IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. [redacted] 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.

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

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JOHN F. TINKER, *et al.*,

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—v.—

DES MOINES INDEPENDENT COMMUNITY SCHOOL DISTRICT, *et al.*,

Respondents.

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

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled case on November 3, 1967.

Citations to Opinions Below

The opinion of the Court of Appeals, per curiam, sustaining the judgment of the District Court is printed in the Appendix, *infra,* pp. 1a-2a, and is reported at 383 F. 2d 988. The District Court opinion is printed in the Appendix, *infra,* pp. 4a-8a, and is reported at 258 F. Supp. 971.

Jurisdiction

The judgment of the United States Court of Appeals for the Eighth Circuit was entered November 3, 1967. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Question Presented

Whether the First and Fourteenth Amendments permit officials of state supported public schools to prohibit students from wearing symbols of political views within school premises where the symbols are not disruptive of school discipline or decorum.

Statute Involved

Section 282.4, Code of Iowa, 1966:

> "Majority vote—Suspension. The board (of directors of a public school corporation) may, by a majority vote, expel any scholar from school for immorality, or for a violation of the regulations or rules established by the board, or when the presence of the scholar is detrimental to the best interests of the school; and it may confer upon any teacher, principal or superintendent the power temporarily to dismiss a scholar, notice of such dismissal being at once given in writing to the president of the board."

Statement of the Case

In December, 1965, the minor petitioners, pupils of respondent school district, decided to wear bands of black cloth on the sleeves of their clothing to demonstrate support for a proposed indefinite truce in the Vietnam war and to demonstrate that they mourn the deaths of those killed in that war (R. 11). The pupils are active in Quaker and Unitarian religious organizations (R. 11, 12, 21, 26).

Upon learning of this plan, the respondents, who are high school administrators, met and decided that wearing of arm bands by pupils in school would be prohibited, and that those who violated the prohibition would be suspended (R. 35).

The minor petitioners wore arm bands to school and were suspended, but were allowed to return without the arm bands (R. 12, 15, 21, 23, 24, 26, 28). The record affirmatively establishes that the arm bands neither disrupted nor threatened to disrupt decorum or discipline within the schools (R. 13-15, 18-19, 21-24, 26-29, 39).

The pupils and their parents petitioned the District Court for damages and injunctive relief under 42 U. S. C. 1983 (R. 1, 7). After hearing, the petition was dismissed (R. 45). The District Court agreed with petitioners that the circumstances were the same as in *Burnside* v. *Byars,* 363 F. 2d 744 (5th Cir. 1966) but declined to follow that decision (R. 45; App., *infra,* p. 8a). Rather, the District Court noted a general nationwide atmosphere of dissent and dispute over the Vietnam war and held in view of that atmosphere, that the respondents' prohibition was not unreasonable (R. 43, 44; App., *infra,* pp. 6a, 7a).

On appeal to the United States Court of Appeals for the Eighth Circuit, the case was argued twice: once before a three-judge panel and subsequently before the court *en banc*. The decision of the District Court was affirmed by an evenly divided court with no discussion in the opinion of the substantive issues in the case.

Reasons for Granting the Writ

Certiorari should be granted because the Court of Appeals, in affirming the District Court, has rendered a decision in conflict with another Court of Appeals on an important question of federal law which has not been but which should be settled by this Court.

In *Burnside* v. *Byars,* 363 F. 2d 744 (1966), the Court of Appeals for the Fifth Circuit held that public school officials had violated the First Amendment by suspending students for wearing small "freedom buttons" symbolic of their opinions that citizens have a right to vote and to have their votes count equally. As in the instant case, the conduct had been prohibited by school authorities ostensibly to maintain discipline although no actual disruption, or threat of it, had been shown. Furthermore, in both cases school authorities testified that the suspensions were for violating a regulation, not for causing disruption [363 F. 2d at 748; R. 34]. Though the District Court below believed *Burnside* to be factually the same as the case at bar, it reached an opposite conclusion because decisions of the Fifth Circuit "are not binding upon this Court" (R. 45; App., *infra,* p. 8a).

The central conflict between the decisions in the Fifth and Eighth Circuits turns on the extent to which school officials may suppress otherwise constitutionally protected expression. The Fifth Circuit has held that there must be a material and substantial interference "with the requirements of appropriate discipline in the operation of the school." 363 F. 2d at 749. The decision below, however, held that the mere apprehension of "reactions and comments from other students . . . [which] would be likely to disturb the disciplined atmosphere . . ." (R. 44; App., *infra,* p. 7a), is sufficient to permit suppression of speech. Cf. *Terminiello* v. *Chicago,* 337 U. S. 1 (1949).

These two views reflect conflicting models of the school community. On the one hand the school is thought of as a model of a democratic community, designed to instill the value of procedural due process, the rights of free speech and free expression which are to be encouraged in the adult democratic society. See, e.g., *West Virginia* v. *Barnette,* 319 U. S. 624 (1943); *Burnside* v. *Byars, supra; Dixon* v. *Alabama State Board of Education,* 294 F. 2d 150 (5th Cir. 1961); *Dickey* v. *Alabama State Board of Education,* 273 F. Supp. 613 (D. M. D. Ala. 1967); *Estaban* v. *Central Missouri State College,* D. W. D. Mo., No. 16473-4, October 3, 1967.

On the other hand, the school has been considered to be patterned after the parent-child relationship, with the teacher posed as the figure of authority presiding over the as yet unequal children. This model stresses the importance of the teacher—or the administrators—being best able to judge unilaterally what may possibly disrupt the educational process. The decision below follows this model in adopting respondents' contentions (R. 34, 35, 36, 38, 39)

that public schools have unqualified authority to prohibit political expression in school whether or not disruptive.

The decision below, insofar as it holds that constitutional restraints upon governmental interference with First Amendment rights or other provisions of the Bill of Rights, do not apply to public schools, is also directly in conflict with applicable decisions of this Court. Thus, this Court has held that the power to compel education of children does not sanction invasion of their religious freedom. *West Virginia* v. *Barnette, supra; School District* v. *Schempp,* 374 U. S. 203 (1963); *Engel* v. *Vitale,* 370 U. S. 421 (1962). As this Court has said, "neither the Fourteenth Amendment nor the Bill of Rights is for adults alone." *In re Gault,* 387 U. S. 1 (1967).

Clearly, whatever rule is finally evolved must take into consideration the necessity for discipline and decorum in the schools. Some forms of expression which would be protected if conducted in public streets, would of course disrupt schools and the education process. But it does not follow that school officials may exercise a totally free hand in banning all speech—including, as here, a form of expression which causes no interference at all with the education process.[1]

Protection of the affirmative values involved in this case is another compelling reason for granting certiorari. The right to free speech embodied in the First Amendment is a lifeless right unless encouraged during school years. If citizens are instructed from kindergarten through high school that their political expression may be curtailed at

[1] This case also involves discriminatory enforcement of the First Amendment, for some kinds of political symbols had been allowed including Presidential campaign buttons and Iron Crosses associated with the Third Reich. See R. 34, 39-40.

the whim of school officers, and indeed may be forbidden entirely for the sake of preserving discipline, society will be the loser, for views of that sort are not easily abandoned when drummed into childrens' heads during their most formative years.

As far as this case is concerned it has so far taught Des Moines school children that speech is free only so long as it satisfies the government's choice as to time and place. The more fitting lesson yet to be learned—the lesson of the First Amendment—is that speech is free except when it presents a clear and present danger of a substantial evil which the state has a right to prevent.[2]

CONCLUSION

For the reasons stated above, certiorari should be granted.

Respectfully submitted,

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January 17, 1968

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[2] The District Court below relied upon *Dennis* v. *United States,* 183 F. 2d 201 (2nd Cir. 1950), aff'd 341 U. S. 494 (1951). It made no reference, however, to the subsequent holding in *Yates* v. *United States,* 354 U. S. 298 (1957), which seems effectively to have repudiated *Dennis.*

APPENDIX

APPENDIX

Court of Appeals Opinion

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 18,642

TINKER, *et al.*,

Appellants,

—v.—

THE DES MOINES INDEPENDENT COMMUNITY SCHOOL DISTRICT, *et al.*,

Appellees.

Before Vogel, Chief Judge; Van Oosterhout, Matthes, Blackmun, Mehaffy, Gibson, Lay and Heaney, Circuit Judges, sitting en banc.

Per Curiam.

This is an appeal from a judgment entered September 1, 1966, by the United States District Court for the Southern District of Iowa, Central Division, dismissing plaintiffs' complaint, based upon 42 U.S.C.A. § 1983, seeking an injunction and nominal damages against defendants, the Des Moines Independent Community School District, the individual members of its Board of Directors, its superintendent and various principals and teachers thereof, for sus-

pending plaintiffs from school for wearing arm bands protesting the Viet Nam war, in violation of a school regulation promulgated by administrative officials of the School District proscribing the wearing of such arm bands. 258 F.Supp. 971. Following argument before a regular panel of this court, the case was reargued and submitted to the court en banc.

The judgment below is affirmed by an equally divided court.

Court of Appeals Judgment

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 18,642

TINKER, *et al.*,

Appellants,

—v.—

THE DES MOINES INDEPENDENT COMMUNITY SCHOOL DISTRICT, *et al.*,

Appellees.

Appeal from the United States District Court for the Southern District of Iowa.

This cause came on to be heard on the record from the United States District Court for the Southern District of Iowa, and was argued by counsel.

On Consideration Whereof, It is now here Ordered and Adjudged by this Court that the Judgment of the said District Court, in this cause, be, and the same is hereby, affirmed by an equally divided Court.

November 3, 1967.

District Court Opinion

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF IOWA

CENTRAL DIVISION

TINKER, *et al.*,

Plaintiffs,

—v.—

THE DES MOINES INDEPENDENT COMMUNITY SCHOOL DISTRICT, *et al.*,

Defendants.

On September 1, 1966, the Court made the following memorandum opinion.

The plaintiffs instituted this action against the Des Moines Independent Community School District, its Board of Directors and certain administrative officials and teachers thereof in an attempt to recover nominal damages and obtain an injunction pursuant to the provisions of 42 U.S.C., § 1983. Jurisdiction exists under 28 U.S.C., § 1343.

The events giving rise to this controversy took place in December, 1965. During the second week of that month, it came to the attention of certain school officials that several students intended to wear black arm bands for the purpose of expressing their beliefs relating to the war in Viet Nam. A regulation was then promulgated by officials of the defendant school district prohibiting the wearing of arm bands

on school facilities. After the regulation had been established, the plaintiffs, John Tinker, Mary Beth Tinker and Christopher Eckhardt, wore black arm bands to their respective schools.[1] Each of the plaintiffs testified that their purpose in wearing the arm bands was to mourn those who had died in the Viet Nam war and to support Senator Robert F. Kennedy's proposal that the truce proposed for Christmas Day, 1965, be extended indefinitely. The plaintiffs herein were all aware of the regulation prohibiting the wearing of arm bands when they wore them to school. After being in their schools for varying lengths of time, each plaintiff was sent home by school officials for violating the regulation prohibiting the wearing of arm bands on school premises. Each plaintiff returned to school following the Christmas holidays. They did not wear arm bands at that time.

The question which now must be determined is whether the action of officials of the defendant school district forbidding the wearing of arm bands on school facilities deprived the plaintiffs of constitutional rights secured by the freedom of speech clause of the first amendment. An individual's right of free speech is protected against state infringement by the due process clause of the fourteenth amendment. *Gitlow* v. *New York,* 268 U.S. 652 (1925). 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. *West Virginia State Bd. of Educ.* v. *Burnette,* 319 U.S. 624

[1] Plaintiff John F. Tinker, age 15, attended North High; plaintiff Mary Beth Tinker, age 13, attended Warren Harding Junior High; plaintiff Christopher Eckhardt, age 15, attended Roosevelt High; Paul and Hope Tinker, age 8 and 11 respectively, younger brother and sister of plaintiffs John and Mary Beth Tinker also wore arm bands to their respective schools.

(1943); *Stromberg* v. *California,* 283 U.S. 359 (1931). However, the protections of that clause are not absolute. See, e.g., *Dennis* v. *United States,* 341 U.S. 494, 503 (1951); *Near* v. *Minnesota,* 283 U.S. 697 (1931); *Pocket Books, Inc.* v. *Walsh,* 204 F.Supp. 297 (D. Conn. 1962). The abridgement of speech by a state regulation must always be considered in terms of the object the regulation is attempting to accomplish and the abridgement 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. *Dennis* v. *United States,* 183 F.2d 201, 212 (2d Cir. 1950).

Officials of the defendant school district have the responsibility for maintaining a scholarly, disciplined atmosphere within the classroom. These officials not only have a right, they have an obligation to prevent anything which might be disruptive of such an atmosphere. Unless the actions of school officials in this connection are unreasonable, the Courts should not interfere.

The Viet Nam war and the involvement of the United States therein has been the subject of a major controversy for some time. When the arm band regulation involved herein was promulgated, debate over the Viet Nam war had become vehement in many localities. A protest march against the war had been recently held in Washington, D.C. A wave of draft card burning incidents protesting the war had swept the country. At that time two highly publicized draft card burning cases were pending in this Court. Both individuals supporting the war and those opposing it were quite vocal in expressing their views. This was demonstrated during the school board's hearing on the arm band regulation. At this hearing, the school board voted in

support of the rule prohibiting the wearing of arm bands on school premises. It is against this background that the Court must review the reasonableness of the regulation.

A subject should never be excluded from the classroom merely because it is controversial. It is not unreasonable, however, to regulate the introduction and discussion of such subjects in the classsroom. The avowed purpose of the plaintiffs in this instance was to express their views on a controversial subject by wearing black arm bands in the schools. 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. 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. The school officials involved had a reasonable basis for adopting the arm band regulation.

On the other hand, the plaintiff's freedom of speech is infringed upon only to a limited extent. They are still free to wear arm bands off school premises. In addition, the plaintiffs are free to express their views on the Viet Nam war during any orderly discussion of that subject. It is vitally important that the interest of students such as the plaintiffs in current affairs be encouraged whenever possible. In this instance, however, it is the disciplined atmosphere of the classroom, not the plaintiffs' right to wear arm bands on school premises, which is entitled to the protection of the law.

Plaintiffs cite two recent opinions from the Court of Appeals for the Fifth Circuit in support of their position. *Burnside* v. *Byars,* Civil No. 22681, 5th Cir., July 21, 1966; *Blackwell* v. *Byars,* Civil No. 22712, 5th Cir., July 21, 1966.

These cases involved the wearing of "freedom buttons" in Mississippi schools. In holding in one of the cases that the school regulation prohibiting the wearing of such buttons was not reasonable, the Court states that school officials "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 do not materially and substantially interfere with the requirements of appropriate discipline in the operation of the school." *Burnside* v. *Byars,* supra, at 9. While the decisions of the Court of Appeals for the Fifth Circuit are entitled to respect and should not be brushed aside lightly, they are not binding upon this Court. *John Deere Co.* v. *Graham,* 333 F.2d 529 (8th Cir. 1964).. 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.

The plaintiffs' request for an injunction and nominal damages are denied. Judgment will be entered accordingly.

Dated this 1st day of September, 1966.

District Court Judgment

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF IOWA

CENTRAL DIVISION

TINKER, *et al.*,

Plaintiffs,

—v.—

THE DES MOINES INDEPENDENT COMMUNITY SCHOOL DISTRICT, *et al.*,

Defendants.

On September 1, 1966, the following Judgment Entry was made:

Pursuant to memorandum opinion filed this date, which pursuant to Rule 52(a) constitutes this Court's findings of fact and conclusions of law.

IT IS ORDERED AND ADJUDGED that plaintiff's complaint is dismissed at plaintiff's cost.

Dated this 1st day of September, 1966.

/s/ ROY L. STEPHENSON
Chief Judge