IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 21

JOHN F. TINKER and MARY BETH TINKER, minors, by their father and next friend, LEONARD TINKER and CHRISTOPHER ECKHARDT, minor, by his father and next friend, WILLIAM ECKHARDT,

Petitioners,

—v.—

THE DES MOINES INDEPENDENT COMMUNITY SCHOOL DISTRICT, THE BOARD OF DIRECTORS OF THE DES MOINES INDEPENDENT COMMUNITY SCHOOL DISTRICT, ORA E. NIFFENEGGER, MRS. MARY GREFE, ARTHUR DAVIS, L. ROBERT KECK, GEORGE CAUDILL, JOHN R. HAYDON, MERLE F. SCHLAMPP, DWIGHT DAVIS, ELMER BETZ, GERALD JACKSON, MELVIN BOWEN, DONALD WETTER, CHESTER PRATT, CHARLES ROWLEY, RAYMOND PETERSON, RICHARD MOBERLY, VERA TARMANN, LEO WILLADSEN, DONALD BLACKMAN, VELMA CROSS and ELLSWORTH E. LORY,

Respondents.

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

BRIEF FOR PETITIONERS

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OCTOBER TERM, 1967

No. 1034

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BRIEF FOR PETITIONERS

Opinions Below

The opinion of the Court of Appeals (A. 77) is reported at 383 F. 2d 988. The opinion of the United States District Court for the Southern District of Iowa, Central Division (A. 71) is reported at 258 F. Supp. 971.

Jurisdiction

The judgment of the United States Court of Appeals for the Eighth Circuit, *en banc,* was entered on November 3, 1967. It affirmed by an equally divided court the judgment of the United States District Court for the Southern District of Iowa, Central Division, which dismissed a complaint brought by petitioners under Section 1983 of Title 42 of the United States Code. Petition for a writ of certiorari was filed on January 17, 1968. The writ was granted on March 4, 1968. The jurisdiction of this Court rests on 28 U. S. C. 1254(1).

Question Presented

Whether petitioners' rights under the First and Fourteenth Amendments were violated by their suspension from public schools for violating an order by the principals of those schools which absolutely prohibited them from wearing black arm bands in school as a means of protesting the Vietnam War.

Statement

Shortly before Christmas in 1965, some high school and college students in the area of Des Moines, Iowa decided to publicize their objection to the killing in Vietnam by wearing black arm bands during the holiday season and by fasting on December 16 and New Year's Day. The students intended, through this form of expression, to mourn the dead in Vietnam, and to express their hope that a Christmas truce in the war would be extended indefinitely, as

proposed by Senator Robert F. Kennedy (A. 15, 22-24, 35, 53-54, 64-65).

Petitioners, all of whom were students duly enrolled in the public schools of Des Moines, Iowa,[1] heard about these plans and they decided to express their personal concern about the war by joining in the fasting, and by wearing arm bands to their schools (A. 15-16, 20-24, 30, 36, 55).

This decision by petitioners reflected the religious, ethical and moral environment in which they were raised and was a natural outgrowth of their religious and moral training. Petitioners John and Mary Beth Tinker and their families have been active in the American Friends Service Committee, and their father is a Methodist minister who served as the "Peace Education Secretary" of the A. F. S. C. in Des Moines (A. 15, 25, 30, 37, 51-52). Petitioner Eckhardt is active in youth activities of the First Unitarian Church (A. 30). Petitioners John and Mary Beth Tinker referred to their protest as an act of "witness" (A. 15, 24).

The students' intention to wear arm bands came to the attention of the school authorities and on December 14, 1965, E. Raymond Peterson, director of secondary education in the Des Moines Independent School District, called a meeting of the principals of the Des Moines schools to discuss an appropriate response. At this meeting, a policy prohibiting the wearing of arm bands in school was adopted by the principals, who decided that a student wearing an arm band to school would be asked to remove it, and that

[1] Petitioner John F. Tinker was a 15 year old student in the eleventh grade of North High School; petitioner Mary Beth Tinker was a 13 year old student in the eighth grade of Warren Harding, Jr. High School; petitioner Christopher Eckhardt was a 16 year old student in the tenth grade at Roosevelt High School (A. 15, 24, 29-30).

if the student refused he would be suspended but allowed to return without the arm band (A. 45). According to Mr. Peterson, the principals felt that:

> ". . . 'For the good of the school system we don't think this should be permitted. The schools are no place for demonstrations. We allow for free discussion of these things in the classes. The policy was based on a general school policy against anything that was a disturbing situation within the school. The school officials believe that the educational program would be disturbed by students wearing arm bands' " (A. 46).

On December 16, 1965, petitioners Mary Beth Tinker and Christopher Eckhardt wore black arm bands in their schools, knowing that they were violating the aforementioned prohibition, which had been announced publicly by the principals and carried in the newspapers (A. 31, 65-66). These arm bands consisted of strips of black cloth, about one or one and a quarter inches in width and about eight or nine inches long (A. 25, 31). Miss Tinker wore her arm band ". . . hoping President Johnson would have a settlement with North Vietnam and a truce" (A. 24). Mr. Eckhardt wore his, ". . . as a matter of protest of the war in Vietnam, and to hope for a Christmas truce. That was the sole reason. I hoped in a small way to influence public opinion toward my views of the war in Vietnam" (A. 35-36).

Miss Tinker arrived at school at about 8 a.m., and wore the arm band throughout the morning, during lunch and into the afternoon without causing any disruption or disorder of any kind whatsoever (A. 25-26). After lunch, Miss

Tinker went to her math class, which was taught by Mr. Richard K. Moberly, a teacher who had previously expressed to the students his opposition to expression of political views in the classroom (A. 27, 29, 49-51).[2]

Although there was no disorder or threat of disorder, Mr. Moberly ordered Miss Tinker to go to the principal's office. At the office, Miss Tinker removed her arm band as she was requested to do, and returned to her class (A. 38-39). Nevertheless, Miss Vera Ann Tarmann, the girls' advisor at the school, entered the classroom shortly thereafter and asked Miss Tinker to accompany her to the office (A. 39-40). Miss Tarmann told Miss Tinker that she was compelled to suspend her from school, although she sympathized with Miss Tinker's opinions, being a descendant of Quakers herself. Miss Tinker thereupon left the school, taking with her a suspension notice (A. 27-28). Before she left, it was made clear to her that she could not return to school wearing an arm band (A. 40).

In light of the prohibition against wearing an arm band, of which he was aware, petitioner Christopher Eckhardt went directly to the office of the principal when he arrived

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[2] Mr. Moberly had told his students that ". . . if there was going to be a demonstration in my class, it would be for or against something in mathematics and if they wanted to demonstrate in my school, they better be demonstrating about something that was in my class" (A. 50). He also ". . . expressed my view on demonstrations that were against things and not for things." However, Mr. Moberly had observed students in his class wearing the Iron Cross ". . . that was used by or that commonly became associated with the government of the Third Reich when it was in power in Germany . . ." (A. 51). Such students were not dismissed from class because, according to Mr. Moberly, "That's not included in the policy involving the arm bands, so far as I know" (A. 51). Mr. Moberly had ". . . seen these Iron Crosses worn since the suspension of Mary Beth Tinker for wearing arm bands" (A. 51).

at school on the morning of December 16 (A. 30-31). He had a conversation there with Mr. Donald Blackman, vice-principal of the school, who asked petitioner to remove the arm band because, among other things, it was going to bring bad publicity to the school (A. 31-32).

Mr. Eckhardt also spoke to Mrs. Velma Cross, the girls' advisor at the school, who told him that wearing the arm band was "going to look bad on my record" and that "the colleges didn't accept demonstrators or protestors, and they told me this and asked me to remove my arm band . . ." (A. 32). Mrs. Cross also told petitioner that:

> ". . . she thought I was too young and immature to have too many views, and thought I ought to take the arm band off, and they let me know while I was going to be out of school that I could probably have plenty of time to look for a new school to go to and I told them I liked Roosevelt and I wanted to come back, and they said that if I did anything like this again that I wouldn't come back to Roosevelt" (A. 34).

In spite of these admonitions and threats, Mr. Eckhardt refused to remove his arm band, and he was sent home (A. 33).

After school, petitioners and other students who had been suspended from school for wearing arm bands, gathered at the home of Mr. and Mrs. Eckhardt to discuss the day's events (A. 16, 37).[3] During this discussion, some

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[3] Among the other students who wore arm bands to school were Paul and Hope Tinker, ages 8 and 11 respectively, the younger brother and sister of petitioners John and Mary Beth Tinker (A. 20-21, 28).

of the students telephoned Mr. Ora E. Niffenegger, an attorney who was President of the Board of Directors of the Des Moines school district, and requested that he convene a special meeting of the board. The students wanted a special meeting because "we thought if it was brought to the school board's attention, what had happened, I really thought that they would change their decision . . . [we] wanted to talk with the school board because [we] didn't want to defy authority and [we] didn't want to break any rules" (A. 21, 37).

Mr. Niffenegger told the students that he would not convene a special meeting, but that the matter might be taken up at the regular board meeting to be held the following week (A. 37). In refusing to call a special meeting, Mr. Niffenegger explained to the students that:

> ". . . I thought they were taking the wrong way out, that we had in this country of ours a well defined way in which to handle this matter and that it was that if they didn't like the way our elected officials were handling things, it should be handled with the ballot box and not in the halls of public schools" (A. 49).

The following day, December 17, petitioner John F. Tinker went to school wearing a black arm band. The arm band was a strip of black cloth about two inches wide and he wore it on the sleeve of his jacket for part of the day and on his shirt for the remainder (A. 17). Mr. Tinker had not worn the arm band the previous day, as had his sister, because "I didn't feel that I should just wear it against the will of the principals of the high schools without even trying to talk to them first" (A. 16). When Mr. Niffenegger

would not meet with the students, however, Mr. Tinker decided to wear the band (A. 22).

During the day, some of the students made unfriendly remarks to Mr. Tinker about the arm band, but these remarks were not threatening and they did not bother him. Moreover, at no time during the day was there any disorder or disruption of normal school activities (A. 18, 23).

After lunch, Mr. Tinker went to his English class. Although nothing out of the ordinary occurred there, the teacher told him to go to the principal's office. Mr. Tinker was told by the principal that he would not be permitted to wear the arm band, upon "orders from higher up" (A. 15). When petitioner refused to remove the arm band the principal dismissed him from school, telling him that he could return only when he took the arm band off (A. 19, 42). The principal also told Mr. Tinker that:

> ". . . I personally felt that there were appropriate times for us to mourn our war dead, including this event and Memorial Day, and it did not seem appropriate or necessary to me to mourn them as he was doing at this time. I told him that I was a Veteran of World War II and the Korean War" (A. 42).

On December 21, 1965, the school board conducted its regular meeting, but decided to defer a decision concerning the suspension of petitioners and the other students until it could obtain legal advice and make a further investigation (A. 47-48).

The board met again the first Monday in January, 1966, and a majority voted to uphold the policy prohibiting the wearing of arm bands (A. 48). Thereafter, on January 4 or

5, 1966, the petitioners returned to school without their arm bands (A. 19, 28, 34, 38).

On March 14, 1966, petitioners, through their fathers, filed a complaint in the United States District Court for the Southern District of Iowa under Section 1983 of Title 42 of the United States Code. The complaint sought a permanent injunction restraining the defendants from suspending petitioners or otherwise disciplining them in such a manner as to deprive them of their rights to free speech under the United States Constitution, and restraining the defendants from interfering with their exercise of free speech. The complaint also sought nominal damages (A. 6-11).

After an evidentiary hearing, the District Court dismissed the complaint holding, in essence, that it was not unreasonable for the school officials to anticipate that the wearing of arm bands would cause some type of classroom disturbance, and that it was "reasonable" under such circumstances to adopt the prohibition against wearing arm bands (A. 71-75). The United States Court of Appeals for the Eighth Circuit, *en banc,* affirmed the judgment below, without opinion, by an evenly divided Court.

ARGUMENT

I.

The order prohibiting petitioners from wearing black arm bands in school as a symbol of protest against the Vietnam War was an unconstitutional infringement of their rights under the First and Fourteenth Amendments.

A. *The First Amendment Protects the Rights of Public School Students to Free Speech in Their Schools and Classrooms*

This Court has repeatedly held that the constitutional rights of students are protected against infringement by state and school authorities. In a series of cases dating back almost half a century, the Court has recognized that although the State may compel its children to attend school and may, within limits, regulate the conditions under which their education takes place, it may not interfere with the individual rights of students in the guise of providing an education for them.

In the first of these cases, *Meyer* v. *Nebraska,* 262 U. S. 390 (1923), the Court held that the State of Nebraska could not constitutionally prohibit the teaching of modern foreign languages to young students, because such a prohibition unconstitutionally interfered with the right of parents to provide for the education of their children. Two years later, in *Pierce* v. *Society of Sisters,* 268 U. S. 510 (1925), the Court held that the State of Oregon could not prohibit its citizens from sending their children to private or parochial schools merely because the State had the power to provide for compulsory education and to estab-

lish certain minimal educational standards. Such a prohibition, it was held, unduly interfered with the right of the students to develop their individual capacities. As the Court stated:

> "The fundamental theory of liberty upon which all governments in this Union repose excludes any general power of the state to standardize its children by forcing them to accept instruction from public teachers only. The child is not the mere creature of the state; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." 268 U. S. at 534.

Two decades later, in *West Virginia* v. *Barnette,* 319 U. S. 624 (1943), the Court held that, under the First Amendment, public school students could not be compelled to salute the United States flag as a means of promoting national unity and patriotism during the Second World War. In striking down the flag salute requirement, the Court expressly recognized that the protections of the First Amendment are fully applicable to public school students, and that their First Amendment rights cannot be infringed even for so lofty a purpose as the promotion of national unity in a time of war. As Mr. Justice Jackson wrote:

> "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." 319 U. S. at 637.

Barnette involved the power of the State to compel students to take part in a patriotic ceremony to which they were conscientiously opposed. The instant case involves the power of the State to prohibit students from expressing their views in school. The guiding principle is the same—the State does not have the power to impose uniformity of thought, action and belief among its students by suppressing expressions of dissent.

Behind all these decisions lies the philosophy that social and political differences among students, and individual rights of students, may not be smothered or suppressed by school authorities for the purpose of promoting unity, discipline or order. Although school authorities must regulate conduct which obstructs the achievement of legitimate educational goals, they are limited by the precepts of the First Amendment and must recognize that the "Bill of Rights is [not] for adults alone". *In Re Gault,* 387 U. S. 1, 13 (1967).

Because the principle of free speech, as embodied in the First Amendment, will not be recognized by our citizens as fundamental to our society unless that principle is a living reality during their formative school years, the Courts have recognized that school authorities not only are forbidden to adopt regulations which infringe upon the First Amendment right of students, but that schools

should be treated as models of our democratic society. The rights of free speech and free expression which are to be encouraged in the adult democratic society must affirmatively be fostered in the school system. See, e.g., *West Virginia* v. *Barnette, supra; Burnside* v. *Byars,* 363 F. 2d 744 (5th Cir. 1966); *Dickey* v. *Alabama Board of Education,* 273 F. Supp. 613 (M. D. Ala. 1967); *Hammond* v. *South Carolina State College,* 272 F. Supp. 947 (D. S. C. 1967); cf. *Sweezy* v. *New Hampshire,* 354 U. S. 234 (1957). As the Court said in *Keyishian* v. *Board of Regents,* 385 U. S. 589, 603 (1967):

> "Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. 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. 'The vigilant protection of constitutional freedom is nowhere more vital than in the community of American schools.' *Shelton* v. *Tucker,* 234 U. S. 479, 487. The classroom is peculiarly the 'market-place of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection' . . . ."

B. *The Prohibition Against Wearing Arm Bands Was an Unconstitutional Prior Restraint on Free Speech*

Wearing black arm bands to protest the war in Vietnam is a form of peaceful, symbolic expression protected by the First Amendment. As this Court recently said of First Amendment rights:

> "... these rights are not confined to verbal expression. They embrace appropriate types of action which certainly include the right in a peaceable and orderly manner to protest by silent and reproachful presence, in a place where the protestant has every right to be ..." *Brown* v. *Louisiana,* 383 U. S. 131, 142 (1966).

See also, *Stromberg* v. *California,* 283 U. S. 359 (1931); *Thornhill* v. *Alabama,* 310 U. S. 88 (1940).

The form of expression chosen by petitioners was dignified, orderly, and peaceful. In no way was it intended to interfere with or obstruct the orderly and customary school routine. Nor did the form of expression conflict or interfere with the rights or activities of others. This kind of peaceful, silent, symbolic expression clearly is protected by the First Amendment. *West Virginia* v. *Barnette, supra;* cf. *Brown* v. *Louisiana, supra; Stromberg* v. *California, supra.*

The prohibition against wearing arm bands was adopted by the school principals in Des Moines at a meeting which was called after they learned of the students' intention to wear the arm bands. At the time the principals announced the prohibition, petitioners had not worn the arm bands to school, no disorder had taken place, and there was no threat of disorder.

The school authorities in Des Moines thus imposed a blanket prohibition against a particular form of expression which was peaceful and dignified, which was not designed to disrupt the schools, and which was not significantly different from types of expression which previously had been allowed in the classrooms of Des Moines. The prohibi-

tion (which was not written) was absolute in nature, made no provision for exceptions, and was to be applicable regardless of the circumstances in which the students attempted to wear the arm bands. In short, this was a broad, sweeping prior restraint on the peaceful exercise of First Amendment rights, of a type which has uniformly been held invalid by this Court. See *Near* v. *Minnesota,* 283 U. S. 697 (1931); *Hague* v. *CIO,* 307 U. S. 496 (1939); *Cantwell* v. *Connecticut,* 310 U. S. 296 (1940); *Kunz* v. *New York,* 340 U. S. 290 (1951); *Niemotko* v. *Maryland,* 340 U. S. 272 (1951).

Mr. E. Raymond Peterson, director of secondary education in the Des Moines Independent School District, who called the meeting of the principals at which the prohibition was adopted, explained that the prohibition ". . . was based on a general school policy against anything that was a disturbing situation within the school. The school officials believed that the educational program would be disturbed by students wearing arm bands" (A. 66). When the principals made this judgment, they had no reason to believe that petitioners would wear the arm bands in such a manner as to deliberately provoke a disturbance or a breach of discipline. Nor does the record show any basis for a judgment that the arm bands could not have been worn by petitioners without inevitably causing a disturbance. Apparently, then, the principals held the mistaken view that they had the power to ban free speech by students arbitrarily and completely.

Though the principals initially gave no specific reasons for the ban, they met after petitioners were suspended and decided to adhere to the prohibition for a number of alleged reasons stated in a memorandum covering the meet-

ing (A. 68-71). Among those reasons were feared anger of friends of a former student who had been killed in the war, statements of other students that they might wear different colored arm bands to express their views, and the desire to protect students from exposure to the political views of a minority (A. 70). Even assuming these were the actual reasons which motivated the ban, they are either far "too remote and conjectural to override the guarantee of the First Amendment", *DeGregory* v. *Attorney General,* 383 U. S. 825, 830 (1967), or in the case of the school's desire to protect the students from exposure to the views of the minority, an impermissible consideration under the First Amendment.

II.

Petitioners Were Unlawfully Suspended From School for Exercising Their First Amendment Rights.

The record conclusively establishes that the wearing of arm bands by petitioners caused no disturbance or disruption of ordinary school activities and programs. Petitioner Eckhardt went directly to the principal's office when he arrived at school wearing an arm band. He was suspended immediately thereafter. Petitioners John and Mary Beth Tinker wore their arm bands during the day, but the record shows that they caused no disturbance or breach of discipline of any kind. Adverse comments were made by some students to Mr. Tinker concerning his views about the war, but such banter typically and routinely occurs in classrooms and halls without disrupting school.

Petitioners' actions were very much like those of students which were held to be constitutionally protected by this

Court in *Brown* v. *Louisiana,* 383 U. S. 131 (1966), and by the Fifth Circuit in *Burnside* v. *Byars,* 363 F. 2d 744 (5th Cir. 1966).

In *Brown* v. *Louisiana,* five young Negroes entered a public library in Clinton, Louisiana, and one of them requested a book. After a librarian told him she would order this book, the youths remained in the library to protest segregation of library facilities in the community. The children sat in the library silently and created no disturbance, but they were ejected ten or fifteen minutes later, arrested, and charged with breach of the peace.

This Court held under these circumstances that there was no evidence to support a violation by the children of the breach of peace statute. Speaking for the Court, Mr. Justice Fortas found that the youths were exercising rights protected by the First Amendment when they quietly protested against segregation in the library. Since their protest created no disturbance, the arrest of the youths violated their fundamental right of free speech.

Four members of this Court dissented in *Brown* v. *Louisiana,* and in an opinion by Mr. Justice Black, stated their opinion that the youths had no right to seek out a library as a forum for expressing their views.

Unlike the youths in *Brown* v. *Louisiana,* however, petitioners did not choose to express their views in a room devoted unequivocally to quiet and concentration. Rather, they sought to publicize their opinions in schools, which are particularly appropriate places for the lively discussion and expression of controversial views pertaining to public issues. Furthermore, petitioners were compelled to attend school, where the major portion of their time is spent and

where they are closely in contact with other students and teachers whose views they naturally would seek to influence.

In *Burnside* v. *Byars, supra,* the Court of Appeals for the Fifth Circuit upheld the right of public school students to express their views in school in a manner strikingly similar to that chosen by petitioners. In that case it came to the attention of the principal of a high school that a number of his students were wearing "freedom buttons" in school, whereupon the principal announced to the students that they would not be permitted to wear them. When a large number of students—30 or 40—persisted in wearing the buttons in violation of the principal's edict, they were suspended. Several of the students then instituted injunctive proceedings, to prevent the school officials from further enforcing the prohibition.

The school authorities contended that the regulation imposed by the principal was a "reasonable" means of maintaining proper discipline in the school, but the Court of Appeals concluded that the regulation was unconstitutional. While recognizing that rules and regulations must be formulated in order to maintain an orderly program of classroom learning, the Court pointed out that there had been no interference with educational activity because of the wearing of the buttons, nor was there any evidence that the buttons had distracted the students. Under these circumstances, the Court held, the order forbidding the wearing of "freedom buttons" on school grounds was an impermissible infringement of the students' protected right of free expression. The Court went on to say that:

> ". . . school officials cannot ignore expressions of feelings with which they do not wish to contend. They cannot infringe on their students' right to free and

> unrestricted expression as guaranteed to them under the First Amendment to the Constitution, where the exercise of such rights in the school buildings and schoolrooms does not materially and substantially interfere with the requirements of appropriate discipline in the operation of the school." 363 F. 2d at 749.

See also, *Sheldon* v. *Fannin,* 221 F. Supp. 766 (D. Arizona 1963), *appeal dismissed,* 372 U. S. 228 (1963).

Measured by the standard enunciated in *Burnside* v. *Byars,* the prohibition by the Des Moines school officials against wearing arm bands clearly is invalid. Wearing arm bands, like wearing freedom buttons, is a dignified, peaceful gesture, which does not "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school." [4]

The District Court recognized that petitioners were exercising rights protected by the free speech clause of the First Amendment when they attended school wearing black arm bands in protest against the war. As the court stated, "The wearing of an arm band for the purpose of expressing certain views is a symbolic act and falls within the protection of the First Amendment's free speech clause" (A. 72). However, the Court expressly refused to apply the standard enunciated in *Burnside* v. *Byars* and upheld the prohibition by applying a standard of review which this Court has consistently held to be impermissible in

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[4] In *Burnside,* 30 or 40 children had worn buttons, and one of the teachers had to summon the principal because he felt that the students were causing a commotion. In this case, only a few students wore arm bands, and none of the teachers were compelled to take any form of disciplinary action, except to enforce the prohibition itself.

determining the constitutionality of limitations on the exercise of First Amendment rights.

As framed by the District Court, the question was whether it was "reasonable" for the "school officials to anticipate that the wearing of arm bands would create some type of classroom disturbance" (A. 74), and whether the prohibition was a "reasonable" means of preventing such a disturbance.

Applying the test to petitioners, the District Court held:

> "After due consideration, it is the view of the Court that actions of school officials in this realm should not be limited to those instances where there is a material or substantial interference with school discipline. 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" (A. 75).

By applying a standard of "reasonableness", the District Court ignored decisions by this Court holding that the First Amendment does not permit the suppression of freedom of speech "on the basis of . . . notions of mere 'reasonableness'." *Dennis* v. *United States,* 341 U. S. 494, 580 (1952) (Black, J. dissenting).[5]

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[5] The District Court also adverted to the following test enunciated in *Dennis* v. *United States,* 183 F. 2d 201, 212 (2nd Cir. 1950):

As viewed by the District Court, the test in every case depends upon a judge's subjective view of the importance of free expression balanced against the importance of the conflicting interest asserted by the state. Every critical word used by the court involves a value judgment made without reference to a fixed standard: gravity of the evil, improbability, reasonableness. The test simply provides no uniform procedure to bind Courts to our Nation's commitment to free speech.

> "The full benefits [of a system of free expression] can only be realized when the individual knows the extent of his rights and has some assurance of protection in exercising them. Thus the governing principles of such a system need to be articulated with some precision and clarity. Doubt or uncertainty negates the process. Furthermore, the theory rests upon subordination of immediate interests in favor of long-term benefits. This can be achieved only through the application of principle, not by ad hoc resolution of individual cases. And it requires procedures adequate to relieve immediate pressures and facilitate objective consideration. All these elements a legal system is equipped to provide." Emerson, Toward a General Theory of the First Amendment, 72 Yale L. J. 877, 894 (1963).

Free speech, for students as for others, may not be subordinated solely upon speculation by the State that it will

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"The abridgment of speech by a state regulation must always be considered in terms of the object the regulation is attempting to accomplish and the abridgment of speech that actually occurs. In each case [courts] must ask whether the gravity of the 'evil' discounted by its improbability justifies such invasion of free speech as is necessary to avoid the danger."

result in a grave evil. *Hague* v. *Committee for Industrial Organization,* 307 U. S. 496, 516 (1939). There must be evidence of a "clear" or "imminent" danger arising directly out of the conduct of the demonstrators themselves. *Thornhill* v. *State of Alabama,* 310 U. S. 88, 104-105 (1940). The threat must be clear, present and immediate, as where members of a crowd, some agreeing and others disagreeing with a highly inflammatory speaker, have already threatened violence. *Feiner* v. *People of State of New York,* 340 U. S. 315 (1951); *Cantwell* v. *Connecticut,* 310 U. S. 296, 308 (1940); *Chaplinsky* v. *State of New Hampshire,* 315 U. S. 568, 572 (1942). While such standards may themselves be somewhat imprecise and leave room for subjectivity in their application to a particular case, they surely require a greater measure of evidence that a substantive evil is threatened than is present in the case at bar.

The District Court simply brushed aside the evidence showing that there was no interference with discipline and rested its decision upon certain alleged "facts" outside the record, to support the Court's conclusion that "it was not unreasonable in this instance for school officials to anticipate that the wearing of arm bands would create some type of classroom disturbance" (A. 74).

Rather than focusing upon what actually happened in the schools, the Court asserted that debate concerning the Vietnam war had become vehement in the Des Moines community, that draft cards had been burned there in protest against the war, and that expressions of opinion concerning the war had become quite vocal and emotional (A. 73). In these circumstances, the District Court felt that:

> "While the arm bands themselves may not be disruptive, the reactions and comments from other students as a result of the arm bands would be likely to disturb the disciplined atmosphere required for any classroom" (A. 74).

If the District Court meant that there was a reasonable likelihood of an overt disturbance from the "reactions and comments" of the other students, that finding has no basis in the record.[6] If the Court merely meant that "reactions and comments" by other students are by themselves reason to permit the prohibition against the arm bands, the answer is that the expression—verbal or symbolic—of opinion on matters of public importance should stimulate response. That is the function and purpose of free speech and the educational process.

Even if the reactions of the other students had been so overtly hostile to petitioners as to interfere with the educational process, it would have been the responsibility of the school authorities to discipline those who so reacted to the speech, rather than deny petitioners the right to express themselves. *Terminiello* v. *Chicago,* 337 U. S. 1 (1959); *Cooper* v. *Aaron,* 358 U. S. 1 (1958); *Feiner* v. *New York, supra; Hague* v. *C. I. O., supra,* at 516; *Ferrell* v. *Dallas Ind. School Dist.,* No. 24301 (5th Cir. March 29, 1968) (Tuttle, J., dissenting).

> "To cure the rights of free speech and assembly against 'abridgment' it is essential not to yield to threats of disorder. Otherwise, these rights * * * could be de-

[6] In cases involving First Amendment rights, this Court will make an independent review of the record to determine the operable facts, *Cox* v. *Louisiana,* 379 U. S. 536 (1965).

> stroyed by the action of a small minority of persons hostile to the speaker or the views he would be likely to express." *Sellers* v. *Johnson,* 163 F. 2d 877, 881 (8th Cir., 1947).

With the dramatic expansion of political awareness and activity by American students, both at the high school and college level, it is crucial that the right of students to express their political views peacefully and appropriately within the schools be firmly established, so that their respect for democratic values will not be thwarted. Unless this Court announces a constitutional standard which reinforces the rights of students to peacefully express their views in the schools, school officials presumably will continue to assume, as they did in this case, that they may suppress free speech by public school students as they see fit, without any consideration for the requirements of the First Amendment.

III.

The prohibition against wearing arm bands was specifically designed to impede petitioners in the exercise of their First Amendment rights.

Petitioners were suspended not for violating the respondents' general regulation regarding disruptive conduct (Def. Ex. 3; A. 67) but specifically for violating the arm band prohibition (A. 45). Thus they were subjected to a regulation directly suppressing speech, not one incidentally limiting speech while furthering an otherwise valid state interest. The case is therefore to be contrasted to the de-

cision in *United States* v. *O'Brien,* 36 U. S. L. Week 4469, 4473 (May 28, 1968):

> "The case at bar is therefore unlike one where the alleged governmental interest in regulating conduct arises in some measure because the communication allegedly integral to the conduct is itself thought to be harmful. In *Stromberg* v. *California,* 283 U. S. 359 (1931), for example, this Court struck down a statutory phrase which punished people who expressed their 'opposition to organized government' by displaying 'any flag, badge, banner, or device.' Since the statute there was aimed at suppressing communication it could not be sustained as a regulation of noncommunicative conduct. See also, *NLRB* v. *Fruit & Vegetable Packers Union,* 377 U. S. 58, 79 (concurring opinion) (1964)."

The case is likewise dissimilar to *Adderley* v. *Florida,* 385 U. S. 39 (1966) where a narrowly drawn trespass statute had the incidental result of restricting a political demonstration; and to *Cox* v. *State of New Hampshire,* 312 U. S. 569 (1941), where members of a religious group were arrested for parading without a permit.

If discipline and decorum were the interests sought to be protected by prohibiting arm bands and suspending petitioners, Defendants' Exhibit Three was adequate to that task—if discipline and decorum were actually threatened. But it is clear that the arm band regulation sought to accomplish something more. One of its purposes was to forbid political demonstrations *per se.*[7] See *Hammond* v. *South*

[7] In his testimony, the President of the school board, an attorney, stated, "I, also, when they told me the purpose of the meeting—they had explained to me—which was the opposition to the United

Carolina State College, 272 F. Supp. 947 (D. South Carolina, 1967). School officials seem also to have been concerned about publicity adverse to the schools which they felt would result from students wearing arm bands. See *Dickey* v. *Alabama Board of Education,* 273 F. Supp. 613 (M. D. Ala., 1967). It was, therefore, a prohibition addressed directly to a particular controversial statement of political opinion, not an even-handed regulation designed to control a valid state interest.

The discriminatory nature of the ban is shown by the fact that petitioners were neither the first nor the only students to wear political emblems, symbols and insignia in the classrooms of the Des Moines public schools. It is apparently commonplace for students in Des Moines to wear political and religious symbols in school, including, for example, presidential campaign buttons and similar items (A. 44, 50-51). Indeed, on more than one occasion, students have worn the "Iron Cross", a symbol associated with the Third Reich, without interference from the school authorities (A. 51). Thus, it is apparent that the school authorities in Des Moines have not adopted a uniform policy prohibiting the wearing of all political symbols regardless of their content.

The prohibition against wearing arm bands was adopted by the principals only after they learned of the students' intention to wear such arm bands in protest against the

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States policy in Viet Nam, I explained to them the best I could that I thought they were taking the wrong way out, that we had in this country of ours a well-defined way in which to handle this matter and that was if they didn't like the way our elected officials were handling things, it should be handled with the ballot box and not in the halls of our public schools" (A. 49).

Vietnam war (A. 45-46). The meeting at which the principals promulgated the restriction took place before any students had actually worn arm bands to school, and in the absence of any indication that wearing them was intended to provoke a disturbance.

Since political insignia had been allowed in the school before, and there was no basis for a belief that arm bands would cause a disturbance, the prohibition must necessarily have been stimulated by hostility on the part of the school authorities towards the particular views or because of their controversial nature. Compare *Bond* v. *Floyd,* 385 U. S. 116 (1966); *Niemotko* v. *Maryland,* 340 U. S. 268, 272 (1951). By singling out petitioners from other students, and placing special limitations upon their expression of views, the school authorities struck at the very core of what the First Amendment protects—the expression of views which may be unpalatable to predominant public sentiment. Compare *Grosjean* v. *American Press Co.,* 297 U. S. 233 (1936). Such picking and choosing is "censorship in a most odious form". *Cox* v. *Louisiana,* 379 U. S. 536, 581 (1965) (Black, J., concurring).

Since the constitutional protections erected by the First Amendment do not turn upon "the truth, popularity, or social utility of the ideas and beliefs which are offered", *N. A. A. C. P.* v. *Button,* 371 U. S. 415, 445 (1963), the petitioners were fully entitled to express their opposition to the war and to urge a truce, regardless of how controversial or unpopular such a view may then have been.

CONCLUSION

For the reasons stated above, the judgment of the District Court, as affirmed by the Court of Appeals, should be reversed, with instructions to grant the relief requested by petitioners in the complaint.

Respectfully submitted,

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