefore urges this Court to hold that high school authorities have an affirmative obligation to limit restraints on student expression to the least restrictive alternatives available for the protection of legitimate, overriding school interests.

4. DECISIONS OF THE FIFTH AND SECOND CIRCUITS HAVE PERMITTED UNDUE RESTRICTIONS ON STUDENT EXPRESSION IN LIKE CASES AND SHOULD BE DISAPPROVED.

The *Tinker* case is not an isolated instance of the kind of litigation which arises on rare occasion. Although thirty-four years have passed since this Court decided *Hamilton v. Regents*, 293 U.S. 245 (1934) (compulsory military training for college males upheld), and twenty-five years since *West Virginia Board of Education v. Barnette*, 319 U.S. 624 (1943), became valid law, the lower courts have faced analogous issues with increasing frequency in recent years, and there is every reason to believe that the courts will be called upon to apply *Tinker* to solve certain basic First Amendment problems in high schools and colleges for several years in the future. For this reason *Amicus* urges this Court to consider this case in the context of the several conflicts which exist within and among the

courts, and to decide the case on the basis of principles which can enable students, faculty, and administrators to adjust their regulations to meet problems which already exist or will arise in the foreseeable future. *Hamilton* and *Barnette* are the only decisions of this Court in the last forty years on the rights of expression for high school and college students, and they have been interpreted in almost as many different ways as those set out in K. LLEWELYN, THE COMMON LAW TRADITION 62-167 (1960) (Llewelyn suggested that at least sixty-four different techniques were in common use for interpreting prior cases).

The instant case reached this Court on a direct conflict between the Fifth and Eighth Circuit Courts of Appeal. The lower court in *Tinker* held that high school authorities could adopt "reasonable" prior regulations upon student expression if the authorities could "reasonably" anticipate disruption on school premises caused by reaction to the expression. 258 F. Supp. at 973. *Amicus* has attempted to show that this standard departs in several important respects from the decision of this Court in *Barnette*, namely, that prior restraints must be very narrowly drawn, and that student expression cannot be punished except upon a showing of an imminent threat to orderly operation of the school, caused not by reaction to the expression, but by the expression itself.

Decisions of the Fifth Circuit have followed a slightly different standard from that of the lower court in *Tinker*. *See, e.g., Burnside v. Byars*, 363 F.2d 744 (5th Cir. 1966) (not appealed); *Blackwell v. Issaquena County Board of Education*, 363 F.2d 749 (5th Cir. 1966) (not appealed); *Ferrell v. Dallas Independent School Dist.*, — F.2d —, No. 24301 (5th Cir. Mar. 29, 1968); *Dickey v. Alabama Board of Education*, 273 F. Supp. 613 (M.D. Ala. 1967) (appeal argued April 29, 1968); *cf. Due v. Florida A. & M. University*, 233 F. Supp. 396 (N.D. Fla. 1963).

Burnside, for example, held that a school official

could promulgate "reasonable" rules and regulations which impinged upon student expression, provided these rules were "materially and substantially" related to "the requirements of appropriate discipline in the operation of the school." 363 F.2d at 748-49. Moreover, *Burnside* ignored the clear and present danger standard of *Barnette*, and read *Dennis v. United States* to authorize a "balancing" of the First Amendment rights of the students with the broad State interest in "maintaining an educational system." 363 F.2d at 748. As pointed out earlier in this brief *Dennis* specifically adhered to the clear and present danger standard of *Barnette* for the kind of issue present in *Burnside* (students expelled pursuant to rule forbidding the wearing of "freedom buttons"). 341 U.S. at 508-09. For this reason the standard in *Burnside* should be specifically disapproved as unduly restrictive of First Amendment rights.

Blackwell, the companion case of *Burnside*, reached a contrary result. The Fifth Circuit there upheld the suspension of students wearing freedom buttons under the same standard enunciated in *Burnside*. A large group of students were denied their right to an education because a small number created disorder which interfered, for a time, with efficient operation of the school. The Court in *Blackwell* made no mention of clear and present danger, nor did it pursue the course of requiring school authorities to seek less restrictive alternatives with which to avoid curtailment of First Amendment rights. In a recent Fifth Circuit case former Chief Judge Tuttle specifically rejected *Blackwell*. *Ferrell v. Dallas Independent School Dist.*, — F.2d —, No. 24301 (5th Cir. Mar. 29, 1968) (dissenting opinion). Judge Tuttle found "courts too prone to permit a curtailment of a constitutional right of a dissenter, because of the likelihood that it will bring disorder, resistance or improper or even violent action by those supporting the status quo." *Id.* *Amicus* contends that Judge Tuttle's dissent expresses an appropriate standard consistent with *Barnette* and nec-

essary for the protection of First Amendment rights. *Blackwell*, however, has been followed not only by the majority in *Ferrell*, but also by at least one lower court. *Jones v. Board of Education*, 279 F. Supp. 190, 198 (M.D. Tenn. 1968). A similar "balancing" approach, with the balance weighted against First Amendment rights, was taken in *Goldberg v. Regents*, 57 Cal. Rptr. 463, 470-72 (Dist. Ct. App. 1967). These cases should be disapproved if the First Amendment rights of students are to receive the protection to which they are entitled under *Barnette*. *See also Green v. Howard University*, 271 F. Supp. 609 (D.D.C. 1967), *injunction pending appeal granted in part*, Civ. No. 21,267 (D.C. Cir. Sept. 8, 1967) (appeal pending before Bazelon, Wright, and Tamm, JJ.).

Finally, the approaches taken by the Eighth and Fifth Circuits have been paralleled by the Second Circuit Court of Appeals. In *Steier v. New York State Education Commissioner*, 271 F.2d 13 (2d Cir. 1959) (2-1), *cert. denied*, 361 U.S. 966 (1960), Chief Judge Clark dissenting, the Second Circuit upheld the expulsion of a college student for little more than sending a series of critical letters to the college president. *Steier* relied on *Hamilton v. Regents*, 293 U.S. 245 (1934), 271 F.2d at 16-17, to characterize college attendance as a mere "privilege" which could be taken away by virtually any state regulation. District Judge Gibson's opinion for the Court went so far as to find no jurisdiction in the federal court because "to take jurisdiction of a case such as this would lead to confusion and chaos in the entire field of jurisprudence in the United States." 271 F.2d at 18. Circuit Judge Moore, concurring, upheld the expulsion because the plaintiff's "overzealous campaign for the causes which he espoused must have had a disruptive effect on the environment of both student body and faculty." 271 F.2d at 19. Either of these approaches is clearly erroneous under decisions of this Court. *Barnette, supra; Brown v. Louisiana*, 383 U.S. 131 n.1 (1966). *Amicus* therefore urges this Court to disapprove *Steier* as un-

duly restrictive of the First Amendment rights of students.

For the reasons stated above, *Amicus* respectfully requests that this Court view *Tinker* in the context of other erroneous, analogous controversies, and provide guidelines with reference to similar future problems which will inevitably arise.

IV. CONCLUSION

Amicus has attempted to present an objective discussion of First Amendment law and policy as it pertains to resolution of this controversy. We hope our brief has been of value to this Court in reaching a just result. In accordance with the arguments developed in the brief, *Amicus* respectfully urges this Court to hold that

(1) Public high school officials cannot, consistent with the First and Fourteenth Amendments, suppress silent symbolic expression of students on school premises until this expression in itself imminently threatens orderly operation of the classroom or other school facility.

   (a) Prior regulation of silent, symbolic expression by students is invalid *per se* unless narrowly drawn to avoid administrative abuse and protect legitimate, overriding school interests.

   (b) Prior regulations of symbolic student expression cannot be justified by the mere reasonable possibility of hostile reaction to the expression.

   (c) In order to encourage a school atmosphere of free inquiry and respect for minority beliefs, high school authorities have an affirmative obligation to limit restraints on student expression to the least restric-

tive alternatives available for the protection of legitimate, overriding school interests.

(d) Decisions of numerous lower courts depart from the standards required by the First Amendment in student expression cases and are disapproved.

V. TABLE OF AUTHORITIES

SECONDARY AUTHORITIES: Pages in Brief

CERTIFICATE OF SERVICE

This is to certify that the brief of United States National Student Association as *amicus curiae* has been served upon the following counsel of record, by airmail, postage prepaid, this 10th day of May, 1968:

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