No. 09-6080

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

TOM DEFOE et al.,
Plaintiffs-Appellants,

v.

SID SPIVA *et al.*,
Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Tennessee (No. 06-00450)

BRIEF OF AMICI AMERICAN CIVIL LIBERTIES UNION AND AMERICAN CIVIL LIBERTIES UNION OF TENNESSEE IN SUPPORT OF APPELLANTS' PETITION FOR REHEARING EN BANC

Catherine Crump
American Civil Liberties Union
125 Broad Street, 17th Floor
New York, NY 10004
(212) 519-7806

Tricia Herzfeld
ACLU Foundation of Tennessee
P.O. Box 120160
Nashville, TN 37212
(615) 320-7143

David W. DeBruin
Elaine J. Goldenberg
Joshua M. Segal
Jenner & Block LLP
1099 New York Avenue, NW
Washington, DC 20001
(202) 639-6000

December 15, 2010

DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST

Sixth Circuit Case Number: 09-6080

Case Name: Tom Defoe et al. v. Sid Spiva et al.

Name of Counsel: David W. DeBruin

Pursuant to 6th Cir. R. 26.1, the American Civil Liberties Union and the American Civil Liberties Union of Tennessee make the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

   No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

   No.

David W. DeBruin

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

INTEREST OF AMICI CURIAE

The American Civil Liberties Union and the American Civil Liberties Union of Tennessee respectfully submit this brief as amici curiae in support of Plaintiff-Appellant Tom Defoe's Petition for Rehearing En Banc, contingent on the granting of the accompanying motion for leave.

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with over 500,000 members dedicated to defending the principles embodied in the Constitution and our nation's civil rights laws. Since its founding in 1920, the ACLU has been deeply committed to defending the right to freedom of speech, including serving as merits counsel in *Morse v. Frederick*, 551 U.S. 393 (2007), the Supreme Court's most recent case addressing the free speech rights of public school students. The American Civil Liberties Union of Tennessee (ACLU-TN) is the ACLU's local affiliate of ACLU and has over three thousand supporters throughout Tennessee. The ACLU-TN has also frequently represented students challenging restrictions on their speech. *See, e.g.*, *Franks v. Metropolitan Bd. of Pub. Educ.*, Case No. 09-cv-446 (M.D. Tenn. filed May 19, 2009). This controversy squarely implicates the ACLU's concern for the First Amendment rights of public school students. Counsel for Appellants has consented to the filing of this brief; counsel for Appellees has not responded to multiple requests for consent.

INTRODUCTION

The panel majority[1] in this case applied an altogether new constitutional test to the defendants' ban on displays of the Confederate flag. Relying on a serious misreading of *Morse v. Frederick*, 551 U.S. 393 (2007), the panel held that, as a categorical matter, "school administrators can limit speech in a reasonable fashion to further important policies at the heart of public education" without showing that the restriction satisfies the "substantial disruption" standard articulated in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969). *See Defoe v. Spiva*, No. 09-6080, 2010 WL 4643256, at *15 (6th Cir. Nov. 18, 2010) (Rogers, J., concurring in the judgment). That decision conflicts with the Supreme Court's decisions in *Morse* and in *Tinker*. It also conflicts with this Court's prior decision in *Barr v. Lafon*, 538 F.3d 554 (6th Cir. 2008), *cert. denied*, 130 S. Ct. 63 (2009), and creates a split with decisions of other courts of appeals, which have appropriately recognized that *Morse* does not somehow render *Tinker* inapplicable to speech deemed racially hostile. This court should grant rehearing en banc to reaffirm that *Tinker* applies, and to evaluate the Confederate flag ban under the appropriate constitutional standard.

---

[1] Though a lead opinion was published, the court recognized that because two of the three panel judges concurred in the judgment, the "concurring opinion shall govern as stating the panel's majority position." *Defoe*, 2010 WL 4643256, at *1.

ARGUMENT

In *Tinker*, the Supreme Court recognized that circumstances will inevitably arise where students' exercise of their First Amendment rights interferes with a school's work, or collides with other students' rights "to be secure and to be let alone." 393 U.S. at 508. Still, the Court made clear that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Id.* at 506. Thus, *Tinker* held that public schools may constitutionally prohibit student speech *only* if it would cause "substantial disruption of or material interference with school activities." *Id.* at 514; *see id.* at 509 (prohibition permissible only upon showing that speech would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school" (internal quotation marks omitted)). Under this standard, "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." *Id.* at 508; *see id.* (recognizing that "[a]ny variation from the majority's opinion may inspire fear," and that "[a]ny word spoken . . . that deviates from the views of another person may start an argument or cause a disturbance"). Nor can a prohibition on student speech be justified by "a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Id.* at 509.

Since *Tinker*, courts across the country have applied that decision's "substantial disruption" standard to all manner of regulations of student speech, including speech that could be deemed racially hostile. *See, e.g.*, *DeFabio v. East Hampton Union Free Sch. Dist.*, 623 F.3d 71, 77-78 (2d Cir. 2010); *A.M. v. Cash*, 585 F.3d 214, 222 (5th Cir. 2009); *B.W.A. v. Farmington R-7 School Dist.*, 554 F.3d 734, 739-40 (8th Cir. 2009); *Castorina v. Madison County Sch. Bd.*, 246 F.3d 536, 539-40 (6th Cir. 2001). The Supreme Court, for its part, has carved out only three exceptions to the *Tinker* rule. Without regard to any likelihood of "substantial disruption," schools may regulate (1) in-school student speech that is offensively lewd and indecent, *Bethel School District No. 403 v. Fraser*, 478 U.S. 675 (1986); (2) student speech that is school-sponsored or that bears the imprimatur of the school, *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988); and (3) student speech reasonably perceived to advocate illegal drug use, *Morse v. Frederick*, 551 U.S. 393 (2007). It is this last exception that the panel below stretched well beyond its intended scope.

I. The Decision Below Conflicts With The Supreme Court's Decisions In *Tinker* and *Morse*.

Purportedly on the strength of *Morse*, the panel concluded that bans on "racially hostile" speech or any other speech restrictions that "further important policies at the heart of public education" are constitutional regardless of whether they satisfy *Tinker*'s "substantial disruption" standard. That conclusion directly

conflicts with Judge Alito's controlling concurrence in *Morse* – which confirms the narrow scope of *Morse*'s holding and explicitly disavows the notion that schools may freely restrict any student speech deemed inconsistent with the school's "educational mission."

In *Morse*, the Supreme Court created a narrow exception to *Tinker* for student speech advocating the use of illegal drugs. In particular, the Court concluded that a principal did not violate a student's right to free speech by confiscating a banner reading "BONG HiTS 4 JESUS." Reasoning that public schools are tasked with educating students about the dangers of illegal drug use, and that this banner could be perceived as celebrating such activity, the Court held that "schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use." *Morse*, 551 U.S. at 397. In so holding, the Court made clear that it was upholding the principal's action without respect to whether there had been a likelihood of "substantial disruption" of school activities; in other words, there was no need for the principal's action to satisfy the *Tinker* standard. *See id.* at 406, 408.

Only a bare majority of five Justices, however, voted to uphold the principal's action in *Morse*. And of these five Justices, two joined a separate concurrence that expressly limited the decision to the narrow category of student speech reasonably perceived as advocating illegal drug use. *See Morse*, 551 U.S.

at 422 (Alito, J. concurring, joined by Kennedy, J.). Both Justice Alito and Justice Kennedy joined the lead opinion of the Court only "on the understanding that (a) it goes no further than to hold that a public school may restrict speech that a reasonable observer would interpret as advocating illegal drug use and (b) it provides no support for any restriction of speech that can plausibly be interpreted as commenting on any political or social issue." *Id.* In that vein, they expressly disavowed the argument that "the First Amendment permits public school officials to censor any student speech that interferes with a school's 'educational mission.'" *Id.* at 423; *see id.* (noting that "some public schools have defined their educational missions as including the inculcation of whatever political and social views are held by the members of these groups").

In view of the 5-4 split in *Morse*, Justice Alito's concurrence is the guiding opinion, as it clarifies the narrow scope of the Court's lead opinion. *See Marks v. United States*, 430 U.S. 188, 193 (1977); *Henley v. Bell*, 487 F.3d 379, 385-86 (6th Cir. 2007). Thus, *Morse*'s carve-out from *Tinker* plainly goes no further than speech reasonably perceived as advocating illegal drug use - and only if that speech cannot "plausibly be interpreted as commenting on any political or social issue." *Morse*, 551 U.S. at 422. Other student speech – including speech that interferes with a school's "educational mission" – remains subject to *Tinker*. *See id.* at 423. Justices Alito and Kennedy further cautioned that the speech restriction

in *Morse* "stand[s] at the far reaches of what the First Amendment permits" and that they "join[ed] the opinion of the Court with the understanding that the opinion does not endorse any further extension." *Id.* at 425.

Despite that explicit warning against any "further extension," the panel treated the *Morse* decision as an invitation to categorically allow prohibition of other types of student speech as long as the school has "a comparably 'important, perhaps compelling' interest" in doing so. *Defoe*, 2010 WL 4643256, at *13 (Rogers, J., concurring in the judgment) (quoting *Morse*, 551 U.S. at 407). In particular, the panel erroneously held that it was unnecessary to subject a ban on "racially hostile or contemptuous speech" to the *Tinker* standard. *Id.* at *12. According to the panel, the Court's holding in *Morse* "provide[d] strong support" for the conclusion that such speech may be prohibited as long as "school administrators reasonably view the speech as racially hostile or promoting racial conflict." *Id.*; *see id.* ("If we substitute 'racial conflict' or 'racial hostility' for 'drug abuse,' the analysis in *Morse* is practically on all fours with this case."). Thus, based on the assertion "that no *Tinker* showing was required in *Morse*," the panel determined that here, too, no *Tinker* showing was required. *Id.* at *14.

That determination flatly conflicts with Justice Alito's controlling concurrence. Indeed, the panel's broad declaration that "the general rule" is simply that "school administrators can limit speech in a reasonable fashion to

further important policies at the heart of public education," *id.* at *15 (Rogers, J., concurring in the judgment), is diametrically opposed to Justice Alito's warning that school officials may not censor student speech simply because it "interferes with a school's 'educational mission.'" *Morse*, 551 U.S. at 423 (Alito, J., concurring in the judgment). Judge Clay recognized this conflict in his lead (but not controlling) opinion. *See Defoe*, 2010 WL 4643256, at *7. But the panel majority offered no response.

II. The Panel Decision Conflicts With And Improperly Disregards This Court's Precedential Decisions.

Besides conflicting with *Tinker* and *Morse*, the panel's decision directly conflicts with clear Sixth Circuit precedent. This Court has long held, both before and after *Morse*, that bans on student displays of the Confederate flag are subject to *Tinker*'s "substantial disruption" standard, notwithstanding that such displays may be racially provocative. *See Barr v. Lafon*, 538 F.3d 554, 565 (6th Cir. 2008) (inquiring whether a ban on clothing depicting the Confederate flag resulted from a reasonable forecast that the flag would cause material and substantial disruption, as required by *Tinker*); *Castorina*, 246 F.3d at 544 (remanding case arising out of students' suspension for wearing T-shirts bearing Confederate flags for further factual analysis under *Tinker*); *Melton v. Young*, 465 F.2d 1332, 1335 (6th Cir. 1972) (evaluating, under *Tinker*, a student's suspension for his unwillingness to

stop wearing a Confederate flag patch, in violation of the school's ban on "provocative symbols").

Critically, the panel's decision directly conflicts with this Court's decision just two years ago in *Barr*, which held that bans on racially charged speech can survive only if they satisfy the *Tinker* standard. *Barr*, whose facts were practically identical to those of this case, specifically addressed the question whether *Morse* rendered the *Tinker* standard inapplicable. On that score, the *Barr* panel explained:

> The Court's most recent student-speech case, *Morse v. Frederick*, does not modify our application of the *Tinker* standard to the instant case. . . . The *Morse* decision . . . resulted in a narrow holding: a public school may prohibit student speech at school or at a school-sponsored event during school hours that the school "reasonably view[s] as promoting illegal drug use."

538 F.3d at 564 (quoting *Morse*, 551 U.S. at 409). The opinion of the panel here cannot be reconciled with *Barr*'s unambiguous holding that *Morse* does not extend beyond bans on speech promoting illegal drug use.

The panel here sought to minimize that conflict by observing that *Barr*'s decision to apply *Tinker* was not ultimately necessary to the *Barr* panel's disposition of the case. In the present panel's view, because the restriction in *Barr* was *upheld* under the *Tinker* standard, the decision to apply the standard in the first place – rather than deem the restriction automatically valid – somehow does not constitute binding circuit precedent. *See Defoe*, 2010 WL 4643256, at *15

(Rogers, J., concurring in the judgment). That is a non sequitur: *Barr*'s holding that the Confederate flag ban in that case satisfied the *Tinker* standard plainly does not diminish the precedential value of the case's other, antecedent holding – *i.e.*, that *Tinker* is the correct standard to apply in the first place. *See, e.g.*, *Salmi v. Sec'y of Health & Human Servs.*, 774 F.2d 685, 689 (6th Cir. 1985) (absent an intervening and inconsistent Supreme Court decision, a prior decision of a panel of this Court remains controlling unless overruled by the Court sitting en banc). Instead, this Court has been left with two panel decisions, post-*Morse*, whose holdings directly conflict with each other – a circumstance warranting en banc review.

III. The Panel Decision Conflicts With Decisions Of Other Courts Of Appeals.

The panel decision also creates a split with other courts of appeals. Prior to *Morse*, courts of appeals routinely held that bans on racially provocative speech are subject to the *Tinker* standard. *See, e.g.*, *Scott v. Sch. Bd. Of Alachua County*, 324 F.3d 1246, 1248 (11th Cir. 2003) (applying *Tinker* to evaluate a principal's ban on displays of the Confederate flag); *Sypniewski v. Warren Hills Regional Bd. of Educ.*, 307 F.3d 243, 254 (3d Cir. 2002) (ruling that a student's suspension for wearing a T-shirt including the word "redneck," in violation of the school's dress code and racial harassment policy, was subject to *Tinker*'s "general rule"); *West v. Derby Unified Sch. Dist. No. 260*, 206 F.3d 1358, 1366 (10th Cir. 2000)

(evaluating, under *Tinker*, a student's suspension for drawing a Confederate flag in violation of the district's harassment and intimidation policy). And after *Morse*, courts of appeals have adhered to this view. *See B.W.A.*, 554 F.3d at 740 (applying the *Tinker* standard to a dress code banning depictions of the Confederate flag, and relying in part on this Court's decision in *Barr*); *A.M.*, 585 F.3d at 221-22 (subjecting a school's ban on displays of the Confederate flag to the *Tinker* standard, and relying in part on this Court's decision in *Barr*). In so holding, they have rejected the proposition that *Morse* removes racially hostile speech from the compass of *Tinker*.

More generally, courts of appeals have had no trouble apprehending that *Morse* applies only to student speech that school administrators reasonably view as promoting illegal drug use. *DeFabio*, 623 F.3d at 78 (applying *Tinker* because the student's restricted speech "did not involve drugs, was not lewd or vulgar, and could not have been perceived to be school-sponsored"); *Corder v. Lewis Palmer Sch. Dist. No. 38*, 566 F.3d 1219, 1228 (10th Cir.) (quoting this Court's decision in *Barr* to describe *Morse*'s "narrow holding"), *cert. denied*, 130 S. Ct. 742 (2009); *Lowrey v. Watson Chapel Sch. Dist.*, 540 F.3d 752, 760-61 (8th Cir. 2008) (recognizing that *Tinker* remains good law even though it has been modified for the particular circumstances described in *Fraser* and *Morse*), *cert. denied*, 129 S. Ct. 1526 (2009).

These decisions, in short, have rejected any effort to extend *Morse* beyond the limited setting of advocacy of illegal drug use – including to speech perceived as racially provocative. The panel's decision here conflicts with all of them.

IV. The Panel Decision Has Far-Reaching Consequences.

The panel decision threatens to have serious effects beyond the facts of this case. Relying on a Supreme Court decision that was limited by its terms to speech advocating illegal drug use, the panel allowed unfettered regulation of an entirely new category of "racially hostile or contemptuous speech" – which, however odious, may still touch on issues of social or political importance. And the panel opinion further signals that future categories of speech could be restricted whenever such restrictions "further important policies at the heart of public education." *Defoe*, 2010 WL 4643256, at *15 (Rogers, J., concurring in the judgment).

As Justice Alito warned, such a malleable standard would eviscerate the First Amendment protections of public school students because school administrators will virtually always be able to couch a speech restriction as promoting a school's educational mission and goals:

> The "educational mission" of the public schools is defined by the elected and appointed public officials with authority over the schools and by the school administrators and faculty. As a result, some public schools have defined their educational missions as

> including the inculcation of whatever political and social views are held by the members of these groups.
>
> During the *Tinker* era, a public school could have defined its educational mission to include solidarity with our soldiers and their families and thus could have attempted to outlaw the wearing of black armbands on the ground that they undermined this mission. Alternatively, a school could have defined its educational mission to include the promotion of world peace and could have sought to ban the wearing of buttons expressing support for the troops on the ground that the buttons signified approval of war. The "educational mission" argument would give public school authorities a license to suppress speech on political and social issues based on disagreement with the viewpoint expressed. The argument, therefore, strikes at the very heart of the First Amendment.

Morse, 551 U.S. at 423 (Alito, J., concurring). Although Justice Alito sought to reject an "educational mission" test "before such abuse occurs," *id.*, the panel majority failed to heed – or even acknowledge – his warning. En banc review is warranted to ensure that the Supreme Court's statement that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," *Tinker*, 393 U.S. at 506, does not become an empty promise.

CONCLUSION

For the foregoing reasons, the petition for rehearing en banc should be granted.

Respectfully submitted,

David W. DeBruin
Elaine J. Goldenberg
Joshua M. Segal
Jenner & Block LLP
1099 New York Avenue, NW
Washington, DC 20001
(202) 639-6000

Catherine Crump
American Civil Liberties Union
125 Broad Street, 17th Floor
New York, NY 10004
(212) 519-7806

Tricia Herzfeld
ACLU Foundation of Tennessee
P.O. Box 120160
Nashville, TN 37212
(615) 320-7143

December 15, 2010

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Brief of Amici American Civil Liberties Union and American Civil Liberties Union of Tennessee in Support of Appellants' Petition for Rehearing En Banc were served by first-class mail, postage prepaid, to the following persons on this 15th day of December, 2010:

Van Irion
Law Offices of Van R. Irion
2327 Laurel Lake Road
Knoxville, TN 37932

Arthur F. Knight, III
Jonathan Swann Taylor
Taylor, Fleishman & Knight
800 S. Gay Street
Suite 600
Knoxville, TN 37929

David W. DeBruin