Case No. 24-1770

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

B.B., a minor by and through her mother, Chelsea Boyle,

Plaintiff – Appellant,

v.

Capistrano Unified School District; Jesus Becerra, an individual in his individual and official capacities; and Cleo Victa, an individual in her individual and official capacities,

Defendants – Appellees.

On Appeal from the United States District Court
for the Central District of California, Case No. 8:23-CV-00306-DOC-ADSx (Carter, D.J.)

BRIEF OF AMICUS CURIAE SOUTHEASTERN LEGAL FOUNDATION IN SUPPORT OF PLAINTIFF-APPELLANT AND REVERSAL

Celia Howard O'Leary
Jordan R. Miller
Counsel of Record
SOUTHEASTERN LEGAL FOUNDATION
560 W. Crossville Rd., Ste. 104
Roswell, GA 30075
(770) 977-2131
coleary@southeasternlegal.org
jmiller@southeasternlegal.org
Counsel for Amicus Curiae

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Case No. 24-1770
B.B. v. Capistrano Unified School District

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Counsel also certifies that the following listed persons and entities have an interest in the outcome of this case and were not included in the Certificates of Interested Persons in any previously filed brief:

1. Celia Howard O'Leary, counsel to amicus
2. Jordan R. Miller, counsel to amicus
3. Southeastern Legal Foundation, Amicus Curiae

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IDENTITY AND INTEREST OF AMICUS CURIAE[1]

Southeastern Legal Foundation (SLF), founded in 1976, is a national, nonprofit legal organization dedicated to defending liberty and rebuilding the American Republic. This case concerns SLF because it has an abiding interest in the protection of our constitutional freedoms and civil liberties. This is especially true when a school suppresses the speech and expression of a child. SLF educates and advocates on behalf of the free speech rights of students in schools and is committed to defending their freedom of speech and freedom of expression.

SUMMARY OF THE ARGUMENT

Institutions of learning shape the minds of tomorrow. For this reason, our nation has a long history of protecting free expression in educational settings. To this point, over fifty years ago, the Supreme Court made it crystal clear that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969). While a student's First Amendment rights are not absolute, the grounds on which a school can truncate these rights are limited and well-defined. Here, officials at the Capistrano Unified School District punished B.B. for her drawing and suppressed future expressive

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), no one other than amicus and its counsel wrote any part of this brief or paid for its preparation or submission. For purposes of Federal Rule of Appellate Procedure 28(a)(2), SLF sent consent requests to all parties. Appellant has granted consent. Appellee did not respond to the consent request. Accordingly, SLF has moved to file this amicus brief.

conduct, even though her speech did not fall within any of the limited and well-defined categories in which schools may restrict students' First Amendment rights. Most notably, the school did so in a content- and viewpoint-based manner when there was no substantial disruption or a reasonable threat thereof.

The curtailment of B.B.'s constitutional rights is more troubling where school officials relied on the heckler's veto, allowing a parent's complaint about a child to set them on their reactionary course. The United States Court of Appeals for the Ninth Circuit has recognized that government entities may not rely on a heckler's veto—the reaction, or feared reaction, of listeners—to restrain speech and expression. And other circuits, including the Seventh and Eleventh Circuits, have applied the heckler's veto doctrine within the school setting. While the Ninth Circuit has resisted doing so, the specific facts of this case warrant recognition of the heckler's veto doctrine and reversal of the district court's grant of summary judgment.

ARGUMENT

I. Public school students retain their First Amendment rights subject only to limited, essential restrictions.

The right to freely speak one's mind conferred by the First Amendment applies to everyone regardless of age. Children are no exception. "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." *Tinker*, 393 U.S. at 506. Under *Tinker*, the fact that one student takes offense at another's speech or suffers hurt feelings does not provide

sufficient grounds for a school to discipline the speaker or censor the speaker from engaging in future expression. *See Zamecnik v. Indian Prairie Sch. Dist. #204*, 636 F.3d 874, 877 (7th Cir. 2011) (rejecting "a generalized 'hurt feelings' defense to a high school's violation of the First Amendment rights of its students" and concluding "'harassment or intimidation can be regulated only if the speech at issue gives rise to a well-founded fear of disruption or interference with the rights of others.'" (ellipsis omitted) (quoting *Sypnieski v. Warren Hills Reg'l Bd. of Educ.*, 307 F.3d 243, 264–65 (3d Cir. 2002))); *J.C. v. Beverly Hills Unified Sch. Dist.*, 711 F. Supp. 2d 1094, 1117 (C.D. Cal. 2010) ("[T]o allow the [s]chool to cast this wide a net and suspend a student simply because another student takes offense to her speech, without any evidence that such speech caused a substantial disruption of the school's activities, runs afoul of *Tinker*."). Furthermore, under *Tinker*, "public elementary schools . . . may not allow some speech on a given topic but not others, based solely on the content of its message." *Morgan v. Swanson*, 659 F.3d 359, 388 (5th Cir. 2011).

Thus, if the Capistrano Unified School District would have taken no action against B.B. had she just captioned the drawing with the phrase "Blacks Lives Matter," it could not act against her for adding the phrase "any life." Further, while the student to whom B.B. gave her drawing took no offense and suffered no apparent hurt feelings, *see* E.R. at 65, 98–99, even if B.B.'s classmate had experienced such, the school would not have been constitutionally permitted to punish B.B. based on the content of her message. *See Zamecnik*, 636 F.3d at 877.

While schools have some narrow ability to censor or punish speech, those circumstances must be defined and content-neutral and do not apply in this case. For instance, although "[t]he First Amendment does not prevent" school officials from banning "vulgar and lewd speech . . . [that] would undermine the school's basic educational mission," *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 685 (1986), B.B.'s drawing of four children holding hands could hardly be called vulgar or lewd. A school can, likewise, censor speech that advocates for illicit drug use. *See Morse v. Fredrick*, 551 U.S. 393, 397 (2007) (upholding prohibition on "Bong Hits 4 Jesus"). Once again, B.B.'s drawing does not remotely fall within this category. Additionally, a school can "disassociate itself" from "speech or speech related activities that 'students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school." *Chandler v. McMinnville Sch. Dist.*, 978 F.2d 524, 529 (9th Cir. 1992) (internal quotation marks omitted); *see id.* at 530 (concluding buttons worn by students in support of teachers' union during teacher strike could not reasonably be viewed as "bearing the imprimatur of the school"). But no reasonable person would attribute a young girl's drawing, given as a gift to a friend, as speech sponsored by a school.

Accordingly, the Capistrano Unified School District could only censor B.B.'s drawing if *Tinker* permits the censorship. *See Mahanoy Area Sch. Dist. v. B.L.*, 594 U.S. 180, 188–89 (2021) (the censorship of student speech that is not vulgar, lewd, obscene, plainly offensive, or bears the resemblance of school-sponsored speech is governed by *Tinker*); *see also Chandler*, 978 F.2d at 529. To suppress speech under *Tinker*, "school

officials must justify their decision by showing 'facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities.'" *Chandler*, 978 F.2d at 529 (quoting *Tinker*, 393 U.S. at 514). In *Tinker*, students wore black armbands to protest the Vietnam War. 393 U.S. at 504. The school, concerned with the disruptive potential of protest on such a serious and sensitive national topic, sent the students home unless they removed their armbands. *Id.* The Court held that this was impermissible because the school needed substantially more reason for preventing student speech on an important topic than just an "undifferentiated fear or apprehension of disturbance." *Id.* at 506.

Similar to the armbands in *Tinker*, B.B.'s drawing did not create a disruption. On the day B.B. drew the picture, the fellow student to whom B.B. gave the drawing thanked B.B. and placed the drawing in her backpack. E.R. at 98–99. Thus, B.B.'s speech was far less intrusive on the school than the speech in *Tinker*, for the audience of B.B.'s speech was a single student, not the whole school. Moreover, the next day, when Principal Jesus Becerra forced B.B. to apologize for the drawing, the fellow classmate was "confused" regarding the need for an apology. *Id.* at 65. This undercuts any likelihood that the fellow student would have interacted with B.B. in a manner to cause a disruption. *Id.* at 65. And, as discussed next, the heckler's veto doctrine precluded school officials from punishing B.B. for her speech and restraining her from making future drawings where (1) any forecasted disruption was not attributable to B.B.; and (2) the lone potential heckler was not even a student at the school.

II. The heckler's veto doctrine protects B.B.'s freedom of expression through drawing.

The Founders recognized that citizens of a free society must possess the right to speak free from government restraint, explicit or implicit. This is because "[t]he vitality of civil and political institutions in our society depends on free expression" and the right to "speak freely . . . is one of the chief distinctions that sets us apart from totalitarian regimes." *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949). When the government yields to the demands of a heckler, it tramples the free expression of ideas and violates the First Amendment.

Black's Law Dictionary defines a "heckler's veto" as "[t]he government's restriction or curtailment of a speaker's right to freedom of speech when necessary to prevent possibly violent reactions from listeners." *Heckler's Veto*, Black's Law Dictionary (10th ed. Deluxe 2014). The Supreme Court held three quarters of a century ago that a government entity could not suppress a speaker solely based on the entity's perceived concerns about the reactions of listeners. *Terminiello*, 337 U.S. at 4–5. Instead, where listeners—not speakers—cause a disturbance, government actors must address the actions of the listeners and not censor the speaker. *See id.*; *see also Meinecke v. City of Seattle*, 99 F.4th 514, 525 (9th Cir. 2024) ("If speech provokes wrongful acts on the part of hecklers, the government must deal with those wrongful acts directly; it may not avoid doing so by suppressing the speech." (quoting *Santa Monica Nativity Scenes Comm. v. City*

of Santa Monica, 784 F.3d 1286, 1292–93 (9th Cir. 2015))). The Supreme Court recognized that speech:

> may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.

Terminiello, 337 U.S. at 4.

The Supreme Court, twenty years after *Terminiello*, applied the heckler's veto doctrine to the school setting in the seminal *Tinker* case. Using language quite similar to the above-quoted language from *Terminiello*, the Court announced that "for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." *Tinker*, 393 U.S. at 509. Likewise, *Tinker* looked at whether the speakers—the students wearing the armbands—caused any disruption. *Id.* at 508. Reviewing the record and locating no evidence of a disruption caused by the armband-wearing students, the Supreme Court concluded that "the prohibition of expression of one particular opinion, at least without evidence that it is necessary to avoid material and substantial interference with schoolwork or discipline, is not constitutionally permissible." *Id.* at 511.

The Ninth Circuit has widely recognized that government entities cannot rely on a heckler's veto to abridge speech and expression. *See, e.g.*, *Meinecke*, 99 F.4th at 522–25 (plaintiff established likelihood of success on the merits of First Amendment claim where police restricted his speech based on concerns about reaction of crowd); *Ctr. for Bio-Ethical Reform, Inc. v. L.A. Cnty. Sheriff Dep't*, 533 F.3d 780, 787 (9th Cir. 2008) (considering display outside of a high school and holding that "[i]f the statute, as read by the police officers on the scene, would allow or disallow speech depending on the reaction of the audience, then the ordinance would run afoul of an independent species of prohibitions on content-restrictive regulations, often described as a First Amendment-based ban on the 'heckler's veto.'").

Although the Ninth Circuit has taken a less favorable view toward applying the heckler's veto doctrine within the school setting, *see Dariano v. Morgan Hill Unified Sch. Dist.*, 767 F.3d 764, 777–78 (9th Cir. 2014), the facts in *Dariano* are distinguishable from this case. There, a high school had a long "history of violence among students, some gang-related and some drawn along racial lines." *See id.* at 774 ("In the six years that Nick Boden served as principal, he observed at least thirty fights on campus, both between gangs and between Caucasian and Hispanic students."). On Cinco de Mayo, an altercation occurred between white students and Mexican students, which was accompanied by some students displaying the American flag and one student wearing an American flag t-shirt. *Id.* The next year on Cinco de Mayo, several students wore t-shirts depicting the American flag. *Id.* at 774-75. When other students complained, the

school told the students to remove their shirts or turn them inside out. *Id.* at 775. Turning to *Tinker*, the Court declined to apply the heckler's veto doctrine and ruled that the school acted within its authority to censor the flag-wearing students given the history of violence and disruption on campus.

Dariano is nothing like this case. Here, the school was not plagued with a similar history that could warrant extra caution from school officials, and there was no history of disruption or violence in the school in response to drawings of the nature of B.B.'s illustration. Additionally, the lone 'heckler' was a parent who was not even present on school grounds. Thus, given the fact-specific nature of school speech cases, *cf. McNeil v. Sherwood Sch. Dist. 88J*, 918 F.3d 700, 707 (9th Cir. 2019), this Court can abide by Ninth Circuit law, distinguish *Dariano*, and apply the heckler's veto doctrine to the specific circumstances of this case.

Other circuits have applied the heckler's veto doctrine specifically within the school setting, holding that school officials violate students' clearly established constitutional rights when they suppress speech and discipline students who speak peacefully based on the possible reaction of other students. *Zamecnik*, 636 F.3d at 878–80 (recognizing *Tinker* as adopting the heckler's veto doctrine and affirming a district court order precluding the school district from banning student from wearing "Be Happy, Not Gay" shirt); *Holloman ex rel. Holloman v. Harland*, 370 F.3d 1252, 1274–76, 1282 (11th Cir. 2004); *see also Smith v. Novato Unified Sch. Dist.*, 150 Cal. App. 4th 1439, 1456–58 (Cal. Ct. App. May 21, 2007) (unpublished) ("We cannot allow the

reactions to *Immigration* by the reading audience (that is, the 'heckler's veto') to silence Smith's communication of unpopular views. *Immigration* is protected speech.").

Holloman underscores the need to vindicate B.B.'s right to free speech. There, a student raised a fist during the pledge of allegiance, protesting the school's decision to discipline another student the day prior for refusing to recite the pledge. *Holloman*, 370 F.3d at 1261. The disruption caused by this demonstration was negligible; other students were "disturbed" and expressed that the student's protest "wasn't 'right.'" *Id.* at 1274; *see id.* at 1265. Nonetheless, the student's teacher orally reprimanded him, and his principal initially imposed three days of detention as punishment.[2] *Id.* at 1261. In holding that the school violated the student's First Amendment rights, the Eleventh Circuit recognized that students retain free speech rights even in the face of some classroom disruption:

> [W]e cannot simply defer to the specter of disruption or the mere theoretical possibility of discord, or even some de minimis, insubstantial impact on classroom decorum. Particularly given the fact that young people are required by law to spend a substantial portion of their lives in classrooms, student expression may not be suppressed simply because it gives rise to some slight, easily overlooked disruption, including . . . some "hostile remarks" or "discussion outside of the classrooms" by other students.

Id. at 1271 (quoting *Tinker*, 393 U.S. at 508, 514).

[2] Because less than three days remained in the school year, the detentions were, upon agreement, converted to a paddling. *Holloman*, 370 F.3d at 1261.

The court also relied heavily on the heckler's veto doctrine, stating that it was irrelevant to the First Amendment analysis whether "other students may have disagreed with either Holloman's act or the message it conveyed" because "Holloman's expression [could not be] removed from the realm of constitutional protection simply because the students cloaked their disagreement in the guise of offense or disgust." *Id.* at 1274–75. Along these lines, and in overturning a past precedent the panel deemed in conflict with *Tinker*, the court reiterated that "[a]llowing a school to curtail a student's freedom of expression based on [how it might provoke other students to react] turns reason on its head." *Id.* at 1275. For instance, if bullies planned to engage violence because a fellow student would not join the football team or wear fancy clothing, the answer, according to *Hollomon*, is to protect the fellow student by addressing the conduct of the bullies, rather than forcing the fellow student to join the football team or wear Abercrombie & Fitch or J. Crew attire. *Id.* at 1275.

The heckler's veto doctrine and *Holloman* easily demonstrate that the Capistrano Unified School District violated B.B.'s constitutional rights by punishing her for her drawing. The drawing expressed a viewpoint that, along with "Black Lives" mattering, "any life" matters. *See* E.R. at 23. No disruption, no less a substantial disruption, occurred at the school on the day B.B. made the drawing and shared it with another student. In fact, nothing in the record shows that B.B.'s teacher or any other school official even *knew* about the drawing on the day B.B. made the drawing. Rather, they learned of it after a parent—the 'heckler' in this matter—expressed offense over the

drawing. Even the parent eventually retracted her complaint after determining that the young child's drawing was, in fact, innocent. But the school proceeded to censor B.B. anyway.

Without a substantial disruption or the threat thereof,[3] the heckler's veto doctrine precludes school officials from punishing B.B. and stifling her future expressive activities. This is particularly true where school officials not only banned B.B. from drawing pictures like the picture giving rise to this matter, but also banned B.B. from *all* other forms of drawing. *See* ER at 99–101, 105–07. Nothing warrants such an egregious intrusion on a student's freedom of speech.

[3] Because no disruption occurred when B.B. gifted the drawing, it strongly cuts against any credible assertion by school officials that a future disruption was likely.

CONCLUSION

This Court should reverse the district court's order and judgment granting summary judgment to Capistrano Unified School District and Jesus Becerra on B.B.'s First Amendment claim.

Respectfully submitted,

/s/ Jordan R. Miller
Celia Howard O'Leary
Jordan R. Miller
Counsel of Record
SOUTHEASTERN LEGAL FOUNDATION
560 W. Crossville Rd., Ste. 104
Roswell, GA 30075
(770) 977-2131
coleary@southeasternlegal.org
jmiller@southeasternlegal.org

Counsel for Amicus Curiae

July 22, 2024

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B) and because it contains 3,104, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

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July 22, 2024 /s/ Jordan R. Miller

CERTIFICATE OF FILING AND SERVICE

On July 22, 2024, I filed this Brief of Amicus Curiae Southeastern Legal Foundation in Support of Plaintiff-Appellant and Reversal using the CM/ECF System, which will send a Notice of Filing to all counsel of record.

July 22, 2024 /s/ Jordan R. Miller

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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